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Case No. 2020-0137-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DEBORAH R. BRAUN and DR. NADER NOORIAN, Individually and on Behalf of All Others Similarly Situated and Derivatively on Behalf of Nominal Defendant TILRAY, INC.,

Plaintiffs,

v.

BRENDAN KENNEDY, CHRISTIAN GROH, MICHAEL BLUE, MARYSCOTT GREENWOOD, MICHAEL AUERBACH, and PRIVATEER EVOLUTION, LLC (as successor to PRIVATEER HOLDINGS, INC.),

Defendants,

and

TILRAY, INC., a Delaware corporation,

Nominal Defendant.

PUBLIC [REDACTED] VERSION AS FILED MARCH 3, 2020

C.A. No. 2020-0137-KSJM

VERIFIED STOCKHOLDER CLASS ACTION AND DERIVATIVE COMPLAINT

Deborah R. Braun and Dr. Nader Noorian (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 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 "Privateer Founders" or "Privateer's Controllers"), 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 a conflicted corporate reorganization ("Reorganization") that (a) transferred and extended the controlling stockholders' majority voting power and (b) conferred enormous, non-ratable tax benefits on the controllers, without providing any corresponding benefit to the Company and its public stockholders.

2. Tilray, a growth-oriented cannabis-products company, was founded and (until the Reorganization) controlled by Privateer, a private equity firm that itself was controlled by its three founders, Defendants Kennedy, Blue and Groh.

3. In July 2018, the Privateer Founders commenced an initial public offering ("IPO") of Tilray. Post-IPO, Privateer controlled of 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 ("Class 2 Stock"). Privateer held a 75% economic interest in Tilray, but controlled over 90% of Tilray's outstanding voting power.

4. By early 2019, the Privateer Founders and other Privateer investors were seeking liquidity for the billions of dollars of paper profits from their Tilray investment. The Privateer Founders hatched a plan to monetize Privateer in a tax-efficient manner while also giving themselves extended control of Tilray.

5. To assist them in achieving this goal, Privateer hired Andersen Tax ("Andersen") to provide tax advice. [redacted]

6. In January 2019, Privateer proposed to Tilray a downstream reverse merger through which 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.

7. Unbeknownst to Tilray's minority public stockholders, the Privateer Founders planned to use the tax benefits achieved through the Reorganization to entice the other Privateer investors to agree to amend the Privateer Certificate of Incorporation (the "Charter") to transfer all of Privateer's high-vote Tilray Class 1 stock to the Privateer Founders instead of *pari passu* to all of Privateer's investors, thereby extending the Privateer Founder's majority control over the Company. Absent the Reorganization, control over Tilray would pass quickly to the market as (a) Privateer distributed and sold its Tilray stake, (b) the Privateer Founders monetized their shareholdings, and (c) Tilray issued additional shares to fund its operations and growth.

8. On January 19, 2019, the board of directors of Tilray (the "Board") discussed forming a special committee consisting of Defendant Greenwood, Rebekah Dopp, and Christine St. Clare (the "Special Committee" or "Committee") to negotiate a transaction with Privateer. The Committee was not actually formed until February 15, 2019, the day after Privateer had distributed its stake in its three other businesses.

9. As detailed below, the Committee's process was defective. Among other things, (i) Greenwood was fatally conflicted because, during the process, she was hired to run the U.S. business of Crestview Strategy ("Crestview"), a public affairs agency that performs extensive lobbying work on behalf of Tilray and

Privateer; (ii) the Committee's legal counsel Paul Hastings LLP ("Paul Hastings") historically represented [redacted] in matters adverse to Tilray, and its lead relationship partner for Tilray and Privateer was a Privateer investor and had a history of favoring the firm's institutional clients at the expense of public investors the firm was purporting to represent; (iii) the Committee failed to negotiate *any* protections for minority stockholders such as conditioning the Reorganization to a majority of the minority voting provision; (iv) the Committee treated Privateer's enormous tax benefits as an afterthought, and never asked for a meaningful "give" from Privateer or the Privateer Founders in exchange for the massive "get" of tax avoidance; and (v) the Committee inexplicably agreed to allow the Privateer Founders 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 the Privateer Charter amendment that benefitted the Privateer Founders at the expense of Tilray's minority investors.

10. On September 9, 2019, Tilray, Privateer and Merger Sub entered into an Agreement and Plan of Merger and Reorganization (the "Merger Agreement"), under which Privateer would be merged with Tilray in an all-stock, downstream Reorganization. Under the Merger Agreement, Tilray was required to, among other things, issue and distribute directly to Privateer's equity holders (including, but not limited to, the Privateer Founders) 75 million newly registered Tilray shares, with

all the high vote shares going to the Privateer Founders. Upon consummation of the Reorganization, all 75 million shares of Tilray that Privateer previously owned would be cancelled. Following the Reorganization's closing, Privateer would not hold any assets.

11. While the prolonged voting control and massive tax savings provide substantial benefits to the Privateer Founders and Privateer's other investors, the benefits to Tilray and its minority public stockholders are meager to non-existent, and vastly outweighed by the harm of transferring extended control to the Privateer Founders. 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 will be 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.

12. 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

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

14. Defendant Brendan Kennedy is the current CEO of Tilray and has served in that position since August 2013. Kennedy has served as a director on Tilray's Board since January 2018. Kennedy founded Privateer in April 2011, serving as CEO from 2011 to July 2018 and as Executive Chairman of Privateer's Board of Directors from July 2018 to December 2019. Prior to the closing, Kennedy controlled Privateer both individually, given his large voting stake and role as Chairman, and as a group with the other Privateer Founders. Privateer in turn controlled Tilray with approximately 90% of its voting power. Following consummation of the Reorganization, Kennedy personally owns approximately 9.5 million shares (or 57%) of Tilray's super-voting Class 1 Stock and approximately 8.6 million shares (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 Privateer Founders as a controlling group have absolute, majority voting control of Tilray with approximately 73% of its voting power, while owning

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

only 31% of economic interest.[2]

15. Defendant Christian Groh is one of the co-founders of Privateer and served as its COO. 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 the SVB Analytics' operations. Both Kennedy and Privateer have publicly described Groh as Kennedy's "long-term friend and colleague." Prior to the Reorganization, Groh controlled Privateer as a group with Kennedy and Blue. Groh currently owns approximately 3.7 million shares (or 22%) of Tilray's super-voting Class 1 Stock and approximately 3.5 million shares (4%) of Tilray Class 2 Stock.[3] Groh 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.

16. Defendant Michael Blue is one of the co-founders of Privateer. 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 currently owns approximately 3.4 million shares (or 21%) of Tilray

[2] Tilray, 8-K, filed with the SEC on December 17, 2019.
[3] S-4 at 190.

super-voting Class 1 Stock and approximately 1.7 million shares (2%) of Tilray Class 2 Stock.[4] 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.

17. Defendant Maryscott Greenwood has served as a member of the Tilray Board since May 2018. Greenwood has also served as the CEO of the Canadian American Business Council (the "CABC")[5] since 2016, where she previously served as Executive Director from 2001 to 2016. Additionally, Greenwood is at Partner of Crestview and has been the Managing Director of Crestview's U.S. practice since June 2019. Greenwood served on the Special Committee that approved the Reorganization.

18. Defendant Michael Auerbach has served on the Tilray Board since 2018. He also served on the board of directors of Privateer from January 2014 to December 2019, and at the time of the Reorganization vote, was a Privateer stockholder. Pursuant to a consulting agreement, Privateer paid Auerbach approximately $910,000 from September 1, 2016 to February 2019.

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[4] *Id.*

[5] The CABC is a non-profit, non-partisan, issues-oriented organization dedicated to elevating the private sector perspective on issues that affect Canada and the United States of America. Privateer is a member of the CABC.

19. Defendant Privateer Evolution, a Delaware limited liability company, is the successor by merger to Privateer Holdings, Inc. According to Tilray's public filings, Privateer 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 as a C-corporation in October 2011. Privateer was parent to Tilray and three other subsidiaries. In the Reorganization, Privateer merged with and into Down River Merger Sub, LLC, a Delaware limited liability company. According to Privateer's Certificate of Merger filed with the Delaware Secretary of State, Division of Corporations dated December 12, 2019, Down River Merger Sub LLC has been renamed to Privateer Evolution LLC ("Privateer Evolution"), with Privateer Evolution surviving the Reorganization as a wholly owned subsidiary of Tilray.

20. 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.

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

22. Non-party Christine St. Clare has served on the Tilray Board of Directors since June 2018. She was a member of the Special Committee that

approved the Reorganization.

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

IV. SUBSTANTIVE ALLEGATIONS

A. Privateer and Its Founders Control Tilray

24. Headquartered in Nanaimo, Canada, Tilray cultivates and sells legal medical and recreational cannabis to patients in Canada, Australia and Germany through agreements with pharmaceutical distributors.

25. Tilray's predecessor, Decatur Holdings, BV ("Decatur"), was founded and initially funded by Privateer. Privateer was a Seattle-based private equity firm that focused solely on investing in the cannabis industry. Privateer was organized as a C-corporation and 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").[6]

26. Tilray was one of Privateer's four portfolio companies, which also included Leafly Holdings, Inc. ("Leafly"), Docklight, LLC ("Docklight"), and Left Coast Ventures, Inc. ("LVC").

[6] Agreement and Plan of Merger and Reorganization, dated September 9, 2019 at 10.

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

28. [redacted]

29. Privateer was controlled by its three founders, namely Blue, Groh and current-Tilray CEO Kennedy. Kennedy was the Executive Chairman of Privateer, sat on the Privateer board of directors and held the largest voting stake in Privateer.[10] Kennedy personally derived significant benefits from Privateer, as evidenced by a [redacted]

[7] TILAY_220_0000226.
[8] *Id.*
[9] TILRAY_220_0002855; TILRAY_220_0002856.
[10] S-4 at 5.

[redacted]

30. Together, the Privateer Founders controlled approximately 70.9% of the voting power in Privateer, and used Privateer as their investment vehicle to control Tilray. Post-Reorganization, the Privateer Founders and their respective affiliated entities directly received 72% voting power over Tilray, and they own approximately 30% of its outstanding capital stock.

31. In January 2018, the Company issued 75 million shares to Privateer in exchange for the assets of Decatur, a Dutch private limited company, through an internal reorganization. Tilray currently 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. After February 2019, Privateer's "***only material assets*** [were] the 75,000,000 shares of Tilray . . . ."[12]

32. By virtue of its holdings of Class 1 and Class 2 Stock, Privateer was Tilray's controlling stockholder, controlling over 90% of the Company's total voting power at the time of the Reorganization. Following the closing of the Reorganization, Tilray remains under the control of the Privateer Founders.

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[11] TILRAY_220_0000502, at 0507.
[12] S-4 at 128 (emphasis added).

33. Tilray describes itself as a "controlled company" in its public filings and prior to the Reorganization identified Privateer as the Company's controlling stockholder.[13]

34. Privateer and Tilray historically entered into several conflict-laden transactions benefitting the Privateer Defendants, including:

- In January 2016, a wholly owned subsidiary of Tilray entered into a revolving credit facility with Privateer for up to $25.0 million;[14]

- In November 2017, a wholly owned subsidiary of Tilray entered into a revolving construction facility with Privateer for up to $10.0 million;[15]

- 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 $1.0 million;[16]

- 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;[17]

- In February 2018, a wholly owned subsidiary of Tilray entered into a brand licensing agreement with Docklight (the "Docklight

[13] 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.").
[14] Tilray, Definitive Proxy, filed with the SEC on April 15, 2019, at 27.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 28.

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;[18] and

- In February 2019, Tilray entered into an agreement with Ten Eleven Management LLC (doing business as "Privateer Management") pursuant to which Privateer Management provides certain general and administrative and corporate services on an as-requested basis for a monthly cost of $25,000.[19]

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

35. On July 19, 2018, Privateer took Tilray public through an IPO at $17 per share, making Tilray the first cannabis company to go public on the NASDAQ.[20] Through the IPO, Tilray sold to the public approximately 9 million shares of Tilray Class 2 Stock.

36. 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.

37. In connection with the IPO, Privateer executed a customary lock-up

[18] *Id.*
[19] *Id.*
[20] 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).

agreement, whereby Privateer agreed not to sell its Tilray shares for a 180-day period following the IPO (*i.e.*, January 15, 2019).[21]

C. The Privateer Founders' Control Over Tilray Was At Risk

38. Tilray's main goal is to grow its cannabis business driven in part by acquisitions and making investments in other cannabis businesses. To achieve this growth, Tilray requires a significant amount of capital. Indeed, as confirmed by Tilray's own internal records, [redacted] 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;

[21] TILRAY_220_0000277.
[22] TILRAY_220_0000288.

- 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.

39. In order to finance acquisitions and continue its growth plan, Tilray frequently needs to raise capital, which would dilute the current stockholders. As long as the Privateer Founders could acquire all of Tilray's supervoting shares, however, their control over Tilray would not be at risk.

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

40. In January 2019, Privateer sought advice from its primary outside tax advisor, [redacted] regarding ways to effectively dissolve without incurring massive tax bills.

41. [redacted][23]

[23] TILRAY_220_0002931.

[redacted]

42. [redacted]

43. [redacted]

44. [redacted]

[24] *Id.* (emphasis added).

[redacted] Privateer's Charter created a significant problem for the Privateer Founders.

46. 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 makes distributions of shares of its portfolio companies to Privateer investors, Privateer was required 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. [redacted] the Privateer Founders would have suffered

a significant reduction of their voting control over Tilray.

E. Privateer Approaches Tilray About A Potential Tax-Free, Control Preserving Reorganization

47. Privateer, having 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.

48. Moreover, selling those shares would impose a tax catastrophe for Privateer's investors. Privateer is a Delaware C-corporation that is subject to double taxation: (1) a 21% flat tax of all corporate income after offsetting income with losses, deductions and credits; and (2) taxation at the stockholder level when the investor realizes the gain on the investment.[25] 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.

49. Based on Tilray's $17 per share IPO price (which is less than Tilray's current trading price), Privateer would realize a $1.242 billion gain (equating to

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

$16.57 per share). Had Privateer recognized such a gain (whether by selling the shares or distributing them in a taxable distribution), it would have had 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), the effective dual-level tax rate would be approximately 40%, or approximately ***$500 million*** in taxes.

50. [redacted]

Thus, had the Privateer Founders been forced to sell shares to cover tax liabilities, their control would surely be reduced.

51. 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.[27] By swapping Privateer's old Tilray shares, and 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

[26] TILRAY_220_0000277 (emphasis added).
[27] Internal Revenue Service, Letter Ruling No. 201721014, May 26, 2017, https://www.irs.gov/pub/irs-wd/201721014.pdf (last accessed Dec. 17, 2019).

subsequent stock issuance as a tax-free reorganization within the meaning of Section 368(a) of the Internal Revenue Code.

52. 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]

53. The 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.

54. On January 9, 2019, Privateer, through Defendant Blue, sent a draft letter of intent to Tilray, addressed to Tilray CFO Mark Castenada, which proposed a tax-free, stock-exchange transaction – the Reorganization. As proposed, the Reorganization would serve many of Privateer's unique-interests and the personal interests of its founders at the expense of Tilray's minority stockholders. As evidenced by the draft letters of intent received from Plaintiffs' Section 220 Demands, the Special Committee capitulated to a majority of Privateer's terms

outlined in the January 9, 2019 draft letter of intent.[28]

55. After receiving the January 9 letter of intent, and without recording any minutes of any discussions, Tilray and Privateer started "negotiations" concerning a tax-free transaction for Privateer. From January 9 and January 13, 2019, "Privateer and Tilray had multiple discussions regarding the letter of intent."[29]

56. 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"[30] and further stated that "it would not sell any of its shares until after the first half of 2019."[31]

57. After the "discussions," Privateer sent a revised draft letter of intent to Tilray on January 14, 2019 that "outline[d] the preliminary understanding" between Privateer and Tilray "regarding the 75,000,000 shares of Tilray Class 1 Common Stock owned by [Privateer]."[32]

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[28] TILRAY_220_0002912.
[29] S-4 at 64.
[30] 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).
[31] TILRAY_220_0000277.
[32] TILRAY_220_0002912, at 2914.

58. The January 14 draft letter of intent indicated that Privateer would indemnify Tilray "for any unknown/contingent liabilities assumed by Tilray as part of the merger (as well as potential escrow of Tilray shares to secure the indemnity)." Importantly, while the January 14 draft letter of intent conditioned the proposed transaction on, among other things, Tilray stockholder approval, it did not condition its "offer" on an independent special committee and a vote of a majority of the minority stockholders in Tilray.[33]

59. The letter also stated that the "[c]orporate [b]enefit[s] to Tilray" were purportedly threefold: (1) an "[e]xtended lockup"; (2) "[g]reater operating flexibility vs." a spinout; and (3) the "retention benefit" from securing Tilray "service providers" when the Company assumes their Privateer stock options. TILRAY_220_0002912, at 2914. [redacted]

60. 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-

[33] *Id.*

kind dividend, but without the tax burden. By avoiding taxes, in turn, Privateer and its investors could avoid selling down their respective positions to cover tax bills.

61. In addition to bestowing a unique benefit to Privateer and Privateer's Controllers through enormous tax savings and the retention of significant voting control, the Reorganization also directly and affirmatively harms Tilray's minority stockholders because it exacerbated the problem posed by Tilray's dual class structure. Specifically, 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.

62. The Reorganization worsened the dual class stock problem affecting Tilray's minority investors because the three Privateer Founders would continue to control the Company by holding all of the supervoting Class 1 Stock, yet their collective economic stake would be around 30%. Thus, they could make more severely self-interested voting decisions that harm the Company without bearing nearly as much of the financial effects of those decisions. The Tilray minority investors are thus not only diluted at the margins through the Reorganization, but the very nature of their investment is directly harmed by further misalignment of the controller's economic and voting interests.

F. The Tilray Special Committee Exerts None of its Leverage

63. A critical difference between a Privateer sell-down and the proposed Reorganization – and the fact giving rise to this Action – is that Tilray's Board had to cooperate to permit the latter, and thus had the ability to act to protect Tilray's minority investors. But it failed to do so.

64. As the late January letter of intent indicates, after several days of discussions between Tilray management and Privateer, the conflicted nature of this transaction became obvious. [redacted]

65. Following 10 days of "discussions" that caused Privateer to send a revised letter of intent, the Tilray Board determined during its January 19, 2019 meeting to form a special committee of allegedly independent directors to review the proposed transaction with Privateer and to retain financial and legal advisors. Unfortunately, the Special Committee was assisted by conflicted advisors, and under the shadow of the Privateer Founders' controlling stake, failed to negotiate for basic benefits and protections for the Company.

66. The beginning of deal discussions between Tilray and Privateer were dominated by Tilray management, Auerbach and Blue. Even after the lethargic

Special Committee of the Board was appointed, it failed to negotiate for any consideration for Tilray's minority stockholders or the Company for the benefit it was conveying on the Privateer Defendants.

G. The Special Committee Retains Conflicted Legal Counsel Who Then Lead Limited and Narrow Negotiations

67. On January 30, 2019, without interviewing any other law firms, Tilray's outside directors retained Paul Hastings to serve as outside counsel in connection with a potential Tilray/Privateer transaction.[34]

68. Paul Hastings, however, was plagued by a serious conflict 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 to represent [redacted] (TILRAY_220_0002770)[35] Additionally, [redacted]

[34] For reasons not explained in the S-4/A or 220 Documents, Tilray's outside directors and Paul Hastings did not memorialize the engagement in writing until February 28, 2019. (TILRAY_220_0002764)

[35] 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 (a) "Tilray, Inc., a leader in cannabis research, cultivation, processing and distribution, in connection with the formation by Tilray and

[redacted] (TILRAY_220_0002765)

69. [redacted][36]

70. If the Special Committee were doing their jobs in good faith, they would have received independent advice regarding Paul Hastings' conflicts and whether the law firm's proposed cleansing mechanism works. Particularly since the Chairman of the Special Committee was a Principal at one of the world's largest law firms at the time the Committee retained Paul Hastings, the Committee knew or should have known that Paul Hastings's proposed resolution was insufficient.

71. The Special Committee should also have considered whether Paul Hastings was suited to represent the Committee in this particular situation, or

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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 (b) "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)."

[36] 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.

whether Tilray and its minority investors may 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. *See, e.g.*, *In re Rural Metro Corp. Stockholders Litigation*, C.A. No. 6350-VCL (Del. Ch.); *Haverhill Retirement System v. Kerley, et. al.*, C.A. No. 11149-VCL (Del. Ch.); *City of Daytona Beach Police and Fire Pension Fund v. ExamWorks Group, Inc., et. al.*, C.A. No. 12481-VCL (Del. Ch.).

72. None of these facts about Paul Hastings' significant conflicts of interest and concurrent representation of parties that would have been adverse in a truly arms'-length transaction appear to have been genuinely assessed by the Special Committee. Moreover, none of these facts were publicly disclosed to Tilray stockholders.

73. As described below, rather than providing unbiased advice to the Special Committee, Paul Hastings appears to have worked with Privateer and its counsel in eliminating protections for Tilray minority stockholders.

74. On February 15, 2019, the Tilray Board officially formed a Special Committee comprised of Defendants Greenwood, St. Clare, and Dopp to consider the Reorganization.

75. The Reorganization was expressly intended, among other things, to "provide the individual [Privateer] shareholders with liquidity."[37] The true effect of the Reorganization, however, was to achieve a tax savings for Privateer and its stockholders that could not take place without Tilray's support. In addition, the result of the Reorganization is that instead of having a single controller that holds 75% of the economic risks and benefits of the Company while exercising over 90% of the voting power, Tilray's minority shares are now subject to a still-controlled vote (through the Privateer Founders' over 70% voting stake) that can be used to force decisions for which the Founders will only hold an under 30% economic stake.

76. From the beginning, the Special Committee capitulated to Privateer's wishes to do a tax-free transaction.

77. Despite the establishment of the Special Committee, the full Board continued to discuss Privateer's revised draft letter of intent through the March 14, 2019 Board meeting.[38]

78. On March 27, 2019, the Special Committee officially retained Imperial Capital ("Imperial") to advise the Special Committee regarding the Reorganization and, if needed, issue a fairness opinion.[39]

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[37] TILRAY_220_0000251.
[38] TILRAY_220_00002792, -797.
[39] TILRAY_220_0000217; S-4 at 65.

H. The Special Committee Approves The Reorganization And Then Allows Privateer to Renegotiate Without Revisiting the Terms for Tilray's Minority Investors

79. Although the Special Committee was purportedly established to consider whether the Reorganization was in the best interests of the Company independently, Kennedy nonetheless played an integral role in the process, infiltrating the Special Committee's deliberations. This includes a May 21, 2019 discussion that Kennedy had with Special Committee Chair Greenwood regarding "the status of negotiations," in which Paul Hastings and Cooley also participated; a conversation on June 2, 2019 between the same parties regarding the "terms set forth in the letter of intent and the transaction process . . . [and] a subsequent conversation [between only Mr. Kennedy and Ms. Greenwood] regarding the terms set forth in the letter of intent and the transaction process."

80. No later than the beginning of June 2019, a disabling conflict arose for Special Committee Chair Greenwood. At that time, Greenwood was hired by Crestview, a Canadian public affairs agency, to open Crestview's first international office in Washington, D.C. Greenwood joined Crestview as a Partner and the Managing Director of its U.S. business. As detailed below, Tilray and Privateer are two of Crestview's most important clients.

81. Under the shadow of pressure exerted by Kennedy and the other founders, Greenwood and her fellow members of the Special Committee never

demanded actual 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.

82. Not surprisingly, given Greenwood's divided loyalties with Crestwood, the Special Committee further capitulated by agreeing 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.[40]

83. This was a significant concession by the Special Committee because, as discussed *supra* ¶¶45-46, the Article IV(E)(2) 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 benefit to persuade the Privateer stockholders to approve an amendment to Article IV(E)(2) of the Privateer Charter.[41] Despite these large concessions, the Special Committee appears to have received nothing in return.

84. Nor did the Special Committee attempt to implement protections for

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

the minority Tilray stockholders. Among other things, the Special Committee 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."[42] 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,"[43] 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.

85. With respect to the Reorganization, the Special Committee did not seek, much less implement a majority of the minority voting condition. The Special Committee relented as their conflicted advisor capitulated to the controller's effort to eliminate a majority of the minority voting condition in favor of the Tilray minority stockholders.

86. 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

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

Cooley, Privateer's counsel. Changes Paul Hastings made included: changing the recipient from Tilray CFO Mark Castaneda to the Chair of the Special Committee, Greenwood and adding a majority of the minority approval condition for Tilray stockholders.

87. Later that same day, the controllers intervened. "[R]epresentatives from Privateer, Tilray, Cooley, and Paul Hastings discussed the revised letter of intent . . . and other issues relating to the proposed merger." Notably, no members of the Special Committee were part of these discussions. [redacted][44]

88. The Special Committee did not attempt to fight for a majority of the minority clause. [redacted]

89. Thus, the Tilray minority stockholders were not given an opportunity to have a meaningful vote on the Reorganization.

90. On June 10, 2019, Tilray announced in a joint press release that the

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

Company and Privateer signed a letter of intent with no majority of the minority voting condition. As evidenced by the execution of entering into 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 "All Tilray shares held by Privateer and all outstanding Privateer common stock will be cancelled upon consummation of the merger." As 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 . . . ."[45]

91. 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 at all) to Tilray and its minority stockholders:

[45] TILRAY_220_0000237.

92. On June 21, 2019, the Special Committee retained Crowe LLP, ostensibly to receive tax advice in relation to the Reorganization.[46]

93. On July 27, 2019, after receiving an oral fairness opinion from Imperial, each of the members of the Special Committee provided signed authorization for the Reorganization.[47] The record contains no evidence of Crowe LLP rendering any advice to the Special Committee regarding the tax benefits that would accrue to Privateer and Privateer Founders from the Reorganization, and clearly provided no guidance on how the Special Committee could have conditioned its support for the

[46] TILRAY_220_0000256.
[47] TILRAY_220_0000240.

Reorganization on achieving economic or voting control benefits for the Company's minority investors.

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

95. 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.

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

97. 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 this time, the Special Committee also saw that Castaneda acted as a go-between for 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.

98. Both of these "requests" are 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 singular arguable benefit the Special Committee achieved in the negotiations in the first place.

99. 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."[48] This effectively leaves the determination in the hands of management, which Tilray controller and CEO Kennedy dominates.

100. On September 6, 2019, Crowe conveyed a tax due diligence presentation to the Special Committee.[49] Of course, this presentation was of no significance, as the Special Committee had granted approval for the transaction in July 2019 even without this advice.

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

[48] S-4 at 69.
[49] TILRAY_220_0000223.

102. On September 8, 2019, the Special Committee again rubber-stamped the Reorganization and ancillary documentation.[50] Again, mirroring its indifference the first time around, the Special Committee had not used any of the leverage it is disposal to benefit Tilray's minority.

103. On September 9, 2019, Imperial delivered a written fairness opinion, the Special Committee delivered its written authorization, and the Board approved the Reorganization.[51]

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

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

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

106. 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.

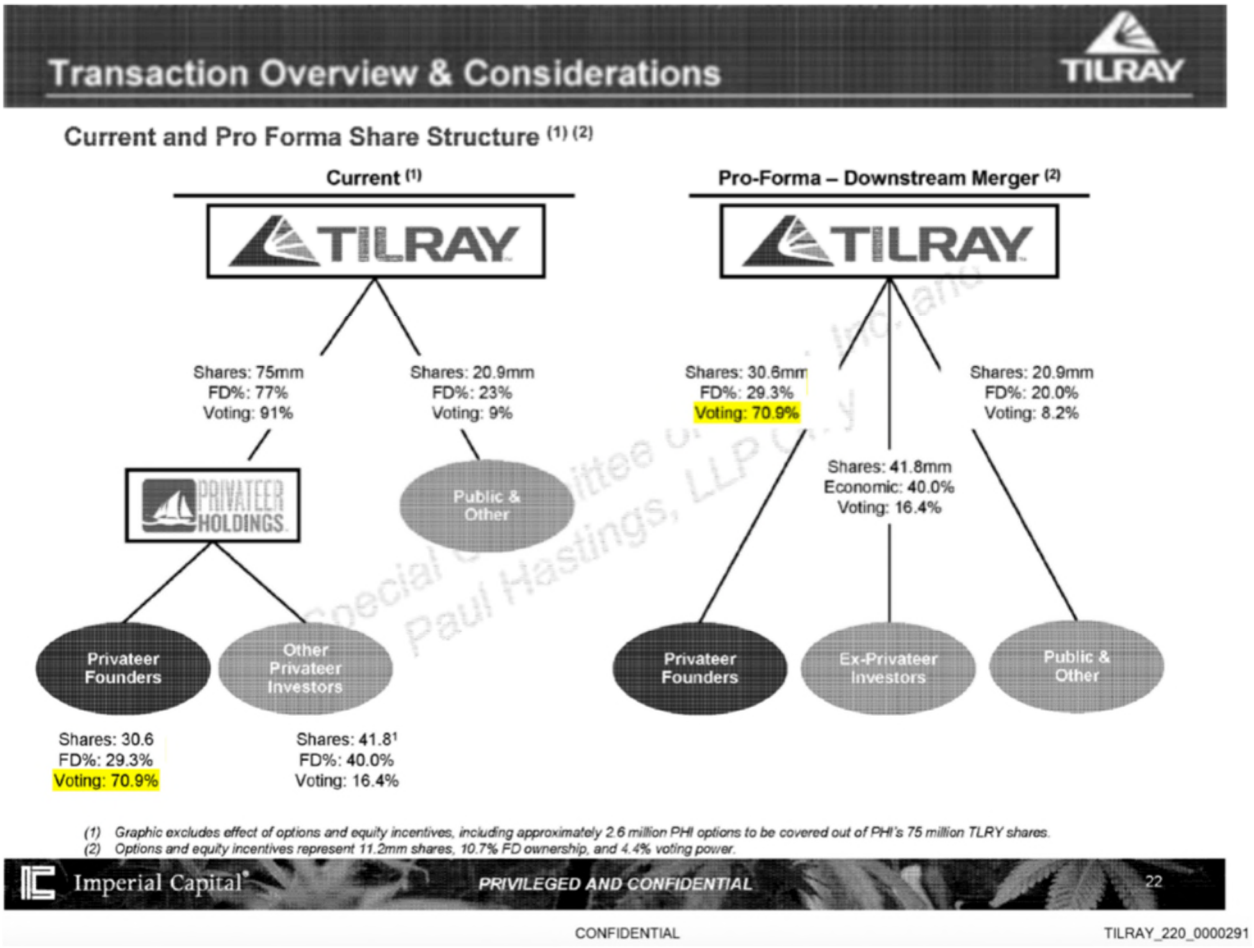
107. The three Privateer Founders together received 16.7 million shares of Tilray Class 1 Stock, and certain shares of Class 2 Stock. This issuance gave the Privateer Founders control of approximately 72% of Tilray's voting power, with

[50] TILRAY_220_0000246.
[51] TILRAY_220_0000246-47.

approximately 30% of its economic interest. A depiction of the effect of the Reorganization taken from a board book used to review the deal is reproduced below (highlighting added):[52]

(Image to follow on next page)

[52] 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, Inc., 8-K, filed with the SEC on December 17, 2019.



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

109. 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.

110. Tilray may apply cash from an at-the-market equity offering as consideration for up to 20% of Privateer holders' Class 2 Stock.

111. 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.

112. The Merger Agreement also provided that the Privateer Founders would agree to back any liabilities of Privateer post-close. TILRAY_220_0000198.

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

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

114. *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.

[redacted]

[53] TILRAY_220_0002855; TILRAY_220_0002856.

[redacted]

116. 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 tens of millions of dollars to Privateer's investors.

117. *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, this had the effect of extending the Privateer Founder's control, which otherwise would have passed to the market as Privateer sold its shares, the Privateer Founders sold shares to pay taxes, and Tilray issued shares to fund its operations and growth.

118. Not only did the Tilray's non-Privateer stockholders not receive any additional consideration, they had their economic and voting control diluted. The

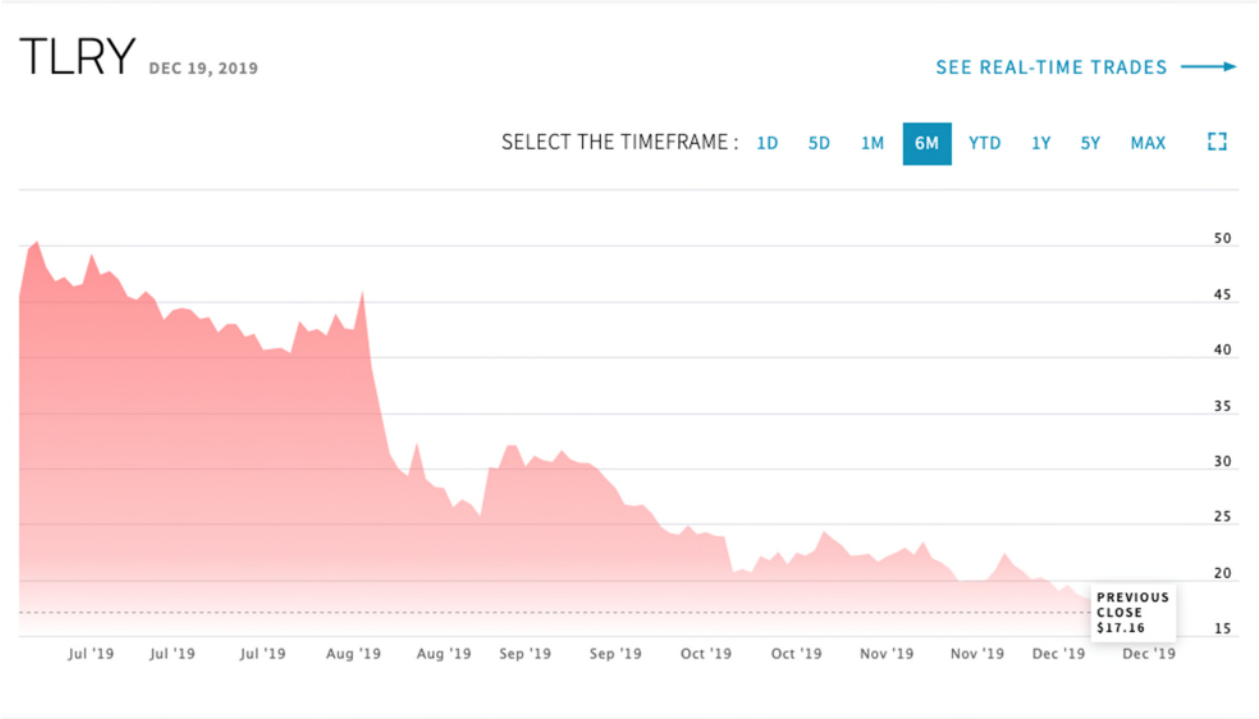
[54] TILRAY_220_0002931 (emphasis added).

pro forma numbers indicate that they would experience economic dilution by approximately 3%; their voting control would be diluted from 9% to 8.2%.

119. Perhaps more importantly, besides relative voting dilution, 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. Privateer could not use its control too aggressively for its own interests because it bore 75% of any harmful decisions. Now, the Privateer Founders still control any voting decision but only bear a fraction of the harm from those decisions. The new capital structure harms Tilray's minority.

120. *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 in to 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

Intent and through the Reorganization's closing on December 12, 2019, Tilray's stock price has fallen ***more than 57%***:



121. 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 controller. 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.

VI. CLASS ACTION ALLEGATIONS

122. 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").

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

124. 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.

125. 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.

126. Plaintiffs are committed to prosecuting the action and has 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.

127. 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.

VII. DERIVATIVE ALLEGATIONS

128. 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.

129. 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 has retained counsel competent and experienced in stockholder derivative litigation.

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

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

131. The Board cannot disinterestedly or independently consider a demand. Two of the members of the Board—Kennedy and Auerbach—have abiding connections to Privateer.

132. 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.

133. 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.

134. Greenwood cannot disinterestedly and independently consider a demand to prosecute the claims alleged herein. Greenwood serves as a Managing Director of Crestview and two of Crestview's most important and lucrative clients are Tilray and Privateer.

135. By Crestview's own admission, Tilray is a Crestview "client":

136. Indeed, Tilray, is one of Crestview's most important clients. 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:[55]

a. Ginny Movat (5 registrations)

b. Susie Heath (1 registration)

c. Jennifer Babcock (3 registrations)

d. Sarina Rehal (2 registrations)

e. Joanna Carey (2 registrations)

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

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)

137. Thus, at least ten of Crestview's 42 employees (*i.e.*, approximately one-quarter) have lobbied on Tilray's behalf at some point between 2016 and the date of this Complaint.[56]

138. The OCLC's website also reveals that Crestview employees have filed 38 "monthly communication reports"[57] relating to outreach to Canadian government officials on Tilray's behalf.

139. Crestview has also lobbied extensively on behalf of Privateer.[58] The

[56] 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. *See* "Economic Impacts of Tilray in Nanaimo" at 5 ("We have relied upon the completeness, accuracy and fair presentation of al information and data obtained from Crestview Strategy").

[57] 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.

[58] 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-

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)

140. Further, 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.

141. Greenwood's position as a Crestview Managing Director and Crestview's thick relationship with both Tilray and Privateer fatally compromised Greenwood's ability to (a) negotiate aggressively against Privateer in connection with the Reorganization and (b) 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

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regulated cannabis industry." Additionally, according to a December 31, 2017 "Who's Lobbying Who in BC? Monthly Snapshot – December 31, 2017", "Charles Rogers, a consultant lobbyist with Crestview Strategy, is 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."

Greenwood's job and primary source of income.

142. 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.

143. 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 controller. 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.

144. 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 arms-length negotiation. [redacted]

145. 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.

146. 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).

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

COUNT I

DIRECT AND DERIVATIVE CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST THE PRIVATEER DEFENDANTS

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

149. 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 owes the Company and the Class the utmost fiduciary duties of due care and loyalty.

150. 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 Kennedy, Blue and Groh's control over Tilray.

151. 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.

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

COUNT II

DIRECT AND DERIVATIVE CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST THE DIRECTOR DEFENDANTS

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

154. 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.

155. By reason of the actions described above, the Director Defendants have breached their fiduciary duties. The Individual Defendants approved the unfair Reorganization that provides the Privateer Defendants with hundreds of millions 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.

156. Further, the Director Defendants never sought a valuation nor even consideration 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.

157. 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.

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

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

F. 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;

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

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

Dated: February 26, 2020

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

/s/ Gregory V. Varallo
Gregory V. Varallo (#2242)
500 Delaware Avenue, Suite 901
Wilmington, DE 19801
(302) 364-3601

FRIEDLANDER & GORRIS, P.A.

/s/ Jeffrey M. Gorris
Jeffrey M. Gorris (#5012)
Christopher M. Foulds (#5169)
Christopher P. Quinn (#5823)
1201 N. Market Street, Suite 2200
Wilmington, DE 19801
(302) 573-3500

ANDREWS & SPRINGER LLC

/s/ Craig J. Springer
Jessica Zeldin (#3558)
Peter B. Andrews (#4623)
Craig J. Springer (#5529)
David M. Sborz (#6203)
3801 Kennett Pike
Building C, Suite 305
Wilmington, DE 19807
(302) 504-4957

Counsel for Plaintiffs

OF COUNSEL:

Mark Lebovitch
David Wales
Jacqueline Y. Ma
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas
New York, NY 10020
(212) 554-1400

Jeremy S. Friedman
David F.E. Tejtel
FRIEDMAN OSTER & TEJTEL PLLC
493 Bedford Center Road,
Suite 2D
Bedford Hills, New York 10507
(888) 529-1108

D. Seamus Kaskela
KASKELA LAW LLC
18 Campus Boulevard, Suite 100
Newtown Square, PA 19073
(484) 258-1585

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I, Gregory Varallo, hereby certify that, on March 3, 2020, the foregoing *Public [redacted] version of the Verified Stockholder Class Action and Derivative Complaint* was filed and served via File & Serve*Xpress* upon the following counsel of record:

Jeffrey M. Gorris, Esq.
Christopher M. Foulds, Esq.
Christopher P. Quinn, Esq.
FRIEDLANDER & GORRIS, P.A.
1201 N. Market Street, Suite 2200
Wilmington, DE 19801

Jessica Zeldin, Esq.
Peter B. Andrews, Esq.
Craig J. Springer, Esq.
David M. Sborz, Esq.
ANDREWS & SPRINGER LLC
3801 Kennett Pike
Building C, Suite 305
Wilmington, DE 19807

/s/ Gregory V. Varallo
Gregory V. Varallo (Bar No. 2242)