

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT

CIVIL ACTION NO. SUCV2015 15-1875BLS

VIREO SYSTEMS, INC. derivatively on )  
behalf of nominal defendant PROMERA )  
HEALTH, LLC, )

Plaintiff, )

v. )

HTG VENTURES, LLC; JOHN T. )  
LEWIS, JR.; TIMOTHY KENSINGER; )  
JAMES P. LEWIS; HARVEST TRADING )  
GROUP, INC.; and HARVEST TRADING )  
GROUP TECHNOLOGIES, INC., )

Defendants, )

and )

PROMERA HEALTH, LLC,

Nominal Defendant.

**VERIFIED COMPLAINT AND JURY DEMAND**

Plaintiff, Vireo Systems, Inc. (“Vireo”), derivatively as a member of ProMera Health, LLC (“ProMera”), for its Verified Complaint against (1) HTG Ventures, LLC (“HTG Ventures”), a member of ProMera; (2) John T. Lewis, Jr., a manager of ProMera; (3) Timothy Kensinger, a manager of ProMera; (4) James P. Lewis; (5) Harvest Trading Group, Inc. (“HTG Inc.”); and (6) Harvest Trading Group Technologies, Inc. (“HTG Tech”), alleges:

## I. PARTIES

1. Plaintiff Vireo is a Tennessee corporation with its principal place of business in Tennessee.

2. ProMera is a Massachusetts limited liability company with its principal place of business in Massachusetts. ProMera's members are HTG Ventures (citizen of Massachusetts), Vireo (citizen of Tennessee) and Brian O'Neill (citizen of Tennessee). ProMera's registered agent for service of process is John T. Lewis, Jr., 61 Accord Park Drive, Norwell, MA 02061.

3. Defendant HTG Ventures, a member of ProMera, is a limited liability company organized under the laws of the state of Massachusetts with its principal place of business in Massachusetts. HTG Ventures' members, John Lewis, James Lewis and Kensinger, are citizens of Massachusetts. HTG Ventures' registered agent for service of process is John T. Lewis, Jr., 61 Accord Park Drive, Norwell, MA 02061.

4. Defendant John T. Lewis, Jr. is a manager of ProMera and a citizen of Massachusetts.

5. Defendant Tim Kensinger is a manager of ProMera and a citizen of Massachusetts.

6. Defendant James P. Lewis is a citizen of Massachusetts.

7. Defendant HTG Inc. is a corporation organized under the laws of the state of Massachusetts with its principal place of business in Massachusetts. HTG Inc.'s registered agent for service of process is James P. Lewis, 61 Accord Park Drive, Norwell, MA 02061.

8. Defendant HTG Tech is a corporation organized under the laws of the state of Massachusetts with its principal place of business in Massachusetts. HTG Tech's registered agent for service of process is John T. Lewis, Jr., 61 Accord Park Drive, Norwell, MA 02061.

## II. JURISDICTION AND VENUE

9. Pursuant to Mass. Gen. Laws c. 156C, § 56, Vireo brings this action derivatively on behalf of and in the name of ProMera. At the time of the acts and omissions of which Vireo complains, Vireo owned 42% of ProMera's membership interests. Defendants have attempted to squeeze out Vireo through an inappropriate and unnecessary capital call so the amount of Vireo's current membership interest is in dispute and is the subject of litigation in the United States District Court for the Middle District of Tennessee styled *Vireo Systems, Inc. v. HTG Ventures, LLC et al*; United States District Court for the Middle District of Tennessee, Nashville Division; Civil Action No., 3:14-cv-02359. HTG Ventures is the controlling member of ProMera, owning 51% of ProMera at the time of the actions complained of herein. Pursuant to ProMera's Operating Agreement, Defendants John Lewis and Kensinger are the managers of ProMera, which is manager-managed. As described in this Verified Complaint, Defendants John Lewis and Kensinger, the managers of ProMera, and Defendant HTG Ventures, the majority member, each have interests in the outcome of the present suit that are adverse to the interests of ProMera. Consequently, any demand by Vireo on the managers of ProMera prior to filing this Verified Complaint would have been futile. *See Billings v. GTFM, LLC*, 449 Mass. 281, 290 (2007).

10. This Court has jurisdiction over this action pursuant to Mass. Gen. Laws c. 156C, § 56 and c. 214, § 1. The amount in controversy exceeds \$25,000, exclusive of interest and costs.

11. Defendants are citizens of Massachusetts and, therefore, subject to personal jurisdiction in this Court. In addition, the causes of action arise at least in part from the Defendants' transacting business in Massachusetts.

12. Suffolk County is the proper venue for this action pursuant to Mass. Gen. Laws c. 223, §§ 1 and 8. Pursuant to Superior Court Administrative Directive No. 09-01, venue is proper in the Business Litigation Session because (1) this case involves claims relating to the liability of members and managers of a closely held limited liability company, claims involving breaches of fiduciary duties and other business torts, and claims relating to the governance and conduct of internal affairs of a closely held limited liability company, (2) the claims are brought derivatively on behalf and for the benefit of the closely held limited liability company, and (3) the action will benefit from substantial case management.

### **III. FACTUAL BACKGROUND**

#### **A. Vireo, ProMera and Relevant Provisions of the ProMera Operating Agreement.**

13. Vireo is a company that manufactures various dietary supplements, chemical compounds, and nutraceuticals.

14. Vireo invented, developed, and currently manufactures creatine hydrochloride (C-HCl), which is the molecule, brand, and product that ProMera markets. Vireo is the holder of the registered trademark CON-CRET®, which it assigned to ProMera.

15. Vireo's owner, Mark Faulkner, is an inventor on the patent for C-HCl.

16. CON-CRET® is sold in dietary supplement stores, such as GNC, and fitness facilities throughout the United States.

17. ProMera was formed to help market and distribute certain dietary supplements and nutraceutical products manufactured by Vireo, including, without limitation, CON-CRET®, CON-CRET® REINFORCED, and STAY ACTIV (the "Branded Products").

18. The members of ProMera (HTG Ventures, Vireo and O'Neill) entered into an Operating Agreement (the "Operating Agreement") on or about January 1, 2010.

19. A true and correct copy of the Operating Agreement is attached hereto as Exhibit 1.

20. The Managers of ProMera are Defendants John Lewis and Kensinger, who are two of the three owners of HTG Ventures.

21. Mark Faulkner, as a representative of Vireo, was manager until he resigned on March 12, 2015.

22. The Operating Agreement specifies that the Managers are to act “based on majority votes (at least two votes from the three Managers).” Operating Agreement § 1(a).

23. The Operating Agreement provides the Managers the “exclusive power and authority” to, in pertinent part:

(i) make all decisions with respect to the business and affairs of the Company; (ii) exercise all power and privileges granted by the [Massachusetts Limited Liability] Act or any other law or this Operating Agreement, together with any powers incidental thereto, so far as such powers are necessary or convenient to the conduct, promotion or attainment of the business, trade, purposes or activities of the Company and . . . (iv) to take any other action not prohibited under the Act or other applicable law.

Operating Agreement § 1(a).

24. The Operating Agreement also specifies the duties owed by all Managers and Members of ProMera to one another, including Vireo, and to ProMera:

All Managers and Members, as defined herein and in the Membership Agreement agree to exercise sound business judgment and *good faith* in all aspects of their decisions and voting relative to the ongoing management of the Company and *shall owe the same fiduciary duty to the Company and each other as directors and shareholders of a corporation* under Massachusetts law.

Operating Agreement § 1(b) (emphasis supplied).

25. The Operating Agreement prohibits related party transactions as follows:

1. Management by Managers

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