



**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

ROBERT STROUGO, On Behalf of )  
Himself and All Others Similarly )  
Situated, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
AARON P. HOLLANDER, )  
STANLEY J. HILL, JOSEPH J. )  
LHOTA, ITSIK MAARAVI, and )  
FIRST AVIATION SERVICES, INC., )  
 )  
Defendants. )  
 )  
 )  
 )

Civil Action No. 9770-CB

**VERIFIED AMENDED CLASS ACTION COMPLAINT<sup>1</sup>**

Plaintiff Robert Strougo (“Plaintiff”), by his undersigned attorneys, alleges the following on information and belief, except as to the allegations specifically pertaining to Plaintiff, which are based on personal knowledge.

**NATURE OF THE ACTION**

1. Plaintiff brings this action on behalf of himself and all other similarly situated public minority stockholders of First Aviation Services, Inc. (“First Aviation” or the “Company”) who have been harmed as a result of Defendants’ breaches of fiduciary duty in approving a freeze out of the public minority interest

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<sup>1</sup> A black-lined version of this Verified Amended Class Action Complaint reflecting all modifications to the initial Verified Class Action Complaint is attached as Exhibit A.

in First Aviation by the Company's controlling stockholder, Defendant Aaron P. Hollander ("Hollander"). Defendant Hollander, through two entities controlled by him, First Equity Group, Inc. ("First Equity") and JEM III, LLC ("JEM"), acquired the outstanding First Aviation common stock not already owned by Defendant Hollander and his affiliates (collectively, the "Consortium") in a "going-private" transaction through a reverse share split of First Aviation Common A stock of 10,000 to 1 at a mere pre-split price of \$8.40 per share (the "Transaction" or the "Reverse Share Split").

2. Plaintiff further raises individual claims relating to the validity, applicability, and enforceability of Amendment No. 1 to the bylaws of First Aviation, which includes a "forum bylaw" provision in Section VII.7 and a "fee-shifting" provision in VII.8 (the fee-shifting provision is hereinafter referred to as the "Bylaw" or "Bylaw VII.8"). Bylaw VII.8 was adopted on June 3, 2014, following the announcement of the Transaction, to deter stockholders such as Plaintiff from pursuing litigation challenging the Transaction. The Bylaw imposes an obligation on Plaintiff to pay "for all fees, costs, and expenses of every kind and description" incurred by defendants if Plaintiff fails to "obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought." First Aviation Bylaws VII.8. No public announcement has been made notifying First Aviation stockholders about the existence of a fee-shifting

provision, nor has the text of the Bylaw been made publically available to First Aviation's stockholders. Plaintiff's counsel was only allowed access to the text of the Bylaw after Plaintiff caused formal discovery requests to be served on defendants.

3. On May 16, 2014, the Company announced that it had established a special committee (the "Special Committee") of its Board of Directors (the "Board") to consider a proposal made for a Reverse Share Split. The Special Committee was composed of Defendants Joseph J. Lhota ("Lhota") and Stanley J. Hill ("Hill"), both of whom were beholden to Defendant Hollander. Despite their purported independence, the members of the Special Committee had financial ties to Defendant Hollander and the Company. Defendants Lhota and Hill stood to benefit from the Transaction, as they both had enough First Aviation shares to remain stockholders of the Company following consummation of the reverse Share split -- a privilege many of First Aviation's public stockholders did not have.

4. Not only were the Special Committee's members conflicted, but the Special Committee had only illusory power in connection with the consideration of the Transaction and was unable to consider any alternatives. Additionally, the Special Committee failed to elicit or obtain *any* price increase from the Consortium.

5. This unfair process culminated in the Transaction which was effectuated, without a shareholder vote approving the Transaction, on May 30, 2014.

6. Unlike many of the Company's public minority shareholders, Defendant Hollander and other members of the Consortium, including the majority of the Board which approved the Transaction, were able to maintain their ownership in the Company post-Transaction.

7. The two week period between the Company's announcement of the Transaction and its effective date was too brief to allow First Aviation minority stockholders to decide whether to sell their shares on the open market or accept the terms of the Transaction.

8. The Board of Directors did not permit a stockholder vote on this matter, rendering the Transaction a prime example of self-dealing where the timing and structure of the Transaction were extremely favorable to the Defendants, yet detrimental to the Company and its minority stockholders.

9. The Transaction was also not entirely fair as to price. The pre-split price of \$8.40 per share fell below the market price of \$8.42 as of May 28, 2014. Further, shares of First Aviation were trading at \$11.00 as recently as November 18, 2013.

10. The coercive nature of the Transaction is further highlighted by the Board's failure to condition the Transaction on the approval of a majority of the Company's unaffiliated minority shareholders. Rather than protect the interests of *all* Company stockholders, the Board instead allowed the Consortium to overstep the shareholder approval voting process and thereby strip the unaffiliated First Aviation stockholders of their right to a value-maximizing process. The Board's failure to require an affirmative vote of a majority-of-the-minority stockholders rendered the Transaction a *fait accompli*.

11. The Individual Defendants (defined herein had a duty to ensure (and now have the burden to show) that the process leading up to the Transaction, and the consideration given to First Aviation's now-former minority stockholders, are entirely fair. The Individual Defendants cannot meet this burden.

12. Plaintiff further raises individual claims relating to the validity, applicability, and enforceability of Amendment No. 1 to the bylaws of First Aviation, which includes a "forum bylaw" provision in Section VII.7 and a "fee-shifting" provision in VII.8 (the fee-shifting provision is hereinafter referred to as the "Bylaw" or "Bylaw VII.8"). Bylaw VII.8 was adopted on June 3, 2014, following the announcement of the Transaction, to deter stockholders such as Plaintiff from pursuing litigation challenging the Transaction. The Bylaw imposes an obligation on Plaintiff to pay "for all fees, costs, and expenses of every kind and

description” incurred by defendants if Plaintiff fails to “obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought.” First Aviation Bylaws VII.8.

13. On June 3, 2014, the First Aviation Board unilaterally enacted Bylaw VII.8. The Bylaw, by its plain terms and as confirmed by the suspicious timing of the adoption of the Bylaw, closely following the announcement of the Transaction on May 16, 2014, was adopted to discourage litigation challenging the Transaction. Plaintiff discovered the existence of the Bylaw shortly after filing this action, when counsel for defendants contacted Plaintiff’s counsel and announced that the Board had adopted a fee-shifting provision.

14. The Bylaw is invalid, inapplicable, and unenforceable against Plaintiff under the circumstances of this case. Accordingly, the Bylaw should be declared invalid under Delaware law, not applicable to pending claims and not enforceable.

### **THE PARTIES**

15. Until the consummation of the Transaction, Plaintiff was, at all times relevant hereto, a holder of First Aviation common stock.

16. Upon closing of the Transaction, Plaintiff was forced to receive the pre-split price of \$8.40 for his First Aviation shares.

17. Defendant First Aviation, a Delaware corporation, is a provider, through itself and its subsidiaries, of repair and overhaul, rotables management and related engineering services to the aviation industry. First Aviation's principal executive offices are located at 15 Riverside Avenue, First Floor, Westport, Connecticut 06880-4214. As of October 24, 2011, First Aviation had 780,245 shares issued and outstanding trading on the OTC US Market stock exchange under the ticker "FAVS." First Aviation became a non-Securities and Exchange Commission reporting company in 2007, and more recent public information concerning the company's shares and shareholders was unavailable as of May 28, 2014.

18. Defendant Hollander was, at all material times, Chairman of the Board and Chief Executive Officer ("CEO") of the Company. As of June 21, 2013, individually and through First Equity and JEM, Defendant Hollander owned approximately 45.5% of First Aviation's common equity and 64.5% of voting Common A stock of First Aviation. In addition, Defendant Hollander held warrants for a total of 233,135 shares of Common A at an exercise price of \$7.00 per share. Defendant Hollander is Chairman and CEO of First Equity, and is the sole voting shareholder of JEM.

19. Defendant Lhota was, at all material times, a Director of First Aviation. As of June 21, 2013, Lhota owned approximately 17,359 shares or 1.8% of First Aviation's common equity.

20. Defendant Hill was, at all material times, a Director of First Aviation. As of June 21, 2013, Hill owned approximately 17,798 shares or 1.8% of First Aviation's common equity.

21. Defendant Itsik Maaravi ("Maaravi") was, at all material times, a Director of First Aviation.

22. Defendants Hollander, Lhota, Hill and Maaravi are collectively referred to herein as the "Individual Defendants", or the "Board."

23. Individual Defendants, as officers and/or directors of First Aviation, have a fiduciary relationship and responsibility to First Aviation and its stockholders.

### **CLASS ACTION ALLEGATIONS**

24. Plaintiff brings this action pursuant to Rule 23 of the Rules of the Court of Chancery, on behalf of himself and all other unaffiliated public stockholders of the Company (the "Class"), and their successors in interest, who were frozen out in the Transaction. Excluded from the Class are the Defendants herein, members of their immediate families, and any subsidiary, firm, trust, corporation, or other entity related to, or affiliated with, any of the Defendants.

25. This action is properly maintainable as a class action for the following reasons:

(a) The Class is so numerous that joinder of all members is impracticable. As of October 24, 2011, there were over 780,245 shares of First Aviation common stock issued and outstanding;

(b) Plaintiff is committed to prosecuting this action and has retained competent counsel experienced in litigation of this nature. Plaintiff's claims are typical of the claims of the other members of the Class and Plaintiff have the same interests as the other members of the Class. Plaintiff is an adequate representative of the Class and will fairly and adequately protect the interests of the Class; and

(c) 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, which would establish incompatible standards of conduct for Defendants, or adjudications with respect to individual members of the Class that would, as a practical matter, be dispositive of the interests of the other members of the Class not parties to the adjudications or substantially impair or impede their ability to protect their interests.

26. There are questions of law and fact which are common to all members of the Class, including:

(d) Whether the Transaction was entirely fair as to price and process to Plaintiff and the other members of the Class;

(e) Whether the Individual Defendants breached their fiduciary duties of due care and/or loyalty with respect to Plaintiff and the other members of the Class in connection with the Transaction;

(f) Whether Defendant Hollander breached his fiduciary duties as the Company's *de facto* controlling stockholder to Class members in connection with the Transaction;

(g) Whether Plaintiff and the other members of the Class have sustained damages, and if so, what is the proper measure of damages.

## **BACKGROUND OF THE TRANSACTION**

### **The Proposal**

27. On May 16, 2014, First Aviation announced that its Board approved a Reverse Share Split of its Common A stock of 10,000 for 1 at a pre-split price of \$8.40 per share. The Transaction was approved following a study by the Special Committee, comprised of purportedly independent directors Lhota and Hill.

28. The Transaction was funded by Defendant Hollander, who exercised warrants in an amount sufficient to complete the Transaction. Through the Transaction, First Aviation effectively became a privately owned corporation.

29. The Transaction's price per share provided no premium for First Aviation stockholders, failing to account for the Company's future prospects. Moreover, the pre-split price of \$8.40 falls below the market price of \$8.42 as of

May 28, 2014. Further, shares of First Aviation were trading at \$11.00 as recently as November 18, 2013.

### **An Oppressive Process Denying Minority Shareholders a Vote**

30. The First Aviation Board approved, in breach of their fiduciary duties, a going-private process while stripping unaffiliated stockholders of their right to vote on the Transaction.

31. Through its actions, the Board breached their fiduciary duties by denying minority stockholders a choice and granting them no other recourse than to expend time and resources exercising their appraisal rights. The Board's failure to condition the Transaction upon the affirmative vote of a majority-of-the-minority stockholders of First Aviation evidences a complete disregard for the Company's minority stockholders by the Board.

32. Contrary to this Transaction, during a previous reverse stock split effectuated on October 24, 2011, the Board did permit a stockholder vote on the matter. The 2011 reverse stock split involved a 1-for-20 reverse stock split of Company Class A and Class B common stock.

33. As of June 21, 2013, Defendant Hollander, individually and through First Equity and JEM, owns approximately 45.5% of First Aviation's common equity and 64.5% of voting Common A of First Aviation common stock. In addition, Defendant Hollander also held warrants for a total of 233,135 shares of

Common A at an exercise price of \$7.00 per share. Defendant Hollander is Chairman and CEO of First Equity, and is the sole voting shareholder of JEM.

34. Defendant Hollander has utilized his massive ownership stake and warrants in the Company to force the consummation of the Transaction for inadequate consideration to First Aviation minority stockholders. Hollander influenced the beholden Board to enter into a Transaction that excludes minority shareholder input and maximizes his own gain.

### **The Individual Defendants' Fiduciary Duties**

35. Where the directors of a publicly-traded corporation undertake a transaction that will result in either a change in corporate control or a break-up of the corporation's assets, the directors have an affirmative fiduciary obligation: (a) to obtain the highest value reasonably available for the corporation's shareholders; (b) if such transaction will result in a change of corporate control, to obtain for shareholders a reasonable premium; and (c) to provide the corporation's shareholders with all information necessary for them to make a fully informed decision when they are asked to vote on the transaction. To diligently comply with these duties, the directors and/or officers may not take any action that:

a. misleads shareholders about the fairness of the proposed transaction;

- b. adversely affects the value provided to the corporation's shareholders;
- c. unreasonably discourages or inhibits alternative offers to purchase control of the corporation or its assets;
- d. contractually prohibits them from complying with their fiduciary duties;
- e. will otherwise adversely affect their duty to search for and secure the best value reasonably available under the circumstances for the corporation's shareholders; or
- f. will provide the directors and/or officers with preferential treatment at the expense of, or separate from, the public shareholders.

36. Plaintiff alleges herein that Defendants, separately and together, in connection with the Transaction, are knowingly or recklessly violating their fiduciary duties, including their duties of loyalty and good faith owed to Plaintiff and other minority stockholders of First Aviation. Defendants have pursued the Transaction through an unfair process that culminated in an announced Transaction for grossly inadequate consideration, denying minority stockholders the right to vote on the Transaction. As a result, neither Plaintiff nor the Class members were treated fairly in connection with the Transaction.

**THE TRANSACTION WAS NOT ENTIRELY FAIR TO  
FIRST AVIATION'S PUBLIC MINORITY STOCKHOLDERS**

### **Defendant Hollander Had *De Facto* Control Over the Company**

37. As of June 21, 2003, Defendant Hollander and his affiliates beneficially owned approximately 45.5% of First Aviation's common equity and 64.5% of voting Common A stock, making him the single largest stockholder of the Company.

38. As the Company's largest stockholder, CEO and Chairman, Defendant Hollander exerted significant influence over the Company's management and affairs. Defendant Hollander maintained control over the day-to-day operations of the Company and had managerial supremacy.

### **The Special Committee Was Not Independent**

39. At the time when the Transaction was effectuated, Defendant Hollander was Chairman of the Board and Chief Executive Officer ("CEO") of the Company. At least one of the two "Independent Directors" was beholden to Defendant Hollander. Defendant Lhota is a friend of Defendant Hollander from Harvard Business School and was selected by Defendant Hollander to sit on the Board when he needed board members.<sup>2</sup> The natural pull of Defendant Lhota's affiliation was too strong, and at no point did he act independently of Defendant Hollander.

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<sup>2</sup> Andrew W. Hawkins, Mayoral Bid Gets Down to Business, CRAIN'S NEW YORK BUSINESS (February 10, 2013, 12:01 AM), <http://www.crainsnewyork.com/article/20130210/POLITICS/302109973/mayoral-bid-gets-down-to-business>.

40. Moreover, as of June 21, 2013, both Defendants Hill and Lhota held enough First Aviation shares to allow them to remain stockholders of the Company following the consummation of the Transaction, a benefit not shared with the majority (if not the entirety) of the Class.

**The Consideration was not Entirely Fair**

41. The consideration of \$8.40 per share was unfair. As of May 28, 2014, First Aviation shares were trading at \$8.42. Moreover, Company shares were trading at \$11.00 as recently as November 18, 2013.

42. Only through the exercise of this Court's equitable powers can Plaintiff and First Aviation's public stockholders be fully compensated for the immediate and irreparable injury which Defendants' actions have inflicted.

43. Plaintiff and First Aviation's public stockholders have no adequate remedy at law.

**Announcement of the Transaction Prior to Achieving 568F Capability**

44. On May 21, 2014, Piedmont Propulsion Systems LLC ("Piedmont"), a wholly owned subsidiary of First Aviation, announced that it had obtained Federal Aviation Administration ("FAA") approval to provide propeller overhaul for the Hamilton Sundstrand Corporation 568F propeller system. The 568F system is used on the popular family of ATR 42-500 & -600 and ATR 72-500 & -600 aircraft. There have been 1,306 ATR 42 and 72 model aircraft built to date.

45. The announcement came only five days after First Aviation announced the Reverse Stock Split and precluded former First Aviation stockholders from enjoying the benefits of a potential increase in profits for the Company. It does not appear that the Transaction price per share took into account the Company's 568F overhaul approval.

**Philpott Ball & Werner's Fairness Opinion Did Not Take Into Account the True Value First Aviation's Minority Interest In Aerospace Profits International Inc.**

46. On or about March 18, 2013, First Aviation Services sold all of the outstanding shares of common stock in its subsidiary Aerospace Products International Inc. ("API") to API Acquisition Company, a subsidiary of API Holding, Inc., which is itself a subsidiary of Resilience Capital Partners ("Resilience"), a private equity firm. API is a global aviation parts and equipment distributor that also provides supply chain management services to the aviation industry.

47. In connection with the sale, First Aviation was issued a minority interest in API Holding, Inc. On March 18, 2013, API Holding, Inc., The Resilience Fund III, L.P., The Resilience Fund II (PF), L.P., and certain investors (including First Aviation) entered into a stockholders agreement, which set forth certain rights and obligations relating to the ownership and transfer of shares in

API Holding, Inc., as well as the transfer of shares and any interest in or right to acquire shares (the “Stockholders Agreement”). That same day, API Acquisition Company, API Holding, Inc., FAVS, Inc. and First Aviation entered into a stock purchase agreement (the “Stock Purchase Agreement”).

48. Both the Stock Purchase Agreement and the Stockholders Agreement require API Holding, Inc. to provide certain financial information to First Aviation Services Inc. regarding API. Among other things, the Stock Purchase Agreement requires API Holding, Inc. to provide (1) the annual amount of management and other management and advisor fees and expenses paid to Resilience; (2) annual, quarterly, and monthly financial statements including consolidated balance sheets, statements of income, cash flows, and stockholders equity; and (3) a proposed annual budget (to be provided to First Aviation no later than 60 days after the end of each fiscal year).

49. On July 25, 2014, First Aviation filed an action in this Court against API Acquisition Company, API Holding, Inc., Resilience Capital Partners, The Resilience Fund III, L.P., and The Resilience Fund III (PF), L.P seeking specific performance of API Holdings’ obligations to provide certain key financial information under the Stock Purchase Agreement and the Stockholders Agreement (the “API Action”). The complaint alleged that defendants failed to provide certain

financial information as required under the Stock Purchase Agreement and the Stockholders Agreement.

50. Pursuant to the Stock Purchase Agreement, once certain criteria are met First Aviation will receive the right to 6,376.87000 shares of API Holding, Inc. Common Stock and 25,507.45000 shares of API Holding Inc. Preferred Stock (the “Earn-Out Shares”). Until the conditions triggering the issuance of the Earn-Out Shares are met, API Holding, Inc. must provide First Aviation with a written report of (1) the status and computation of progress toward reaching the Earn-Out Target, and (2) the management and other advisory fees and expenses paid to Resilience. As of the time of initiation of the API Action, First Aviation stated that API Holdings’ obligations to provide key material information regarding API had not been met.

51. Philpott Ball & Werner (“Philpott”), the financial advisor First Aviation’s retained to advise the Company on the Transaction, could not have taken into account the information contained in API’s financial statements. Philpott conducted their analysis and issued their fairness opinion in support of the Transaction prior to the announcement of the Transaction on May 16, 2014. First Aviation did not file the API Action for more than two months after API announced the Transaction, and alleged that at the time the Complaint was filed, First Aviation did not have access to crucial financial statements and information

concerning API. Therefore, Philpott was not fully informed of the value of First Aviation's investment in API when it issued its fairness opinion. Consequently, the price that Philpott advised First Aviation was fair for First Aviation shares does not accurately reflect the value of First Aviation's investment in API.

52. First Aviation shareholders are entitled to have a financial advisor with full knowledge of all the relevant facts before them evaluate the price of the Company before their shares are cashed out at a price that could be utterly non-representative of the true value of First Aviation shares.

### **The Entire Fairness Standard Applies Here**

53. When a controlling stockholder uses a reverse split to freeze out minority stockholders without any procedural protections, the transaction will be reviewed for entire fairness with the burden of proof on the defendant fiduciaries. *See Metro. Life Ins. Co. v. Aramark Corp.*, 1998 WL 34302067, at \*3 (Del.Ch. Feb. 5, 1998) (TRANSCRIPT). See generally *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1115 (Del.1994). A reverse split under those circumstances is the "functional equivalent" of a cash-out merger. *Metro. Life*, 1998 WL 34302067, at \*3. If the controlling stockholder permits the board to form a duly empowered and properly functioning special committee, or if the transaction is conditioned on a correctly formulated majority-of-the-minority vote, then the burden could shift to

the Plaintiff to prove that the transaction was unfair. *See In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 644 (Del.Ch.2005)

54. Here, controlling stockholder Defendant Hollander used a reverse split to freeze out minority shareholders without any valid procedural protections. The burden does not shift to Plaintiff to prove that the transaction was unfair because a duly empowered and properly functioning special committee was not formed, and the Transaction was not conditioned on a correctly formulated majority-of-the-minority vote.

55. It is abundantly clear that Defendant Hollander's position as the dominant shareholder of First Aviation standing on both sides of the Transaction requires the Court to evaluate this case using the Entire Fairness Standard.

**Bylaw VII.8 is Inequitable, Invalid, and Unenforceable**

56. On June 3, 2014, the Board adopted Amendment No. 1 to First Aviation's Bylaws. Amendment No. 1 provides as follows:

Section VII.7. Exclusive Forum for Certain Actions. Unless the Corporation consents in writing to the selection of an alternative forum, the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer, assistant officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim pursuant to any provision of the Delaware General Corporation Law, or (iv) any action asserting a claim governed by the internal affairs doctrine shall be a state or federal court located within the state of Delaware, in all cases subject to the court's having personal jurisdiction over the indispensable parties named as defendants.

Section VII.8. Expenses for Certain Actions. In the event that (i) any current or prior stockholder or anyone on their behalf (collectively a “Claiming Party”) initiates or asserts and (sic) claim or counterclaim (collectively a “Claim”), or joins, offers substantial assistance to or has a direct financial interest in any Claim against the Corporation or any director, officer, assistant officer or other employee of the Corporation, and (ii) the Claiming Party (or the third party that received substantial assistance from the Claiming Party or in whose Claim the Claiming Party has a direct financial interest) does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought, then each Claiming Party shall be obligated jointly and severally to reimburse the Corporation and any such director, officer, assistant officer or employee for all fees, costs and expenses of every kind and description (including, but not limited to, all reasonable attorneys’ fees and other litigation expenses) that the parties may incur in connection with such Claim.

57. Bylaw VII.8 was adopted after the Transaction was announced, no doubt with the goal of discouraging First Aviation stockholders such as Plaintiff from pursuing litigation challenging the Transaction. The Bylaw states that any Claiming Party<sup>3</sup> who brings a claim against the Company and “does not obtain a *judgment on the merits that substantially achieves, in substance and amount, the full remedy sought*” is obligated jointly and severally to reimburse the Company and any director, officer, assistant officer or employee not only for all reasonable attorneys’ fees and litigation expenses but for “*all fees, costs and expenses of every kind and description*” that First Aviation and the Individual Defendants may incur in connection with such claim (emphasis added).

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<sup>3</sup> The Bylaw’s definition of “Claiming Party” is unacceptably broad in its reach, applying to any individual that brings any claim against the Company or joins an existing claim, offers substantial assistance to a person bringing such a claim, or even has a direct financial interest in any claim against the Company

58. The Bylaw imposes an impossibly high standard of success on Plaintiff in order to avoid liability under the Bylaw. Plaintiff must obtain a “judgment on the merits that substantially achieves, in substance and amount, the full remedy sought” to avoid liability. According to the Bylaw, Plaintiff will still be liable if even he achieves the full remedy sought through settlement, and not through a judgment on the merits. Further, Plaintiff will still be liable if he prevails on most but not all of his claims, and achieves a significant portion of the full remedy sought.

59. Furthermore, the standard of success imposed by the Bylaw is in grave conflict with Delaware indemnification law. Under the terms of the Bylaw, Plaintiff continues to be liable if he does not achieve the full remedy sought on all of his claims, even if the Individual Defendants are found to be in breach of their fiduciary duties. Under 8 *Del. C.* § 145(b), “***no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the corporation unless and only*** to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper” (emphasis added).

60. In addition to the unacceptably high standard of success imposed by Bylaw VII.8, the Bylaw also imposes liability on Plaintiff for “all fees, costs and expenses of every kind and description.” This too is irreconcilable with Delaware law regarding indemnification which limits indemnification to expenses “actually and reasonably incurred by the person in connection with the defense or settlement of such action or suit if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation.” 8 *Del. C.* § 145 (b).

61. Further, it is a flagrant violation of Delaware public policy to adopt a fee-shifting provision on the heels of a major corporate change, which would discourage and effectively preclude any challenge to the proposed corporate change. The tremendous risk of liability faced by Plaintiff, especially when viewed in light of the relatively small potential economic recovery Plaintiff stands to gain, even if Plaintiff is successful on all his claims, makes it economically irrational to pursue the litigation. It has not been the policy of Delaware courts to stifle the voice of stockholders at the most critical moments of corporate ownership.

62. Whereas Delaware courts have allowed forum selection clauses to stand, it is important to recognize that these clauses merely dictate where the stockholders can seek redress. By contrast, fee-shifting provisions are so successful in discouraging plaintiffs that they effectively prevent stockholders from seeking

redress and extinguish their claims, by virtue of the economic infeasibility of a private stockholder shouldering the litigation costs of a corporation.

63. It is obvious from the timing of this Bylaw that it was adopted with the goal of stifling litigation arising out of the Transaction. The Bylaw was enacted on June 3, 2014, mere weeks after First Aviation publically announced the Transaction in a press release on May 16, 2014. Further, it is entirely possible that the Bylaw was adopted after Plaintiff spoke with a member of the Board and expressed his discontent over the Transaction. The Bylaw was not voted upon by First Aviation stockholders. In fact, it was never even publically announced to First Aviation stockholders. Plaintiff only learned of the Bylaw when defense counsel threatened Plaintiff's counsel with the Bylaw after Plaintiff filed the instant action. Plaintiff and his counsel were only able to obtain a copy of the Bylaw after serving a formal discovery request on Defendants and their counsel.

64. Plaintiff was in effect ambushed with a fee-shifting provision he was unaware of, after he had already instituted his case. Plaintiff then had to fight to even see a copy of the Bylaw, which was not publically announced or made available to First Aviation stockholders. This Bylaw, which was passed without stockholder approval, and indeed without their knowledge, is inequitable, invalid, and unenforceable. Defendants attempt to transfer all the burden and risks of

litigation onto Plaintiff, and in doing so exceed the limits designated by Delaware law and public policy.

## COUNT I

### **Breach of Fiduciary Duty Against the Individual Defendants**

65. Plaintiff repeats and realleges each and every allegation set forth above as if fully set forth herein.

66. The Individual Defendants violated their fiduciary duties owed to the public minority stockholders of First Aviation and acted to put the interests of Defendant Hollander, his affiliates, and consequently their personal interests, ahead of the interests of the Company's minority stockholders or acquiesced in those actions by fellow Defendants. The Individual Defendants failed to take adequate measures to ensure that the interests of First Aviation's minority stockholders are properly protected, and engaged in a process that avoided competitive bidding and provided Defendant Hollander and his affiliates with an unfair advantage by effectively excluding other possible proposals.

67. By the acts, transactions, and courses of conduct alleged herein, the Individual Defendants, individually and acting as a part of a common plan, unfairly deprived Plaintiff and other members of the Class of the true value of their First Aviation investment.

68. By reason of the foregoing acts, practices, and courses of conduct, the Individual Defendants breached their fiduciary obligations owed to Plaintiff and the other members of the Class.

69. As a result of the actions of Individual Defendants, Plaintiff and the Class were harmed in that they did not receive their fair portion of the value of First Aviation's stock and businesses.

70. Because the Individual Defendants dominate and control the business and corporate affairs of First Aviation and have access to private corporate information concerning First Aviation's assets, business, and future prospects, there exists an imbalance and disparity of knowledge and economic power between them and the public stockholders of First Aviation which makes it inherently unfair for them to pursue and recommend any proposed transaction wherein certain Individual Defendants will reap benefits to the exclusion of maximizing shareholder value.

## **COUNT II**

### **Claim for Breach of Fiduciary Duties Against Defendant Hollander**

71. Plaintiff repeats and realleges each and every allegation set forth above as if fully set forth herein.

72. As a *de facto* controlling stockholder of First Aviation, Defendant Hollander owes the Company and its minority stockholders, fiduciary duties of care and loyalty.

73. As set forth herein, Defendant Hollander breached his fiduciary duties to Plaintiff and the other members of the Class by effecting a self-dealing transaction that froze out Plaintiff's and Class members' minority interest in First Aviation at less than fair value.

74. By reason of the foregoing, Defendant Hollander was unjustly enriched and the Class was damaged in an amount to be determined at trial.

**COUNT III**  
**Bylaw VII.8 is Invalid and Unenforceable Because It Is Inconsistent with Delaware Law on Indemnification**

75. Plaintiff repeats and realleges each and every allegation set forth above as if fully set forth herein.

76. Under 8 *Del. C.* § 145(b), a director or officer can only be indemnified “against expenses (including attorneys’ fees) actually and reasonably incurred... in connection with the defense of settlement” of the derivative action. In addition, the director or officer must have “acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the corporation.” However, “no indemnification shall be made in respect of any claim, issue, or matter as to which such person shall have been adjudged to be liable to the corporation unless and only to the extent” that the Court “shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to

indemnity for such expenses which [the Court] shall deem proper.” Under 8 *Del. C.* § 145(c), indemnification of directors or officers is required for expenses actually and reasonably incurred “[t]o the extent” the director or officer “has been successful on the merits or otherwise.”

77. Bylaw VII.8 provides indemnification rights for directors and officers against Plaintiff that exceed the indemnification permitted by 8 *Del. C.* § 145. The Bylaw provides for indemnification of all fees and expenses of directors and officers, even if those directors and officers are adjudged liable on breach of fiduciary duty claims in this action, provided the Plaintiff does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought. For example, if defendants prevail on certain claims, such as the claim for breach of fiduciary duty against Defendant Hollander, they would be entitled under the Bylaw to have Plaintiff reimburse all their expenses on all claims, even if they were adjudged liable on the claims related to the other Individual Defendants. The Bylaw violates § 145(b), which does not permit indemnification as to any claim, issue or matter where directors are adjudged liable to the corporation absent certain findings by the Court.

78. The Bylaw requires Plaintiff to reimburse “all fees, costs, and expenses of every kind and description (including, but not limited to, all reasonable attorneys’ fees and other litigation expenses) that the parties may incur in

connection with such Claim.” However, indemnification under § 145(b) is limited to actual and reasonable litigation expenses, including attorneys’ fees and does not include all costs of every kind and description. The Bylaw is also inconsistent with § 145(c), which entitles directors and officers to indemnification only to the extent they have been successful on the merits or otherwise. Instead, the Bylaw entitles them to have Plaintiff pay all their fees and expenses on all claims, including claims on which they were not successful, if Plaintiff does not obtain a judgment on the merits for the full remedy sought.

**COUNT IV**  
**Bylaw VII.8 is Void Under 8 Del. C. § 144**

79. Plaintiff repeats and realleges each and every allegation set forth above as if fully set forth herein.

80. The bylaws of First Aviation are a contract between the Company and its directors. Bylaw VII.8 confers upon all directors and officers of First Aviation a right to have Plaintiff pay all fees, costs, and expenses of every kind and description. Therefore, the Bylaw is a contract between the corporation and all its directors. Consequently, the Bylaw is void or voidable unless one of the conditions of 8 Del. C. § 144 (a) is met.

81. None of the conditions of § 144 (a) is met. All the directors and officers have a self-interest in the Bylaw, which creates a financial right against

Plaintiff in their favor. The Bylaw was not authorized by disinterested directors under § 144(a)(1) because all the directors are parties to the contract the Bylaw represents with the Company and have a self-interest in that financial right against Plaintiff that contract created. The Bylaw has not been submitted to a vote of the stockholders under § 144(a)(2). As discussed below, the Bylaw was not entirely fair as of the time it was authorized by the self-interested directors. Therefore, § 144(a)(3) is inapplicable. Because the Bylaw does not meet the validity criteria of § 144, it is void.

#### **COUNT V**

#### **Bylaw VII.8 is Invalid and Unenforceable Because It Is Not Entirely Fair, Reasonable, or Equitable**

82. Plaintiff repeats and realleges each and every allegation set forth above as if fully set forth herein.

83. The Directors stand on both sides of the transaction with respect to Bylaw VII.8 because they unilaterally enacted the Bylaw, which conferred on them the right to have Plaintiff reimburse all of their expenses related to this action. Because the directors are not disinterested and independent with respect to the Bylaw, they have the burden of showing under strict judicial scrutiny the entire fairness of the Bylaw.

84. The Bylaw constitutes unfair dealing. The directors initiated and timed the Bylaw for their own benefit. They unilaterally enacted the Bylaw on

June 3, 2014, after the Transaction had been announced and very likely after Plaintiff communicated with Defendant Hollander and voiced his discontent regarding the Transaction. Counsel for defendants sent a communication to Plaintiff's counsel threatening that under the Bylaw, Plaintiff would become obligated to reimburse the Company and the directors for all litigation-related expenses if Plaintiff continues this litigation.

85. The structure of the Bylaw also represents unfair dealing. It is one-sided and non-reciprocal. The directors gave themselves a right to reimbursement unless Plaintiff achieves an impossibly high degree of success. Yet there is no obligation for the directors to pay Plaintiff's expenses, even if the directors are held to have breached their fiduciary duties. The Bylaw was written to apply to cases arising out of this Transaction, and was entered into after the Transaction was announced. It is so far reaching as to threaten liability for any person who offers substantial assistance to Plaintiff or has a financial interest in any Claim. The Bylaw was written so that the directors' reimbursement right against Plaintiff includes not just "all reasonable attorneys' fees and other litigation expenses" but "all fees, costs and expenses of every kind and description."

86. As the unreasonable and one-sided terms of the Bylaw illustrate, there was no negotiation whatsoever with respect to the Bylaw. It was unilaterally enacted by the directors, who gave themselves the right to reimbursement

contained in Bylaw VII.8 without any input from First Aviation's public shareholders. There was no stockholder approval and no agreement by Plaintiffs. There has been no direct or public disclosure of the Bylaw to Plaintiff or First Aviation's other stockholders. Plaintiff became aware of the fee shifting agreement through the threatening communication that Plaintiff's counsel received from defendants' counsel. Plaintiff served formal discovery requests on defendants before defendants allowed Plaintiff's counsel to view the Bylaw. To date, there has been no public announcement alerting First Aviation's shareholders to the existence of the Bylaw, and First Aviation shareholders have no access to the text of the Bylaw.

87. The Bylaw is tremendously unfair from a financial standpoint. It is one-sided and non-reciprocal. The Bylaw renders any attempt by Plaintiff to enforce their right to maintain a derivative action or to enforce the fiduciary duties of the directors and officers prohibitively risky. The Bylaw imposes liability on Plaintiff for "all fees, costs, and expenses of every kind and description" incurred by defendant, even with respect to those aspects of the case where Plaintiff is successful.

88. To be valid, bylaws must be reasonable in their contents, application, and effect. As the discussion above shows, Bylaw VII.8 is not reasonable. Defendants do not adopt the English Rule because Bylaw VII.8 is not reciprocal. It

is not the case that the “loser pays” because the defendants do not pay if they lose, and Plaintiff has to pay even if he prevails. If Plaintiff prevails in a significant way but does not “obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought” they are liable for all of defendants’ expenses. The scope of the Bylaw is also unreasonable. The Bylaw was structured to put stockholders at financial risk for exercising their basic rights under the Delaware General Corporation Law, such as the right to bring an action to compel an annual meeting (§ 211(c)), to obtain books and records (§ 220) or to seek review of an election or vote (§§ 225 and 227). Indeed, the Bylaw extends the liability threat to every form of litigation a stockholder could bring, including any derivative action, any fiduciary duty claim, any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, as well as any claim governed by the internal affairs doctrine. The Bylaw by its terms renders Plaintiff liable for “all fees, costs, and expenses of every kind and description” including those incurred before the Bylaw was enacted and those incurred on claims or issues on which the stockholders prevail. The Bylaw’s effect is to make it economically irrational for Plaintiff to exercise his right or challenge corporate conduct.

89. The language of the Bylaw and the circumstances of its adoption demonstrate that the Bylaw was adopted for the inequitable purpose of

discouraging Plaintiff and other First Aviation shareholders from pursuing any litigation arising out of the Transaction. Shortly after Plaintiff filed the instant case challenging the Transaction, counsel for defendants contacted Plaintiff's counsel and announced that the Board had adopted a fee-shifting provision. Defendants did not reveal the date that the fee-shifting provision was adopted or the language of the fee-shifting provision. Only after Plaintiff's counsel caused formal discovery requests to be served on defendants was Plaintiff allowed access to the text of the Bylaw. No public announcement has been made notifying First Aviation stockholders about the existence of a fee-shifting provision, nor has the text of the Bylaw been made publically available to First Aviation's stockholders.

90. The Bylaw imposes financial liability that causes it to be economically irrational for Plaintiff to continue this litigation because the newly created liability threat far exceeds the economic interest of Plaintiff (or any other stockholder) in any recovery. The directors have obstructed Plaintiff's legitimate efforts to challenge the Transaction through a breach of fiduciary duty case. The Board amended the bylaws in order to obtain an inequitable advantage in the context of this existing derivative litigation by imposing non-reciprocal fee-shifting based on a success standard that is virtually impossible for Plaintiff to meet. The Bylaw is invalid because its inequitable purpose is to deter litigation challenging the Transaction.

## **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff demands judgment relief in his favor and in favor of the Class, and against the Defendants as follows:

A. Certifying this case as a class action, certifying Plaintiff as Class representative and his counsel as Class counsel;

B. Directing Defendants to account to Plaintiff and the Class for all damages suffered by them as a result of Defendants' wrongful conduct alleged herein;

C. Rescinding the Transaction or awarding Plaintiff and the class rescissory damages;

D. Declaring the Bylaw void, invalid, inapplicable, and unenforceable;

E. Awarding Plaintiff the costs, expenses, and disbursements of this action, including any attorneys' and experts' fees and expenses and, if applicable, pre-judgment and post-judgment interest; and

F. Awarding Plaintiff and the Class such other relief as this Court deems just, equitable, and proper.

Dated: September 24, 2014

**MONTGOMERY McCracken  
WALKER & RHOADS, LLP**

By:

*/s/ Sidney S. Liebesman*

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