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

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| SMITH ELECTRIC VEHICLES CORP., | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | C.A. No. 12324-CB |
| | ) | |
| FDG ELECTRIC VEHICLES LIMITED, ORNG EV SOLUTIONS, INC. f/k/a PREVOK SOLUTIONS COMPANY, d/b/a NOHM and ACTIVE WAY INTERNATIONAL LIMITED, | ) | |
| | ) | |
| Defendants. | ) | |

**SECOND AMENDED VERIFIED COMPLAINT**

Plaintiff Smith Electric Vehicles Corp. ("Smith" or "the Company"), by its attorneys, for its Second Amended Verified Complaint against Defendants FDG Electric Vehicles Limited ("FDG"), Orng EV Solutions, Inc. f/k/a Prevok Solutions Company d/b/a nohm ("nohm"), and Active Way International, Limited ("Active Way") states:

## INTRODUCTION

1. Defendants have engaged in an unlawful scheme to cripple Smith, convert Smith's assets and resources to their own benefit, and enable FDG to more rapidly enter and dominate the United States' market for electric vehicles, thereby fortifying FDG's position globally, at Smith's expense. A key tactic in their

scheme was to improperly exploit Bryan Hansel's ("Hansel") fiduciary position as Smith's Chief Executive Officer and Director. Using Hansel to advance their interests through material and fraudulent misrepresentations and omissions on their behalf, Defendants worked in concert to induce Smith, *inter alia*, to enter into predatory joint venture and loan agreements as those agreements were misused by the Defendants to cause financial harm to Smith. Smith respectfully requests a judgment rescinding or terminating those agreements and an award of damages for the extensive injuries that have resulted from Defendants' conduct.

## PARTIES, JURISDICTION, AND VENUE

2. Plaintiff Smith is a Delaware corporation with its principal place of business in Kansas City, Missouri.

3. Defendant FDG is a Bermuda corporation with its principal place of business in Hong Kong, China. FDG and its affiliates (namely, Hangzhou Changjiang Automobile Co., Ltd., Yunnan FDG Automobile Co., Ltd., Sinopoly Battery Limited, and Jasmin International Auto R&D (Beijing) Co., Ltd.) (collectively referred to herein as "FDG") have extensive business operations in China.

4. Defendant Prevok d/b/a nohm is a Delaware corporation with its principal place of business in Kansas City, Missouri.

5. On information and belief, Defendant Active Way is a Hong Kong limited liability company that is a wholly or majority owned subsidiary of FDG and is controlled by FDG, with its principal place of business at Rooms 3001-3005, 30th Floor, China Resources Building, 26 Harbour Road, Wanchai, Hong Kong.

6. This Court has subject matter jurisdiction pursuant to 10 *Del. C.* § 341 because this action seeks equitable relief. This Court has jurisdiction over the Defendants and venue is proper based upon the agreement between the parties and Smith's status as a Delaware corporation. The Joint Venture Agreements (defined below) provide that the agreements "shall be governed by and construed in accordance with the Laws of the State of Delaware without regard to the Laws of the State of Delaware or any other jurisdiction that would call for the application of the substantive Laws of any jurisdiction other than the State of Delaware." The Joint Venture Agreements further provide that "[t]he Parties agree that the appropriate, exclusive and convenient forum . . . for any disputes between the Parties arising out of or related to this Agreement or the transactions contemplated hereby shall be in the Court of Chancery in the City of Wilmington, New Castle County, Delaware."

## SUBSTANTIVE ALLEGATIONS

7. Since Smith's founding in 2009, its goal has been to become the leading designer and producer of high efficiency, zero-emissions vehicles in the

commercial transportation industry. Smith has successfully developed two electric vehicles, known as the Newton and Edison. Smith has sold Newtons in the United States, and has sold Edisons and Newtons internationally.

8. FDG (also known as Five Dragons Electric Vehicles Limited) is part of a vertically integrated automotive manufacturing group traded on the Hong Kong stock exchange. FDG claims to specialize in the research, design, development, production, and manufacture of electric vehicles and systems and parts used in the assembly and production of electric vehicles. FDG developed a number of electric vehicles, including a commercial electric van known as the JAS01 specifically for the Chinese market. FDG has been unable to market or sell that vehicle in the United States due to United States regulatory requirements that FDG has failed to satisfy.

9. FDG developed an interest in Smith, which had established itself in the United States and international market and which had the marketing knowledge, engineering expertise and other capabilities necessary to develop commercially viable electric vehicles. Through one if its senior executives, Jaime Che, FDG cultivated a close relationship with Hansel. As Smith's CEO and Director, Hansel, was in a position to provide information and assistance to FDG. Through its relationship with Hansel, FDG knew that Smith, as is typical for early stage ventures, needed capital from time to time to develop, advance and improve

the business. FDG took advantage of Smith's need for capital and FDG's close relationship with Hansel to become a stockholder in and creditor of Smith. On information and belief, FDG's intention in doing so was not to advance Smith's best interests, but was, instead, to advance FDG's interests at Smith's expense and to its detriment.

10. After several years of development and operations, Smith had reached an inflection point in its growth as a company. Smith had developed attractive, compliant and marketable products, had made tangible progress in marketing its products, established mature and robust manufacturing operations, and added multiple, well known fleet-based customers. As a result, Smith's business development team was projecting that orders from customers in 2015 would meet or exceed its capacity, that Smith's revenue would spike and Smith would become significantly profitable. At the same time, however, while Hansel was Smith's CEO, Smith's financial condition had become strained, having accrued approximately $20 million in debt and having drained itself of working capital. Satisfying its capital needs was essential for Smith to achieve the operational stability and profitability, thereby benefitting from its years of investment.

11. Hansel had served as CEO of Smith since January 2009; he was substantially responsible for and encouraged the decisions which led to Smith's challenged financial condition.

12. Primarily through its relationship with Hansel, FDG was aware that Smith was poised for growth but required additional capital. In 2014 and 2015, FDG engaged in discussions with Hansel about various transactions by which Smith would substantially improve its capital position with funding from FDG. After discussions and negotiations with Che and FDG involving these different business scenarios, some of which Smith actively pursued at significant expense, but which were never consummated, Hansel recommended to the Smith Board of Directors that the company enter into a joint venture with FDG (the "Joint Venture"). On information and belief, at the time Hansel made these recommendations, FDG and Che had improperly succeeded in executing its scheme to (a) induce Hansel to violate his duty of loyalty to Smith, (b) shift his loyalty to FDG and (c) serve as FDG's undisclosed agent in Hansel's interactions with Smith.

13. As a direct result of FDG's improper scheme to co-opt Hansel, Smith was induced to enter into the Joint Venture. The Joint Venture entity would, among other things, become the exclusive marketing and sales arm for Smith and FDG vehicles within the United States.

14. On information and belief, acting as FDG's undisclosed agent, Hansel represented to Smith that the Joint Venture would allow Smith to accelerate the sales of its electric vehicles in the United States and create an advantageously

closer relationship with FDG, which was eager to bring its own vehicle, the JAS01, to the United States market.

15. Specifically, Hansel pitched the Joint Venture, which later became known as Prevok and, more recently, as nohm to Smith's directors and stockholders as an entity that would "fully and aggressively focus on the sales and marketing of these EV products [the Smith medium-duty Newton platform] in the U.S."

16. Hansel also represented to Smith stockholders that the Joint Venture would facilitate Smith's ability to "manufacture the FDG product here, obviously alongside of the Newton," thereby conveying that Smith would continue to manufacture Newtons for sale to and through the Joint Venture in the United States.

17. Pursuant to terms reached in purportedly arms-length negotiations between Hansel (on behalf of Smith) and Che (on behalf of FDG), Smith would, among other things, contribute to the Joint Venture the exclusive right to sell and distribute the Smith Newton vehicle in the United States and would license to the Joint Venture a perpetual right to use the Smith name and the Smith intellectual property necessary to market and sell Smith's Newton vehicle.

18. As alleged above in paragraphs 12-14, on information and belief, Hansel, as then-CEO of Smith, ceased to have Smith's best interests in mind at the

time he was purportedly negotiating on behalf of Smith. Under the joint venture terms Hansel and Che negotiated, Smith would immediately contribute exclusive sale and distribution rights to the joint venture for Smith Newtons in the United States. The ultimate terms of that agreement, however, did not require the joint venture to immediately commit to order any specific number of vehicles from Smith, nor was a definitive agreement then reached on other key terms under which the joint venture would purchase and sell Smith vehicles.

19. Instead, the agreement Hansel brokered, on information and belief, in furtherance of FDG's scheme acting as FDG's undisclosed agent, required that the joint venture and Smith use their reasonable best efforts to enter into an OEM Agreement pursuant to which the joint venture entity would then be committed to orders, pricing, and other terms (the "OEM Agreement").

20. The Smith Board of Directors and other members of Smith's management team questioned the soundness of terms negotiated by Hansel; they particularly expressed concern that the finalization of the OEM Agreement was being deferred, and, accordingly, the Joint Venture would have no immediate obligation to order Newtons or other products or services in addition to those it was already obtaining from Smith (such as homologation and design validation relating to FDG's JAS01), while, at the same time, Smith would be immediately prevented from selling its Newton through any other means in the United States.

21. Timely orders for electric vehicles in significant volumes at appropriate prices were critical to Smith's ability to generate cash flow and secure additional financing on commercially reasonable terms. As Smith's long-time CEO, Hansel well understood these facts.

22. Hansel, on information and belief, having been co-opted by FDG, dismissed these concerns raised by Smith's Board of Directors and management, and strongly recommended that Smith agree to the terms he negotiated with FDG, as set forth above.

23. Smith's directors and other officers recognized that Hansel understood the importance that the OEM Agreement contain the Joint Venture's minimum purchase commitments for Newtons, forecasts and other standard terms because, in addition to his knowledge of Smith's condition, Hansel, as Smith's CEO, had seen drafts prepared by Smith of the OEM Agreement and had expressed no concern about reaching agreement on the terms Smith expected.

24. As Smith's CEO and a director, but, on information and belief acting as FDG's undisclosed agent, Hansel:

(a) advised that the terms contemplated in the OEM Agreement would greatly benefit Smith;

(b) on information and belief acting as FDG's undisclosed agent as alleged above, falsely represented to Smith's stockholders that upon the formation of

the Joint Venture it would be "job one to solidify the relationship and get the OEM contract defined in its full detail," and that he would be "obviously focused on doing that quickly" and

(c) mis-informed Smith's Board of Directors that it would be imprudent to make finalization of the OEM Agreement a precondition of the transaction.

25. The Smith Board of Directors relied upon Hansel's tainted advice, recommendations and representations and approved Smith's entering into the Joint Venture. But for Hansel's false and misleading communications with and to Smith's Directors, the Smith Board would not have entered into the Joint Venture.

26. On or about April 24, 2015, the Joint Venture was incorporated as the entity in which Smith and FDG would participate as joint venture partners. The Joint Venture's name is Orng EV Solutions, Inc.; it did business as Prevok Solutions Company. On information and belief, it is now doing business as nohm.

27. On or about May 4, 2015, Smith executed the agreements that formalized the Joint Venture among Smith, FDG, and nohm through a Contribution Agreement and Intellectual Property License Agreement with nohm (together, the "Joint Venture Agreements").

28. Only in retrospect did it become evident that Hansel had not been acting for the benefit of Smith and its stockholders; as alleged above he was, in fact, working for the benefit of FDG as its undisclosed agent. On information and

belief, during their discussions concerning the joint venture with FDG, Hansel and Che reached an agreement or understanding that Hansel would resign as CEO of Smith and become the CEO of the new joint venture company, nohm, and that he began acting for FDG's benefit, while Hansel remained Smith's CEO and a Smith Director. At some point prior to execution of the Joint Venture Agreements, Hansel knew that he was negotiating terms for the Joint Venture that would benefit FDG and knew that he would obtain a position with the Joint Venture, yet Hansel and Che knew that Hansel continued to hold himself out to Smith, its Board of Directors, and its stockholders as acting solely for their benefit in these negotiations.

29. Particularly due to the deferral of the negotiation and finalization of the OEM Agreement—the deferral of which Hansel persuaded the Smith Board of Directors was wise—Hansel knew that the terms of the Joint Venture he negotiated would place Smith in a dangerous position by giving FDG the ability to coerce and severely damage Smith. Nonetheless, Hansel affirmatively represented to Smith, its Board of Directors, and its stockholders that entering into the Joint Venture was very advantageous for Smith and unquestionably in Smith's best interests.

30. On information and belief, FDG reached an agreement with and encouraged Hansel to take the actions described.

31. In or around June 2015, Hansel stepped down as the CEO of Smith, maintaining his position on the Smith Board of Directors. Thereafter, the negotiation of the OEM Agreement became a weapon Defendants, with Hansel as their agent, wielded to cripple and coerce Smith and dilute Smith's interest in nohm.

32. Working on behalf of nohm (and FDG as its controlling majority stockholder), Hansel purported to engage in negotiations over the OEM Agreement on behalf of Prevok. As alleged above, FDG had succeeded in making Hansel FDG's undisclosed agent while he was Smith's CEO and a Director. His efforts to serve FDG's interest at the expense of Smith and of the Joint Venture continued after Hansel resigned as Smith's CEO and assumed that position at nohm. Defendants and Hansel knew that Smith's entire future, as it concerned the United States market, was now committed to and dependent on nohm through the Joint Venture Agreements. Defendants also knew that Smith would, absent progress on the OEM Agreement, find itself in even more difficult financial circumstances.

33. Nonetheless, FDG and nohm—acting through Hansel—refused to accept terms in the OEM Agreement which, along with Hansel, they had previously caused Smith to expect would be included.

34. Instead, through Hansel, FDG and Prevok took positions with respect to the OEM Agreement which Defendants knew Smith could not accept and that

were diametrically opposed to Smith's understanding—an understanding that Hansel and FDG had encouraged—during and prior to nohm's formation. On information and belief, FDG's behavior and that of nohm were intended to exclude Smith from at least the United States electric vehicle market, and capture Smith's engineering capabilities and market position to develop and sell FDG's JAS01 and future products.

35. Ostensibly on behalf of nohm, but, on information and belief, on instructions from Che and FDG, Hansel insisted on terms of the OEM Agreement that he knew were contrary to Smith's legitimate interests and contrary to Smith's legitimate expectations because, when he was Smith's CEO, Hansel, with FDG's knowledge and encouragement and, on information and belief, acting as FDG's undisclosed agent, actively created those expectations through his inducing representations to Smith's directors, other officers and investors.

36. As a result of the delay and eventual failure to enter into the OEM Agreement, Smith, even more capital starved as Defendants would have foreseen and intended, was forced to seek additional financial support. At the time, the extent of the wrongful plan was not clear to Smith or its Board of Directors. Having been backed into a financial corner through FDG's misconduct and that of nohm and Hansel described above, Smith, with no other practical alternative, sought capital from FDG; accordingly, negotiations between Smith and FDG

commenced concerning a stock purchase agreement with FDG ("SPA"), which would infuse $10 million into Smith. The terms FDG initially proposed were reasonable, but required additional time to fully document.

37. Because the process took time, Smith was forced to secure bridge funding to ensure its continued operations. Critically, Smith had relinquished its right to sell Newtons in the U.S., with Hansel's active encouragement as FDG's undisclosed agent, upon entering into the joint venture agreement. Thus, Smith's ability to sell Newtons and generate revenue depended on the Joint Venture and on FDG, its controlling stockholder, to follow through on the inducing representations Hansel and FDG had made to Smith as described above. At this time, Defendants knew that Smith had substantial expenses and desperately needed revenue and working capital.

38. Purporting to represent the interests of Smith, Hansel, as a Smith director, facilitated and encouraged Smith's receipt of such bridge funding.

39. With Hansel's encouragement, Smith entered into an October 5, 2015 short-term loan agreement ("October 2015 Loan") with Active Way, an FDG affiliate, whereby Smith borrowed a total principal sum of $1,000,000 (HK), $500,000 (HK) of which was secured by all shares of American Business Services, Inc., a Colorado corporation, then or thereafter held by Smith. Among other

things, the October 2015 Loan required Smith to make quarterly payments of interest which accrued at a rate of 18% per annum.

40. Jaime Che executed the October 2015 Loan on behalf of Active Way.

41. Thereafter, with Hansel's encouragement, Smith entered into a December 11, 2015 short-term loan agreement ("December 2015 Loan") with FDG whereby Smith borrowed a principal sum of $2,000,000 secured by collateral of 10,000,000 shares (50%) of Smith's stock in nohm.

42. Jamie Che executed the December 2015 Loan on behalf of FDG.

43. The Defendants and Hansel understood that Smith's timely repayment of the October 2015 Loan and the December 2015 Loan (together, the "Fraudulent Loans") would depend on FDG's timely infusion of a much greater amount of capital through the SPA or otherwise.

44. Smith approved and accepted the Fraudulent Loans because it reasonably believed, based on FDG's encouragement, that Smith soon would consummate one or more agreements with FDG that would provide a substantial capital infusion into Smith and easily allow Smith to repay the Fraudulent Loans and address other capital requirements.

45. But after the Fraudulent Loans were consummated, FDG demanded terms for the financing agreements referred to above that differed materially from those initially proposed and would have been irresponsible for Smith to accept.

These terms included, without limitation: (1) adherence to a budget that required deep personnel cuts; (2) the discontinuation of all Newton production; (3) the closure of Smith's engineering center in the United Kingdom, which was Smith's innovative engineering core; and (4) Smith's immediate termination of its license agreement with Taiwan Smith Industrial Company, Ltd., to which Smith had licensed rights, among other things, to develop, manufacture, purchase, market, and sell Smith-branded electric vehicles outside of the United States.

46. In fact, it ultimately became apparent that the financing agreements referred to above were a ruse designed to close the financial vice in which FDG had placed Smith. Based upon the belief, encouraged by FDG, that the terms of the financing agreements would be commercially reasonable and would be consummated, Smith had committed itself to the Fraudulent Loans.

47. To further intensify the financial pressure on Smith in light of Smith's limited revenue and working capital exacerbated by its inability to sell Newtons in the U.S., FDG caused nohm to refuse to pay outstanding Smith invoices for engineering services that had been rendered by Smith to bring FDG's JAS01 into compliance with United States regulations to enable the vehicle to be sold in this country, as contemplated by the Joint Venture Agreements (hereinafter, the "Smith Invoices"), which total $1,034,950.41. FDG, nohm and Hansel understood the crucial importance to Smith of the timely payment of the Smith invoices.

48. Because of the Joint Venture's failure to pay Smith's long-outstanding invoices for its homologation services and due to the dire effect of this failure to pay Smith's invoices, Smith ceased rendering homologation services to and notified nohm of its decision. Eventually, nohm paid $850,000 toward the Smith Invoices in March 2016. As Defendants knew and know, nohm's protracted refusal to make any such payments deprived Smith of much needed capital during a period when every dollar was vital to Smith.

49. FDG and nohm in bad faith continued to attempt to impose terms on Smith and to take positions that were antithetical to fundamental tenets of the Joint Venture, including the refusal to place orders for Smith's Newtons as initially understood. Specifically, nohm refused to include standard terms for the OEM Agreement such as: (1) minimum purchase volumes for Newtons and JAS01s for specific periods of time; (2) continued use of the Smith name; and (3) sales forecasts for Smith products and FDG products.

50. Indeed, despite its having obtained the exclusive right to do so in the United States, nohm refused to commit to selling Smith products altogether.

51. FDG and nohm understood that if they had made good on their inducing representations regarding the sale of Newtons by the Joint Venture, agreed to a commercially reasonable SPA, and timely paid for Smith's valuable homologation and engineering services, Smith would have benefitted from

increased revenue and been in a much stronger, healthier financial position instead of being placed in its increasingly desperate financial position caused by Defendants' implementation of its scheme.

52. After luring Smith into (1) the Joint Venture Agreements based on false representations, inter alia, about the Joint Venture's beneficial effects on Smith of accelerated US sales of Newtons and the false promises to negotiate in good faith and to enter into the OEM Agreement and (2) the Fraudulent Loans based on false and misleading assurances regarding the financing agreements referred to above, in February 2016 Defendants tightened the vise even further. As a result of Smith's unavoidable failure to repay the December 2015 Loan, FDG declared that it had foreclosed upon the collateral, which purportedly increased its ownership interest in nohm from 52.94 percent to 78.67 percent, and diluted Smith's ownership interest in nohm from 47.06 percent to 21.33 percent. On June 1, 2016, FDG purported to hold an auction for the collateral; FDG ultimately purchased the collateral for the allegedly high bid of $500,000 – a fraction of the per-share price FDG had claimed the Joint Venture shares were worth previously.

53. Additionally, on February 16, 2016, Active Way sent Smith a letter alleging non-payment of its purported interest obligations under the October 2015 Loan, accelerating the maturity of the note and demanding payment in full, then totaling 1,065,032.56 (HK), within one week. On June 29, 2016, a Hong Kong law

firm sent a demand letter on behalf of Active Way, seeking, on the same basis, payment of $1,085,327.88 (HK) within seven days.

54. On July 5, 2016, FDG notified Smith that, despite FDG's purchase of the collateral for the December 2015 Loan pursuant to its $500,000 credit bid, $1,692,591.54 in principal and $12,788.47 in accrued interest allegedly remained due and owing by Smith to FDG on account of the December 2015 Loan.

55. In addition to manipulating Smith's acceptance of the Fraudulent Loans from FDG and Active Way, FDG has invoked provisions of prior loan agreements to attempt to deny Smith the ability to obtain financing from third parties—financing that Smith needed to continue as a going concern—stating that it would only give its consent if Smith agreed to terms by which Smith would confirm the validity of agreements, including the Joint Venture Agreements, that are no longer legally effective and/or that Smith seeks to rescind or otherwise nullify in that litigation.

56. As a result of Defendants' concerted wrongful conduct, and the wrongful conduct of Hansel, the terms of the Joint Venture Agreements, if judicially recognized and enforced, would prevent Smith from selling its vehicles in the United States. Such conduct has also deprived Smith of much-needed capital and caused losses of millions of dollars in lost profits and damage to its reputation. Defendants' attempt with which Hansel has been complicit to drive

Smith out of business and secure for FDG's sole benefit Smith's business, assets, and opportunities, requires and fully justifies judicial intervention.

**COUNT I**
**FRAUD AND MISREPRESENTATION**
**(ALL DEFENDANTS)**

57. The preceding paragraphs are repeated and realleged as if fully set forth herein.

58. Through their actions as set forth above, Defendants acting with Hansel as their undisclosed agent defrauded Smith by misrepresenting and concealing material facts with the intention of creating a false impression or inference about FDG's intentions and to induce Smith to enter into the Joint Venture Agreements and Fraudulent Loans.

59. Defendants knew, or recklessly disregarded the fact, that their material misrepresentations were false when they were made and/or that these omissions of fact were necessary to correct a false impression or inference.

60. Defendants intended for Smith to rely upon these material misrepresentations and omissions.

61. Smith reasonably relied on Defendants' material misrepresentations and omissions.

62. As a result, Smith has been and will be damaged.

63. Smith has offered, and offers, the return of its Prevok stock upon the termination and/or rescission of the Contribution Agreement.

**COUNT II**
**BREACH OF FIDUCIARY DUTY BY CONTROLLING SHAREHOLDER (FDG)**

64. The preceding paragraphs are repeated and realleged as if fully set forth herein.

65. Smith is, and has since the joint venture's formation been, the minority stockholder of nohm. FDG is, and has always been, since the joint venture's formation, the controlling stockholder of nohm.

66. When Smith agreed to enter into the nohm Joint Venture with FDG, Smith had the reasonable expectation that, when it contributed to nohm the exclusive right to market and sell Newtons and other Smith products in the United States, nohm would utilize that right to market and sell Smith's electric vehicles, including, but not limited to, the Newton. But for that expectation, which was intentionally created by FDG as alleged above, Smith would never have entered into the Joint Venture.

67. Smith also had the reasonable expectation that FDG would not abuse its position as the controlling stockholder of nohm to prevent nohm from utilizing its exclusive right to market and sell Smith's electric vehicles.

68. Smith's reasonable expectation of FDG's cooperation and goodwill, encouraged by the Defendants, were the foundation of its decision to enter into the Joint Venture.

69. Smith relied, to its detriment, on (1) its reasonable expectation of cooperation and goodwill from FDG in making its decision to enter the Joint Venture and (2) the reasonable expectations regarding Smith's contribution to the Joint Venture the exclusive right to sell and market Smith products in the United States and nohm's subsequent refusal to do so.

70. FDG's actions as set forth herein breached its fiduciary duties as controlling stockholder.

71. As a result, Smith has been and will be damaged.

**COUNT III**
**BREACH OF CONTRACT—CONTRIBUTION AGREEMENTS**
**(NOHM)**

72. The preceding paragraphs are repeated and realleged as if fully set forth herein.

73. Under the circumstances set forth above, nohm entered into the Contribution Agreement with Smith which required, among other things, that Smith and Prevok negotiate an OEM agreement "in good faith between the Parties, using respective reasonable endeavors."

74. nohm materially breached the Contribution Agreement by failing to negotiate an OEM agreement in good faith using reasonable endeavors.

75. Smith has been damaged as a result.

76. Smith has offered, and offers, the return of its Prevok stock upon the termination and/or rescission of the Contribution Agreement.

**COUNT IV**
**DECLARATORY JUDGMENT**
**TERMINATION OF SMITH INTELLECTUAL PROPERTY LICENSE**
**(NOHM)**

77. The preceding paragraphs are repeated and realleged as if fully set forth herein.

78. A ripe controversy exists between Smith and nohm regarding the continued validity and operation of the Smith Intellectual Property License.

79. As set forth in Count VI, nohm materially breached the Contribution Agreement.

80. The Intellectual Property License is an integral part of the Contribution Agreement.

81. Since Smith intended, and FDG purportedly intended, the Joint Venture Agreements to function together, nohm's material breach of the Contribution Agreement has a direct and material effect on the Intellectual Property License.

82. Without the Contribution Agreement, the Intellectual Property License fails to effectuate Smith's intent and the expressed intent of FDG in entering into the joint venture arrangement.

83. Due to nohm's material breach of the Contribution Agreement, Smith respectfully requests that the court declare: (1) that the Intellectual Property License is terminated, and (2) that any Smith property transferred to Prevok thereunder be returned to Smith.

84. Smith has no adequate remedy at law.

**COUNT V**
**BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING**
**(NOHM)**

85. The preceding paragraphs are repeated and realleged as if fully set forth herein.

86. nohm owed Smith the common law duty to engage in and demonstrate good faith and fair dealing in fulfilling its obligations under the Joint Venture Agreements.

87. After obtaining the exclusive rights to market and sell Smith products in the United States, nohm breached that common law duty by, *inter alia*, unreasonably refusing to agree to terms for the exclusive sale and distribution of Smith electric vehicles.

88. Smith has been damaged as a result.

**WHEREFORE**, Smith prays for judgment as follows: (1) rescission or termination of the Joint Venture Agreements; (2) rescission or termination of the Fraudulent Loans and/or placement of any shares of or owned by Smith that have been foreclosed upon in a constructive trust pending the resolution of this proceeding; (3) rescissionary and restitutional damages; (4) in the alternative, an award of compensatory monetary damages; (5) a declaration that the Intellectual Property License has been rescinded and/or terminated; (6) an award for Smith's costs and expenses incurred in this action, including, but not limited to, experts' and attorneys' fees; and (7) such other and further relief as may be just and proper.

*/s/ Gregory P. Williams*
Gregory P. Williams (#2168)
Kevin M. Gallagher (#5337)
Richards, Layton & Finger, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

*Counsel for Plaintiff Smith Electric Vehicles Corp.*

OF COUNSEL:

Philip J. Kessler
Honigman Miller Schwartz and Cohn LLP
2290 First National Building
660 Woodward Avenue
Detroit, Michigan 48226
(313) 465- 7630

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