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Case No. 2023-0220-

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

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| COLISEUM CAPITAL MANAGEMENT, LLC, COLISEUM CAPITAL PARTNERS, L.P., COLISEUM CAPITAL, LLC, and COLISEUM CO-INVEST III, L.P.<br><br>Plaintiffs,<br><br>v.<br><br>PANO ANTHOS, GARY T. DICAMILLO, CLAUDIA HOLLINGSWORTH, PAUL ZEPF, DAWN ZIER, and PURPLE INNOVATION, INC.,<br><br>Defendants. | C.A. No. _____ |

# VERIFIED COMPLAINT

Plaintiffs Coliseum Capital Management, LLC, Coliseum Capital Partners, L.P., Coliseum Capital, LLC, and Coliseum Capital Co-Invest III, L.P. (collectively, "Coliseum" or "Plaintiffs"), by and through their undersigned counsel, allege the following for their Verified Complaint against Defendants Pano Anthos, Gary T. DiCamillo, Claudia Hollingsworth, Paul Zepf, and Dawn Zier (collectively, the "Non-Executive Director Defendants" or the "NED Defendants") and Defendant Purple Innovation, Inc. ("Purple" or the "Company"):

## NATURE OF THE ACTION

1. This case challenges an improper dividend of super-voting preferred stock that the Non-Executive Director Defendants authorized disloyally and in bad faith for the sole purpose of impeding the stockholder franchise at Purple and entrenching the existing Purple board of directors (the "Board"). The NED Defendants did not declare the preferred dividend on a "clear day," but rather immediately after Coliseum, the Company's largest stockholder, invested $27 million in a Purple stock offering and nominated five highly qualified candidates for election at the Company's upcoming annual meeting to serve on its seven-member Board. The dividend issuance, which is designed solely to prevent Coliseum from electing its nominees and removing existing directors, violates the Company's charter and was not justified by any conceivable threat to corporate policy or effectiveness. Where, as here, a board of directors "deliberately employs various legal strategies to either frustrate or completely disenfranchise a shareholder vote, … [t]here can be no dispute that such conduct violates Delaware law." *Coster v. UIP Cos., Inc.*, 255 A.3d 952, 961 (Del. 2021) (quoting *Stroud v. Grace*, 606 A.2d 75, 91 (Del. 1992)).

2. This case also challenges Purple's last-gasp attempt to avoid a proxy challenge by belatedly and falsely characterizing Coliseum's director nomination notice as "incomplete, deficient, and defective." The NED Defendants

purposefully delayed notifying Coliseum of the purported deficiencies in its nomination notice until after the advance notice deadline had passed, thereby attempting to prevent Coliseum from curing any purported deficiencies in its notice. The NED Defendants' effort to play "gotcha" with a compliant nomination notice only highlights their bad faith. Coliseum's nomination notice was complete and accurate in all material respects when Coliseum submitted it days before the deadline, and the NED Defendants' deficiency notice is transparently pretextual. The NED Defendants' intentional delay in raising their purported deficiencies precludes Purple from relying on the advance notice deadline to reject Coliseum's nominees.

3. Coliseum is a long-time stockholder of Purple and has been highly involved since providing $65 million of capital raised to help the Company go public through a de-SPAC transaction in 2018. Over the years, Coliseum has provided much-needed capital to the Company (has provided nearly one-half of the equity capital raised since 2018), and has helped direct the Company through its director-designee on the Board. Coliseum is the holder of approximately 45% of Purple's Class A common stock and, with its shares of Class B common stock, holds approximately 44% of the vote.[1] Coliseum is thus strongly aligned with the

[1] Purple's Class A and Class B Common Stock vote together as a single class in director elections.

interests of the Company and its stockholders. The same cannot be said of the Board. Excluding the one Coliseum director and Purple's Chief Executive Officer, the remaining Board members (*i.e.*, the NED Defendants in this case) collectively own just 0.3% of the Company's common stock.

4. While Coliseum is enthusiastic about Purple's long-term prospects and strongly supportive of Purple's current management team, the Company has faced headwinds and has experienced five years of disappointing returns. In September 2022, Coliseum, believing that Purple could best meet its challenges as a private company, made a proposal to acquire the outstanding stock of Purple that it did not already own. The proposal was at a 56% premium to Purple's closing price the previous day and was expressly conditioned on the structural protections of *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*"). The Special Committee formed by the Board to evaluate the proposal reacted to Coliseum's *MFW*-compliant proposal as if it were a hostile takeover attempt, promptly engaging advisors who specifically specialize in activist and takeover defense, before even engaging a financial advisor. Instead of exploring potential negotiations with Coliseum, the Special Committee, which was fully empowered at Coliseum's insistence to say no, promptly adopted a poison pill. On January 12, 2023, without having engaged in any meaningful discussions with Coliseum, the Special Committee announced that it had rejected the proposal.

5. On February 13, 2023, Coliseum announced that it was no longer pursuing its proposal to acquire the outstanding stock of Purple and committed that if it made any such proposal in the future, it would be conditioned, like the September 2022 proposal, on the structural protections of *MFW*. In addition, while reiterating its support for the current management team, Coliseum stated that it no longer had confidence in the Board's ability to shepherd the Company through current headwinds and unlock value. Coliseum announced a proposed slate of directors who would provide the necessary skill set, perspective, and engagement to benefit all stockholders and help Purple reach its potential. One of the five nominees, a managing partner of Coliseum, was already a member of the Board. The four proposed new directors, all of whom are highly qualified and experienced, are all independent and, apart from an investment by one of the nominees in a Coliseum fund representing less than 5% of his net worth, have no affiliation with Coliseum.

6. The NED Defendants responded to this exercise of the stockholder franchise once again as if Coliseum had launched a hostile takeover attempt. Demonstrating textbook entrenchment, the NED Defendants hardly took time to glance at the nominees' names before responding (the next day) with the extreme step of purporting to dividend one newly created Proportional Representation Preferred Linked Stock (the "Preferred Stock") for each 100 shares of Purple Class

A Common Stock (the "Preferred Issuance"). Each share of Preferred Stock issued was authorized to vote together with each share of Class A Common Stock to elect directors, with each share of Preferred Stock carrying 10,000 votes. Although the Company's common stock establishes a "straight" voting structure (*i.e.*, one share, one vote), holders of Preferred Stock are entitled to allocate their votes among the nominees in director elections on a cumulative basis. Therefore, the Preferred Stock, issued without the approval of the Company's stockholders and in breach of the Company's charter, fundamentally altered the method of voting for Company directors from "straight" election (one share, one vote) to cumulative voting.

7. As a further means of entrenching the existing Board, the Preferred Stock also provides backdoor protection for directors removed without cause. In that circumstance and if the number of shares voted against the removal would be sufficient to elect the director if cumulatively voted, the Preferred Stock has the right to elect a class director and then immediately fill the class director seat with the removed director. As a result, the removed and immediately replaced director is converted from a director elected and removed by a straight election of the Common Stock to a director elected and removed exclusively pursuant to cumulative voting of the Preferred Stock, voting as a separate class.

8. While the NED Defendants tried to justify the Preferred Issuance as a necessary step to protect Purple's stockholders, there was no pending threat, and

their action in approving the Issuance to serve their own ends was in bad faith breach of the Company's charter and their fiduciary duties.

9. Article IV, Section 4.4(b)(3) of the Second Amended and Restated Certificate of Incorporation of the Company (the "Second A&R Charter") provides, in relevant part, that "[s]tock dividends with respect to Class A Common Stock may be paid only with Class A Common Stock …." The dividend of Preferred Stock constitutes a "stock dividend" under the DGCL. As Section 4.4(b)(3) of the Second A&R Charter prohibits the declaration and payment of a stock dividend on the Class A Common Stock other than in the form of shares of Class A Common Stock, by purporting to authorize the Preferred Issuance and the Preferred Stock, the NED Defendants and, through their actions, the Company violated the Second A&R Charter.

10. In addition, the Preferred Issuance is a bad faith breach of fiduciary duty because the NED Defendants have no reasonable justification for the Preferred Issuance. There is no corporate threat pending. *First*, Coliseum's September 2022 proposal did not constitute a threat because it was subject to *MFW* and, by the time of the Preferred Issuance, it had been withdrawn. *Second*, the possibility of a future takeover attempt is not a threat because Coliseum committed to condition any future proposal on compliance with *MFW* protections. *Third*, Coliseum's nomination of highly qualified director candidates, four of whom are

independent of Coliseum, is not a threat but rather a legitimate exercise of the stockholder franchise, which the Delaware Supreme Court has described as "sacrosanct" and the "ideological underpinning upon which the legitimacy of the directors' managerial power rests." *Fourth*, the particular candidates nominated by Coliseum could not have been the threat purportedly justifying the Preferred Issuance because the Company did not even make a pretense of examining their individual qualifications and independence before pulling the trigger on the Preferred Issuance. Directors are presumed under established Delaware law to act in good faith, and the NED Defendants' imagination that the proposed new directors on Coliseum's slate will breach their fiduciary duties is not a reasonably perceived threat. Instead of acting with loyalty and care, the NED Defendants unilaterally and fundamentally reconfigured the Company's voting structure in the midst of a proxy contest to thwart the will of the majority and remain firmly entrenched on the Board.

11. In so doing, the Board upset the reasonable and settled expectations of every stockholder that invested in Purple—namely, that one share would equal one vote and that holders of a majority of the common stock would be empowered to replace the entire Board if they saw fit to do so. This principle is fundamental to the legitimacy of a board. The structure imposed by the NED Defendants strikes at the heart of corporate democracy and Purple stockholders' expectations by

empowering holders of a comparatively small number of shares to block change at the Board level, even if the majority wants to replace the existing directors.

12. Shockingly, the Preferred Issuance came one day after a stock offering settled whereby Purple received from Coliseum $27 million in cash that Purple needed to facilitate an amendment to its credit agreement to provide Purple with necessary flexibility and runway for growth. The NED Defendants knew as early as January 17, 2023, that Coliseum considered nominating a new slate of directors, and knew well in advance of the stock offering closing that they planned to authorize the Preferred Issuance if they received formal notice of Coliseum's slate. Nevertheless, the NED Defendants—acting in bad faith—allowed Coliseum (and other stockholders) to proceed with the stock offering without ever disclosing that they had crafted a dilutive dividend that they were ready to and would deploy at a moment's notice to fundamentally change the voting structure and prevent holders of a majority of the common stock from replacing the entire Board.

13. The NED Defendants' authorization of the Preferred Issuance and their belated, improper attempt to reject Coliseum's nomination notice are disloyal and bad faith acts designed to entrench themselves and preserve their Board seats in the face of a proxy contest. Coliseum has no choice but to file this action and seek declaratory and permanent injunctive relief to remedy the NED Defendants' improper attempt to entrench themselves in office and to restore corporate

democracy consistent with the settled expectations of all Purple stockholders. The NED Defendants breached their fiduciary duties and the charter by approving the Preferred Issuance and fundamentally altering the Company's voting structure in direct response to Coliseum's proposed director slate, and through their belated, improper purported rejection of the nomination notice. The Preferred Issuance and Preferred Stock must be declared invalid and unenforceable, and the nomination notice must be declared valid.

## PARTIES

14. Coliseum Capital Partners, L.P ("CCP") and Coliseum Capital Co-Invest III, L.P. ("CCC III") are investment funds managed and controlled by Coliseum Capital Management, LLC. ("CCM"). Coliseum Capital, LLC ("CC LLC") is the General Partner of CCP and CCC III. CCM is a private investment firm founded in 2005 and located in Rowayton, Connecticut. CCM invests with a long-term orientation in undervalued companies. CCM, through CCP, CCC III, and its separately managed account, is the beneficial owner of 46,814,450 shares of Purple's Class A Common Stock, which constitutes approximately 45% of Purple's outstanding Class A Common Stock. Coliseum is Purple's largest stockholder. Coliseum has been a significant investor in Purple since the Company first went public in early 2018.

15. Purple is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 4100 North Chapel Ridge Rd., Suite 100, Lehi, Utah 84043. Purple's common stock is listed on the Nasdaq Stock Exchange and trades under the symbol "PRPL." The Company is a digitally-native vertical brand that develops, manufactures, and markets innovative comfort solutions primarily in the sleep products industry, including the "World's First No Pressure Mattress." Its Board is composed of seven directors.

16. Paul Zepf is the Chairman of the Purple Board. Mr. Zepf joined the Board on August 18, 2020, and has served as its Chairman since December 1, 2020. Mr. Zepf was the CEO and a director at Global Partner Acquisition Corp. ("GPAC"), the predecessor entity to the Company, from its formation in June 2015 through the Business Combination (defined below) in February 2018. From before the closing of the Business Combination until August 2020, Mr. Zepf served as a non-voting observer to Purple's Board and each of its committees. Mr. Zepf is also the former CEO and a former director (Chairman) of Global Partner Acquisition Corp. II ("GPACII"). Mr. Zepf serves on the Special Committee that proposed and recommended approving the Preferred Issuance.

17. Pano Anthos is a director of the Company. Mr. Anthos was a director of GPAC since GPAC's initial public offering in July 2015 and continued to serve

as a director of the Company following the Business Combination in February 2018. Mr. Anthos is also a former director of GPACII.

18. Gary T. DiCamillo is a director of the Company. Mr. DiCamillo was a director of GPAC since its initial public offering in July 2015 and continued to serve as a director of the Company following the Business Combination in February 2018. Mr. DiCamillo is also a director of GPACII. Mr. DiCamillo serves on the Special Committee that proposed and recommended approving the Preferred Issuance.

19. Claudia Hollingsworth is a director of the Company. Ms. Hollingsworth joined the Board immediately following the closing of the Business Combination in February 2018. Ms. Hollingsworth is also a director of GPACII. Ms. Hollingsworth serves on the Special Committee that proposed and recommended approving the Preferred Issuance.

20. Dawn Zier joined the Board in November 2020. Ms. Zier serves on, and is the Chair of, the Special Committee that proposed and recommended approving the Preferred Issuance. The Company has announced that Ms. Zier does not intend to stand for re-election at the Company's upcoming annual meeting.

21. Non-party Robert DeMartini has served as CEO and a director of Purple since December 13, 2021.

## FACTUAL BACKGROUND

### A. Purple's Business and De-SPAC Transaction

22. Purple is a leader in the sleep products category, designing and manufacturing innovative products to assist in its mission to help "every body" sleep, feel and live better. Purple was founded by two brothers, Terry and Tony Pearce, one with a manufacturing and design background and the other an aerospace scientist, who sought to revolutionize the comfort space in the early 1990s. The vast majority of Purple's net revenues come from its sleep products (mattresses, pillows, bases, foundations, sheets, mattress protectors, blankets and duvets). Purple officially launched on January 22, 2016 after a successfully funded Kickstarter campaign in September 2015.

23. Purple's predecessor entity was incorporated on May 19, 2015, as a special purpose acquisition company under the name of Global Partnership Acquisition Corp. or GPAC.

24. On February 2, 2018, the Company, then still known as GPAC, consummated a transaction similar to a reverse recapitalization (the "Business Combination"), pursuant to which the Company acquired a portion of the equity of Purple Innovation, LLC ("Purple LLC"). At the closing of the Business Combination, Purple became the sole managing member of Purple LLC, and GPAC was renamed Purple Innovation, Inc.

25. On February 1, 2018, in connection with the Business Combination, Purple entered into a subscription agreement (the "Subscription Agreement") with CCP and a CCM client, pursuant to which CCP and that client agreed to purchase from Purple an aggregate of 4.0 million shares of Class A Common Stock at a purchase price of $10.00 per share (the "Coliseum Private Placement"). In connection with the Coliseum Private Placement, Global Partner Sponsor I LLC ("Sponsor") assigned to CCP and affiliates (i) an aggregate of approximately 1.3 million additional shares of Class A Common Stock and (ii) an aggregate of approximately 5.8 million warrants to purchase approximately 2.9 million shares of Class A Common Stock.

26. Section 6 of the Subscription Agreement provided Coliseum with the right to nominate a designee to Purple's Board.

27. Section 7 of the Subscription Agreement provided CCP and an affiliate with certain preemptive rights with respect to future sales of Purple's securities. For example, Section 7(a) provided that CCP shall have a preemptive right to purchase up to its Pro Rata Share (as defined in the Subscription Agreement) of all Equity Securities (as defined in the Subscription Agreement) that Purple may propose to sell.

28. Beginning on February 5, 2018, Purple's Class A common stock and warrants were listed on the Nasdaq Stock Exchange under the symbols PRPL and PRPLW, respectively.

**B. Board Composition and Performance**

29. Purple's Board is comprised of seven directors: NED Defendants Anthos, DiCamillo, Hollingsworth, Zepf, and Zier; non-party and CEO Robert DeMartini; and Coliseum's designee Adam Gray.

30. Two directors who had previously served as directors of GPAC, Mr. Anthos and Mr. DiCamillo, continued to serve on the Purple Board following the Business Combination. Mr. Zepf, who joined the Board in 2020, served as the chief executive officer and a director of GPAC before the Business Combination. Further, from before the closing of the Business Combination in February 2018 until August 2020, Mr. Zepf served as a non-voting observer to Purple's Board and each of its committees. Ms. Hollingsworth was also appointed to the Board directly following the Business Combination. Ms. Zier joined the Board in 2020 and Mr. DeMartini in 2021.

31. Immediately following the Business Combination, and pursuant to Coliseum's rights under the Subscription Agreement, Purple appointed Mr. Gray to the Board as Coliseum's designee. Mr. Gray is a manager of Coliseum Capital, LLC, which is the general partner of CCP. He is also a managing partner of

Coliseum Capital Management, LLC ("CCM"), which is the investment manager of CCP. Mr. Gray has helped guide Purple through various stages of its journey, including various governance, management transition, strategic, operational, and financial initiatives.

32. Despite its unique business model and competitive advantages, Purple has not reached its expected potential.[2] Purple is an innovative company with a promising future, but it needs the right Board to support management to execute on its potential. The incumbent Board is not up to the task. Two of the Board's members—Mr. Anthos and Mr. DiCamillo—are on the Board by mere virtue of being part of the company that completed the de-SPAC transaction with Purple. A third—Mr. Zepf—was a non-voting Board observer starting around the time of the Business Combination until he joined the Board in 2020, also by virtue of his involvement with GPAC. They lack the required level of engagement to lead Purple—a company with innovative technology and a burgeoning direct-to-consumer brand—through current industry headwinds facing the Company.

**C. Coliseum Makes Multiple Significant Investments in Purple**

33. Coliseum has been a significant and constructive investor in Purple since its de-SPAC transaction in February 2018.

[2] As of February 10, 2023—five years after the Business Combination—Purple's common stock was trading 54% below its IPO price, and 89% below its all-time high.

34. Since 2018, Coliseum has provided meaningful capital support, both in the form of equity and debt, at key points in Purple's history, funding nearly $110 million (about half) of the equity capital Purple has raised and acquiring nearly 47 million shares of Purple's common stock. In particular, Coliseum contributed meaningfully by funding the de-SPAC Business Combination, acquiring $40 million of shares of common stock of GPAC through a private placement, and making an additional $25 million investment in Purple through a term loan agreement. Later, Coliseum provided an additional $10 million to the Company through an incremental term loan. Coliseum has also invested significantly in Purple through certain of its subsequent offerings, as well as through purchases of Purple Class A Common Stock on the public market. Like all Purple stockholders, Coliseum made these investments with the expectation that Purple had a conventional one share, one vote structure and that Coliseum's voting power would increase as its ownership increased.

**D. Coliseum Makes an *MFW*-Compliant Proposal**

35. On September 17, 2022, Coliseum, believing the Company could better address its challenges as a private company, submitted a letter on behalf of its funds and managed accounts setting forth a non-binding proposal to acquire all of the outstanding shares of common stock of Purple not owned by Coliseum or its

affiliates for cash consideration of $4.35 per share of Common Stock—a 56% premium over Purple's closing stock price the previous day (the "Proposal").

36. Importantly, Coliseum expressly conditioned the Proposal upon the structural protections prescribed by the Court of Chancery and affirmed by the Delaware Supreme Court in *In re MFW Shareholders Litig.*, 67 A.3d 496 (Del. Ch. 2013), *aff'd sub nom. Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014). In particular, Coliseum conditioned its proposal on the transaction being (a) negotiated by, and subject to the approval of, a special committee of independent and disinterested members of the Board and (b) subject to a non-waivable condition requiring approval by the affirmative vote of a majority of the shares of Common Stock not owned by Coliseum or its affiliates. Coliseum also subsequently informed Purple that any future proposals would likewise be conditioned upon the transaction satisfying these same conditions.

37. By conditioning the Proposal and any future proposals on the *MFW* conditions, Coliseum signaled to the Board and Purple's stockholders that it was not a threat to Purple's corporate policy and effectiveness. The *MFW* conditions are designed to protect the interests of minority stockholders in a take-private transaction involving a controller by replicating arm's-length negotiations with a third party—a scenario that cannot reasonably be interpreted as threatening or coercive. In addition, Coliseum publicly announced in a September 17, 2022 press

release that it is "supportive of current leadership and believe they are focused upon the right priorities, albeit meaningfully constrained given the Company's balance sheet and current profile as a publicly traded company."

38. In response to the Proposal, Purple formed a Special Committee comprised of Mr. DiCamillo, Ms. Hollingsworth, Mr. Zepf, and Ms. Zier, with Ms. Zier serving as the Special Committee chair. Rather than engage with Coliseum on its *MFW*-contingent proposal, the Special Committee treated the proposal as if it were a hostile takeover attempt and acted to protect its own interests. The Special Committee's first order of business was to authorize the adoption of a stockholder rights agreement (the "Poison Pill") on September 25, 2022, "to protect against any coercive or abusive takeover tactics, and to help ensure that the Company's stockholders are not deprived of the opportunity to realize the full and fair value of their investment." The Special Committee did not even attempt to articulate what aspect of an *MFW*-compliant proposal could conceivably be characterized as "coercive or abusive."

39. In November 2022, without having engaged in any substantive negotiations with Coliseum, the Special Committee conveyed orally to Coliseum that it did not see a path to a transaction based on the Proposal. Instead, the Board began working on defensive measures, including proposing amendments to the Company's advance notice bylaw. Among the proposed amendments was the

adoption of a "springing" director questionnaire (*i.e.*, one that would not be published in advance) that nominees would need to complete. Mr. Gray objected to the springing nature of the questionnaire and advocated for more notice and transparency with the Company's stockholders. However, the "springing" questionnaire was approved over Mr. Gray's objection, and, while he was assured the questionnaire would be customary and similar to the Company's existing director questionnaire, it was not. The "springing" questionnaire was significantly more intrusive and complicated, the purpose of which was to make it meaningfully more difficult for a stockholder to comply with the Company's advance notice bylaw.

40. Also, during this time, Purple continued to face a multitude of business challenges. On January 11, 2023, given these challenges and given the passage of time without substantive engagement from the Special Committee, Mr. Gray indicated to the Board that Coliseum wished to explore a cooperative path forward for Purple. The next day, Purple issued a press release announcing that the Special Committee rejected the Proposal.

### E. Coliseum Proposes a Cooperation Agreement to the Purple Special Committee

41. Coliseum continued to seek ways to revamp the Board and push Purple to reach its business potential, while at the same time taking care not to threaten Purple's corporate policy or effectiveness. On January 13, 2023, Coliseum (through Mr. Gray) submitted a letter to the Chairman of the Board, Mr. Zepf, setting forth a new proposal (the "Cooperation Proposal"), proposing that:

- the Board be expanded from seven to nine members, which would include Purple's Chief Executive Officer (Mr. DeMartini), Mr. Gray, two current independent directors of Purple to be agreed between Purple and Coliseum, two additional Coliseum-affiliated directors, two directors identified by Coliseum who would be independent under Nasdaq Stock Exchange rules and not affiliates of Coliseum, and a new director to be agreed between Purple and Coliseum who would be independent under Nasdaq Stock Exchange rules and not an affiliate of Coliseum;
- Coliseum would formally withdraw the Proposal;
- Purple would terminate the stockholder rights agreement purportedly adopted on September 25, 2022; and

- Coliseum would agree not to acquire greater than 50% ownership of Purple's Common Stock, subject to certain exceptions, for an agreed-upon period of time.

42. In the January 13 letter, Coliseum stated that "in the absence of a going private transaction, Purple requires a *cooperative* but meaningful effort to change the Company's governance, as set forth above, which will benefit all Purple stockholders. We look forward to working with you on it."

43. The NED Defendants, focused first and foremost on preserving their Board seats and accompanying financial and reputational benefits, demonstrated no interest in reaching a cooperative arrangement with Purple's largest stockholder. Instead, on January 16, 2023, the Special Committee provided a response to the Cooperation Proposal that was, in essence, a substantive rejection of the Cooperation Proposal and provided no basis for agreement.

**F. Coliseum Announces Its Intent To Nominate a Slate of Directors**

44. With its attempt to work cooperatively with the NED Defendants to improve stockholder value again stymied by an entrenched Board, Coliseum announced on January 17, 2023 (via a press release and Schedule 13D/A filing) that, absent agreement, "it intended to nominate a slate of directors for election at the 2023 annual meeting of the stockholders of [Purple], which slate would constitute a majority of the Board." By letter that same day, Coliseum requested

that Purple provide it with the form of questionnaire to be completed by proposed nominees for election to the Board. Thus, by January 17, 2023, the NED Defendants were aware of Coliseum's intent to engage in a proxy contest.[3] The announcement that Coliseum intended to nominate a slate of directors absent agreement with the Company was not a corporate threat but rather a legitimate exercise of Coliseum's rights as a stockholder.

45. On January 19, 2023, Purple filed a Form 8-K acknowledging that "[Coliseum's] Schedule 13D/A indicated that, in the absence of an agreement with the Company, Coliseum intends to nominate a slate of directors for election at the 2023 annual meeting of the stockholders of the Company, which slate would constitute a majority of the board of directors of the Company." Also on January 19, 2023, Purple issued a press release stating that, while the Special Committee "values Coliseum's investment in Purple and shares Coliseum's enthusiasm for, and confidence in, the Company's plan and management team, … Coliseum's current proposal to reconstitute Purple's Board of Directors goes beyond what we consider appropriate: Coliseum is seeking the right to appoint, identify or approve every member of Purple's Board, leaving Purple's other shareholders with no

[3] While Coliseum's actions taken on January 17 removed any doubt that Coliseum planned to engage in a proxy contest, Purple likely was aware of the possibility that Coliseum would decide to nominate a slate of directors before then based on the unfolding of events and, in particular, the fact that the Cooperation Proposal sent days earlier contemplated adding directors identified by Coliseum.

representatives on the Board who have not been endorsed by, and who do not serve at the pleasure of, Coliseum."

46. The Special Committee's statement reflects a fundamental misunderstanding of corporate democracy and the principle on which the legitimacy of a board of directors rests—namely, that the stockholders are entitled to replace a board by majority vote, whether or not an entrenched group of directors considers that outcome "appropriate." It also misrepresents the Cooperation Proposal, which would have given the NED Defendants equal say with Coliseum in the selection of three directors, including two independent directors from the existing Board and one new independent director. Seen through the prism of the Special Committee's subsequent actions, the Special Committee's statement and misrepresentations reveal its intent to act in bad faith to impede a significant stockholder's right to vote simply because that stockholder had announced its intention not to vote to reelect the incumbent board.

47. On January 25, 2023, Purple responded by letter to Coliseum and provided the requested form of questionnaire to be completed by director nominees.

### G. Purple Induces Coliseum To Participate in the Stock Offering, Hiding From Coliseum Its Imminent Plan To Dilute Coliseum's Voting Rights

48. Having received definitive confirmation that Coliseum intended to engage in a proxy contest, Purple, upon information and belief and as detailed

below, readied its secret plan to dilute Coliseum's voting power through the Preferred Issuance. Before blindsiding Coliseum with this fundamental and illegal change to the voting structure in the midst of a proxy contest, however, Purple took the opportunity in February 2023 to raise additional much-needed capital from Coliseum, which Coliseum agreed to invest on the assumption that it would continue to have voting power based on the principle of one share, one vote.

49. Purple needed to raise capital in order to facilitate an amendment to its 2020 Credit Agreement with KeyBank National Association ("KeyBank") and a group of other financial institutions (the "2020 Credit Agreement") and sought to do so by means of an equity offering.

50. The 2020 Credit Agreement provides for a $45 million term loan and a $55 million revolving line of credit. As of the filing of Purple's February 8, 2023 prospectus for the equity offering, there was approximately $25 million outstanding under the term loan. With only approximately $27 million in cash on hand at the time and other obligations on the horizon, Purple sought to work with KeyBank and the other lenders to amend the 2020 Credit Agreement to provide Purple with more favorable terms, including improved covenant flexibility and amendments to various terms that would provide Purple with the necessary flexibility and runway for growth. To do so, however, Purple was required not

only to pay off the approximately $25 million outstanding under the term loan, but also to raise at least $40 million in a stock offering.

51. On or about February 8, 2023, Purple commenced an underwritten public offering of approximately 13.4 million shares of its Class A Common Stock and solicited Coliseum to participate in accordance with Coliseum's preemptive rights in the Subscription Agreement (the "Stock Offering"). The Stock Offering was intended to raise funds so that Purple could pay down a portion of its bank debt and obtain the amendment of the 2020 Credit Agreement it sought from its lenders. At no time during the solicitation process relating to the Stock Offering, or at any other time, did the NED Defendants or their advisors inform Coliseum of the Preferred Issuance that the Special Committee was prepared and ready to launch. On information and belief, the NED Defendants made the calculated, bad faith decision to hide from Coliseum (and all other investors in the Stock Offering) the highly material fact that the Special Committee was ready to approve the Preferred Issuance—and thereby avoid the risk that Coliseum might back out of the offering if it knew the truth.

52. There can be no reasonable doubt that the Special Committee had, well in advance of the Stock Offering, conceptualized, vetted, and preloaded the Preferred Issuance. The Preferred Issuance was declared one day after the Stock

Offering settled, which happened to be the same day that Coliseum submitted its notice of director nominations.

53. Purple ultimately raised approximately $60 million in the Stock Offering—$27 million of which came from Coliseum. The remaining $33 million, which was less than the required $40 million minimum to amend the 2020 Credit Agreement, came from other stockholders.[4]

### H. Coliseum Submits a Notice to Purple that Complies with the Bylaws and all SEC Requirements Nominating a Slate of Five Well-Qualified Directors

54. On February 13, 2023, the same day the Stock Offering settled, Coliseum submitted a notice of Nomination of Directors at the 2023 Annual Meeting of Stockholders of Purple Innovation, Inc. (the "Notice") to Purple. The Notice complied with all requirements under the Company's Second Amended and

[4] Moreover, as part of the Stock Offering, Mr. Gray entered into a "Lock-Up Agreement" with various underwriters of the Stock Offering wherein Mr. Gray agreed, among other restrictions, not to pledge, sell, contract to sell, sell any option or contract to purchase, purchase any option or contract to sell, grant any option, right or warrant to purchase or otherwise transfer or dispose of any shares of Class A Common Stock without prior written consent from the underwriters. The circumstances surrounding the lock-up are highly suspect. The original form of lock-up the Company provided to Mr. Gray—which he did not sign—contained a provision that would have waived all of Coliseum's preemptive rights. Even though this was a new provision, not included in lock-ups that the Company had previously asked Mr. Gray to sign, the Company did not call it out when it asked Mr. Gray to sign the new lock-up. When Mr. Gray asked why that provision had been included, the Company apologized and characterized the waiving of preemptive rights as an inadvertent mistake.

Restated Bylaws (the "Bylaws"). Coliseum provided the Notice several days in advance of the February 16, 2023 deadline provided under the Bylaws (the "Advance Notice Deadline"). *See* Bylaws Article III, Section 3.3(b)(i).

55. The Notice nominated four new directors—Seth "Hoby" Darling, R. Carter Pate, Erika Serow, and Robert DeVincenzi—as well as Coliseum's existing designee, Mr. Gray, to the Board.[5] The four new directors are all independent and, apart from an investment by one of the nominees in a Coliseum fund representing less than 5% of his net worth, have no affiliation with Coliseum. In addition, they are all highly qualified and experienced, having served in each case as directors of other public companies and in executive roles in public or private corporations. Collectively, they would bring to the Board specialized expertise with respect to consumer brands, performance-improvement and technology/manufacturing, among other things, as well as fresh engagement with the challenges facing Purple. They are presumed under Delaware law to act in good faith. Nothing about their nomination constitutes a corporate threat justifying defensive measures designed to impede the stockholder vote.

56. In a press release filed the same day, Coliseum explained its rationale for nominating this new slate of directors:

[5] On February 9, 2023, Defendant Dawn Zier informed Purple that she would not stand for reelection at the Company's 2023 annual meeting of stockholders.

> While we (Coliseum Capital Partners, L.P., together with our affiliates, "Coliseum") are enthusiastic about the Company's longer-term prospects, and strongly supportive of its existing management team, we also recognize that the road ahead—particularly over the next 12-24 months—will be neither straight nor smooth. Purple needs, *and shareholders deserve*, a far nimbler board with a heightened sense of urgency to help management navigate these challenges and halt further deterioration of shareholder value. *As the Company's largest shareholder, our interests are squarely aligned with yours.*
>
> To be clear, we believe that the current non-executive directors are good people with good intentions. Nevertheless, we believe that *after five years of disappointing returns it is time for shareholders to demand change*. Absent significant change, we no longer have confidence in this board's ability to help steward the Company through current headwinds, and to unlock the value creation that we believe is achievable. Accordingly, and in the absence of agreement with the Company for an overhaul in the non-executive composition of its board, we have decided to pursue this public nomination process. Further, given our conviction that such an overhaul is necessary, we are funding this initiative on behalf of all shareholders *without* a customary request that the Company reimburse such costs if our slate is elected.
>
> As you will see below, our proposed directors are accomplished, dynamic business leaders: value creators with deep and relevant experience navigating headwinds, transformation, and growth. We believe, and hope you will agree, *that their skillset, fresh perspective, and energized engagement will prove critical for the benefit of all shareholders.*

57. In the Press Release, Coliseum confirmed that it was no longer pursuing its September 2022 Proposal and that it had no current plan to pursue a going-private transaction. It further committed that, if it does make a similar proposal in the future, it would again condition the proposal on the approval of an

independent special committee and on a majority vote of Purple's unaffiliated stockholders. Coliseum also announced its support for the election of CEO DeMartini.

## I. The Day After the Stock Offering Settles and Coliseum Nominates Its Director Slate, Purple Declares a Preferred Dividend that Fundamentally Changes the Company's Voting Structure

58. As of February 13, 2023, the date on which Coliseum notified the Board of its slate, there were no conflicts between Purple and Coliseum that would justify the Special Committee's continued exercise of power. Nor was there a reasonably perceived corporate threat at any time during the Special Committee's existence that would justify defensive action.

59. Nonetheless, the entrenched Special Committee approved and caused Purple to file with the Delaware Secretary of State the certificate of designations ("COD") creating the Preferred Stock—a new series of preferred stock consisting of 1.5 million authorized shares—thereby manipulating the director election machinery for the sole purpose of diluting Coliseum's voting rights. The COD, in Section 2, states that on February 13, 2023, the Board (not the Special Committee) declared a dividend of one one-hundredth of a share of Preferred Stock on each share of Purple Common Stock outstanding on February 24, 2023. Generally known as "piggy-back preferred," the 1/100 fractional share of Preferred Stock "attaches" to each share of Common Stock, is represented by the share certificate

that represents the associated share of Common Stock, and cannot be transferred separately from the associated Common Stock.

60. The Preferred Stock is essentially non-economic. It has no dividend preference or conversion preference, has a nominal liquidation "preference" of $0.10 per share, and does not thereafter participate in liquidating distributions. The COD provides that the Preferred Stock ranks senior to the Series A Junior Participating Preferred Stock (the preferred that would be issued upon trigger of the Poison Pill). The substance of the Preferred Stock lies entirely in its voting power.

61. Each share of Preferred Stock carries 10,000 votes for the election of directors (and is otherwise non-voting). The Preferred Stock votes together with the Common Stock on the election of directors. Given the dividend ratio of .01 share of Preferred Stock on each Common Stock, the effect is to give a holder of Common Stock 100 additional votes for each share of Common Stock. The COD provides that the holder of the share of Preferred Stock "shall be entitled to allocate such votes among the nominees for election as directors on a cumulative basis as follows: the holder shall be entitled to allocate all, none or such portion of such votes to each nominee to be voted upon for election as a director." As described in Purple's press release announcing the dividend of Preferred Stock, "[a]s an example, shareholders who collectively own 30% of Purple's Common Stock will

be able to use the voting rights associated with their [Preferred Stock] to effectively elect approximately 30% of the members of the Board." The press release also states that the Preferred Stock will "enable shareholders who are not affiliated with Coliseum to choose and elect as many as 55% of the directors on the Purple Board."

62. The Preferred Stock is thus designed for the exclusive purpose of granting additional voting power to Purple stockholders and fundamentally altering the method of voting for directors from "straight" election (with one share, one vote) to cumulative voting, to prevent a majority from electing the full Board. As Purple acknowledges in its press release announcing the Preferred Issuance, stockholders who collectively own 51% of Purple's Common Stock will now be able to elect only approximately 51% of the Board, instead of the entire Board as was within those stockholders' rightful powers before the NED Defendants declared the Preferred Issuance. Moreover, assuming a similar turnout to last year's annual meeting (approximately 89% of the shares outstanding) and absent the Preferred Issuance, Coliseum would be able to elect its full slate of five directors (or seven directors if it had proposed seven nominees). With the Preferred Issuance, assuming the same turnout, a director can be elected with roughly only 11.125% of the votes cast. The result is that Coliseum, with approximately 44% of the vote, can now elect at most three of seven directors by

virtue of its stock ownership. Thus, by authorizing the Preferred Issuance, the Board unilaterally changed Purple's voting structure and upset the reasonable and settled expectations of Coliseum, not to mention the expectations of every other stockholder that invested in Purple.[6]

63. The COD also imposes a form of "dead hand" redemption and amendment provision that would effectively eliminate the ability of a majority of directors to "pull" the Preferred Stock and return the Company to normal, straight voting for the election of directors.

64. The terms of the COD lock the Preferred Stock in place. Even though Section 141 of the DGCL and Purple's charter allow the holders of a majority of outstanding stock to remove a director without cause, the COD will deem that removed director to be automatically re-elected to fill the vacancy left by her removal, if the number of votes cast against removal of that director would be sufficient to elect the director if an election were being held. In other words, a director elected by a minority can be protected from removal without cause by that same minority. Moreover, the Preferred Stock may be redeemed for $0.10 per share, in full and not in part, at the option of Purple solely by the affirmative vote

[6] Not only did Defendants materially and unjustifiably upset Coliseum's expectations and dilute Coliseum's voting power, but they also materially increased the risk that an actual insurgent could accumulate a relatively small block of Purple stock and place its own director on Purple's board.

of two-thirds of the entire Board. This supermajority vote requirement will prevent a majority of the directors from exercising their fiduciary duty to undo the effect of the Preferred Stock. The clear intent is to ensure that directors elected by the cumulative votes of holders of a minority of the common stock will be in a position to block any attempt to redeem the Preferred Stock. Finally, the COD provides that it similarly may not be amended without the affirmative vote of the holders of two-thirds of the outstanding shares of Preferred Stock voting separately as a class. Again, this prevents holders of a majority of the common stock from undoing the damage done by the Preferred Issuance.

### J. Furthering Its Pattern of Sand-bagging and Bad Faith Conduct, Purple Submits a Pre-Textual Challenge to the Notice After the Advance Notice Deadline

65. During the evening of February 19, 2023 (a Sunday in the middle of a holiday weekend), six days after receiving the Notice and three days after the Advance Notice Deadline, the Special Committee's counsel, purportedly on behalf of Purple, sent a letter response to the Notice (the "Notice Response"). The Notice Response claimed that the Notice was incomplete, deficient, and defective for two identified reasons. *First*, the Company claimed that the Notice was deficient or defective because the Notice did not fully disclose the extent of any arrangements or understandings between the nominees and Coliseum or its associates in accordance with Item 5(b)(1)(xii) of Schedule 14A. *Second*, the Company claimed

that the Notice was deficient or defective because it did not disclose specific sources of Mr. DeVincenzi's consulting income.

66. Coliseum sent a letter providing a detailed explanation for the purported issues in the Notice Response the very next morning, February 20, 2023. With respect to the first purported issue in the Notice Response, Coliseum clarified that it did not disclose any arrangements or understandings under Item 5(b)(1)(xii) of Schedule 14A because there were no arrangements or understandings to disclose. With respect to the second purported issue in the Notice Response, Coliseum provided a confidential explanation of the source(s) of Mr. DiVincenzi's consulting income—all of which is in agricultural businesses completely unrelated to Purple's business (or Coliseum) for conflict purposes—while also noting that the information Purple requested from Mr. DeVincenzi is only required for candidates seeking to serve on the Human Capital and Compensation Committee, and not a required disclosure for serving on Purple's Board.

67. Accordingly, the Notice complied with all requirements under the Bylaws, and the Company's belated Notice Response is a pre-text to serve the NED Defendants' wrongful attempt to entrench themselves.

* * *

68. On its face, NED Defendants' actions are a violation of (i) the Company's charter, (ii) *Unocal* and *Blasius* and (iii) the NED Defendants'

fiduciary duties. *Unocal Corp. v Mesa Petroleum, Inc.*, 493 A.2d 946 (Del. 1985); *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 661-62 (Del. Ch. 1988).

69. *First*, the issuance of a stock dividend in the form of preferred stock violates Article IV, Section 4.4(b)(3) of the Second A&R Charter. Article IV, Section 4.4(b)(3) of the Second A&R Charter provides that "[s]tock dividends with respect to Class A Common Stock may be paid ***only*** with Class A Common Stock. Stock dividends with respect to Class B Common Stock may be paid ***only*** with Class B Common Stock … " (emphasis added). The dividend of Preferred Stock constitutes a "stock dividend" under the DGCL. Section 4.4(b)(3) of the Second A&R Charter prohibits the declaration and payment of a stock dividend on the Class A Common Stock or the Class B Common Stock other than in the form of shares of Class A Common Stock or Class B Common Stock, respectively. The attempted dividend of the Preferred Stock thus violates the Second A&R Charter and is void and invalid.[7]

70. *Second*, the Preferred Issuance is an unjustified and unreasonable defensive measure in violation of *Unocal* and *Blasius*. To say that the Preferred

[7] Article IV, Section 4.4(b)(3) of the Second A&R Charter states, in full: "Stock dividends with respect to Class A Common Stock may be paid only with Class A Common Stock. Stock dividends with respect to Class B Common Stock may be paid only with Class B Common Stock; provided, that the deemed transfer and retirement of shares of Class B Common Stock to the Corporation in accordance with terms and conditions of the Exchange Agreement shall not be a transaction subject to this Section 4.4(b)(3)."

Issuance is an aggressive defensive measure is an understatement. The Preferred Issuance ***directly alters the voting structure*** of Purple by instantaneously and fundamentally shifting the allocation of voting power from the majority to a minority for the primary purpose of preventing the election of Coliseum's nominees.

71. According to a press release issued by Purple immediately following the Preferred Issuance, the Special Committee declared the Preferred Issuance "to protect against any coercive or abusive takeover tactics, and to help ensure that the Company's stockholders are not deprived of the opportunity to realize the full and fair value of their investment." The press release stated that the Preferred Stock issuance is justified because Coliseum owns approximately 45% of the Common Stock, has provided a notice to nominate a slate of five director candidates, and, without the Special Committee's manipulation of the election process, "might have been able to single-handedly nominate and elect all of the directors on the Board, including the five nominees Coliseum has selected." In other words, the Special Committee fears that a significant stockholder who desires to conduct a proxy contest might actually succeed if able to vote its stock with its then-commensurate voting power. This is not a threat but rather corporate democracy at work.

72. Nor did Coliseum pose any other corporate threat to justify the NED Defendants' aggressive and self-interested interference with the stockholder vote.

*First*, Coliseum's September 2022 Proposal did not constitute a threat because it was expressly conditioned on compliance with the structural protections of *MFW*. *Second*, notwithstanding the rejection and withdrawal of the September 2022 Proposal, there is no threat that Coliseum will attempt a coercive going-private transaction given its commitment to condition any future proposal, like the September 2022 Proposal, on the *MFW* conditions. The Special Committee's treatment of Coliseum—a long-time investor and important source of periodic funding for Purple with a representative on the Purple board—as a corporate raider or short-term activist has no reasonable basis.

73. *Third*, there is no justification for the Special Committee or the Board to view Coliseum's exercise of its right to nominate and vote for directors as a threat to Purple. At most, Coliseum is a threat to certain incumbent directors' personal and disloyal interest in retaining their seats on the Board. The risk that incumbent directors may lose a proxy battle is not a threat that justifies defensive action but, rather, a hallmark and essential component of stockholders' rights under Delaware law.

74. *Fourth*, there is nothing about Coliseum's individual nominees—four of whom are independent—that constitutes a corporate threat. The Company's press release appears to claim that only independent directors on management's slate, not the independent directors on Coliseum's slate, can "ensure that all

shareholders receive ongoing independent representation on the Board." The Special Committee could not have made this determination in good faith, given that the Special Committee authorized the Preferred Stock immediately after Coliseum's notice of nomination—and given that the Special Committee did not interview, and made no other efforts to assess the qualifications of, Coliseum's independent nominees. The NED Defendants' apparent assumption that these nominees would breach their duties to Purple has no support in Delaware law and is per se unreasonable.

75. To the contrary, Coliseum's interests are aligned with Purple and its public stockholders. Coliseum holds a large equity stake in Purple and, unlike the NED Defendants, has made numerous capital contributions. It also has repeatedly expressed to the Board its desire to strengthen Purple and the Board, and to increase return on investment for Purple's stockholders. It has sought numerous paths to work cooperatively with the Board, including through the Cooperation Proposal. The NED Defendants know that Coliseum is not a threat to corporate policy. In contrast, the NED Defendants collectively own approximately 323,000 shares of Class A Common Stock (worth approximately $1.4 million) and have not made any meaningful stock purchases since joining the Board (share ownership is mostly through director stock awards), while having been paid approximately $3.8 million in cumulative director compensation since 2018.

76. The circumstances surrounding the Preferred Issuance, including its timing, reveal that the NED Defendants' principal motivation is to entrench themselves. The Preferred Issuance was not authorized on a clear day or in compliance with the NED Defendants' fiduciary duties. Rather, the NED Defendants authorized the Preferred Issuance in reaction to a pending proxy contest. In addition, the NED Defendants concealed their intent to authorize the Preferred Issuance as part of a bad faith scheme to induce Coliseum to participate in the Stock Offering, intentionally not disclosing any information concerning the Preferred Issuance while secretly planning all along to dilute Coliseum's voting rights as soon as Coliseum noticed its nominees.

77. *Finally*, the NED Defendants waited until three days after the Advance Notice Deadline—and six days after receiving the Notice—to send their flawed Notice Response, in breach of their fiduciary duties. The Notice complied with the Bylaws in all respects, and the Notice Response did not articulate any legitimate deficiency. However, the NED Defendants were obligated to submit the Notice Response promptly. Had the NED Defendants acted promptly in compliance with their fiduciary duties, Coliseum would have been able to cure any so-called deficiencies in advance of the Advance Notice Deadline. Indeed, Coliseum responded in detail to the Notice Response in less than one day. The NED Defendants' conduct with respect to the Notice and Notice Response

constitutes a further breach of their fiduciary duties that cannot survive enhanced scrutiny.

78. Through it all, the NED Defendants also intentionally kept Coliseum's designee, Mr. Gray, in the dark, actively sandbagging their fellow director by failing to inform him of the plan to solicit Coliseum's participation in the Stock Offering while concealing their intent to authorize the Preferred Issuance. Had the NED Defendants been forthright with Mr. Gray, Coliseum could have sought procedural protections, such as bylaw amendments or submissions of written consents, aimed at protecting its voting rights or, at the very least, at ensuring that the pursuit of this drastic action would first be duly considered by the Board in multiple meetings before it was authorized. The NED Defendants then continued their sandbagging pattern, with their belated and pretextual Notice Response. The NED Defendants' strategic delay in sending the Notice Response, to frustrate Coliseum's ability to cure any so-called deficiencies before the Advance Notice Deadline, constitutes a clear breach of fiduciary duty by the NED Defendants. Indeed, the NED Defendants have no legitimate reason to declare the Notice deficient or defective. Their pretextual quibbles are but the NED Defendants' latest effort to entrench themselves.

79. In sum, the NED Defendants in bad faith breached the Second A&R Charter, breached their fiduciary duty of loyalty, and engaged in a scheme that

ultimately resulted in the dilution of Coliseum's investment (through the dilution of its voting power) and that included, among other bad faith conduct detailed herein, the fraudulent inducement of a $27 million cash payment in connection with the Stock Offering, as well as both (i) the authorization of an unreasonable and disproportionate defensive measure and (ii) the assertion of pretextual deficiencies in the Notice after the Advance Notice Deadline, purposefully depriving Coliseum of the opportunity to correct the purported deficiencies before the deadline. The NED Defendants' actions improperly interfere with the stockholder franchise and violate well-established Delaware law.

80. Furthermore, as a result of their bad faith conduct and egregious breaches of fiduciary duties and of the Second A&R Charter, the NED Defendants are not exculpated from liability under Section 102(b)(7) of the DGCL; are not entitled to indemnification in connection with this action; are not entitled to insurance coverage for any damages or costs they may incur in connection with this action; and can and should be held liable in their individual capacities as directors for the harm they have caused Coliseum.

**K. Coliseum Faces Irreparable Harm**

81. The authorization of the Preferred Issuance is causing irreparable injury to Coliseum and the other stockholders of Purple by interfering with the stockholder franchise in the face of a proxy contest.

82. The Preferred Issuance has the effect of diluting Coliseum's voting power and disenfranchising its rights as a stockholder in virtual perpetuity. Such changes to an entity's corporate structure—particularly when orchestrated by disloyal directors to entrench themselves at the expense of the stockholders—constitutes clear irreparable harm.

83. Further, it will be very difficult to unwind the Preferred Issuance, and impossible to fully unscramble the consequences of the tainted stockholder vote. To the extent the improper election of the entrenched Board could be invalidated, Coliseum and its nominees will be surrounded by a stigma that constitutes irreparable harm. The damage will have been permanently done to Coliseum's ability to run a fair proxy contest.

84. And, to the extent the NED Defendants succeed in their self-serving plan, the Company will suffer ongoing irreparable harm and damage as the NED Defendants continue in their ongoing pattern of acting disloyally and in bad faith. The NED Defendants' conduct surrounding the Stock Offering, the Preferred Issuance, and the Notice Response demonstrate a clear pattern of acting in self-interest at the expense of stockholders, and there is no reason to believe the NED Defendants' bad conduct will stop. At the very least, the Company will be stuck with a Board that is distracting management with its wasteful actions in the pursuit

of entrenchment and self-interest instead of executing on Purple's business plan at a critical time for Purple's growth and operations.

**COUNT I**
**(Breach of Second A&R Charter Against All Defendants)**

85. Coliseum incorporates by reference and realleges each and every allegation contained above as if fully set forth herein.

86. The Second A&R Charter is a valid and enforceable contract between and among Purple, the Board, and Purple's stockholders.

87. Article IV, Section 4.4(b)(3) of the Second A&R Charter provides, in relevant part, that "[s]tock dividends with respect to Class A Common Stock may be paid only with Class A Common Stock. Stock dividends with respect to Class B Common Stock may be paid only with Class B Common Stock …."

88. The dividend of Preferred Stock constitutes a "stock dividend" under the DGCL.

89. Section 4.4(b)(3) of the Second A&R Charter prohibits the declaration and payment of a stock dividend on the Class A Common Stock or the Class B Common Stock other than in the form of shares of Class A Common Stock or Class B Common Stock, respectively.

90. By purporting to authorize the Preferred Issuance and the Preferred Stock, all defendants violated the Second A&R Charter, and the Preferred Stock is therefore void and invalid.

91. Accordingly, Coliseum is entitled to a declaration that all defendants violated the Second A&R Charter and that the Preferred Stock and the Preferred Issuance are invalid.

92. Coliseum has no adequate remedy at law.

## COUNT II
## (Breach of Fiduciary Duty Against NED Defendants—the Preferred Issuance)

93. Coliseum incorporates by reference and realleges each and every allegation contained above as if fully set forth herein.

94. The NED Defendants owe Coliseum and Purple's other stockholders fiduciary duties of loyalty and due care.

95. Delaware law imposes a fiduciary duty on the NED Defendants to act reasonably and in good faith, and not to invoke defensive measures unless they are in response and proportionate to a legitimate threat to Purple's corporate policy and effectiveness.

96. Coliseum's proxy contest does not impose a legitimate threat, or any threat, to Purple's corporate policy and effectiveness.

97. If a defensive measure is adopted with the primary purpose of interfering with or impeding the stockholder franchise, Defendants must have a compelling justification for adopting the defensive measure.

98. The Preferred Issuance was adopted for the sole purpose of interfering with or impeding the stockholder franchise at Purple in connection with the upcoming annual meeting.

99. The NED Defendants have no justification, let alone a compelling justification, for authorizing the Preferred Stock and the Preferred Issuance.

100. The NED Defendants' actions were not reasonable or proportionate in relation to any legitimate threat to Purple's corporate policy and effectiveness.

101. The NED Defendants have breached their fiduciary duties and acted disloyally and in bad faith by authorizing the Preferred Stock and the Preferred Issuance.

102. The NED Defendants have also breached their fiduciary duties and acted disloyally and in bad faith by failing to disclose information concerning the Preferred Stock and the Preferred Issuance in connection with soliciting Coliseum's participation in the Stock Offering, and by intentionally concealing the plan to authorize the Preferred Issuance in order to fraudulently induce Coliseum into participating in the Stock Offering.

103. Accordingly, Coliseum is entitled to a declaration that the NED Defendants breached their fiduciary duties under Delaware law and that the Preferred Stock and the Preferred Issuance are invalid.

104. Coliseum has no adequate remedy at law.

## COUNT III
## (Breach of Fiduciary Duty Against the NED Defendants—the Notice)

105. Coliseum incorporates by reference and realleges each and every allegation contained above as if fully set forth herein.

106. The NED Defendants owe Coliseum and Purple's other stockholders fiduciary duties of loyalty and due care.

107. Delaware law imposes a fiduciary duty on the NED Defendants to act reasonably and in good faith, including by providing a stockholder sufficient opportunity to cure any purported deficiencies in a notice of nominations in advance of an advance disclosure deadline.

108. The Notice was sent in advance of the Advance Notice Deadline and complied with all aspects of the Company's Bylaws.

109. The NED Defendants waited six days after receiving the Notice and three days after the Advance Notice Deadline to send the Notice Response stating that the Notice was purportedly deficient and defective.

110. Coliseum provided a detailed explanation regarding the purported issues in the Notice Response the very next morning.

111. The Notice Response does not identify any legitimate deficiency within the Notice.

112. The NED Defendants have breached their fiduciary duties and acted disloyally and in bad faith by waiting until after the Advance Notice Deadline to raise purported deficiencies in the Notice, therefore purposefully interfering with Coliseum's ability to cure any such purported deficiencies.

113. The NED Defendants have further breached their fiduciary duties and acted disloyally and in bad faith by wrongfully asserting pre-textual deficiencies in the Notice in an apparent act to insulate themselves from an election challenge and further entrench themselves on the Board.

114. Enhanced scrutiny applies to NED Defendants' conduct with respect to the Notice.

115. Accordingly, Coliseum is entitled to a declaration that the NED Defendants breached their fiduciary duties under Delaware law and that the Notice is valid.

116. Coliseum has no adequate remedy at law.

## PRAYER FOR RELIEF

WHEREFORE, for the reasons set forth above, Coliseum respectfully requests that this Court enter an Order:

A. Declaring that all defendants breached the Second A&R Charter;

B. Declaring that the NED Defendants breached their fiduciary duties;

C. Declaring that the Preferred Issuance and Preferred Stock are invalid, unenforceable, and void;

D. Declaring that the Notice is valid and that Coliseum's nominees are permitted to stand for election at the Company's 2023 Annual Meeting;

E. To the extent the Court does not declare the Preferred Stock invalid, unenforceable, or void for any reason, requiring the Company to redeem or otherwise disable the Preferred Stock;

F. Awarding Coliseum damages in an amount to be proven at trial for Defendants' breaches;

G. Awarding Coliseum costs and expenses incurred in this action, including attorneys' fees; and

H. Awarding such other and further relief to Coliseum as the Court deems just, equitable, and proper.

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