



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

HIGHLAND SELECT EQUITY FUND, )  
L.P., a Delaware limited partnership, )  
 )  
Plaintiff, )  
 )  
v. ) C.A. No. 2092-N  
 )  
MOTIENT CORPORATION, )  
a Delaware corporation, )  
 )  
Defendant. )

**PLAINTIFF'S PRE-TRIAL OPENING BRIEF**

Of Counsel:

Layne E. Kruse  
Gerard G. Pecht  
Fulbright & Jaworski LLP  
1301 McKinney, Suite 5100  
Houston, Texas 77010  
(713) 651-5151

Kevin G. Abrams (#2375)  
A. Thompson Bayliss (#4379)  
Abrams & Laster LLP  
Brandywine Plaza West, Suite 303  
1521 Concord Pike  
Wilmington, Delaware 19803  
(302) 778-1000  
Attorneys for Plaintiff

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## TABLE OF CONTENTS

	Page
NATURE AND STAGE OF PROCEEDINGS.....	1
STATEMENT OF FACTS.....	2
A.    THE PARTIES AND OTHER RELEVANT INDIVIDUALS.....	2
B.    THE PIPE TRANSACTIONS AND CTA’S INSISTENCE THAT MOTIENT RETAIN TEJAS. ....	5
C.    THE AUDIT COMMITTEE “INVESTIGATES” POTENTIAL BREACHES OF FIDUCIARY DUTY AND SELF-DEALING. ....	7
D.    MANAGEMENT PROPOSES A ROLL-UP TRANSACTION.....	8
E.    LITIGATION BETWEEN THE HIGHLAND SELECT AFFILIATES AND MOTIENT .....	11
F.    THE HIGHLAND SELECT PROXY CONTEST, THE MOTIENT 2005 10-K, THE 220 DEMAND AND MOTIENT ANNUAL MEETING DEVELOPMENTS.....	12
ARGUMENT.....	15
I.    HIGHLAND SEEKS BOOKS AND RECORDS TO COMMUNICATE WITH STOCKHOLDERS REGARDING MISMANAGEMENT.....	15
II.   HIGHLAND HAS A CREDIBLE BASIS TO SUSPECT POSSIBLE MISMANAGEMENT. ....	16
A.    Motient’s Material Weaknesses In Internal Controls, Its Regulatory Issues And Management’s Mistakes Establish A Credible Basis To Infer Possible Mismanagement.....	16
B.    Motient’s Announcement That It May Have Inadvertently Become An Investment Company Establishes A Credible Basis To Infer Possible Mismanagement .....	19
C.    The Company’s Suspicious Ties To CTA, Tejas And The Singers Establish A Credible Basis To Infer Possible Mismanagement.....	20

## TABLE OF CONTENTS

	Page
D. Motient’s Stock Repurchases From Select Individuals Establish A Credible Basis To Infer Possible Mismanagement.....	21
E. Motient’s Recent Execution Of New Employment Agreements For Downie, Newman And Macklin Establish A Credible Basis To Infer Possible Mismanagement.....	22
F. The Various Ties Between Motient’s Board, Its Senior Management, Tejas, CTA And The Singers Establish A Credible Basis To Infer Possible Mismanagement.....	23
G. The Company’s Decision To Designate CTA Insiders To Lucrative Positions At MSV And TerreStar Establish A Credible Basis To Infer Possible Mismanagement.....	25
H. The Abandonment Of The Failed Roll-Up And Its Re-Emergence As A New Transaction On May 8, 2006 Establish A Credible Basis To Infer Possible Mismanagement.....	26
I. The Audit Committee Investigation And The Conflicts Faced By The Audit Committee’s “Independent Counsel” Establish A Credible Basis To Infer Possible Mismanagement.....	27
J. Gary Singer’s Criminal Record, His Relationship To Motient’s Chairman And His Lucrative Relationship With The Company Establish A Credible Basis To Infer Possible Mismanagement. ....	28
CONCLUSION .....	30

## TABLE OF AUTHORITIES

	Page
<i>Brehm v. Eisner</i> , 746 A.2d 244 (Del. 2000).....	15
<i>Leroy v. Hardwicke Co.</i> , C.A. No. 7023, 1983 WL 21022 (Del. Ch. Feb. 16, 1983) .....	15
<i>Marmon v. Arbinet-Thexchange, Inc.</i> , C.A. No. 20092, 2004 WL 936512 (Del. Ch. Apr. 28, 2004). .....	16
<i>Scattered Corp. v. Chicago Stock Exch. Inc.</i> , 701 A.2d 70 (Del. 1997).....	15
<i>Sec. First Corp. v. U.S. Die Casting &amp; Dev. Co.</i> , 687 A.2d 563 (Del. 1997).....	15, 16
<i>Skoglund v. Ormand Indus., Inc.</i> , C.A. No. 5144, 1976 WL 2443 (Del. Ch. Dec. 3, 1976).....	15
<i>Vista Resources Inc. v. Camelot Indus. Corp.</i> , C.A. No. 6744, 1982 WL 17850 (Del. Ch. Mar. 31, 1982).....	15

## NATURE AND STAGE OF PROCEEDINGS

In this action, plaintiff Highland Select Equity Fund, L.P. (“Highland Select”) seeks to enforce its rights under 8 *Del. C.* § 220 (“Section 220”) to inspect the books and records of defendant Motient Corporation (“Motient” or the “Company”). Highland Select and its affiliates own 14% of Motient’s common stock on a fully converted basis. On February 14, 2006, Highland Select and its affiliates commenced a proxy contest to replace all members of Motient’s board of directors (the “Board”). Motient’s annual meeting of stockholders (the “Annual Meeting”) is scheduled for July 12, 2006.

To secure information about Motient’s mismanagement, to evaluate potential corrective measures and to communicate with stockholders in the ongoing proxy contest, Highland Select delivered a detailed Section 220 demand letter to Motient on April 12, 2006 (the “220 Demand”). Motient has responded with the typical roadblocks in an effort to harass and delay Highland Select. In addition, Motient’s self-styled defenses on the merits to the 220 Demand relate primarily to claims between the parties in multiple Texas lawsuits which have nothing to do with the clear legal rights of Highland Select or the narrow scope of a Section 220 proceeding.

A one day trial is set for June 2, 2006 to allow one witness--the Highland Select officer who signed the Section 220 demand letter--to explain the purposes and needs for the documents requested by Highland Select.

## STATEMENT OF FACTS

### **A. The Parties And Other Relevant Individuals.**

Plaintiff Highland Select is a Delaware limited partnership with its principal place of business in Dallas, Texas. The combined holdings of Highland Select and its affiliates in Motient are worth an estimated \$230 million. The sole officer of Highland Select is Mickey Mince, a former Skadden, Arps attorney who also serves as the chief compliance officer for several affiliates of Highland Select. James Dondero, a former Motient director, is a principal of Highland Capital Management, L.P. ("Highland Capital"), the primary investment advisor to the multiple Highland-related entities. Highland Capital currently manages approximately \$20 billion of investments.

Defendant Motient is a publicly held Delaware corporation with its principal place of business in Illinois. Motient currently has a ten-member Board including Steven G. Singer, Gerald S. Kittner, Barry A. Williamson, Jonelle St. John, Raymond L. Steele, C. Gerald Goldsmith, David Grain, David Meltzer, David Andonian and Jacques Leduc.<sup>1</sup> JX75. Motient's current Board members and its top executive, Christopher Downie, collectively own less than 1% of Motient's outstanding common stock. Motient's primary assets are its direct and indirect equity interests in Mobile Satellite Ventures, LP ("MSV") and TerreStar Networks Inc. ("TerreStar"), which are attempting to develop satellite-based communications systems based on U.S. government licenses to use particular segments of the spectrum. Motient currently owns a 49% stake in MSV and a 61% stake in TerreStar.

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<sup>1</sup> Grain, Meltzer, Andonian and Leduc were appointed by the Board as Motient directors. Just three days after Highland Select delivered the 220 Demand, five of Motient's ten directors announced they would not stand for re-election and will step down at the annual Meeting. JX83.

Motient is a mismanaged company. Public filings reflect that the Company has:

- Failed to timely file its Form 10-K reports for fiscal years 2005, 2004, 2003 and 2002;
- Amended its Form 10-Q reports for the first, second and third quarters of fiscal year 2004 and its Form 10-K for fiscal year 2003 in response to comments and inquiries from the SEC;
- Restated all quarterly financial statements with respect to the first, second and third quarters of fiscal year 2005 and the first quarter of fiscal year 2002;
- Reported multiple “material weaknesses” in its internal controls over financial reporting;
- Announced that it “identified lack of resources to ensure complete application of generally accepted accounting principles as it relates to nonroutine transactions;” and
- Potentially and inadvertently become an “Investment Company” under the Investment Company Act of 1940.

Motient’s financial reporting troubles are only the beginning of the Company’s problems. Motient has reported declining revenues for the past three years. Motient has reported substantially increasing net losses of \$62.1 million, \$72.3 million and \$158.4 million over the last three years. JX66 at p. F-2. Despite the continued decline in its core business and inability to exploit its proposed satellite business, Motient has been paying exorbitant fees to related parties. In fiscal 2005, Motient incurred expenses of \$13.0 million (JX66 at F-34) to related parties for “service-related obligations,” compared to only \$13.8 million in total revenue. JX66 at p.40.

Motient has no President, Chief Executive Officer or Chief Financial Officer. Instead, to run and raise money for the Company, Motient’s thin management maintains a complex web of ties to Communication Technology Associates and Communication Technology Advisors (together “CTA”) and their parent company, Tejas, Inc. (“Tejas”). The

Company now pays CTA \$100,000 per month to provide “ongoing operational consulting” related to the Company’s “core communications business.” JX66 at p. F-34. In addition to this monthly payment, the Company paid CTA and certain of its affiliates substantial investment banking fees over the course of the 2005 fiscal year. For example, in February 2005, as compensation for purported services in connection with Motient’s acquisition of Telecom Satellite Ventures, the Board approved the payment of \$3,709,796 in cash and stock to CTA and specifically agreed that the Company would pay the fee to any party CTA designated. Motient ended up paying \$1,483,918 to the brother of Motient’s chairman -- Gary Singer. JX66 at F-34. All told, Motient paid CTA approximately \$9.43 million in cash and stock in 2005. JX66 at p. F-34.

Current and former CTA affiliated individuals dominate Motient’s Board and its senior management:

- Kittner, a Company director, is a CTA advisor and consultant. JX28 at p. 9.
- Downie, Motient’s Executive Vice President, Chief Operating Officer and Treasurer, was formerly affiliated with CTA as an independent consultant. JX28 at p. 11.
- Gerard Abbruzzese, the founder and a senior executive of CTA, was a director of Motient until June 20, 2003, and remains a director of MSV and TerreStar. JX28 at p. 23; JX73.
- Peter Aquino, formerly a senior managing director of CTA, was a director of Motient until he tendered his resignation effective February 28, 2005. JX101.
- Shawn O’Donnell, a director of MSV, has served as Chief Operating Officer of CTA since July 2005. JX73.
- Gary Singer, the brother of Motient’s Chairman and a convicted felon, was paid \$1 million by CTA for his assistance in connection with Motient’s purchase of certain interests in MSV in February 2005.

**B. The PIPE Transactions And CTA's Insistence That Motient Retain Tejas.**

In 2004, Motient began raising capital through the sale of securities pursuant to various private placement transactions including "private investment in public equity" or "PIPE" transactions. JX16 at p. 2. Abbruzzese, Kittner, Aquino, Downie and Steven Singer encouraged Motient to engage Tejas to serve as a financial advisor to Motient. The Tejas advocates on Motient's Board did not reveal CTA's relationship with Tejas (the two parties were negotiating a business combination) and they concealed the fact that Tejas was not an experienced or reputable investment banking services firm.<sup>2</sup> Instead, they discouraged competitive bidding with other potential financial advisors and steered Motient's business to Tejas in decisions approved by Motient directors with obvious conflicts of interest.<sup>3</sup> See JX94.

These business referrals by conflicted directors and officers paid Tejas and CTA handsomely at the expense of Motient's stockholders. For example:

- On April 7, 2004, Motient sold 4,215,910 shares of common stock at a per share price of \$5.50 for an aggregate purchase price of \$23.2 million. In connection with this sale, Motient issued to Tejas Securities Group, Inc., its placement agent for the private placement and certain CTA affiliates, warrants to purchase 600,000 and 400,000 shares, respectively, of its common stock. The exercise price of these warrants is \$5.50 per share. The warrants are immediately exercisable upon issuance and have a term of five years. Motient also paid Tejas a placement fee of \$350,000 at closing. JX66 at p. F-25.

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<sup>2</sup> In 2003, Tejas earned a meager \$72,799 in investment banking income. Thanks to Abbruzzese's referrals, Tejas finally hit "payday" when Motient paid Tejas \$17.8 million in fees and commissions in 2004. JX16 at p. 19.

<sup>3</sup> For example, in March 2005 when the Board approved Tejas as placement agent for the sale of Series A preferred stock, the Board consisted of six individuals: Williamson, Steven Singer, Kittner, Dondero, St. John and Steele. Williamson was a board member of Tejas, Kittner was a CTA advisor and consultant, and Steven Singer's brother, Gary, had just received over a million dollars from CTA for his work on a Motient financing which had closed in February 2005.

- On July 1, 2004, Motient sold 3,500,000 shares of its common stock at a per share price of \$8.57 for an aggregate purchase price of \$30.0 million to multiple investors. In connection with this sale, Motient issued to certain affiliates of CTA and Tejas Securities Group, Inc., its placement agent for the private placement, warrants to purchase 340,000 and 510,000 shares, respectively, of its common stock. The exercise price of these warrants is \$8.57 per share. The warrants are immediately exercisable upon issuance and have a term of five years. Motient also paid Tejas a placement fee of \$850,000 at closing. *Id.*
- On November 12, 2004, Motient sold 15,353,609 shares of its common stock at a per share price of \$8.57. Motient received aggregate proceeds of \$126,397,809, net of \$5,182,620 in commissions paid to its placement agent, Tejas. *Id.*
- On April 15, 2005, the Company sold 408,500 shares of non-voting Series A Cumulative Convertible Preferred Stock and paid \$11.5 million in placement agent commissions to Tejas. JX66 at p. F-27.

Tejas, in turn, richly rewarded its friends for their referral of Motient's lucrative business. In November 2004, Tejas granted Abbruzzese options to purchase 100,000 shares of Tejas common stock, one-third of which were immediately exercisable.<sup>4</sup> Abbruzzese apparently never disclosed this fact to the Motient Board. Instead, he and other CTA-affiliated insiders continued to recommend Tejas as the appropriate entity to be Motient's financial advisor. This continued support of Tejas paid off. On May 9, 2005, Tejas announced that it would acquire CTA for approximately \$65 million (the "CTA-Tejas Transaction"). JX26 at SEF 3518. The CTA-Tejas Transaction resulted in a payment to Abbruzzese of more than \$30 million and may have monetized other CTA-affiliated insiders' interests in CTA. *See* JX33.

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<sup>4</sup> According to a footnote in Abbruzzese's Form 4 filed with the SEC on December 5, 2005, Abbruzzese elected to rescind these options. JX46. There is no publicly available explanation for this curious behavior.

The Company has refused to produce materials documenting its relationships with CTA and Tejas, and it has refused to produce materials documenting the relationships of its directors and senior managers to those entities.

**C. The Audit Committee “Investigates” Potential Breaches Of Fiduciary Duty And Self-Dealing.**

At meetings of the Motient Board during mid-2005, Dondero raised concerns regarding the warrants, options and other payments awarded to CTA and Tejas and requested that Motient’s Audit Committee investigate. JX40. Motient’s Board instructed the Audit Committee to commence an investigation into Mr. Dondero’s allegations. Following an investigation by outside counsel, the Audit Committee “cleared all of the subjects ... of any wrongdoing.” *Id.*

The supposedly “independent counsel” employed for the Audit Committee investigation, however, was anything but independent. The Company hired Barack, Ferrazzano, Kirschbaum, Perlman & Nagelberg LLP (“Barack, Ferrazzano”). The Company failed to disclose that the wife of Motient’s General Counsel was an associate at the firm.<sup>5</sup> Motient also failed to disclose that Barack, Ferrazzano had performed work for Motient on at least six prior occasions. Motient’s leadership chose this firm to investigate the conflicts permeating its leadership. The Company has refused to produce the Audit Committee report or any materials related to the Audit Committee’s investigation.

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<sup>5</sup> Motient’s General Counsel, Robert Macklin, is the husband of Heather Macklin, who is listed as an associate on Barack Ferrazzano’s website. JX87.

**D. Management Proposes A Roll-Up Transaction.**

On September 22, 2005, Motient announced that it had executed a non-binding letter of intent to consolidate ownership of MSV and TerreStar within Motient in a roll-up transaction which would have more than doubled the Company's outstanding shares and significantly diluted Highland Select and the company's existing stockholders. JX34.<sup>6</sup> On September 29, 2005, Highland Capital sent a letter to Motient attacking the proposed roll-up transaction, including the Company's valuations of TerreStar and MSV. JX37. Highland Capital explained that the proposed deal grossly undervalued the spectrum owned by MSV and TerreStar--which are the key components of any Motient valuation. Highland Capital pointed out that Motient's proposed valuations would cause Motient to grossly overpay for MSV, grossly underpay for TerreStar, skew the exchange ratio and dilute Motient's stockholders to the benefit of MSV's limited partners.

On October 4, 2005, the Motient Board delegated the authority to run the business and affairs of Motient to a previously constituted Executive Committee which did not include Dondero--the Board representative for the Company's largest stockholder group. JX99. The Board appears to have expanded the authority of the Executive Committee so that Motient could continue to pursue the proposed roll-up transaction without involvement or input from Dondero. Since Dondero had no apparent conflict of interest regarding the proposed

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<sup>6</sup> The letter of intent set forth the basic terms of the proposed transaction, which included (i) the issuance of approximately 93 million shares of Motient common stock in exchange for the MSV interests and TerreStar shares not already owned by the Company, (ii) a possible spin-off of TerreStar after the closing (the spin-off would be executed if Motient's Board approved it following the closing), and (iii) the reconstitution of the boards of Motient, MSV and TerreStar with nine members mutually acceptable to the parties.

transaction and the Company offered no explanation for its actions, it is unclear what Motient's directors had to hide.

On October 6, 2005, representatives of Highland Capital made a presentation to Motient's Executive Committee which explained in detail the folly of the proposed roll-up transaction. JX42. As Motient's largest holder of common stock, Highland's interests were aligned with all other Motient stockholders in preserving and furthering the Company's value. Motient never responded to Highland Select's presentation.

On November 15, 2005, Motient filed its Form S-1/A in preparation for the proposed roll-up transaction. JX43. The Form S-1/A did not indicate that the Company conducted any valuation, did not indicate whether management hired any financial advisor or investment bank, and did not indicate whether any fairness opinion was contemplated or obtained regarding MSV. *Id.* The only references to the valuation of MSV appeared where the Company (i) acknowledged the use of estimates in the valuation of its investment in MSV, (ii) stated that in November 2003, it engaged CTA to provide a valuation of the Company's equity interest in MSV as of December 31, 2002, and (iii) stated that it paid CTA in March 2005 to provide certain valuation allocations for the Company's interest in MSV as a result of the Company's November 12, 2004 additional investment in MSV. *Id.*

The Company did describe a valuation model for TerreStar in several sections of the Form S-1/A, but the model appears to relate to the Company's provision of certain pro forma financial data -- which gives effect to the May 11, 2005 purchase by the Company of 8,190,008 shares of TerreStar common stock. *Id.* The fact that the Company was still referencing this May 2005 valuation in November 2005 (and even, indirectly, in March

2006) indicates that the valuation data was at least six months old. The Form S-1/A does not reflect that any financial advisor or investment banker was hired or that any fairness opinion was contemplated or obtained with respect to TerreStar. *Id.*

On February 2, 2006, Motient issued a press release announcing that it was abandoning the proposed roll-up transaction, stating that “while the goals of the previously announced transactions remain in the best interest of Motient’s shareholders, the structure previously announced for accomplishing these goals will likely need to be modified.” JX50.

On May 8, 2006, Motient announced that it had entered into definitive agreements related to a new transaction with SkyTerra Communications, Inc. (“SkyTerra”), which is dominated by Apollo investment vehicles, to consolidate the ownership of MSV under SkyTerra and to increase Motient’s ownership of TerreStar. JX84. Based on the skimpy information released to date by Motient and the reports of research analysts, the values assigned to TerreStar and MSV are markedly different from the values assigned in the abandoned roll-up transaction. *Id.* Motient’s current management apparently is valuing MSV at approximately half of its September 22, 2005 value and TerreStar at more than twice what it was worth just six months before. *See* JX85. On its face, this deal appears to be the last gasp of several conflicted directors who will not stand for re-election at the Annual Meeting.

Unsurprisingly, this “last gasp” will enrich various insiders. For example, according to Motient’s public filings, Downie, the most senior Motient officer and a TerreStar director, was granted 125,000 shares of restricted stock last November that apparently will fully vest (as a “change of control”) upon the closing of this transaction, a gain of well over \$2 million

at Motient's current stock price. JX45; JX84. The Company has refused to disclose what equity interests will vest as a result of the SkyTerra transaction for Abbruzzese, O'Donnell and Kittner as Motient-appointed directors of MSV's general partner, and Abbruzzese, O'Donnell and Downie as Motient-appointed directors of TerreStar.

**E. Litigation Between The Highland Select Affiliates And Motient.**

On August 16, 2005, an affiliate of Highland Select filed a derivative action in this Court (the "Delaware Derivative Action") alleging multiple breaches of fiduciary duties by Motient's directors and actionable conduct by Motient's officers, certain consultants to Motient, affiliates of Tejas and Gary Singer. On the same day, affiliates of Highland Select filed a petition in Texas state court against Motient seeking the rescission of the sale of the Company's Series A preferred stock for \$90 million to the Highland affiliates (the "Rescission Action").

On October 7, 2005, certain of Highland Select affiliates who were holders of the Series A Preferred filed a class action lawsuit in this Court to enjoin an exchange offer for the Series A Preferred (the "Exchange Offer Litigation").

On October 19, 2005, Motient filed a breach of fiduciary duty lawsuit against Mr. Dondero in a Texas state court (the "Texas Fiduciary Duty Action"). On the same day, Motient filed a lawsuit against Mr. Dondero in a Texas federal district court alleging that Mr. Dondero made misleading statements and has solicited proxies to replace Motient's current board and management without complying with the federal proxy rules ("13D Suit").

On March 17, 2006, this Court issued an order dismissing the Delaware Derivative Action for failure to make pre-suit demand. The Rescission Action, the Exchange Offer Litigation, the Texas Fiduciary Duty Action and the 13D Suit remain pending.

**F. The Highland Select Proxy Contest, The Motient 2005 10-K, The 220 Demand And Motient Annual Meeting Developments.**

On February 14, 2006, Highland Select issued a press release announcing that it intended to nominate a slate of new directors for election to the Motient Board.<sup>7</sup> JX52. On March 16, 2006, Highland Select sent a letter to the stockholders of Motient providing background information on the reasons why a management change is essential to the future of Motient. JX54.

Motient filed its 2005 Form 10-K on March 31, 2006. JX66. Among other things, the 2005 Form 10-K disclosed that a deficiency in the design and implementation of the Company's internal controls over financial reporting resulted in a misstatement of the financial statements for *each* of the quarterly reporting periods in 2005. *Id.* at p. 75-76. The 2005 Form 10-K also warned that the Company's equity investments, in particular its ownership interest in MSV, may constitute investment securities under the Investment Company Act of 1940. *Id.* In addition, the 2005 Form 10-K explained that the Company had increased its monthly payment to CTA to \$100,000 (*Id.* at p. F-34) and that the Company generated only \$13.8 million in total revenue in 2005 as compared to \$13.0 million paid to related parties. *Id.* at p. 40.

On April 12, 2006, Highland Select transmitted its 220 Demand to Motient. JX81. Six business (eight calendar) days later, Motient released a terse, three-page letter summarily refusing each and every one of Highland Select's requests to inspect Motient's books and records (the "Refusal Letter"). JX82. The Refusal Letter claimed that Highland Select was

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<sup>7</sup> On the same day, Mr. Dondero sent a letter to the Motient Board announcing his resignation as a director of Motient, effective immediately.

not entitled to the books and records requested because the Demand (i) “was nothing more than an end-run around the rules that govern discovery in the existing lawsuits between the parties,” (ii) was “inappropriate in light of the fact that Highland Select and Dondero have consistently refused to cooperate with Motient’s internal nominating committee investigation,” (iii) was a “burdensome fishing expedition,” and (iv) sought documents already in Highland Select’s possession or control. *Id.* On April 24, 2006, Highland Select filed this suit to enforce its rights under 8 *Del. C.* § 220.

Based upon the Court’s instructions, Highland Select has narrowed its demand for Motient documents and prepared a confidentiality agreement to govern the use of the anticipated document production by Motient in response to the 220 Demand. The narrowed request for books and records by Highland Select is attached as Exhibit A and its blackline (Exhibit B) identifies the substantial narrowing of the request by Highland Select. The proposed confidentiality agreement is attached as Exhibit C. Highland Select is prepared to address with Motient prior to trial the scope of the document request and the terms of the confidentiality agreement.

On April 27, 2006, five of the ten current Motient directors (Goldsmith, Kittner, Steven Singer, St. John and Williamson) announced they would not to stand for re-election at the Annual Meeting. The next day, Motient announced that old director Steele and four directors appointed by the departing directors (Meltzer, Leduc, Grain and David Andonian) plus Robert Brumley, the current President and Chief Executive Officer of TerreStar, would constitute the management slate. Motient has agreed in connection with this litigation to conduct its annual meeting of stockholders on July 12, 2006. Thus, the prompt resolution of

this proceeding and the immediate production of the documents by Motient will be required for Highland Select to use the Company's books and records in connection with the proxy contest.

## ARGUMENT

### **I. HIGHLAND SELECT SEEKS BOOKS AND RECORDS TO COMMUNICATE WITH STOCKHOLDERS REGARDING MISMANAGEMENT.**

Section 220(b) provides that “[a]ny stockholder, in person or by attorney or other agent, shall, upon written demand ... have the right ... to inspect for any proper purpose ... the corporation’s ... books and records. 8 *Del. C.* § 220(b). “A proper purpose shall mean a purpose reasonably related to such person’s interest as a stockholder.” *Id.*

The Delaware Supreme Court has repeatedly instructed stockholders to use Section 220 as one of the “tools at hand” to investigate the possibility of corporate wrongdoing. *See, e.g., Brehm v. Eisner*, 746 A.2d 244, 266-67 (Del. 2000); *Scattered Corp. v. Chicago Stock Exch. Inc.*, 701 A.2d 70, 78-79 (Del. 1997). “It is well established that investigation of mismanagement is a proper purpose for a Section 220 books and records inspection.” *See First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 567 (Del. 1997); *Skoglund v. Ormand Indus., Inc.*, C.A. No. 5144, 1976 WL 2443, at \*6 (Del. Ch. Dec. 3, 1976) (stating that a demand “to investigate the likelihood of general corporate mismanagement” is a proper purpose “which warrants inspection of books and records under our decisional law”).

Likewise, communicating with stockholders regarding the company’s affairs is a proper purpose. *See, e.g., Leroy v. Hardwicke Co.*, C.A. No. 7023, 1983 WL 21022 at \* 2 (Del. Ch. Feb. 16, 1983) (explaining that communicating with other stockholders regarding management’s inadequacies is a purpose directly related to one’s interest as a stockholder); *Vista Resources Inc. v. Camelot Indus. Corp.*, C.A. No. 6744, 1982 WL 17850, at \*1 (Del. Ch. Mar. 31, 1982) (noting that contacting stockholders regarding an impending meeting was a “concededly proper purpose”).

Here, Highland Select seeks books and records to investigate mismanagement and to communicate with stockholders regarding that mismanagement in advance of the Annual Meeting. Motient cannot credibly dispute that Highland Select launched a proxy contest on February 14, 2006. Nor can Motient credibly dispute that Highland Select seeks books and records to communicate with stockholders regarding management's inadequacies.

**II. HIGHLAND SELECT HAS A CREDIBLE BASIS TO SUSPECT POSSIBLE MISMANAGEMENT.**

A stockholder employing Section 220 to investigate possible mismanagement must provide a "credible basis from which the court can infer that waste or mismanagement may have occurred." *Marmon v. Arbinet-Thexchange, Inc.*, 2004 WL 936512, at \*4 (Del. Ch. Apr. 28, 2004).<sup>8</sup> After meeting this standard, a stockholder employing Section 220 must show that the documents sought are essential and sufficient for investigating the purported mismanagement. *See id.* at \*7. Highland Select meets both standards.

**A. Motient's Material Weaknesses In Internal Controls, Its Regulatory Issues And Management's Mistakes Establish A Credible Basis To Infer Possible Mismanagement.**

On April 17, 2003, Motient dismissed PricewaterhouseCoopers as its independent public accountant. JX12 at p. 55. According to Motient, PricewaterhouseCoopers and management disagreed on certain accounting and auditing matters related to certain 2000 and 2001 transactions. JX7. On April 25, 2003 and March 2, 2004, Motient approved the

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<sup>8</sup> "A stockholder is 'not required to prove by a preponderance of the evidence that waste and [mis]management are actually occurring.'" *Sec. First Corp.*, 687 A.2d at 568 (citation omitted); *see generally* Donald J. Wolfe and Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 8.6[e][1], at 8-75 (2000).

engagement of Ehrenkrantz Sterling & Co. LLC as its independent accountants. Ehrenkrantz will be Motient's third outside accounting firm in four years.<sup>9</sup> JX12 at p. 56.

In the Company's Form 10-K for the year ended December 31, 2004, the Company identified significant deficiencies in the Company's internal controls over financial reporting. JX18. On November 11, 2005, the Company filed an amended quarterly report on Form 10-Q for the second quarter of 2005, which restated various portions of its consolidated financial statements. JX102.

In the 2005 Form 10-K, the Company reported a "material weakness in our internal control over financial reporting." JX66 at p. 75. In light of the material weakness, "management ... concluded that, as of December 31, 2005, Motient Corporation and Subsidiaries did not maintain effective internal control over financial reporting." The 2005 Form 10-K discloses that "[m]anagement ... identified a lack of sufficient oversight and review involved in the quarterly and year-end financial reporting process [and] a lack of resources to ensure complete application of generally accepted accounting principles as it relates to non routine transactions." *Id.*

In addition to the disclosures contained in the 2005 Form 10-K, the Company has had to amend a number of its quarterly reports filed with the SEC in order to restate financial information to reflect certain stock compensation paid to insiders Abbruzzese, Kittner and O'Donnell. On March 30, 2006, the Company filed Amendment No. 2 to the quarterly report on Form 10-Q for the period ended March 31, 2005 (the "First Quarter 2005 Form 10-Q/A"). JX67. As reflected on page 22 of the First Quarter 2005 Form 10-Q/A, the restatement

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<sup>9</sup> Motient dismissed Arthur Andersen as its outside auditor in 2002.

reflected an increase in the Company's net loss from \$28.5 million as previously reported to \$31.1 million as restated for the three months ended March 31, 2005. For the same three month period, the Company reported revenues of only \$5.0 million. *Id.*

Also on March 30, 2006, the Company filed amendments to its quarterly reports on Form 10-Q for the period ended June 30, 2005 (JX68) (the "Second Quarter Form 10-Q/A") and for the period ended September 30, 2005 (the "Third Quarter Form 10-Q/A"). JX69. The Company again failed to properly reflect certain accounting treatment of equity interests, this time failing to properly record the value of certain warrants issued in February 2005. For the period ended June 30, 2005, the restatement reflects an increase in the Company's net loss from \$22.9 million to \$25.8 million for the three month period ended June 30, 2005, and an increased net loss for the six month period ended June 30, 2005 from \$51.4 million as previously reported to \$56.9 million as restated. JX68 at p. 28. The revenues for the same three and six month periods were \$3.6 million and \$8.6 million, respectively. For the period ended September 30, 2005, the Company increased its net loss from \$18.5 million to \$20.1 million for the three month period ended September 30, 2005, and increased its net loss from \$69.88 million to \$77.0 million for the nine month period ended September 30, 2005. JX69 at p. 29. The revenues for the same three and nine month periods were \$3.2 million and \$11.7 million, respectively.

Despite these deficiencies, weaknesses and restatements of financial information, the Company gave both its Treasurer and Controller/Chief Accounting Officer, the two officers responsible for accurate accounting and financial reporting, increased compensation and new employment agreements. JX61; JX 63.

The Company's repeated inability to maintain adequate internal controls, especially with respect to "non-routine transaction," establishes a credible basis to infer possible mismanagement. Motient has failed to timely file its Form 10-K reports every year since 2002, and Highland Select should be able to inquire into management's obvious ineffectiveness. Moreover, Highland Select has a substantial interest in communicating accurate and complete information to Motient's other stockholders in connection with the 2006 Annual Meeting regarding Motient's obvious financial, operating and internal controls problems. Highland Select needs the narrowed list of documents listed in subsections 1-4 of Exhibit A to accomplish these purposes.

**B. Motient's Announcement That It May Have Inadvertently Become An Investment Company Establishes A Credible Basis To Infer Possible Mismanagement.**

In its 2005 Form 10-K, Motient disclosed that it inadvertently may have become an "investment company" under the Investment Company Act of 1940. The Company believes that its equity investments, in particular its ownership interest in MSV, may constitute investment securities under the Investment Company Act of 1940. An entity may be deemed to be an investment company if it owns investment securities with a value exceeding 40% of its total assets excluding cash items and government securities, subject to certain exclusions. JX66 at p. 23. If the Motient is deemed an investment company, it could be prohibited from engaging in business as it has in the past and might be subject to civil and criminal penalties for noncompliance. In addition, certain of the Company's contracts might be voidable, and a court-appointed receiver could take control of the Company and liquidate the business. *Id.*

Motient's disclosures create a credible basis to infer possible mismanagement in light of the severe consequences the Investment Company Act problem. Highland Select should

be able to communicate with stockholders regarding Management's potential inability to steer the Company clear of the Investment Company Act. Highland Select needs the information listed in Subsection 3 of Exhibit A to accomplish its investigation and to communicate its concerns to Motient's stockholders.

**C. The Company's Suspicious Ties To CTA, Tejas And The Singers Establish A Credible Basis To Infer Possible Mismanagement.**

As explained above at p. 4, CTA-affiliated individuals make up a large portion of Motient's management team, and several directors have direct ties to CTA. CTA-affiliated individuals including Downie and Abbruzzese, have directed Motient's investment banking business to Tejas without disclosing (i) that they had interests in Tejas or (ii) that Tejas was negotiating a business combination with CTA. Motient paid \$9.4 million in cash and stock to CTA in 2005 and Motient lost more money, abandoned a disastrous roll-up plan, proposed by management (presumably with CTA's input), restated (again) its financial results, gave new and improved employment agreements to incompetent management, and failed to pursue a coherent strategic plan. CTA representatives appear at every Motient Board meeting, and Motient management appears incapable of acting without them.

CTA also has paid enormous sums to Gary Singer, the brother of Motient's chairman and a convicted felon who is barred for life from serving as an officer or director of a public company. *See infra.* at p. 28; JX1; JX2.

Motient's cash payments to Tejas have been approximately \$17,800,000. These cash fees do not take into account the tens of millions of dollars worth of warrants to purchase Motient common stock that Motient granted to Tejas (and CTA) in connection with the PIPES transactions. Tejas captured Motient's business because of referrals made by

Abbruzzese and CTA-affiliated insiders at Motient. Tejas's May 9, 2005, acquisition of CTA rewarded CTA and Abbruzzese for those referrals and explains why CTA-affiliated individuals were anxious that the Company employ Tejas instead of other, more reputable advisors.

The complexity and scope of the interrelationships between the Singer brothers, Tejas, CTA and Motient's management, when considered alongside the enormous sums flowing from Motient's coffers to these individuals and entities, form a credible basis to infer potential mismanagement. Payments to CTA and Tejas were not approved by a majority of disinterested and independent directors. The Board's determination that an Audit Committee Investigation was necessary to investigate these relationships is a tacit admission that there is a credible basis to infer possible mismanagement. Highland Select needs the documents listed in subsections 5, 7, and 9 of Exhibit A to investigate this activity and to communicate its concerns to stockholders.

**D. Motient's Stock Repurchases From Select Individuals Establish A Credible Basis To Infer Possible Mismanagement.**

Although Motient is a reporting company, not all of its common stock is registered, and the stock that is registered trades on the "pink sheets." As a result, there is a limited market for Motient's stock. Pages F-26 and F-34 of Motient's 2005 Form 10-K disclosed that the Company has repurchased shares from George Haywood. JX66. Haywood owned approximately 9% of Motient's outstanding common stock prior to the repurchases. On May 13, 2005, Motient repurchased 500,000 shares of common stock from Haywood at a price of \$19.90 per share – totaling \$9,950,000.

Motient is a troubled company with limited cash resources. The Company reported total revenue of approximately \$13.8 million in fiscal year 2005. The Company has engaged in financing after financing to obtain cash to fund its operations. Apparently, however, some of this financing is simply flowing through the Company and into Haywood's pocket.

In February 2005, through a tax free merger transaction between the Company and Telecom Satellite Ventures, Rajendra Singh exchanged his interests in MSV for \$239 million worth of Motient's common stock. The transaction benefited Singh, who obtained a windfall payment of Motient stock and benefited Abbruzzese, O'Donnell and Kittner, whose MSV options were triggered by the transaction. Singh is now selling chunks of his stock on the open market. JX47.

Singh has shadowy ties to CTA, Tejas and the Singers. He is the owner of First Avenue Networks, Inc. ("First Avenue") which, according to a prospectus filed in May 2005, counts the Singer Children's Management Trust, O'Donnell and Tejas among its equity investors. See JX25 at p. 14. Management has offered no justification for this suspicious behavior. Highland Select needs the documents in subsection 6 of Exhibit A to investigate this possible mismanagement to and communicate with stockholders regarding its concerns.

**E. Motient's Recent Execution Of New Employment Agreements For Downie, Newman And Macklin Establish A Credible Basis To Infer Possible Mismanagement.**

Despite Motient's downward financial spiral, management announced in the 2005 Form 10-K that it entered into new employment agreements with its three top executives: Downie, Newman, and Macklin. See JX66. These executives are responsible for Motient's dismal performance, including a year's worth of restated financial statements. Even so, they received lucrative pay packages and change of control provisions. Downie's agreement is so

one-sided that he has the right to terminate his employment if he is required to work outside the greater New York City area for an average of more than three days per week, including travel time to and from such location, over the course of any calendar month. JX60 at p. 4. Motient's headquarters are in Lincolnshire, Illinois, so Downie's contract allows him to be an absentee manager. Downie's sweet deal is further evidence of insider dealings between Motient and CTA related parties.

Each of the employment agreements includes the curious provision that provides that events investigated by the Audit Committee "shall not give rise to a termination of the Employee for 'Cause.'" See JX60-65. This carveout protects Motient's senior management from a change at the Board level that could result in a renewed investigation of the misconduct Highland Select seeks to investigate. The employees' insistence on these provisions is a tacit admission that there is a substantive basis for Highland Select's concerns. Moreover, if the Audit Committee conducted an inadequate investigation (as Highland Select suspects), the Company may have contracted away its right to terminate these individuals for cause without adequate investigation of the Company's potential claims. Highland Select needs the information in subsection 8 of Exhibit A to determine whether these arrangements were the product of reasonable investigation and arm's length dealing. Equally important, Highland Select needs this information to communicate with other Motient stockholders regarding the potential replacement of current management.

**F. The Various Ties Between Motient's Board, Its Senior Management, Tejas, CTA And The Singers Establish A Credible Basis To Infer Possible Mismanagement.**

Downie is Motient's Executive Vice President, Chief Operating Officer, and Treasurer. Because Motient does not have a president or chief executive officer, Downie is

its top-ranking officer. Downie is a former CTA consultant and advisor and maintains relationships with CTA, Tejas and their employees and directors. JX75. Kittner is a Motient director and an advisor and consultant to CTA and remains in position where he can influence Motient's relationship with CTA at Motient's expense. *Id.* Aquino is a former Motient director and the former managing director of CTA. *Id.* Aquino also owns PDA Group, LLC ("PDA"). In 2004, Tejas assigned PDA warrants to purchase 56,250 shares of Motient common stock at \$5.50 per share. JX11. Abbruzzese was a Motient director until 2003. He is the founder and a senior executive of CTA, and he is a director of Tejas, MSV, and TerreStar. With the help of other CTA- affiliated insiders at Motient, Abbruzzese consistently channeled Motient's investment banking business to Tejas in 2004 and 2005. He apparently also arranged the sizable payments CTA made to Gary Singer. *See* JX93.

Williamson became a Motient director on March 4, 2005. JX75. At the time, he was also a member of the board of directors of Tejas. Williamson was the beneficial owner of 51,066 shares of Tejas as of April 21, 2005. JX24 at p. 13. On a Form 4 filed by Williamson on January 30, 2006, Williamson indicated that on January 26, 2006 he had received options to purchase 10,000 shares of Tejas common stock (at an exercise price of \$7), one-third of which vested immediately. On March 16, 2006 the adjusted closing price of Tejas common stock was \$9.00 per share.<sup>10</sup> JX58. Based on SEC filings and the adjusted closing price of Tejas' common stock on March 16, 2006, the value of Williamson's equity holdings in Tejas on March 16, 2006 was \$466,260 (his common stock holdings, plus the value of his vested options).

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<sup>10</sup> Based on the adjusted closing price of Tejas' common stock on March 16, 2006.

Both Goldsmith and Steele are current Motient directors. *Id.* Both serve as directors of American Banknote with Steven Singer, who remains American Banknote's Chairman and Chief Executive Officer. Steele is also a director of Globix, where Steven Singer is the current non-executive chairman and the former chairman of the board.

This complicated web of ties between the Motient Board, its senior management, Tejas, CTA and the Singers supports a credible basis to infer wrongdoing. Highland Select needs the documents requested in subsections 9-17 of Exhibit A to investigate the ties between these individuals and entities and to determine whether the directors are capable of disinterested and independent decisionmaking. Highland Select also desires to communicate with stockholders regarding the information it uncovers to allow the stockholders to make an informed judgment as between the competing slates in the ongoing proxy.

**G. The Company's Decision To Designate CTA Insiders To Lucrative Positions At MSV And TerreStar Establish A Credible Basis To Infer Possible Mismanagement.**

Motient is entitled to designate three directors of Mobile Satellite Ventures GP, Inc. ("MGP"), the general partner of MSV. Abbruzzese, Kittner and O'Donnell, all of whom are CTA representatives, have been designated by Motient to serve as directors of MGP. This does not appear to be a coincidence. At a November 22, 2004 board meeting, for example, CTA recommended that Motient appoint O'Donnell to the MGP board. Unsurprisingly, the Motient board, including three CTA-affiliated directors, agreed. JX88. Motient's MGP directors are entitled to participate in MSV's Unit Incentive Plan. Messrs. Abbruzzese, O'Donnell and Kittner together hold options to purchase an aggregate of 212,500 MSV partnership units. Mr. Abbruzzese is a member of the committee of the MGP board that administers MGP's Unit Incentive Plan under which directors may be granted options to

purchase partnership units of MSV. The Compensation Committee of the MSV board of directors recently determined that the vesting of these options was accelerated as a result of the acquisition by Motient of MSV partnership units held by other limited partners in February 2005. The Company's improper accounting treatment of the acceleration of these options was a major cause of the Company's restating its financial results for 2005. The SkyTerra transaction the Company announced on May 8, 2006 may trigger even more significant payments to these insiders.

Motient's designation of these CTA insiders to lucrative positions at the MSV TerreStar level supports Highland Select's credible basis to investigate possible mismanagement. Highland Select needs the documents requested in subsections 18-19 of Exhibit A to investigate and communicate with stockholders regarding what it discovers.

**H. The Abandonment Of The Failed Roll-Up And Its Re-Emergence As A New Transaction On May 8, 2006 Establish A Credible Basis To Infer Possible Mismanagement**

After Highland Select expressed its substantial objections to the roll-up transaction proposed in September 2005, the Motient Board delegated the authority to run the business and affairs of Motient to a previously constituted Executive Committee so that it could pursue the transaction without involvement or input from Dondero. Motient's Form S-1/A for the proposed roll-up transaction did not indicate that the Company conducted any valuation, did not indicate whether management hired any financial advisor or investment bank, and did not indicate whether any fairness opinion was contemplated or obtained regarding MSV. Three months later, Motient abandoned without substantive explanation the originally proposed roll-up in favor of pursuing a "modified" transaction structure.

On May 8, 2006, Motient announced that it had entered into definitive agreements with SkyTerra Communications, Inc. ("SkyTerra"). According to Motient's public filings and publicly available research reports, the values assigned to TerreStar and MSV are markedly different from the values assigned in the roll-up transaction proposed in September 2005. The Company has not released valuation information regarding the SkyTerra transaction even though it will fundamentally alter the Company's assets without a stockholder vote and the transaction was approved by a Board consisting of essentially new directors who face removal at the annual meeting in only two months.

The announcement of the proposed roll-up, its subsequent transformation, the apparent discrepancies in management's valuations of the Company's assets, the awkward timing of the SkyTerra transaction and the lack of material information from the Company about the SkyTerra deal create a credible basis to infer possible mismanagement. The SkyTerra deal will be a major issue in the proxy contest to be concluded on July 12. Highland Select needs the documents it requests in subsections 21-24 of Exhibit A to investigate this potential mismanagement and to communicate with stockholders regarding what it discovers.

**I. The Audit Committee Investigation And The Conflicts Faced By The Audit Committee's "Independent Counsel" Establish A Credible Basis To Infer Possible Mismanagement.**

According to a press release, Motient's Audit Committee began an investigation in July 2005 into allegations made by Mr. Dondero concerning certain Motient directors, officers, related parties, consultants, and advisors. JX40. The allegations raised severe conflict of interest issues because they targeted specific Motient directors and officers and required the members of the Audit Committee to investigate their colleagues on the Board.

In conducting a purportedly “independent” assessment of the claims of misconduct, Motient inexplicably retained Barack, Ferrazzano—the law firm that employs the wife of Motient’s general counsel and that has previously performed work for the Company—to assess the merits of the claims against Company insiders. Motient insisted in public filings that the firm was “independent” despite these material, personal and financial conflicts of interest.

The Board’s determination that an Audit Committee Investigation was necessary is a tacit admission that there is a credible basis to infer possible mismanagement. Furthermore, the Board’s selection of a law firm that has performed work for the Company in the past and that continues to employ the wife of the General Counsel creates a credible basis to infer additional possible mismanagement. . . Neither Highland Select nor, to its knowledge, any other stockholder has ever received a copy of the Audit Committee’s report. Highland Select needs the documents requested in subsections 25-28 of Exhibit A to assess the adequacy of the Audit Committee’s investigation into alleged misconduct and the adequacy of the Audit Committee’s “independent counsel.”

**J. Gary Singer’s Criminal Record, His Relationship To Motient’s Chairman And His Lucrative Relationship With The Company Establish A Credible Basis To Infer Possible Mismanagement.**

Gary Singer is the brother of Motient’s Chairman, Steven Singer. On January 13, 1994, Gary Singer was convicted of twenty-one counts of securities fraud, racketeering, money laundering, and other serious crimes. JX1. As a result of his unscrupulous activities, Gary Singer has been permanently enjoined from serving as a public company officer or director. JX2. Nevertheless, Gary Singer has been and remains intimately involved in Motient’s business, he serves as a consultant to Tejas and CTA, and he is receiving substantial benefits from Motient’s payments to third parties. *See, supra*, p. 4.

Gary Singer's record, his relationship to Motient's Chairman, and his obviously lucrative involvement with the Company create a credible basis to infer possible mismanagement. Highland Select needs the information requested in subsections 29-34 of Exhibit A to determine whether a felon who committed securities fraud is directly or indirectly doing business with Motient and to communicate with stockholders regarding what it discovers.

**CONCLUSION**

For the foregoing reasons, the Court should grant Highland Select the relief it requests.

Of Counsel:

Layne E. Kruse  
Gerard G. Pecht  
Fulbright & Jaworski LLP  
1301 McKinney, Suite 5100  
Houston, Texas 77010  
(713) 651-5151

/s/ Kevin G. Abrams  
Kevin G. Abrams (# 2375)  
A. Thompson Bayliss (#4379)  
Abrams & Laster LLP  
Brandywine Plaza West, Suite 303  
1521 Concord Pike  
Wilmington, Delaware 19801  
(302) 778-1000  
Attorneys for Plaintiff

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