



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

JOHN SOLAK, derivatively on behalf of  
CLOVIS ONCOLOGY, INC.,

Civil Action No. \_\_\_\_\_

Plaintiff,

M. JAMES E. BARRETT Ph.D., PATRICK  
J. MAHAFFY, BRIAN G. ATWOOD,  
JAMES C. BLAIR Ph.D., KEITH T.  
FLAHERTY M.D., GINGER L. GRAHAM,  
PAUL H. KLINGENSTEIN, EDWARD J.  
MCKINLEY, and Dr. THORLEF  
SPICKSEN,

Defendants,

-and-

CLOVIS ONCOLOGY, INC., a Delaware  
corporation,

Nominal Defendant.

**VERIFIED SHAREHOLDER DERIVATIVE COMPLAINT  
FOR BREACH OF FIDUCIARY DUTY, WASTE OF  
CORPORATE ASSETS, AND UNJUST ENRICHMENT**

Plaintiff John Solak (“Solak” or “Plaintiff”), by and through his undersigned attorneys, brings this Verified Shareholder Derivative Complaint (“Complaint”) in the name of and on behalf of Nominal Defendant Clovis Oncology, Inc. (“Clovis” or the “Company”) against certain directors and officers of Clovis named herein.

### **SUMMARY OF THE ACTION**

1. This is a shareholder derivative action brought by a Clovis shareholder on behalf of the Company against certain of its officers and directors seeking remedy for the Director Defendants’ (as defined below) breaches of fiduciary duty and self-dealing.

2. In particular, Clovis’ Board of Directors (the “Board”) has adopted a compensation plan which grossly overcompensates the Non-Employee Director Defendants (defined below), in relation to companies of comparable market capitalization and size. Moreover, the compensation plan fails to take into account any relevant metrics, such as revenue and profit, in setting compensation. The Non-Employee Director Defendants have been, and are being, paid more than twice the compensation of their peers at similarly sized, publicly traded companies.

3. Plaintiff brings this action to recoup the excessive compensation being paid to the Non-Employee Director Defendants, and to impose meaningful corporate governance reforms that will both restrict the Non-Employee Director Defendants’ ability to award themselves egregious compensation and to align the

elements of compensation, including grants of options to purchase Clovis' stock, with the Company's success and long-term interests.

### **JURISDICTION AND VENUE**

4. Pursuant to 10 Del. C. § 341, this Court has jurisdiction over this action. As directors of a Delaware corporation, the Director Defendants listed below have consented to the jurisdiction of this Court pursuant to 10 Del. C. § 3114. This Court has jurisdiction over nominal defendant Clovis pursuant to 10 Del. C. § 3111.

5. Venue is proper in this forum because this Complaint raises significant issues of Delaware law, including the fiduciary duties of loyalty, good faith, and oversight. This action is suitable for adjudication before this Court.

### **PARTIES AND OTHER PERSONS**

#### **A. Plaintiff**

6. Plaintiff John Solak is, and at all times relevant hereto has been, an owner and holder of Clovis common stock.

#### **B. Nominal Defendant**

7. Nominal Defendant Clovis Oncology, Inc. is a Delaware corporation with its principal executive offices located in Boulder, Colorado. Clovis is a biopharmaceutical company that focuses on acquiring, developing, and commercializing anti-cancer agents in the United States and foreign markets.

Clovis was incorporated in 2009, and held its initial public offering (“IPO”) in November 2011.

**C. Executive and Director Defendants**

8. Defendant Patrick J. Mahaffy (“Mahaffy”) is the Company’s President and Chief Executive Officer, and a director, and has been since April 2009.

9. Defendant M. James E. Barrett, Ph.D. (“Barrett”) has served as the Chairman of the Board since April 2009. Barrett is a member of the Compensation Committee, and serves as Chair of the Nominating and Corporate Governance Committee.

10. Defendant Brian G. Atwood (“Atwood”) has been a member of the Board since April 2009. Atwood is a member of the Audit Committee, and the Nominating and Corporate Governance Committee.

11. Defendant James C. Blair Ph.D. (“Blair”) has been a member of the Board since April 2009. Blair is a member of the Nominating and Corporate Governance Committee, and serves as Chair of the Compensation Committee.

12. Defendant Keith T. Flaherty M.D. (“Flaherty”) has served as a director since June 2013. Flaherty is a member of the Nominating and Corporate Governance Committee.

13. Defendant Ginger L. Graham (“Graham”) has served as a director since June 2013. Graham is a member of the Compensation Committee.

14. Defendant Paul H. Klingenstein (“Klingenstein”) has served as a director since April 2009. Klingenstein is a member of the Audit Committee.

15. Defendant Edward J. McKinley (“McKinley”) has served as a director since April 2009. McKinley serves as Chair of the Audit Committee.

16. Defendant Dr. Thorlef Spickschen (“Spickschen”) has served as a director since April 2009. Spickschen is a member of the Compensation Committee.

17. The defendants identified in paragraphs 9-16 are referred to collectively as the “Director Defendants.”

18. The defendants identified in paragraphs 10-16 are referred to collectively as the “Non-Employee Director Defendants.”

**NON-EMPLOYEE DIRECTOR DEFENDANTS AWARD  
THEMSELVES EXCESSIVE COMPENSATION**

19. In the Company’s Form S-1, filed June 23, 2011, with the Securities and Exchange Commission (“SEC”), it was revealed that the Board intended to adopt a new equity incentive plan prior to the closing of that offering, pursuant to which a number of shares of the Company’s common stock were reserved for options outstanding and future grants to the Company’s employees, consultants and directors. The Company’s 2011 Equity Incentive Plan<sup>1</sup> (the “2011 Plan”), in which

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<sup>1</sup> In a number of regulatory filings, the Company refers to the 2011 Equity Incentive Plan as the 2011 Stock Incentive Plan.

all the Non-Employee Director Defendants participate, was to become effective immediately prior to the completion of that offering, automatically and without any further approval by shareholders.

20. The 2011 Plan has since become effective and has not been approved by shareholders at any time.

21. The Compensation Committee has the authority to determine the time and amount of awards under the 2011 Plan. The 2011 Plan however does not contain any director-specific, meaningful limitations on director compensation.

22. The fair value of the equity compensation awarded to the Non-Employee Director Defendants under the 2011 Plan is computed in accordance with the Financial Accounting Standards Board *Accounting Standards Codification*® Topic 718 *Compensation — Stock Compensation*,<sup>2</sup> one of the Generally Accepted Accounting Principles (“GAAP”), and it is therefore properly subject to comparison to the equity compensation awards awarded to directors of other companies which also account for non-employee share-based payment under GAAP.

23. The Company has opted to use the Black-Scholes option pricing model to value its stock option awards each year. The Black-Scholes option pricing

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<sup>2</sup> This generally accepted accounting principle is commonly referred to as FASB ASC 718, ASC 718 or Topic 718 or a similar reference.

model is one of several models in use for the valuation of options, and is widely used by its peers. Use of the Black-Scholes valuation methodology requires the Company making assumptions as to the expected dividend yield, price volatility of the Company's common stock, the risk-free interest rate for a period that approximates the expected term of the stock options and the expected term of the stock options. The Company utilizes a dividend yield of zero based on the fact that it has never paid cash dividends and reportedly has no current intention to pay cash dividends. For example, in 2016, the assumptions made in the valuation were a volatility of 93%, a risk-free interest rate of 1.77%, and an expected term of 5.8 years. In the year before, in 2015, the assumptions were a volatility of 72%, a risk-free interest rate of 1.77%, and an expected term of 6.1 years.

24. Although shareholders who purchased Clovis stock in the IPO may have had knowledge of the essential terms of the 2011 Plan, neither they, nor any shareholders who purchased Clovis stock subsequent to the Company's IPO, have been provided an opportunity to expressly approve and vote on the 2011 Plan.

25. The Company has provided detailed disclosures regarding director compensation, including for non-employee directors, in its annual proxy statements and other public filings with the Securities and Exchange Commission. At no point, however, has the Company provided its shareholders the opportunity to approve and vote on the director compensation practices and policies and

compensation paid as disclosed.

26. The Company's shareholders have elected or reelected the Clovis nominees to the Board every year. Such election and reelection of individual nominees to the Board is however not equivalent to approval of the compensation the Director Defendants award themselves and the Board's practices and policies concerning non-employee director compensation. At no point has the Company provided its shareholders the opportunity to elect or reelect any Clovis nominee to the Board unmistakably in conjunction with the approval of and vote on each individual nominee's compensation.

27. In breach of their fiduciary duties, the Non-Employee Director Defendants grant themselves excessive compensation. Over the past five reported years, the years ended December 31, 2012, to December 31, 2016, the five full fiscal years since the Company's IPO, the Non-Employee Director Defendants received, on average, approximately \$429,163 compensation each. For example, for the year ended December 31, 2015, the Non-Employee Director Defendants received, on average, approximately \$617,735 compensation each.

28. This level of compensation significantly exceeds the median total director compensation of \$281,667 for a Fortune 50 company,<sup>3</sup> an average of

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<sup>3</sup> See Meridian Compensation Partners, LLC press release, May 29, 2015, concerning compensation for the year 2014, available at: <http://www.enhancedonlinenews.com/news/eon/20150529005077/en>



\$277,237 for an S&P 500 company,<sup>4</sup> and the median total director compensation for 2016 of \$260,000 for a sample of large cap companies.<sup>5</sup>

29. Clovis is *not* a Fortune 50 company or even a S&P 500 constituent. In fact, Clovis is a current constituent of the Russell 2000 Index, a small-cap US index.

30. Notwithstanding, Clovis' average total director compensation greatly exceeds the median total director compensation of \$200,000 for 2016 for a sample of companies with a market capitalization of between \$1 billion and \$5 billion. As such, the Non-Employee Director Defendants' compensation is unwarranted and grossly excessive in comparison to other companies of similar size.

31. The Company's director compensation practices and policies have caused the Non-Employee Director Defendants to be compensated in amounts averaging in excess of \$400,000 per annum each for the past five reported years, consisting of an annual cash retainer, options to purchase shares of common stock plus Chair's and committee membership fees.

32. Prior to February 16, 2015, each of the Non-Employee Director

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<sup>4</sup> See Spencer Stuart's Board Index 2015, available at: [https://www.spencerstuart.com/~media/pdf%20files/research%20and%20insight%20pdfs/ssbi-2015\\_110215-web.pdf](https://www.spencerstuart.com/~media/pdf%20files/research%20and%20insight%20pdfs/ssbi-2015_110215-web.pdf)

<sup>5</sup> See Frederic W. Cook & Co., Inc.'s 2016 Director Compensation Report, available at: [http://www.fwcook.com/content/documents/publications/11-30-16\\_FWC\\_2016\\_Director\\_Comp\\_Report.pdf](http://www.fwcook.com/content/documents/publications/11-30-16_FWC_2016_Director_Comp_Report.pdf)

Defendants was entitled to receive a \$40,000 annual cash retainer for their service on the Board. In addition, prior to February 16, 2015, the Chair of the Board and the Chair of each committee were entitled to receive an additional annual cash retainer of up to \$16,000. Other committee members were entitled to receive an additional annual cash retainer of up to \$8,000.

33. On February 16, 2015, the Board's Compensation Committee revised the Non-Employee Director Defendants' compensation to increase the additional annual cash retainer payable to the Chair of the Board and the Chair of each committee to up to \$25,000 and the additional annual cash retainer payable to other committee members was increased to up to \$10,000. The Compensation Committee also revised the one-time initial stock option grant due to new directors to stock options to purchase 20,000 shares of common stock and the annual grant of stock options to stock options to purchase 10,000 shares of common stock.

34. On April 13, 2017, the Board's Compensation Committee further increased the baseline annual cash retainer paid to each non-employee director to \$50,000, and the additional annual cash retainer paid to the Chair of the Board increased to \$30,000, with all other 2017 director compensation remaining at 2016 levels.

35. In sum, the compensation of each Non-Employee Director Defendant presently consists of: (i) a \$50,000 annual cash retainer; and (ii) under the 2011

Plan, an annual grant of stock options to purchase 10,000 shares of common stock. Additionally, non-employee directors acting as Chair of the Board or any Board committee are eligible for Chair's fees of up to \$30,000 per director and other members of committees receive fees of up to \$10,000 per committee. In addition, new directors receive a one-time initial stock option grant of stock options to purchase 20,000 shares of common stock.

36. The compensation that the Non-Employee Director Defendants have awarded, and will continue to award, themselves, under the 2011 Plan, greatly exceeds that of the Company's peers which account for non-employee share-based payment under GAAP, standing at a level well more than twice that which is appropriate.

37. The Board's present level of compensation is and will be harmful to both the Company and its shareholders as it wastes valuable and limited corporate assets. Since Clovis' IPO, the Company has accumulated more than \$1 billion in negative net income.

38. Investment analysts expect the losses to continue. The consensus forecast amongst 10 investment analysts covering the Company polled by Thomson Reuters advises that the company will continue to report losses for the current and next fiscal years, in the amounts of \$238 million in negative net income for the year ending December 31, 2017, and \$117 million in negative net

income for the year ending December 31, 2018.<sup>6</sup>

39. The Board's self-dealing compensation practice lacks any modicum of alignment with the long-term interests of the Company.

### **DERIVATIVE AND DEMAND REFUSED ALLEGATIONS**

40. Plaintiff brings this action derivatively in the right of and for the benefit of Clovis to redress injuries suffered, and to be suffered, by Clovis as a direct result of the violations of state law, including breaches of fiduciary duty by the Director Defendants.

41. Clovis is named as a Nominal Defendant in this case solely in a derivative capacity. This is not a collusive action to confer jurisdiction on this Court that it would not otherwise have. Plaintiff was a shareholder of Clovis at the time of the transgressions of which he complains, and continues to be so.

42. Plaintiff will adequately and fairly represent the interests of Clovis and its shareholders in prosecuting and enforcing their rights. Prosecution of this action, independent of the current Board of Directors, is in the best interests of the Company.

43. The wrongful acts complained of herein subject, and will continue to subject, Clovis to continuing harm because the adverse consequences of the actions are still in effect and ongoing.

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<sup>6</sup> Estimates are means of 10 and 9 estimates, respectively.

44. Clovis' current Board consists of the following nine individuals: Director Defendants Barrett, Mahaffy, Atwood, Blair, Flaherty, Graham, Klingenstein, McKinley, and Spickschen.

45. On February 10, 2017, Plaintiff, through his attorneys, made a demand (the "Demand"). A copy of the Demand is attached hereto as Exhibit A.

46. On behalf of Clovis, the Demand requested that the Board take action, within 30 days, to reduce the amount of executive compensation received by the Director Defendants.

47. On March 10, 2017, the Board, by and through its attorneys, responded in writing, denying the demand and concluding that "the Company sees no issues here regarding director compensation that warrant future investigation." A copy of the Company's March 10 response is attached hereto as Exhibit B.

48. As of the date of this Verified Complaint, Plaintiff has received no further communication from the Company.

49. The Board's wrongful refusal of demand is not unexpected. In fact, based on the within allegations, it is reasonable to conclude that each of the Director Defendants lack disinterest and independence and/or that the challenged compensation awards are not the product of a valid exercise of business judgment. Accordingly, even in the absence of demand, the effort can be deemed futile based upon, *inter alia*:

- (a) the Board has ignored demand;
- (b) the Non-Employee Director Defendants stand on both sides of the challenged compensation awards having approved the compensation and being past and/or future beneficiaries of the challenged compensation;
- (c) the Non-Employee Director Defendants received and/or stand to receive the challenged compensation, and thus derived and/or stand to derive substantial personal financial benefit from the transactions at issue; and
- (d) each of the Non-Employee Director Defendants has wasted the Company's assets by accepting (or agreeing to accept) the improper compensation detailed herein as no disinterested director would take advantage of the opportunity to award compensation far beyond the Company's peers and in utter disregard of the Company's financial performance and market value.

50. As the Director Defendants lack disinterest and, having the burden of proving the entire fairness of their compensation, there is more than a reasonable doubt that the Board could impartially consider a demand on themselves.

51. Accordingly, even if demand was not already deemed refused,

demand would have been excused in light of the Director Defendants' conflicts of interest, cause of waste, and manifest lack of independence.

## COUNT I

### **Derivatively Against the Director Defendants for Breach of the Fiduciary Duty of Loyalty**

52. Plaintiff incorporates by reference and re-alleges each and every allegation contained above, as though fully set forth herein.

53. By reason of their fiduciary relationship with Clovis, the Director Defendants owed and owe Clovis the highest obligation of loyalty.

54. In derogation of these duties, the Director Defendants have harmed the Company by awarded to the Non-Employee Director Defendants excessive and improper compensation at the Company's expense.

55. As a result of their breaches, Clovis has suffered and will suffer significant damages, as explained herein.

56. Thus, the Director Defendants are liable to the Company.

57. Plaintiff, on Clovis' behalf, has no adequate remedy at law.

## COUNT II

### **Derivatively Against The Director Defendants for Breach of Fiduciary Duty of Good Faith**

58. Plaintiff incorporates by reference and re-alleges each and every allegation contained above, as though fully set forth herein.

59. By reason of their fiduciary relationship with Clovis, the Director Defendants owed and owe Clovis the highest obligation of good faith and fair dealing.

60. In derogation of these duties, the Director Defendants have improperly and in bad faith refused to consider the Demand, and thus, by their wrongful acts and omissions, determined that no pursuit of the demanded actions has been or will be taken, in breach of their fiduciary duty of good faith owed to Clovis.

61. As a direct and proximate result of the Director Defendants' breaches of their fiduciary obligations, Clovis has sustained, and will continue to sustain, significant damages, as alleged herein.

62. The Individual Defendants are liable to the Company for the misconduct alleged herein.

63. Plaintiff, on Clovis' behalf, has no adequate remedy at law.

### **COUNT III**

#### **Derivatively Against The Director Defendants for Waste of Corporate Assets**

64. Plaintiff incorporates by reference and re-alleges each and every allegation contained above, as though fully set forth herein.

65. As a result of the Director Defendants' self-dealing, the Company has wasted and continues to waste its valuable assets by paying the Director



Defendants excessive compensation.

66. As a result of this waste of corporate assets, the Director Defendants are liable to the Company.

67. Plaintiff, on Clovis' behalf, has no adequate remedy at law.

#### **COUNT IV**

#### **Derivatively Against The Director Defendants for Unjust Enrichment**

68. Plaintiff incorporates by reference and re-alleges each and every allegation contained above, as though fully set forth herein.

69. By their wrongful acts and omissions, as alleged herein, the Director Defendants were unjustly enriched at the expense of, and to the detriment of, Clovis.

70. Plaintiff, as a shareholder and representative of Clovis, seeks restitution from the Non-Employee Director Defendants, and each of them, and seeks an order from this Court requiring the Non-Employee Director Defendants to disgorge all profits, benefits, and other compensation obtained by these Defendants, and each of them, from their wrongful conduct and fiduciary breaches.

71. Plaintiff, on Clovis' behalf, has no adequate remedy at law.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff demands judgment as follows:

A. Against all of the Director Defendants and in favor of the Company

for the amount of damages sustained by the Company as a result of the Director Defendants' breaches of fiduciary duties, waste of corporate assets, and unjust enrichment;

B. Directing Clovis to take all necessary actions to reform and improve its corporate governance and internal procedures to comply with applicable laws and to protect Clovis and its shareholders from a repeat of the damaging events described herein. In particular, the Board must take all necessary steps to bring its director compensation in line with that of the Company's peers using reasonable and accepted metrics as well as market and performance considerations and take into account an appropriate sample of companies for purposes of its own compensation and enumerate the Company's objectives and market conditions it incorporates into its compensation plan and then present the same such for changes to the shareholders for a vote;

C. Extraordinary equitable and injunctive relief as permitted by law, equity, and state statutory provisions sued hereunder, including attaching, impounding, imposing a constructive trust on, or otherwise restricting the proceeds of defendants' trading activities or their other assets so as to assure that Plaintiff on behalf of Clovis has an effective remedy;

D. Awarding to Clovis restitution from Non-Employee Director Defendants, and each of them, and ordering disgorgement of all profits, benefits,

and other compensation obtained by the Director Defendants;

E. Awarding to Plaintiff the costs and disbursements of the action, including reasonable attorneys' fees, accountants' and experts' fees, costs, and expenses; and

F. Granting such other and further relief as the Court deems just and proper under the circumstances.

Dated: May 10, 2017

COOCH AND TAYLOR, P.A.

*/s/ Blake A. Bennett*

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Blake A. Bennett (#5133)

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