

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATURAL PRODUCTS ASSOCIATION,)	
)	
Plaintiff,)	
)	Case No. 1:16-cv-194-RJL
v.)	
)	
CAROLYN BEHRMAN, <i>et al.</i> ,)	
)	
Defendants.)	

FIRST AMENDED COMPLAINT

Plaintiff, Natural Products Association ("NPA"), for its First Amended Complaint ("FAC") against Defendants Carolyn Behrman, Donelson Caffery, Robert Craven, Claudia David-Roscoe, Stephen Distefano, Frances Drennen, Ben Henderson, Angie O'pry-Blades, Nicholas Pascoe and Howard Pollack (collectively "Defendants") alleges as follows:

NATURE OF THE ACTION

1. This is a civil action against ten current or former members of NPA's Board of Directors – self-described as NPA's "shadow board" – for breach of fiduciary duties, waste of corporate assets, tortious interference with business relations and economic advantage, civil conspiracy, and indemnification or contribution. NPA filed this case to protect the association in the face of Defendants' wildly inappropriate and illegal behavior. Defendants grossly abused their authority set forth in Illinois law and the corporate Bylaws by acting as individuals and part of an unauthorized and illegal rogue shadow board, rather than collectively, all to the detriment of NPA. Defendants colluded and conspired with a disgruntled, now former, employee of NPA. By their bad faith actions, they intended to harm and tried to undermine NPA and force the termination of its new CEO/Executive Director, who was hired to reform and revitalize NPA.

Defendants blatantly breached the duties they owed to the association, all for their own personal benefit and to indulge their personal whims. They also knowingly and intentionally induced and aided and abetted the former employee's breaches of duties he owed to NPA as his employer. As a result, the Defendants who are currently Directors should be removed from their position of trust and responsibility, enjoined from further improper and bad faith conduct, and ordered to compensate NPA for its injuries.

THE PARTIES

2. Plaintiff NPA is an Illinois not-for-profit corporation with its principal place of business in Washington, DC.

3. Defendant Carolyn Behrman ("Behrman") is a citizen of Indiana. She was and is a member of NPA's Board of Directors and chaired its Retailer Council, a committee of the Board. She is affiliated with Natural Choices for Healthy Living, which is a retail member of NPA.

4. Defendant Donelson Caffery ("Caffery") is a citizen of Virginia. He was and is a member of NPA's Board of Directors. He is affiliated with Good Foods Grocery, Inc., which is a retail member of NPA.

5. Defendant Robert Craven ("Craven") is a citizen of New Hampshire. He was a member of NPA's Board of Directors until he resigned January 22, 2016. He is the CEO of FoodState, Inc., which is a subsidiary of Pharmavite LLC.

6. Defendant Claudia David-Roscoe ("David-Roscoe") is a citizen of Ohio. She was and is a member of NPA's Board of Directors. She is affiliated with Healthy Foods by Claudia, which is a retail member of NPA.

7. Defendant Stephen Distefano ("Distefano") is a citizen of New York. He was and is a member of NPA's Board of Directors. He is affiliated with Strictly Gluten Free, which is a retail member of NPA.

8. Defendant Frances Drennan ("Drennan") is a citizen of Alabama. She was and is a member of NPA's Board of Directors. She is affiliated with Manna Grocery & Deli, which is a retail member of NPA.

9. Defendant Ben Henderson ("Henderson") is a citizen of North Carolina. He was a member of NPA's Board of Directors until he resigned on February 1, 2016. He was or is affiliated with Bare Essentials Natural Market, which is a retail member of NPA.

10. Defendant Angie O'pry-Blades ("O'pry-Blades") is a citizen of Louisiana. She was a member of NPA's Board of Directors until her term expired on or about December 31, 2015. She is affiliated with Fiesta Nutrition Center, Inc., which is a retail member of NPA.

11. Defendant Nicholas Pascoe ("Pascoe") is a citizen of Washington. He was a member of NPA's Board of Directors until his term expired on or about December 31, 2015. He is affiliated with Bear Foods Natural Market, which is a retail member of NPA.

12. Defendant Howard Pollack ("Pollack") is a citizen of California. He was and is a member of NPA's Board of Directors. He is affiliated with Rainbow Acres, which is a retail member of NPA.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction of this action pursuant to 28 U.S.C. §§ 1332, 2201 and 2202. NPA and Defendants are citizens of different states and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

14. This Court has personal jurisdiction over all Defendants. Personal jurisdiction exists pursuant to D.C. Code § 13-423, which extends to the full limits of the due process clause of the U.S. Constitution. Defendants have continuous and systemic contacts with the District of Columbia and have been and are conducting and doing business in this District. Defendants are Directors of NPA, which has its principal place of business in the District of Columbia. Defendants have traveled to and participated in NPA business and events in the District of Columbia. Defendants have taken actions in the District of Columbia that form, at least in part, the bases for NPA's claims against them. Defendants are all affiliated companies who are members of NPA (*see* ¶¶ 3-12, *supra*). They applied for and volunteered to serve as Directors of an advocacy trade association located in this District. They attend NPA Board meetings as well as other events in the District of Columbia, either personally or by telephone. For example, all Defendants except Distefano attended the December 2, 2015 meeting of NPA's Board in the District of Columbia. They did so at their own personal expense. Further, according to Federal Elections Committee records, in 2015, Behrman, Caffery, Craven, Henderson, O'pry-Blades and Pollack made personal contributions to NPA's political action committee located in the District of Columbia. Moreover, at least Behrman, Caffery, Drennan and Pollack have registered to travel to the District of Columbia to lobby members of Congress on natural products issues on April 12, 2016. Discovery is expected to reveal additional contacts Defendants had with the District. While Defendants' motions to dismiss the initial complaint invoked the "fiduciary shield" doctrine, they did not cite any authority holding that the doctrine applies to an action brought against a group of some of its directors for their personal misconduct. That doctrine does not provide a basis to deny the existence of personal jurisdiction here. *See, e.g., Flocco v. State Farm Mut. Ins. Co.*, 752 A.2d 147, 163 n.20 (D.C. 2000); *American Directory Services Agency*,

Inc. v. Beam, 131 F.R.D. 15, 17 (D.D.C. 1990); *Chase v. Pan-Pacific Broadcasting, Inc.*, 617 F. Supp. 2d 1414, 1422-23 (D.D.C. 1985). Even if the fiduciary shield doctrine applied, Defendants fall within an exception because, as Board members they enjoy a position of authority in the association, charged with taking actions that have significant effects in the District, and are more than mere employees of NPA.

15. Venue is proper in this District pursuant to 28 U.S.C. § 1391.

BACKGROUND

NPA Corporate Structure

16. Founded in 1936, NPA is the nation's largest and oldest nonprofit organization dedicated to the natural products industry. NPA represents over 1,400 members accounting for more than 10,000 retail, manufacturing, wholesale, and distribution locations of natural products, including foods, dietary supplements, and health/beauty aids. NPA has a diverse membership, from the smallest health food store to the largest dietary supplement manufacturer.

17. NPA's Bylaws, incorporated herein by reference, provide that the principal purposes of NPA shall be:

- (a) To support and encourage the production, marketing and consumption of nutritional foods, dietary supplements and related products and services which provide optimum health benefits to consumers;
- (b) To encourage the recruitment and retention of businesses for membership whose primary focus is the promotion of optimum health products and services and who agree to observe the Natural Products Association Code of Ethics;
- (c) To encourage adherence to product and label integrity and to develop adequate guidelines to improve the quality of health products and services;
- (d) To provide education to Association members and the consumer;
- (e) To encourage and support nutrition research and disseminate the findings;

(f) To encourage laws and regulations consistent with Association goals, and to protect the industry from laws, regulations and other actions adverse to its best interest; and

(g) To serve as a unified voice for businesses that promote optimum health.

Exhibit 19 § 2.1.

18. Pursuant to its Bylaws, NPA has two categories of voting members – retailers and suppliers. Voting members are eligible for election or appointment to office, to vote on matters submitted to the members, to serve on committees, attend meetings and receive information. NPA's officers, elected by the voting members, include a President, President-Elect, Immediate Past President, Treasurer, Retail Council Chairperson and Supply Council Chairperson. The affairs of NPA are managed under the direction of a Board of Directors consisting of 20 voting members, 10 of which are retailers and 10 are suppliers. An Executive Committee of the Board is authorized to act upon such matters as may be referred to it during intervals between meetings of the Board of Directors. Pursuant to its Bylaws, NPA has chartered regional organizations to provide services to members on regional issues in accordance with the terms of the charters.

19. Section 5.2(a) of the Bylaws provide that unless otherwise provided therein, the Board of Directors shall have the general powers and duties, and be subject to the restrictions and limitations, indicated in the Bylaws. Board members enjoy a position of authority in the association, charged with taking actions that have significant effects in the District, and are more than mere employees. As a group, the Board oversees the affairs of the association.

20. NPA's Bylaws do not authorize one or more members of its Board of Directors to conduct an investigation of an NPA employee. The Board of Directors acts at noticed meetings of the Board at which a quorum must be present. Exhibit 19 §§ 5.7, 5.8. Any committee of the Board must be approved by resolution. *Id.* § 6.1.

21. An individual director is not the agent of the corporation or its members. A director has no power of his or her own to act on the corporation's behalf, but only as one of the body of directors collectively acting as a board. Even when acting as a member of the board, he or she does not act as an agent, but as part of a group.

22. The members of NPA's Board of Directors owe fiduciary duties to the organization. Whether their companies are retailer or supplier members, the Directors owe such duties to the entire association.

23. NPA employs a CEO/Executive Director to manage and direct the activities of NPA subject to general supervision by the Board of Directors and the Executive Committee. Under NPA's Policies and Procedures (Exhibit 18, incorporated herein by reference), the CEO/Executive Director manages and directs the headquarters' office and is responsible for implementing and enforcing NPA's policies. The CEO/Executive Director is the official spokesperson for NPA. Under § 13 of the Policies and Procedures, the Executive Committee has the authority to hire and terminate the CEO/Executive Director and establish the length and term of his or her contract, subject to ratification by the Board of Directors.

24. Brent Weickert ("Weickert") was employed by NPA from about 1997 until he was terminated on October 15, 2015. During all relevant times, he was an at will employee who acted as NPA's Senior Vice President and Chief Financial Officer. He also performed some human resource duties. As such, he owed fiduciary duties to NPA. Even though NPA's offices were in Washington, he worked out of his house in California. At the time he was terminated in October 2015, NPA was paying Weickert \$170,000 per year, used to support his taste for fine wine and expensive vacations, which Weickert readily discloses in true and correct copies of

excerpts of his Twitter and Facebook postings. *See* Exhibits 1-2, incorporated herein by reference.

NPA Hires Fabricant as CEO/Executive Director

25. In 2014, NPA was moribund and not particularly effective in representing its members. Membership in the association was stagnant. Its finances were bleak, there were divisions among the members, and NPA lacked the necessary scientific and natural products industry expertise and ability to represent its members on important policy and regulatory issues. Its two immediate CEOs/Executive Directors left the association after short tenures.

26. In order to change the status quo and revitalize the association, NPA hired Daniel Fabricant, Ph.D. ("Fabricant") as its CEO/Executive Director in April 2014. Fabricant previously served as the Director of the Division of Dietary Supplement Programs at the U.S. Food and Drug Administration ("FDA"), where he directed agency policy, public affairs and regulatory action regarding regulation of the dietary supplement industry for more than three years. Fabricant received more than 30 FDA awards for his enforcement initiatives on dietary supplements. Prior to serving at FDA, Fabricant was Vice President for global government and scientific affairs for NPA. He has a Ph.D. in Pharmacognosy from the University of Illinois at Chicago. He has also published extensively and is internationally recognized for his regulatory and governmental public health expertise and natural products research.

27. NPA also hired Corey Hilmas, MD, Ph.D. ("Hilmas"), as Senior Vice President of Scientific and Regulatory Affairs. Hilmas leads NPA in researching, developing, drafting and submitting official comments on proposed rulemakings with federal and state regulatory authorities. NPA now submits more official public comment than any other industry trade association. Hilmas also oversees educational and compliance programs, such as cGMP training,

Natural Seal, TruLabel and others. Prior to NPA, he served as Chief of the Dietary Supplement Regulation Implementation Branch under the Division of Dietary Supplement Programs at the FDA, and also was Senior Toxicologist for Dietary Ingredients.

28. NPA further hired Michael Kelley ("Kelley") as Director of Government Affairs. He coordinates NPA's federal and state government affairs efforts, which involves legislative strategy, managing relations with the U.S. Congress, and overseeing the industry's largest Political Action Committee (PAC). Kelley previously worked for two leading Members of Congress and later held government relations positions at Mayer Brown LLP and The Moffett Group.

29. Fabricant identified four primary objectives for NPA:

- (a) Messaging, Media and Communications – Establish and strengthen an aggressive public relations campaign with media, influencers and others to demonstrate the quality, safety and benefits of products manufactured and distributed by responsible members. Launch new research and data products that can be released to regulators, influencers and media to improve the narrative.
- (b) Technical Expertise, Education and Training – Work with members and regulatory officials in an ongoing informational exchange of best practices, new technologies and joint efforts to meet growing demand for high quality products.
- (c) Advocacy, Outreach and Grassroots – Conduct sophisticated advocacy campaign and ongoing dialogue with federal and state lawmakers, attorneys general, and regulatory officials.

- (d) Membership – Build NPA's membership to convince target audiences that NPA's members are reputable, follow best practices, and are committed to delivering the highest quality products to help improve public health and wellness.

30. After Fabricant was hired, he began efforts to revitalize NPA and support its supplier and retailer members. NPA became much more active and involved in public policy and regulatory issues affecting its members. NPA's membership, financing, grassroots initiatives, and scientific and technical expertise have all grown under the leadership of Fabricant. For example, NPA has added more than 350 new members since April 2014. When PBS' Frontline program recently broadcast a report on "Supplements and Safety", it looked to NPA's Fabricant to speak for the industry. *See, e.g.*, <http://www.pbs.org/wgbh/frontline/article/can-regulators-keep-up-with-the-supplements-industry> (last visited Mar. 16, 2016).

31. Additional facts regarding NPA's progress and reform since Fabricant was hired are summarized in news stories and NPA documents, true and correct copies of which are attached as Exhibit 3, incorporated herein by reference.

32. Fabricant also took action to place NPA on a more secure financial footing. For example, in addition to growing revenue, NPA reduced expenses. As part of these reductions, certain travel expenses for retail members of NPA's Board of Directors were no longer reimbursed. Further, Fabricant proposed changing NPA's dues structure. While supplier members paid tens of thousands of dollars in dues, retail members paid only \$49 to join the association. The companies of nine out of the ten Defendants only paid \$49. Some retail members of the Board of Directors, including Defendants, loudly opposed these changes, which would cause them to have to pay their own travel expenses and increased annual membership

dues. Thus, they determined that Fabricant's changes would not be in their personal interest, while ignoring the interests of NPA.

33. Weickert did not agree with NPA's decision to hire Fabricant, to whom he reported, and Fabricant's reform agenda to strengthen the organization. Moreover, Weickert knew that NPA could contract with an outside firm to perform his job functions at half the annual cost.

34. In fact, as early as February 11, 2015, Fabricant emailed Weickert regarding his deficient job performance that cost NPA a \$25,000 contribution to its political action committee. Fabricant also notified Weickert that he should begin planning for a six to 12 month transition plan to leave NPA. *See* Exhibit 4, incorporated herein by reference. Weickert became concerned that his \$170,000 annual salary from NPA was at risk.

Defendants Collude and Conspire with Weickert and Injure NPA

35. In Spring 2015, Weickert and Defendants began communicating between and among themselves with the intent and purpose of sabotaging changes and reforms at the association and to force Fabricant out as its CEO/Executive Director. Weickert knew that if Fabricant's contract with NPA could be terminated, he would be in a position to keep his lucrative job or even become the new CEO/Executive Director. Weickert improperly used his position as a NPA employee to try to achieve that objective.

36. For example, in May 2015, approximately three months after Fabricant indicated that Weickert's time at NPA would be coming to a close (Exhibit 4), Weickert sent a letter to NPA's President – largely based on hearsay, double hearsay or rumors, alleging that Fabricant had engaged in supposed prohibited, unethical or illegal behavior. He sent a second letter to NPA's President with additional hearsay allegations.

37. Weickert's letters to NPA's President did not disclose that Weickert wasted NPA's money and property or his deficient performance as a NPA employee. For example, he authorized an employee's use of NPA's corporate credit card to buy hundreds of dollars of clothing, for which there could be no business purpose. *See* Exhibit 5, incorporated herein by reference. Further, in May 2015, Weickert approved two expense checks payable to employee Connie Randolph ("Randolph"), supposedly to pay for costs of Randolph's relocation expenses. In fact, the actual reimbursement receipts included a round trip airplane ticket issued to Debra Ray, a relative or friend of Randolph, from Hawaii to Arizona and a car rental in Arizona of about \$2,598. Weickert paid Randolph even though there was no NPA business purpose for those expenses, Weickert's letter to NPA's President also left out the fact that he misappropriated NPA's property by using award points on NPA's corporate credit card to buy an expensive telescope and camera for himself. Nor did Weickert disclose that, contrary to NPA's policies, Weickert rarely supplied receipts and unilaterally approved his own expense reimbursements. Further, Weickert set up NPA's account with American Express as a small business account, listing himself as the sole owner of the business. Not only was that false, it left Weickert in control of the account such that he could provide himself and his favored employees with personal benefits at NPA's expense. After Weickert's termination on October 15, 2015, NPA engaged an accounting firm, Tate & Tryon, to conduct a forensic audit. Its preliminary report, a true and correct copy of which is attached as Exhibit 6 and incorporated herein by reference, establishes numerous issues with Weickert's job performance. Weickert chose not to disclose any of these or other issues to NPA's officers, Board of Directors or Executive Committee. Nor did he reveal this information to the unauthorized "shadow board" Weickert was conspiring with.

38. As a result of Weickert's letters to NPA's President, NPA engaged its outside counsel, Sidley & Austin, to conduct a comprehensive privileged inquiry into the allegations made against NPA and Fabricant. Sidley & Austin conducted such an inquiry and provided NPA with a privileged oral report. NPA's President subsequently informed Weickert that the matter was investigated and concluded. A Sidley & Austin partner provided the Board of Directors with one or more privileged oral reports on the investigation of Weickert's allegations.

39. At least as early as July 2015, Weickert and Defendants began colluding and conspiring to remove Fabricant as CEO/Executive Director, to assist Weickert in retaining his lucrative job, to harass the officers, managers and staff of NPA, and to attempt to harm the long-term stability of NPA, all for their own personal benefit, in direct and malicious contravention of their fiduciary duties as Directors of the association. In acting adverse to the association's interests, the Defendants acted outside their prescribed duties as Board members. By way of example, FAC Exhibit 7, incorporated herein by reference, are some of the emails to and from Weickert and Defendants (with privileged communications and personnel information redacted) evidencing their improper and wrongful bad faith conduct. The emails identify the participants in their scheme. Examples include the following communications currently known to NPA:

- (a) Defendants Behrman, Caffery, Craven, David-Roscoe, Distefano, Drennen, Henderson, O'pry-Blades, Pascoe and Pollack agreed that they were part of a group that Henderson called the "shadow board." FAC Exhibit 7 at 1-3.
- (b) Henderson told Weickert on July 20, 2015 that "I concur with you that something has to be done" and that "removing Dan [Fabricant] has to be priority #1." *Id.* at page 65.

- (c) On July 24, 2015, Henderson wrote to Caffrey saying that they had talked and Caffrey provided "ideas and suggestions." Henderson attached a "highly confidential" draft letter to NPA's President with unsubstantiated hearsay allegations adverse to NPA and Fabricant and to seek an executive session of NPA's Board "to discuss all past or current investigations of the job performance of Dr. Dan Fabricant." *Id.* at pages 60-61.
- (d) On July 26, Henderson asked Weickert to put "an addendum together: the continuing saga of bad behaviour [sic]." *Id.* at page 58.
- (e) On July 29, Henderson sent an email to Caffery, Distefano, and Pascoe saying "I've talked to each of you about calling for an executive session [to remove Fabricant] individually, and I have gotten your word to maintain this in the strictest of confidence. To date, I have garnered five votes (yours, mine and Robert Craven)" and "the element of surprise is critical" *Id.* at pages 53-55.
- (f) On August 19, Henderson sent Weickert an email, writing, among other things, that revealed the agreement among the Defendants and their scheme to remove Fabricant:

As an update, I now have 10 Board members to vote for the ES [executive session]. I added Angie Blades and Howard Pollack yesterday. I need one more for a majority. would [sic] like to get two just to be on the safe side. Right now I have two supply side and 8 retail side....

I THINK there is no clue that anything is going on (ie [sic] plan to request ES), but I'm being very careful. I don't want this to get out.

I'm thinking that a motion to move to ES without staff or attorneys would be made and seconded as soon as the minutes are approved ... that way there HAS to be discussion and a vote. And a vote would get us into ES. Once in ES, there would be a swift motion (and second) to terminate the ED [the CEO/Executive Director

Fabricant]. Of course, I don't expect it to be that simple ... there will be much "discussion" I'm sure.

I'm going to take your budget observations and follow up to the discussions. Will send you a bcc.

Interestingly, I learned from Robert Craven yesterday that the Supply Council has not met since March (unless they are excluding him!), therefore they've not seen this budget.

Id. at pages 50-51.

- (g) On August 24, Henderson wrote to Weickert that "I'm still planning to follow the course sent to you this weekend with a slight modification. I'll forward Robert Craven's feedback on what I wrote. I'll probably follow his suggestions." *Id.* at pages 39-41.
- (h) On September 6, Henderson wrote Weickert that he had 11 confirmed votes, and a possibility of 13, to call for an executive session of the Board and that many of those will also vote to terminate Fabricant. *Id.* at page 31. Clearly, Henderson had been communicating with the Defendants through oral or written communications that were not provided to NPA. Defendants agreed to act in concert with each other and with Weickert.
- (i) On September 19, after a September 14 NPA Board meeting, Pascoe wrote to Henderson asking to speak about Fabricant prior to a meeting with an attorney from NPA's counsel, Sidley & Austin. *Id.* at page 24.
- (j) On September 22, Henderson sent an email to Behrman, Caffery, David-Roscoe, Distefano, Drennen, O'pry-Blades, Pascoe, Pollack, Weickert, and others to set up a call on September 25 to discuss strategy. *Id.* at pages 12-13.

- (k) On September 29, Henderson sent an email to Behrman, Caffery, Craven, David-Roscoe, Distefano, Drennen, O'pry-Blades, Pascoe, and Pollack (and later copied Weickert) to set up a call for September 30 to "[c]ome up with strategies" for yet another executive session. *Id.* at pages 7-8.
- (l) Emails sent on October 14 confirm that Behrman, Caffery, Craven, David-Roscoe, Distefano, Drennen, Henderson, O'pry-Blades, Pascoe, and Pollack were operating as members of the "shadow board." *Id.* at pages 1-2.

In addition to these communications that NPA is aware of, there are undoubtedly additional relevant communications that would be revealed in discovery. As discussed below in ¶ 51, these additional communications should have been disclosed to NPA in Fall 2015 in response to repeated requests in connection with NPA's internal inquiry into the conduct of Weickert and some Board members, including Defendants. Failure to cooperate with the inquiry constitutes breach of duties.

40. Defendants conspired and colluded with Weickert and acted in concert with each other and with him to commit improper and wrongful bad faith conduct detrimental to the NPA. The Defendants and Weickert conducted a one-sided "investigation" of Fabricant, which was not unauthorized by the Executive Committee or Board of NPA. Defendants grossly abused their authority under Illinois law and the corporate Bylaws by acting as individuals and part of an authorized and illegal shadow board, rather than collectively, all to the detriment of NPA. The Defendants did not rely on the investigation of Weickert's allegations by NPA's outside counsel. Nor did they seek the advice or consent of NPA's Executive Committee or counsel before conducting their own investigation. To the contrary, they acted in concert with Weickert to conduct their own unauthorized investigation that was not protected by the attorney-client

privilege or work product doctrine to the detriment of NPA. By conducting such an investigation and trying to create adverse evidence, the Defendants breached their duties to NPA, including by aiding, abetting and inducing Weickert's breaches of his fiduciary duties and placing NPA in legal jeopardy. By way of example, Weickert and Defendants engaged in the following improper activities outside the scope of their authority:

- (a) Weickert provided Defendants with copies of NPA credit card statements;
- (b) Weickert provided Defendants with multiple confidential attorney-client communications with Sidley & Austin, NPA's outside counsel;
- (c) Defendants encouraged Weickert to obtain a letter from former employee, Connie Randolph, critical of Fabricant, in violation of an agreement with NPA;
- (d) Weickert compiled and provided Defendants with a spreadsheet regarding employee tenure and speculating on reasons for termination;
- (e) Weickert prepared and provided Defendants with "thoughts" on reasons for an employee's departure and a summary of discussions with an intern critical of NPA; and
- (f) Weickert and Defendants encouraged former employees to make complaints about their treatment at NPA.

Defendants further breached their duties to NPA by failing to notify the Executive Committee, other Board members or NPA's counsel about what Weickert was doing and their role in encouraging and supporting it.

41. From at least July through October 2015, Weickert also consulted with Defendants on strategic advice on policy issues to be considered by the Board, such as NPA's dues and budget, expenses, personnel issues, and attempts to remove Fabricant as

CEO/Executive Director. From July through September 2015, Weickert sent Defendants information and documents outside the normal channels of communication. *See, e.g.*, FAC Exhibit 7 at pages 46-47, 51, 56, 57, 70, 72-75. The highly irregular nature of the communications is shown by the fact that Weickert used his personal email, bweickert@sbcglobal.net, to communicate with Defendants. *See* FAC Exhibit 7 (*passim*). Further, an August 19, 2015, email to Henderson from Weickert's personal account was signed "James Bond." *Id.* at page 49. On August 26, 2015, Weickert sent a copy of a letter he solicited from former employee Randolph. Weickert signed his transmittal email "BW (007)." *Id.* at page 37. Henderson responded: "Good letter! Thanks for sharing, '007. The evidence is mounting." *Id.* These and other communications reflect Weickert's and Defendants' conscious knowledge that they were acting secretly and improperly. Defendants breached their duties to NPA by not disclosing to the full Board of Directors or Executive Committee what Weickert was doing or their own role in supporting it.

42. On July 29, 2015, Defendants communicated with each other by email regarding holding an executive session of the Board, sharing confidential documents received from Weickert and a letter that had been reviewed by a non-NPA "attorney friend" of Henderson. Henderson emphasized the "element of surprise" in calling for such a session. By concocting a scheme to "surprise" the other members of the Board of Directors, Defendants did not act in good faith and loyalty.

43. Defendants consulted and obtained assistance and support from Weickert in executing their secret plan.

44. On August 18, 2015, Fabricant emailed Weickert regarding his continued deficient job performance, specifically noting that he had become aware of his communications

with Board members without his knowledge and instructed Weickert that "if there is any contact with the board or [Executive Committee] you are to advise me of the nature of such contact." *See* Exhibit 8, incorporated herein by reference. Weickert ignored the instruction and continued his improper conduct.

45. On August 28, 2015, Weickert wrote to Randolph and another former employee expressly seeking negative statements about Fabricant on behalf of "several board members." FAC Exhibit 7 at page 33.

46. Defendants implemented their long-planned "surprise" attack on NPA and Fabricant at the September 14, 2015, regular meeting of the Board of Directors. They demanded that the Board meet in executive session, during which they tried – and failed – to remove Fabricant as CEO/Executive Director based on Weickert's allegations that already been investigated by Sidley & Austin. It was clear from the discussion that a majority of the Executive Committee – which is the NPA entity responsible for such decisions, subject to Board ratification – would not support Fabricant's termination.

47. Defendants also colluded and acted in concert before and at the September 14 Board meeting to ensure that NPA tabled and failed to pass a budget at the September 14 meeting.

48. Even after (a) receiving the privileged oral reports by NPA's counsel on the investigation into the Weickert allegations, (b) attending the September 14, 2015 executive session of the Board of Directors that discussed the allegations and Fabricant's management, and (c) knowing that a majority of the Executive Committee (the NPA entity charged by the Policies and Procedures with the responsibility to hire and fire the CEO/Executive Director) would not

support terminating Fabricant, Defendants knowingly and willfully continued their grossly abusive scheme to oust Fabricant and hinder NPA, to the detriment of the association.

49. For example, on October 14, 2015, Henderson wrote to his co-Defendants and others that: "I think there is a consensus among this group (I've dubbed us the 'shadow board') that Dan is just not the right person for this job." FAC Exhibit 7 at page 2. Behrman responded "Hear! Hear!" She further said "people think no one but [Fabricant] could have taken us this far. Perhaps that's true, but it is hard to believe there isn't someone out there equally as good and less abrasive." *Id.* at page 1. Al Powers, who was a member of the Board at that time, responded to the Defendants that the Executive Committee "has already taken a position" that Fabricant should be retained but asking Defendants to continue to work to fire Fabricant. Exhibit 9, incorporated herein by reference. Defendants agreed to continue to try to force out Fabricant as CEO/Executive Director.

50. On October 15, 2015, NPA terminated Weickert from his at will employment. He was terminated for at least the following reasons:

- (a) Because Defendants prevented passage of a budget at the September 14 Board meeting that would have resulted in increased revenue, NPA needed to further reduce expenses. Weickert was paid base compensation of about \$170,000 per year. NPA is a relatively small trade association and had been exploring ways to reduce its costs to meet a budget shortfall. NPA's Executive Committee determined that it would be much cheaper for NPA to outsource the functions Weickert performed as a full time employee. The Executive Committee was also concerned that NPA is located in Washington, D.C. and Weickert worked out of his home in California, which was not necessarily efficient or prudent from a

control and reporting standpoint. Following his termination, NPA outsourced his functions to a professional firm at a fraction of the cost of Weickert's salary.

- (b) Prior to his termination, NPA learned that Weickert engaged in financial improprieties while an employee of NPA. He used NPA credit card reward points for his personal benefit, including the purchase of an expensive telescope and a camera. On October 15, 2015, he admitted he did so without authorization. NPA determined that it could not continue to employ a person as chief financial officer who abused his position for improper personal benefit.
- (c) Prior to his termination, there were issues with Weickert's performance of his job responsibilities. By way of example, communications with NPA's auditors revealed that he was unable to account for a significant variance in the general ledger. *See, e.g.*, FAC Exhibits 4, 6, 8. In addition, Weickert had poor relationships with other NPA employees.
- (d) Prior to his termination, Weickert communicated internal NPA data and information to certain members of the Board of Directors (*i.e.*, to Defendants) outside the normal reporting channels and beyond the scope of his authority. NPA determined that it could not continue to employ a person who acted outside the scope of his authority. Evidence uncovered after his termination, including Weickert's emails sent and stored on an NPA computer and communications with Defendants, corroborate the fact that he acted improperly. *See, e.g.*, FAC Exhibit 6. Defendants aided and abetted Weickert's breaches of fiduciary duties he owed to NPA, including without limitation, Henderson's repeated requests to Weickert

to obtain letters and statements from former employees detrimental to NPA. Other Defendants encouraged and induced Henderson's efforts.

51. On or about October 26, 2015, faced with the prospect of a claim from Weickert, NPA notified certain Board members, including Defendants, that it was conducting an internal inquiry into, among other things, their communications with Weickert and their compliance with their fiduciary duties. NPA asked for their cooperation, requested that responsive documents be produced no later than November 2, 2015. NPA also asked the Defendants to advise NPA by October 29, 2015, if they would cooperate by producing documents. NPA also asked to schedule interviews with Defendants and asked for available dates during the week of November 2, 2015. NPA subsequently asked Defendants to disclose whether or not they revealed any privileged communications to Weickert. None of the Defendants fully cooperated with NPA, which itself is a breach of their duties owed to NPA.

52. On December 7, 2015 Weickert sued NPA and Fabricant in the Superior Court of San Luis Obispo County, California. On December 23, NPA and Fabricant timely removed the case to U.S. District Court for the Central District of California. On January 28, 2016, the Central District transferred the case to this Court, where it is now pending as No. 1:16-cv-00142-RJL ("Weickert Litigation").

53. The complaint in the Weickert Litigation alleges nine causes of action against NPA or Fabricant personally. These are: (1) wrongful termination in violation of public policy against NPA; (2) retaliation in violation of the Fair Employment and Housing Act ("FEHA") (Cal. Gov't Code § 12940, *et seq.*) against NPA; (3) religious and sexual harassment/hostile work environment in violation of FEHA against NPA and Fabricant; (4) failure to prevent discrimination, harassment and retaliation in violation of FEHA against NPA; (5) negligent

hiring and retention of Fabricant by NPA; (6) violation of Cal. Labor Code § 1102.5 against NPA; (7) intentional infliction of emotional distress against NPA and Fabricant; (8) failure to pay vested vacation time upon termination against NPA; and (9) waiting time penalties against NPA. NPA and Fabricant deny the material factual and legal allegations in Weickert's complaint. A motion to dismiss for failure to state a claim and to strike certain allegations was filed before the case was transferred.

54. Less than a month after he was fired, on or about November 12, 2015, Weickert obtained a new job as Director of Finance of the Paso Robles Housing Authority. Further, while claiming he suffered emotional distress, Weickert continues to enjoy fine wine and vacations. *See Exhibits 1-2.*

55. As alleged above, after Weickert was terminated, NPA began an inquiry into his conduct and his communication with certain members of the Board of Directors, including Defendants. NPA asked Defendants, among others, to provide relevant documents and information in their possession, custody or control and to be interviewed. Without any excuse, Defendants did not fully and/or timely cooperate with the inquiry and thus breached their fiduciary duties to NPA. Indeed, Defendant Pascoe told the Board of Directors on December 15, 2015 meeting that he would not cooperate with the inquiry.

56. At the December 15, 2015 NPA Board meeting held in Washington, DC, Defendants continued their effort to have NPA terminate Fabricant. However, NPA's President invoked § 13 of NPA's Policies and Procedures, which provides that only the Executive Committee has the authority to hire and terminate NPA's CEO, subject to ratification by the Board of Directors, and ruled that such a motion would be improper for the Board to make and consider. Thus, the issue of Fabricant's continued employment at NPA has been conclusively

resolved.

57. As a result of the foregoing, NPA has been injured. Defendants conduct has resulted in the loss of potential members and business opportunities that would strengthen the position of the association, including being awarded benefits in response to a request for proposals. *See, e.g.*, FAC Exhibits 10 & 11, incorporated herein by reference. It has also been forced to incur unnecessary costs and expenses, including attorneys' fees, accountants' fees, expenses and costs. Defendants failure to consider and adopt a budget in September 2014 also resulted in lost or lower membership dues. Defendants harassing and vexatious conduct has also diverted the attention of NPA and its staff from carrying out its corporate purposes.

58. Even after this case was filed, the Defendants who remain as current Board members – Behrman, Caffery, David-Roscoe, Distefano, Drennen, and Pollack (collectively referred to as "Current Member Defendants") – have continued to grossly abuse their positions and act in bad faith and maliciously to injure NPA and hinder its activities. For example, in advance of the scheduled February 5, 2015 Executive Committee meeting, counsel for NPA notified counsel for Behrman that she was an interested director and could not attend the meeting in light of this pending lawsuit and the allegations against her. In the normal course of business, Fabricant circulated the minutes from the February 5 meeting to the Board of Directors. FAC Exhibit 12, incorporated herein by reference. In response, Current Member Defendants Behrman, Caffery, David-Roscoe, and Drennan each replied objecting to all motions passed at the meeting. FAC Exhibits 13-15, incorporated herein by reference. The intended effect of these objections is to further block the NPA from carrying out its corporate purposes, including the appointment of an interim President.

59. The Current Member Defendants have also held unofficial rogue meetings of

NPA's Retailer Council. FAC Exhibits 16 & 17, incorporated herein by reference. The Retailer Council is a committee of NPA's Board of Directors. Exhibit 18 § 5(a). "Committee administration, including agenda creation, meeting flow, minute taking and continuity, shall be the responsibility of committee staff, subject to review and approval by the Chairman. Substantive issues, such as policy development or recommendations for Board action shall be the responsibility of the Committee Chair, assisted by staff. The Executive Director/CEO shall determine who will staff each committee." *Id.* § 10(a). Nothing in NPA's corporate documents authorizes the Retailer Council or other committees to meet in executive session without staff present. Behrman was so advised in November 2015.

60. On information and belief, one or more Defendants have disparaged and defamed NPA to the media and the public.

61. An immediate, real and justiciable controversy exists between the parties to this action.

62. The conduct of Defendants was willful, malicious and intended to benefit them personally at the expense of NPA.

63. The business judgment rule does not protect the Defendants in this case. For an unpaid director of an Illinois not for profit corporation, a director is not liable for damages in connection with his or her duties or responsibilities "unless the act or omission involved willful or wanton conduct." 805 ILCS § 105/108.70(a). So, too, does bad faith and illegal acts. As alleged above, the Defendants' acts and omissions involved willful, wanton, bad faith and illegal conduct that was not in the best interests of NPA and thus not protected by the business judgment rule. Further, Defendants' failure, if not outright refusal, by Defendants to cooperate with NPA's internal investigation of conduct by Weickert and certain directors is not protected

by the business judgment rule. Further, the business judgment rule does not prevent the association from seeking the removal of Current Members Defendants.

COUNT I
(Breach of Fiduciary Duties)

64. The foregoing allegations of this FAC are incorporated by reference.

65. The Illinois Not for Profit Corporation Act provides that "[d]irectors and officers are subject to common law and other statutory duties and responsibilities." 805 ILCS § 105/108.85. A fiduciary relationship exists where there is special confidence in one who, in equity and good conscience, is bound to act in good faith with due regard to the interests of the other. The fiduciary duties owed by directors of a Illinois corporation are the duties of due care, loyalty and good faith.

66. Whether their companies are retailer or supplier members, the individual Directors owe such duties to the entire association, not just a class of members.

67. Weickert, as an employee, also owed fiduciary duties to NPA.

68. The fiduciary duty of due care requires that directors use that amount of care that ordinarily careful and prudent men would use in similar circumstances and consider all material information reasonably available" in making business decisions.

69. The fiduciary duty of loyalty requires directors not to use their position of trust and confidence to further their private interests. A director must affirmatively act to protect the interests of the corporation. She also may not do anything that would injure the organization, deprive it of an advantage, or to enable it to engage in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there be no conflict between duty and self-interest. The duty of loyalty mandates that the best interest of the corporation and its shareholders take precedence over any interest possessed by a

director and not shared by the members generally. The classic example that implicates the duty of loyalty is when a fiduciary either appears on both sides of a transaction or receives a personal benefit not shared by all members.

70. To act in good faith, a director must act at all times with an honesty of purpose and in the best interests and welfare of the corporation. A director may not act for some purpose other than a genuine attempt to advance the organization's welfare or when it would be a knowing violation of applicable law. In other words, an action taken with the intent to harm the organization is a disloyal act in bad faith.

71. Defendants' improper and wrongful conduct and communications alleged above constitute bad faith breaches of their duties of due care, loyalty and good faith they owed to NPA as Directors of NPA.

72. Defendants acted together with Weickert in supporting, inducing and aiding and abetting his breaches of fiduciary duties owed to NPA. Their knowing and willful participation with him in his breaches of duties constitute direct breaches of fiduciary duties owed to NPA as Directors.

73. Under the Illinois Not for Profit Corporation Act, a court may remove a director from office in a proceeding commenced by the corporation if the court finds (1) the director is engaged in fraudulent or dishonest conduct or has grossly abused his or her position to the detriment of the corporation, and (2) removal is in the best interest of the corporation. 805 ILCS § 105/108.35(d). The Current Member Defendants have engaged in fraudulent and dishonest conduct and have grossly abused their position as Directors to the detriment of NPA. Their immediate removal as Directors is in the best interests of NPA. They have violated – and continue to violate – the duties that they owe to NPA and are actively engaging in trying to

hinder NPA's corporate functions and work representing the natural products industry. The Current Member Directors are also publicly disparaging NPA and have caused financial and membership losses. The business judgment rule does not prevent the association from seeking the removal of Current Members Defendants. As a direct and proximate result of the foregoing, Defendants should be order removed as members of NPA's Board of Directors.

74. In addition, Defendants improper and wrongful conduct as alleged above is continuing and ongoing and, unless enjoined, they are continuing to breach their fiduciary duties to NPA. Defendants should be preliminarily and permanently enjoined from breaching their fiduciary duties. NPA will be irreparably harmed unless an injunction is entered. The balance of hardships is in favor of NPA and an injunction is in the public interest.

75. As a direct and proximate result of the foregoing, Defendants' breaches of their fiduciary duties have damaged and injured NPA in an amount to be determined at trial in excess of \$75,000. Because their conduct involves "willful or wanton conduct", they are liable for damages to NPA. 805 ILCS § 105/108.70(a).

COUNT II
(Waste of Corporate Assets)

76. The foregoing allegations of this FAC are incorporated by reference.

77. Defendants' acts and omissions constitute waste of the corporate assets of NPA. Their actions served no valid corporate purpose and irrationally squandered NPA's assets and funds, including needless professional fees and expenses and resources NPA employees were forced to expend.

78. As a direct and proximate result of the foregoing, NPA has sustained financial losses and other damages in an amount to be determined at trial in excess of \$75,000.

COUNT III
(Tortious Interference with Business Relations and Economic Advantage)

79. The foregoing allegations of this FAC are incorporated by reference.

80. At all relevant times, NPA had a valid business relationship or expectancy with members, potential members and the natural products industry. *See, e.g.*, FAC ¶¶ 57, 75 & Exhibits 10, 11.

81. Defendants knowingly and intentionally interfered with such relationships.

82. While Defendants were Directors of NPA, their malicious conduct was not privileged because they acted contrary to the interests of NPA.

83. As a direct and proximate result of Defendants' wrongful conduct, NPA has been injured by Defendants in an amount to be proven at trial in excess of \$75,000.

84. Further, Defendants' tortious interference was made with the intent to vex, injure and harm NPA so as to constitute oppression and malice justifying an award of exemplary and punitive damages in an amount to be determined at trial.

COUNT IV
(Civil Conspiracy)

85. The foregoing allegations of this FAC are incorporated by reference.

86. Initially, Henderson and Weickert agreed, combined and conspired for an unlawful purpose or for a lawful purpose by unlawful means, *i.e.*, to breach fiduciary duties, disparage NPA, and tortiously interfere with economic advantage with the intent to injure NPA and Fabricant. Ultimately, as alleged above, the other Defendants joined the conspiracy.

87. Defendants and Weickert committed one or more overt tortious or illegal acts in furtherance of their conspiracy.

88. An overt act by one member of the conspiracy is chargeable to all members.

89. Defendants' conduct far exceeded their duties to exercise collective oversight of NPA, including their conduct occurring after (a) they received one or more privileged briefings from NPA's counsel on the investigation into the Weickert allegations, (b) they discussed the allegations and Fabricant's management at the September 14, 2015 executive session of the Board of Directors, and (c) they knew that a majority of the Executive Committee (the NPA entity charged by the Policies and Procedures with the responsibility to hire and fire the CEO/Executive Director) would not support terminating Fabricant.

90. Defendants' agreement and overt acts were done intentionally and with malice.

91. As a direct and proximate result of the civil conspiracy, NPA has been injured by Defendants in an amount to be proven at trial in excess of \$75,000.

COUNT IV
(Declaratory Judgment – Indemnification)

92. The foregoing allegations of this FAC are incorporated by reference.

93. Defendants owed fiduciary duties to NPA and they breached those duties. As a result of Defendants' improper and wrongful conduct, including their expressly encouraging and requesting Weickert to gather information to be used against NPA and Fabricant, NPA was sued in the Weickert Litigation and has incurred and will continue to incur defense fees, expenses, costs and potential liability. Defendants assisted Weickert in ginning up claims for Weickert to use against NPA. *See* FAC Exhibit 7. As such, common law and equity requires that they indemnify NPA.

94. NPA is entitled to a judgment declaring that Defendants must provide common law or equitable indemnification to NPA for defense fees, expenses, costs and potential liability.

REQUEST FOR RELIEF

NPA respectfully requests the following relief:

- a. judgment in NPA's favor and against Defendants;
- b. order removing Current Member Defendants as members of the Board of Directors of NPA;
- c. judgment granting preliminary and permanent injunctions enjoining Defendants and those persons in active concert with any of them, from breaching their fiduciary duties to NPA and engaging in further wrongful acts against NPA;
- d. judgment awarding compensatory damages to NPA in an amount to be determined at trial in excess of \$75,000;
- e. judgment granting punitive and exemplary damages in the maximum amount allowed by law;
- f. judgment declaring that NPA is entitled to be indemnified for any damages, costs and expenses incurred in connection with the Weickert Litigation;
- g. an award of reasonable attorneys' fees and expenses in this action as allowed by law;
- h. an award of costs; and
- i. such other relief as the Court deems just and proper under the circumstances.

Dated: March 18, 2016

Respectfully submitted,

/s/ Richard J. Oparil

Richard J. Oparil (D.C. Bar No. 409723)
PORZIO, BROMBERG & NEWMAN P.C.
1200 New Hampshire Ave., NW, Suite 710
Washington, DC 20036-6802
(202) 517-1888
(202) 517- 6322 (fax)
rjoparil@pbnlaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served on March 18, 2016 on counsel of record through the Court's ECF system.

/s/ Richard J. Oparil

Richard J. Oparil (D.C. Bar No. 409723)