



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TERRICE THARP and CLARENCE)
HENKEL, Individually, on Behalf of)
All Others Similarly Situated, and)
Derivatively on Behalf of Nominal)
Defendant NORTHWEST)
BIOTHERAPEUTICS, INC.,)

Plaintiff,)

v.)

C.A. No. 11179-

COGNATE BIOSERVICES, INC.,)
TOUCAN PARTNERS, LLC,)
TOUCAN CAPITAL FUND III, L.P.,)
LINDA F. POWERS, ALTON L.)
BOYNTON, ROBERT A. FARMER,)
NAVID MALIK, JERRY)
JASINOWSKI, and LESLIE)
GOLDMAN,)

Defendants,)

and)

NORTHWEST BIOTHERAPEUTICS,)
INC.,)

Nominal Defendant.)

**PUBLIC INSPECTION VERSION
FILED JUNE 24, 2015**

VERIFIED CLASS ACTION AND DERIVATIVE COMPLAINT

Plaintiffs Terrice Tharp and Clarence Henkel (“Plaintiffs”) by and through their undersigned counsel, upon knowledge as to themselves and upon information and belief as to all other matters, allege as follows:

NATURE OF THE ACTION

1. Plaintiffs bring this action individually, as a class action on behalf of themselves and all other similarly situated minority stockholders of Northwest Biotherapeutics, Inc. (“NWBO” or the “Company”) (the “Class,” as defined herein), and derivatively on behalf of nominal defendant NWBO against its controlling stockholders and the members of its Board of Directors (the “Board”), to remedy defendants’ breaches of fiduciary duty, unjust enrichment and other violations of law.

2. NWBO is a biotechnology company that has never turned a profit since its inception in March 1996. As its filings with the United States Securities and Exchange Commission (“SEC”) disclose, the Company “may never achieve or sustain profitability.”

3. Further, in Forms 10-K filed by NWBO with the SEC for fiscal years 2003 through 2014, the Company’s independent auditors have routinely expressed substantial doubt as to NWBO’s ability to continue as a going concern.¹

4. At all times relevant hereto, NWBO has been controlled by defendant Linda Powers (“Powers”), who is NWBO’s Chairperson, Chief Executive Officer (“CEO”) and Principal Accounting Officer, and her affiliated entities, defendants

¹ These opinions were expressed by the following independent auditors: KPMG LLP (for fiscal years 2002 and 2003); Peterson Sullivan LLP (for fiscal years 2004 through 2012); and Marcum LLP (for fiscal years 2013 and 2014).

Toucan Capital Fund III, L.P. (“Toucan Capital”) and Toucan Partners, LLC (“Toucan Partners,” and together with Toucan Capital, “Toucan”) and Cognate BioServices, Inc. (“Cognate”), which Powers also controls.

5. NWBO has historically received substantial amounts of financing from Toucan and Cognate. Furthermore, NWBO does not manufacture its own products or run its own clinical trials. Rather, NWBO contracts with Cognate to provide these services.

6. Despite several successful debt offerings, including issuances of promissory notes in October 2008 (\$1,000,000 principal amount at 12% annual interest), November 2008 (\$1,650,000 principal amount at 12% annual interest), March 2009 (\$110,000 principal amount at 6% annual interest), April 2009 (\$1,100,000 principal amount at 6% annual interest), August 2012 (\$1,105,000 principal amount at 8% annual interest), September 2012 (\$500,000 principal amount at 8% annual interest), and August 2014 (\$17,500,000 principal amount at 5% annual interest), NWBO has historically had a chronic shortage of cash. The Company, therefore, was not timely paying Cognate’s invoices, but rather was allowing the invoices to remain payable for months or years.

7. In July 2013, pursuant to an agreement reached between the Powers-led Board and Powers-led Cognate, NWBO agreed to “convert” some of Cognate’s outstanding invoices and future invoices into NWBO equity valued at a fixed value

of \$4.00 per share (the “Conversion Price Arrangement”). At the time, \$4.00 per share was slightly above the market price of NWBO stock.

8. As the market price of NWBO stock rose well above \$4.00 in the second half of 2013 and throughout 2014, the Conversion Price Arrangement resulted in NWBO repeatedly paying Cognate invoices using NWBO stock and warrants that provided significant premiums above the invoiced amounts (the “Conversions”). NWBO stock currently trades at about \$10.00 per share.

9. As the controlling stockholders of NWBO, defendants Powers, Toucan and Cognate stood on both sides of the Conversion Price Arrangement and all Conversions undertaken pursuant thereto. Thus, the Board was required to ensure that the Conversion Price Arrangement and each of the Conversions were entirely fair to NWBO and its minority stockholders.

10. On September 19, 2014 and November 17, 2014, respectively, Plaintiffs Tharp and Henkel, stockholders of NWBO, made demands to inspect the books and records of NWBO pursuant to 8 *Del. C.* § 220 (the “220 Demands”) to obtain documents regarding a number of transactions between NWBO on the one hand and Toucan, Cognate and/or certain of NWBO’s directors and officers on the other, including documents pertaining to the Conversion Price Arrangement.

11. In response to Plaintiffs’ 220 Demands and the subsequent initiation of Section 220 litigation, the Company agreed to produce, among other things,

“[b]ooks and records, if any, constituting the Board and committee minutes and materials concerning” the Conversion Price Arrangement and certain other transactions.

12. The documents produced by the Company in response to Plaintiffs’ 220 Demands reveal that the Board did not (i) form a special committee of independent directors to evaluate and approve the Conversion Price Arrangement or subsequent Conversions pursuant thereto; (ii) retain any independent legal counsel, financial advisor, or other advisors or experts to advise it in connection with the Conversion Price Arrangement or Conversions; (iii) obtain any “fairness opinion” regarding the Conversion Price Arrangement or Conversions; (iv) engage in any meaningful negotiations with Cognate or Powers regarding the terms of the Conversion Price Arrangement or the Conversions; or (v) consider any alternative transactions or terms. In other words, the Board did nothing to ensure that the terms of the Conversion Price Arrangement or Conversions were entirely fair to NWBO and its minority stockholders, even though those terms provided Cognate significant premiums above the amounts that it invoiced.

13. Indeed, the Conversion Price Arrangement was not entirely fair to NWBO and its minority stockholders, because as the Company’s stock price has risen, the Conversion Price Arrangement has resulted in Cognate receiving at least

\$17.6 million worth of NWBO stock and warrants *in excess of* the amounts owed on Cognate's invoices.

14. In breach of their fiduciary duties owed to NWBO and its minority stockholders, the Defendants (as defined herein) wrongfully caused and allowed the Company to agree to the Conversion Price Arrangement and engage in the self-dealing Conversions to benefit Powers and her affiliates at the expense of NWBO and its minority stockholders.

15. Furthermore, as a result of the issuance of the excessive NWBO stock and warrants paid to Cognate, the minority stockholders of NWBO have suffered substantial economic and voting power dilution.

16. Plaintiffs bring this action to (i) remedy the improper Conversion Price Arrangement and self-dealing Conversions, and (ii) compel Powers, Toucan and Cognate to disgorge to NWBO the excessive payments and/or benefits received in connection with the Conversions.

PARTIES

17. Plaintiff Tharp is a stockholder of NWBO and has been a stockholder of NWBO continuously since December 12, 2012.

18. Plaintiff Henkel is a stockholder of NWBO and has been a stockholder of NWBO continuously since December 3, 2013.

19. Nominal defendant NWBO is a Delaware corporation with its principal place of business located at 4800 Montgomery Lane, Suite 800, Bethesda, Maryland 20814. Shares of NWBO's common stock are traded on the NASDAQ under the ticker symbol "NWBO." According to its public filings, NWBO is "a biotechnology company focused on developing immunotherapy products to treat cancers more effectively than current treatments, without toxicities of the kind associated with chemotherapies, and, through a proprietary batch manufacturing process, on a cost-effective basis, initially in both the United States and Europe." According to the Company's most recent annual report, NWBO has 12 full-time employees.

20. Defendant Powers has served as Chairperson of the Board since May 17, 2007 and as the Company's CEO since June 8, 2011. She also serves as NWBO's Principal Executive Officer and Principal Accounting Officer. Powers served as a managing director of Toucan Capital Fund II from 2001 to 2010, and has served as a managing director of Toucan Capital thereafter. She is also the sole director of Cognate. At all times relevant hereto, defendant Powers and her affiliates (*i.e.*, Cognate, Toucan Capital and Toucan Partners) have been the majority and controlling stockholders of NWBO. In the Company's proxy statements filed with the SEC on January 18, 2012, August 16, 2012, December 3, 2013, and November 26, 2014 (the "2011 Proxy," "2012 Proxy," "2013 Proxy,"

and “2014 Proxy,” respectively), NWBO listed Powers and her affiliates as the beneficial owner of at least 50% of the Company’s outstanding common stock. Powers entered into a two-year employment agreement in May 2011. According to the Company’s most recent annual report, that contract expired under its terms. The Company’s most recent annual report and proxy statement do not disclose the terms of Powers’s employment since the expiration of that contract.

21. Defendant Toucan Capital is a Delaware limited partnership with its corporate headquarters located at 4800 Montgomery Lane, Suite 801, Bethesda, Maryland 20814, in the same building and floor as NWBO. It is a venture capital fund focused on regenerative medicine and immune therapy investments. NWBO’s Forms 10-K filed with the SEC on March 17, 2015, April 8, 2013, and April 13, 2012 (the “2015 10-K,” “2013 10-K,” and “2012 10-K,” respectively) state that Powers controls Toucan Capital.

22. Defendant Toucan Partners is a Delaware limited liability company with its corporate headquarters also located at 4800 Montgomery Lane, Suite 801, Bethesda, Maryland 20814. The 2015 10-K, 2013 10-K, and 2012 10-K state that Powers controls Toucan Partners.

23. Defendant Cognate is a Delaware corporation with its corporate headquarters located at 7513 Connelley Drive, Hanover, Maryland 21076. According to its website, Cognate is “a fully-integrated contract bioservices

organization” that “provides full development and cGMP [current good manufacturing practice] services to companies and institutions engaged in the development of cell-based products.” Cognate provides manufacturing and other services to NWBO. The State of Delaware’s Annual Franchise Tax Report for Cognate for tax year 2014 states that Cognate has no officers and only one director, Defendant Powers. Toucan Capital holds a majority interest in Cognate, and thus Powers, through her controlling interest in Toucan Capital, controls Cognate.

24. Defendant Alton L. Boynton is a co-founder of NWBO and has served as its Chief Scientific Officer and a director since its inception. He was appointed as NWBO’s Chief Operating Officer in August 2001, President in May 2003, and served as the Company’s CEO from June 2007 to June 2011.

25. Defendant Robert A. Farmer has served as a director of NWBO since December 2009.

26. Defendant Navid Malik has served as a director of NWBO since April 2012.

27. Defendant Jerry Jasinowski has served as a director of NWBO since April 2012.

28. Defendants Powers, Boynton, Farmer, Malik and Jasinowski are referred to collectively herein as the “Individual Defendants” or the “Board.” The

Individual Defendants, Cognate, Toucan Partners and Toucan Capital are referred to collectively herein as “Defendants.”

SUBSTANTIVE ALLEGATIONS

NWBO, Toucan and Cognate

29. According to its public filings, NWBO is a development stage biotechnology company focused on developing immunotherapy products to treat cancers more effectively than current treatments, without toxicities of the kind associated with chemotherapies, and, through a proprietary batch manufacturing process, on a cost-effective affordable basis, initially in both the United States and Europe.

30. The Company purports to have developed a platform technology, DCVax®, which uses activated dendritic cells to mobilize a patient’s own immune system to attack cancer. The DCVax technology is expected to be applicable to most cancers, and is embodied in several distinct product lines. One of the product lines (DCVax®-L) is designed to cover all solid tumor cancers in which the tumors can be surgically removed. Another product line (DCVax®-Direct) is designed for all solid tumor cancers that are considered inoperable and cannot be surgically removed.

31. Toucan is a venture capital fund focused on regenerative medicine and immune therapy investments, allocating investment money into pioneering

research areas that have difficulty obtaining funding from other sources. As Managing Director and Co-Founder of Toucan, Powers helped form Cognate in 2002.

32. According to its website, Cognate is a fully integrated contract bioservices organization providing the highest level of scientific and management expertise. In 2004, NWBO entered into a service agreement with Cognate. Under this service agreement, which was renewed in 2007, 2011 and 2014, NWBO agreed to utilize Cognate's services in the manufacturing of DCVax technology, research and development preclinical activities, and managing clinical trials. According to the Company's public filings, NWBO relies upon Cognate to produce all of its DCVax® product candidates in the United States and to supervise the production of its DCVax® product candidates outside the United States.

33. Powers is the Chairperson, President, CEO, Principal Executive Officer and Principal Accounting Officer of NWBO. Powers is also the Co-Founder and Managing Director of Toucan. Powers is currently the sole director of Cognate, a majority of which is owned by Toucan Capital.

34. According to the 2014 Proxy and 2013 Proxy, as of October 31, 2014 and October 31, 2013, respectively, defendant Powers beneficially owned 50.67% and 51.35% of NWBO's common stock on a fully diluted basis through her direct

ownership of NWBO common stock and exercisable options and warrants, as well as those of Toucan and Cognate, over which Powers has voting and dispositive power. NWBO's 2014 10-K incorporated by reference the stock ownership information reported in the 2014 Proxy. On April 30, 2015, NWBO filed with the SEC a Form 10-K/A for fiscal year 2014 that updated the stock ownership information to reflect the consummation of a private placement of newly issued shares of common stock. According to the Form 10-K/A, as of December 31, 2014, Powers beneficially owned 48.07% of NWBO's common stock on a fully diluted basis.

35. NWBO's annual reports, including the 2014 10-K, have consistently stated that as a result of their ownership of a significant percentage of NWBO's common stock, Powers, Toucan and Cognate "have the ability to exert substantial influence over all matters requiring approval by [NWBO's] stockholders, including the election and removal of directors and any proposed merger, consolidation or sale of all or substantially all of [NWBO's] assets." Such reports have further stated that the concentration of ownership among Powers, Toucan and Cognate "could involve conflicts of interest."

A History of Related-Party Transactions

36. Throughout its history, NWBO has received substantial funding from Toucan and Cognate and their affiliates, as well as from its own officers and

directors, and has conducted substantial business with Cognate. The documents produced in response to Plaintiffs' 220 Demand reveal numerous related-party transactions, and fail to evidence that the Board took any actions to ensure that the terms of such transactions were entirely fair to NWBO and its minority stockholders. The following is just a sample of these types of transactions.

Historical Cognate/Toucan Conversions

37. On November 23, 2011, NWBO converted \$9.2 million of amounts owed to Cognate into 46 million shares of NWBO common stock using an agreed-upon conversion rate of \$0.20 per share (the "2011 Cognate Conversion"). The Company's common stock closed at \$0.37 per share on November 23, 2011. Accordingly, NWBO recognized a loss of \$7.8 million in connection with the 2011 Cognate Conversion, which was the difference between the market value of the shares issued to Cognate and the carrying amount of the liability.

38. In response to Plaintiffs' 220 Demands, the Company agreed to produce all Board minutes and materials concerning the 2011 Cognate Conversion. NWBO produced no documents evidencing negotiation, review, and/or approval by the Board (or any committee thereof) of the 2011 Cognate Conversion.

39. On September 25, 2012, NWBO effected a 1-for-16 reverse split of its issued and outstanding common stock (the "Reverse Split") pursuant to an amendment to the Company's Certificate of Incorporation. NWBO announced the

Reverse Split in a Form 8-K filed with the SEC on September 26, 2012. NWBO had approximately 165 million shares of common stock issued and outstanding prior to the Reverse Split and approximately 11 million shares of common stock issued and outstanding thereafter.

40. On October 16, 2012, NWBO and Cognate entered into a Conversion Agreement for Outstanding Invoices and a Conversion Agreement for Outstanding Expenses, pursuant to which a total of approximately \$7.5 million of unpaid invoices and payables were converted into NWBO equity consisting of 2.8 million shares of NWBO common stock and 1.4 million warrants to purchase NWBO common stock (the “2012 Cognate Conversion”). The difference between the fair value of the shares of common stock and warrants issued in excess of the carrying amount of the liabilities was \$3.1 million, which the Company recorded as a “conversion inducement expense.”

41. Also on October 16, 2012, NWBO entered into conversion agreements with Toucan pursuant to which a total of \$10.7 million of convertible notes and payables were converted into equity consisting of 3.6 million shares of NWBO common stock and 1.8 million warrants to purchase NWBO common stock (the “2012 Toucan Conversion”). The difference between the fair value of the shares of NWBO common stock and NWBO warrants issued in excess of the

carrying amount of the liabilities was \$1.9 million, which the Company recorded as a “conversion inducement expense.”

42. In response to Plaintiffs’ 220 Demands, the Company agreed to produce all Board minutes and materials concerning the 2012 Cognate Conversion and the 2012 Toucan Conversion. NWBO produced only the minutes of the October 16, 2012 Board meeting, which indicates that the Board considered no materials in connection with its approval of the 2012 Cognate Conversion and the 2012 Toucan Conversion.

43. There is no indication in the October 16, 2012 Board minutes that the Board (or any committee thereof) obtained any sort of fairness opinion or independent advice with respect to the 2012 Cognate Conversion or the 2012 Toucan Conversion or made any attempt to negotiate with Cognate or Toucan regarding the terms of such conversions. Rather, the minutes indicate that the terms of the 2012 Cognate Conversion and the 2012 Toucan Conversion had been predetermined by the parties (*i.e.*, NWBO led by Powers, on one side, and Cognate and Toucan, both led by Powers, on the other side), and the Board merely approved the predetermined terms.

Settling Debts on Behalf of Cognate

44. In 2012, the Company issued 500,000 shares of NWBO common stock and 100,000 warrants to purchase NWBO common stock with an exercise

price of \$6.40 per share to an “outside party” in order to settle a note payable that Cognate owed to the “unrelated party” (the “2012 Cognate Note Payment”). According to NWBO’s Form 10-K/A filed with the SEC on April 30, 2013 (the “2013 10-K/A”), “[t]he Company does not expect reimbursement from Cognate[.]” Accordingly, NWBO recorded an “inducement expense” of \$2.2 million in connection with the issuance. The 2013 10-K/A did not disclose, among other things, the identity of the “outside party,” what Cognate actually owed the “outside party,” whether the “outside party” received a premium on the amount owed, why NWBO made this payment on behalf of Cognate, why NWBO did not expect reimbursement from Cognate or why an “inducement expense” was even necessary.

45. In response to Plaintiffs’ 220 Demands, the Company agreed to produce all Board minutes and materials concerning the 2012 Cognate Note Payment. NWBO produced no documents evidencing negotiation, review, and/or approval by the Board (or any committee thereof) of the 2012 Cognate Note Payment, which indicates that the Board did not review, negotiate, or approve the 2012 Cognate Note Payment.

Loans From Toucan

46. In 2011, the Company issued notes to and received loans from Toucan on terms that, based on NWBO’s public filings, were substantially beneficial to

Toucan and not fair to NWBO and, based on the documents received in response to Plaintiff's 220 Demand, were not reviewed, negotiated, and/or approved by the Board or any committee thereof.

47. According to the 2012 10-K, on March 31, 2011, Toucan loaned the Company \$500,000 under the terms of a convertible promissory note with a 10% original issue discount ("OID") and a 10% one-time interest charge. The conversion price of the note was 80% of the average five-day closing price of the Company's common stock for 25 days prior to conversion. According to the 2012 10-K, the balance of the note payable amounting to \$550,000 was converted into 2,016,667 shares of NWBO common stock on October 28, 2011. However, 80% of the average five-day closing price for the 25 days prior to conversion was \$0.36 per share. Thus, the \$550,000 balance should have been converted into only 1,527,778 shares of NWBO common stock, 488,889 fewer shares than Toucan actually received.

48. In response to Plaintiffs' 220 Demands, the Company agreed to produce all Board minutes and materials concerning the March 31, 2011 Toucan note conversion. NWBO produced no documents evidencing negotiation, review, and/or approval by the Board (or any committee thereof) of the March 31, 2011 Toucan note conversion, which indicates that the Board did not review, negotiate, or approve the note conversion or the issuance of 488,889 excess shares to Toucan.

49. On December 29, 2011, the Company entered into a Convertible Loan Agreement and Promissory Note with Toucan for an aggregate of \$100,000 with an OID of 10% and one time interest charge of 10%. Warrants to purchase 250,000 shares of NWBO common stock at an exercise price of \$0.40 per share were issued in connection with the note.

50. In response to Plaintiffs' 220 Demands, the Company agreed to produce all Board minutes and materials concerning the \$100,000 loan. NWBO produced no documents evidencing negotiation, review, and/or approval by the Board (or any committee thereof) of the loan, which indicates that the Board did not review, negotiate, or approve the loan.

Transactions With Insiders

51. In addition to the loans from Toucan, the Company has entered into numerous transactions with NWBO insiders on terms that, based on NWBO's public filings, were highly beneficial to the insiders and not fair to NWBO, and based on the documents received in response to Plaintiffs' 220 Demands, were not reviewed, negotiated, and/or approved by the Board or any committee thereof.

52. According to the 2013 10-K/A, on January 3, 2012, NWBO received proceeds of approximately \$200,000 in connection with issuing an unsecured convertible note to Senior Vice President, Business Development Les Goldman ("Goldman"). The note included 44,532 warrants to purchase NWBO common

stock with an exercise price of \$6.40 per share. The note carried an OID of 10% and a one-time interest charge of 10%. The conversion price of the note was 95% of the average of the lowest five days' closing prices of NWBO common stock in the 20 days prior to conversion.

53. In response to Plaintiffs' 220 Demands, the Company produced a Form of Convertible Loan Agreement and Promissory Note dated January 13, 2012, and minutes from a Board meeting two days later stating that the loan from Mr. Goldman had already been obtained but its "terms remain to be determined pending Board approval." The minutes of the next meeting, dated April 15, 2012, state that NWBO issued shares and warrants to Mr. Goldman in accordance with the Board's prior discussion and authorization, but there is no evidence of any such discussion or authorization, nor what terms were eventually determined. According to the 2013 10-K/A, the principal amount of the note plus undisclosed accrued interest was converted into 49,500 shares of NWBO common stock on an undisclosed date in December 2012.

54. On or about June 28, 2012, NWBO received proceeds of \$280,000 in connection with issuing an unsecured convertible demand note to Goldman. The conversion price was \$0.33 per share pre-split (\$5.28 per share post-split) and the interest rate was 10%. The note included 43,570 warrants to purchase NWBO common stock at an exercise price of \$0.35 per share pre-split (\$5.60 per share

post-split). According to the 2013 10-K/A, the principal amount of the note plus undisclosed accrued interest was converted into 66,341 shares of common stock on an undisclosed date in December 2012. Based upon the conversion price of \$5.28 per share, the balance of the note plus accrued interest was \$350,280.48. However, in the six months that the note was outstanding, it should have accumulated only approximately \$14,000 in interest, thus indicating NWBO overpaid Goldman by approximately \$36,000. In response to Plaintiffs' 220 Demands, the Company produced no documents evidencing review, negotiation, and/or approval by the Board (or any committee thereof) of the issuance of the \$36,000 in excess shares to Goldman.

The Conversion Price Arrangement and Self-Dealing Conversions

55. As discussed above, since 2011, NWBO has repeatedly converted notes held by Toucan, Cognate, and other related parties and settled unpaid invoices and payables owed to Toucan, Cognate, and other related parties by delivering to these entities NWBO equity valued at significantly more than the face value of the notes or the amounts owed.

56. With respect to Cognate, this practice was made formal at a July 30, 2013 meeting of NWBO's Board. Pursuant to the minutes of that meeting, the Board

discussed potential arrangements for at least half of the monthly invoices from Cognate to be paid in stock rather than in cash

for a period of at least 18 months Such an agreement will have to provide for a fixed conversion price for the invoice amounts that are to be paid in stock, as variable rate agreements are prohibited by the financing documents executed last April, and may be prohibited again by the upcoming financing documents in August. The conversion price would be \$4.00 per share. . . . However, in order for such an arrangement to be accepted by Cognate, there would need to be downside protection through most favored nation provisions

57. The minutes further state that “[t]he Board decided to proceed with the above arrangements.”²

58. The minutes do not reflect that the Board, or any subset of the Board, took any measures whatsoever to ensure that the Conversion Price Arrangement or any subsequent Conversions made pursuant thereto were fair to the Company or its minority stockholders. The minutes do not evidence any negotiation between the Company and Cognate regarding the conversion price or any other terms of the Conversion Price Arrangement. Rather, the minutes reflect that Powers, who controlled both NWBO and Cognate, served as Chairperson of the meeting.

59. Based on the documents produced in response to Plaintiffs’ 220 Demands, neither the Board nor any subset of the Board formed an independent committee to evaluate and negotiate the terms of the Conversion Price Arrangement, retained any independent legal counsel or financial advisor to advise

² NWBO has not produced any formal contract setting forth the terms of the Conversion Price Arrangement.

it in connection therewith, received any “fairness opinion” regarding the Conversion Price Arrangement, or considered any alternative transactions or terms. The members of the Board who approved the Conversion Price Arrangement consisted of two admittedly non-independent directors (Powers and Boynton) and two purportedly independent directors (Farmer³ and Jasinowski). Defendant Malik did not attend the meeting.

60. Indeed, the Company’s public filings demonstrate that the Board has failed entirely to adopt, implement or maintain any sort of internal controls to ensure the fairness of related-party transactions, despite the fact that NWBO and its most frequent transaction partners, Toucan and Cognate, are all under common ownership and control.

61. According to both the 2013 Proxy and the 2014 Proxy, the Company does not subject related-party transactions to review by a special committee or other committee of independent directors. Rather, related party transactions are reviewed by the entire Board, of which Powers is the Chairperson. Specifically, the proxies state “[w]ith respect to reviewing and approving related-party transactions, the Board reviews related-party transactions for potential conflicts of interests or other improprieties.”

³ As discussed below, defendant Farmer has received cash and stock awards from the Company not granted to the other non-employee directors; thus, his independence is questionable, at best.

62. On July 25, 2013, Marcum LLP replaced Peterson Sullivan LLP as the Company's independent registered public accounting firm for the audit of the year ended December 31, 2013, which change was approved by the Company's Audit Committee (consisting of defendants Farmer, Jasinowski and Malik) and the Board. According to NWBO's Form 8-K filed with the SEC on July 31, 2013, "Peterson Sullivan identified material weaknesses in Northwest's financial reporting process with respect to segregation of duties and lack of controls over reporting of material transactions and developments in the financial statements." Thus, just five days before approving the Conversion Price Arrangement, the Audit Committee and the Board terminated the auditor that had identified problems with the "segregation of duties" and "reporting of material transactions," e.g., transactions with Toucan and Cognate.

63. The 2014 10-K disclosed not only that these material weaknesses have not yet been corrected, but also that additional material weaknesses, including weaknesses pertaining specifically to related party transactions, have been identified:

- Insufficient segregation of duties, oversight of work performed and lack of compensating controls in our finance and accounting function due to limited personnel.
- *Lack of controls in place, including those surrounding related party transactions*, to ensure that all material transactions and developments impacting

the financial statements are reflected and properly recorded.

- *Lack of documentation to support occurrences of review and approval procedures.*
- Design deficiencies that do not meet stated control objectives that elevate the level of risk of a material misstatement to our financial statements.
- Policies and procedures with respect to the review, supervision and monitoring of our accounting operations throughout the organization were either not designed and in place or not operating effectively.
- We did not maintain an adequate risk oversight function to evaluate and report on risks to financial reporting throughout the organization, including completion of a comprehensive risk assessment to identify all potential risk areas and evaluate the adequacy of controls to mitigate identified risk.
- We did not maintain an effective anti-fraud program designed to detect and prevent fraud relating to (i) an effective whistle-blower program or other comparable mechanism and (ii) an ongoing program to manage identified fraud risks.

(Emphasis added).

64. Consistent with the Company's abysmal internal controls over related party transactions, the process by which the Conversion Price Arrangement was approved was unfair and in breach of the Defendants' fiduciary duties to NWBO and its minority stockholders.

65. Likewise, the terms of the Conversion Price Arrangement were unfair to NWBO and its minority stockholders, and have resulted in numerous

Conversions at substantial premiums above the amounts purportedly payable to Cognate. Indeed, the Board agreed to the conversion price of \$4.00, which was only slightly above the Company's stock price at the time, regardless of what would happen to the market price of the Company's stock over the "at least 18 month" term of the Conversion Price Arrangement. Thus, if the price of the Company's stock rose above \$4.00 per share, Cognate would receive NWBO equity at a discount to market value.

66. This is precisely what happened. NWBO's stock price rose above \$4.00 per share during the fourth quarter of 2013 and traded well above \$4.00 per share consistently throughout 2014. The 2014 10-K disclosed:

- (a) "During the quarter ended December 31, 2013, the Company converted accounts payable to Cognate BioServices into approximately 1,818,000 shares, with fifty percent warrant coverage, subject to most favored nation treatment (including with respect to warrants). The Company also converted notes payable to Cognate into 150,000 shares. The fair value of the common stock on the date of these transactions was approximately \$6.7 million and \$0.5 million, respectively. The Company recorded \$1.5 million of inducement expense related to the conversion of accounts payable."
- (b) "During the quarter ended March 31, 2014, the Company converted accounts payable due to Cognate BioServices of approximately \$5.9 million into 1,481,644 shares, subject to most favored nation treatment. The Company recorded \$2.8 million of inducement expense associated with the issuance of the common shares. In addition, the Company issued warrants that were valued at \$2.5 million at the date of issuance related to the conversion of accounts payable. Total inducement charge was \$5.3 million."

- (c) “During the quarter ended June 30, 2014, the Company converted accounts payable due to Cognate BioServices of approximately \$2.9 million into 727,291 shares of common stock and 363,646 warrants, subject to most favored nation treatment. The Company recorded \$1.4 million of inducement expense associated with the issuance of the common shares. In addition, as noted in Note 4 the Company issued warrants that were valued at \$1.1 million at the date of issuance related to the conversion of accounts payable. Total inducement charge was \$2.5 million.”
- (d) “During the quarter ended September 30, 2014, the Company converted accounts payable due to Cognate BioServices of approximately \$7.9 million into 1,986,205 shares of common stock and 1.1 million warrants, subject to most favored nation treatment. The Company recorded \$4.5 million of inducement expense associated with the issuance of the common shares. In addition, as noted in Note 4, the warrants were valued at \$3.8 million at the date of issuance, resulting in a total inducement charge for the quarter of \$8.3 million.”

67. The “inducement” charges taken by the Company in connection with the above Conversions – which totaled **\$17.6 million** as of the filing of the 2014 10-K – consist of the difference between the carrying value of the accounts payable and the fair value of the stock and warrants on the date such shares and warrants were issued. Accordingly, because of the Conversion Price Arrangement, which the Powers-led Board approved, NWBO has overpaid Cognate by \$17.6 million, more than 12 times NWBO’s 2014 revenues.

68. Furthermore, the issuance to Cognate of an excess \$17.6 million worth of NWBO stock and warrants has diluted the economic and voting power of the Company’s minority stockholders.

69. According to NWBO's Form 10-Q for the first quarter of 2015, filed with the SEC on May 11, 2015, the Company has just \$1,172,000 in notes payable. Accordingly, NWBO has ample ability to raise additional capital in the debt market, as the Company has done consistently over the last several years. Nevertheless, upon information and belief, NWBO continues to overpay Cognate in connection with its monthly invoices under the Conversion Price Arrangement and continues to dilute the minority stockholders' economic and voting power. NWBO's stock is currently trading at over \$10.00 per share, more than double the \$4.00 per share fixed value under the Conversion Price Arrangement, which is resulting in further unjustified premiums being paid to Cognate.

DERIVATIVE AND DEMAND EXCUSED ALLEGATIONS

70. Plaintiffs bring certain claims herein derivatively in the right and for the benefit of NWBO to redress Defendants' breaches of fiduciary duties, waste of corporate assets and unjust enrichment.

71. Plaintiffs will adequately and fairly represent the interests of the Company and its stockholders in enforcing and prosecuting its rights.

72. As a result of the facts set forth herein, Plaintiffs have not made any demand on the Board to institute this action against the Defendants. Such demand would be a futile and useless act because the Board is incapable of making an

independent and disinterested decision to institute and vigorously prosecute this action.

73. The Board currently consists of five directors: defendants Powers, Boynton, Farmer, Jasinowski and Malik. None of these directors is capable of disinterestedly and independently considering a demand to commence and vigorously prosecute this action for the reasons set forth below.

74. Powers, the controlling stockholder of the Company, had a conflicting self-interest in and stood on both sides of the Conversion Price Arrangement and each of the Conversions that have occurred pursuant thereto. Accordingly, the business judgment rule does not protect the Board's decision to cause NWBO to enter into the Conversion Price Arrangement and Conversions. Rather, the Defendants bear the burden of proving that the Conversion Price Arrangement and Conversions were entirely fair to NWBO, which they have not done and cannot do. As alleged in detail herein, in allowing NWBO to enter into the Conversion Price Arrangement and Conversions, the Board failed to act loyally, in good faith, and with due care and instead knowingly acquiesced to NWBO's controlling stockholder Powers' proposing, negotiating and consummating the Conversion Price Arrangement and Conversions, which were intended to and did benefit Cognate and Powers to the detriment of NWBO and its minority stockholders. Consequently, no demand on the Board is required.

75. Defendant Powers is incapable of disinterestedly and independently considering a demand to commence and vigorously prosecute this action because she is directly interested in the self-dealing Conversion Price Arrangement and Conversions complained of herein, and has received substantial personal benefits as a result of the self-dealing Conversion Price Arrangement and Conversions.

76. Defendants Boynton and Farmer are likewise incapable of disinterestedly and independently considering a demand to commence and vigorously prosecute this action for the following reasons:

- (a) The principal professional occupation of defendant Boynton is his employment with NWBO as Chief Scientific Officer, pursuant to which he has received and continues to receive substantial monetary compensation and other benefits. Specifically, in fiscal years 2013, 2012 and 2011, defendant Boynton received compensation in the amount of \$295,685, \$295,685 and \$1,882,695, respectively. Thus, defendant Boynton lacks independence from Powers, Toucan and Cognate, the controlling stockholders of NWBO. Furthermore, the Company admits in its SEC filings that defendant Boynton is not independent.
- (b) Defendant Farmer also receives substantial monetary compensation and other benefits from NWBO. Specifically, during the third quarter of 2012, the Company awarded defendant Farmer 63,364 shares of common stock valued at approximately \$300,000 purportedly in exchange for Farmer's arranging of multiple financings for the Company, referred to in the 2013 Proxy as "consulting services." The minutes of the August 9, 2012 Board meeting state that "Management" – *i.e.*, Powers – was to negotiate the terms and the form of such compensation for defendant Farmer's "role in the financings as well as compensation for the long delay in providing the compensation." Furthermore, although the 2013 Proxy states

that NWBO “currently pay[s] each non-employee director an annual cash fee of \$50,000,” the 2014 Proxy discloses that in 2013, defendant Farmer was paid more than twice that much, \$120,000 in cash, which the other two non-employee directors did not receive. The 2013 Proxy does not disclose why defendant Farmer received the \$120,000 cash payment. Farmer’s repeated receipt of cash and stock compensation from the Company over and above the amounts paid to the other non-executive directors renders him incapable of considering a demand, as he lacks independence from Powers, Toucan and Cognate, the Company’s controlling stockholders.

CLASS ACTION ALLEGATIONS

77. Plaintiffs bring certain claims in this action on their own behalf and as a class action, pursuant to Court of Chancery Rule 23, on behalf of all holders of NWBO common stock (the “Class”) since July 30, 2013 and their successors in interest. Excluded from the Class are Defendants and any person, firm, trust, corporation, or other entity related to, or affiliated with, any of the Defendants.

78. This action is properly maintainable as a class action.

79. The Class is so numerous that joinder of all members is impracticable. As of October 31, 2013, there were approximately 11.4 million shares of NWBO common stock held by the Company’s minority stockholders. Upon information and belief, there are thousands of members of the Class.

80. There are questions of law and fact which are common to the Class including, but not limited to:

- (a) whether Defendants breached their fiduciary duties to Plaintiffs and the other members of the Class; and

- (b) whether Plaintiffs and the other members of the Class are entitled to damages as a result of Defendants' breaches of fiduciary duties.

81. Plaintiffs are committed to prosecuting this action and have retained competent counsel experienced in litigation of this nature. Plaintiffs' claims are typical of claims of the other members of the Class, and Plaintiffs have the same interests as the other members of the Class. All members of the Class have suffered the same harms in that Powers and Cognate orchestrated and executed the Conversion Price Arrangement and Conversions to benefit themselves and Toucan to the detriment of the Company's minority stockholders. Moreover, the Defendants caused the same equitable harm and damages to the Class through their breaches of their fiduciary duties of loyalty and care. Accordingly, Plaintiffs are adequate representatives of the Class and will fairly and adequately protect the interests of the Class.

82. The prosecution of separate actions by the individual members of the Class would create a risk of inconsistent or varying adjudications with respect to the individual Class members that would establish incompatible standards of conduct for Defendants. Adjudications with respect to individual Class members would, as a practical matter, be dispositive, or would substantially impair the interests of the Class members.

83. Defendants have acted or refused to act on grounds that apply generally to the Class, such that injunctive or declaratory relief is appropriate with respect to the Class as a whole.

84. The questions of law and fact common to the members of the Class predominate over any questions affecting only its individual members, such that a class action is superior to any other available method for fairly and efficiently adjudicating the controversy.

COUNT I

Derivative Claim Against the Individual Defendants for Breach of the Fiduciary Duty of Loyalty

85. Plaintiffs incorporate by reference and reallege each and every allegation set forth above, as though fully set forth herein.

86. Plaintiffs bring this Count I derivatively on behalf of NWBO.

87. As directors and/or officers of NWBO, each of the Individual Defendants had a fiduciary duty to, among other things, act in furtherance of the best interests of the Company and its stockholders so as to benefit all stockholders equally and not in furtherance of their personal interests and/or the interests of the controlling stockholders.

88. Each of the Individual Defendants breached his or her fiduciary duty of loyalty by causing and/or allowing NWBO to enter into the self-dealing Conversion Price Arrangement and Conversions, which were not, and could not

have been, exercises of good faith business judgment. Rather, the Conversion Price Arrangement and Conversions were intended to, and did, unduly benefit controlling stockholders Powers and Cognate at the expense of the Company and its minority stockholders and were not entirely fair to the Company.

89. As a direct and proximate result of the Individual Defendants' breaches of fiduciary duty, the Company has sustained substantial damages, as alleged herein.

COUNT II

Derivative Claim Against Powers, Toucan and Cognate for Breach of Fiduciary Duty as Controlling Stockholders

90. Plaintiffs incorporate by reference and reallege each and every allegation set forth above, as though fully set forth herein.

91. Plaintiffs bring this Count II derivatively on behalf of NWBO.

92. As the controlling stockholders of NWBO, each of defendants Powers, Toucan and Cognate had a fiduciary duty to, among other things, act in furtherance of the best interests of the Company and its stockholders so as to benefit all stockholders equally and not in furtherance of their personal interests.

93. Defendants Powers, Toucan and Cognate breached their fiduciary duty of loyalty by causing NWBO to enter into the self-dealing Conversion Price Arrangement and Conversions in order to unduly benefit themselves at the expense of the Company.

94. As a direct and proximate result of Powers, Toucan and Cognate's breaches of fiduciary duty, the Company has sustained substantial damages, as alleged herein.

COUNT III

Derivative Claim Against Defendants Powers, Toucan and Cognate for Unjust Enrichment

95. Plaintiffs incorporate by reference and reallege each and every allegation set forth above, as though fully set forth herein.

96. Plaintiffs bring this Count III derivatively on behalf of NWBO.

97. Defendants Powers, Toucan and Cognate received improper benefits from NWBO as a result of the Conversions made pursuant to the Conversion Price Arrangement, as alleged herein.

98. It would be unconscionable and against the fundamental principles of justice, equity and good conscience for defendants Powers, Toucan and Cognate to retain the improper benefits they received as a result of the Conversions.

99. To remedy Powers and Cognate's unjust enrichment, the Court should order them to disgorge to the Company all profits derived from the Conversions.

COUNT IV

Individual and Class Claim Against the Individual Defendants for Breach of Fiduciary Duty

100. Plaintiffs incorporate by reference and reallege each and every allegation set forth above, as though fully set forth herein.

101. Plaintiffs bring this Count IV individually and on behalf of the Class.

102. The Individual Defendants, as directors of NWBO, owed the minority stockholders of NWBO fiduciary duties of loyalty and care. The Conversion Price Arrangement and Conversions were intended to, and did, unduly benefit controlling stockholders Powers and Cognate at the expense of the Class through the improper transfer of economic and voting power from the individual Class members to the Company's controlling stockholders. Thus, in approving the Conversion Price Arrangement and allowing the self-dealing Conversions to take place, the Individual Defendants breached their fiduciary duty to the Class.

103. The Individual Defendants' breach of their fiduciary duty to the minority stockholders entitles the Class to damages and other monetary relief, as well as equitable relief, including rescission of the Conversion Price Arrangement, cancellation of the excess shares issued to Cognate, and declaratory and injunctive relief to prevent dilution of voting rights.

104. Plaintiffs have no adequate remedy at law.

COUNT V

Individual and Class Claim Against Powers, Toucan and Cognate for Breach of Fiduciary Duty as Controlling Stockholders

105. Plaintiffs incorporate by reference and reallege each and every allegation set forth above, as though fully set forth herein.

106. Plaintiffs bring this Count V individually and on behalf of the Class.

107. As the controlling stockholders of NWBO, each of defendants Powers, Toucan and Cognate had a fiduciary duty to, among other things, act in furtherance of the best interests of the Company's minority stockholders so as to benefit all stockholders equally and not in furtherance of their personal interests.

108. Defendants Powers, Toucan and Cognate breached their fiduciary duty by causing NWBO to enter into the self-dealing Conversion Price Arrangement and Conversions in order to unduly benefit themselves at the expense of the Company's minority stockholders through the improper transfer of economic and voting power from the individual Class members to themselves.

109. As alleged herein, defendant Powers, who controlled both NWBO and Cognate, ran the meeting at which the Board approved the Conversion Price Agreement and therefore controlled the terms thereof.

110. The Conversion Price Arrangement and Conversions were intended to, and did, unduly benefit Powers, Toucan and Cognate, at the expense of the Class. Thus, Powers, Toucan and Cognate breached their fiduciary duties to the Class.

111. Furthermore, the award of \$17.6 million worth of excess shares to Cognate constituted an improper expropriation of economic value and voting power from NWBO's public stockholders to its controlling stockholders, Powers, Toucan and Cognate. Therefore, the Conversions did not result in an equal

dilution of each of the Company's shares. Instead, the public stockholders suffered a separate harm resulting from the extraction from the public stockholders, and redistribution to the controlling stockholder, of a portion of the economic value and voting power embodied in the minority interest. Consequently, NWBO's public stockholders are entitled to recover the value represented by the overpayment.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment as follows:

- A. Certifying this action as a class action;
- B. Awarding Plaintiffs and the Class monetary and equitable relief against Powers, Toucan and Cognate for the expropriation of value they sustained as a result of such defendants' breaches of their fiduciary duties;
- C. Awarding Plaintiffs and the Class monetary and equitable relief against the Individual Defendants for their breaches of fiduciary duties owed to the minority stockholders;
- D. Awarding NWBO the amount of damages it sustained as a result of Defendants' breaches of fiduciary duties to the Company;
- E. Ordering Powers, Toucan and Cognate to disgorge to the Company improper benefits they received as a result of the Conversions;
- F. Granting appropriate equitable relief to remedy Defendants' breaches of fiduciary duties, including rescinding the Conversion Price Arrangement, cancelling the excess shares issued by NWBO to Cognate, ordering the Company to cease converting accounts purportedly payable to Cognate at the conversion rate of \$4.00 per share, and preventing voting power dilution of the minority stockholders;

- G. Awarding to Plaintiffs the costs and disbursements of this action, including reasonable attorneys' fees, accountants' and experts' fees, costs and expenses; and
- H. Granting such other and further relief as the Court deems just and proper.

Dated: June 19, 2015

PRICKETT, JONES & ELLIOTT, P.A.

OF COUNSEL:

**KESSLER TOPAZ -
MELTZER & CHECK, LLP**

Eric L. Zagar
Kristen L. Ross
Christopher M. Windover
280 King of Prussia Road
Radnor, Pennsylvania 19087
(610) 667-7706

By: /s/ Paul A. Fioravanti, Jr.
Michael Hanrahan (DE Bar No. 941)
Paul A. Fioravanti, Jr. (DE Bar No. 3808)
Kevin H. Davenport (DE Bar No. 5327)
1310 N. King Street
Wilmington, Delaware 19801
(302) 888-6500

Attorneys for Plaintiff Terrice Tharp

OF COUNSEL:

ANDREWS & SPRINGER LLC

FRIEDMAN OSTER PLLC

Jeremy Friedman
Spencer Oster
240 East 79th Street, Suite A
New York, NY 10075
(888) 529-1108

By: /s/ Craig J. Springer
Peter B. Andrews (DE Bar No. 4623)
Craig J. Springer (DE Bar No. 5529)
3801 Kennett Pike
Building C, Suite 305
Wilmington, Delaware 19807
(302) 504-4957

Attorneys for Plaintiff Clarence Henkel

CERTIFICATE OF SERVICE

I, Paul A. Fioravanti, Jr., certify that on this 24th day of June 2015, I caused a copy of the foregoing **Public Inspection Version of Verified Class Action and Derivative Complaint** to be served via File & ServeXpress upon the following counsel:

Peter B. Andrews, Esquire
Craig J. Springer, Esquire
Andrews & Springer LLC
3801 Kennett Pike
Building C, Suite 305
Wilmington, Delaware 19807

William M. Lafferty, Esquire
Morris Nichols Arsht & Tunnell LLP
1201 N. Market Street
P. O. Box 1347
Wilmington, Delaware 19899-1347

/s/ Paul A. Fioravanti, Jr.
Paul A. Fioravanti, Jr.
(DE Bar No 3808)