



**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

EUGENIO POSTORIVO, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 2991-VCP
	)	
AG PAINTBALL HOLDINGS, INC., et al.,	)	
	)	
Defendants.	)	
	)	
	)	
	)	

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

KEE ACTION SPORTS HOLDINGS, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. _____
	)	
EUGENIO POSTORIVO, et al.,	)	TRANSFERRED PURSUANT TO 10 <i>Del. C.</i> §1902
	)	
Defendants.	)	
	)	

**FIRST AMENDED VERIFIED COMPLAINT<sup>1</sup>**

Plaintiff, Eugenio Postorivo, by and through the undersigned counsel, brings this action individually and derivatively on behalf of KEE Action Sports Holdings, Inc., a Delaware corporation (“KEE Action Inc.”), PBS Holding Group, Inc., f/k/a National

<sup>1</sup> Plaintiffs amend for the first time as a matter of course because Defendants have not yet filed a responsive pleading. Pursuant to Court of Chancery Rule 15(aa), Plaintiffs have attached a blackline exhibit as Exhibit “X” hereto indicating the revisions to the Verified Complaint.

Paintball Supply, Inc., a Delaware corporation (“NPS”), PBS Holding Group X-Tremes, Inc., a New Jersey corporation, PBS Holding Group 1, LLC, (f/k/a Empire Sports, LLC), a Delaware Limited Liability Company, and Kings View Associates Limited, a Private Company registered in England and Wales, for an Order: (i) requiring the Defendants to reinstate Postorivo as director and President of KEE Action Sports, LLC (“KEE Action LLC”) pursuant to an Employment Agreement between Postorivo and KEE Action LLC (the “Employment Agreement”); (ii) declaring invalid and *ultra vires* the written consent purporting to remove Postorivo as director of KEE Action, Inc. that Defendant Leffel executed on behalf of AG Paintball Holdings, Inc. (through AG Paintball Holdings, LLC) to hide his misdeeds and the orchestrated actions of Defendants to freeze out Postorivo and fraudulently convert his stock; (iii) compelling KEE Action Inc. to reinstate and return Two Hundred Fifty Thousand (250,000) Unvested Shares of KEE Action Inc’s voting Common Stock to Postorivo, cancelled as a result of wrongful and fraudulent termination of Postorivo as President of KEE Action LLC; (iv) compelling KEE Action Inc. to return to Postorivo One Hundred Twenty-Five (125,000) Shares of the Common Stock fraudulently transferred to KEE Action Inc. and in breach of the Pledge Agreement, dated November 17, 2006 (the “Postorivo Pledge Agreement”); (v) compelling KEE Action Inc. to return One Hundred (100,000) shares of KEE Action Inc’s Series B Junior Preferred Stock to NPS fraudulently transferred to KEE Action Inc. and in breach of the Pledge Agreement, dated November 17, 2006 (“NPS Pledge Agreement”); (vi) requiring Defendants to account for the waste of corporate assets of KEE Action Inc, including without limitation any and all of the proceeds of the sale of the inventory alleged to have been undervalued by Postorivo; (vii) declaring

that Defendants breached the terms of the Asset Purchase Agreement, the Postorivo Employment Agreement, the Postorivo Pledge Agreement and NPS Pledge Agreement; and (viii) declaring that Defendants must indemnify Plaintiffs in accordance with the terms of the Asset Purchase Agreement. In support of their First Amended Verified Complaint, Plaintiffs allege as follows:

### **PRELIMINARY STATEMENT**

1. Plaintiffs bring this action for equitable and declaratory relief and damages in an effort to, *inter alia*, restore the *status quo* that existed at the time the parties entered into an Asset Purchase Agreement (“APA”) and related transactions as more fully described below. As a result of the Defendants’, and in particular, the Director Defendants’ breaches of fiduciary duties, acts of conversion, acts of fraud, waste of corporate assets, and breaches of contract, Plaintiffs have been wrongfully defrauded of the benefits they bargained for under the APA and related transactions and have suffered significant damages, including without limitation the loss of significant value in the stock of the entity in which Plaintiffs had invested substantial assets, including their goodwill and personal reputation. Defendants’ continued mismanagement of the surviving operating entity threatens to render Plaintiffs’ injuries irreparable absent intervention from this Court.

### **THE PARTIES**

2. Plaintiff Eugenio Postorivo (“Postorivo”) is an adult individual residing at 329 Breakneck Road, Sewell, New Jersey 08080.

3. Plaintiff KEE Action Sports Holdings, Inc. (formerly AJ Acquisition Holdings, Inc.) (“KEE Action, Inc.”), is a Delaware corporation with a principal place of business at 570 Mantua Boulevard, Sewell, New Jersey 08080.

4. Plaintiff PBS Holding Group, Inc., f/k/a National Paintball Supply, Inc. (“PBS Holding, Inc.” or “NPS”) is a Delaware corporation with a principal place of business at 329 Breakneck Road, Sewell, New Jersey 08080.

5. Plaintiff PBS Holding Group X-Tremes, Inc., f/k/a Paintball 2Xtremes, Inc. (“PBS Extreme”), is a New Jersey corporation with a primary place of business at 329 Breakneck Road, Sewell, New Jersey 08080.

6. Plaintiff PBS Holding Group 1, LLC, f/k/a Empire Sports, LLC (“PBS Holding LLC”), is a Delaware limited liability company with a principal place of business at 329 Breakneck Road, Sewell, New Jersey 08080.

7. Plaintiff Kings View Associates Limited, is a Private Company registered in England and Wales (“Kings View”) limited by shares registered in England and Wales with formerly a registered office at 24 Chiswell Street, London, United Kingdom EC1Y4YX.

8. Defendant AG Paintball Holdings, Inc. (“AG Paintball”), is a Delaware corporation with a principal place of business at 570 Mantua Boulevard, Sewell, New Jersey 08080. Its registered agent is The Corporation Trust Company, 1209 Orange Street, Wilmington, DE 19801.

9. Defendant KEE Action Sports Holdings, Inc., f/k/a AJ Acquisition Holdings, Inc., (“KEE Action, Inc.”), is a Delaware corporation with a principal place of

business at 570 Mantua Boulevard, Sewell, New Jersey 08080. Its registered agent is The Corporation Trust Company, 1209 Orange Street, Wilmington, DE 19801.

10. Defendant KEE Action Sports, LLC, f/k/a AJ Intermediate Holdings, LLC (“KEE Action, LLC”), is a Delaware Limited Liability Company with a principal place of business at 570 Mantua Boulevard, Sewell, New Jersey 08080. Its registered agent is The Corporation Trust Company, 1209 Orange Street, Wilmington, DE 19801.

11. Defendant KEE Action Sports I, LLC (“KEE Action I, LLC”), is a Delaware Limited Liability Company with a principal place of business at 570 Mantua Boulevard, Sewell, New Jersey 08080. Its registered agent is The Corporation Trust Company, 1209 Orange Street, Wilmington, DE 19801.

12. Defendant KEE Action Sports I UK Limited (“KEE Action UK”), is a Private Company limited by shares registered in England and Wales with a registered office at 24 Chiswell Street, London, United Kingdom EC1Y4YX.

13. Defendants AG Paintball, KEE Action, Inc., KEE Action, LLC, KEE Action I, LLC, and KEE Action UK are collectively referred to as the “Defendant Entities.”

14. Defendant Raymond E. Dombrowski, Jr., (“Dombrowski”) is an adult individual who, on information and belief, is a resident of the State of New Jersey. On information and belief, Dombrowski has a law degree and a license to practice law in an unknown jurisdiction. At all times relevant to this matter, Dombrowski has been (and remains) a managing director of Alvarez & Marsal North America, LLC (“A&M”), and through this position, he has become/been appointed as a director and/or agent of AJ

Holding, Inc., and he is a Director and Officer of both KEE Action Sports, Inc. and KEE Action, LLC.

15. Defendant Brent Leffel, (“Leffel”) is an adult individual, who on information and belief is a resident of the State of New York. At all times relevant to this matter, Leffel was a principal of AJ Holding, Inc. and (on information and belief) the Chairman and a Director of, both KEE Action Sports, Inc. and KEE Action, LLC.

16. Defendants Dombrowski and Leffel are collectively referred to as the “Director Defendants.”

### **JURISDICTION**

17. This Court has jurisdiction over Defendants AG Paintball, KEE Action, Inc., KEE Action, LLC and KEE Action I, LLC, because they are organized in the State of Delaware.

18. This Court has jurisdiction over Defendants KEE Action, Inc., KEE Action, LLC, KEE Action I, LLC, and KEE Action UK because they have voluntarily and purposefully availed themselves of the benefits of this jurisdiction by filing an action in the Superior Court of the State of Delaware in and for New Castle County on May 4, 2007.

19. This Court has jurisdiction over the Director Defendants pursuant to 10 *Del. C.* §3114 because they are directors of KEE Action, Inc.

20. This Court has subject matter jurisdiction over this action pursuant to 10 *Del. C.* §§341, 342 and 343 because Plaintiffs have no adequate remedy at law.

## **FACTUAL BACKGROUND**

### **Postorivo Creates and Grows His Paintball Supply Distribution Business**

21. In 1989, Postorivo began his paintball supply distribution business, which eventually became known worldwide as “National Paintball Supply, Inc.” (“NPS”).

22. As a result of a fortuitous meeting with several persons active in the sport, Postorivo took an immediate interest in paintball and started his paintball distribution business with the initial intent to satisfy the existing demand in southern New Jersey for paintball supplies – a demand that Postorivo found was not being satisfied by any other businesses.

23. Over time, and into the early 1990s, local retail sales extended regionally, and then nationally after Postorivo began to place ads in industry magazines and began to network with other emerging leaders in the industry.

24. NPS’ significant business growth during the 1990’s resulted in a relocation of the business from its original location in Mantua, New Jersey to its worldwide headquarters at a facility located at 570 Mantua Road, in Sewell, New Jersey.

25. NPS’ early retail sales focus shifted to wholesale in the early 1990’s, with NPS eventually selling on a wholesale basis to paintball dealers/distributors throughout the world.

26. Further, NPS’ business development included research and development, product innovation, patents, trademarks, and even the publishing of one of the industry’s leading magazines – Paintball 2Xtremes.

27. From its modest beginnings, NPS' business developed to its peak in 2004 when NPS generated more than \$110 million dollars in revenues, and captured more than approximately 25% of the worldwide paintball supply market.

### **Development of the NPS Paintball Business and Postorivo's Reputation**

28. From its inception, Postorivo had one fundamental goal for his business: he wanted to be a "one stop shop" for any paintball enthusiast, paintball team, or paintball equipment/apparel retailer to fill their paintball needs – immediately. Available goods (through purchase) at advantageous pricing were critical. Postorivo sought to achieve this goal with the acquisition of quality goods at the lowest price possible, so that he could pass those savings on to the customers. Postorivo became known as an effective, respected businessman in the industry.

29. The success of this goal-driven business depended largely upon six very important elements: (a) vendor/supplier relationships; (b) customer relationships; (c) research and development/innovation; (d) branding; (e) marketing; and (f) loyalty. Postorivo's mastery of each of these elements built his first-class reputation and resulted in a great deal of goodwill in the industry in terms of: (i) being a "one stop shop" business with the right pricing; and (ii) being on the cutting edge of research and development of better, more efficient products and apparel.

30. Ongoing relationships with vendors were critical, because ongoing business assured that vendors would honor post-sale warranty commitments and servicing.

31. But the relationships had a personal aspect as well. Vendors would provide product not only on the promise of (and follow through on) repeat business, but

also on Postorivo's word; trust had been forged to such a level that vendors would provide product on the promise of payment and performance of that promise strengthened those relationships, particularly as respected NPS' reputation as a business that could sell larger quantities of vendor products than could others.

32. The commitment from Postorivo himself, and through his staff, to continue to consistently do business with these vendors, and to fairly pay them for their goods, helped fuel NPS' exponential growth.

33. Postorivo has always been the driving force behind these vendor relationships. He personally visited with vendor executives and owners, and he developed relationships of trust and confidence with them.

34. Although Postorivo, like any other smart businessman, would drive a tough bargain at times, Postorivo would abide by his commitments, which enhanced NPS' ability to continue to do consistent and revolving business with these vendors.

35. The second aspect of NPS' successful development involved its customers. Postorivo promoted the "one-stop shopping" concept, and developed his business with this concept in mind. Customers knew that any paintball needs, from apparel to the latest in technology and equipment, could be met by NPS, and that Postorivo honored his commitments to make sure those customers' needs were fulfilled.

36. As the business grew, Postorivo hired and trained sales people in the ways of his business model. He introduced them to customers, educated them on the paintball industry and the needs of customers, and they capitalized on Postorivo's reputation, and by extension, the reputation of the company, to grow NPS' sales.

37. In fact, Postorivo became known in national and international paintball circles as “the Paintball Guy.”

38. The third area of NPS’ success that Postorivo drove and nurtured was in the field of innovation and cutting-edge technology. Postorivo was constantly developing different ways to improve equipment, both from a safety and performance standpoint. His innovations and ideas, particularly in the areas of style, design, and functionality, led him to create new products. Then, by obtaining licenses for, or purchasing patents of component products, Postorivo would turn his vision into reality. Through the acquisition of intellectual property rights, and the creation of his own, Postorivo amassed intellectual property rights that touched virtually every area of the business, from apparel to equipment.

39. Postorivo capitalized on his reputation and invested millions of dollars in the development of new and inventive technology for distribution exclusively through NPS.

40. Fourth, Postorivo was effective at branding. For example, he developed the “Empire” brand, comprising high-end paintball products made from high quality materials. He had a vision of developing a brand that paintball enthusiasts would associate with high quality; they would consider the brand to be the marquis in the industry. He put that vision into action by hiring the right people and experts to design and test the products in a way that conformed to his vision, and he maintained direct control and influence over the process. Every product distributed under the brand had to be personally approved and accepted by Postorivo before it would be marketed. Where appropriate,

associated intellectual property rights would be secured, and NPS would then sponsor and sell the brand.

41. Examples of domain names, NPS brands, and other innovations developed and promoted by Postorivo can be seen on the “<http://www.nationalpaintball.com>” website. Other examples of these brands include Diablo, BT Paintball, and paintballsolutions.com.

42. Fifth, Postorivo was a master marketer. Postorivo mastered the intricacies of the paintball sport and the industry, capturing the nuances in new products and innovations. He quenched the thirst of paintball enthusiasts everywhere for newer, reliable, and technologically superior equipment. If NPS did not have it, no one did.

43. And he knew how to market, advertise and capitalize on his superior reputation and good name in the industry, even publishing one of its most popular magazines -- Paintball-2Xtremes – which became recognized as an industry leader in its content.

44. Perhaps the best example of Postorivo’s value to and reputation in the paintball industry lies in his pre-transaction, day-to-day activities. Postorivo had a passion for wanting to know what the industry demanded, what the customers wanted. NPS would receive hundreds of e-mails every day from interested customers, describing what they wanted from suppliers. Postorivo arranged that every single e-mail that came in over the internet went through his desk, and he would read them every day. He would constantly ask his salespeople what the individual and retail customers were interested in, and, in real time, he would make sure he found some way to meet those demands.

45. Postorivo developed 17 years of unprecedented industry knowledge and experience through trial-and-error, communication, hard work, and education in the industry. He knew how to identify trends and market direction before they happened, and in some instances, he created and influenced that direction. That value, that reputation and goodwill is unparalleled, and every day he is frozen out of the industry is another day that Postorivo – and the industry – cannot recover.

46. Postorivo brought unprecedented popularity to the industry. He invested millions of dollars into bringing paintball to television. He was the driving force behind ESPN televising paintball competitions, and Spike TV televising the “Paintball-2Xtremes” show, which promoted the sport and the safety of the sport. This popularity in turn attracted new players and participants to the sport. In short, it brought paintball enthusiasts and customers to the industry.

47. Finally, customer and employee loyalty was another foundation of NPS’ success. Postorivo had perhaps the lowest employee turnover of any company in the business. He used his knowledge and experience to train his employees, and he built reliable levels of trust and commitment in the employee ranks. In fact, KFF Action, LLC insisted in Postorivo’s Employment Agreement that he use his best efforts, post-transaction, to persuade employees to stay and not move to competing businesses. He achieved great success in carrying out this mandate.

48. Over 17 years, Postorivo built NPS to a compliment of over 150 employees, and his 2004 revenue of more than \$110 million dollars may have comprised more than 25% of the worldwide paintball market.

### **Postorivo is Induced to Sell the Business to These Defendants**

49. From its peak in revenues in 2004 through 2006, NPS experienced a market downturn attributable to both the stagnation of new paintball interest, and a significant dispute between NPS and one of its major, exclusive suppliers. The latter led to litigation which recently resulted in NPS achieving a very significant monetary recovery against that supplier, but the effects of the supplier's conduct affected the company's bottom line through 2006.

50. Desires to retain the employees and find a regular, exclusive supplier of paintballs, among other things, led Postorivo to pitch the NPS assets, and the idea of the merging them with the assets of Pursuit Marketing, Inc. ("PMI"), a significant NPS competitor, to venture capital firms that could provide the lacking resources to grow the business to unprecedented levels. Eventually, the Defendants, backed by a venture capital firm, emerged as the primary interested party.

51. The mechanics of the combination called for KEE Action, LLC through its parent, AJ Acquisition Holdings, Inc., *now known as* KEE Action Sports Holdings, Inc. ("KEE Action, Inc."),<sup>2</sup> to purchase from Postorivo substantially all of the assets of NPS (and several other related entities and businesses), and the assets of PMI. A copy of the press release announcing the combination is attached hereto as Exhibit "A."

52. The letter of intent, and indeed the ultimate agreement, called for Postorivo to continue in his role as President, but do so for the merged entity - KEE Action, LLC, so that the company could continue to capitalize on his tremendous reputation and

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<sup>2</sup> Defendants are funded by the venture capital firm of Angelo Gordon & Company.

goodwill, and perform the duties and handle the responsibilities that had been traditionally his at NPS, as well as those that would reasonably be expected of the President of this new, dynamic entity. Postorivo was told that KEE Action, Inc. was seeking to capitalize on the tremendous vendor and customer relationships he had forged in 17 years in the industry, his innovation, creativity, knowledge, and experience in the paintball field, all of which were virtually unsurpassed.

53. Officers of the acquiring company, including Defendant Leffel, induced Postorivo to agree to the deal by assuring him that they would not have purchased the assets of the two entities and moved forward with the merger of those assets and the operation of the combined business without Postorivo playing a major, integral part in the integration of the businesses and their daily operations.

54. In reasonably relying on Defendants' representations, Postorivo was sufficiently satisfied, particularly given the offer of his post-merger involvement, to sell the assets of his company to KEE Action, Inc. Postorivo was also attracted by the notion that the merger and new capital backing would provide different and greater resources to grow the business in limitless ways.

55. To solidify his involvement, and to assure protection of his continued investment in the NPS assets, Postorivo wanted, and was provided as part of the deal, at least: (i) a 10% common ownership/shareholder interest in the new company, (ii) junior preferred shares with an aggregate liquidation value of Five Million Dollars, (iii) appointment to the board of directors of both KEE Action, Inc. and its wholly-owned subsidiary KEE

Action, LLC, the company formed primarily to operate the merged businesses, and (iv) to maintain his day to day management of the post-merger entity.

### **The Asset Purchase Agreement and the Benefits to Postorivo and NPS**

56. The Asset Purchase Agreement (the “APA”), which closed on November 17, 2006, contained some significant promises from both sides. A true and correct copy of the APA (without exhibits) will be filed under seal once a protective order has been entered to protect potentially confidential information at Exhibit “B” hereto.

57. From Postorivo’s perspective, he sold substantially all of the assets of NPS and several related entities, including without limitation, NPS’ interest in leased real property, inventories, prepaid items, machinery, equipment and other personal property, contracts, a tremendous amount of intellectual property developed by and through Postorivo and NPS including trademarks, patents, copyrights, trade secrets and domain names, security deposits, the sellers’ goodwill, purchase orders, guarantees, receivables, and cash and investments. All NPS/Postorivo customer and vendor relationships were assumed by the new company. All brands, the website, and any other significant operating asset of the businesses were relinquished to KEE Action, Inc. and its subsidiaries/related companies as part of the deal.

58. In partial exchange for the assets, KEE Action, Inc. agreed: to assume the outstanding debt of NPS and Postorivo in an amount not to exceed \$19 million dollars, to issue to NPS and Postorivo junior preferred stock in KEE Action, Inc. with an aggregate liquidation preference of \$5 million dollars (the “Junior Preferred Shares”), and to issue to

NPS and Postorivo restricted shares equal to ten percent (10%) of the fully diluted common stock of KEE Action, Inc. (the “Common Shares”).

59. Although the assumption of debt relieved NPS and Postorivo from that burden, nevertheless, Defendants have only refinanced the debt, after which, they had available to them the same assets Postorivo and NPS possessed to operate the business and satisfy the debt.

60. In essence, by assuming the assets and the debt, Defendants stepped into Postorivo’s shoes in exchange for the issuance of stock and an agreement to employ Postorivo as the new entity’s President.

61. In conjunction with the APA, Postorivo and NPS entered into pledge agreements respecting the Junior Preferred Shares and the Common Shares.

62. The parties also entered into a Certificate of Designations respecting Series A Senior Preferred Stock and the Junior Preferred Shares in conjunction with the APA.

63. Finally, the Common Shares were also subject to a Restricted Stock Agreement.

64. The APA also contains certain indemnification provisions. In particular, the APA provides in pertinent part at Section 11.6 as follows:

If Sellers and Stockholder fail to satisfy an indemnity claim in cash when due, then the Buyer Indemnified Parties may cause such claim to be satisfied, in whole or in part, by the forfeiture (a) first, of Junior Preferred Shares (the “Junior Preferred Equity Interest”) having a value (as determined below) of up to the dollar amount of such claim, and (b) then, if such claim remains unsatisfied after such forfeiture, by the forfeiture of shares of common stock of the Buyer Parent held by Postorivo

(the “Common Equity Interests”) and together with the Junior Preferred Equity Interests, the “Pledged Equity Interests”) having a value (as determined below) of up to the dollar amount of the remaining unsatisfied claim, subject to section 11.7 below.

65. Section 11.6 further sets forth a procedure for the Board of Directors of KEE Action Inc. to determine the fair market value of the forfeited Pledged Equity Interests (as defined above). In the event of a dispute regarding the valuation of the Pledged Equity Interests, the APA defines a procedure whereby the parties may select an Independent Appraiser to determine such fair market value.

66. Section 11.6 provides specifically that “the obligation of the Sellers and the Stockholder to pay the Buyer Damages and the right of the Buyer Parent to cause forfeiture of the Pledged Equity Interests shall be secured by the NPS Pledge Agreement and the Postorivo Pledge Agreement.” (the Postorivo Pledge Agreement and the NPS Pledge Agreement, collectively the “Pledge Agreements”).

#### **Postorivo’s Employment Agreement**

67. Further, and in addition to his appointment to the KEE Action, Inc. and the KEE Action, LLC Boards, Postorivo entered into with KEE Action, LLC (then known as AJ Intermediate Holdings, LLC) an Agreement of Employment dated as of September 29, 2006 (the “Employment Agreement”) and later amended as of November 13, 2006 (the “First Amended Employment Agreement”). The Employment Agreement and the First Amended Employment Agreement are attached hereto as Exhibit “C”.

68. The Employment Agreement was not effective until, and was contingent upon, the actual transfer of assets, which occurred on November 17, 2006. *See* Employment Agreement, preamble (Ex. C).

69. The Employment Agreement called for Postorivo to be the President of KEE Action, LLC, the new paintball business operating company, for an initial period of five years, with options to renew and extend that time frame, in partial exchange for which he agreed to a 5-year, global non-competition clause. Employment Agreement §§ 1.1, 2, 7.3. Postorivo was also scheduled to earn \$400,000 a year in salary (§3.1), and additional bonuses of up to 125% of his salary (§3.2).

70. Under Section 3.3 of the Employment Agreement, as modified by Section 1 of the First Amended Employment Agreement, Postorivo was granted 250,000 “Restricted Shares” of KEE Action Inc. common stock, representing 10% of the total outstanding common stock of KEE Action Inc., on a fully diluted basis (the Common Shares referenced above) under the terms of a Restricted Stock Agreement.

71. Pursuant to the terms of the Restricted Stock Agreement (§2(a)) and Section 1 of the First Amended Employment Agreement, KEE Action Inc. maintained a lapsing right of forfeiture/repurchase in the Common Shares which lapsed 20% annually on the first anniversary of the Grant Date, and 20% thereafter for the next four years on the anniversary Grant Date. The Restricted Stock Agreement Section 2(a) defines “Vested” as “Restricted Shares for which the Company’s right of repurchase shall have lapsed.”

72. Postorivo – like the other managers of the company, including on information and belief Dombrowski – was incented with a bonus compensation scheme tied

to the financial performance of the Company. Section 3.2 of the Employment Agreement provides in pertinent part:

Bonus Incentive Compensation. During the Services Term, the Executive shall be eligible to receive annual incentive compensation (a “Bonus”) of up to 125% of his Base Salary, in such actual percentage (and amount) as the Board (or the Compensation Committee) may determine in the good faith exercise of its discretion to award to him based on the achievement of the Company, as determined by the Board, of earnings targets and Executive’s personal performance and contributions toward meeting such targets, each as the Board may establish in good faith, and upon such other reasonable business and personal goals and objections as the Board may establish in good faith. . . . It is anticipated that the Board (a) will base the Company targets principally upon the achievement of specified EBITDA levels for the applicable periods and (b) that the Executive’s personal targets during the year will include achievement of certain goals relating to the integration of the business of National Paintball Supply, Inc. and its affiliates with the business of Pursuit Marketing, Inc. and its affiliates. . . .

73. Postorivo agreed to this deal only under the condition that he maintain his position as President with the company, and he fully expected to continue his day to day responsibilities, in line with merging the assets of the two competing companies, to take the company to unprecedented levels of success.

74. In fact, paragraph 1.1 of the Employment Agreement contemplated Postorivo continuing post transaction in the same role he enjoyed pre-transaction: “As President [of KEE Action, LLC], [Postorivo] shall perform such duties and have such responsibilities as a reasonably and customarily expected of *such position*.”

### **Postorivo is Frozen Out of the Business**

75. From virtually the first day after the acquisition occurred, Defendants, particularly the Director Defendants, began a systematic pattern of conduct intended to

freeze Postorivo completely out of the operations of the business. It happened so quickly after the acquisition that it was clear that this had been planned all along.

76. For example, in dealing with the development of agreements to purchase goods in the future with vendors, the continuing cyclical agreements with vendors that were the bread and butter of NPS' business prior to the acquisition, Leffel and Dombrowski (the appointed CEO of the new company) repeatedly immersed themselves in those negotiations without any consultation with or input from Postorivo. They sought, and had, no knowledge of or feel for the vendor relationships, and instead went into vendor meetings dictating the terms of payments, the terms of business, with an "our way or the highway" attitude. Vendor relationships critical to business growth were thus destroyed.

77. Moreover, Postorivo was separated from sales, marketing, research and development, mass market accounts, vendors, accounting/reporting, and even internal meetings on these relationships that Postorivo had overseen in his 17 years of business development.

78. In addition, Dombrowski would openly strip Postorivo of any authority with the employees, telling them in open meetings and hallways to instead report to Dombrowski.

79. Beyond: (a) insulating Postorivo from contact with the vendors and customers with whom he had enjoyed long term relationships; (b) isolating him from any marketing plans or strategies; (c) separating him from any product development; and (d) failing and/or refusing to provide Postorivo with any meaningful financial information to monitor the company's progress, all of which he did or enjoyed as President and CEO of

NPS, Defendants took from Postorivo perhaps his most personal contribution to the business: they made him invisible. Postorivo went from being the “Paintball Guy,” the face of the company he built, to being locked away in an office without any public persona. After being the face of the company to the press since its inception, Dombrowski barred Postorivo from talking to the press, and actually forbade Postorivo from speaking with anyone in the industry.

80. Despite these obstacles, and capitalizing on the employee loyalty he developed, Postorivo was able to carry out another one of his employment duties under section 1.1 of the Employment Agreement post-transaction when he successfully used “his best efforts to retain [NPS] employees... and deter them from terminating and competing with [KEE Action, LLC].” Most, if not all, of the integral NPS employees remained with the company during the transition, and they continue to work for KEE Action, LLC, today, at least until the company is irretrievably driven into the ground. Even then, once Postorivo secured employee retention until KEE Action LLC put the employees under contract, the Defendants isolated Postorivo from those relationships as well.

81. Offers by Postorivo by email and orally to assist in whatever endeavors the Director Defendants needed help with were met with belligerence and rejection. Indeed, due to the poor management of Dombrowski and Leffel, the company has not only failed to reach projected financial goals since the merger, the company is losing a great deal of money and being driven into the ground.

**Defendants Artificially Deflate the Value of the Business in order to Manufacture Indemnification Claims against Postorivo**

82. Then, on or about March 28, 2007, KEE Action, Inc. sent a notice of indemnification to Postorivo under the APA which purported to put Postorivo on notice of Defendants' claims that Postorivo had, among other things, (a) excessively valued certain NPS inventory (the "Inventory"), (b) failed to disclose certain "liabilities", and (c) transferred to the purchasers certain intellectual property alleged to infringe upon certain patents, in violation of certain representations and warranties under the APA.

"Defendants' Indemnification Claims"). The Indemnification Claims Notice is attached hereto as Exhibit "D."

83. More specifically, with respect to the Inventory, Defendants alleged significant discrepancies between the "book value" of the Inventory underlying the asset valuation for the APA and the "fair market value" asserted by Defendants post-closing. For example:

<b><u>Type of Inventory</u></b>	<b><u>Book Value</u></b>	<b><u>Defendants alleged "value"</u></b>
NPS Europe Bad Paint	\$442,230	\$195,804
NPS Guns	\$1,209,442	\$0
Empire Trucks	\$281,136	\$0
NPS Reboxed Paint	\$354,896	\$305,565
NPS Closeout Paint	\$337,512	\$200,545
Old Paint	\$451,541	\$242,580
NPS Defective Write-off	\$379,174	\$0

<u>Type of Inventory</u>	<u>Book Value</u>	<u>Defendants alleged "value"</u>
NPS Defective	\$146,010	\$0
NPS Selling Below Cost	\$467,051	\$198,452
NPS Soft Goods	\$1,189,408	\$254,855
Other Inventory	\$6,632,873	\$3,222,951

84. Defendants' Indemnification Claims regarding the Inventory demonstrate excessive write-downs by Defendants – to the point of liquidation firesale prices - and the conduct of business in a way that was inconsistent with NPS' past business practices. Moreover, Defendants' Indemnification Claims do not arise from misrepresentations by Postorivo in conjunction with the sale of the assets. Defendants' choice to close out certain brands, rather than sell the Inventory for profit, does not amount to a misrepresentation. In fact, it is further believed that the Defendants' course of action was dictated, not by profit motive, but instead by a desire to show to their lenders an artificially formulated balance sheet that would present a skewed financial picture of the company after the merger of assets.

85. Postorivo and NPS responded in writing to Defendants' Indemnification Claims on April 17 and May 4, 2007, respectively, in which they denied the claims asserted in the notice of indemnification. Therein, they noted, *inter alia*, that KEF Action, Inc. had provided no supporting data to justify the figures that were supplied for each subcategory of Inventory claimed. Furthermore, Postorivo and NPS noted that not only had the pre-asset sale inventory been confirmed by NPS personnel, but also that the

buyers had conducted their own due diligence with respect to that same inventory without issue. The May 4, 2007 letter from Postorivo and National Paintball Supply, Inc. to KEE Action, Inc. is attached hereto as Exhibit "13".

86. Postorivo and NPS deny, categorically, Defendants' Indemnification Claims, instead seeing the claims as part of the grand scheme to freeze out and eliminate Postorivo to obtain all of the hard work, intellectual property, and customer and vendor relationships forged by Postorivo over 17 years of business operations, without having to compensate Postorivo as an employee, or provide to him the financial benefits of the Common Shares and Junior Preferred Shares that he bargained for in the APA and related transactions. All of Defendants' actions were taken as part of the scheme, and not as an exercise of legitimate business judgment.

87. It is also clear that Defendants' Indemnification Claims were manufactured to justify the taking and assumption of all NPS assets, including the extensive intellectual property, customer/vendor relationships, and even the relationships with NPS employees, only to later completely shut Postorivo out of the business, and more importantly to Defendants, out of the industry. In essence, they took the assets without paying for them, and proceeded to eliminate Postorivo from further involvement and future competition.

88. Compounding the insult is the fact that Defendants are trying to "recoup their losses" at Postorivo's added expense through Defendants' Indemnification Claims.

89. Indeed, upon information and belief, Dombrowski either independently, or in conjunction with one or more Defendants, intentionally dumped, at less than fair market value, much of the NPS inventory in order to meet certain compensation benchmarks contained in his employment agreement, and now, he is attempting to recoup those monies by pursuing the claim against Postorivo. Thus, some or all of KEE Action, Inc.'s inventory claims underlying Defendants' Indemnification Claims are simply a fabrication to cover Dombrowski's own fraudulent activities.

90. Postorivo also responded to Defendants' Indemnification Claims by asserting his own claim arising from the breach of KEE Action, Inc.'s obligations under the APA.

91. Notwithstanding the provisions of the APA, on May 4, 2007, KEE Action, Inc., KEE Action, LLC, KEE Action I, LLC and KEE Action UK (the "Superior Court Plaintiffs") brought an action against Postorivo, PBS Holding, Inc., PBS Extreme, PBS Holding LLC, and Kings View (the "Superior Court Defendants") in the Superior Court of the State of Delaware in and for New Castle County (the "Superior Court Action"). A true and correct copy of the Superior Court Complaint is attached hereto as Exhibit "F".

92. In the Superior Court Action, the Superior Court Plaintiffs brought claims for contractual indemnification (Count I), breach of contract (Count II), and unjust enrichment (Count IV) against the Superior Court Defendants, as well as a separate claim of intentional misrepresentation against Postorivo, individually (Count III). Because the allegations of the Superior Court Complaint are inextricably intertwined with the claims and relief sought in this action, and because the relief sought in this action is primarily equitable,

the Superior Court Action has been transferred to the Court of Chancery and consolidated with this action.

**Defendants Fraudulently Remove Postorivo from the Board**

93. Simultaneously with the filing of the Superior Court Complaint, Defendants purported to terminate Postorivo from the board of directors of KEE Action, Inc. on May 4, 2007. A true and correct copy of the termination notice and resolution is attached hereto as Exhibit “G”.

**Defendants Improperly Terminate Postorivo’s Employment**

94. Notwithstanding repeated requests for financial information, in order to allow Postorivo to ascertain Defendants’ compliance with the provisions of the Employment Agreement, APA and the Pledge Agreements, Defendants never provided Postorivo with any meaningful or material back up or other financial information.

95. Then, on May 5, 2007, Defendants terminated Postorivo’s employment (purportedly for cause) in violation of the Employment Agreement (the “Employment Termination Notice”). A true and correct copy of the Employment Termination Notice is attached hereto as Exhibit “H”.

96. Section 5.2(a) of the Employment Agreement lists the potential grounds for termination of employment for cause, including: “(i) the failure of the Executive [Postorivo] to use his good faith efforts to perform in all material respects such duties as are contemplated by this Agreement or any other lawful direction of the Board of Directors. . . ; (ii) a material breach by the Executive of this Agreement, including, without limitation, the

provisions of Section 7 [entitled “Restrictive Covenants”], or any policies of the Company [Defendant KEE Action LLC] and its subsidiaries applicable to the Executive and communicated to the Executive in writing. . .”. See Ex. C, p. 5 (emphasis added).

97. Sections 5.2(a)(iii) and (iv) list as additional grounds for termination for cause, acts of fraud or the intentional violation of the duty of loyalty to the Company (subsection (iii)), and gross negligence in the performance of Postorivo’s duties as President of KEE Action LLC (section (iv)).

98. Section 5.2(b) does not deem termination for cause under sections (i) and (ii) effective until: (a) Postorivo is given written notice of the proposed grounds for termination under Section 5.2(a)(i) and (ii) and a thirty (30) day right to cure any alleged violations of the Employment Agreement; and (b) Postorivo receives from the Board certified resolutions finding that, in the good-faith opinion of the majority of the Board, Postorivo engaged in the proscribed conduct, specifying in reasonable detail the grounds for termination, and indicating that the grounds for termination have not been cured within the appropriate time limit.

99. Termination for cause results in Postorivo’s loss of any unvested Common Shares of the 10% of the common stock of KEE Action Inc. (KEE Action LLC’s parent), which vests in 20% increments at the end of each year of employment. At the time of Postorivo’s termination, none of the stock had vested, resulting in his complete loss of such stock. (Employment Agreement, p. 3, Section 3.3.) (Ex. C).

100. Termination of Postorivo without cause would have resulted in 100% of the Common Shares vesting. (See Ex. C, p. 4, Section 3.4.)

101. In addition, termination with cause results in Postorivo receiving no salary and no bonus as contemplated under Sections 3.1 and 3.2, whereas termination without cause contemplated receipt of certain amounts of each. (*See* Ex. C, pp. 7-8, Sections 6.2 and 6.3.)

102. The restrictive covenant outlined in Section 7.3 of the Employment Agreement contemplates that Postorivo cannot work in any business in the paintball industry for the greater of five years from initial employment (e.g., through November 17, 2011), or one year after termination, in the United States or abroad in any jurisdiction where any of the sellers had or could reasonably be expected to have customers or a physical presence during the five-plus years of the Employment Agreement.

103. Section 7.9 of the Employment Agreement lists the consideration paid for Postorivo's agreement to the Restrictive Covenants; it states that the Defendants' execution of the Employment Agreement, the grant of the 160,000 Common Shares as of the Effective Date (November 17, 2006), and the other consideration (salary, bonus) to be paid to Postorivo under the Employment Agreement constituted good and adequate consideration for the restrictions set forth in section 7 of the Employment Agreement.

104. The Employment Termination Notice invoked Section 5.2(i), (iii) and (iv). Specifically, KEE Action LLC asserted that Postorivo:

- (i) Failed to use his good faith efforts to perform in all material respects the duties contemplated in the Employment Agreement or other lawful directions of the KEE Action LLC Board of Directors (5.2(a)(i));
- (ii) engaged in acts or omissions constituting fraud or embezzlement, or an intentional violation of his duty of loyalty (5.2(a)(ii)); and

(iii) engaged in gross negligence in the performance of his duties (5.2(a)(iv)).

105. The KFE Action LLC Board asserted seven purported instances of misconduct in the Employment Termination Notice:

- (1) a disputed conflict of interest asserted by Postorivo with respect to intellectual property outside counsel Michael Snyder, Esquire;
- (2) Postorivo's purported failure to disclose accurately the condition of the company's inventory.
- (3) Postorivo's alleged failure to disclose the existence of certain purchase orders;
- (4) Postorivo's alleged "routine" unexplained absences from work;
- (5) Postorivo's alleged disclosure of litigation with a supplier with whom Postorivo was negotiating a settlement;
- (6) Postorivo's alleged misuse of company assets; and
- (7) Postorivo's alleged failure to fulfill his obligations respecting certain unassumed vendor liabilities.

106. Importantly, any purported termination for cause under Section 5.2(a)(i) and (ii) requires notice and opportunity to cure. *See* Ex. H.

107. None of Defendants' manufactured grounds support termination of employment for cause because: (a) the alleged acts arise from pre-Employment Agreement transactions governed by separate and unrelated duties; and/or (b) the grounds do not fall under Sections 5.2(a)(iii) or (iv) of the Employment Agreement, but instead fall under no more than Section 5.2(a)(i), and even if true, which Plaintiff denies, any applicable grounds are curable.

108. For example, item numbers (2), (3), and (7) of the Termination Notice (Ex. H), although absolutely denied, arise from pre-Employment Agreement obligations and duties of Postorivo and NPS as asset sellers, and not from post-merger employment obligations under the Employment Agreement.

109. As for items numbers (1) and (4-6), not only are they vague and non-specific, they could not, under any reasonable set of facts, possibly constitute “gross negligence” under Section 5.2(a)(iv), or any ostensible “intentional violation of [Postorivo’s] duty of loyalty to the Company. . .” under Section 5.2(a)(iii).

110. Defendants have, without justification, failed to follow any of the appropriate procedures for termination with cause outlined in the Employment Agreement, including, without limitation, notice and an opportunity to cure.

111. As a result, Defendants’ termination of Postorivo, along with the usurpation of all consideration given for the restrictive covenants, renders Postorivo completely unemployable in the only industry he has ever known, and, if it stands, irretrievably erodes the reputation, goodwill, experience, knowledge, and relationships Postorivo has developed in over seventeen years in the business.

### **Defendants Strip Postorivo of his Stock**

112. Finally, on May 14, 2007, to add absolute insult to injury, KFE Action, Inc. purported to cancel and forfeit all shares issued to Postorivo under the APA, both the Junior Preferred Shares and the Common Shares, leaving him with no ownership interest in KFE Action, Inc. whatsoever. Notices of Transfer of Shares attached hereto as Exhibit “I”.

113. Thus, as part of a contrived and organized conspiracy to obtain the assets of NPS at the expense of Postorivo and then eliminate Postorivo, by May 14, 2007, less than six months after obtaining the assets of NPS on November 17, 2006, the Defendants systematically stripped Postorivo of his employment, his role as a director of the company, and as a significant owner in the company.

**Defendants Breach the APA with respect to the “Procaps Litigation”**

114. The APA also contains a nondisclosure provision prohibiting disclosures regarding the transactions contemplated by the APA, without the prior approval of the other parties. APA §12.5.

115. “Procaps Litigation” is defined in the APA at Section 1.3(b)(viii) as follows:

any liability relating to (A) *National Paintball Supply, Inc. v. Paintball, LP*, AAA No. 50 181 T 000252 05; and (B) *National Paintball Supply, Inc. v. Imperial Capital Corporation* (U.S.D.C. District of New Jersey) (Civil Action No. 1:06-cv-1544 (JBS) (the “Procaps Litigation”).

116. Pursuant to Section 1.2(c) of the APA, any proceeds or other rights in respect of the Procaps Litigation were excluded from the assets acquired by Defendants and were specifically retained by Plaintiffs (subject to an option right set forth in Section 1.6).

117. Section 1.6(a) of the APA provides Holdings LLC with an option to purchase from NPS, exercisable upon written notice to NPS, all of NPS’ rights in and to a final non-appealable judgment or arbitrator’s award or a binding settlement of the Procaps Litigation for a purchase price equal to the fair market value of such Procaps judgment,

award or settlement as determined pursuant to a fair market value appraisal proceeding defined in Section 1.6(b) of the APA.

118. Plaintiffs recently received a judgment in the arbitration aspect of the Procaps Litigation in the net amount of approximately \$9.6 million dollars.

119. On information and belief, since the issuance of the arbitration judgment in the Procaps Litigation, Defendants have been in contact with Procaps to negotiate a settlement on their own behalf, to the extreme detriment of Plaintiffs and in violation of the contractual nondisclosure obligations in the APA.

120. Defendants' actions are interfering with Plaintiffs' ability to negotiate and explore a final resolution of the Procaps Litigation.

**Demand on the Board Should Be Excused as Futile**

121. Any efforts to cause the directors of KEE Action, Inc. to bring the claims asserted in this action on behalf of KEE Action Inc is inevitably futile and is excused because Dombrowski, Leffel, Dan Bonhoff, David Freeman, Sean Murphy and David Roberts, who constitute a majority of KEE Action Inc.'s directors, are incapable of disinterestedly considering a demand to initiate an action on behalf of KEE Action, Inc. against KEE Action, Inc., Dombrowski and Leffel.

122. Indeed, the particularized facts described above, which are incorporated by reference herein, raise a reasonable doubt both as to Director Defendants' disinterest and independence and as to whether their challenged actions were the product of a valid exercise of business judgment. Based upon the manner in which the business has been operated since the acquisition of assets, it is believed that the remaining directors are

relying upon input and information provided by Dombrowski and Leffel as support for their actions, and they have not independently assessed the information or formed their own judgment concerning their actions, effectively rendering their conduct beholden to the actions of Dombrowski and Leffel.

123. Moreover, Plaintiffs have standing to maintain the derivative claims asserted herein because the systematic steps taken by these Defendants to deprive Plaintiffs of their shares were effectuated through fraud.

**COUNT I**  
**BREACH OF FIDUCIARY DUTY**  
**(Against Defendants Dombrowski and Leffel)**

124. Plaintiffs incorporate each of the preceding paragraphs as though fully set forth herein.

125. The Director Defendants, in their capacities as directors and officers of KEE Action Inc. owed fiduciary duties of care, loyalty and good faith to Postorivo and PBS Holding, Inc.

126. The Director Defendants breached all of these fiduciary duties by, *inter alia*:

- a. wrongfully diverting and wasting corporate assets of KEE Action LLC and KEE Action, Inc.;
- b. purporting to remove Postorivo as Director of KEE Action LLC and KEE Action, Inc.;
- c. purporting to remove Postorivo as President of KEE Action LLC;

- d. causing KEE Action, Inc. to assert fraudulent Indemnification Claims;
- and
- e. wrongfully seizing and forfeiting Postorivo's Common Shares and Junior Preferred Shares.

127. The Director Defendants' breaches of fiduciary duties described above have harmed KEE Action, Inc. and its stockholders in an amount to be determined at trial.

**COUNT II**  
**CONVERSION**  
**(Against All Defendants)**

128. Plaintiffs incorporate each of the preceding paragraphs as though fully set forth herein.

129. AG Paintball and the Director Defendants, directly and as agents for KEE Action Inc. converted the Common Shares and the Junior Preferred Shares of KEE Action Inc.'s stock belonging to Postorivo and PBS Holding Inc.

130. Neither Postorivo nor PBS Holding, Inc. received any consideration in return for the fraudulent forfeiture of their stock.

131. The above-described misappropriation of Postorivo's and PBS Holding Inc.'s stock was without justification and under the guise of a legitimate exercise of rights under the APA and the Pledge Agreements predicated on Defendants' fraudulent Indemnification Claims. AG Paintball and the Director Defendants are liable, jointly and severally, for the full amounts of the misappropriated stock.

**COUNT III**  
**FRAUD**  
**(Against All Defendants)**

132. Plaintiffs incorporate each of the preceding paragraphs as though fully set forth herein.

133. As more fully set forth above, the Defendant Entities and the Director Defendants intentionally and knowingly made numerous material misrepresentations to Plaintiffs and/or failed to disclose material information to Plaintiffs in order to induce Plaintiffs to enter into the APA and to contribute the assets of NPS, and then to immediately thereafter strip Postorivo of the entire consideration he received under the APA, as an employee, director and shareholder, *inter alia*:

a. Defendants misrepresented and/or failed to disclose the true value of the Inventory;

b. Defendants misrepresented and/or failed to disclose the amounts received through the fire sale;

c. Defendants misrepresented and/or failed to disclose the reasoning behind liquidation of the Inventory below the fair market value;

d. Defendants misrepresented and/or failed to disclose their orchestration of the fraudulent Indemnification Claims as a predicate to freeze-out Postorivo and PBS Holding Inc.;

e. Defendants misrepresented and/or failed to disclose that they had committed the acts of waste and misappropriation and the breaches of fiduciary duties more particularly described above; and

f. Defendants misrepresented and/or failed to disclose material information during the negotiations regarding the Disputed Vendor Liabilities.

134. Defendants intended to induce Plaintiffs' reliance on these misrepresentations and material omissions.

135. Plaintiffs justifiably relied on the material misstatements and omissions made by Defendants.

136. As a result of Defendants' fraudulent conduct, Plaintiffs have been injured in an amount to be determined at trial. Plaintiffs reserve the right to elect such equitable remedy as may be appropriate under the circumstances.

**COUNT IV**  
**WASTE OF CORPORATE ASSETS**  
**(Against Defendants Dombrowski and Leffel)**

137. Plaintiffs incorporate each of the preceding paragraphs as though fully set forth herein.

138. The Director Defendants, in their capacities as directors and officers of KEE Action Inc., owe fiduciary duties to KEE Action Inc. and its stockholders.

139. These fiduciary duties prohibited the Director Defendants from approving and participating in the waste of KEE Action, Inc.'s assets.

140. Upon information and belief, Defendant Dombrowski's approval and participation in the waste of KEE Action, Inc.'s corporate assets was precipitated, in whole or part, by a provision in his employment agreement.

141. Upon information and belief, like Postorivo's Employment Agreement, Dombrowski's employment agreement links his bonus compensation to KEE Action, Inc.'s

EBITDA achievement. As a result, Dombrowski had special incentive to find a way to dispose of the NPS assets for less than fair market value and, therefore, wasted those assets in order to ensure that he received his EBITDA-based bonus.

142. The Director Defendants wasted KEE Action, Inc.'s corporate assets by, *inter alia*:

- a. Causing KEE Action, Inc. to suffer losses by failing to return NPS Europe Paint to the manufacturer for credit;
- b. Causing KEE Action, Inc. to suffer losses by disposing of close out paint at less than fair market value;
- c. Causing KEE Action, Inc. to suffer losses by disposing of old paint at less than fair market value;
- d. Causing KEE Action, Inc. to suffer losses by failing to return defective merchandise to the manufacturer and/or selling as refurbished products;
- e. Approving the liquidation sale of the Inventory at below the market prices.

143. Plaintiffs have been damaged by Defendants' waste in an amount to be determined at trial.

**COUNT V**  
**AIDING AND ABETTING**  
**(Against All Defendants)**

144. Plaintiffs incorporate each of the preceding paragraphs as though fully set forth herein.

145. The Defendants have knowingly participated in and aided and abetted each other in the violations of law complained of herein.

146. The Defendant Entities have knowingly participated in and aided and abetted the Director Defendants' breaches of fiduciary duties and waste of KEE Action Inc.'s assets.

**COUNT VI  
CIVIL CONSPIRACY  
(Against All Defendants)**

147. Plaintiffs incorporate each of the preceding paragraphs as though fully set forth herein.

148. The Defendant Entities have knowingly participated in and conspired with each other and the Director Defendants in the violations of law complained of herein.

149. Defendants' fraud and breaches of fiduciary duties, and their conspiracy in each others' fraud and breaches of fiduciary duties have harmed KEE Action Inc. and its stockholders.

**COUNT VII  
BREACH OF CONTRACT/SPECIFIC PERFORMANCE  
(Against Defendants KEE Action, Inc., Dombrowski and Leffel)**

150. Plaintiffs incorporate each of the preceding paragraphs as though fully set forth herein.

151. Pursuant to the terms of the APA, the Employment Agreement and the Pledge Agreements, the forfeiture of any stock by Postorivo arising out of an indemnity claim brought by any or all of the buyers under the APA required the Board of Directors of

KEE Action, Inc. (the “Board”) to determine the fair market value of the shares forfeited by Postorivo as of the date of the forfeiture and share that determination with Postorivo.

152. Further, in the event that Postorivo, following receipt of the fair market value of the forfeited shares as determined by the Board, disputes the fair market value of the forfeited shares, then an “Independent Appraiser” shall be selected and engaged by Postorivo and KEE Action, Inc.

153. However, to date, the Board has not determined the fair market value of the shares forfeited by Postorivo.

154. If the Board has made such a determination, then the Board has failed to share its determination with Postorivo.

155. As a result, Postorivo is not able to dispute the valuation of the forfeited shares and cannot exercise his rights to request an Independent Appraiser.

156. As a result of KEE Action, Inc.’s and the Board’s breach of the express terms of the valuation provisions of the APA, the Employment Agreement and the Pledge Agreements, Postorivo has suffered damages for which he is entitled to relief.

157. Therefore, Plaintiff has been damaged in an amount equal to the fair value of his Junior Preferred Shares and Common Shares in KEE Action, Inc., plus any compensatory, incidental or consequential damages.

**COUNT VIII**  
**BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING**  
**(Against All Defendants)**

158. Plaintiffs incorporate each of the preceding paragraphs as though fully set forth herein.

159. Under Delaware and New York law, every contract impliedly contains a covenant of good faith and fair dealing. A party to a contract makes an implied covenant to interpret and to act reasonably upon contractual language that is on its face reasonable.

160. The covenant of good faith and fair dealing precludes a party from engaging in inequitable conduct in order to avoid its obligations and is designed to protect the spirit of an agreement when, without violating an express term of the agreement, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain.

161. The APA, the Employment Agreement and the Pledge Agreements each constitutes a binding contract among the parties and, as such, each is imbued with the obligation that the parties thereto act in good faith and deal with each other fairly and reasonably.

162. Plaintiffs fulfilled all of their obligations under the APA, the Employment Agreement and the Pledge Agreements, including the contribution of the assets of NPS and the significant value provided by Postorivo's reputation and good will in the paintball industry. In exchange therefore, Plaintiffs were entitled to the benefits of employment, to serve as a director, and to a substantial equity interest pursuant to the Common Shares and the Junior Preferred Shares.

163. Defendants, on the other hand, as more fully set forth above, failed to conduct themselves in good faith under each of the APA, the Employment Agreement and the Pledge Agreements.

164. Defendants have engaged in oppressive and underhanded tactics to deny Plaintiffs the fruits of the parties' bargain, including but not limited to, wrongfully terminating Postorivo as an employee on trumped up indemnification claims, removing Postorivo as a director on the basis of the purported "for cause" termination, and cancelling and causing the Common Shares and the Junior Preferred Shares to be forfeited.

165. As a result of Defendants' oppressive tactics, Plaintiffs have been denied each and every element of consideration bargained for under the APA and related transactions, as set forth herein.

166. Plaintiffs have been damaged in an amount to be determined at trial.

### **COUNT IX** **DECLARATORY JUDGMENT**

167. Plaintiffs reallege and repeat the allegations in the paragraphs above, as if fully set forth herein.

168. There is a dispute between parties whose interests are real and adverse which is justiciable and ripe for adjudication, respecting the wrongful forfeiture of Postorivo's Common Shares and the Junior Preferred Shares.

169. In light of the Defendants' wrongful acts as more fully set forth herein, Plaintiffs seek a declaration:

- a. Declaring Postorivo was wrongfully removed as a director and President and restoring his status as a director and employee;
- b. Declaring invalid and *ultra vires* Defendants' actions purporting to forfeit the Common Shares and the Junior Preferred Shares;

- c. Declaring invalid and *ultra vires* Defendants' actions purporting to terminate Postorivo's employment;
- d. Declaring that Defendants breached the APA, the Employment Agreement and the Pledge Agreements;
- e. Declaring that Defendants must indemnify Plaintiffs in accordance with the terms of the APA and related transactions; and
- f. Declaring that Defendants have breached their fiduciary duties to Plaintiffs and wasted corporate assets.

**COUNT X**  
**PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF**

170. Plaintiffs reallege and repeat the allegations in the paragraphs above, as if fully set forth herein.

171. Plaintiffs are reasonably likely to succeed on the merits of the claims alleged herein.

172. Postorivo and KEE Action, Inc. will suffer immediate and irreparable injury, in the absence of the issuance of an injunction.

173. The harm Plaintiff and the Company will suffer in the absence of preliminary and permanent injunctive relief greatly outweighs the harm Defendants will suffer if such relief is denied.

174. Plaintiffs have no adequate remedy at law for the wrongs complained of above.

175. Plaintiffs seek preliminary and permanent injunctive relief:

- a. Compelling Defendants to reinstate Postorivo as a director;
- b. Compelling Defendants to re-issue and return the Common Shares and the Junior Preferred Shares to Plaintiffs; and
- c. Compelling Defendants to account for their valuation of the inventory purportedly in support of the Indemnification Claims against Plaintiffs.

176. Absent such preliminary injunctive relief, Defendants will continue their pattern of waste and breaches of fiduciary duty in order to enrich themselves.

**COUNT XI**  
**CLAIM UNDER 8 DEL. C. §225 FOR DECLARATORY AND INJUNCTIVE RELIEF**

177. Plaintiffs reallege and repeat the allegations in the paragraphs above, as if fully set forth herein.

178. Postorivo served as a director of KEE Action Inc. and KEE Action LLC and as President of KEE Action LLC.

179. On May 4, 2007, Defendants purported to remove Postorivo as a director pursuant to a termination and removal notice.

180. Defendants' removal of Postorivo as a director was unlawful and in furtherance of Defendants' wrongful and fraudulent acts as further set forth herein.

181. Plaintiffs do not have an adequate remedy at law.

182. Plaintiffs seek an order (a) declaring that the removal of Postorivo as President and as a director was invalid and reinstating Postorivo as a director and as President; (b) preliminarily and permanently enjoining Defendants from taking any actions

contrary to, inconsistent with or which fail to recognize Postorivo's position as a director of the Company.

**COUNT XII**  
**BREACH OF CONTRACT, DECLARATORY AND INJUNCTIVE RELIEF**  
**WITH RESPECT TO THE PROCAPS LITIGATION**

183. Plaintiffs reallege and repeat the allegations in the paragraphs above, as if fully set forth herein.

184. Plaintiffs recently received a judgment after a lengthy arbitration involving Procaps in the amount of \$9.6 million (the "Procaps Litigation").

185. On information and belief, since the issuance of a judgment in the Procaps Litigation, Defendants have been in contact with Procaps to negotiate a settlement.

186. The APA provides Holdings LLC with an option to purchase from NPS, exercisable upon written notice to NPS, all of NPS' rights if the Procaps Litigations settles for a purchase price equal to the fair market value of such Procaps settlement as defined in the APA Section 1.6.

187. Section 12.5 of the APA prohibits the parties from making disclosures to anyone concerning the transactions contemplated by the APA.

188. Defendants are in breach of the nondisclosure provisions of the APA by contacting Procaps directly regarding a potential settlement.

189. Defendants' actions are interfering with Plaintiffs' ability to negotiate a resolution of the Procaps litigation.

190. Defendants have neither a contractual right nor justification to interfere with Plaintiffs' resolution of the Procaps Litigation.

191. Plaintiffs therefore seek an order compelling Defendants to cease and desist their contact of Procaps and specifically enforcing the nondisclosure provisions of the APA.

**COUNT XIII**  
**BREACH OF THE EMPLOYMENT AGREEMENT**

192. Plaintiff hereby incorporates the allegations in the previous paragraphs of this complaint as if set forth at length herein.

193. Each day that Postorivo either fails to receive salary, compensation or other benefits of employment and company ownership, while at the same time being barred from pursuing any activity in the paintball market in the United States because of his non-competition agreement imposes irreparable harm on Postorivo.

194. By barring Plaintiff from contact with customers, vendors, employees, and anyone in the industry, since the day of the asset transfer on November 17, 2006, Defendants have been causing irreparable harm to Postorivo for six months since the transfer of assets, although for much of that time, Postorivo was compensated in a manner contemplated by the APA, the Pledge Agreements, and the Employment Agreement.

195. However, since all compensation was swiftly and systematically taken from him by May 14, 2007, Postorivo has no job, and with the loss of his reputation for more days, weeks, months, and years (up to another four-plus years of inactivity), Postorivo has lost any future in the only industry he has ever known – paintball. Finally, the loss of the Common Shares and Junior Preferred Shares leaves him with nothing from the transaction in exchange for the assets.

196. As a result, Postorivo will suffer immediate and irreparable harm to the reputation, goodwill, and knowledge base that he has generated over seventeen years in the industry. There are several specific examples of this harm.

197. First, the non-compete contained in Paragraph 7 of the Employment Agreement (Ex. C) ostensibly prevents him from speaking with vendors and customers of the business. This has the effect of completely shutting down and eliminating any relationship that he would have had with these entities and persons. As every day passes, contacts with those vendors and customers are supplanted by contacts between Postorivo's competitors in the paintball industry on the one hand, and these business entities and persons on the other.

198. Second, without being involved in day-to-day operations of the paintball company, Postorivo loses a significant knowledge base and the ability to participate in and be involved in the creation of cutting-edge paintball technology, and the branding and marketing of that technology. This will irretrievably eliminate any opportunity he would have in the future to capitalize on his developed ability to understand and predict future movement of the paintball industry, leaving him effectively in the competitive dust.

199. In completely shutting Postorivo out of the paintball business, Defendants have rendered Postorivo unemployable in the industry. Moreover, the industry that had previously benefited from his vision and ability to develop and bring innovative products to the market suffers as well.

200. There is a substantial and justiciable controversy between Postorivo on the one hand, and KEE Action, LLC on the other, regarding whether KEE Action, LLC: (a)

properly vested Postorivo with the authority and discretion to perform the proper duties and handle the responsibilities expected of the President as required under Section 1.1 of the Employment Agreement; (b) properly terminated Postorivo for cause; and (c) properly followed the notice and opportunity to cure provisions of Section 5.2 of the Employment Agreement.

201. Postorivo is likely to succeed on the merits of his claim that he was not terminated for proper cause and was not provided with the opportunity to perform the duties and carry out the responsibilities expected of KEE Action LLC's President, or, alternatively, that Defendants failed to follow the proper notice and cure provisions in terminating Postorivo.

202. The granting of declaratory, preliminary and permanent injunctive relief will not result in greater hardship to Defendants than to Plaintiff.

203. The public interest favors granting the declaratory and injunctive relief.

**WHEREFORE**, Plaintiffs respectfully demand equitable and declaratory relief and damages, and a full and final judgment in their favor and against Defendants as follows:

- a. Declaring that Plaintiff Eugenio Postorivo was removed without cause and restoring the *status quo* with respect to his status as a director of KEE Action, Inc.
- b. Declaring that Plaintiff Eugenio Postorivo was terminated without cause and restoring the *status quo* with respect to his status as President of KEE Action, LLC.

- c. Declaring that Defendants did not bring their indemnity claim in good faith and restoring the *status quo* with respect to any shares forfeited by the Plaintiffs.
- d. Awarding Plaintiff such damages, in addition to the equitable relief requested, as necessary to compensate Plaintiff for the injuries suffered as a result of the breaches of duty alleged herein.
- e. Awarding Plaintiff such damages, in addition to the equitable relief requested, as necessary to compensate Plaintiff for the injuries suffered as a result of the acts of fraud, conversion and waste of corporate assets alleged herein.
- f. Awarding Plaintiffs such damages, in addition to the equitable relief requested, as necessary to compensate Plaintiffs for the injuries suffered as a result of the breaches of contract alleged herein.
- g. Ordering an accounting with respect to Defendants' claims regarding the Inventory.
- h. Declaring that Plaintiff's attorneys' fees and expenses shall be paid by the Defendants;
- i. Awarding Plaintiffs their reasonable attorneys' fees and expenses pursuant to the Asset Purchase Agreement and for the Defendants' bad faith.
- j. Reinstating Plaintiff Postorivo into KEE Action Sports, I.J.C as its President, affording him the freedom and discretion to "perform such duties and have such responsibilities as are reasonably and customarily expected" from that particular position as required under Section 1.1 of the Employment Agreement (including, without limitation, the duties and responsibilities he had in that position

before the asset transfer), restoring his salary and other compensation given by Defendants under the Employment Agreement, and further;

k. Determining that none of the grounds asserted by Defendants constitute a contractual basis to terminate Postorivo with cause;

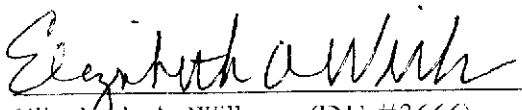
l. To the extent that the Court determines that any such grounds could constitute dismissal for cause, reinstate Postorivo to perform the duties and responsibilities expected of his position and afford him a full thirty (30) day opportunity to cure any such alleged items;

m. Declare that the consideration provided to support the covenant not to compete has been usurped from Postorivo, and therefore, declare that the covenant not to compete is unenforceable either permanently or until and unless Defendants reinstate Postorivo under the conditions sought above; and

n. Awarding Plaintiffs the costs of this action, attorneys' fees, and granting such other and further relief as the Court deems just and proper.

Dated: June 26, 2007

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