**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

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| **NERIUM SKINCARE, INC. on behalf of itself and in a derivative capacity for Nerium International, LLC, and NERIUM BIOTECHNOLOGY, INC.** | § | |
| **Plaintiffs,** | § | |
| **v.** | § | |
| | § | **Civil Action No. 3:16-cv-1217-B** |
| **JEFF A. OLSON, NERIUM INTERNATIONAL, LLC, and JO PRODUCTS LLC,** | § | |
| **Defendants.** | § | |

**PLAINTIFF'S BRIEF IN SUPPORT OF APPLICATION TO COMPEL**
**STATUTORY RECORDS INSPECTION**

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Plaintiff Nerium SkinCare ("Nerium") respectfully submits this brief regarding the Court's authority to compel an inspection of Nerium International's ("NI's" or the "Company's") books and records under Texas Business Organizations Code § 101.502 after Nerium, a member of the Company, served a written demand for one:

## INTRODUCTION

Nerium has recently obtained concrete evidence of numerous inappropriate transactions—totaling millions of dollars—that were directed or overseen by Jeff Olson, the Company's sole Manager. This evidence leaves no room for doubt that Olson is guilty of financial impropriety; now the question is the scope and extent. Nor is there any room for dispute that the Company previously underpaid Nerium by millions of dollars in equity and bonus distributions. After Nerium filed its application to compel records inspection and served discovery regarding the Company's equity allocations, the Company was finally forced to admit that its prior equity allocations were wrong. Yet it refuses to provide Nerium the information needed to calculate what it is owed.

To compel an inspection, the Court need not find that financial impropriety occurred. Rather, Nerium has an absolute right to inspect the Company's records to understand its finances. The Company's sole defense is to establish that Nerium has an improper purpose. And to be entitled to a jury trial on that issue, the Company must marshal substantial evidence and show that there is a *genuine* dispute that Nerium's purpose is improper. Texas law presumes that Nerium has a proper purpose, and the Company cannot overcome this presumption—especially in light of the evidence of fraud and self-dealing. It cannot reasonably dispute that a purpose of this inspection is for Nerium to understand where all the money is going and how much it is owed, a core purpose for statutory inspections under Texas law.

The Company has not made an equity distribution to Nerium since February 2015. It has never made a bonus distribution. It is purchasing less and less NeriumAD as it shifts from selling that to selling Optimera. In short, it is trying to win by cutting off Nerium's income—and diverting it to Olson—until Nerium is forced to close its doors. The need for an inspection has become increasingly urgent.

## FACTS

In 2015, the Company reported an amazing $498 million in revenue. Still more amazing, however, was that it reported a net *loss* of $2.6 million.[1] It remains a mystery how $500 million could vanish in a single year, but financial records recently obtained from third parties and Defendants are shedding light. Nerium is now aware of several different illegal financial schemes described below, but these appear only to scratch the surface.

### 1. FARC, LLC.

Olson has directed the Company to disburse over time more than $3.5 million in Company funds to an entity called FARC, LLC (hereinafter "FARC").[2] In the spring of 2015, Nerium's CFO, Lori Jones, discovered a collection of these mysterious payments (in $15k and $150k increments) scattered and buried in a Company ledger of over 100,000 entries.[3] After this discovery, she and Joe Nester asked Jeff Branch (the Company's Chief Financial Officer) to explain who FARC was and what services or goods it was providing to the Company.[4] Mr. Branch stated that the expenditures were not something Nerium should concern itself with. He directed further inquiry to the Company's General Counsel, Eric Haynes.[5] When asked the same

[1] App. 353, ¶9.
[2] App. 1-68.
[3] App. 351, ¶4.
[4] *Id.*
[5] *Id.*

question, Mr. Haynes responded that FARC was engaged for "business development purposes," and refused to explain more.[6]

Only after a third-party subpoena was served upon FARC did the Company produce underlying documentation. It turns out that Olson bound the Company to a secret agreement with his long-time friend Steve Bright, to transfer enormous wealth from the Company to Bright, through FARC.[7] FARC was created on August 26, 2011 for the apparent purpose of receiving these payments.[8] That same day, Bright's wife Vicki entered into the agreement whereby Olson purportedly (1) transferred 3% ownership in the Company to FARC; (2) agreed to pay FARC 5% of the revenues Olson received from the sale of promotional items or sales tools under the Company Agreement; and (3) agreed to retroactively place a phony sales distributorship at the top of the Company's sales pyramid, whereby FARC would be paid commissions as one of the top earning sales distributors without actually performing services as a sales distributor for the Company.[9] In exchange for these lucrative promises of Company cash, FARC tendered just "ten dollars and other good and valuable consideration."[10]

Nerium did not know about this wealth transfer. On its face, this "agreement" has no business purpose and violates the Company Agreement's prohibition against transfers of equity. Company Agreement §§ 13.01 and 13.06.[11] But even that purported transfer does not explain the payments to FARC, which were *not* made as equity distributions. They were made on a monthly basis in round numbers and booked as "consulting" or "legal" payments—checks for $15,000 and $150,000.[12] Bright would personally come to the Company offices and pick up the checks.[13]

[6] *Id.*
[7] App. 83-84; App. 69-70.
[8] App. 71-82.
[9] App. 83-84.
[10] *Id.*
[11] App. 105-06
[12] App. 69; App. 145; App. 1-68.

The payments were made with the knowledge and approval of Mr. Haynes and Mr. Branch.[14] At one point, a bookkeeper requested backup in the form of a bill, but apparently there was none, and the bookkeeper was instructed to make the payments anyway.[15] Not coincidently, once Nerium filed this lawsuit, Mr. Branch discontinued the $150,000 monthly payment "until further notice," and paid only the $15,000 checks.[16]

No effort has been made to legitimize these payments of Company money, nor has anyone explained why they chose to use an entity named "FARC" instead of the names of the people actually benefitting. Only through third-party discovery has it been revealed that FARC, LLC's sole member is the FARC Special Trust.[17] The Settlor and Trustee of the Trust is Vicki Bright, Steve Bright's wife.[18] Bright is Olson's long-time personal attorney and friend.[19] The beneficiaries of the Trust are the Bright's two children.[20]

The only plausible explanation for the creation of "FARC" was to hide payments to Bright. When inquiry was made regarding the payments, Company executives lied and continued to conceal the nature of the transaction. It remains unknown what other role Bright may have in this conspiracy and whether he (as Olson's attorney) is helping him set up the system of legal entities and phony vendors into which he funnels money.

**2. NEFX, Inc**.

Mr. Branch, the Court will recall, was the Company's CFO and the only person Mr. Olson allowed into the "silo" surrounding the Company's internal financial data.[21] It now

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[13] App. 145–46.
[14] App. 147–49.
[15] App. 151.
[16] App. 150, 152; *cf.* App. 55-68.
[17] App. 72.
[18] App. 85.
[19] Dec. 1, 2016 Hearing Tr. 156:17-22, 256:13-25 (Olson testimony); App. 388 (Windsor Dep. Tr. 54:5-6).
[20] App. 85.
[21] Nov. 30 Hrg. Tr. 315:9–22 (Windsor testimony); App. 393-94 (Windsor Dep. Tr. 77:14–79:24).

appears that to ensure Mr. Branch's loyalty, he received additional "compensation" of $10,000 per month, to be funneled through a corporation owned by Mr. Branch—NEFX, Inc. (hereinafter "NEFX"). Although already an employee of the Company for several years, on December 8, 2104, Jeff Branch executed an agreement between NEFX and the Company, which characterized NEFX as an "independent contractor" retained to advise the Company on "investment transactions," in exchange for $10,000 per month from the Company.[22] NEFX is nothing more than Branch, who already was the CFO of the Company – responsible for overseeing investment transactions.

The agreement, which was only recently disclosed following a subpoena served on NEFX, calls for NEFX to received $2,500 a week beginning December 8, 2014. App. 153. Records now demonstrate that Mr. Branch surreptitiously received in excess of $300,000 through NEFX.[23] Based upon documents only recently obtained, it appears that on at least one occasion, on January 16, 2015, Mr. Branch submitted an invoice in order to receive an additional $75,000 "bonus", which was promptly approved and paid,[24] although it does not seem to have been recorded on any of the Company's ledgers or financial statements.

Plaintiffs requested all documents from both the Company and NEFX which would demonstrate that actual services were provided to the Company from NEFX, and were told that none existed. Mr. Branch has admitted that the payments were simply additional "compensation" which he was to receive through NEFX.[25]

[22] App. 153-55.
[23] App. 156-95.
[24] App. 196-198.
[25] App. 199-200.

In September 2016, Mr. Branch left the employment of the Company. On his way out the door, the Company agreed to pay him $125,000 annually for "consulting" services and, perhaps more importantly, his silence.[26]

**3. Amber and Renee Olson**

Amber Olson is Jeff Olson's daughter. Renee Olson is Jeff Olson's ex-wife. Each has been a salaried employee of the Company since 2012.[27]

Recently produced documents reveal that, besides paying their salaries, Jeff Olson created phony distributorship positions for them, placing them at the top of the pyramid of brand partners where they could receive monthly "commission" checks as leading distributors—without actually distributing anything.[28] To hide these payments, phony distributor names were entered into the accounting system.[29] For Amber Olson, the distributorship was called "Gator Marketing."[30] For Renee Olson, the distributorship was called "Chill Development."[31] Secret payments to Gator Marketing exceeded $1 million[32] and payments to Chill Development exceeded $700,000.[33]

Other disguised payments were also made to directly to the Olson family. The Company booked a "real estate bridge loan" to the law firm of "Stone & Bruce" in the amount of $347,000.[34] Nerium only later learned that this money really went to Renee.[35] To hide that transaction, it had been recorded on the ledger as an "investment – CD" with "Stone & Bruce-

[26] App. 297, 300-01.
[27] App. 201-208.
[28] App. 385 (Windsor Dep. Tr. 43:19–44:1).
[29] App. 209.
[30] App. 210.
[31] App. 211.
[32] App. 212-16.
[33] App. 217-21.
[34] App. 227.
[35] App. 222-225.

Real Estate Bridge Loan" in the memo line. [36]To further mask it, the funds were wired to Stone & Bruce's ***IOLTA*** account.[37] Interestingly, Dan Bruce, of Stone & Bruce, is the registered agent for FARC, LLC and several other Olson entities. He also prepared the Company Agreement.[38]

**4. Stuart Johnson**

On the surface, Stuart Johnson appears to be the owner of "Success Partners," a vendor that purports to provide marketing aids. He also happens to be Olson's long-time friend.[39] The Company paid Success Partners in excess of thirty-five million dollars ($35,000,000) through the third quarter of 2015.[40] In addition, Olson has directed the Company to pay over $400,000 in rent on Johnson's Hermosa Beach, California beach house, including a $25,000 charge that was approved by Olson personally and over the phone for "leasehold improvements to California office."[41] The Company has no "office" in California.

Other personal payments to Johnson appear scattered throughout the Company's books. For example, ledger entries and bank statements reflect a $200,000 payment to Stuart Johnson on April 2, 2015, which (revealing their true purpose) was later re-booked as a "distribution" to "JO Products."[42] In other words, in the minds of Olson and Branch (who keeps the books), payments to Stuart Johnson and payments to JO Products are one and the same. (Incidentally, this so-called "distribution" to JO was not accounted for as one. A corresponding distribution was not credited to JO Product's equity account and there was not a pro-rata distribution to NSC).

[36] App. 227.
[37] App. 226-227.
[38] Dec. 1, 2016 Hearing Tr. 256:14-15, 257:19-22.
[39] App. 228; App. 388 (Tr. 55:8-13).
[40] App. 229, 249, 250.
[41] App. 252-55.
[42] App. 256-260.

Other money paid to Johnson is not accounted for. The Company reported in other documentation recently obtained that it disbursed $145,000 to Johnson in 2015.[43] Beyond the single $200,000 payment in 2015, there is no evidence that the Company paid any monies to Stuart Johnson, which raises the possibility that an additional $145,000 was paid to Stuart Johnson under yet another "alias" entity or distributorship.

Discovery has revealed that, in transferring this wealth to Johnson, Olson was lining his own pockets. At least $2,600,000 was secretly funneled directly back from Johnson (Success Partners/Video Plus) to Olson (or Olson-owned entities) between 2011 and 2015.[44] In addition, Olson's personal expenses—and debts from when he was with the "Poker Training Network"—were paid by Success Partners, who in turn billed Nerium International for them.[45] In other words, Olson was using Johnson to siphon funds out of the Company. The full extent of this scheme is unknown, which is why the Company's books and records must be examined.

Additionally, the Company paid Johnson, or a related entity, at least $400,000 to acquire an entity known as "Live Happy."[46] The business purpose for this is unclear.

**5. Don Gardner**

Don Gardner is a shareholder of NBI. Over the past several months, Mr. Gardner has been campaigning among other NBI shareholders to marshal support to oust NBI management. He filed a lawsuit in Canada attempting to achieve those goals, and he has contacted shareholders to requisition a shareholder meeting to replace NBI's board of directors.[47]

The evidence shows a high degree of coordination between Gardner and Olson. Olson recently demanded in writing, to a large NBI shareholder, that CEO Dennis Knocke be fired and

[43] App. 261.
[44] App. 469-77.
[45] App. 262-272.
[46] App. 230.
[47] App. 273-296.

replaced by Gardner himself.[48] Gardner's Canadian lawsuit also mimics many of the allegations brought by the Company in the instant suit.[49]

Mr. Gardner also happens to be on Olson's payroll (using Company money). The Company has been making monthly payments to Gardner—in amounts ranging from $10,000 to $18,000 per month—for "support."[50] Other than to spearhead an effort to overthrow Plaintiffs' current management, there is no evidence that Mr. Gardner provided any support to the Company.

**6. Equity Allocation and Bonus Payments**

As a member of the Company, NSC is entitled to three separate payment streams under the Company Agreement. These revenue streams are independent of their compensation for manufacturing the product.

First, Section 5.02 of the Company Agreement provides that at least every quarter, the manager of the Company (who is Olson) shall determine whether "excess cash" exists and, if so, distribute that amount pro-rata to the members (that is, 70% to JO Products (Olson's entity) and 30% to Nerium).[51] The Company has never produced a worksheet, or an accounting, which would reflect either a quarterly or ad-hoc determination of excess cash as required by Section 5.02. Additionally, it is not clear how much money has been distributed to Olson or JO Products. There are instances where it appears that payments of at least $1,000,000 were made to Olson and/or JO Products, without even an effort to account for the payment as an equity distribution.[52] Summaries provided to NBI for 2015 from the Company reflect that JO Products received

[48] App. 320-321.
[49] App. 276-296.
[50] App. 253, 319.
[51] App. 92.
[52] App. 322-323.

$6,5000 in distributions in 2015.[53] Other documents obtained recently reflect that JO Products actually received $9,459,423.[54] Accordingly, the true amount of excess cash that Olson has caused the Company to distribute to other persons or entities cannot be known without a thorough examination of the Company's books and records.

Further, despite the Company Agreement, the Company has never distributed excess cash on a 70/30 basis. When distributions were allocated, the percentage was closer to 80/20. The Company never had a coherent explanation for this, yet refused to correct it. Eventually, Plaintiffs were forced to file this lawsuit and application to compel a records inspection, and served discovery demanding an explanation. Finally, the Company conceded it had been wrong all along, that Plaintiffs were entitled to 30% distributions, and it has "accounted for the discrepancy."[55] However, it refuses to (1) make a reconciliation payment; (2) provide the reconciliation; or (3) disclose the actual amounts or percentages of distributions made. By Nerium's estimation, millions of dollars are due to Nerium.[56] However, without an examination of the accounts and ledgers of the Company, it is not possible to determine the precise amount.

The second stream of revenue due to NSC is the right to increased revenue based upon the sales of the product line found in Section 21.04 of the Company Agreement.[57] As the sales of the Product Line surpassed $100,000,000 (starting in 2013), NSC was entitled to receive escalating 2% "ladder" bonuses, up to a maximum of 10%.[58] The Company's only attempt to address Section 21.04 occurred in February of 2015, when the CFO Branch calculated a revenue bonus of $9,635,042, due to NSC for 2013 and 2014—specifically citing the relevant provision

[53] App. 324, 328. The summary indicates that $8,500,000 was distributed on March 30, 2015, but it is undisputed that $2,000,000 of the $8,500,000 was actually received and accounted for in 2014 Schedule and Equity Allocation Worksheet.
[54] App. 481-82.
[55] App. 334.
[56] App. 352, ¶7.
[57] App. 119-20.
[58] *Id.*

of the contract.[59] However, the bonus was never paid. And, although the Company's revenue exceeded $100,000 million in 2015 and 2016, no bonus was paid for those years either. The Company otherwise refuses to calculate bonuses, and has steadfastly refused to provide NSC with access to books and records so that the bonuses could be properly calculated.[60]

The third income stream was to be twenty percent (20%) of the net profits of all "Marketing Aids" sold or licensed by the Company, pursuant to Section 21.03 of the Company Agreement.[61] Olson was to personally have received the remaining eighty percent (80%) of the net profits.[62] Marketing Aids are defined as "hard goods . . . and/or online or computer systems for marketing . . ." created by "Olson."[63] Net Profit is defined as "the amount of revenue received for the purchase and/or licensing of such Marketing Aids, less the cost to produce and distribute the Marketing Aids (including applicable overhead expenses incurred by Olson and reasonably allocated to the production and distribution of the Marketing Aids)."[64] This revenue sharing is not the same as an equity distribution. The Company Agreement specifically names Olson (not equity-owner JO Products) as the recipient of the 80%.[65]

NSC has never received a calculation or accounting setting forth the revenue or costs associated with Marketing Aids.[66] It appears from recent discovery that Olson had little to no role in the creation of the Marketing Aids[67], but instead used Success Partners to "produce" them and then charged the Company excessive fees associated therewith. *See supra* Part 4. This

[59] App. 352, 357, 369 (Supp. L. Jones Dec. ¶ 8 & Ex. A)
[60] App. 352-53.
[61] App. 119-20.
[62] *Id.*
[63] App. 95 (Company Agreement § 6.03).
[64] App. 119.
[65] *Id.*
[66] App. 352, ¶7.
[67] App. 416 (Tr. 167:18–168:10).

complicated and fraudulent billing scheme cannot be fully uncovered without a full and complete inspection of the Company's books and records related to Marketing Aids.

## ARGUMENT

### I. Plaintiffs have an absolute right to inspect the Company records for any proper purpose, which includes understanding how money is allocated and spent, or investigating fraud.

The Texas Business Organizations Code provides that "[a] member of a limited liability company . . . on written request and for a proper purpose. . . . may examine and copy at any reasonable time . . . records required under Sections 3.151 and 101.501; and . . . other information regarding the business, affairs, and financial condition of the company . . . ." Tex. Bus. Orgs. Code § 101.502(a). This statutory inspection right is separate and independent from any discovery rights. *Burton v. Cravey*, 759 S.W.2d 160, 162 (Tex. App.—Houston [1st Dist.] 1988, no writ) (a court will not "engraft discovery notions upon [a party's] statutory right of inspection, which is independent of any right of discovery in litigation"). The right of members to inspect books and records is "valuable"[68] and intended to "enlarge and extend" the common-law right to inspection. *Texas Infra-Red Radiant Co. v. Erwin*, 397 S.W.2d 491, 493 (Tex. App—Eastland 1973, no pet.) (citation omitted) (discussing a shareholder's right to inspect books and records).

Accordingly, the right to inspect is "only limited by the requirement that the inspection be for any proper purpose." *Shioleno v. Sandpiper Condos. Council of Owners, Inc.*, No. 13-07-00312-CV, 2008 Tex. App. LEXIS 5289, at **12, 16 (Tex. App.—Corpus Christi July 17, 2008, no pet.). A proper purpose is any reason "reasonably related" to the member's interests. *E.g.*, *Sanders v. Ohmite Holding, LLC*, 17 A.3d 1186, 1193-94 (Del. Ch. 2011) (permitting inspection

[68] *Chavco Inv. Co. v. Pybus*, 613 S.W.2d 806, 809 (Tex. App.—Houston [1st Dist.] 1981).

for "proper purposes" including evaluating the company's financial condition and investigating potential wrongdoing).

For example, it is proper to seek an inspection to understand how allocations are being made and where money is being spent. *See* Tex. Bus Orgs. Code § 101.502(a)(1) (allowing inspection for "information regarding the business, affairs, and financial condition of the company"); *Boehringer v. Konkel*, 404 S.W.3d 18, 27 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (holding that inspection for the purpose of determining how a company spends its money is proper). It is proper to seek to obtain information about a company's "financial position." *Biolustre' Inc. v. Hair Ventures, LLC*, No. 04-10-00360-CV, 2011 Tex. App. LEXIS 1084, *9 (Tex. App.—San Antonio, Feb. 16, 2011) ("In view of Hair Ventures's substantial investment and interest in the company, obtaining information about the financial position of the company and its proposed public offering was a proper purpose for inspecting the records."). And it is proper to investigate fraud and mismanagement. *Okla. Firefighters Pension & Ret. Sys. v. Citigroup Inc*., 2015 Del. Ch. LEXIS 119, at *11–16 (Del Ch. Apr. 24, 2015) (holding that inspection for the purpose of investigating mismanagement and fraud was proper); *Sec. First Corp. v. U.S. Die Casting & Dev. Co*., 687 A.2d 563, 567 (Del. 1997) ("It is well established that investigation of [company] mismanagement is a proper purpose for a [] books and records inspection."). When such valid reasons exist for an inspection, the defendant cannot defeat it merely by alleging "ulterior motives." *Moore v. Rock Creek Oil Corp.*, 59 S.W.2d 815, 819 (Tex. Comm'n App. 1933, holding approved)).

## II. There is no right to a jury trial absent a genuine dispute that Plaintiffs have a proper purpose for the records inspection.

The usual procedure to enforce a statutory inspection right is to file a mandamus petition in state court. *See Burton*, 759 S.W.2d at 161. But that is not exclusive. *See Davis v. Middle*

*Bosque Partners, LP*, 2014 Tex. App. LEXIS 3780, *7 (Tex. App.—San Antonio, April. 9 2014, no pet.) (explaining that the existence of mandamus as a remedy to inspect books and records under § 101.502(a) "does not bar the right to maintain an action for declaratory judgment" or seek other relief to inspect records). Courts have, among other ways, compelled records inspections by motion. *See In re Halter*, No. 05-98-01164-CV, 1999 Tex. App. LEXIS 6478, *2, *18 (Tex. App.—Dallas 1999) (unpublished) (affirming trial court's order compelling statutory records inspection on a motion; deciding issue under both Texas and Delaware law).

Courts will compel records inspections without a jury trial in the absence of a genuine dispute about whether the inspection has a proper purpose. *See id.*; *Burton*, 759 S.W.2d at 162; *Chavco Inv. Co. v. Pybus*, 613 S.W.2d 806, 809 (Tex. App.—Houston [1st Dist.] 1981). This is not necessarily a summary judgment standard. *See Chavco*, 613 S.W.2d at 809 (affirming mandamus proceeding based on absence of a genuine dispute about inspection's purpose, without applying summary judgment standard); *In re Halter*, 1999 Tex. App. LEXIS 6478, at *18 (affirming order granting motion for inspection and explaining that, "by granting the motion, the court impliedly found no fact issue exists on the propriety of the request"); *see also Moore*, 59 S.W.2d at 819 (issuing mandamus for inspection).

It is the defendant who bears the "burden of proof to establish the absence of a proper purpose." *Burton*, 759 S.W.2d at 162 (citing *Uvalde Rock Asphalt Co. v. Loughridge*, 425 S.W.2d 818, 819-20 (Tex. 1968); *Moore*, 59 S.W.2d at 819); *see also Shioleno*, 2008 Tex. App. LEXIS 5289, at *12, *16 (reversing trial court's refusal to order inspection in part because party opposing inspection did not meet burden to show improper purpose); *Chavco*, 613 S.W.2d at 809.

It is not easy for a defendant to establish a genuine dispute that warrants a jury trial. If it were, the policy of the inspection statute would thwarted by years of litigation delay before any inspection could be had. *See Chavco*, 613 S.W.2d at 809 (the statutory right to examine records is too "valuable" to "be circumvented by the mere conclusion that no proper purpose exists"). In *Chavco*, the appellant-corporation opposed the stockholders' inspection on the grounds that the inspection was for an improper purpose. *Id*. After the trial court ordered an inspection, the corporation appealed, arguing that "the trial court erred in hearing the case without a jury." *Id.* at 808. The corporation alleged several reasons why the purpose was improper:

> In its first amended original answer, appellant alleged that plaintiff (appellee) brought the suit to compel inspection of the books in bad faith and for an improper purpose. Appellant stated the sole purpose of the inspection was the culmination of a long but disagreeable relationship between the parties. Appellant claimed appellee sought to force appellant either to purchase appellee's stock at a grossly inflated price or to sell to appellee at a grossly inadequate price.

*Id.* at 809. Despite these contentions, the court of appeals affirmed and held that no jury trial was required. It explained that "[c]onclusory statements such as the existence of bad faith, improper purpose, or a disagreeable relationship, are not sufficient to raise a fact issue" to warrant a jury trial. *Id.* Similarly, in *Moore,* the court ordered an inspection (without a jury trial) because a company cannot establish an improper purpose based on allegations about "ulterior motives" of the requesting party, that the parties are on "unfriendly terms," or that the examination is made with the "hope to find something alarming in the affairs of the company." *Moore,* 59 S.W.2d at 816, 818-19; *see also In re Dyer Custom Installation, Inc.,* 133 S.W.3d 878, 882 (Tex. App.—Dallas) (holding that a jury trial was necessary only after defendant adduced substantial evidence that the movant's request had an improper motive).

Although the federal rules do not spell out a procedure for federal courts to follow here, the Court may use the same procedure as state courts—i.e., issue an order based on the fact that

Nerium is a member of the Company with a proper purpose for inspection. *See Nat'l Gas Pipeline Co. v. Energy Gathering*, 2 F.3d 1397, 1409 (5th Cir. 1993) (holding that "Texas practice and the court's inherent powers combined to authorize the court" to order production of documents without a subpoena or discovery requests). In *Natural Gas Pipeline*, the appellant argued that the district court lacked authority to order him to produce certain documents because they were not governed by a subpoena or discovery request under the Federal Rules of Civil Procedure. The Fifth Circuit disagreed for two reasons. First, the district court has "inherent authority." *Id.* at 1407. ("A long line of cases establishes that the Rules are not always the exclusive source of a federal court's powers in civil cases."); *see also ITT Cmty. Development Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978) ("The inherent powers doctrine . . . is rooted in the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion.")

Second, the district court was empowered by Texas practice and procedure to order the production of records. *Nat'l Gas Pipeline,* 2 F.3d at 1409 ("Moreover, we conclude that the combined authority of Texas Civil Practice & Remedies Code § 312 (note 4 supra) and Texas Rule 167(4) (note 19 supra) empowered the court to so order Fox."). The panel further observed that "any failure to comply with all the procedural requirements of those [Texas practice] provisions was not substantially prejudicial." *Id.* at 1410.

Accordingly, this Court may order an inspection of records based on a combination of its inherent power and Texas practice under § 101.502(a). Alternatively, it could reach the same result by granting summary judgment.[69]

[69] The court might construe this pleading as a motion for summary judgment. *Cf. Burns v. Harris Cty Bail Bond Bd.*, 139 F.3d 513, 517 (5th Cir. 1998) (discussing court's authority to convert motions to dismiss into motions for

### III. The evidence puts it beyond dispute that Nerium has a proper purpose for its records inspection.

In light of the evidence presented above, it is beyond dispute that Nerium has a proper purpose for an inspection. As shown, Nerium seeks to inspect the Company's books and records to investigate accounting irregularities, fraud, and embezzlement, to determine correct equity and cost allocations, and to evaluate whether the Company's distributions and accounting methods comply with the Company Agreement.

In opposing inspection, the Company has argued that Nerium Skincare already inspected the records. As an initial matter, that Nerium has previously been permitted to review some records is not a defense to a books and records request. *See supra* Part I. If anything, that Nerium was previously allowed to inspect some of the books and records undercuts any new contention that there is an "improper purpose." The Company has not and cannot show that Nerium has an improper purpose for *this* inspection in light of the overwhelming evidence of financial misdealing. Although the evidence is conclusive, that is not the standard here. It is enough that Nerium has reason to investigate. *See supra* Part I.

Further, this claim is belied by the Company's recent (January 2017) production of new records, many of which Nerium had never seen before.[70] Moreover, the Company's argument about previous "audits" refers only to audits performed on *Nerium Biotechnology*, not the Company. *See* July 9, 2016 Declaration of Lori Jones in Support of Motion to Compel, Dkt. 49 at App. 373 (Decl. Lori Jones ¶¶2-3). Nerium Biotechnology's auditors had only reviewed

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summary judgment). Summary judgment is proper if there "is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); *see Star Apartment, Inc. v. Martin*, 204 F.2d 829, 830 (5th Cir. 1953) (granting summary judgment to plaintiff where defendant's factual issue did not create a "genuine issue of fact," but instead addressed legally irrelevant arguments). A dispute about a material fact is genuine only when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Substantive law identifies which facts are material. *Id.* Under state substantive law, as noted above, NI bears the burden to show that Plaintiffs' purpose is improper. *Burton*, 759 S.W.2d at 162; *Chavco*, 613 S.W.2d at 809.

[70] App. 353, ¶11.

certain financial information in the Company's possession for two limited purposes: (i) to value Nerium's ownership interest for the purpose of reporting it to the Ontario Securities Commission, and (ii) to convert the Company's financial statements to a GAAP basis for the purpose of reporting a summary to the Ontario Securities Commission. *Id.* Their last such review was a year ago, and was ended prematurely by the Company.[71]

These accountants' reviews did not endeavor to resolve equity allocation disputes nor did Nerium conduct a forensic analysis of the Company's books and records for purposes of investigating fraud or self-dealing. Nerium Biotechnology's CFO has explained in detail what Nerium's auditors reviewed and what they did not review. *See id.* ¶¶ 1-9.

Finally, Jeff Olson's concession at the last hearing should end any debate:

> THE COURT: Will you give them full access to your books and records?
> THE WITNESS: We have.
> THE COURT: No, you haven't. You haven't given them full access to your books and records. Will you give them full access to your books and records requested in the lawsuit?
> THE WITNESS: We have. They come in every quarter for two or three weeks with their auditors
> THE COURT: They don't agree you have given them full access. I think that full access would tell the true story, whatever that is, whether it's your version or their version, full access
> THE WITNESS: **Yes**.
> THE COURT: **All right. So we don't need to dispute that.**

Transcript of December 1, 2016 Hearing at 294 (emphasis added). Incidentally, Olson's claim that "they come in every quarter" is false. The Company has not allowed Nerium to access anything except high level summaries since April 2016. App. 351-352, ¶5.

The Company's earlier disclosure of some records was actually just part of its scheme to defraud Nerium and the Company. It now appears that Olson and Branch filtered and characterized data to conceal suspect transactions. As evidenced above, the fraudulent activity

[71] App. 351-352, ¶5

has been well hidden through a concerted and well-orchestrated effort. Consulting payments to consultants who do no work, commissions to "distributors" who sell no product, share transfers that have never been made public and tens of millions of dollars run through Johnson and back to Olson again. None of these schemes show up on a quarterly income statement or balance sheet and the true extent of the fraud is likely still unknown. What is known, however, is that the Company cannot adduce credible evidence indicating that Nerium's request to inspect the books and records is for an "improper purpose," as it must, to force a jury trial about the inspection. The Company's interest in concealing Olson's fraud by resisting a complete inspection of its books and records is not a credible reason to defeat a proper request under Texas law.

## CONCLUSION

There is no genuine dispute that Nerium has a proper purpose for inspecting the Company's books and records. Accordingly, based on Texas practice and procedure and its inherent powers, the Court has authority to order a records inspection without a jury trial.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 9, 2016, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which served all counsel of record.

/s/ Jonathan R. Mureen