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August 27, 2024

[redacted]

[redacted]

Re: Buxton Helmsley Letter to Assertio Holdings, Inc. dated August 20, 2024

Mr. [redacted]:

We represent Assertio Holdings, Inc. ("Assertio") and its board of directors (the "Board"). We write in response to the letter dated August 20, 2024, ("the Letter") from Alexander Parker of The Buxton Helmsley Group, Inc. ("BH"). We understand that an apparent affiliate of BH (the Buxton Helmsley Active Value Fund L.P.) is an Assertio stockholder of record of 100 shares of common stock since May 1, 2024.

In the Letter, BH states that it "addresses the Board alongside our legal counsel, [redacted]." The Letter includes threats by BH to take various actions, including filing a stockholder derivative complaint against Assertio's directors individually, directing others to file litigation against Assertio and its directors, and publishing false and baseless claims regarding the safety and approval process of Rolvedon, a drug marketed by an Assertio subsidiary. The Letter explicitly states that Assertio (and its Board members) can avoid these threats only if Assertio agrees within seven days to a long list of frivolous demands, including entering into an unspecified "cooperation agreement" with BH, appointing Mr. Parker or another BH nominee to the Board,[1] asserting a *qui tam* False Claims Act lawsuit against Assertio's subsidiary Spectrum Pharmaceuticals, Inc. ("Spectrum"), and placing Spectrum into bankruptcy proceedings for what appears to be the purpose of defrauding Spectrum's creditors.

Assertio and its Board take the concerns of its stockholders seriously, including any stockholder demand that the Board consider directing the Company to take legal action. But the Letter is not a proper request or demand for the Board to consider a proposed corporate action. Rather, it is an improper attempt by BH (and, according to the Letter, [redacted]) to obtain benefits to which they are not entitled. The *quid pro quo* the Letter demands is inappropriate, unjustifiable, illegal, and Assertio rejects it.

[1] Any stockholder seeking to recommend a director candidate or any director candidate who wishes to be considered by the Nominating and Corporate Governance Committee (which recommends a slate of nominees to the Board for election at each annual meeting) must provide Assertio with all information relating to such nominee that is required to be disclosed in proxy statements pursuant to Regulation 14A under the Exchange Act (including such person's written consent to being named in a proxy statement as a nominee and to serving as a director if elected). The Nominating and Corporate Governance Committee will consider all director candidates who comply with these requirements.

First, "[o]ne of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation," including decisions about whether to take legal action on the company's behalf. *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1291–92 (Del. 1998). The Board takes this responsibility very seriously. Accordingly, Assertio's Board—not the Company's stockholders and certainly not a single, conflicted so-called activist stockholder—is responsible for deciding whether Assertio will take any specific legal action on any matter concerning the Company's business.

If BH believes the Company should take any particular legal action, the proper vehicle for seeking the Board's consideration is a stockholder litigation demand consistent with Delaware law and Rule 23.1. The Letter is not a proper litigation demand. Rather than demand that the Board consider its proposed course of action, BH threatens a coordinated campaign of public harassment and "rampant, out-of-pocket personal liability" for individual directors unless the Company accedes completely to BH's demands.

If any stockholder were to make a proper litigation demand, then the Board would consider any such demand—and any information provided in support—in good faith and consistent with its fiduciary duties. But BH is ***not*** entitled to dictate the outcome of the Board's consideration. *In re The Walt Disney Co. Derivative Litig.*, 731 A.2d 342, 364 (Del. Ch. 1998) ("Plaintiffs may disagree with the Board's judgment… But … mere disagreement cannot serve as grounds for imposing liability based on alleged breaches of fiduciary duty and waste"). And it is certainly not entitled to demand that the Board reach BH's preferred judgment about whether to take legal action ***and*** demand that the Company provide personal financial benefits to BH, Mr. Parker, and [redacted]. *See* Ltr. at 4.

Moreover, the legal actions that BH proposes demonstrate BH lacks even a basic understanding of the law and the facts. The demand that Assertio initiate a *qui tam* action against its *own* subsidiary, asserting bogus fraud claims (which would ultimately harm Assertio), and then placing the subsidiary into a bankruptcy proceeding in the hopes of using an imagined "bounty" from the frivolous litigation to purchase the subsidiary's assets from its bankruptcy estate is complete legal nonsense.

The convoluted and baseless legal "strategy" that BH demands the Company pursue would not advance the interests of Assertio and its stockholders.

The Board will base its decisions on its good faith business judgment as to Assertio's best interests. The members of the Board will not, however, be swayed by personal threats against them — including that acceding to their demands represents "the Board's best option, not only for retaining its seats, but also avoiding personal liability" or that directors will face "rampant, out-of-pocket personal liability"—when exercising their roles as fiduciaries to Assertio.

Indeed, if Assertio's directors were to base corporate decisions on a desire to "retain[ ] [their] seats" or to "avoid[ ] personal liability"—as BH urges—that itself could constitute a breach of duty. *See In re Ezcorp Inc. Consulting Agreement Deriv. Ltig.*, 2016 WL 301245 (Del. Ch. 2016) (identifying potential conflict of interest if "[t]he incentive to retain a board position … outweighs the incentive to maximize shareholder value"); *TVI Corporation v. Gallagher*, 2013 WL 5809271 (Del. Ch. 2013) (noting that directors' "substantial risk of personal liability" may raise "disabling conflict"). Thus, by threatening directors with loss of their Board seats and potential personal liability if the Company does not accede to its demands—and suggesting these threats should

motivate corporate decisions—BH is itself urging the directors to violate their fiduciary duties, which the directors will not do.

Second, while the Letter pays lip service to the "best interest" of Assertio stockholders, it is clear the Letter's authors have no such interest at heart.

Of particular note, BH does not simply threaten to initiate baseless stockholder derivative litigation, but the Letter plainly states that BH also threatens to encourage disgruntled former employees to pursue other causes of action against the Company its directors, lawsuits that the Letter states would bring a "likelihood of devastation at the parent company level" and "far more likely than not" make Assertio "hopelessly insolvent." *See* Ltr. at 4, 5. BH explicitly calls this action "not in the interest of the Assertio stockholders." *Id*. at 8. And only if the Company accedes to all of BH's demands, BH would then be "happy" to try to persuade former Spectrum employee Kelli Moore to drop her pending litigation against Spectrum—for a price. It is obvious that such scheming is not intended to benefit Assertio or its stockholders.

The Letter also takes pains to convince the Board that BH means it: "to clarify any doubts that [BH] would" if its demands are not met take actions that are destructive of stockholder value, it explains that it "has proactively identified contingent routes to ensure we emerge very favorably from this situation." Ltr. at 7. Whatever actions BH has taken, or intends to take, to "emerge very favorably" from the actions it threatens to set in motion which it claims will destroy stockholder value, those actions cannot possibly align with the interests of other stockholders.

BH's confidence that it will "emerge very favorably" from "destruction of stockholder value" reinforces our concerns, discussed in our August 23 letter, that it is short Assertio stock. A desire to profit from the fall of Assertio's stock price appears to be the only possible rational motivation for BH's threatened actions, which would be entirely consistent with BH's history of "short activism" against Mallinckrodt Plc., Endo International Plc., and EchoStar Corporation.[2]

Moreover, while BH has represented to Assertio and to the investing public that it is "beneficial owner of 1% of the equity shares of Assertio," the only evidence of BH's stock ownership is the 100 shares of Assertio common stock registered in an affiliate's name on May 1, 2024. These circumstances suggest that BH, Mr. Parker, and/or their affiliates or others working with them, may be holding net short positions in Assertio stock and misrepresenting to Assertio and the public the nature of their interests and their true intentions.

Third, the Letter identifies no proper basis for BH's threatened derivative claims against Assertio's directors.

As an initial matter, BH lacks standing to pursue the threatened claims under Delaware's "continuous ownership rule." As we understand it, BH threatens to bring derivative claims based on the Board's response to purported evidence of FCA violations at Spectrum before its acquisition by Assertio in 2023. But, under Delaware law, "to have standing to maintain a derivative action,

[2] In prior correspondence, Mr. Parker has expressly identified his firm's short campaigns against Endo and Mallinckrodt as precedents for his current campaign against Assertio. For example, Mr. Parker's April 22, 2024 letter to the Board stated that Assertio "should first note [BH's] [purported] involvement leading up to the bankruptcy filings of Endo International plc." and "Mallinckrodt plc.," stating that both companies "filed for bankruptcy protection just over a quarter after [BH] had gone public with" accusations of fraud.

the plaintiff must not only be a stockholder at the time of the alleged wrong and at the time of commencement of suit but ... must also maintain shareholder status throughout the litigation." *Ark. Teacher Ret. Sys. v. Countrywide Fin. Corp.*, 75 A.3d 888, 894 (Del. 2013). Again, the only evidence of any BH entity's stock ownership we have seen is the registration of 100 shares in Buxton Helmsley Active Value Fund L.P.'s name on May 1, 2024. As a result, it appears that BH lacks standing to assert any derivative claims related to supposed pre-merger misconduct at Spectrum.

More fundamentally, BH lacks derivative standing under Rule 23.1's demand requirement. To proceed derivatively on a corporation's behalf, a stockholder must either establish that demand requirement is excused or that it made a demand on the board, which was wrongfully refused. There is nothing in the Letter to support the required showing under either scenario. The Letter does not raise any facts suggesting that any of the directors are conflicted, as required to plead that demand is excused. Nor has BH made any stockholder litigation demand under Rule 23.1 or Delaware law, let alone had such demand wrongfully refused. BH apparently intends to file a derivative complaint regardless of whether Assertio pursues the self-destructive and quixotic *qui tam* legal action, unless Assertio also enters into the demanded cooperation agreement. *See* Ltr. at 5, 6 ("Should the Board reject BHG's offer to negotiate a cooperation agreement, the derivative action against this Board will imminently proceed…"). Of course, a corporation's refusal to enter into a "cooperation agreement" with an activist stockholder is not a basis for that stockholder to file a derivative complaint.

Finally, BH is not a proper and adequate derivative plaintiff, given its threats to "destr[oy] stockholder value," its "proactive" steps to "ensure that [it] emerge[s] very favorably" if stockholder value is destroyed, and its attempts to leverage potential legal actions against the Company and its directors for personal gain. "[P]ursuing a derivative claim requires more than ownership. A plaintiff must also satisfy the adequacy requirements implicit in Court of Chancery Rule 23.1." *Parfi Holding AB v. Mirron Image Internet, Inc.*, 954 A.2d 911 (Del. Ch. 2008). Because a "derivative plaintiff serves in a fiduciary capacity as representative of persons whose interests are in plaintiff's hands and the redress of whose injuries is dependent upon her diligence, wisdom, and integrity," a stockholder may not serve as a derivative plaintiff if it will not adequately and fairly represent the interests of all stockholders. *Id.* The Letter makes it abundantly clear that BH could not adequately serve as a derivative plaintiff.

Fourth, the Letter confirms that BH and [redacted] are coordinating their actions against Assertio with Kellie Moore, a disgruntled former Spectrum employee who is engaged in litigation against the Company. As Assertio has previously explained to Mr. Parker, the Company is well-aware of Ms. Moore's allegations concerning Rolvedon, which were previously and thoroughly investigated and are meritless. Mr. Parker admits he has no basis to believe otherwise, as he claims BH has not itself viewed any of Ms. Moore's purported evidence. This coordination raises several concerns and confirms that BH is not acting in the best interest of the Company and its stockholders.

As an initial matter, the Letter states that BH and [redacted] are in possession of confidential Spectrum documents obtained from Ms. Moore. As you no doubt already understand given your apparent familiarity with Ms. Moore and review of those documents, any Spectrum documents Ms. Moore retained from Spectrum are documents she received from Spectrum in her capacity as its in-house counsel and pursuant to a confidentiality agreement, such that any improper use or

public disclosure of Spectrum's confidential information would be a violation of her professional and contractual duties. While reserving all rights with respect to this issue, we demand that [redacted] immediately return all such documents, which it is clear BH intends to improperly use for its own gain.

In addition, the Letter suggests that Assertio agree to reimburse Ms. Moore's legal fees and provide her with a share of an imagined "bounty" from a potential FCA claim and that, should the Company refuse to do so, Ms. Moore will bring legal action against Assertio and Spectrum and publicize confidential Company information. The Company will not be pressured into providing Ms. Moore a benefit to which she is not entitled by threats of baseless legal actions or threats that Ms. Moore or others will publicize wrongfully obtained confidential Company information. We take it from the plain words of the Letter that Ms. Moore has authorized BH and [redacted] to make these demands on her behalf, a fact which places in even stronger doubt that BH's interests are aligned with those of Assertio and its stockholders.

Finally, I draw your attention to the Letter's numerous false and baseless factual assertions against members of the Board, as well as the Company's executives. Your client is on notice that his role as a so-called shareholder activist does not shield him or anyone working in concert with him from personal liability for conduct that violates state and federal law. Moreover, the Letter's complaints about the Company's general counsel are frivolous, as is the threat that the Board must fire him. As for BH's statement that it has filed some sort of complaint against the Company's general counsel, any such complaint is undoubtedly legally frivolous and factually baseless and represents conduct by BH and Mr. Parker that may expose both to personal liability under state and federal law.

Sincerely,

[redacted]

cc: Sam Schlessinger, Esq.