IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOE JOHNSTON, DIETMAR ROSE, and DOUG HOLT, Plaintiffs, v. KEN PEDERSEN, ROBERT CLIFFORD, JAY MCGARRIGLE, RICHARD RYGG, JACK FISH, and XUREX, INC., Defendants.	)	C.A. No. _____

VERIFIED COMPLAINT FOR
DECLARATORY JUDGMENT PURSUANT TO 8 *DEL. C.* § 225

Plaintiffs Joe Johnston ("Johnston"), Dietmar Rose ("Rose"), and Doug Holt ("Holt" and collectively, "Plaintiffs"), by their undersigned attorneys, allege for their verified complaint as follows:

Nature of the Action

1. Plaintiffs seek an order pursuant to 8 *Del. C.* § 225 declaring that the written consents (the "Written Consents") of a majority of the outstanding shares of defendant Xurex, Inc. ("Xurex" or the "Company") removing the then-existing directors and electing Johnston, Rose, Carl McCutcheon, Bill O'Brien, and Nate Hutchens (the "New Directors") to fill the resulting vacancies were valid and effective.

2. Defendants Ken Pedersen ("Pedersen"), Robert Clifford ("Clifford"), Jay McGarrigle ("McGarrigle"), Richard Rygg ("Rygg"), and Jack Fish ("Fish" and collectively, the

"Individual Defendants") are the former directors who were removed by the Written Consents. On information and belief, despite the express action of stockholders holding a majority of the outstanding shares of the Company to remove them, the Individual Defendants contend that the Written Consents are ineffective and that they remain in office. In particular, the Individual Defendants argue that while the Written Consents were executed by a majority of the outstanding shares, they were not executed by a majority of the Series B Preferred Shares and that such shares are entitled to a class vote approving ***any and all matters or actions*** by the Company's stockholders, including the removal and election of directors.

3. In reality, however, the Series B Preferred do not have a class vote with respect to the removal or election of directors. Indeed, as shown herein and in the attached affidavit of Rex Powers -- a former director who was on the board at the time that the "Class Vote Provision" (defined below) was adopted, the "Class Vote Provision" was expressly adopted by the Individual Defendants in breach of their fiduciary duties and is therefore unenforceable. The Individual Defendants included the Class Vote Provision in the Series B certificate for the express and sole purpose of entrenching themselves in office and thwarting the voting rights of the Company's other stockholders. The Individual Defendants further intentionally failed to fully disclose the existence and alleged effects of the Class Vote Provision to the Company's stockholders. In fact, although the Individual Defendants contend that the Class Vote Provision grants the Series B Preferred an incredibly broad class voting right covering any and all actions by the Company's stockholders (including the removal and election of directors), that fact was not disclosed in the Offering Memorandum. Nor did the Individual Defendants disclose that they, and other stockholders aligned with them, intended to purchase a majority of the Series B

shares and, thereby, based upon their interpretation of the Class Vote Provision, grant themselves a veto right on any issue put to the stockholders, including their own removal from the Board.

4. Even in the unlikely event that the Class Vote Provision is found to be enforceable, it must be construed strictly and by its terms does not apply to either actions by written consent or to the removal and election of directors. Accordingly, the Class Vote Provision does not in any way render the Written Consents ineffective.

The Parties

5. Defendant Xurex, a Delaware corporation headquartered in Albuquerque, New Mexico, is a specialty chemical company focusing on industrial protective coatings that utilize "nano technologies." Xurex was co-founded by chemical-formulation specialist Bo Gimvang ("Gimvang"), who has produced nearly 200 unique specialty coatings and paints formulations.

6. The Individual Defendants comprised Xurex's Board of Directors (the "Board") prior to June 14, 2011. Pedersen, McGarrigle, and Rygg are residents of California, Clifford is a resident of Nevada, and Fish is a resident of Kentucky.

7. Plaintiffs Johnston, Rose, and Holt are each stockholders of Xurex, and Johnston and Rose were appointed to the Board through the Written Consents. Holt was previously a Xurex director before the first of the Individual Defendants joined the Board in late 2009. Johnston, Rose, and Holt are residents of Missouri, New Mexico, and California, respectively.

Background Facts

A. The Series B Preferred Is Issued For The Express Purpose Of Entrenchment And To Thwart The Other Stockholders' Voting Rights.

8. Defendants Pedersen, Clifford, and McGarrigle became directors of Xurex in October 2009. Shortly thereafter, defendant Pedersen assumed the roles of Interim CEO and Treasurer. Defendant Clifford assumed the role of Secretary of the Company in January 2010.

In these capacities, defendants Pedersen and Clifford acted as the Company's primary executive officers and began to receive salaries from the Company. Defendant Rygg was appointed to the Xurex Board in February 2010. On information and belief, defendant Fish became a director of the Company in early 2011.

9. Prior to the summer of 2010, the Company's co-founder, Gimvang, was its largest shareholder, holding approximately 41.5% of the outstanding shares. However, in the summer of 2010, the Individual Defendants became concerned that Gimvang was contemplating selling his shares, including potentially to another large shareholder. The Individual Defendants then on the Board (Pedersen, Clifford, McGarrigle, and Rygg) recognized that a sale of Gimvang's interest could result in a shareholder obtaining a controlling interest in the Company. Such a controlling shareholder would have the power to remove these Individual Defendants as directors and, in the case Pedersen and Clifford, remove them as officers.

10. Fearful of being removed from office, the Individual Defendants hatched a plan to entrench themselves in office and to ensure that control of the Company rested in "friendly" hands. Specifically, the foregoing Individual Directors conceived of a plan to offer a new round of preferred stock to the Company's stockholders.

11. Under Article IV of the Company's Certificate of Incorporation, the Company had authorized 100,000,000 shares of "blank check" preferred stock, which could be issued by the Board subject to such preferences, rights, and limitations as designated by the Board. In or around April 2008, the Company authorized and issued shares of Series A Preferred Stock at an issue price of $.67 per share. *See* Ex. A, Series A Certificate of Designation ("COD") at 1.

12. In the summer of 2010, in order to ensure their entrenchment in office, the Individual Directors (excluding Fish) determined to offer existing stockholders the opportunity

to purchase shares of a new Series B Preferred Stock. Based on two purportedly independent valuations of the Company, the Individual Directors determined to price the Series B Preferred Stock at only approximately $.10 per share. Although the Series B Preferred Stock would be offered to all existing stockholders, on information and belief, the Individual Defendants did not expect significant interest in the new preferred stock among the non-insider stockholders. Rather, the Individual Defendants expected that they and other stockholders friendly to them would be able to purchase a majority of the newly (and cheaply) issued shares. This presented the Individual Defendants with the opportunity to vest the Series B Preferred Stock with heightened voting rights that would ensure that they could continue to exercise control over the Company regardless of the desires of the common and Series A preferred stockholders.

13. Specifically, the Individual Defendants determined to include in the Series B Preferred Stock certificate of designations the following provision:

> Voting as a Class. In addition to the rights in Section 4(a) hereof, so long as the shares of Series B Preferred remain outstanding, the affirmative vote or written consent of the holders of a majority of the outstanding shares of Series B Preferred, voting separately as a single class, shall be required for the approval of any matter that is subject to a vote of the Corporation's stockholders, whether or not a class vote is required by law.

Ex. B, Series B COD at 3 (the "Class Vote Provision"). This broad class vote right was intended by the Individual Defendants to transfer control of the Company to the holders of the Series B Preferred Stock and to forever disenfranchise the holders of the common stock and Series A Preferred Stock.

14. For the Individual Defendants' plan to entrench themselves in control of the Company to work, it was necessary to hide the foregoing voting provision from the Company's other stockholders. Accordingly, the Individual Defendants crafted an Offering Memorandum that buried the only mention of the Class Vote Provision on page 29 of 34. *See* Ex. C, Series B

Offering Memo. at 29. Indeed, nothing at all was said about the Class Vote Provision in either of the key "Summary of Offering" or the "Risk Factors" sections of the Offering Memorandum. Instead, the only mention of the Class Vote Provision occurs at the back of the Offering Memorandum in a section entitled "Description of Capital Stock and Stock Ownership." Even then, the Class Vote Provision is merely paraphrased as a term of new Series B Preferred Stock. ***There is not any discussion of the importance or effect of the Class Vote Provision anywhere in the Offering Memorandum.***

15. There is no doubt that the Individual Defendants sought not to fully disclose the Class Voting Provision in the Offering Memorandum. Indeed, when the then-Chairman of the Board, Rex Powers, expressed concerns about the Series B Preferred Stock and questioned the Individual Defendants concerning whether the Class Voting Provision had been adequately disclosed to the Company's stockholders, the Individual Defendants (excluding Fish who was not yet on the Board) admitted that reference to the provision had been intentionally buried at the back of the Offering Memorandum in the hopes that it would escape notice by the stockholders. *See* Ex. D, Affidavit of Rex A. Powers ¶ 8 ("Powers Affidavit").

16. Accordingly, the Xurex stockholders received an Offering Memorandum that made only a passing reference to the Class Vote Provision, even though such provision was intended to effectively transfer control of the Company. Nowhere did the Individual Defendants alert stockholders to the importance of the provision nor did they alert stockholders to their intent to purchase a significant block of the Series B Preferred Stock.

17. Moreover, on its face, the Class Voting Provision is an unreasonable term of the Series B Preferred Stock. As explained in the Offering Memorandum, the purpose of the Series B offering was simply to raise additional working capital and there is no suggestion that it was

necessary to offer control of the Company in order to raise such additional capital. To the contrary, while any stockholder participating in the offering had to make a minimum investment of $2,605 (25,000 shares), the offering was not contingent on any minimum amount of subscriptions. Thus, it was possible that a stockholder could purchase absolute control of the Company (which had previously raised approximately $20 million in capital) through the payment of just a few thousand dollars. This fact too was not disclosed to the Xurex stockholders.

18. For the foregoing reasons, the Class Vote Provision was obviously the result of a breach of fiduciary duty and is therefore invalid and unenforceable.

B. The Class Vote Provision Does Not Apply To Actions By Written Consent Or To The Removal And Election Of Directors.

19. Special rights and preferences of preferred stock, which are in derogation of the rights of the common, must be clearly expressed and are strictly construed.

20. The operative provision of the Series B certificate provides that that "the affirmative vote or written consent of the holders of a majority of the outstanding shares of Series B Preferred, voting separately as a single class, shall be required *for the approval of any matter that is subject to a vote of the Corporation's stockholders, whether or not a class vote is required by law.*" An action by written consent is not a matter "subject to a vote" of the Company's stockholders. Thus, the Written Consents, authorized by a majority of the outstanding shares of Xurex, are an action undertaken by written consent and not by a stockholder vote. And, the Class Vote Provision (to the extent it may be valid at all) does not apply to actions by written consent.

21. Moreover, when stockholders act to elect or remove directors, such actions (whether authorized by written consent or otherwise) are not matters which require "the approval

of" the Company's stockholders, unlike mergers or sales of all or substantially all of a corporation's assets. Rather, directors are "elected" or "removed" directly by stockholders, and there is no "approval" by stockholders. For this reason as well, on its face, the Class Voting Provision does not apply to the removal or election of directors.

C. The Board Is Replaced By The Written Consents Of A Majority Of The Outstanding Shares.

22. On June 14, 2011, duly executed and valid stockholder written consents (the "Written Consents"), signed by proxyholders for the holders of approximately 57% of the outstanding stock of Xurex, resolving to (i) remove the Individual Defendants as directors; (ii) determine that Xurex shall have five directors; and (iii) electing the New Directors were delivered to the Company's principal place of business and to its registered agent in Delaware. A true and correct copy of the Written Consents are attached hereto at Exhibit E.

23. The Company's Certificate of Incorporation and Bylaws provide that the Company's stockholders have the power to act by written consent. True and correct copies of the Certificate of Incorporation and Bylaws are attached hereto as Exhibits F and G, respectively.

24. The Company's Certificate of Incorporation and Bylaws do not provide for a classified Board pursuant to 8 *Del. C.* § 141(d). *See* Exs. F; G at 3.02. Rather, each director on the Board stands for re-election at each annual meeting of Xurex's stockholders. *See* Ex. G at Art. 3.02. Under 8 *Del. C.* § 141(k), each director on the Board could therefore be removed without cause by the holders of a majority of the outstanding shares of the Company's stock. Article III, Section 2 of the Bylaws of the Company likewise provides that "[a] director may be removed from office by affirmative vote of a majority of the outstanding shares entitled to vote generally for the election of directors taken at a meeting of stockholders called for such purpose." Ex. G at Art. 3.02.

25. The Company has outstanding approximately (i) 32,157,305 shares of its common stock, par value $0.01per share; (ii) 15,159,068 shares of series A preferred stock, par value $0.01 per share; and 6,840,207 shares of series B preferred stock, par value $0.01 per share.

26. The Written Consents represent approximately (i) 57% of the total outstanding shares of the Company; (ii) 69% of the outstanding common stock; (iii) 51% of the outstanding series A preferred stock; and (iv) 15% of the outstanding series B preferred stock of the Company as of the date they were delivered to the Company's principal place of business and registered agent in Delaware. True and correct copies of the letters enclosing the Written Consents are attached hereto as Exhibits H and I.

27. The Written Consents each provide as follows:

> The undersigned holders of Common Stock, par value $0.01 per share, Series A Preferred Stock, par value $0.01 per share, and Series B Preferred Stock, par value $0.01 per share of Xurex Inc., a Delaware corporation (the "Company"), in lieu of a special meeting of the stockholders and pursuant to Section 228 of the General Corporation Law of the State of Delaware (the "General Corporation Law"), do hereby consent to the adoption of and do hereby adopt the following resolutions:
>
> **WHEREAS**, it is advisable, and is determined to be in the best interests of the Company, to remove without cause all of the individuals currently serving as members of the Company's Board of Directors (the "Current Directors").
>
> **WHEREAS**, it is advisable, and is determined to be in the best interests of the Company, to elect a new Board of Directors to fill the vacancies created by the removal of the Current Directors.
>
> **NOW, THEREFORE, BE IT RESOLVED**, that each of the Company's Current Directors are hereby removed without cause as directors of the Company effective immediately pursuant to and in accordance with Section 141(k) of the General Corporation Law and Section 3.02 of the bylaws of the Company (the "Bylaws").
>
> **FURTHER RESOLVED**, that pursuant to Section 3.01 of the Bylaws, the Board of Directors shall consist of 5 members.
>
> **FURTHER RESOLVED**, that, pursuant to Section 3.10 of the Bylaws, the following individuals are hereby elected to fill vacancies on the Company's

Board of Directors by virtue of the foregoing removals, and to serve as directors of the Company until their successors are duly elected and qualified or until the earlier of their death, resignation or removal:

Joe Johnston
Dietmar Rose
Nate Hutchens
Bill O'Brien
Carl McCutcheon

28. Based on information and belief, the Individual Defendants dispute the effectiveness of the Written Consents based upon the purported requirement of the Class Vote Provision to obtain the approval of a majority of the Series B Preferred Stock.

COUNT I

29. Plaintiffs repeat and incorporate by reference each of the allegations contained in paragraphs 1 - 28 above.

30. The Written Consents were valid and they effectively removed the Individual Defendants as directors, fixed the number of Xurex directors at five, and elected the New Directors as directors of Xurex.

31. On information and belief, the Individual Defendants challenge the validity of the Written Consents based upon the purported requirement of the Class Vote Provision to obtain the approval of a majority of the Series B Preferred Stock. However, the Class Vote Provision does not render the Written Consents ineffective for at least the following reasons: (1) the Class Vote Provision was adopted in breach of the fiduciary duties owed by the Individual Defendants (excluding defendant Fish); and (2) the Class Vote Provision does not apply to action by written consent or to the removal and election of directors.

32. Accordingly, Plaintiffs are entitled to a declaration that (i) the Written Consents were valid; (ii) the Individual Defendants have been removed as directors; (iii) Xurex shall have

five directors; and (iv) the Board of Xurex shall consist of Joe Johnston, Dietmar Rose, Carl McCutcheon, Bill O'Brien, and Nate Hutchens.

33. Plaintiffs have no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter an Order and Decree as follows:

(a) declaring that the Written Consents were valid;

(b) declaring that the Individual Defendants have been validly removed from the Xurex Board;

(c) declaring that the five-member Board of Xurex shall consist of Joe Johnston, Dietmar Rose, Carl McCutcheon, Bill O'Brien, and Nate Hutchens;

(d) awarding Plaintiffs their fees and expenses, including reasonable attorneys' fees incurred in this action; and

(e) granting such other relief as the Court may deem just and proper.

/s/ *Brock. E. Czeschin*
Brock E. Czeschin (#3938)
Robert L. Burns (#5314)
Richards, Layton & Finger, P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801
(302) 651-7700
Attorneys for Plaintiffs

Joseph W. Medved
Kimberly A. Wingate
Lathrop & Gage LLP
2345 Grand Boulevard, Suite 2200
Kansas City, Missouri 64108
816) 292-2000

Dated: June 14, 2011