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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

CALISTA CORPORATION,

Plaintiff,

v.

WAYNE DON; SAM FORTIER; and
HARLEY SUNDOWN,

Defendants.

FILED in the TRIAL COURTS
STATE OF ALASKA, THIRD DISTRICT
MAY 14 2018
By _____ Clerk of the Trial Courts
Deputy

3AN-18-6788 CI

COMPLAINT

Plaintiff Calista Corporation ("Calista"), by and through counsel of record, Holland & Knight LLP, hereby files its Complaint against a member of its Board of Directors, his attorney, and a Calista shareholder.

Defendant Wayne Don ("Mr. Don") and his attorney Defendant Sam Fortier ("Defendant Fortier") have repeatedly violated Alaska securities laws by issuing multiple false and misleading proxy solicitations in an improper effort to effect the rapidly approaching annual election of directors scheduled for July 6, 2018. In furtherance of this corporate campaign, Mr. Don and Defendant Fortier have made multiple egregiously false and misleading statements to the press, and have vowed to continue doing so

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“regardless of the consequences.”¹ Defendant Harley Sundown (“Defendant Sundown”), a Calista shareholder and former Board member, has launched his own false and misleading proxy solicitation campaign for the Calista board election on Facebook, in an effort to change the composition of Calista’s Board of Directors. Alaska’s securities laws prohibit Defendants Don, Fortier, and Sundown from making these false and misleading statements.² Therefore, Calista seeks injunctive relief to protect the integrity of its upcoming annual shareholder meeting. Calista asks this Court to enter an injunction prohibiting Defendants Don, Fortier, and Sundown from issuing any further proxy solicitations prior to Calista’s upcoming annual meeting.³

Further, Calista asks the Court to remove Mr. Don from Calista’s Board of Directors because of his gross misconduct. Mr. Don breached his statutory fiduciary duties of care and loyalty to Calista by, among other actions: participating in the above-described false and misleading proxy solicitations; exceeding and abusing his authority as then-Chair of the Board by unilaterally acting in secret to oust Calista’s President without the knowledge or permission of the Board; leaking confidential Calista corporate information to the media; and publicly rebuking the Board’s final determination that

¹ Mr. Wayne Don, *The Delta Discovery*: “A Statement from Former Calista Chairman” (April 5, 2018) (available at <https://deltadiscovery.com/a-statement-from-former-calista-chairman/>).

² *Rude v. CIRI*, 294 P.3d 76, 94 (Alaska 2012) (“Alaska law prohibits material misrepresentations in proxy solicitations.”) (citing AS 45.55.160 and 3 AAC 08.315(a)).

³ *Meidinger v. Koniag, Inc.*, 31 P.3d 77, 85 (Alaska 2001) (affirming trial court entrance of an injunction that directed defendants to cease and desist from further violation of Alaska’s securities laws, to send all future solicitations to the State Division of Banking and Securities ten days prior to issuing to shareholder, and invalidating the proxies they collected using false and misleading statements).

Mr. Don had engaged in gross misconduct, even though this determination was made after Mr. Don, with the assistance of his attorney, had presented his case during a hearing before the Board. Calista asks the Court to remove Mr. Don from its Board because of these willful breaches of fiduciary duties and gross misconduct to Calista.

PARTIES AND JURISDICTION

1. Plaintiff Calista Corporation ("Calista") is an Alaska Native Regional Corporation with offices in Anchorage and Bethel, Alaska, and is in all ways qualified to bring and maintain this action.
2. Defendant Wayne Don is a member of Calista's Board of Directors.
3. Defendant Sam Fortier is a member of the Alaska Bar Association and is represented and continues to represent Mr. Don. As Mr. Don's agent and attorney, Defendant Fortier has independently made and repeated false and misleading statements that violate the securities laws of the State of Alaska.
4. Defendant Harley Sundown is a shareholder and former board member of Calista.
5. This Court has jurisdiction pursuant to AS 22.10.020 and AS 09.05.010 and venue is proper in this Court.

FACTS

Mr. Don Attempts to Exploit a Calista Personnel Matter to Make Political Moves

6. The background facts for this lawsuit begin in the summer of 2017, when an individual seeking to sell her business ("prospective business partner") contacted Calista.

7. The prospective business partner's ex-husband introduced her to a Calista employee ("Calista Employee A") who was the ex-husband's personal acquaintance and friend.

8. The prospective business partner and Calista Employee A talked about selling the prospective business partner's business to Calista.

9. On August 22, 2017, the prospective business partner submitted to Calista President Guy a proposal to sell her business to Calista for \$50 million up front plus additional licensing royalty fees.

10. Upon receiving the proposal, President Guy immediately forwarded it to Calista's investment group without comment. The investment group promptly advised President Guy that the financial terms proposed were not appropriate. President Guy concurred with the investment group's analysis of the proposal.

11. On August 23, 2017, President Guy emailed the prospective business partner that the \$50 million asking price was a nonstarter given the company's lack of revenue and operating history, but that if she was interested in discussing a partnership Calista would welcome that discussion.

12. On August 24, 2017, the prospective business partner emailed President Guy and told him that she not only understood Calista's position on the proposal, but happened to agree with it. She also advised President Guy that she would like to discuss her less-than-comfortable experience with Calista over the past month.

13. On August 28, 2017, President Guy replied and offered to speak with her that day.

14. On August 29, 2017, President Guy and the prospective business partner talked by telephone. President Guy took notes of the call. The prospective business partner told President Guy that she believed the value of her business was in the \$2-5 million range, and that she only submitted a \$50 million proposal because Calista Employee A had recommended and insisted that Calista would not consider anything less. The prospective business partner also told President Guy that she had had a terrible experience with Calista Employee A over the past month. She told President Guy, that Calista Employee A had shown up at her house in Colorado with his daughter; and that she had 1,142 text-message contacts with Calista Employee A over the month, every day and night. While the prospective business partner told President Guy that she did not want to get Calista Employee A in trouble, she also said she did not want to work with him anymore. President Guy responded that she would no longer have to deal with Calista Employee A, and Calista's Director of Business Development, Jim St. George ("Mr. St. George"), would be her new point of contact at Calista. President Guy told the prospective business partner that Mr. St. George was a good person for her to deal with

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because not only was he the Director of Business Development but he had a construction background, which related to her proposal.

15. After this telephone call, President Guy went to Mr. St. George and asked him to follow up with the prospective business partner on her resubmission. President Guy advised Mr. St. George that he would be the prospective business partner's primary point of contact moving forward and that Calista Employee A would not be involved. President Guy checked with Mr. St. George to make sure he had connected with the prospective business partner.

16. Mr. St. George called the prospective business partner and they had a productive call. After more than a month working with Mr. St. George, the prospective business partner confirmed she was comfortable dealing with him.

17. After August 25, 2017, there was no contact between the prospective business partner and Calista Employee A.

18. Mr. St. George later reported to Calista's Chief Operating Officer ("COO") that the prospective business partner had told him that Calista Employee A had sexually harassed her. Calista's COO reported Mr. St. George's report to Calista's Senior Human Resources Director Heather Spear ("Senior HR Director Spear").

19. Senior HR Director Spear launched a formal investigation. On October 17, 2017, she contacted Calista's outside legal counsel regarding the allegations. The next day (October 18) Spear and a member of Calista's in-house legal team met with Calista's outside legal counsel. Calista's outside legal counsel advised them to retain an

independent third-party investigator to look into Calista Employee A's conduct toward the prospective business partner.

20. The same day, on October 18, 2017, Senior HR Director Spear, a member of Calista's in-house legal team, and President Guy met with Calista Employee A. Based on the prospective business partner's statements to Mr. St. George and recommendation of outside legal counsel, Senior HR Director Spear put Calista Employee A on administrative leave while the investigation was conducted. President Guy agreed that Calista Employee A needed to be suspended immediately.

21. On November 14, 2017, the independent third-party investigator submitted her confidential report to Senior HR Director Spear and Calista's in-house legal team.

22. On November 15, 2017, Calista Employee A was terminated effective immediately.

23. Somehow and at some point, then-Chairman of Calista's Board of Directors Mr. Don learned that there was an internal investigation into the conduct of Calista Employee A.

24. On November 21, 2017, Mr. Don called Senior HR Director Spear and requested the phone number for Calista's outside legal counsel, who had advised Calista to obtain an independent third-party investigator to look into the sexual harassment allegations.

25. The next day, on November 22, Mr. Don, without notifying the Board and without any authority from the Board, met with Calista's outside legal counsel, the third-

party investigator, Senior HR Director Spear, and a member of Calista's in-house legal team, to meet at the office of Calista's outside legal counsel.

26. Also on November 22, Mr. Don, against the advice of legal counsel, directed Calista's outside legal counsel to draft a notice of a special meeting and directed Calista's in-house counsel to send it to the Directors. Mr. Don also called President Guy and gave him directives over the phone during the meeting. Mr. Don had not received any authority from the Board to issue directives to the President or to have Calista's lawyers engage in work to oust President Guy. These lawyers obeyed Mr. Don's directives because they did not feel like they were in a position to say no to him.

Mr. Don Leads A Plot to Oust President Guy

27. On November 22, 2017, members of Calista's Board of Directors received a Notice of Special Board of Directors Meeting to take place on December 1, 2017, at Calista's offices in Anchorage.

28. The special meeting notice stated that then-Chair of Calista's Board of Directors, Mr. Don, had called the meeting. Attached to the notice was a meeting agenda that included Mr. Don briefing the Board on an ongoing investigation into a former Calista employee (Calista Employee A). The notice also stated that the Board was to consider at the special meeting suspending Calista President and Chief Executive Officer Andrew Guy ("President Guy") for his "possible actions and/or inactions" relating to the former Calista employee's behavior and appointing in his place an interim President/CEO.

29. Several members of Calista's Board of Directors were immediately concerned and disappointed when they received the notice and agenda of the special meeting called by Mr. Don. These Board members recognized instantly what the notice of the special meeting called by Mr. Don meant – another plot to oust the Calista President was well underway, and this time it was being led by Mr. Don. These board members, Willie Kasayulie, Margaret Pohjola, Paul "George" Guy, Robert Beans, Earl Samuelson, and Johnny Evan, remembered that a previous Calista Board Chair, in 2012, had similarly orchestrated an attempt to oust President Guy, including placing President Guy on administrative leave.⁴ What had occurred in 2012, was a naked play for President Guy's office and position, and it was apparent that Mr. Don was now running the same play. What happened in 2012, although ultimately unsuccessful in ousting President Guy, had caused tremendous disruption and damage to Calista, and Board members Kasayulie, Pohjola, Guy, Beans, Samuelson, and Evan were alarmed that what had happened in 2012, was happening again.

30. On December 1, 2017, just after the special meeting was called to order, a Board member moved to adjourn the meeting. Another Board member seconded the motion, and the Board voted in favor of adjourning the meeting. The special meeting was over, and the plot by Mr. Don and others to oust President Guy had been averted.

⁴ Indeed, Directors Kasayulie, Pohjola, and Guy have first-hand knowledge of what occurred in 2012, as they were serving as Board members at that time.

31. Mr. Don's wrongdoing in connection with the plot to oust President Guy involved more than circumventing the Board's policies and acting without the authority of the Board. More egregiously, Mr. Don sought to corrupt the governance of the Board by attempting to pressure a board member to support Mr. Don's plot. Prior to the December 1 special meeting, Mr. Don called Calista Board member Johnny Evan, a member of Calista's Corporate Governance, Employees, and Compensation Committee ("Corporate Governance Committee") and a regular "swing vote" on Calista's 11-member Board. Mr. Don, who is a member of the Alaska Army National Guard, reminded Director Evan, who had served 23 years in the Alaska Army National Guard, that he had helped Mr. Evan with the paperwork necessary for Director Evan to receive his retirement from the Guard. Mr. Don told Director Evan "I helped you before, you help me now." After the aborted special meeting on December 1, Mr. Evan reported to the Chair of the Governance Committee that Mr. Don had asked Director Evan to vote for the suspension of President Guy before the special meeting.

The Corporate Governance Committee Takes Action

32. Section 13 of Calista's Code of Conduct governs the Board's investigation and disciplining any current or former Calista Director who is alleged to have violated the Code of Conduct. Under Section 13.b., the Corporate Governance Committee has the authority to institute disciplinary proceeding based on its "concerns that a Director may have violated this Code."

33. The Corporate Governance Committee followed Section 13.b. in instituting an investigation into Mr. Don's conduct. On December 5, 2017, Calista's Corporate Governance Committee passed a Resolution to Initiate Investigation into Conduct of Board Chair and Recommending Suspension of Board Chair Pending Report of Investigation, or Resolution 17-07. This resolution noted that it had come to the attention of the Corporate Governance Committee that Mr. Don may have violated Section 3 of Calista's Code of Business Ethics and Conduct for Directors ("Code of Conduct"), which provides, among other matters, that "Individual Directors do not have direct hiring or disciplinary authority over any Calista employees," such as President Guy, as well as breached his fiduciary duties of care and loyalty by failing to respect the boundaries between the Board's role in policy development and oversight and Management's role in the implementation of Board policy.

34. On December 6, 2017, the Board approved Resolution 17-16A that suspended Mr. Don as the Chair pending an investigation into whether he exceeded his authority with his secretive and swift actions to oust President Guy.

35. Calista Director Earl Samuelson was one of the votes in favor of suspending Mr. Don while Calista investigated the extent of his misconduct. At 9:50 a.m. on December 6, just after the Board voted to suspend Mr. Don, the Board took a short recess. During this recess Mr. Don and Director Samuelson were alone, and Mr. Don approached Director Samuelson and said to him: "Your balls are up to your neck." Director Samuelson was appalled but did not say anything in return, as he was raised in

the Yupik ways to avoid personal conflict. But when the meeting reconvened, Director Samuelson noticed Mr. Don glaring at him and shaking his head. Based on the context and Mr. Don's demeanor, Director Samuelson understood Mr. Don to be trying to intimidate and shame him for not supporting Mr. Don.

36. On December 18, 2017, Willie Kasayulie, the Chair of the Corporate Governance Committee, sent a written notice to Mr. Don of the Committee's allegations against him and notified him that he 10 days to respond to the allegations.

37. On January 2, 2018, Mr. Don, through his attorney Defendant Fortier, submitted a response to the allegations that Mr. Don violated Calista's Code of Conduct. As per the procedures in the Board's Code of Ethics and Business Conduct, the Corporate Governance Committee, with the assistance of outside counsel, conducted an investigation of the allegations pursuant to a plan of investigation adopted by the Committee. The investigation included interviewing Mr. Don with his attorney present.

38. On January 22, 2018, the Corporate Governance Committee met to review Mr. Don's Response to Allegations and a report of the investigation performed by outside counsel. Following its review of these documents, the Corporate Governance Committee determined that there existed no disputes as to the material and relevant facts and that it would not be necessary or helpful to hold a hearing to question witnesses.

39. On February 5, 2018, the Corporate Governance Committee met to deliberate the findings of the investigation and acted to adopt a written determination regarding the allegations against Mr. Don.

40. As per the Code of Conduct, on February 5, 2018, the Corporate Governance Committee sent Mr. Don its written determination that he had exceeded his authority as Chairman under Calista's Bylaws and his authority as an individual director under the Code of Conduct, and that he had violated Calista's Code of Conduct by crossing the boundary of his role as a Board member and Chair by injecting himself into an ongoing personnel matter. The written determination listed fourteen separate instances of Mr. Don violating Calista's Bylaws and Code of Conduct by arranging and conducting meetings with Calista employees and lawyers outside the scope of his role as Chair, directing Calista lawyers and employees that he had no authority over, and injecting himself into a personnel investigation by asking for a report and directing the attorney conducting that investigation to create a "summary" of her findings that focused not on the target of her investigation (Calista Employee A) but instead President Guy, who Mr. Don was seeking to suspend from his position at Calista:

- Mr. Don contacted Calista's Senior Human Resources Director numerous times to discuss the status of Calista's investigation into whether Calista Employee A committed sexual harassment.
- Mr. Don contacted Calista's outside legal counsel on November 21, 2017, to inquire into the status of the investigation into whether Calista Employee A committed sexual harassment.
- Mr. Don met with Calista's outside legal counsel at his law office the evening of November 21, 2017, and asking the legal counsel to brief him on the investigation.
- Mr. Don directed Calista's outside legal counsel to arrange a meeting among Mr. Don, the outside legal counsel, the attorney who was conducting the investigation, Calista's Senior Human Resources

Director, and Calista's Associate General Counsel, for November 22, 2017, on the subject of the investigation.

- Mr. Don met with Calista's outside legal counsel, the attorney who was conducting the investigation, at the law office of Calista's outside legal counsel on November 22, 2017, and directing those present to brief him on the investigation and whether that investigation revealed any evidence of misconduct by President Guy.
- Mr. Don requested and obtained the confidential investigative report drafted by the attorney who was conducting the investigation.
- Mr. Don directed Calista's in-house and outside legal counsel to prepare for and call a special meeting of the Board, and directing that they prepare a resolution placing President Guy on administrative leave.
- Mr. Don called President Guy and directed him to refrain from taking certain personnel actions and to refrain from communicating with certain persons.
- Mr. Don sent an email to President Guy directing him to refrain from taking certain personnel actions and to refrain from communicating with certain persons.
- Mr. Don directed Calista's in-house and outside legal counsel and Calista's Senior Human Resources Director to attend a meeting at the law office of Calista's outside legal counsel on November 30, 2017, for the purpose of preparing for the December 1, 2017 special Board meeting.
- Mr. Don attended the meeting with Calista's in-house legal counsel and its Senior Human Resources Director on November 30, 2017, and directed them to take further actions in preparation for the December 1, 2017 special Board meeting.
- Mr. Don directed the attorney conducting the investigation to prepare an "executive summary" of her investigative report and to focus the executive summary on the role she believed President Guy had in the investigation.

- Mr. Don directed Ms. Spear to prepare a summary of the disciplinary history of Calista Employee A from that employee's confidential employee files.
- Following the adjournment of the special Board meeting on December 1, 2017, Mr. Don secretly met with Calista's in-house and outside legal counsel in the legal file room at Calista's office in Anchorage to discuss strategy for the upcoming regular Board meeting.

The written determination notified Mr. Don that he had the right under the Code of Conduct to appeal the determination to the full board.

Mr. Don Presents His Case to the Board

41. On March 9, 2018, Mr. Don, represented by Defendant Fortier, presented his case to the full Board. At the conclusion of the hearing, the Board deliberated and concluded "that Mr. Don violated Section 3 of Calista's Code of Conduct as well as Attachment A-Duty of Care-Code of Conduct," as the Corporate Governance Committee had determined. The Board adopted Resolution 18-06, which imposed the following sanctions:

- Request that Mr. Don resign as a Calista Director;
- In the event Mr. Don fails or refuses to resign as a Calista Director, then public censure and disclosure of the violations and sanctions;
- Removal as Board Chair;
- Removal from any and all Calista Board committees, including, but not limited to, the audit and finance committee; and
- Suspension of Board stipends for a period of three (3) months, which amount is approximately equivalent to the outside counsel fees incurred by Calista as a result of Mr. Don's misconduct.

42. Following the March 9 meeting, Defendant Fortier was advised that Mr. Don would be given a reasonable period of time to make a decision whether he

would comply with the Board's request that he resign from the Board. When no response was received, on April 2, 2018, Calista's Corporate Governance Committee held a telephonic meeting and passed Resolution 18-01, setting April 10th as the deadline for Mr. Don to advise whether he would resign from the Board.

43. On April 10, 2018, Mr. Don submitted a letter to the Calista Board stating that he "decline[d] to resign from my position as a director of Calista Corporation."

44. Based on Mr. Don's refusal to voluntarily resign, the Board, at its quarterly meeting on April 24, 2018, voted to publicly censure Mr. Don in accordance with the sanctions it had adopted in Resolution 18-06.

Mr. Don Launches Campaign to Promote Himself and Undermine the Calista Board

45. The Board's Code of Conduct provides that there "shall be no appeal from the Board's final decision" regarding board disciplinary matters.⁵ The Code of Conduct further provides, "Directors must also put the corporate and shareholder good before their own personal interest. Once the Board has acted, a Director may seek change through Board action, but shall not undermine public or shareholder confidence in the Board or Calista."⁶

46. In flagrant violation of the Code of Conduct, Mr. Don lost no time commencing his public campaign to discredit the Board's actions and to seek to sway the election of board members scheduled for July 6, 2018. Significantly, even before the

⁵ Provision 13.g. of the Code of Conduct.

⁶ Provision 2.b. of the Code of Conduct.

public censure was adopted by the Board, Mr. Don had submitted a letter in a local Yukon-Kuskokwim newspaper, *The Delta Discovery*, entitled "A Statement From Former Calista Chairman," a true and accurate copy of which is attached to this Complaint as **Exhibit 1**.⁷ While Mr. Don spends the majority of the article boasting about his military service, which has no bearing on his misconduct at Calista, he states in the letter that the determination that he violated Calista's Code of Ethics is baseless and that it was the "result of a biased and flawed process driven by a slim majority of the board."⁸ Further, Mr. Don, implied in fact that Calista Corporation was lacking in "moral, ethical and personal conduct," and compared Calista Corporation to those organizations in which "these values are absent . . . as witnessed by the #me too movement and the very public lapses in judgment and basic respect for people demonstrated by some people in positions of power and influence across the country." None of this is true.

47. Mr. Don continued to spread his false and misleading story about Calista to other news organizations. And his attorney Defendant Fortier joined in promoting these lies.

48. On May 1, a local and widely listened to Yukon-Kuskokwim Delta public radio station, KYUK, published and broadcast to the entire Calista Region, a story entitled "Calista Director Colonel Wayne Don Denies Allegations Against Him," a true

⁷ Also available online at: <https://deltadiscovery.com/a-statement-from-former-calista-chairman/>.

⁸ *Id.*

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and accurate copy of which is attached to this Complaint as **Exhibit 2.**⁹ Statements by Mr. Don and Defendant Fortier were quoted in that piece, and their statements were also broadcast on KYUK's public radio station, and an audio recording of that broadcast is embedded on KYUK's website.¹⁰ A transcription of Mr. Don and Defendant Fortier's broadcasted statements is attached to this Complaint as **Exhibit 3.** Defendant Fortier claims that a woman who was a potential Calista vendor reported to President Guy in August 2017, that she was repeatedly sexually harassed by a Calista employee, and that President Guy did nothing: "An employee engaged in basically a rather significant 'me too' moment, in fact a series of moments." *Id.*

49. Defendant Fortier's statement that President Guy "did nothing" in response to the information he was given by the "woman who was a potential vendor" is completely false and misleading. Mr. Guy immediately told another executive about President Guy's call with the woman, directed him to call the woman, and directed Calista Employee A to have no further contact with the woman. President Guy also advised the woman, in his call with her that she no longer would be dealing with Calista Employee A and that Director of Business Development would now be her point of contact.

⁹ Also available online at: <http://bank.org/>

50. Defendant Fortier's statement that Mr. Don "did everything you're supposed to do in compliance with fiduciary duties and more" is also false. As found by the Corporate Governance Committee and the Board, Mr. Don, in at least fourteen instances, acted without the authority of the Board to give orders to or otherwise interact with Calista's in-house and outside legal counsel, Senior HR Director and to President Guy himself.

51. Defendant Fortier's statements contain confidential corporate information that he should not have disseminated to the media.

52. It was also misleading for Defendant Fortier to state to KYUK that the attempt to remove Mr. Don from Calista's Board is "entirely political." By characterizing the Board action as "entirely political," Fortier intended and did convey that the Board action was biased, unfair, arbitrary, and lacking a good-faith basis in fact and law. Defendant Fortier's statements implied in fact that Calista's Board was engaging in improper corporate governance. These statements are demonstrably false. To the contrary, while Defendant Fortier may have disagreed with the Board's public censure and discipline of his client, he knew the Board's discipline was imposed on Mr. Don after full due process and deliberation by the Board. Mr. Don was found to have violated Calista's Code of Conduct on fourteen separate occasions. First, Calista's Corporate Governance Committee and then the Calista Board determined, after Mr. Don presented testimony and documentary evidence with the assistance of his attorney, that Mr. Don's repeated instances of misconduct warranted a call for his resignation from the Board. The

Board's decision was supported by the facts as found by the Board after due process was accorded to Mr. Don. It was misleading for Defendant Fortier to ignore the extensive documentation that he has in his possession showing that Mr. Don did engage in misconduct and claim that Calista's actions were instead "entirely political."

53. On May 8, 2018, Defendant Fortier went even further in making false and misleading statements about Calista in a KYUK interview.¹¹ Defendant Fortier asserts in that interview that President Guy "definitely knew" in August 2017, that a former Calista employee had sent "a six page love letter" and "a box of Victoria Secret's lingerie" to the prospective business partner because he has copies of President Guy's notes that show he knew about the love letter and lingerie. These assertions are bald falsehoods. No such notes exist. To the contrary, President Guy's notes refer only to the number of texts, reference to the former Calista's employee's daughter moving to Colorado, and to the person saying she was offended by the unannounced visit by the former employee and his daughter to her home in Colorado. There is nothing about sexual advances, lingerie, or a love letter contained in President Guy's notes of his August 2017 telephone call with the prospective business partner, and Defendant Fortier knows this. Defendant Fortier's statements were false and misleading for the purpose of influencing voting by Calista shareholders in the upcoming annual shareholders meeting.

54. Defendant Fortier's statements contain confidential corporate information that he should not have disseminated to the media.

¹¹ See <http://kyuk.org/post/attorney-calista-ceo-andrew-guy-knew-about-sexual-harassment>.

The False and Misleading Proxy Solicitation Campaigns

55. Mr. Don's and Defendant Fortier's statements in *The Delta Discovery* and on KYUK are proxy solicitations. They were intended to influence Calista shareholders' voting in the upcoming annual election. Calista's annual meeting of shareholders is scheduled for July 6, 2018, and Calista will start sending meeting packets with proxies to shareholders on or about May 16, 2018. Mr. Don's letter in *The Delta Discovery* twice refers to the Board's current governing majority as a "slim majority," and Mr. Don vows to "fight and stand up for Loyalty, Duty, Selfless Service, Honor, Integrity, and Personal Courage regardless of the consequences." These are campaign statements. They are aimed at the current Board and its public censure against Mr. Don. They are aimed at the upcoming annual meeting, in which Calista shareholders will vote to fill four of the eleven seats on the Calista Board of Directors.

56. As Defendants intended, these proxy solicitations have been seen by many Calista shareholders. *The Delta Discovery* is a popular and widely read local newspaper in the Yukon-Kuskokwim Delta region, where a majority of Calista shareholders reside. Following publication of these articles and broadcast of these interviews, Calista directors have been approached by Calista shareholders with questions and concerns. Likewise, KYUK is a popular news site and public radio station listened to by countless Calista shareholders that reside in Alaska and particularly on the Y-K Delta.

57. Mr. Don and Defendant Fortier failed to file, simultaneously with their publication, their statements with the Alaska Division of Banking and Securities, in violation of Alaska's securities laws.

58. Following publication and broadcast of Mr. Don's and Defendant Fortier's statements, other Calista shareholders predictably have amplified and expanded on their false and misleading statements about Calista's Board and President. Defendant Sundown is one person that has been particularly egregious in spreading and expanding on Mr. Don's and Defendant Fortier's false and misleading statements.

59. Defendant Sundown is a former Calista board member who was involved in the failed 2012 plot to oust President Guy, and he regularly uses the social media platform Facebook to promote his viewpoints about Calista's annual elections. Since Calista's Board removed Mr. Don from his position as Chair of the Board, Defendant Sundown has regularly published false and misleading statements to Calista shareholders in an effort to effect its corporate elections.

60. The following are examples of Defendant Sundown Facebook posts. Sharing Mr. Don's *Delta Discovery* article, Defendant Sundown stated:

... mr. Don was basically set up to be found for doing something wrong. Anytime there is an allegation for something don[e] wrong an independent counsel is supposed to be appointed who had absolutely no connection. Mr. Don was set up to be found guilty of violations by kasayuli, pg guy, pojhola, beans, Evan, and Samuelson. Some of these board members are really good people [s]o it's hard to believe they would allow themselves to be convinced by a one sided investigation. It shows the power of personal corruption of morals and values is possible in this day and age to our fellow Yupiks. Mr. bea[n]s needs to be voted out along with other board members

who are up for re-election. The named people have reached their bench life and I urge them to resign before the [a]valanche reveals who they really are.

See H. Sundown Facebook Post (errors in original), a true and accurate copy of which is attached to the Complaint as **Exhibit 4**. Defendant Sundown's reference to "kasayuli, pg guy, pojhola, beans, Evan, and Samuelson" are the clear references to current board members, and Defendant Sundown's reference to "Mr. Bea[n]s" is Director Robert L. Beans of Mountain Village, who is running in this corporate election cycle to be re-elected to Calista's Board of Directors.

61. This Facebook post is a proxy solicitation because it is intended to influence shareholders in voting their proxies for the upcoming election of Board members at the July 2018 shareholders meeting.

62. Defendant Sundown's Facebook post contains false and misleading statements. While Defendant Sundown states that Mr. Don's public censure is the product of a one-sided investigation, in truth, Calista's Board voted to censure Mr. Don only after he was permitted to present his case with the assistance of his attorney. Further, this post implies that Mr. Don's punishment is the result of "personal power and corruption of morals and values," when, in fact, Calista only disciplined Mr. Don after the Board and the Corporate Governance Committee followed the process outlined in the Board's Code of Conduct. Calista's Board voted in favor of censuring Mr. Don after it heard the facts as presented by both sides, and concluded that Mr. Don had violated Calista's Code of Conduct on multiple occasions.

63. In another Facebook post, Defendant Sundown made the following statements:

Plausible deniability is when you are told something or you tell someone something only between the 2 people. Then in turn you deny that anything was ever said between the 2 of you. It's hard to prove when only 2 people say something to each other and then deny it or accuse each other. That is what trump is going through when he denied ever doing anything with stormy Daniels. I think our CEO guy has learned well from our eastern culture of lawyers and people who do something and deny it. In our culture our word is very important. We have 2 people that are believable. One is a career decorated serviceman who climbed his way to Colonel and you can only become a commissioned officer after receiving a degree which Mr. Don did through the ua system. He sits on many commissions and has worked hard to get where he is by using codes of honor, professionalism, and duty. Not a lot of Yupik men can say they accomplished these.

On the other hand you have a Yupik man who became a lawyer through his own grit and hard work. Mr. guy used his training and education to move his way up calistas ladder of succession.

Who do we believe? This is where we start taking environment and reputation into consideration. Calista board and this leadership that was taken away from from [sic] Wayne Don has shown itself to some of us that understand personalities, the belief that the majority is only out to keep themselves in power. They have only elected themselves into power of chairman of the board. When Wayne was elected board, somehow, the outgoing chairman selected who would serve on the committees. It was only the majority of beans, pojhola, kasayuli, guy, Samuelson, Evan, that got on the preferred committees. Never in Calistas history that an outgoing chair has chosen who gets on the committees. This is normally the new board chairs prerogative to name who sits on the committees. The CEO has had a big say along with the new chair who sits on the committees. This opportunity was never given to Wayne to choose his committees. The CEO with his skewed understanding of board policy found a loophole that allowed himself and the outgoing chair to start the process of undermining the new chairs power. So from the beginning Wayne was setup to not be able to carry out his

responsibilities. He was being set up for being undermined by the CEO and the majority. In the original votes Johnny Evan was the swing vote that got Wayne the chairmanship.

...
... H. Sundown Facebook Post (errors in original), a true and accurate copy of which is attached to the Complaint as **Exhibit 5**.

64. Setting aside the disturbing fact that Defendant Sundown's Facebook posting contains confidential information from executive sessions of the Board of Directors that should not have been disclosed to Defendant Sundown, Defendant Sundown's post is false and misleading in numerous respects. To point out just one, Defendant Sundown states that it "is normally the new board chairs [sic] prerogative to name who sits on the committees." This is clearly false, as the Alaska Corporations Code, which is followed by the Calista Board, requires that the designation of board members to serve on committees can only be made by a vote of the full board.

65. Defendant Sundown also published these statements on Facebook:

This article confirms my suspicions and theories I wrote about last time. It's confirmed that our CEO tried to hinder or look away from a sexual harassment allegation against a favored employee. This portion of the info leads to a valid belief that an allegation was ignored and no action taken to address the allegation. This is a serious breach of fiduciary responsibility that looks like the best interest of the corporation was not protected, instead the actions of an employee who sexually harassed another person appeared to be put under the rug or protected. If the majority board of pojhola, kasayuli, Samuelson, Evan, pg guy, beans, called for the adjournment of a meeting to address this issue which is a serious offense of not protecting the assets of the corporation. This adjournment of a meeting that was called to address the CEOs inaction on the issues is only quantified by the majority boards

inaction to address the poor judgment of the ceo and now the board. This is a serious breach of trust that shows the ceo and the 6 board members name are truly out for themselves. Robert beans is up for election and he needs to be voted out. Robert Hoffman, Joann Jorgenson, and Myron Naneng need to be voted in again so they and Roberts replacement can straighten out the issues with the ceo and get rid of him. The best thing Samuelson pojhola evan guy beans and kasayuli should do is resign from the board. Aligning themselves with the ceo to create profit for calista is great. The align themselves to protect a sexual harasser and to protect the CEO at all costs is absolutely wrong that no sane shareholder should stand for. Vote beans out. Vote Naneng Jorgenson and Hoffman this election.

See H. Sundown Facebook Post (errors in original), a true and accurate copy of which is attached to the Complaint as **Exhibit 6**.

66. This is a blatant proxy solicitation against Director Beans and in support of the three incumbent Directors, Hoffman, Naneng, and Werning. It contains numerous egregiously false and misleading statements. There is no factual basis to say that Calista President Guy "hindered," "ignored," or "put under the rug" any investigation into sexual harassment. To the contrary, President Guy was supportive and agreed to put Calista Employee A on administrative leave pending an investigation, was supportive and cooperated fully with the independent investigation, and was supportive of the decision to terminate Calista Employee A at the conclusion of the investigation. President Guy did not hinder or ignore any investigation. Further, this solicitation falsely states that Calista's Board voted to adjourn the special meeting called by Mr. Don on December 1, because they were only out for themselves. To the contrary, the Calista Board voted to end that meeting because the agenda betrayed Mr. Don's plot to oust President Guy. As the Chair, Mr. Don's authority was limited to presiding over shareholder and board

meetings, and he was prohibited, as any director is, from injecting himself into the day-to-day operations of Calista, including employment and human resource decisions.

67. Like Mr. Don and Defendant Fortier, Defendant Sundown failed to file copies of his Facebook posts with the Alaska Division of Banking and Securities as required by Alaska Securities laws.

COUNT I: INJUNCTIVE RELIEF

(Order Prohibiting Defendants Don, Fortier, and Sundown from Engaging in Further False and Misleading Proxy Solicitations)

68. Paragraphs 1-67 are hereby incorporated by reference.

69. As shown in Paragraphs 45-57 of this Complaint, Defendants Don and Fortier have repeatedly published and broadcast false and misleading proxy solicitations to Calista shareholders, and promise to continue to do so "regardless of the consequences."

70. By engaging in the conduct described in Paragraphs 45-57 of this complaint, Defendant Fortier knowingly provided substantial assistance to Mr. Don's false and misleading proxy statements. By reason of the foregoing, Defendant Fortier has aided and abetted Mr. Don's violations of Alaska's securities laws.

71. As shown in Paragraphs 49-67 of this Complaint, Defendant Sundown has repeatedly published false and misleading proxy solicitations to Calista shareholders.

72. Alaska's securities laws make it unlawful for proxy solicitations to contain a material misrepresentation. A misrepresentation is a statement that, at the time and under the circumstances in which it was made: (1) is false or misleading with respect to a

material fact; (2) omits a material fact necessary in order to make a statement made in the solicitation not false or misleading, or (3) omits a material fact necessary to correct a statement, in an earlier communication regarding the solicitation of a proxy for the same meeting or subject matter, which has become false or misleading. A misrepresentation is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. For all of the reasons outlined above, Defendants Don's, Fortier's, and Sundown's recent proxy solicitations contain materially false and misleading statements and violate Alaska's securities laws.

73. Calista is therefore entitled to immediate injunctive relief prohibiting Defendants from issuing any further proxy solicitations this election cycle, and this Court should enjoin defendants from soliciting and voting any proxies for the upcoming shareholders' meeting. Defendants should be further enjoined from aiding, abetting, and assisting of voting proxies for the election of Calista directors for the upcoming shareholders' meeting scheduled for July 6, 2018.

**COUNT II: JUDICIAL REMOVAL
OF DIRECTOR DON FOR MISCONDUCT
(AS 10.06.463)**

74. Paragraphs 1-73 are hereby incorporated by reference.

75. Alaska law, AS 10.06.463, allows an Alaska superior court to remove from office a director for fraudulent or dishonest acts, gross neglect of duty, or gross abuse of authority or discretion with reference to the corporation, and may bar from reelection a director removed in that manner for a period prescribed by the court.

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76. Mr. Don is a sitting member of Calista's Board of Directors. Mr. Don engaged in the gross neglect of duty by breaching his fiduciary duties of care and loyalty to Calista, and Calista's Code of Conduct.

77. Mr. Don violated his fiduciary duties to Calista by using quid pro quo bullying tactics in an attempt to pressure Board members to support him. As Director Evan recounted, Mr. Don called to garner his support to suspend President Guy before the Board had received any information on the issue, by reminding him that he had helped with Director Evan's Alaska Army National Guard retirement paperwork, stating "I've helped you, now you help me." When Director Evan reported Mr. Don's misconduct to the Board, Mr. Don then lied to the Board and denied that he had proposed a quid pro quo arrangement. Turning to Mr. Evan in that meeting, Mr. Don said, "I told you before that I would help you with your retirement and that it would have no connection with seeking your vote at Calista."

78. Mr. Don also breached his fiduciary duties by attempting to bully Director Samuelson into supporting Mr. Don through intimidation tactics that others on the Board described as sexual harassment of Director Samuelson.

79. A director's fiduciary duty of loyalty prohibits a director from undermining public or shareholder confidence in the corporation by attacking the Board's decision on an issue. Indeed, Calista's Code of Conduct states: "Once the Board has acted, a Director may seek change through Board action, but shall not undermine public or shareholder confidence in the Board or Calista." Mr. Don has repeatedly and flagrantly violated his

fiduciary duty of loyalty to Calista by actively publishing and broadcasting statements that undermine public and shareholder confidence in the Calista Board's investigation into Mr. Don's misconduct and its vote to publicly censure Mr. Don.

80. A director's fiduciary duty of care prohibits a director from knowingly disseminating false or misleading information. Indeed, Calista's Code of Conduct states: "Directors shall not knowingly disseminate false or misleading statements, and shall act promptly to correct erroneous communications for which they are responsible." As shown in Paragraphs 24-36 of this Complaint, Mr. Don has repeatedly and flagrantly breached his fiduciary duty of care to Calista by making materially false and misleading statements in *The Delta Discovery* and on KYUK.

81. Mr. Don has breached his fiduciary duties of care and loyalty by having his agent, Defendant Fortier, disseminate Calista's confidential corporate information about its internal investigation into Calista Employee A to the media.

PRAYER FOR RELIEF

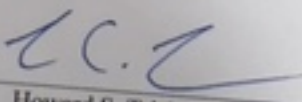
Calista prays for the following relief:

1. A preliminary and permanent injunction:
 - a. Prohibiting Defendants from disseminating any further proxy solicitations for the upcoming Calista meeting; and
 - b. Defendants from aiding, abetting, soliciting, or voting proxies for the election of Calista directors at the upcoming Calista meeting.

- c. Counting any proxies invalidated by injunctive relief as valid for quorum purposes.
2. Removal of Mr. Don from Calista's Board, pursuant to AS 10.06.463.
 3. A monetary award for the damages caused by the misconduct of Mr. Don, and his breaches of fiduciary duties.
 4. A monetary award for the damages caused by Defendant Fortier's aiding and abetting of Mr. Don's misconduct and breaches of fiduciary duties.
 5. An award of pre- and post-judgment interest, costs, and attorneys' fees.
 6. Such other legal and equitable relief as is just.

DATED at Anchorage, Alaska this 14th day of May, 2018.

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