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Case No. 2020-0137-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE TILRAY, INC. REORGANIZATION LITIGATION	Consolidated C.A. No. 2020-0137-KSJM **PUBLIC VERSION AS FILED JULY 24, 2020**

FIRST AMENDED CONSOLIDATED VERIFIED STOCKHOLDER CLASS ACTION AND DERIVATIVE COMPLAINT

Deborah R. Braun, Dr. Nader Noorian, Catherine Bouvier, James Hawkins, and Stephanie Hawkins (collectively, "Plaintiffs"), on behalf of themselves and all other similarly situated stockholders of Tilray, Inc. ("Tilray" or the "Company"), and for the benefit of nominal defendant Tilray, bring the following First Amended Consolidated Verified Stockholder Class Action and Derivative Complaint (the "Complaint") against: (i) Brendan Kennedy ("Kennedy"), Christian Groh ("Groh"), Michael Blue ("Blue" and together with Kennedy and Groh, the "Control Group" or "Privateer Founders"), and Privateer Evolution, LLC ("Merger Sub"), as successor to Privateer Holdings, Inc. ("Privateer") (collectively, the "Privateer Defendants") for breaching their fiduciary duties as the Company's controlling stockholders; and (ii) Kennedy, Maryscott Greenwood ("Greenwood") and Michael Auerbach ("Auerbach") (collectively, the "Director Defendants") for breaching their fiduciary duties as directors and/or officers of Tilray.

The Complaint's allegations are based on Plaintiffs' personal knowledge as to themselves, and the investigation of counsel, which included reviewing publicly available information, including press reports, filings made with the U.S. Securities and Exchange Commission ("SEC"), Wall Street research and analyst reports, and the books and records produced by the Company in response to Plaintiffs' demands made under 8 *Del. C.* § 220 (the "Section 220 Demands"), as to all other matters.

I. INTRODUCTION

1. This case challenges the conflicted corporate reorganization ("Reorganization") of Tilray, a growth-oriented cannabis-products company. Tilray was controlled by Privateer, a private equity firm that was, in turn, controlled by the Control Group—*i.e.*, Defendants Kennedy, Blue, and Groh. The Control Group timed, initiated, and structured the Reorganization to (i) confer enormous, non-ratable tax benefits on Privateer, without providing any corresponding benefit to the Company and its public stockholders and (ii) transfer and extend its control over Tilray.

2. In July 2018, the Control Group commenced an initial public offering ("IPO") of Tilray. Post-IPO, the Control Group (through Privateer) owned all of the Company's Class 1 super-voting stock ("Class 1 Stock"), entitled to ten (10) votes per share, and (ii) the majority of the Company's Class 2 common stock ("Class 2

Stock"), entitled to one vote per share. In total, Privateer held a 75% economic interest in Tilray, but controlled over 90% of Tilray's outstanding voting power.

3. By early 2019, the Control Group and other Privateer investors were seeking liquidity for the billions of dollars of paper profits from their Tilray investment. The problem was that any direct distribution by Privateer of its Tilray stock to its investors would trigger substantial tax bills at the C-corporation ("C-Corp") level *and* substantial tax bills for the individual Privateer investors' massive gains on Tilray.

4. To avoid that issue, the Control Group sought to (i) distribute its three non-Tilray investments directly to Privateer's investors in a transaction that would trigger taxes at both the Privateer C-Corp level and at the Privateer investor level; and (ii) subsequently do a tax-free merger of Privateer with a Tilray subsidiary. The second-step tax-free merger was critical to the plan because although Privateer's net operating losses ("NOLs") would substantially offset Privateer's C-Corp level tax liability for the distribution of the three non-Tilray investments, its NOLs would then be exhausted. Now all the Control Group needed was Tilray's agreement to merge.

5. In January 2019, the Control Group began direct discussions with Tilray management. Even though Kennedy was both part of the Control Group and Tilray's CEO, he did not recuse himself. The Control Group and Tilray's management memorialized their "preliminary understanding" in a letter of intent.

Tilray would cancel the Tilray shares held by Privateer and issue new—but substantively identical—securities *directly* to Privateer's investors in a way that would avoid C-Corp level taxes and defer recognition of individual level taxes.

6. On January 19, 2019, Tilray's board of directors (the "Board") purportedly met to discuss forming a special committee consisting of Defendant Greenwood, Rebekah Dopp ("Dopp"), and Christine St. Clare ("St. Clare" and together with Greenwood and Dopp, the "Special Committee" or "Committee"). There are no Board minutes or other corporate records reflecting who attended the meeting or what was discussed. For unknown reasons, the Committee deliberately failed to keep minutes throughout the process.

7. The Committee was not formed for another month. Greenwood was named the Chair, despite (or perhaps because of) her longstanding business relationship with Kennedy. She remained the Chair throughout the process, even after she was hired by a public relations firm that counts Tilray and Privateer among its most important clients. That conflict was never disclosed.

8. The Committee hired Paul Hastings LLP ("Paul Hastings"), despite (or perhaps because of) its longstanding business relationship with Kennedy. No other counsel was interviewed or considered. Paul Hastings served as Kennedy's personal counsel, having represented him [redacted]. Kennedy had also hired Paul Hastings a little more than two months earlier in

October 2018 to represent Tilray in a joint venture. Moreover, Paul Hastings's lead relationship partner [redacted]. Paul Hastings's engagement letter with the Special Committee does not disclose Kennedy's prior retention of Paul Hastings. Stockholders were never informed of these conflicts.

9. Perhaps unsurprisingly, the Committee and its counsel failed to negotiate ***any*** procedural protections for minority stockholders. There was no majority-of-the-minority voting provision. The Committee treated Privateer's enormous tax benefits as an afterthought, and never asked for a meaningful "give" from Privateer or the Control Group in exchange for the massive "get" of tax avoidance.

10. The Committee agreed to allow the Control Group to use the Reorganization to gain extended control of Tilray, even going so far as to condition the Reorganization on the Privateer investors consenting to amend the Privateer Certificate of Incorporation (the "Charter") to require that the Control Group receive all of Privateer's super-voting stock. Unbeknownst to Tilray's minority public stockholders, the Control Group planned to use the tax benefits achieved through the Reorganization to entice the other Privateer investors to agree to amend the Privateer Charter to transfer all of Privateer's high-vote Tilray Class 1 stock to the Control Group instead of *pari passu* to all of Privateer's investors, thereby extending the Control Group's majority control over the Company. Absent the Reorganization,

control over Tilray would have passed quickly to the market as (i) Privateer distributed and sold its Tilray stake, (ii) the Privateer Founders monetized their shareholdings, and (iii) Tilray issued additional shares to fund its operations and growth.

11. On September 9, 2019, Tilray and Privateer entered into an Agreement and Plan of Merger and Reorganization (the "Merger Agreement"), under which Privateer would merge into a Tilray subsidiary. All 75 million shares of Tilray that Privateer previously owned would be cancelled. In exchange, Tilray was required to, among other things, issue and distribute directly to Privateer's equity holders (including, but not limited to, the Control Group) 75 million newly registered Tilray shares, with all the high vote shares going to the Control Group.

12. The Reorganization's benefits to Tilray and its minority public stockholders are meager to non-existent, and are vastly outweighed by the harm of transferring extended control to the Control Group. The primary purported benefit to Tilray—elimination of the "overhang" from Privateer's potential sale of Tilray shares—was illusory at best. In reality, Privateer would not have sold down its position any faster than allowed through the modest selling restrictions included in the Reorganization because doing so would crater Tilray's stock price (and therefore inflict the most harm on Privateer, as Tilray's largest stockholder) and, absent the Reorganization, trigger huge, double-level tax bills.

13. For the reasons set forth herein and as will be shown at trial, the conflicted controlling stockholder Reorganization triggers—and will not satisfy—entire fairness review.

II. THE PARTIES

A. PLAINTIFFS

14. Plaintiffs are and have been, at all relevant times, the beneficial owners of shares of Tilray Class 2 Stock.

B. THE CONTROL GROUP DEFENDANTS

15. Defendant Privateer was a private equity firm that held approximately 75% of the economic interest and over 90% voting control of the Company. Kennedy, Blue, and Groh founded Privateer together and incorporated it in Delaware as a C-Corp on October 6, 2011. In the Reorganization, Privateer merged with and into Down River Merger Sub, LLC, a Delaware limited liability company that is now known as Privateer Evolution, LLC. The actions of Privateer at issue in this case all occurred before the closing of the Reorganization, and therefore any related liability is subject to indemnification from the merger escrow under Section 11.2 of the Merger Agreement.

16. Defendant Kennedy is the current CEO of Tilray and has served in that position since August 2013. Kennedy has been the Executive Chairman of Tilray's Board since January 2018. Kennedy co-founded and controlled Privateer, serving as CEO from 2011 to July 2018 and as Executive Chairman of Privateer's Board of

Directors from July 2018 to December 2019. Kennedy was the largest stockholder of Privateer. Following consummation of the Reorganization, Kennedy personally owns approximately 9.5 million shares (*i.e.*, 57%) of Tilray's super-voting Class 1 Stock and approximately 8.6 million shares (*i.e.*, 10%) of Tilray Class 2 Stock.[1] With approximately 41% voting power and his role as CEO and public face of Tilray, Kennedy has de facto control of Tilray. Together with Blue and Groh, who are Kennedy's long-term friends and colleagues, the Control Group continues to have absolute, majority voting control of Tilray with approximately 73% of its voting power, while owning only a 31% economic interest.[2]

17. Defendant Groh is one of the co-founders of Privateer, served as its COO, and sat on Privateer's board of directors with Privateer's two other co-founders, Blue and Kennedy. Both Kennedy and Privateer have publicly described Groh as Kennedy's "long-term friend and colleague." Groh and Kennedy worked together at SVB Analytics at the time that Kennedy came up with the idea for Privateer—Groh was the Head of Sales, while Kennedy directed SVB Analytics' operations. Prior to the Reorganization, Groh controlled Privateer as a group with Kennedy and Blue. As a result of the Reorganization, Groh currently owns approximately 3.7 million shares (*i.e.*, 22%) of Tilray's super-voting Class 1 Stock

[1] Tilray, Prospectus, filed on form S-4 with the SEC on Nov. 12, 2019 at 190 (the "S-4").
[2] Tilray, 8-K, filed with the SEC on December 17, 2019.

and approximately 3.5 million shares (*i.e.*, 4%) of Tilray Class 2 Stock, which equates to approximately 16% of Tilray's voting power and together with the Control Group 73% of Tilray's voting power.

18. Defendant Blue is one of the co-founders of Privateer, where he sat on the board of directors with Groh and Kennedy. Blue and Kennedy are close friends who were classmates at the Yale School of Management. Kennedy invited Blue to join him in starting Privateer, saying: "You know how we've always talked about starting something together? I think I've found it." Prior to the Reorganization, Blue controlled Privateer as a group with Kennedy and Groh. Blue was heavily involved in the Reorganization process, as the author of the letter of intent and as one of the primary negotiators for Privateer. Blue currently owns approximately 3.4 million shares (*i.e.*, 21%) of Tilray super-voting Class 1 Stock and approximately 1.7 million shares (*i.e.*, 2%) of Tilray Class 2 Stock.[3] Blue thus controls approximately 16% of Tilray's voting power, and together with the other Privateer Founders acts as a controlling group with approximately 73% of its voting power. Under the Merger Agreement, Blue was designated the Stockholder Representative for all the former Privateer investors.

[3] *Id.*

19. Kennedy describes Groh and Blue as his "partners."[4] Kennedy, Groh, and Blue agreed to divvy up management of the Privateer portfolio companies that they controlled and majority owned together. Kennedy would directly manage Tilray as CEO and Chairman, while Groh and Blue would run a new management company that provided unspecified services to Tilray and the other three Privateer portfolio companies.

20. Groh and Blue co-own and co-manage Ten Eleven Management LLC d/b/a Privateer Management ("Privateer Management"), a Delaware limited liability company. In February 2018, Tilray agreed to retain Privateer to provide Tilray with certain unidentified administrative and corporate services on an "as-requested basis." In February 2019 (and in anticipation of Privateer being absorbed into Tilray), Tilray entered into an agreement with Privateer Management to provide unidentified "as-requested services" for $25,000 per month.

21. Groh and Blue manage the other Privateer portfolio companies that Privateer spun out as part of the first step in Privateer's scheme, which Kennedy, Blue, and Groh continue to majority own. Groh sits with Blue on the board of directors of Left Coast Ventures, Inc. ("Left Coast Ventures"), a Delaware corporation and former Privateer portfolio company. Groh and Blue are the directors

[4] Brendan Kennedy, *Tilray's CEO on Becoming the First Mover in a Controversial Industry*, HAR. BUS. REV., Mar.–Apr. 2020, https://hbr.org/2020/03/tilrays-ceo-on-becoming-the-first-mover-in-a-controversial-industry.

of Docklight Brands, Inc. (f/k/a Docklight Brands, LLC) and DB One, LLC (together, "Docklight"), both of which are Delaware entities. Groh and Blue are also the "Governors" of Leafly Holdings, Inc. ("Leafly").

22. Kennedy, Groh, Blue, Tilray, Privateer, and Privateer Management share the same office space on the third floor of 2701 Eastlake Avenue E, Seattle, WA 98102 ("2701 Eastlake").[5] From January to May 2019, Tilray made payments towards Privateer's lease of 2701 Eastlake. In May 2019, Tilray paid Privateer $1,000,000 and assumed Privateer's lease. Tilray then entered into a Real Estate License Agreement with Privateer Management that allows Privateer Management to continue to occupy an area on the third floor of 2701 Eastlake. According to various public records and Company filings, Kennedy, Groh, and Blue continue to work on their various co-ventures just down the hall from each other.

C. THE DIRECTOR DEFENDANTS

23. Tilray's Board has five members. In addition to Kennedy, two other directors were interested in the Reorganization or not independent.

[5] Following closing of the Reorganization, on December 23, 2019, Kennedy filed a Schedule 13D, and Blue and Groh filed Schedule 13Gs, in which each identified 2701 Eastlake as his "principal business office." Subsequent filings make clear that Kennedy, Blue and Groh continue to use 2701 Eastlake as their business address. *See* Tilray, Definitive Proxy, filed with SEC on April 30, 2020, at 19-20 (listing 2701 Eastlake as Blue and Groh's contact address) *to* Tilray, Schedule 13D, filed with SEC on June 19, 2020, at 1 (listing 2701 Eastlake as Kennedy's contact address); Tilray, Definitive Proxy, filed with SEC on April 30, 2020 at 43-44 (explaining Tilray and Privateer Management operate out of 2701 Eastlake);

24. Defendant Auerbach was a dual fiduciary of Tilray and Privateer at the time of the Reorganization. Auerbach has served on the Tilray Board since 2018. In 2013, Auerbach invested in Privateer's Series A funding round. Following Privateer's first round of fundraising, Privateer named Auerbach as its first board member. Auerbach served on Privateer's board through the Board vote on the Reorganization. At the time of the Reorganization vote, he also was a Privateer stockholder. Pursuant to a consulting agreement, from September 1, 2016 to February 2019, Privateer paid Auerbach approximately $910,000 in cash plus stock options and warrants worth more than $10 million at the time the Reorganization was completed. According to the S-4, the Tilray Board determined that Auerbach was not independent under the Nasdaq Global Select Market listing rules due to, among other things, his relationship with Privateer.[6]

25. In July 2019, Auerbach facilitated, and the Special Committee members approved (in their capacity as Audit Committee members), a multimillion-dollar cash payment by Tilray to Kennedy. The payment was part of a scheme to funnel cash from Tilray to Kennedy to pay Kennedy's personal taxes. Specifically, in anticipation of the Reorganization, [redacted]

[6] S-4 at 150.

[redacted], at a time when Kennedy was inferably cash poor. To funnel cash to Kennedy to pay the tax liability, Auerbach and the Special Committee members caused Tilray to purchase Smith & Sinclair, Ltd. ("S&S"), which was 30% owned by Privateer, so that Privateer could in turn give Tilray's cash to Kennedy. Auerbach was the agent for Privateer's S&S investment, through his controlled entity, Subversive Capital, LLC ("Subversive"), and facilitated the sale of Privateer's stake in S&S to Tilray. For Privateer's 30% stake, Tilray paid approximately $2.4 million in cash to Subversive, which then distributed Tilray's cash to Privateer, which in turn distributed Tilray's cash to Kennedy (but not any other Privateer investor).[7] For the remaining 70% stake, Tilray paid (i) 79,289 shares of Tilray's Class 2 common stock (worth approximately $3.2 million based on Tilray's then-current trading price), and (ii) contingent consideration purportedly worth approximately $2 million. By the end of 2019, however, the contingent consideration had been re-measured to *$420*, meaning that the contingent consideration was a fiction intended to disguise that Tilray paid nearly twice as much per share for Privateer's shares as it paid for the remaining 70%.[8] It is reasonable to infer from the S&S transaction

[7] TILRAY_220_0000378, at 392.

[8] Tilray attempted to disguise its overpayment to Privateer (*i.e.*, Kennedy) by disclosing that "the cash paid to [Privateer] as part of the purchase consideration for the acquisition of S&S reflected no gain on its investment, thereby eliminating any

terms and the references to the S&S transaction in exchanged drafts of the Reorganization documents that Auerbach, the Special Committee, and Paul Hastings were all aware that the S&S transaction was intended to funnel Tilray's cash to Kennedy to pay his personal taxes without disclosing that fact to Tilray's public stockholders.

26. Defendant Greenwood has served as a member of the Tilray Board since May 2018. Greenwood served as the Chair of the Special Committee that approved the Reorganization, despite her longstanding ties to Privateer and Kennedy.

27. Greenwood served as the CEO of the Canadian American Business Council (the "CABC") since 2016, where she previously served as Executive Director from 2001 to 2016. As a longstanding member and eventual CEO of the CABC, Greenwood advocated to deregulate cannabis on behalf of Privateer/Tilray, which was one of CABC's member companies.

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economic conflict of interest or appearance thereof." Tilray, Form 10-K, filed with the SEC on March 2, 2020 at 58. The operative question, however, was not what Privateer paid for the shares, but rather what the shares were worth in July 2019. Based on the consideration paid to the non-Privateer S&S stockholders and S&S's 2019 performance—just $1.6 million in revenue and more than $2.7 million in *net losses*—the answer was considerably less.

28. For example, on August 6, 2015, Kennedy and Greenwood attended the National Council of State Legislators ("NCSL") summit, the purpose of which was for Greenwood to introduce Kennedy to U.S. state legislators:

Later that day, Greenwood, Kennedy and various U.S. state legislators travelled together on what Greenwood described as a "policy field trip[] to Tilray's medical cannabis facility in Nanaimo, B.C. . . . [to] experience[e] first-hand the issues that drive business, policy and civil society decision-making" related to the cannabis industry.[9] Greenwood received "a guided tour" of the Tilray factory courtesy of Kennedy[10] and then thanked Kennedy "for the amazing hospitality."[11]

[9] Maryscott Greenwood, *Greetings from Kitimat*, CABC, September 19, 2017, available at https://medium.com/canadian-american-business-council/greetings-from-kitimat-c882c1d39d5f

[10] https://twitter.com/cabc_co/status/629383398033719296.

[11] https://twitter.com/MaryscottG/status/629466560504164352

(Greenwood and Kennedy standing together on the far right).[12]

[12] Greenwood's relationship with Kennedy appears to go back to at least 2013 when Greenwood likely assisted Kennedy and Privateer in garnering "the support of the local community, the local city council, the local mayor and the local chamber of commerce" for its eventual move of Tilray's headquarters to Nanaimo. *See* David Greene, *How Banks Are Transforming Canada's Cannabis Industry*, KAWC, available at https://www.kawc.org/post/how-banks-transformed-canadas-cannabis-industry. Greenwood has longstanding ties to Vancouver trade organizations and local Nanaimo organizations (including the Greater Nanaimo Chamber of Commerce ("GNCC")), and visited Nanaimo—a remote town of 80,000 people in British Columbia—***twice*** in the six months preceding Privateer's October 2013 purchase of its future Tilray headquarters and factory in Nanaimo. *See*, *e.g.*, https://issuu.com/blackpress/docs/i20130504070014622 at page 12 (Greenwood was a key note speaker for the GNCC in May 2013); https://twitter.com/MaryscottG/status/369881669202763776/photo/1, https://twitter.com/MaryscottG/status/369279033650851840/photo/1 (Greenwood attended the Canadian Port Conference in Nanaimo in August 2013);

29. Later in 2015, Greenwood publicly advocated for the legalization of medical marijuana in the U.S., a cause she specifically linked to her relationship with Kennedy.[13]

30. In December 2015, Kennedy was a guest of honor in Ottawa at the CABC's annual dinner.[14]

31. At around the same time, Kennedy rewarded Greenwood with lobbying business. In late 2015, Privateer hired Greenwood's then-employer Dentons—where she was head of its U.S. Federal Public Policy practice—to lobby on behalf of Privateer to amend the Controlled Substance Act regarding the federal regulation of cannabis for medical use, an engagement that lasted until 2017.[15] Greenwood's longtime colleague Andrew Shaw—who (i) worked under Greenwood at Dentons and McKenna Long & Aldridge LLP (before it was acquired by Dentons), (ii) was a policy advisor under Greenwood at the CABC,[16] and (iii) coauthored articles with

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https://www.wd-deo.gc.ca/eng/19435.asp ("The Greater Vancouver Board of Trade will host . . . CEO of the Canadian-American Business Council and political media personality, Scotty Greenwood, to discuss expectations on NAFTA negotiations.")

[13] https://twitter.com/MaryscottG/status/656613221558829056.

[14] https://twitter.com/BrendanTKennedy/status/672506916732538880.

[15] https://projects.propublica.org/represent/lobbying/r/300933878.

[16] http://s247391332.onlinehome.us/wsb4954044801/cabcstaff.html.

Greenwood[17]—led Dentons' Privateer lobbying team, under the direction of Greenwood.[18]

32. Then, in May 2018, while Greenwood was still at Dentons, Kennedy recruited Greenwood to serve on the Board of Privateer-controlled Tilray. Greenwood gushed about Kennedy: "Do you know how cool it is to serve on a corporate board ***whose visionary founder*** [*i.e.*, Kennedy] decided to create a majority female board? When I was recruited, I assumed incorrectly that I might be the only woman. Proud to be part of @tilray."[19] Shortly after Greenwood's appointment to the Tilray Board, Privateer appointed Howard Dean, Greenwood's colleague in the Public Policy practice group at Dentons as an inaugural member of Tilray's International Advisory Board.

33. During the negotiations over the Reorganization, Greenwood was further compromised. In June 2019, Crestview Strategy ("Crestview") hired Greenwood as a Managing Director to lead its U.S. practice. The Crestview U.S. "office" is essentially an extension of Crestview's Canadian operations. Crestview's

[17] Maryscott Greenwood and Andrew Shaw, *Back to the Future: Liberals Seize Majority in Canadian Elections*, October 21, 2015, InsideSources, available at https://www.insidesources.com/back-to-the-future-liberal-seize-majority-in-canadian-elections/ ("Scotty Greenwood and Andrew Shaw are with Dentons' public policy and regulation practice in Washington, DC, where they both specialize in U.S.-Canada relations.")

[18] https://projects.propublica.org/represent/lobbying/r/300933878.

[19] https://twitter.com/MaryscottG/status/1123713953161469952.

U.S. office has only two employees (Greenwood and Kim Lipsky) and has no phone number. Its address— 1800 Massachusetts Ave. NW, Second Floor, Washington D.C. 20036—is the same address as the CABC.

34. Given Greenwood's longstanding relationship with Kennedy and Privateer/Tilray, it is no surprise that Tilray and Privateer are two of Crestview's most important clients. A *Washington Business Times* article announcing Crestview's hiring of Greenwood identified Tilray as one of Crestview's five most important clients.[20] Crestview's relationship with Tilray stretches back to at least 2015. In March 2015, Crestview assisted Tilray in connection with a report created by the Nanaimo Economic Development Corporation.

35. Crestview frequently advocates publicly for Tilray and Privateer causes. For example, in 2019 Crestview stated: "Our client @tilray had a momentous 2018 – becoming the 1st cannabis company to complete an IPO on a major US stock exchange, their notable inroads made w/in the int'l market, & their creation of High Park Company are all highlights! Can't wait to see what they accomplish next!" Crestview also highlighted its relationship with Privateer/Tilray when Greenwood was appointed to the Board:

[20] Katishi Maake, *Canadian public affairs firm opens first international office in the District* ("[Crestiview]'s client roster includes ride-sharing service Lyft Inc., Toronto mining giant Barrick Gold Corp., Ticketmaster Corp., Amazon.com Inc. and Tilray Inc., a Canadian pharmaceutical company.")

36. A large percentage of Crestview's 41 employees have lobbied on Tilray's behalf at some point between 2016 and the date of this Complaint. According to the Office of the Commissioner of Lobbying of Canada's ("OCLC") website, the following Crestview employees have filed "registrations" to lobby on behalf of Tilray:[21]

a. Ginny Movat (5 registrations)

b. Susie Heath (1 registration)

c. Jennifer Babcock (3 registrations)

d. Sarina Rehal (2 registrations)

[21] Canada requires lobbyists to register before communicating with public officials on behalf of a corporation or organization.

e. Joanna Carey (2 registrations)

f. Stephen Hampton (4 registrations)

g. Michael Westcott (2 registrations)

h. Chad Rogers (3 registrations)

i. Patricia Sibal (1 registration)

j. Michael Sung (1 registration)

37. The OCLC's website also reveals that Crestview employees have filed 38 "monthly communication reports"[22] relating to outreach to Canadian government officials on Tilray's behalf.

38. Crestview has also lobbied extensively on behalf of Privateer. According to an *iPolitics* article entitled *CMA taps Earnscliffe to lobby against small biz tax changes*, dated September 19, 2017, "Seattle-based Privateer Holdings hired Lorne Geller of Crestview Strategy to lobby for government investment into 'medical cannabis production expansion in key regions' and a continued well-regulated cannabis industry." Additionally, according to a December 31, 2017 "Who's Lobbying Who in BC? Monthly Snapshot – December 31, 2017," "Charles

[22] Lobbyists are required to provide information to the OCLC concerning their communications with designated public office holders ("DPOHs"). The Canadian Lobbying Act requires lobbyists to produce a monthly report detailing when they lobby a DPOH, when they need to change their initial registration, and when they terminate or complete their lobbying undertaking.

Rogers, a consultant lobbyist with Crestview Strategy, [was] lobbying a number of public office holders on behalf of Privateer Holdings to advocate for a strong, well-regulated cannabis system, to educate government with respect to medical cannabis and to reach out to government regarding job opportunities in the industry." The OCLC's website reflects that the following Crestview employees have filed "registrations" to lobby on behalf of Privateer:

a. Sarina Rehal (2 registrations)

b. Joanna Carey (2 registrations)

c. Lorne Geller (1 registration)

d. Alex Chreston (1 registration)

e. Chad Rogers (1 registration)

According to the OCLC's website, Crestview employees have filed 13 "monthly communication reports" relating to outreach to Canadian government officials on Privateer's behalf.

39. Greenwood is dependent on Privateer both directly and indirectly for most, if not all, of her publicly reported income. As a director of Tilray, Greenwood made $297,347 and $380,338, in 2018 and 2019, respectively. Thus, her average compensation from Tilray over these two years was well in excess of the average

board compensation at even the largest U.S. companies.[23] Greenwood's only other disclosed source of income is as a partner and managing director of Crestview, a company that, in part, depends on the patronage of Tilray and Privateer, two of its largest and most important clients.[24] Greenwood was sufficiently incentivized to cater to—rather than upset and/or lose—one of Crestview's most important clients, especially considering her admiration for and past lucrative relationship with Kennedy. The only other employment that Greenwood lists in the Proxy is her role as CEO of the CABC, a position for which she received no compensation in 2017 and 2018,[25] and which does not appear to have ever paid compensation to its employees.[26]

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[23] Tim McLaughlin, *U.S. company directors compensated more than ever, but now risk backlash*, Reuters, November 8, 2019, available at https://www.reuters.com/article/us-compensation-directors-insight/u-s-company-directors-compensated-more-than-ever-but-now-risk-backlash-idUSKBN1XI1PF.

[24] The median salary for a partner at a Canadian law firm is around $180,000, and the top ten percent of highest compensated partners make an average of $281,000 per year. *See* https://www.payscale.com/research/CA/Job=Law_Firm_Partner/Salary. While Crestview is a public affairs/lobbying agency, average law firm compensation in Canada provides a reasonable proxy for average public affairs/lobbying compensation in Canada.

[25] *See* CABC IRS 2018 Form 990, at 8, available at https://www.causeiq.com/organizations/view_990/521542724/d16afb62f5a49cb7e59956f41dbaa5ba; CABC IRS 2017 Form 990, at 8, available at https://www.causeiq.com/organizations/view_990/521542724/dd225615a4dc64af461a3bc4a8f5d386.

[26] *See*, *e.g.*, CABC IRS 2015 Form 990O, at 7-8, available at https://www.causeiq.com/organizations/view_990/521542724/81987fe6468328c9f42062c490789001.

D. RELEVANT NOMINAL AND NON-PARTIES

40. Nominal Defendant Tilray is a global cannabis-products company and conducts cannabis research, cultivation, processing, and distribution.

41. Non-party St. Clare has served on the Tilray Board since June 2018. She was a member of the Special Committee that approved the Reorganization.

42. Non-party Dopp has served on the Tilray Board since May 2018. She was a member of the Special Committee that approved the Reorganization.

III. SUBSTANTIVE ALLEGATIONS

A. "Longtime friends" Kennedy, Blue, and Groh Form Privateer and Tilray

43. Tilray cultivates and sells legal medical and recreational cannabis to patients in Canada, Australia, and Germany through agreements with pharmaceutical distributors. In the United States, where cannabis is still a federal narcotic, the Company sells hemp and cannabis-derived compound products.

44. Tilray was started by three friends, Kennedy, Blue, and Groh, who, as noted above, still work out of the same office. In 2010, Kennedy, while working as an investment banker at SVB Analytics with his friend Groh, "realized that he could make more money selling pot than as a banker."[27] After listening to an NPR story

[27] Chris Kornelis, "A CEO Tries To Navigate The Legal Cannabis Sector's Bad Trip," Wall Street Journal, March 6, 2020, https://www.wsj.com/articles/a-ceo-tries-to-navigate-the-legal-cannabis-sectors-bad-trip-11583518019 (last accessed June 25, 2020).

that California was beginning an initiative to legalize marijuana, Kennedy called Blue, his "business school classmate and friend,"[28] and told him to quit so they could start a legal marijuana business.[29]

45. In December 2010, Kennedy left SVB Analytics and "started developing a business plan with Christian [Groh] and Michael [Blue]."[30] When they created their business plan, Kennedy, Blue, and Groh realized that that they couldn't trust any of the cannabis companies with their money, so instead the three of them decided to create Privateer, a Seattle-based private equity firm that focused solely on investing in the cannabis industry. Kennedy described Privateer as "a private-equity holding model, whereby we'd wholly own, operate, and incubate a portfolio of companies . . . ."[31]

46. During the first couple of years of Privateer's existence, Kennedy, Blue, and Groh struggled to raise capital. As Kennedy noted: "People thought we were crazy. If not for our backgrounds—MBAs who'd worked with a lot of VC funds—nobody would have even met with us."[32]

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[28] Brendan Kennedy, *Tilray's CEO on Becoming the First Mover in a Controversial Industry*, HAR. BUS. REV., Mar.–Apr. 2020, https://hbr.org/2020/03/tilrays-ceo-on-becoming-the-first-mover-in-a-controversial-industry.
[29] *See supra* note 12.
[30] *See supra* note 13.
[31] *Id.*
[32] *Id.*

47. By November 2012, Washington and Colorado legalized cannabis, and, as a result, the Privateer Founders started to successfully raise capital. One of Privateer's first purchases was Leafly, a website that reviews certain strains of marijuana. After acquiring Leafly, Kennedy, Blue, and Groh used data accumulated by Leafly to identify the 20 most coveted, high potency strains of cannabis across Canada. Once the top 20 strains of cannabis were identified, Kennedy, Blue, and Groh traveled across Canada to find the right bud. As Groh recalled from that time, "We would go and meet people at a Tim Hortons, and we would follow them down a road. Then we'd have to ditch a car . . . ."[33] Groh further explained that "[w]e'd be in rooms with a lot of cash and weapons."[34] Kennedy also recounted "[m]y cofounders and I were fit, had short haircuts, and dressed conservatively. At first glance, a lot of people suspected that we were federal narcotics agents."[35]

48. In 2013, Canada's national department of public health asked Privateer to fund certain start-up cannabis businesses. In response, Kennedy, Blue, and Groh "told the government that we'd like to create and fund our own company. The response was that if we moved fast, it would move equally fast."[36] Based on that

[33] Jen Wieczner, *The Marijuana Billionaire Who Doesn't Smoke Weed*, Fortune, January 16, 2019, https://fortune.com/longform/marijuana-weed-cannabis-tilray-stock/ (last accessed June 23, 2020).
[34] *Id.*
[35] *See supra* note 4.
[36] *Id.*

response, Kennedy, Blue, and Groh quickly applied for a cannabis license, bought land, and built a cultivation facility, while incorporating Tilray's predecessor, Tilray Canada, Ltd.

B. Privateer and Its Founders Control Tilray

49. Tilray was one of Privateer's four portfolio companies, which also included Leafly, Docklight, and Left Coast Ventures.

50. Privateer was organized as a C-Corp. Privateer had three classes of preferred stock: Series A Preferred Stock ("Series A"), Series B Preferred Stock ("Series B"), and Series C Preferred Stock ("Series C").[37]

51. Privateer was controlled by Kennedy, Blue, and Groh. Kennedy was the Executive Chairman of Privateer, sat on the Privateer board of directors with Blue and Groh, and held the largest voting stake in Privateer.[38] Together, the Control Group held approximately 70.9% of the voting power in Privateer.

52. In January 2018, Tilray issued 75 million shares to Privateer in exchange for the assets of Decatur Holdings, BV, a Dutch private limited company, through an internal reorganization. [redacted]

[37] Agreement and Plan of Merger and Reorganization, dated September 9, 2019 at 10.
[38] S-4 at 5.

[redacted].[39]

After February 2019, Privateer's "only material assets [were] the 75,000,000 shares of Tilray . . . ."[40]

53. Tilray has two classes of outstanding stock: (i) Class 1 Stock, entitled to ten (10) votes per share; and (ii) Class 2 Stock, entitled to one vote per share. Prior to the Reorganization, Privateer owned all 16,666,667 shares of Tilray's Class 1 Stock and 58,333,333 shares of Class 2 Stock. Post-Reorganization, the Control Group and their respective affiliated entities directly received 72% voting power over Tilray, and own approximately 30% of its outstanding capital stock.

54. Tilray describes itself as a "controlled company" in its public filings. Prior to the Reorganization, Tilray identified Privateer as the Company's controlling stockholder.[41] While Tilray expressly acknowledges Privateer, the entity, as its controlling stockholder, both Privateer's and Tilray's internal governing documents confirm that the Privateer Founders are Tilray's true controlling stockholders and

[39] TILRAY_220_0002855; TILRAY_220_0002856.
[40] S-4 at 128 (emphasis added).
[41] Tilray 10-Q Quarterly Report, filed with the SEC on August 13, 2019, at 49 ("Privateer Holdings currently owns a majority of the voting power of all outstanding shares of our capital stock. As a result, we are a 'controlled company' within the meaning of the listing rules of the Nasdaq Global Select Market.").

have been given special treatment in comparison with Tilray's minority stockholders.

55. Tilray's Charter not only specifically defines "Founder" [42] as any of Kennedy, Blue or Groh, but specifically exempts the Founders from Tilray's general requirement that any "transfer" of Class 1 Stock automatically converts, on a one-for-one basis, into shares of Class 2 Stock.[43]

56. Privateer's Charter expands "Founder" to not only Kennedy, Blue and Groh, but also any "Permitted Entity" and/or "Permitted Transferee" of Kennedy, Blue and Groh.[44]

57. Indeed, prior to the public announcement of the Reorganization, Tilray used the defined term "Founders" ***66 times*** in no less than 14 filings with the SEC

[42] For the avoidance of doubt, "Founders" as defined by Tilray's public filings is defined the same as "Privateer Founders" and "Control Group."

[43] Tilray Charter, Article IV(D)(5); *see also*, Tilray, 10-Q, filed with the SEC on August 13, 2019, at 50 ("Generally, a transfer by Privateer Holdings of the Class 1 common stock it holds would cause a conversion of such shares into Class 2 common stock. However, a transfer by Privateer Holdings to the three founders of Privateer Holdings, or certain entities controlled by them, such as estate planning entities, would not result in a conversion and these individuals would continue to hold Class 1 common stock the superior voting rights of 10 votes per share. These three founders are Brendan Kennedy (our Chief Executive Officer and President as well as one of our directors), Michael Blue and Christian Groh, and such founders collectively hold 45% of the shares of Privateer Holdings.").

[44] Privateer Charter Article (IV)(E)(1)(g); Kennedy, as Chairman of Privateer signed Privateer's Charter.

since March 2018 to describe Kennedy, Groh, and Blue's collective control and influence over Tilray.[45]

58. Once the Reorganization was announced, Tilray continued to concede the Privateer Founders' control and influence over Tilray:

> Following the Downstream Merger, if consummated, Brendan Kennedy (our Chief Executive Officer and President as well as one of our directors), Michael Blue and Christian Groh will ***continue to collectively hold the majority of the voting power of our capital stock.*** This concentrated control reduces other stockholders' ability to influence corporate matters and, as a result, ***we may take actions that our stockholders other than Privateer Holdings, or Messrs. Kennedy, Blue and Groh after the Downstream Merger, if consummated, do not view as beneficial.***[46]

59. Following the Reorganization, Tilray's most recent annual 10-K filing verifies the control and influence (again) of the Privateer Founders over Tilray:

[45] Tilray, 10-Q, filed with the SEC on August 13, 2019; Tilray, 10-Q, filed with the SEC on May 15, 2019, Tilray, 10-K, filed with the SEC on March 25, 2019; Tilray, 10-Q, filed with the SEC on November 14, 2018; Tilray, 8-K, filed with the SEC on October 10, 2018; Tilray, 10-Q, filed with the SEC on August 29, 2018; Tilray, Prospectus, filed with the SEC on July 19, 2018; Tilray, Canadian Prospectus, filed with the SEC on July 19, 2018; Tilray, Amendment No. 2 to Form S-1, filed with the SEC on July 17, 2018; Tilray, Amendment No. 1 to Form S-1, filed with the SEC on July 9, 2018; Tilray, S-1, filed with the SEC on June 20, 2018; Tilray, S-1, filed with the SEC on May 30, 2018; Tilray, S-1, filed with the SEC on May 2, 2018; Tilray, S-1, filed the SEC on March 19, 2018.

[46] *Id.* at 50 (emphasis added).

Risks Related to Ownership of Our Securities

Holders of Class 2 common stock have limited voting rights as compared to holders of Class 1 common stock. We cannot predict the impact that our capital structure and concentrated control by former Privateer Holdings stockholders may have on the market price of our Class 2 common stock.

Following consummation of the Downstream Merger, Brendan Kennedy (our Chief Executive Officer and President and a director), Michael Blue and Christian Groh, including individual and affiliated entities, beneficially own or control approximately 75% of the voting power of our capital stock. Class 1 common stock, held entirely by such individuals and affiliated entities, has 10 votes per share, resulting in such individuals and affiliated entities controlling a majority of the voting power of all outstanding shares of our capital stock and control of all matters that may be submitted to our stockholders for approval as long as they hold at least approximately 10% of all outstanding shares of our capital stock. Generally, a transfer by these individuals and entities of the Class 1 common stock they hold would cause a conversion of such shares into Class 2 common stock (including, if there is a transfer of Class 1 common stock, or entering into a binding agreement with respect to the power to vote or direct the voting of such shares). However, a transfer to certain entities controlled by such individuals, such as estate planning entities, would not result in a conversion and these individuals would continue to hold Class 1 common stock the superior voting rights of 10 votes per share. This concentrated control reduces other stockholders' ability to influence corporate matters and, as a result, we may take actions that our stockholders other than Messrs. Kennedy, Blue and Groh do not view as beneficial. Further, the concentration of the ownership of our Class 1 common stock may prevent or delay the consummation of change of control transactions that stockholders other than or Messrs. Kennedy, Blue and Groh may consider favorable, including transactions in which stockholders might otherwise receive a premium for their shares. As a result, the market price of our Class 2 common stock could be adversely affected.

Additionally, while other companies listed on United States stock exchanges have publicly traded classes of stock with limited voting rights, we cannot predict whether this structure, combined with concentrated control by Messrs. Kennedy, Blue and Groh will result in a lower trading price or greater fluctuations in the trading price of our Class 2 common stock as compared to the market price were we to have a single class of common stock, or will result in adverse publicity or other adverse consequences.

40

(Tilray, 10-K, filed with the SEC on March 2, 2020, at 40) (Highlighting added).

60. The Control Group has deployed its control over the Company and Privateer to enter into several conflict-laden transactions benefitting the Control Group, including:

- In January 2016, a wholly owned subsidiary of Tilray entered into a revolving credit facility with Privateer for up to $25 million;[47]

- In November 2017, a wholly owned subsidiary of Tilray entered into a revolving construction facility with Privateer for up to $10 million;[48]

[47] Tilray, Definitive Proxy, filed with the SEC on April 15, 2019, at 27.
[48] *Id.*

- In December 2017, a wholly owned subsidiary of Tilray entered into an intercompany loan agreement with Privateer where Privateer agreed to loan the Company up to $1 million;[49]

- In February 2018, Tilray entered into an agreement with Privateer pursuant to which Privateer agreed to provide certain general administrative and corporate services on an as-requested basis;[50]

- In February 2018, a wholly owned subsidiary of Tilray entered into a brand licensing agreement with Docklight (the "Docklight Licensing Agreement"), a wholly owned subsidiary of Privateer primarily owned by the Privateer Founders, pursuant to which Tilray obtained exclusive rights in Canada for adult use of certain cannabis brands and agreed to pay Privateer's subsidiary royalties between 2.5% and 7.5% of the net revenue generated by the licensed products;[51]

- In February 2019, as noted above, Tilray retained Privateer Management to provide certain unnamed general and administrative and corporate services on an as-requested basis for a monthly cost of $25,000;[52] and

- In July 2019, as described above, Tilray purchased S&S from Privateer as part of a scheme to funnel cash from Tilray to Kennedy to pay Kennedy's personal taxes.

[49] *Id.*
[50] *Id.* at 28.
[51] *Id.*
[52] *Id.*

C. Tilray Goes Public, Creating A Huge Unrealized Gain On Privateer's Initial Investment

61. On July 19, 2018, the Control Group took Tilray public through an IPO at $17 per share, making Tilray the first cannabis company to go public on the NASDAQ.[53] Through the IPO, Tilray sold to the public approximately 9 million shares of Tilray Class 2 Stock.

62. Holding 75 million Tilray shares at $17 per share, the Privateer Defendants' initial [redacted] investment in Tilray reached a post-IPO market value of over $1.275 billion.

63. In connection with the IPO, Privateer executed a customary lock-up agreement, whereby Privateer agreed not to sell its Tilray shares for a 180-day period following the IPO (*i.e.*, until January 15, 2019).[54]

D. The Control Group Avails Itself Of Exclusive Jurisdiction in Delaware

64. Also in connection with the IPO, the Control Group caused Tilray to adopt an Amended and Restated Certificate of Incorporation (the "Tilray Charter") that remained in effect through the consummation of the Reorganization. Article

[53] Emily Stewart, *How the Canadian Cannabis Company Tilray Became Worth More Than American Airlines*, Vox, Sept. 19, 2018, https://www.vox.com/business-and-finance/2018/9/19/17879830/tilray-stock-cannabis-peter-thiel-short-squeeze (last accessed Dec. 18, 2019).
[54] TILRAY_220_0000277.

Five of the Tilray Charter requires that the Control Group be sued in Delaware for internal affairs claims:

> Unless the Company consents in writing to the selection of an alternative forum, ***the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Company; (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Company to the Company or the Company's stockholders***; (iii) any action asserting a claim against the Company arising pursuant to any provision of the DGCL, the certificate of incorporation or the Bylaws of the Company; ***or (iv) any action asserting a claim against the Company governed by the internal affairs doctrine***. Unless the Company consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933. ***Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Company shall be deemed to have notice of and to have consented to the provisions of this Section D of Article V***.

(Emphasis added.)

65. Further cementing its desire to have claims brought in the Delaware Court of Chancery, the Control Group also caused Tilray to amend and restate the Company's bylaws to add a second, substantially similar, forum selection clause. Article Fourteen, Section 47, of Tilray's Amended and Restated Bylaws (which were effective through the Reorganization) expressly stated:

> Unless the corporation consents in writing to the selection of an alternative forum, ***the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the corporation; (ii) any action asserting a claim of breach of a fiduciary duty owed by any director,***

> ***officer or other employee of the corporation to the corporation or the corporation's stockholders;*** (iii) any action asserting a claim against the corporation or any director or officer or other employee of the corporation arising pursuant to any provision of the DGCL, the certificate of incorporation or the Bylaws of the corporation; or (iv) any action asserting a claim against the corporation or any director or officer or other employee of the corporation governed by the internal affairs doctrine.

(Emphasis added.)

E. The Control Group Risked Losing Control Over Tilray

66. The Control Group faced the erosion of its control through natural dilution from organic growth and acquisitions. Tilray's operations require a significant amount of capital that it raises through equity offerings. As confirmed by Tilray's own internal records, "[redacted], whether from primary offerings of stock, a strategic investor, or convertible securities." Moreover, in order to finance acquisitions, Tilray frequently needs to raise capital, which would dilute the Control Group. Since the IPO, Tilray has made a series of acquisitions and investments to grow its worldwide enterprise, mostly using Class 2 Stock as currency:

- Between January 2019 and February 2019, Tilray issued 1,680,214 shares of Class 2 Stock relating to its entry into Profit Participation Arrangement with ABG Intermediate Holdings 2, LLC;

- In February 15, 2019, Tilray issued 180,332 shares of Class 2 Stock in connection with its acquisition of Natura Naturals Holdings Inc.;

- Between March 2019 and August 2019, Tilray issued 1,209,946 shares and 899,306 shares of Class 2 Stock respectively in connection with the acquisition of Manitoba Harvest;

- On July 12, 2019, Tilray issued 79,289 shares of Class 2 Stock in connection with the acquisition of Smith & Sinclair Ltd.;

- On September 13, 2019, Tilray issued 128,670 shares of Class 2 Stock in exchange for a minority investment in a Canadian cannabis retailer;

- On September 19, 2019, Tilray issued 63,747 shares of Class 2 Stock as a portion of the purchase consideration for a 50% equity interest in a cannabis edibles manufacturer, pursuant to which the Company and such manufacturer will develop and manufacture cannabis products for phase two of adult-use legalization in Canada; and

- On September 20, 2019, Tilray issued 161,632 shares of Class 2 Stock in exchange for a convertible note issued by a specialized equipment company.

67. In the face of the natural dilution of their voting power and their looming tax bill, the Control Group set its sights on intercepting Privateer's super-voting shares.

F. Privateer Determines To Distribute Its Four Investments, But Cannot Do So Unilaterally Without Bearing Undue Tax Risk

68. In January 2019, Privateer sought advice from [redacted].

69. [redacted]

[redacted]

70. [redacted][56]

71. [redacted]

[redacted]

[55] TILRAY_220_0002931.
[56] *Id.* (emphasis added).

[redacted]

72. Privateer, having now disposed of its other three investments, needed a way to monetize or distribute its last remaining (and most significant) investment, its Tilray equity stake. Given the "unfavorable" market conditions for cannabis companies, however, selling 75 million Tilray shares in a down market would harm Privateer's interests.

73. Moreover, selling those shares would impose a tax catastrophe on Privateer's investors. Privateer is a Delaware C-Corp that is subject to double taxation: (i) a 21% flat tax of all corporate income after offsetting income with losses, deductions and credits; and (ii) taxation at the stockholder level when the investor realizes the gain on the investment.[57] Making the reasonable assumption that Privateer investors would be taxed on Privateer distributions at the long-term capital gains rate of 23.8%, any taxable distribution would result in double-taxation totaling approximately 40% of any gain.

74. Based on Tilray's $17 per share IPO price, Privateer would realize a $1.242 billion gain (equating to $16.57 per share). Had Privateer recognized such a gain (whether by selling the shares or distributing them in a taxable distribution), it

[57] Internal Revenue Service, "Forming A Corporation", https://www.irs.gov/businesses/small-businesses-self-employed/forming-a-corporation (last accessed Dec. 18, 2019).

would have needed to pay ***over $260 million*** in taxes under the current 21% corporate rate. When combined with the resulting individual-level taxes (assuming a 23.8% long-term capital gains rate), Privateer and the Control Group would be required to pay approximately ***$500 million*** in taxes.

75. [redacted]).[58] Thus, had the Control Group been forced to sell shares to cover tax liabilities, their control would have dissipated significantly.

76. The solution was to use their influence to force through the Reorganization. [redacted]

[58] TILRAY_220_0000277 (emphasis added).

77. IRS Letter Ruling 201721014 permits a holding company to reorganize on a tax-free basis by swapping out old shares for new shares and then liquidating.[59] By swapping Privateer's old Tilray shares, replacing them with newly issued Tilray shares, and then redistributing the newly issued shares to Privateer's equity holders, the Company may ensure that the IRS will treat the share cancellation and subsequent stock issuance as a tax-free reorganization within the meaning of Section 368(a) of the Internal Revenue Code.

78. Importantly, had Privateer sold its Tilray shares directly into the market or issued a stock dividend to its investors as part of winding down, a beneficial (for Tilray's minority investors) consequence of the resulting tax hit would be a significant reduction of the Privateer Founders' control over the entity as shares were sold down to cover tax costs. [redacted] could sidestep that reduction of control.

79. The first potential hitch in Privateer's plan to get its Tilray shares into the hands of Privateer's investors without triggering a massive tax hit was simple: Tilray's Board had to endorse the transaction. Fortunately for Privateer, Tilray's Board barely paid lip service to its duty to negotiate a fair deal for Tilray's minority investors in exchange for cooperation in the Reorganization.

[59] Internal Revenue Service, Letter Ruling No. 201721014, May 26, 2017, https://www.irs.gov/pub/irs-wd/201721014.pdf (last accessed Dec. 17, 2019).

80. The second hitch was Privateer's charter. While the Section 368 Reorganization presented an opportunity for Privateer to avoid significant tax liability, Privateer's Charter created a significant problem for the Privateer Founders. According to Article IV(E)(2) of the Privateer Charter, "[a]ny Distributions paid or payable to the holders of shares of Common Stock shall be paid pro rata, on an equal priority, *pari passu* basis." In other words, when Privateer made distributions of shares of its portfolio companies to Privateer investors, Privateer was required to distribute shares on a *pari passu* basis (*i.e.*, pro rata) to Privateer stockholders. With respect to Tilray, this meant that Privateer had to distribute its high-vote Tilray Class 1 shares to all Privateer stockholders based on their economic interests in Privateer, and not based on the Privateer Founders' super-voting rights in Privateer itself.

81. The Control Group solved both problems by exerting their control.

G. The Control Group Bakes Up A Deal With Tilray's Management

82. On January 9, 2019, Privateer sent a draft letter of intent to Tilray's management proposing a downstream merger. The ultimate Reorganization included a majority of Privateer's terms outlined in the letter.[60] Blue was listed as the "author" on behalf of Privateer and Tilray's CFO (who reported directly to Kennedy) was listed as the "recipient." In reality, Kennedy was involved throughout the process and never recused himself.

83. Between January 9 and January 13, 2019, unidentified individuals at "Privateer and Tilray had multiple discussions regarding the letter of intent."[61] There are no minutes or other corporate records reflecting those "discussions."

84. On January 11, 2019, three days before the expiration of the Lock-Up, Privateer publicly announced that it did "not have plans to register, sell or distribute the 75 million shares that Privateer owns in Tilray . . . when the lock-up expires next week"[62] and further stated that "it would not sell any of its shares until after the first half of 2019."[63]

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[60] TILRAY_220_0002912.
[61] S-4 at 64.
[62] Privateer Holdings, Inc., *Privateer Holdings Inc. Releases Statement That It Does Not Plan To Register, Sell or Distribute Its Tilray Shares In The First Half Of 2019*, BusinessWire, Jan. 11, 2019, https://www.businesswire.com/news/home/20190111005068/en/Privateer-Holdings-Releases-Statement-Plan-Register-Sell (last accessed Oct. 10, 2019).
[63] TILRAY_220_0000277.

85. After the initial "discussions," the Control Group sent a revised draft letter of intent to Tilray on January 14, 2019 that "outline[d] the preliminary understanding" between the Control Group and Tilray "regarding the 75,000,000 shares of Tilray Class 1 Common Stock owned by [Privateer]."[64] While the January 14 draft letter of intent conditioned the proposed transaction on, among other things, Tilray stockholder approval, it did not condition the offer on an independent special committee and a vote of a majority-of-the-minority stockholders in Tilray.[65]

86. The letter stated that the "[c]orporate [b]enefit[s] to Tilray" were purportedly threefold: (i) an "[e]xtended lockup"; (ii) "[g]reater operating flexibility vs." a spinout; and (iii) the "retention benefit" from securing Tilray "service providers" when the Company assumes their Privateer stock options.[66] [redacted]

87. In short, Privateer proposed for Tilray to effectively replace the Tilray securities held at the Privateer corporate level with securities to be distributed directly to Privateer's investors that would mirror the voting control over Privateer itself. The deal, if approved, would achieve substantially similar results as an in-kind dividend, but without the tax burden. By avoiding taxes, the Control Group

[64] TILRAY_220_0002912, at 2914.
[65] *Id.*
[66] TILRAY_220_0002912, at 2914.

could avoid selling down their respective positions to cover tax bills, thereby reaping enormous tax savings and preserving their voting control.

88. The corollary to the Control Group's retention of voting control is that the Class was deprived of the opportunity to hold stock of a non-controlled company, where they would have the opportunity to influence the management decisions of the Company on an ongoing, long-term basis. The transfer of control also exacerbated the problem posed by Tilray's dual-class structure. The prior status quo had a single controller—Privateer—with over 90% of the vote and about 75% of the economic interests. If the controller had forced ill-advised or even malevolent decisions on Tilray, it would also bear the brunt of the financial consequence of its conduct. The Reorganization worsened the dual class stock problem affecting Tilray's minority investors because the three Privateer Founders continued to control the Company by holding all of the super-voting Class 1 Stock, yet their collective economic stake is a mere 30%. Thus, the Control Group can make more severely self-interested voting decisions that harm the Company without bearing nearly as much of the financial effects of those decisions.

H. From the Start, the Special Committee Process Was Infected With Conflicts

89. A critical difference between a Privateer sell-down and the proposed Reorganization is that Tilray's Board had to cooperate to permit the latter, and thus had the ability (and obligation) to act to protect Tilray's minority investors. But the Board failed to do so.

90. From the outset, the parties were aware that the Reorganization was a conflict transaction. [redacted]

91. After the Control Group and Tilray management agreed on the primary terms of the deal, the S-4 alleges that the Tilray Board had a meeting on January 19, 2019, to discuss forming a special committee of independent directors and to retain financial and legal advisors. There are no minutes of this meeting.

92. On January 30, 2019, without interviewing any other law firms, the S-4 claims that Tilray's outside directors retained Paul Hastings to serve as outside counsel in connection with a potential Tilray/Privateer transaction. Once again, there are no minutes or other corporate records for that meeting.

93. Paul Hastings was plagued by serious conflicts of interest. According to an October 23, 2018 engagement letter signed by Barry Brooks ("Brooks"), the

Chair of Paul Hastings' New York office, Paul Hastings had previously been retained by [redacted] (TILRAY_220_0002770) Brooks touts his work on behalf of Tilray on Paul Hastings' website. Under the "Recent Representations" section of his personal biography, Brooks lists his representation of (i) "Tilray, Inc., a leader in cannabis research, cultivation, processing and distribution, in connection with the formation by Tilray and Authentic Brands Group of a long-term revenue sharing agreement to market and distribute a portfolio of consumer cannabis products within ABG's brand portfolio" and (ii) "Tilray, Inc., in connection with the formation of a joint venture with AB InBev to research non-alcohol beverages containing tetrahydrocannabinol (THC) and cannabidiol (CBD)." [redacted] (TILRAY_220_0002765). None of these facts were publicly disclosed to Tilray stockholders in the S-4.

94. The S-4 states that Paul Hastings was having discussions with the Control Group's lawyers at Cooley LLP ("Cooley") on January 24, 2019 before the Special Committee had even retained Paul Hastings, which the S-4 claims occurred at a meeting on January 30, 2019.

95. For reasons not explained in the S-4 or 220 Documents, Paul Hastings did not memorialize the engagement in writing until February 28, 2019. (TILRAY_220_0002764). [redacted][67]

96. In *Haverhill Retirement System v. Kerley, et. al.*, C.A. No. 11149-VCL, tr. (Del. Ch. Feb. 9, 2016) (the "*Kerley* Action"), Vice Chancellor Laster questioned an eerily similar situation where Brooks used Iovine to paper over a conflict. In the Court's words, "Brooks flipped sides . . . whenever he wanted to." *Id.* at 6. In that case, Brooks and Paul Hastings had historically served as outside counsel to both the Providence Services Corporation ("Providence Services") and its largest stockholder, Coliseum Capital Management, LLC ("Coliseum").[68] In October 2014, Providence Services was negotiating a financing package in which Coliseum was the transaction counterparty.[69] Despite Paul Hastings's role as Coliseum's primary

[67] As corporate partners in the same Paul Hastings office, Brooks and Iovine frequently work together. For example, (i) in 2012, Brooks and Iovine worked together on a $6.6 billion transaction for Suddenlink Communications and (ii) in 2014, Brooks and Iovine jointly represented TierPoint on its acquisition of XAND.
[68] Verified Second Amended Class Action and Derivative Complaint at ¶¶ 58-61.
[69] *Id*. at ¶¶ 77-79.

outside counsel, Brooks decided that Paul Hastings would represent Providence Services in any negotiations concerning the Coliseum financing,[70] but to purportedly protect against any conflict, Brooks had Iovine handle the negotiations on Providence Services' behalf.[71] Vice Chancellor Laster observed that there was "striking information about conflicts . . . at the legal counsel level" that were not disclosed.[72]

97. The combination of Kennedy's undisclosed past and concurrent retentions of Paul Hastings, the conspicuous omission of who suggested that the Committee use Paul Hastings, the failure to interview or consider any other advisors, [redacted], Paul Hastings's work before being retained, the failure to identify the specific lawyers involved in the early discussions and meetings, the failure to disclose any of these potential conflicts to stockholders, and the apparently deliberate choice not to prepare minutes (or even to take notes) of meetings obliterates any pretense of fair dealing.

98. If the Special Committee were doing their jobs in good faith, they would have received independent advice regarding Paul Hastings's conflicts and

[70] *Id*. at ¶ 101.
[71] *Id*. at ¶107.
[72] *Id*. at 27-28. Brooks was also involved in *In re Rural Metro Corp. Stockholders Litigation*, C.A. No. 6350-VCL (Del. Ch.), and Paul Hastings paid a large settlement in *City of Daytona Beach Police and Fire Pension Fund v. ExamWorks Group, Inc., et. al.*, C.A. No. 12481-VCL (Del. Ch.).

whether the law firm's proposed cleansing mechanism works. Particularly since the Chair of the Special Committee—Greenwood—was a Principal at one of the world's largest law firms at the time the Special Committee retained Paul Hastings, the Committee, and Greenwood in particular, knew or should have known that Paul Hastings's proposed resolution was insufficient. The Special Committee should also have considered whether Paul Hastings was suited to represent the Committee in this particular situation, or whether Tilray and its minority investors would be better served with counsel that did not face any arguable conflict (much less the very real conflicts described above). Had the Special Committee acted as if it had a choice of counsel, it may have observed that Paul Hastings had a history of favoring institutional clients at the expense of public stockholders in clearly conflicted situations. None of these facts about Paul Hastings' significant conflicts of interest and concurrent representation of parties that would have been adverse in a truly arm's-length transaction appear to have been genuinely assessed by the Special Committee.

I. The Committee Is Belatedly Formed Just After The Control Group Completes the Spin-Off of Other Portfolio Companies

99. On February 14, 2019, Privateer spun off Leafly, DockLight, and Left Coast Ventures by making in-kind taxable distributions to its stockholders. As a result of Privateer's divestment in these businesses, [redacted]

[redacted]

100. The very next day, in a written consent dated February 15, 2019, the Board finally formed the Special Committee.[73] The Committee was composed of Greenwood, St. Clare, and Dopp. The consent states that the Committee was supposed to "consist[] of directors who are not directly or indirectly affiliated with [Privateer]." Nevertheless, despite her close association with Kennedy, Greenwood was appointed the Chair. The Board never determined that Greenwood was independent under Delaware law, and the Committee never received any advice concerning her lack of independence under Delaware law. She continued to serve as the Chair, even after she was hired by Privateer's lobbying firm Crestview.

101. On March 6, 2020, the Special Committee purportedly met again to discuss hiring Imperial Capital ("Imperial") as its financial advisors and Crowe LLP ("Crowe") as a tax advisor. There is no indication that the Committee interviewed any other advisors. Again, there are no minutes or other corporate records for that

[73] The Control Group tried to obscure the sequence of events that led to the formation of the Special Committee. The "Background of the Merger" section of the S-4 is in chronological order, but it asserts the Committee was formed on February 15 and then states underneath that sentence that "in February" Privateer spun out its other portfolio companies.

alleged meeting, who attended it, or what was discussed, assuming the meeting happened.

102. The Committee then waited until March 27, 2019, to retain Imperial—*i.e.*, over two months after the Control Group had already cooked up the material terms of the transaction with Tilray management.[74]

103. On March 28, 2019, the Special Committee purportedly met with Paul Hastings to discuss the advisors' fees. Again, there are no minutes for that meeting.

104. Two months later, on May 28, 2019, the Special Committee purportedly met "with its advisors." Again, there are no minutes for that meeting.

105. The S-4 claims that between June 1 and June 7, 2019, "the special committee held five meetings." Again, there are no minutes for those meetings.

J. The Control Group Continues to Intermeddle and Exert Its Influence

106. Meanwhile, the Control Group continued to exert its influence over the process. Kennedy should have removed himself. Instead, he orchestrated the whole deal with Blue and Groh.

107. The S-4 states that on March 1, 2019, unidentified "representatives from Tilray and Privateer discussed the potential structure for a downstream merger." Less than two weeks later, on March 12, unidentified "representatives of Privateer and Tilray further discussed the proposed merger" again. There are no

[74] TILRAY_220_0000217; S-4 at 65.

minutes or corporate records reflecting who attended those meetings or what was discussed.

108. The Special Committee utterly failed to put in place any policies to replicate true third-party arm's-length bargaining. The Special Committee never authorized these discussions. There is no indication that the Special Committee even knew they were occurring.

109. The S-4 states that "[o]n March 13, 2019, representatives of Privateer presented a presentation to the Tilray Board." There are no minutes of the March 13 meeting.

110. On March 14, 2019, Kennedy required the full Board to meet to discuss Privateer's revised letter of intent and the Privateer Management "as-requested services" agreement.[75] Paul Hastings was not invited to and did not attend that meeting.

111. On May 10, 2019, according to the S-4, "representatives from Tilray, Privateer, Paul Hastings, and Cooley discussed the proposed structure of the Merger." There is no explanation as to why the Special Committee members did not attend that meeting to oversee the glaring conflicts on all sides. There are no minutes or other corporate documents reflecting who specifically attended or what was discussed at that meeting.

[75] TILRAY_220_00002792, -797.

112. On May 13, 2019, the S-4 states that "Michael Blue, Managing Partner of Privateer, and Mark Castaneda, Chief Financial Officer of Tilray [who reported directly to Kennedy] discussed financial statements." The Special Committee did not authorize that meeting and was not invited, if the Committee even knew the meeting occurred. There are no minutes or other corporate documents reflecting what was discussed at that meeting.

113. On May 21, 2019, Kennedy had a direct discussion with Greenwood regarding "the status of negotiations." There are no minutes or other corporate documents reflecting what was discussed at that meeting.

114. On June 2, 2019, Kennedy met with Greenwood, Cooley, and Paul Hastings to discuss the "terms set forth in the letter of intent and the transaction process." Kennedy and Greenwood then "had a subsequent conversation regarding the terms set forth in the letter of intent and the transaction process."

115. No later than June 3, 2019, Greenwood (who had a prior longstanding relationship advocating for Kennedy and Privateer/Tilray) was hired by Crestview, of which Tilray and Privateer are two of the most important clients.

116. On June 5, 2019, Paul Hastings edited the letter of intent that Privateer had delivered to the Special Committee in January, and sent that edited letter to Cooley, Privateer's counsel. Paul Hastings (i) changed the recipient from Tilray

CFO Mark Castaneda to the Chair of the Special Committee, Greenwood, and (ii) added a majority-of-the-minority approval condition for Tilray stockholders.

117. Later that same day, the Control Group intervened again. "[R]epresentatives from Privateer, Tilray, Cooley, and Paul Hastings discussed the revised letter of intent . . . and other issues relating to the proposed merger." Notably, the Special Committee members were not part of those discussions. [redacted]

118. On June 8, 2019, with her job at Crestview in hand, and without receiving any analysis as to the fairness of the transaction from the Special Committee's financial advisor, Greenwood readily signed the letter of intent, paving the way for the Control Group to reap massive tax benefits and cement its control. Under the shadow of pressure exerted by Kennedy and the other founders, Greenwood and her fellow members of the Special Committee never demanded meaningful value for the minority in exchange for the Company's support for the Reorganization that would so clearly benefit Privateer and its own underlying investors.

[76] *See* TILRAY_220_0002890 (blackline version).

119. The Special Committee similarly failed to seek protection for the Company and minority stockholders from a potentially improper entrenchment device embedded in the Docklight Licensing Agreement allowing Docklight to fleece Tilray of all of its brands in the event there was a "change in control."[77] Despite identifying the change-in-control language of the Docklight Licensing Agreement as a "risk factor" and that Tilray's "business, financial condition and results of operations may suffer,"[78] in connection with agreeing to the Reorganization, the Special Committee failed to seek protection for the Company and minority stockholders from the potentially punitive change-in-control provision of the Docklight Licensing Agreement.

120. On June 10, 2019, Tilray announced in a joint press release that the Company and Privateer signed a letter of intent with no majority-of-the-minority voting condition. As evidenced by the execution of the letter of intent, the Special Committee had already determined that the Company was going to issue "to Privateer stockholders [] newly issued and registered shares of Tilray common stock in an aggregate amount equal to the number of Tilray common shares currently held by Privateer" and that "[a]ll Tilray shares held by Privateer and all outstanding Privateer common stock will be cancelled upon consummation of the merger." As

[77] *See* §10.2(k) Trademark License Terms & Conditions, between Docklight LLC and High Park Cannabis Corp (Tilray subsidiary), dated February 18, 2018.
[78] Tilray, Registration Statement, filed July 19, 2019, at 40.

documented in the "Summary of the Terms" attachment to the Letter of Intent, the Special Committee also had already agreed to distribute the newly issued Tilray shares "in accordance with the amended PHI charter in effect prior to closing, with the anticipated allocation that PHI founders . . . will receive all of the Class 1 shares . . . ."[79]

121. Shortly after Tilray announced the signing of letter of intent, Kennedy took to Twitter to tout how tax advantageous the transaction would be to Privateer's "visionary equityholders" instead of highlighting any perceived benefits (if any) to Tilray and its minority stockholders:

[79] TILRAY_220_0000237.

K. The Special Committee Goes Through the Motions and Approves the Reorganization

122. From the announcement of the letter of intent to the closing, the Special Committee went through the motions and approved the Reorganization without getting fair consideration for the Company or its minority stockholders.

123. On June 21, 2019, the Special Committee retained Crowe ostensibly to receive tax advice in relation to the Reorganization.[80] The record contains no evidence of Crowe rendering any advice to the Special Committee regarding the tax benefits that would accrue to Privateer and Privateer Founders from the Reorganization, and provided no guidance on how the Special Committee could have conditioned its support for the Reorganization on achieving economic or voting control benefits for the Company's minority investors.

124. On July 11, 14, and 15, the Special Committee supposedly met, but there are no minutes of those meetings.

125. In a July 12, 2019 email Paul Hastings wrote to Cooley that the Special Committee required (i) expense reimbursement up to $3 million and (ii) a six-month lock-up in the event that Privateer stockholders did not approve amending Privateers' certificate of incorporation. Neither of these requests provided meaningful benefits to Tilray.

[80] TILRAY_220_0000256.

126. The expense reimbursement was not a benefit to Tilray because the expenses were being incurred to accommodate the Control Group. There is no reason why the expense reimbursement should have been capped if Privateer terminated the Merger.

127. The six-month lock-up was not a meaningful benefit to Tilray. Given Greenwood's divided loyalties, the Special Committee had already agreed that Privateer could terminate the Reorganization if it did not receive approval from its stockholders to amend Article IV(E)(2) of the Privateer Charter.[81] That was a significant concession by the Special Committee because, as discussed above, Article IV(E)(2) of the Privateer Charter required all in-kind distributions to be made on a *pari passu* basis, so an amendment was necessary to prevent an equal in-kind distribution of the Class 1 Stock which would jeopardize the Privateer Founders' voting control over Tilray. Once the Special Committee agreed to bestow a huge tax benefit on Tilray, the Privateer Founders then used the tax savings as a benefit to persuade the Privateer stockholders to approve an amendment to Article IV(E)(2) of the Privateer Charter.[82]

128. Despite this large "give" of a termination right to Privateer, the "get" the Special Committee appears to have received is far less meaningful. Indeed, the

[81] TILRAY_220_0000237; TILRAY_220_0004956-57.
[82] *See* Article IV(E)(2)(b), Form of Amended and Restated Privateer Charter attached as Exhibit D to Merger Agreement.

purported "consideration" that the Special Committee received in return was merely Privateer's agreement not to do what it would not do otherwise – an agreement to not dump its stock for a six month period following Privateer's termination of the Reorganization.

129. [redacted]

130. [redacted]

[redacted]”[83] The Special Committee was supposed to be in control of Tilray’s side of the negotiations. Kennedy was adverse to Tilray and Tilray’s minority stockholders. He had no right to tell Tilray’s GC to help him carry out his threat. This is exactly the kind of conduct that the *MFW* protections were intended to prevent.

131. On July 26, 2019, Kennedy interjected himself again. According to the S-4, Kennedy again convened a full Board meeting to discuss the Reorganization. There is no indication that Paul Hastings was invited or attended. Again, there are no minutes for that meeting.

132. The Special Committee met the following day. For the first time, the Special Committee received an evaluation from its financial advisor, Imperial, of the long ago fully baked terms of the Reorganization. Imperial, however, simply rubber-stamped the fairness of the Reorganization without performing any meaningful analysis of the relevant “give” versus “get.” Imperial’s analysis utterly failed to

[83] TILRAY_220_0004956.

value the massive "give" of hundreds of millions of dollars in tax benefits. Imperial utterly failed to attempt to value the additional "give" of the benefits to the Control Group of continued control or the negative effects of the separation of ownership and control on Tilray's minority stockholders. [redacted] After receiving an oral fairness opinion from Imperial, each of the members of the Special Committee provided signed authorization for the Reorganization.[84]

133. Mere days after the Special Committee approved the transaction terms, Privateer's representatives sought to re-negotiate for further benefits for themselves.

134. On August 4, 2019, Defendant Blue spoke with Tilray's CFO Mark Castaneda regarding certain issues relating to the merger and stockholder lock-up agreement.

135. The S-4 states that Castaneda then spoke with members of the Special Committee to "communicate Privateer's position with respect to certain open issues, including Privateer's ***request to require*** Tilray to use as merger consideration in lieu of shares a portion of any cash proceeds from a public offering [by Tilray] consummated between the signing of the merger and the closing, as well as

[84] TILRAY_220_0000240.

Privateer's request to release certain shares from the lock-arrangement prior to the one year anniversary of the merger." (Emphasis added.)

136. The members of the Special Committee were aware that not only was Kennedy a controller of Privateer and the CEO of Tilray, but that Privateer had directed its initial letter of intent to Castaneda. By that time, the Special Committee also saw that Castaneda acted as a go-between for the Privateer Founders and the Company, and lacked independence. Thus, the members of the Special Committee had reason to examine the fairness of any controller requests closely—especially where the controllers' "requests" were phrased as requirements.

137. Both of these "requests" were unusual and one-sided. If Tilray raised money in an offering before the closing, it presumably needed that capital to fund its ongoing business and growth. Redirecting cash to Privateer and Privateer's investors would leave Tilray worse off. And, releasing shares from the lock-up would undermine the single arguable benefit the Special Committee achieved in the negotiations in the first place.

138. Rather than use Privateer's cash requirement as negotiating leverage to gain benefits for Tilray's minority stockholders, the Special Committee merely responded on August 8, 2019, that "any determination to utilize cash as merger consideration must be in Tilray's sole discretion and [] not a requirement."[85] Thus,

[85] S-4 at 69.

the Special Committee effectively left the determination in the hands of management, which Tilray controller and CEO Kennedy dominates.

139. On August 27, 2019, the Board met to discuss putting in place an "at the market offering" program (an "ATM") for Tilray stock. [redacted] In other words, absent the Reorganization, the Control Group presumably would have engaged in sales at similar levels to avoid depressing the stock price and thereby damaging the value of its own stock.

140. On September 6, 2019, Crowe conveyed a tax due diligence presentation to the Special Committee.[86] Of course, that presentation was of no significance, as the Special Committee had granted approval for the transaction in July 2019 without that advice.

141. Imperial conveyed its purported fairness opinion on September 8, 2019.

142. On September 8, 2019, the Special Committee again rubber-stamped the Reorganization and ancillary documentation.[87] Mirroring its indifference the

[86] TILRAY_220_0000223.
[87] TILRAY_220_0000246.

first time around, the Special Committee had not used any of the leverage at its disposal to benefit Tilray's minority.

143. On September 9, 2019, Imperial delivered a written fairness opinion, the Special Committee delivered its written authorization, and the Board approved the Reorganization.[88]

L. The Reorganization Closes Without Sufficient Disclosures or an Unaffiliated Vote

144. The Reorganization was structured as a reverse merger in which Privateer would merge with and into a wholly-owned subsidiary of Tilray.

145. The Reorganization was completed on December 12, 2019.

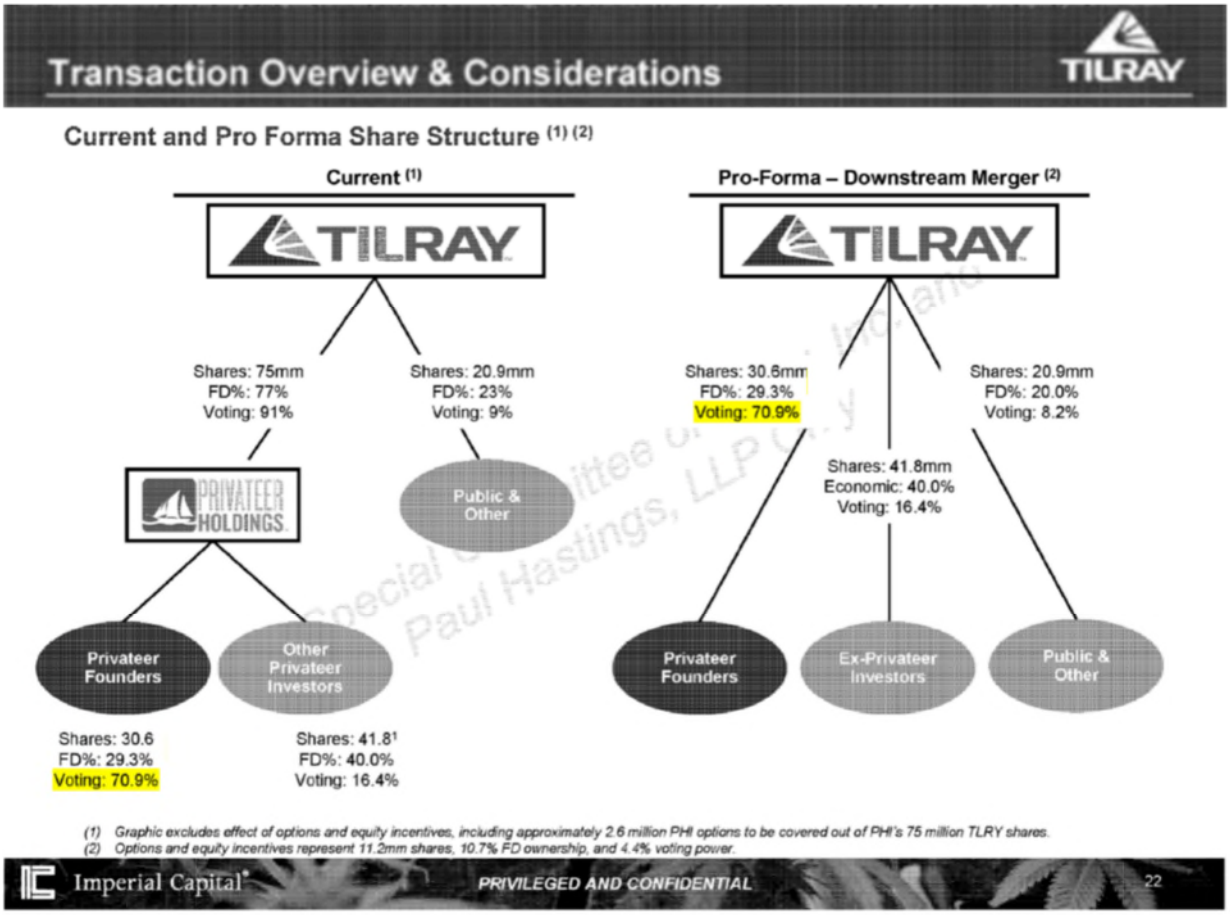
146. All of Privateer's Tilray shares have since been canceled, and each canceled share has been replaced with a new share issued by Tilray directly to Privateer equity holders.

147. The three Privateer Founders together received 16.7 million shares of Tilray Class 1 Stock, and certain shares of Class 2 Stock. That issuance gave the Privateer Founders control of approximately 72% of Tilray's voting power, with approximately 30% of its economic interest. A depiction of the effect of the

[88] TILRAY_220_0000246-47.

Reorganization taken from a board book used to review the deal is reproduced below (highlighting added):[89]

(Image to follow on next page)



(TILRAY_220_0000291).

[89] Following the closing of the Reorganization, Tilray disclosed in public filings that "Immediately after the Merger . . . [the Privateer Founders], including affiliated individuals and entities, collectively beneficially owned approximately 31% of the outstanding capital stock of Tilray and approximately 72% of the voting power of Tilray." Tilray, 8-K, filed with the SEC on December 17, 2019.

148. All other Privateer equity holders, including holders of preferred shares, received Tilray Class 2 Stock.

149. Together with the Privateer Founders, all former Privateer equity-holders hold approximately 73% of the outstanding capital stock of Tilray and approximately 89% of the voting power of Tilray.

150. Tilray may apply cash from an ATM as consideration for up to 20% of the Privateer holders' Class 2 Stock.

151. A block of Class 2 Stock worth approximately $125 million will be held in escrow for 18 months following the close of the transaction for any potential indemnification claims; the initial 50% of that escrow will be withheld from non-Privateer Founder stockholders, with the remaining 50% coming from the Privateer Founders.

152. The Merger Agreement also provided that the Privateer Founders would agree to back any liabilities of Privateer post-close.[90]

153. To consummate the Reorganization, two of the three Privateer Founders executed documents on behalf of Privateer that were integral to the Reorganization. For example, as Chairman of Privateer, Kennedy signed Privateer's new Amended and Restated Certificate of Incorporation. For his part, Blue signed the Merger Agreement on behalf of Privateer.

[90] TILRAY_220_0000198.

154. Other agreements that were necessary to effectuate the Reorganization were signed by all three Privateer Founders. For example, all three Privateer Founders signed the following:

a. The Guarantee Agreement: The Privateer Founders signed an agreement whereby each of them agreed to assume all of Privateer's obligations arising under a certain guarantee previously entered into by Privateer, for the benefit of Marley Green, LLC;

b. The Lock-Up Agreement: Each Privateer Founder signed an agreement prohibiting them from selling their Tilray shares for a two-year period following the Reorganization subject to certain restrictions; and

c. The Support Agreement: Each of the Privateer Founders agreed to deliver written consent with respect to all of the shares of Privateer capital stock held by them and those shares in favor of all transactions contemplated by the Reorganization.

155. The S-4 failed to provide a "fair summary" of Imperial's work in reaching its fairness opinion. Indeed, the S-4 included no meaningful discussion of Imperial's analyses because any "fair summary" of Imperial's work would have revealed the absence of any relative valuation of the "give" by Tilray and the "get" by, in the S-4's own words, the "controlling stockholders."

156. The S-4 failed to disclose Greenwood's prior relationship with Kennedy and Privateer/Tilray and Greenwood's conflict through Crestview, which counted Privateer and Tilray as two of its most important clients. Indeed, the Board deemed Greenwood's conflict material enough to disclose in its Proxy Statement issued after the Reorganization on April 30, 2020, which stated that in reviewing

Greenwood's purported independence "the Board considered [Greenwood's] current employment at Crestview Strategy USA LLC, a Delaware limited liability company ('Crestview US'), and Tilray's previous engagement with Crestview Strategy Inc., an Ontario corporation and an indirect majority owner of Crestview US ('Crestview Canada'). Crestview Canada provided lobbying and advisory services to Tilray from November 2014 to March 2020." However, the Board failed to disclose that information to stockholders, even though the S-4 was issued five months after Crestview hired Greenwood.

157. The Board failed to disclose Paul Hastings's past and concurrent retentions by Kennedy. The Board also failed to disclose that Paul Hasting's lead relationship partner, Brooks, [redacted]

M. The Reorganization Confers Significant Unique Benefits To Privateer And The Privateer Founders

158. Through the Reorganization, the Privateer Defendants extracted valuable, non-ratable benefits.

159. *First*, the cancellation of Privateer's 75 million Tilray shares and near simultaneous re-issuance of 75 million shares to Privateer's equity holders bestowed hundreds of millions in tax savings to Privateer and the Privateer Founders.

160. [redacted]

[redacted]

161. Moreover, because the Reorganization was not a taxable event, it did not trigger individual level taxes. The ability to defer hundreds of millions of dollars in individual-level taxes until Tilray shares were sold was worth at least tens of millions of dollars to Privateer's investors.

162. *Second*, the Reorganization converted the Privateer Founders' 70.9% *indirect* voting interest in Privateer into a *direct* 72% voting interest in Tilray without any consideration paid to Tilray or the minority stockholders. As explained above, that conversion had the effect of extending the Privateer Founders' control, which otherwise would have passed to the market as Privateer sold its shares, the Privateer

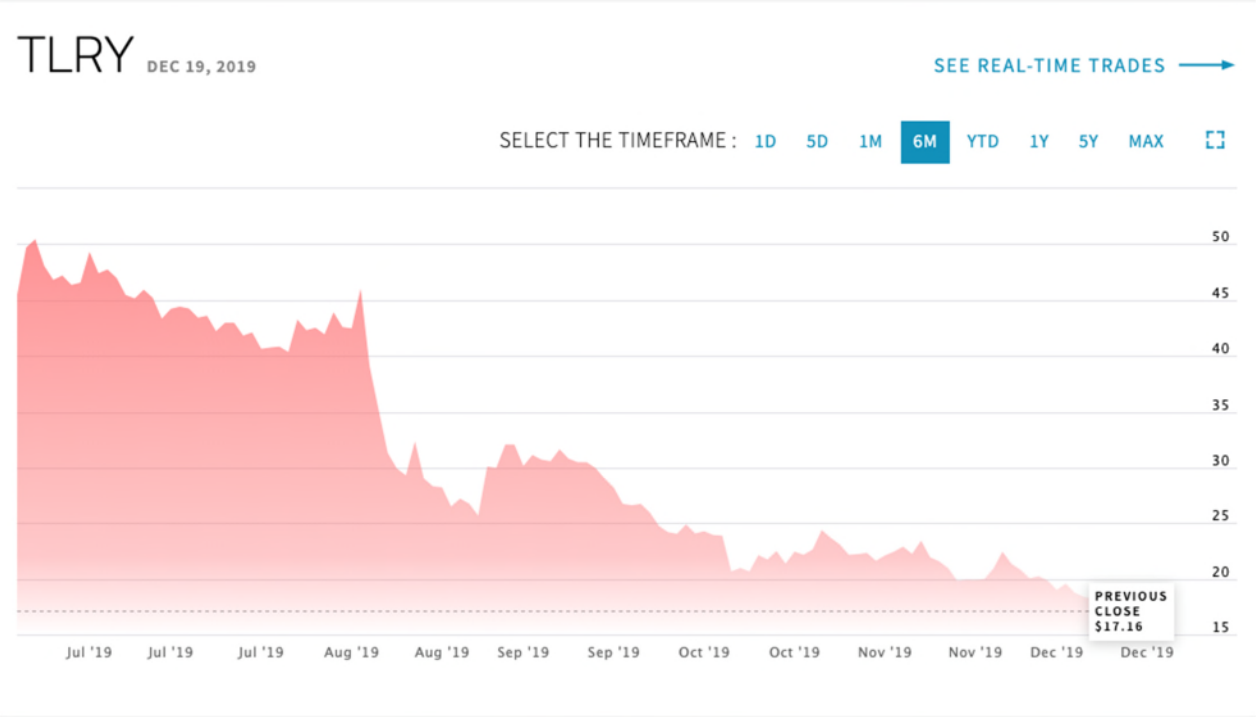
[91] TILRAY_220_0002855; TILRAY_220_0002856.
[92] TILRAY_220_0002931 (emphasis added).

Founders sold shares to pay taxes, and Tilray issued shares to fund its operations and growth.

163. Tilray's non-Privateer stockholders also suffer directly because the agency costs imposed by Tilray's capital structure are far more pronounced in the post-Reorganization world than they were earlier. Previously, Privateer could not use its control too aggressively for its own interests because it bore 75% of the economic burden of any harmful decisions. Now, the Privateer Founders still have total voting control but only bear a fraction of the harm from their decisions. The new capital structure harms Tilray's minority stockholders. The Company's minority stockholders were further deprived of (i) the opportunity to eliminate the super-voting Class 1 Stock from the capital structure and eliminate a control group in the Reorganization, and (ii) the opportunity to influence the management decisions of the Company on an ongoing, long-term basis.

164. *Third*, the market did not react favorably to the announcements of either Tilray's entry into the Letter of Intent or the Reorganization. The Letter of Intent was first announced in a press release by the Company in the early morning of June 10, 2019. By the end of the day, Tilray's stock price fell from $44.26 to $43.14, representing a 2.5% decline. On the following day, Tilray's stock price dropped another 6.1%, closing at $40.49 per share. Three months later, on September 9, 2019, Tilray announced the Reorganization and the Company's entry into the

Merger Agreement. Following the announcement of the Reorganization Tilray's stock dropped from $32.38 per share down to $30.15, another 6.9% decline in value. When the Reorganization closed on December 12, 2019, Tilray's stock price closed at $18.93 per share. As shown below, since the public announcement of the Letter of Intent and through the Reorganization's closing on December 12, 2019, Tilray's stock price has fallen ***more than 57%***:



165. In sum, the Reorganization unfairly gave (i) the Privateer Founders continued control over Tilray; and (ii) Privateer hundreds of millions in tax savings—in exchange for *de minimis* consideration—while subjecting the Company and its public stockholders to continued exploitation at the hands of Tilray's controllers. Neither of these unique benefits were shared with Tilray's minority

public stockholders. The Reorganization was the product of self-dealing and undue influence by the Privateer Defendants, and the Board breached its fiduciary duties by approving it.

IV. CLASS ACTION ALLEGATIONS

166. Plaintiffs bring this action pursuant to Rule 23 of the Rules of the Court of Chancery, individually and on behalf of all other holders of Tilray Class 2 Stock (except any Defendants herein and any persons, firm, trust, corporation or other entity related to or affiliated with them and/or their successors in interest) who were injured because of Defendants' wrongful actions, as more fully described herein (the "Class").

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

168. The Class is so numerous that joinder of all members is impracticable. As of September 9, 2019, there were 81,894,731 shares of Tilray Class 2 Stock issued and outstanding. Thus, upon information and belief, there were hundreds or thousands of Tilray stockholders scattered throughout the United States.

169. There are questions of law and fact common to the Class, including, *inter alia*, whether:

a. The Director Defendants breached their fiduciary duties;

b. The Privateer Defendants breached their fiduciary duties as the controlling stockholders of Tilray; and

c. Plaintiffs and the other members of the Class were injured by the wrongful conduct alleged herein and, if so, what is the proper measure of damages.

170. Plaintiffs are committed to prosecuting the action and have retained competent counsel experienced in litigation of this nature. Plaintiffs' claims are typical of the claims of the other members of the Class, and Plaintiffs have the same interests as the other members of the Class. Plaintiffs are adequate representatives of the Class.

171. Further, the prosecution of separate actions by individual members of the Class would create the risk of inconsistent or varying adjudications with respect to individual members of the Class. Such inconsistent or varying adjudications would establish incompatible standards of conduct for Defendants and/or with respect to individual members of the Class, that would as a practical matter be disjunctive of the interests of the other members not party to the adjudications or substantially impair or impede their ability to protect their interests.

V. DERIVATIVE ALLEGATIONS

172. Plaintiffs also bring this action derivatively to redress injuries suffered by the Company as a result of breaches of fiduciary duties by the Director Defendants and the Privateer Defendants.

173. Plaintiffs currently are beneficial owners of Tilray Class 2 Stock and have owned Tilray Class 2 Stock continuously during the relevant time period.

Plaintiffs will adequately and fairly represent the interests of Tilray and its stockholders in enforcing and prosecuting their rights, and have retained counsel competent and experienced in stockholder derivative litigation.

VI. THE DEMAND BOARD COULD NOT DISINTERESTEDLY AND/OR INDEPENDENTLY CONSIDER A DEMAND

174. Plaintiffs repeat and reallege each and every allegation above as if set forth in full herein.

175. The Board cannot disinterestedly or independently consider a demand. Two of the members of the Board—Kennedy and Auerbach—were dual fiduciaries with abiding connections to Privateer.

176. Kennedy, jointly with Privateer and the other Privateer Founders, will benefit financially from this transaction. As such, they each have breached their duty of loyalty to Tilray as controlling stockholders.

177. Similarly, due to his ties to Privateer and the lowered cost basis at which he entered this investment, Auerbach will benefit financially from this transaction and, jointly with the Privateer Founders, has breached his duty of loyalty to Tilray.

178. Greenwood cannot disinterestedly and independently consider a demand to prosecute the claims alleged herein. Greenwood has longstanding ties to Privateer/Tilray and to Privateer founder and Tilray CEO Kennedy. Greenwood's prior relationship with Kennedy and Privateer/Tilray, position as a Crestview

Managing Director, and material compensation either directly or indirectly related to Kennedy and Privateer/Tilray fatally compromised Greenwood's ability to (i) negotiate aggressively against Privateer in connection with the Reorganization and (ii) independently determine whether Tilray should pursue the claims alleged herein because doing so would jeopardize Crestview's continued business relationship with Tilray, which in turn would jeopardize Greenwood's job and primary source of income.

179. All three members of the Special Committee (Greenwood, Dopp and St. Clare) were dominated by the controlling stockholders and advised by conflicted legal counsel. Because they knew about the conflicts rife throughout this process, their casual rubber-stamping of this controller-driven transaction and glib abandonment of important protections such as a majority-of-the-minority vote revealed their bad faith.

180. They failed to even consider negotiating a meaningful benefit for Tilray's minority stockholders or the Company itself in exchange for the massive tax benefit conferred on its controllers. Their apathy demonstrates their lack of independence and bad faith. As a result, each of the members of the Special Committee breached their respective fiduciary duties.

181. Indeed, the members of the Special Committee were willfully blind. Despite knowing that the Reorganization would create tax savings flowing to

Privateer and provide Privateer a unique benefit, they failed to obtain information regarding the magnitude of those tax savings to arm themselves for an arm's-length negotiation. [redacted]

182. When Privateer sought to re-negotiate the deal for further benefits after the July approval of the Reorganization, the Special Committee again rubber-stamped the transaction, and failed to negotiate for meaningful or material benefits to the Tilray minority stockholders. Instead, they sat idly by as critical minority stockholder checks—such as a majority-of-the-minority voting condition—were eliminated.

183. When it came time to seek approval of the Reorganization by Tilray's stockholders, the Board intentionally concealed material, troubling information from Tilray's stockholders, including Greenwood's conflicts, Paul Hastings' conflicts, and Imperial's utter failure to value the tax and control benefits transferred to the Privateer Defendants. Greenwood, in particular, knew that she was improperly hiding her conflicts from the Tilray stockholders in seeking their approval of a transaction where she served as chair of the Special Committee.

184. Plaintiffs reserve the right to add the other members of the Special Committee as defendants in due course.

185. Finally, because Privateer and Kennedy stand on both sides of the Reorganization and there is no majority-of-the-minority voting condition, entire fairness applies. "[A]lthough application of the entire fairness standard to a transaction involving a controller does not automatically satisfy the second prong of *Aronson*, the presence and influence of a controller is an important factor that should be considered in the director-based focus of the demand futility inquiry under the first prong of *Aronson*, particularly on the issue of independence." *In re BGC Partners, Inc.*, C.A. No. 2018-0722-AGB, 2019 WL 4745121, at *8 (Del. Ch. Sept. 30, 2019).

186. Thus, demand on the Demand Board is excused as futile.

COUNT I

BREACH OF FIDUCIARY DUTY
AGAINST THE PRIVATEER DEFENDANTS

187. Plaintiffs repeat and reallege each and every allegation above as if set forth in full herein.

188. As explained herein, at the time of the Reorganization, the Privateer Defendants were the controlling stockholders of Tilray. As controlling stockholders, the Privateer Defendants owed and owe the Company and the Class the utmost fiduciary duties of due care and loyalty.

189. By reason of the foregoing, the Privateer Defendants have breached their fiduciary duties by, among other things, causing the Company to undertake the

Reorganization and causing the Board to agree to the Reorganization, which (i) provided Privateer hundreds of millions in tax savings not shared equally with Tilray or its minority stockholders; and (ii) unfairly transferred and extended the Privateer Founders' control over Tilray.

190. The Class was directly harmed because it was deprived of the opportunity to share in the benefits of control. At a minimum, the Control Group's voting power should be limited to no more than they would have had in the absence of the self-interested and conflicted Reorganization. Instead, the Privateer Defendants caused the Company to issue all of the super-voting Class 1 Stock to them in the Reorganization, further misaligning the controllers' economic and voting interests at the expense of the Class by permitting the Privateer Founders to maintain supermajority voting control of the Company despite holding only a 30% economic interest. The Class is also harmed by being deprived of the opportunity to influence the management decisions of the Company on an ongoing, long-term basis. The harm to the Class's voting power is necessarily distinct from any harm to Tilray because Tilray cannot vote its own shares.

191. As a result of the foregoing, Tilray, Plaintiffs and the Class have been harmed, as the Company and Tilray's minority stockholders did not share in any of the benefits conferred to the Privateer Defendants as a result of the Reorganization,

and the Class was deprived of other benefits which might have served to balance out, at least in part, the substantial benefits conferred to the Privateer Defendants.

192. Plaintiffs and the Class have no adequate remedy at law.

COUNT II

BREACH OF FIDUCIARY DUTY AGAINST THE DIRECTOR DEFENDANTS

193. Plaintiffs repeat and reallege each and every allegation above as if set forth in full herein.

194. The Director Defendants, as Tilray directors and officers, owe the Company and the Class the utmost fiduciary duties of due care and loyalty. Under Delaware law, the Director Defendants must, but cannot, show that the Reorganization is entirely fair to Tilray and its public stockholders.

195. By reason of the actions described above, the Director Defendants have breached their fiduciary duties. The Director Defendants approved the unfair Reorganization that provides the Privateer Defendants with hundreds of millions of dollars in tax savings, as well as continued control of Tilray, without adequate or appropriate value transferred to the Company and its public stockholders in exchange.

196. The Director Defendants never sought a valuation nor even considered the hundreds of millions in avoided taxes that were given to Privateer, and therefore

could not have made an informed decision on the advisability of the Reorganization to the Company and its public stockholders.

197. As a result of the foregoing, Tilray, Plaintiffs and the Class have been harmed as, *inter alia*, the Board agreed to the Reorganization, which (i) provided Privateer hundreds of millions in tax savings not shared equally with Tilray or its minority stockholders; and (ii) unfairly preserved Kennedy, Blue and Groh's control over Tilray.

198. Further, the Class was directly harmed because it was deprived of the opportunity to eliminate the super-voting Class 1 Stock from the capital structure entirely and eliminate a control group, or at least to limit the Privateer Founders' voting control the Company to no more than they would have had in the absence of the self-interested and conflict-ridden Reorganization. Instead, the Director Defendants approved the issuance of all of the super-voting Class 1 Stock to the Privateer Founders in the Reorganization, further misaligning the controllers' economic and voting interests at the expense of the Class by permitting the Privateer Founders to maintain supermajority voting control of the Company despite holding only a 30% economic interest. The Class is also harmed by being deprived of the opportunity to influence the management decisions of the Company on an ongoing, long-term basis. The harm to the Class's voting power is necessarily distinct from any harm to Tilray because Tilray cannot vote its own shares.

199. Plaintiffs and the Class have no adequate remedy at law.

VII. RELIEF REQUESTED

WHEREFORE, Plaintiffs, on behalf of themselves, the Class and Tilray, request judgment as follows:

A. Declaring that this action is properly maintainable as a class action;

B. Finding the Director Defendants liable for breaching their fiduciary duties owed to the Class and the Company;

C. To the extent any claim is deemed to be a derivative claim, finding that demand on the Tilray Board is excused as futile;

D. Finding that the Privateer Defendants breached their fiduciary duties in their capacity as the controlling stockholders of Tilray;

E. Ordering the Privateer Defendants: (a) (i) not to acquire any additional Class 1 Stock; (ii) not to vote or transfer any Class 1 Stock owned by them; and (iii) to convert any super-voting Class 1 Stock owned by them into common Class 2 Stock; or, in the alternative, (B) to convert a sufficient number of their shares of super-voting Class 1 Stock into Class 2 Stock such that their aggregate voting control of Tilray is reduced to a level equivalent to what it would have been in the absence of the Reorganization.

F. Awarding Plaintiffs and the other members of the Class damages in an amount which may be proven at trial;

G. Awarding Plaintiffs and the other members of the Class pre-judgment and post-judgment interest, as well as their reasonable attorneys' and experts' witness fees and other costs;

H. Awarding Tilray the amount of damages it sustained as a result of Defendants' breaches of fiduciary duties to the Company; and

I. Awarding such other and further relief as this Court may deem just and proper.

Dated: July 17, 2020

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CERTIFICATE OF SERVICE

I, Gregory Varallo, hereby certify that, on July 24, 2020, the foregoing *Public [Redacted] version of the First Amended Consolidated Verified Stockholder Class Action and Derivative Complaint* was filed and served via File & Serve*Xpress* upon the following counsel of record:

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