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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91223290
Party	Defendant Nerium Biotechnology, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In Re:	§	
Application No.: 85/303510	§	
Filed: April 25, 2011	§	
Mark: NERIUM	§	
IC: 05	§	
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NERIUM INTERNATIONAL, LLC	§	
Opposer	§	Opposition No.:
	§	91223290
	§	
v.	§	
	§	
NERIUM BIOTECHNOLOGY, INC.	§	
Applicant	§	
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	§	

RESPONSE TO OPPOSED MOTION FOR SUSPENSION OF PROCEEDING

The Board should deny Opposer’s Motion for Suspension (filed March 22, 2016). First, the recent Supreme Court decision in *B&B Hardware, Inc. v. Hargis Industries, Inc.* eliminated the key rationale favoring suspension in the past—namely, that the Board’s decisions were not binding upon courts. Second, the state court action styled as *Nerium SkinCare, Inc. v. Nerium International, LLC*, Cause No. DC-15-09594, in the 116th Judicial District Court of Dallas County, Texas (the “Civil Action”) is not sufficiently related to this Opposition and presents no other justification to warrant suspension. Third, Opposer’s seven-month delay in filing the Motion casts serious doubt on the purported “conspicuous, substantive overlap” between the Civil Action and this Opposition. Accordingly, the Board should deny the Motion and allow this Opposition to continue.

I. The Supreme Court’s *B&B Hardware* Decision Did Away with the Traditional Justification for Suspension

In the past, the primary consideration in granting suspensions of TTAB proceedings was the fact that “[a] decision by the district court [would] be binding on the Board whereas a determination by the Board as to a defendant’s right to obtain or retain a registration would not be binding or res judicata in respect to the proceeding pending before the court.” *New Orleans Louisiana Saints, LLC v. Who Dat?, Inc.*, 99 USPQ2d 1550, 1552 (TTAB 2011); accord TBMP § 510.02(a) (3d ed. rev. 2, June 2013) (“[T]he decision of the Board is not binding upon the court.”). Indeed, one of the attorneys representing Opposer in the current proceeding previously argued this very point to a district court in 2011:

“[I]t is standard procedure for the [TTAB] to stay administrative proceedings pending the outcome of court litigation between the same parties involving related issues.” *McCarthy on Trademarks and Unfair Competition* (“McCarthy”) § 32:47 (4th ed. 2011). This is **because “the decision of the federal district court is often binding upon the [TTAB], while the decision of the [TTAB] is not binding upon the court.”** Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 510.02(a). The Fifth Circuit has provided that “several Circuit courts have noted that **federal courts are not obligated to defer to [USPTO] proceedings nor are [USPTO’s] findings on infringement binding on federal courts.**” *Robin Singh Educ. Servs., Inc. v. Excel Test Prep Inc.*, 274 Fed. Appx. 399, 403 n.4 (5th Cir. 2008) (citing *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1162-63 (9th Cir. 2007); *PHC, Inc. v. Pioneer Healthcare, Inc.*, 75 F.3d 75, 80 (1st Cir. 1996)). Indeed, any limited finding within the TTAB’s jurisdiction would be **reviewed “de novo” at the district court.** *Goya Foods, Inc. v. Tropicana Prods., Inc.*, 846 F.2d 848, 853 (2d Cir. 1988).

Exhibit A, Excerpts from *Officeware Corp. v. Dropbox Inc.*, No. 3:11-cv-01448-L, dkt. no. 19 [Plaintiff’s Opposition to Motion to Stay and Brief in Support] at 7 (N.D. Tex. Dec. 12, 2011) (bold and underline emphasis added).

But *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293 (2015), overturned the long-standing rule that the Board’s decisions could not have preclusive effect. In *B&B Hardware*, the Supreme Court firmly rejected the “narrow understanding of issue preclusion”

adopted by courts, *id.* at 1299, and instead held that “[s]o long as the other ordinary elements of issue preclusion are met, when the usages adjudicated by the TTAB are materially the same as those before the district court, issue preclusion should apply,” *id.* at 1310. The *B&B Hardware* opinion thereby placed the Board’s decisions on equal footing with those of other adjudicative bodies, including district courts, in terms of preclusion. *Id.* at 1310 (“Congress’ creation of this elaborate registration scheme, with so many important rights attached and backed up by plenary review, confirms that registration decisions can be weighty enough to ground issue preclusion.”).

As a consequence, the central rationale used for suspending TTAB proceedings before the 2015 *B&B Hardware* opinion—that TTAB decisions were never given preclusive effect—no longer applies. Instead, a federal district court may now be bound by findings of the TTAB. *B&B Hardware*, 135 S. Ct. at 1310.

Opposer urges the Board to uncritically follow its prior “standard policy or procedure . . . to stay administrative proceedings” as a matter of course whenever a civil action may have some remote bearing on TTAB proceedings. 10 TTABVUE 4 (Opp. No. 91223290). But given the drastically altered legal landscape, the putative status quo suspension policy cannot stand. The chief reason for granting suspension no longer exists, and the balance has moved toward maintaining more TTAB proceedings. *See B&B Hardware*, 135 S.Ct at 1310. And, as explained below, no other reason is sufficient to justify a suspension of this Opposition.

II. The Texas State Court Action Has Insufficient Connection to this Opposition to Support a Suspension

Viewing this Opposition through the lens of *B&B Hardware*, there is no adequate justification in favor of suspension based on the Texas state court action cited by Opposer.

First, Opposer’s Motion casually dismisses the relevant fact that the Civil Action involves very different issues than those raised in this Opposition. The Civil Action is in essence

a business dispute, not a trademark dispute. *See Exhibit B*, Second Amended Original Petition, No. DC-15-09594, at 6 (116th Dist. Ct., Dallas County, Tex. Apr. 4, 2016).¹ In the state court case, Nerium SkinCare, Inc. (“SkinCare”)—which is not a party to this proceeding—seeks remedies under various Texas state laws based on Opposer’s material breaches of a Company Agreement, *id.* ¶¶ 24-34, and breaches of fiduciary duties by Opposer’s sole Manager, *id.* ¶¶ 35-47. SkinCare also seeks a judicial declaration of its right to distribute certain products and to examine the corporate records of Opposer. *Id.* ¶¶ 49-53. Finally, the Civil Action requests an accounting and a winding up and termination. *Id.* ¶¶ 54-60. The common thread among these causes of action is that they are fundamentally about Opposer’s business operations, not its alleged ownership of trademarks.

This Opposition, in contrast, is anchored firmly in federal trademark law, namely, whether Opposer or Applicant Nerium Biotechnology, Inc. (“NBI”) owns and/or has the right to register certain marks. This is true for Opposer’s Notice of Opposition, *see, e.g.*, 1 TTABVUE 4-5, well as NBI’s Answer and Counterclaims, *see, e.g.*, 7 TTABVUE 10-13.

Thus, the issues subjected to judicial scrutiny in the Civil Action and this Opposition are quite clearly different. Moreover, Opposer’s argument that paragraphs 13 and 14 of “SkinCare’s Amended Petition put[] at issue the use and ownership of the Nerium name,” 10 TTABVUE 3, is now moot because the Second Amended Petition deletes the statements in question cited by Opposer. Consequently, there is no danger of substantial “duplication of effort and possible inconsistency in result” based on Board action in this Opposition. *Arcadia Group Brands, Ltd. v. Studior Moderna SA*, 99 USPQ2d 1134, 1136 (TTAB 2011) (non-precedential).

¹ The Second Amended Original Petition, filed on April 4, 2016, is the current active petition in the Civil Action.

Second, Opposer's Motion glosses over the fact that the Civil Action involves a different petitioner—SkinCare—than either of the parties in this Opposition. Opposer attempts to sidestep this deficiency by incorrectly asserting that “Biotech asks the Board to determine SkinCare's rights as well.” 10 TTABVUE 2 (Opp. No. 91223290). Apart from the fact that Biotech seeks no such determination on SkinCare's behalf, Opposer identifies no authority for its proposition that a non-party becomes a party merely by virtue of being mentioned in a pleading. Given the different petitioner in the Civil Action, that case should not cause this Opposition to be suspended.

Third, Opposer's citation to NBI's filing in a New Zealand trademark opposition only confuses whether suspension is currently warranted here. Apart from an unspecified and likely different standard for suspension in New Zealand, as noted above the revised language of the Second Amended Petition removes the references to trademarks cited by Opposer, thereby rendering moot the statement in the New Zealand filing.

In sum, the Civil Action does not support suspension of the Opposition. To the contrary, a suspension would constitute an unnecessary delay to the rights of NBI to registration of a trademark that it has been using in commerce for a decade.

III. Opposer's Months-Long Delay Calls into Question the Supposed Overlap

Finally, Opposer's delay in filing its Motion casts doubt on Opposer's claim that there are “conspicuous, substantive overlap between the issues in the Civil Action and those before the Board.” 10 TTABVUE 3 (Opp. No. 91223290). Had such a truly significant similarity existed, one would have expected Opposer to promptly file a suspension request after August 21, 2015, when the Civil Action was initiated. Instead, Opposer did nothing. During that time, the Board considered NBI's Rule 12(b)(6) Motion to Dismiss, 4 TTABVUE (Opp. No. 91223290), dismissed Opposer's dilution claim on December 22, 2015, 6 TTABVUE 1 (Opp. No.

91223290), and then NBI filed its Answer and Counterclaims on January 21, 2016, 6 TTABVUE (Opp. No. 91223290). And still, Opposer did nothing. Then, after seven months, and with the deadline to answer to NBI's Counterclaims imminent, Opposer filed the subject Motion to Suspend, suddenly asserting that since the very beginning "the outcome of the Civil Action may and will have a bearing on the issues in this opposition proceeding." 10 TTABVUE 5 (Opp. No. 91223290). Opposer's delay in filing this Motion suggests that it is no more than a litigation strategy conceived solely to try to frustrate NBI's pursuit of its lawful remedies.

IV. Conclusion

Given the change in substantive law in the *B&B Hardware* case, the differences between the Civil Action and this Opposition, and the inconsistent delay in raising the issue of suspension, the Motion to Suspend should be denied and this Opposition allowed to proceed.

PRAYER

Applicant Nerium Biotechnology, Inc. therefore respectfully requests that the Motion to Suspend the Proceedings be DENIED.

Dated: April 6, 2016.

Respectfully submitted,

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COUNTER-PETITIONER NERIUM
BIOTECHNOLOGY, INC.**

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing *Response to Opposed Motion for Suspension of Proceeding* and all exhibits and other attachments thereto has been served on Opposer Nerium International, LLC on April 6, 2016 by e-mail per the parties' agreement to the following counsel of record for Opposer:

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/s/ Jason W. Whitney /s/
Jason W. Whitney

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

**OFFICEWARE CORPORATION d/b/a
FILESANYWHERE.COM,**

Plaintiff,

v.

DROPBOX, INC.,

Defendant.

§
§
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§

Civil Action No. 3:11-cv-01448-L

**PLAINTIFF'S OPPOSITION TO MOTION TO STAY
AND BRIEF IN SUPPORT**

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proceeding is completed, Plaintiff would then have to turn to this Court to re-litigate the issue before the TTAB, in addition to the numerous issues that only this Court has the authority to decide, all at substantial, unnecessary, and inefficient cost. In light of the substantial harm to Plaintiff, Defendant's motion should be denied.

D. The TTAB correctly suspended its proceedings in favor of the District Court.

The Court need not consider whether to stay this action in favor of the TTAB proceeding because the TTAB has already suspended its proceedings. Under 37 C.F.R. § 2.117, “[w]henver it shall come to the attention of the Trademark Trial and Appeal Board that a party or parties to a pending case are engaged in a civil action or another Board proceeding which may have a bearing on the case, proceedings before the Board may be suspended until termination of the civil action or the other Board proceeding.” As the leading trademark commenter (cited by Defendants at p.3 of their motion to stay), Thomas McCarthy, has stated: “[i]t is standard procedure for the Trademark Board to stay administrative proceedings pending the outcome of court litigation between the same parties involving related issues.” McCarthy § 32:47. This is because “[t]o the extent that a civil action in a federal district court involves issues in common with those in a proceeding before the Board, the decision of the federal district court is often binding upon the Board, while the decision of the Board is not binding upon the court.” TBMP § 510.02(a).³ Notably, “the civil action does not have to be dispositive of the Board proceeding to warrant suspension, it need only have a bearing on the issues before the Board.” *New Orleans Louisiana Saints, LLC v. Who Dat? Inc.*, 99 U.S.P.Q.2d 1550, 1552 (TTAB 2011) (suspending TTAB opposition). As a result, the TTAB consistently stays its proceedings in deference to district court actions that may have even a bearing on the TTAB proceeding. *See, e.g., Arcadia Group Brands Ltd. v. Studio Moderna SA*, 99 U.S.P.Q. 2d 1134 (TTAB 2011); *General Motors*

³ available at http://www.uspto.gov/trademarks/process/appeal/Preface_TBMP.jsp (last visited December 11, 2011).

Corp. v. Cadillac Club Fashions Inc., 22 U.S.P.Q.2d 1933 (TTAB 1992); *Toro Co. v. Hardigg Indus., Inc.*, 187 U.S.P.Q. 689 (TTAB 1975), *rev'd on other grounds*, 549 F.2d 785 (C.C.P.A. 1977); *Other Telephone Co. v. Connecticut Nat'l Telephone Co.*, 181 U.S.P.Q. 125 (TTAB 1974); *Tokaido v. Honda Assoc. inc.*, 179 U.S.P.Q. 861 (TTAB 1973); *Whopper-Burger, Inc. v. Burger King Corp.*, 171 U.S.P.Q. 805 (TTAB 1971). Here, the TTAB found more than issues with a mere “bearing” on its proceeding – it explicitly found issues in common between the opposition and this case:

Indeed, not only may the Federal Case have a bearing on this one, but in the Federal Case applicant specifically requests “[a]n order instructing the United States patent and Trademark Office to deny registration of” applicant’s involved application.

See exhibit A. Because of these common issues, and in accord with precedent, the TTAB properly suspended the opposition in this case. *Id.*

E. Defendant’s arguments regarding consolidation at the TTAB are “plain wrong.”

In support of granting a stay, Defendant argues that “the four parties necessary to conclusively resolve this dispute are before the TTAB.” Even assuming the “four parties” had been consolidated, the Ninth Circuit has specifically dismissed considerations of consolidated TTAB proceedings when considering a motion to stay:

[The party seeking a stay’s] contention that “[opposer] is just plain wrong to argue that the District Court is the only forum that can adjudicate all the issues between the parties in a single action” because the TTAB has consolidated the United States proceedings is itself “plain wrong.” The point is not the number of TTAB proceedings, but rather that only the district court can award damages or injunctive relief in an infringement action.

Rhoades, 504 F.3d at 1164 n.12. Thus, Defendant is “plain wrong” with regard to the import of consolidation.

Further, the TTAB expressly denied Defendant’s request for a consolidation and, in doing so, noted that “all three cases involve claims under Section 2(d) of the Act and are therefore, at

NO. DC-15-09594

NERIUM SKINCARE, INC., <i>on behalf of</i>	§	IN THE DISTRICT COURT OF
<i>itself and in a derivative capacity for</i>	§	
NERIUM INTERNATIONAL, LLC,	§	
	§	
Plaintiff,	§	
	§	
v.	§	DALLAS COUNTY, TEXAS
	§	
NERIUM INTERNATIONAL, LLC,	§	
JEFF A. OLSON and JO PRODUCTS,	§	
L.L.C.	§	
	§	
Defendant.	§	116th JUDICIAL DISTRICT

PLAINTIFF’S SECOND AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Nerium SkinCare, Inc., on behalf of itself and Nerium International LLC, files this Second Amended Original Petition and for causes of action would show the Court as follows:

I. PARTIES, JURISDICTION AND VENUE

1. Plaintiff Nerium SkinCare, Inc. (“Nerium SkinCare”) is a corporation organized and existing under the laws of the state of Texas and is a member of Nerium International, LLC (the “Company”). Plaintiff asserts claims both in its own capacity and in a derivative capacity on behalf of the Company. Pursuant to Section 101.463(c) of the Texas Business Organizations Code, because the Company is closely held and Plaintiff is a substantial minority member, justice requires that the derivative action be treated as a direct action brought by the member for the member’s benefit.

2. Defendant Nerium International, LLC is a limited liability company existing under the laws of the state of Texas. The Company has been previously served and appeared herein.

3. Defendant Jeff A. Olson (“Olson”) is an individual who resides in Denton County, Texas. He has been previously served with process.

4. Defendant JO Products, L.L.C. (“JO”) is a limited liability company existing under the laws of the state of Texas. It has been previously served with process.

5. The amount of damages sought by Nerium SkinCare is within the jurisdictional limits of the Court. Nerium SkinCare seeks monetary relief over \$1,000,000.

6. Venue is proper in Dallas County, because it is the county of the Company’s principal office in this state and because it is the county where all or a substantial part of the events or omissions giving rise to the claim occurred. TEX. CIV. PRAC. & REM. CODE § 15.002(a)(1), (3).

II. DISCOVERY LEVEL

7. Nerium SkinCare requests that discovery be conducted under Level 3 of Texas Rules of Civil Procedure Rule 190.4.

III. FACTUAL ALLEGATIONS

8. Several years before the formation of the Company, Nerium Biotechnology, Inc. (“Biotech”), Plaintiff Nerium SkinCare’s parent, was engaged in researching, developing and testing products using extracts of the *Nerium oleander* plant that appear to have unique health benefits. During that process, Biotech discovered that the unique properties of the *Nerium oleander* plant provided remarkable age-defying results when applied to the skin. Biotech patented an extraction process to create a Nerium oleander extract product called NAE-8®. Biotech created Nerium SkinCare to develop, formulate and manufacture natural skincare products, some of which would contain the NAE-8® extract. Biotech and Nerium SkinCare are focused on bringing safe and quality products with real science behind them to the marketplace.

9. Having developed a first-of-its-kind product, with a patented extraction process that yields a beneficial extract, Nerium SkinCare considered marketing alternatives and was introduced to Jeff Olson (“Olson”). Nerium SkinCare and Olson agreed to create the Company to market and sell Nerium SkinCare products. By creating the Company, Nerium SkinCare and Olson hoped to marry Olson’s marketing experience with the ability of Biotech and Nerium SkinCare to develop and produce safe and effective cosmetic products with real science behind them.

10. A Company Agreement for Defendant Nerium International, LLC was entered into on April 6, 2011, effective as of October 23, 2010, with Olson’s company, JO, owning 70%, and Nerium SkinCare owning 30%. Olson is the Manager, and the Company is a “Manager-Managed” limited liability company. Olson, as sole Manager, adopted the Company Agreement.

11. The Company Agreement defines the “Product Line” as products that have been developed, or are in the future developed, by Nerium SkinCare and/or Biotech.

12. The Company Agreement establishes the parties’ roles in the relationship. Nerium SkinCare develops and produces the Product Line and the Company sells and distributes the Product Line. The Company Agreement also calls for the execution of a Perpetual Distribution and Licensing Agreement (the “DLA”) between the Company and Nerium SkinCare to delineate the exclusive and non-exclusive rights of Company to market the Product Line and to grant certain intellectual property rights to the Company “to the extent reasonably necessary for the marketing, distribution and sale of the Product Line.” Despite this, the Company has failed and refused to enter into the DLA which, among other things, has frustrated the purpose of the Company Agreement and caused irreconcilable damage to the parties’ relationship.

13. Section 2.05 of the Company Agreement provides that the “primary purposes of the Company shall be the development, purchase, distribution and sale of . . . the Product Line.” Accordingly, the production or distribution of products competitive to the Product Line by the Company is detrimental to the very purpose for which the Company is organized.

14. Without Nerium SkinCare’s consent the Company began selling imitation products overseas that were not manufactured by Nerium SkinCare and do not contain the proprietary oleander extract NAE-8®. The Company refers to the imitation products as the “Optimera Line.” The Company promotes the Optimera Line of skincare products as similar and equivalent to those in the Product Line, despite the fact that they are not manufactured by Nerium SkinCare and they do not contain the proprietary oleander extract NAE-8®. The Optimera Line has become directly competitive with the Product Line.

15. The Company began selling the Optimera Line in Canada in April 2014, in Mexico in September 2014, and some has been sold in the U.S. as well. Since the Company began selling the Optimera Line and for specifically the period between July 2014 and June 2015, sales of the Product Line have decreased by more than \$12 million. In addition to diverting attention from the sale of the Product Line and reducing sales revenue to Nerium SkinCare, the Company has hired personnel to handle manufacturing and regulatory approval, causing an unnecessary duplication of effort and costs.

16. Article V of the Company Agreement requires the Company to allocate profits and make distributions to all Members, on a pro-rata basis, according to the Members’ respective Percentage Interest, subject only to the profit sharing regarding Marketing Aids in Section 21.03 of the Company Agreement and a percentage increase in the distribution in favor of Nerium SkinCare pursuant to Section 21.04 of the Company Agreement.

17. In addition to the Company selling the Optimera products without Nerium SkinCare's consent, the Company has allocated Nerium SkinCare 30% of the Company's costs and expenses but only 20% of the profits from the Optimera Line. The same is true for the EHT product beginning in 2015. As a 30% Member of the Company, Nerium SkinCare is entitled to 30% of the net income from the sale of the Optimera Line and the EHT product. This incorrect allocation of costs and revenue has resulted in unpaid distributions to Nerium SkinCare in excess of \$4 million in violation of Article V of the Company Agreement.

18. Section 21.03 of the Company Agreement expressly provides for a profit sharing regarding Marketing Aids (as defined in Section 6.03 of the Company Agreement) that is different from the Members' percentage ownership interests in the Company. Olson, individually, (as distinguished from JO) is entitled to receive 80% of the Net Profits from Marketing Aids and Nerium SkinCare is entitled to receive 20% of the Net Profits from Marketing Aids. Marketing Aids are certain hard goods and online or computer systems created, authored and/or designed by Olson. Net Profits derived from Marketing Aids is defined as revenue received from the purchase and/or licensing of Marketing Aids, "less the cost to produce and distribute the Marketing Aids (including applicable overhead expenses incurred by Olson and reasonably allocated to the production and distribution of the Marketing Aids)." However, the Company, not Olson, has been incurring those costs and, as a result, Nerium SkinCare has been allocated 30% of those costs in contravention of Section 21.03 of the Company Agreement.

19. The Company has made distributions of cash to JO without making pro-rata distributions to Nerium SkinCare in violation of Article V of the Company Agreement.

20. Section 21.04 of the Company Agreement provides for increased revenue to Nerium SkinCare based upon gross cash proceeds from the sale of the Product Line exceeding

certain thresholds. The relevant thresholds have been exceeded since August 2013, yet the Company has not made the requisite payments to Nerium SkinCare in violation of Article V and Section 21.04 of the Company Agreement.

21. Upon information and belief, the Company has made transfers in excess of \$16,000,000 to off-shore accounts resulting in reduced distributions to Nerium SkinCare in violation of the Company Agreement.

22. On July 30, 2015, pursuant to the applicable provisions of the Texas Business Organizations Code, Nerium SkinCare made a written demand, as a 30% member of the Company, to examine the Company's books, records of accounts, and other information regarding the business affairs and financial condition of the Company. To date, the Company has failed and refused to grant Nerium Skincare access to these materials in violation of the Texas Business Organizations Code.

23. As a result of the actions of the Company and Olson as its sole manager, Nerium SkinCare has suffered and continues to suffer damages.

IV. CAUSES OF ACTION

COUNT 1 – BREACH OF CONTRACT (Against Company and Olson)

24. Nerium SkinCare incorporates herein, as if fully set forth, paragraphs 8 through 23.

25. The Company Agreement is a contract governing the relationship between and the Company, JO, Olson and Nerium SkinCare.

26. The Company Agreement provides that the Manager will not do any act in violation of the Company Agreement. Olson is the sole manager of the Company.

27. By manufacturing and selling Optimera Line and EHT (i.e. products not developed by Nerium SkinCare or Nerium Biotechnology), Olson and the Company have breached the Company Agreement and are frustrating the express purpose for which the Company was organized.

28. Olson and the Company participated in a business which produces cosmetic products, including the Optimera Line, which are materially similar to or competitive with the Product Line, in violation of Section 6.03 of the Company Agreement.

29. As sole manager, pursuant to Section 6.13 of the Company Agreement Olson was “delegated the sole authority for the organization, supervision and oversight of the marketing efforts of the Company, and in such capacity shall supervise and manage the Company efforts to: ... (b) promote and advertise the Product Line; ... (h) plan and coordinate sales and promotional events for the Product Line on a nationwide and, as the markets for the Product Line expand, worldwide basis; In violation of Section 6.13, Olson has failed and refused to promote and advertise the Product Line and instead has introduced, promoted and advertised products outside the Product Line, including competing products such as the Optimera Line.

30. Olson and the Company have breached the Company Agreement by failing to allocate profits and make pro-rata distributions to Nerium SkinCare as required by Article V of the Company Agreement.

31. Olson and the Company have breached Section 21.03 Company Agreement by failing to comply with the profit sharing procedure for Net Profits from Marketing Aids.

32. Olson and the Company have breached Article V and Section 21.04 the Company Agreement by failing to pay increased revenue to Nerium SkinCare based upon gross cash proceeds from the sale of the Product Line exceeding the stated thresholds since August of 2013.

33. Olson and the Company's material breaches of the Company Agreement have caused and continue to cause injury to Nerium SkinCare, and excuse Plaintiff's future performance.

34. Nerium SkinCare seeks damages within the jurisdictional limits of this Court, as well as termination of the Company Agreement.

COUNT 2 – Breach of Fiduciary Duty (Against Olson)

35. Nerium SkinCare incorporates herein, as if fully set forth, paragraphs 8 through 34.

36. Olson is the sole Manager of the Company and owes fiduciary duties of loyalty and care to the Company.

37. Olson breached his fiduciary duties by causing the Company to violate the Company Agreement for his direct personal benefit and to the Company's detriment.

38. Olson has breached his fiduciary duties by allocating profits and making distributions of cash to JO (a company he owns and controls) in excess of JO's pro-rata share—for his personal enrichment and to the detriment of the Company.

39. Olson has breached his fiduciary duties by failing and refusing to pay increased revenue to Nerium SkinCare based upon gross cash proceeds from the sale of the Product Line exceeding the stated thresholds since August of 2013—to the direct and substantial monetary benefit of his company JO.

40. Upon information and belief, Olson breached his fiduciary duties by causing the Company to make transfers in excess of \$16,000,000 to off-shore accounts, reducing the equity in the Company.

41. Olson breached his fiduciary duties by manufacturing and selling the Optimera Line and EHT (i.e. products not developed by Nerium SkinCare or Nerium Biotechnology), for his personal benefit and in contravention of the express purpose of the Company.

42. Olson breached his fiduciary duties by participating in a business which produces cosmetic products which are competitive with the Product Line.

43. Olson breached his fiduciary duties by failing and refusing to promote and advertise the Product Line and instead introducing, promoting and advertising products outside the Product Line, including competing products such as the Optimera Line, that he had a personal financial interest in.

44. Olson's breaches of fiduciary duty injured the Company and Nerium SkinCare.

45. Nerium SkinCare seeks damages within the jurisdictional limits of the Court. In the interest of justice, pursuant to section 101.463 of the Business Organizations Code, the damages should be paid directly to Nerium Skincare.

46. Olson's intentional acts of misconduct entitle Nerium SkinCare to exemplary damages under Texas Civil Practice & Remedies Code section 41.003(a).

47. To remedy Olson's breach of fiduciary duty in this closely-held enterprise, the Court should enter a decree to wind up and terminate the company.

COUNT 3 – DECLARATORY JUDGMENT (Against Company, Olson and JO)

48. Nerium SkinCare incorporates herein, as if fully set forth, paragraphs 8 through 47.

Part 1 – Declaratory Judgment: Product Line and Scope of Exclusivity

49. The Company Agreement contemplates that the Company will be the sole and exclusive worldwide distributor (with the exception of listed Central American Countries) of certain Product Line products, including OTC acne products. However, Section 4.03 of the Company Agreement provides that “it is expressly understood that the Company’s right to distribute OTC products [other than OTC acne products] ... as discussed in Exhibit “C” that are produced by Nerium [i.e. Nerium SkinCare or Nerium Biotechnology] would be on a non-exclusive basis.”

50. Exhibit “C” of the Company Agreement sets forth the Product Line products to which the Company has exclusive and non-exclusive distribution rights. In relevant part, Exhibit “C” provides as follows:

2. Product Line Products that are distributed by the Company on a non-exclusive basis:
 - a. All OTC and associated products produced by Nerium, and/or Nerium Biotech, with the exception of acne products for which the Company shall have exclusive rights as provided above.

51. The Company has taken the position that it has exclusive rights to OTC products in addition to acne products.

52. Accordingly, pursuant to Texas Civil Practice and Remedies Chapter 37, Nerium SkinCare seeks a declaratory judgment that the Company Agreement only grants the Company non-exclusive distribution rights in OTC products (with the exception of acne products which are

exclusive) and that Nerium SkinCare has the right to distribute OTC products to third parties other than that Company.

Part 2 – Declaratory Judgment: Right to Examine Books and Records

53. Nerium SkinCare also seeks declaratory judgment that, pursuant to the applicable provisions of the Texas Business Organizations Code, Nerium SkinCare is entitled to examine the Company's books, records of accounts, and other information regarding the business affairs and financial condition of the Company.

COUNT 4 – ACCOUNTING (Against Company)

54. Nerium SkinCare incorporates herein, as if fully set forth, paragraphs 8 through 53.

55. Nerium SkinCare is equitably entitled to an accounting of the Company's revenue, expenses, and net profits for purposes of calculating any dividend or distribution to which it may be entitled.

COUNT 5 – JUDICIAL WIND UP AND TERMINATION OF THE COMPANY

56. Nerium SkinCare incorporates herein, as if fully set forth, paragraphs 8 through 55.

57. The Court should order the winding up and termination of the Company because it is not reasonably practicable to carry on its business in conformity with its governing documents. *See* Tex. Bus. Org. Code § 11.314.

58. The Court should order the winding up and termination of the Company as a remedy for Olson's breach of fiduciary duty.

59. The Court should order the winding up and termination of the Company as a remedy for Defendants' material breach of the Company Agreement, which excuses Plaintiff's future performance. Alternatively, the Court should recognize a common law cause of action to terminate a closely-held company agreement for breach. The Texas Supreme Court has recognized that "the foreseeability, likelihood, and magnitude of harm sustained by minority shareholders due to the abuse of power by those in control of a closely held corporation is significant, and Texas law should ensure that remedies exist to appropriately address such harm when the underlying actions are wrongful." *Ritchie v. Rupe*, 443 S.W.3d 856, 879 (Tex. 2014). It further observed that "a proper case might justify our recognition of a new common-law cause of action to address a 'gap' in protection for minority shareholders." *Id.* at 890. Such a gap exists here because minorities in close LLCs lack the statutory right that minorities in close corporations have to terminate an entity for breach. *Cf.* Tex. Bus. Org. Code § 21.756. Because there is no existing and adequate remedy, a cause of action to terminate a close LLC should be recognized at common law.

60. Plaintiff requests that the court appoint a qualified person to carry out the winding up the Company who is not affiliated with any Defendant. *See* Tex. Bus. Org. Code § 11.054.

V. ATTORNEY FEES

61. Nerium SkinCare incorporates herein, as if fully set forth, paragraphs 8 through 60.

62. Nerium SkinCare is entitled to recover reasonable and necessary attorney fees under the Texas Civil Practice and Remedies Code chapter 38 because this suit is for breach of contract. Nerium SkinCare has retained counsel. Likewise, Nerium SkinCare is entitled to

recover reasonable and necessary attorney fees under the Texas Civil Practice and Remedies Code § 37.009.

63. If the derivative portion of this lawsuit is not treated as a direct action, *see supra* ¶¶ 1 & 44, Nerium SkinCare is entitled to its attorney's fees under Section 101.461 of the Business Organizations Code because of the substantial benefit conferred on the Company.

VI. CONDITIONS PRECEDENT

64. All conditions precedent to Nerium SkinCare's right to recovery herein have occurred or been excused.

VII. PRAYER

ACCORDINGLY, Nerium SkinCare, Inc. respectfully requests judgment as follows:

- (a) Actual damages in an amount not less than \$1 million;
- (b) Exemplary damages for Olson's breaches of his fiduciary duty;
- (c) Declaratory relief as set forth above;
- (d) An order to wind up and terminate the Company;
- (e) The appointment of another individual, unaffiliated with any Defendant, to carry out the winding up of the Company;
- (f) An accounting as set forth above;
- (g) Reasonable and necessary attorney fees;
- (h) Pre-judgment and post-judgment interest at the highest rate allowed by law;
- (i) All costs of suit; and
- (j) Such other and further relief to which Nerium SkinCare may be justly entitled.

Respectfully submitted,

/s/ Scott D. Levine

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ATTORNEYS FOR PLAINTIFF NERIUM
SKINCARE, LLC

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon the attorneys of record in the above cause in accordance with Rule 21a, Texas Rules of Civil Procedure, on this 4th day of April, 2016.

/s/ Michael S. Forshey