

# STEPHEN C. THIENEL, ESQ.

*Admitted in DC, MD, VA*

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February 23, 2023

Graham Jackson, Esq.  
General Counsel and Corporate Secretary  
(ISC)<sup>2</sup>  
311 Park Place Boulevard, Suite 400  
Clearwater, FL 33759

Re: Your Notice of Breach of Non-Disclosure Agreement to Stephen Mencik

Dear Mr. Jackson:

Your Notice of Breach of Mutual Non-Disclosure and Confidentiality Agreement and Demand to Cease and Desist Disclosure of Confidential Information sent to my client, Stephen Mencik, has been forwarded to me for reply on his behalf.

## ***Corporate Governance***

You note at the outset of your letter the commitment of the Board Chair to work with (ISC)<sup>2</sup>'s "stakeholders" and the next steps, based on member feedback, were being planned. As part of this process to engage stakeholders, (ISC)<sup>2</sup> officers agreed to meet with Mr. Mencik regarding his petition to call a Special Meeting of the membership to vote on a proposal for new by-laws even though they believed he fell two signatures short of the required 500 signatures necessary for a Special Meeting of the members. Subsequently the officers stipulated he had met this signature requirement but required him to sign a Non-Disclosure Agreement "setting forth each [party's] rights and responsibilities" so the attendees could "share meaningful feedback in a secure and private manner."

(ISC)<sup>2</sup> is a non-profit corporation formed on a membership basis meaning the members elect a Board of Directors who, in turn, select corporate officers. Members need the ability to freely discuss the affairs of the corporation amongst themselves as ultimately, they are the "owners" of the organization. With this in mind, state and federal laws require corporations, and especially non-profit organizations, to allow corporate members a right of inspection. Massachusetts case law recognizes stockholders' right of inspection as stockholders "are the beneficial owners of all the assets of the corporation, and they are entitled to reliable information as to the financial condition of the corporation, the manner in which business has been

conducted and its affairs have been managed, and whether those to whom they have entrusted their property have acted faithfully and efficiently in the interests of the corporation.” *Chitwood v. Vertex Pharmaceuticals, Inc.*, 71 N.E.3d 492, 496 (2017) quoting *Albee v. Lamson & Hubbard Corp.*, 69 N.E.2d 811 (1946).

Unlike for-profit corporations where the shareholders pecuniarily benefit, the assets of a non-profit organization are intended to help the public good and effective governance requires transparency and accountability to its members charged with fiduciary oversight. In return for favorable tax benefits to the corporation, the members of a non-profit corporation have broad powers to fulfill their responsibilities to elect board members and oversee the corporation’s business, including the right to inspect corporate documents and protection from corporate retaliation for oversight activities.

Requiring a corporate member to execute a non-disclosure agreement as a *quid pro quo* for having a discussion with corporate officers to share meaningful feedback from members is, in itself, suspect.

### ***The Non-Disclosure Agreement***

As troubling as the concept of stifling communications between corporate members with non-disclosure agreements, the inappropriate form used by (ISC)<sup>2</sup> for this purpose is even more troubling, especially under the guise of setting forth each party’s rights and responsibilities. The form presented to Mr. Mencik has no stated purpose other than to avoid third-party beneficiaries and seems to be intended for legal transactions such as a purchases/sales, joint ventures, due diligence reviews, etc., and clearly missed the stated target of setting forth the rights and responsibilities of corporate officers and members.

The NDA presented to Mr. Mencik by (ISC)<sup>2</sup> is focused on “Transactions” defined as the “potential business transactions between or under evaluation by or negotiation between the parties or ongoing business transactions between the parties.” The interactions between Mr. Mencik and (ISC)<sup>2</sup> officers were based on Mr. Mencik’s non-compensated efforts to improve corporate governance. There were no “transactions” between the parties and no information from documents identified by (ISC)<sup>2</sup> as “confidential”, whether the documents fit the definition of “confidential” in the NDA or not, was exchanged. Not only did the NDA fail to set forth the rights and responsibilities of the parties, but the NDA also did not serve the lawful interests of the corporation members (the beneficial owners of (ISC)<sup>2</sup>) and infringed upon Mr. Mencik’s free-speech rights necessary as a corporate member. The NDA is unenforceable as against public policy, violates both federal and state laws and regulations, and simply is incoherent.

### ***Reply***

While denying generally the claims made in your letter as no Confidential Information was exchanged, much less revealed to a third party, Mr. Mencik offers these factual corrections to statements made in your letter. (Statements made in your letter are shown in italics.)

*Upon conclusion of the January 31, 2023 meeting, we agreed that you could publicly announce three outcomes:*

- *Acceptance of your petition outside of the 500 signature requirement.*
- *Your proposal would undergo a legal and risk review.*
- *You were invited to participate on the Bylaws Committee.*

The understanding at the meeting pertained only to what he could reference regarding his petition for a special meeting of the membership. There was no discussion about what could or could not be released as part of the rest of the meeting summary.

\* \* \* \* \*

### ***Your Commitments Under the Non-Disclosure Agreement***

*The Non-Disclosure Agreement you signed defined Confidential Information as "all information provided by the Disclosing Party to the Recipient in connection with this Agreement ...," which includes all oral and written information disclosed by ISC2.*

*Pursuant to the Non-Disclosure Agreement, you agreed that all:*

*... Confidential Information will be kept strictly confidential, and that the Recipient **shall not disclose any Confidential Information in any manner whatsoever, directly or indirectly, to any third party** except as expressly permitted in this Agreement.*

*In addition, we agreed not to " ... make, publish or otherwise disseminate **in any manner any public statement or description of the Transactions, the existence of the Confidential Information or the negotiations** which are the subject of this Agreement."*

*Below is a list of material inaccuracies and disclosed confidential information in your posts.*

*Part 1 – Inaccuracies:*

Even ignoring the fact no “Confidential Information” was exchanged between the parties relating to the “Transactions” or “Negotiations”, this section in its entirety is moot as making “inaccurate statements” is not prohibited by the terms of the NDA. The meeting was advertised as simply a get together to discuss current topics Mr. Mencik brought forth to the Board. Never was he told the meeting was “secret.”

\* \* \* \* \*

*Statement 1:*

*“The Board lawyer said that since there are no defined procedures for just submissions, there is no reason why the 500 could not come from multiple submissions, and because of the nature of the petition, there is no time limit for gathering the signatures, the petition drive is deemed successful.”*

*During the meeting, we generally recapped that your petition is something new we’ve had to address for the first time. We identified 498 valid signatures and noted at least 2 of the invalid ones were members in good standing. Despite this failing, we agreed to accept the petition. We did not say the 500 signatures could come from multiple submissions, nor did we say there was no time limit for gathering signatures.”*

This topic was discussed because there were no defined procedures for such a submission and the Board would not challenge whether multiple submissions were acceptable, nor would the Board question the time limit. Further, if two of the “invalid” signatures were from individuals that are members in good standing, then the 500-signature threshold was met by the first submission, and this whole issue is moot. The bottom line is the petition has been accepted and a special meeting needed to be called, and a vote held.

\* \* \* \* \*

*Statement 2:*

*“Estimated time for the review is no more than a month. At the end of that review, we will get together again to discuss the results and how to proceed. If there are minor tweaks to be made or if the proposals move on as is.”*

*We informed you that we did not have a timeline for review yet. Further, we discussed working together after the legal and risk review. We did not agree that we*

*would allow you to make changes to your proposal. You also stated that you were not concerned with whether the 90 day timeline was met."*

The informal consensus of those in the room was the review would take no longer than a month. If there is any inaccuracy, it is only that Mr. Mencik's statement might have said "a month or so" to make the timeline less precise. The statement about tweaks comes from the discussion that if something violates Massachusetts corporate law or is considered "high risk" to the corporation, tweaks were to be made before voting. There is no implication in Mr. Mencik's statement he alone could make any tweaks to the wording. He clearly noted the attendees would get together again after the review to discuss the results and how to move forward. Mr. Mencik stated he was not concerned with the exactness of the 90-day time limit if things kept moving forward. He also noted he could not speak for the others that contributed to the proposals, nor the over 500 people that signed the petition, so opinion about the 90 days was his opinion, and not a negotiated settlement.

\* \* \* \* \*

*Statement 3:*

*"I said that if [Jill] really feels that way then she is not fit to serve on the Board of Directors and should resign."*

*This statement was never made.*

Mr. Mencik believes he made that statement during the conversation, and he has made that statement in other public fora. This is related to the statements Ms. Slay made during one of the Bright Talk webinars: "We were never in the situation where we had to exclude really good people as far as I am concerned." If she feels that none of the other 80+ Board applicants were "really good people", Mr. Mencik opined she should resign, as that is insulting to all the members. See "Governance and Nominations Changes Discussion with the (ISC)<sup>2</sup> Board of Directors" on BrightTalk, at about 13:00 minutes and forward. Notably, BrightTalk webinars are not restricted to (ISC)<sup>2</sup> members, so no information provided in these webinars can be considered Confidential Information.

\* \* \* \* \*

*Statement 4:*

*"I did have a conversation in private with the attorney in which I discussed the makeup of the Ethics Committee and what is required by the By-Laws. She agreed that the plain English reading calls for 1 Director and 2 or more non-Directors as members*

*of the Committee. I said that the current Committee was not validly constituted, and hasn't been for some time, since there are multiple Directors on the Committee... She agreed to look into this."*

*The discussion was that we could see your interpretation, but that we interpret it differently. We also explained that our practice has been the same since Board Counsel started advising the Board, which was also when Wim Remes was chair.*

Response 4:

Mr. Mencik stands by his statement which was a conversation with the Board attorney. She even flipped to the other Committee descriptions in the by-laws and saw they mentioned Corporate Officers as opposed to Directors. She would use them as an example of why your interpretation is correct, but Mr. Mencik pointed out the wording difference for the Ethics Committee and she admitted the difference and would look into it. As General Counsel you may have a different viewpoint but the by-laws state, "Professional Conduct (Ethics) Committee -this committee is composed of one Director and at least two other Members who are not Directors. This committee shall review allegations of ethical misconduct by Members and recommend appropriate action for the Board."

If the by-Laws meant to allow for more than one Director, it would read, "one or more Directors" or "at least one Director," but it does not. It reads "one Director." So, if the Ethics Committee has more than one Director as a member, it is not a duly constituted committee. The point of the Ethics Committee being set up that way is that if a member were to be charged with an Ethics violation, their case would be heard by a committee of their peers, not by the Board of Directors. The single Director on the Ethics Committee is there for the procedural purpose of chairing the Committee.

\* \* \* \* \*

*Part 2 - Disclosed Confidential Information:*

*You widely disseminated the following information in at least two social media posts, including but not limited to:*

- 1. The attendees at the meeting on Tuesday, 1/31/2023.*
- 2. Information on documents reviewed, including meeting minutes and redacted election results.*
- 3. Summaries on our nominations scoring process and our down select process.*

## Response

I note that the NDA defines Confidential Information as:

"Confidential Information"--All information provided by the Disclosing Party to the Recipient in connection with this Agreement, including without limitation: any Request for Proposals issued in connection with this Agreement; all technical and non-technical data; formulae; patterns; compilations; programs; software; devices; methods; techniques; designs; drawings; processes; business practices; plans or proposals; financial information; information relating to actual or potential customers or suppliers; sales and marketing information; training and operations materials; unreleased certifications; membership lists; information received from others that the Disclosing Party is obligated to treat as confidential; and pricing and other financial information relating to the business or affairs of the Disclosing Party. All Nonpublic Personal Information and Highly Sensitive Information shall be Confidential Information of (ISC)<sup>2</sup>.

Confidential Information shall not include any disclosure relating to information that: (a) is in or enters the public domain through no fault of the Recipient; (b) is known by the Recipient at the time it is disclosed, as shown by Recipient's records, provided the source of such information was not known or reasonably suspected by the Recipient to be bound by a confidentiality agreement or other contractual, legal or fiduciary obligation with respect to such information; (c) is independently developed by the Recipient at any time, as shown by Recipient's records or other competent evidence; or (d) is rightfully obtained by the Recipient from a source other than the Disclosing Party who does not have a contractual, legal or fiduciary obligation of confidentiality to the Disclosing Party; or (e) the Disclosing Party agrees in advance in writing does not constitute Confidential Information.

Nothing mentioned in Mr. Mencik's posts fall into the category of Confidential Information as defined by the NDA. The existence of the documents given to review are in the public domain: Meeting Minutes, some policies called out by the (ISC)<sup>2</sup> IRS 990 form, and the 3rd Party Election results report.

Specific to your three points:

1. There is nothing confidential about who the attendees of the meeting were. This meeting was not described in advance as being Confidential. So, listing the attendees cannot be considered Confidential.

2. The existence of the documents is not confidential. Mr. Mencik revealed none of the contents of the meeting minutes. He did note one thing he expected to find in the minutes was not present. Mentioning the absence of information expected is not revealing confidential information. As for the third-party report on the election, the existence of that is public knowledge as it was discussed at the annual meeting. Mr. Mencik did not reveal the contents other than to note he was not provided with the vote totals, consistent with Zach Tudor's statement at the annual meeting that vote totals are not revealed.

3. The summary of your scoring process and down select process is not confidential. The generalities of the process discussed in the meeting were already discussed in the Bright Talk webinar mentioned above and noted as being available to the public. There was nothing more specific discussed during the January 31<sup>st</sup> meeting thus, nothing confidential was revealed.

\* \* \* \* \*

### *Part 3 - Demands and Next Steps*

*Based on the Non-Disclosure Agreement, we hereby demand that you:*

1. *Immediately take all necessary action to prevent further unauthorized disclosure/misuse of our Confidential Information including, but not limited to ceasing to post, publish, or disseminate any information related to your meeting and discussions with ISC2.*

2. *Correct and edit your posts noting the inaccuracies and misstatements as outlined above.*

3. *Turn over any copies made, including photographs, of any Confidential Information taken during our meetings.*

4. *Turn over any correspondence sent to third parties referencing the meeting or negotiations sent on or after January 24, 2023.*

5. *Identify and produce every communication you have had with a third party relating to the Confidential Information since January 24, 2023, including the person or persons involved, date and time, type of communication, and information discussed.*



6. *Respond to this letter, in writing, confirming your adherence to the Non-Disclosure Agreement provisions and confirming the above actions have been taken.*

**Demand Responses:**

1. In Mr. Mencik's initial response he indicated that he would not post, publish, or otherwise discuss the meeting and he has adhered to this statement despite your note of February 10, 2023.

2. Since nothing in the posts is confidential, there is no reason to edit anything.

3. Mr. Mencik removed nothing from the meeting room other than his own cell phone which was not used and the notepad he brought to the meeting, but no notes were taken. No copies of any documents were made. No photographs were taken. No recordings were made (at least not by Mr. Mencik).

4. This meeting was a discussion; it was not a negotiation. Mr. Mencik made clear he represented only himself, and he could make no commitments on behalf of the others responsible for the proposed by-laws, nor for the 500+ people that signed the petition. He could negotiate nothing.

5. This is redundant with demand 4.

6. Mr. Mencik confirms he has adhered to the NDA he signed and denies he violated its terms.

\* \* \* \* \*

***Closing***

Mr. Mencik coordinated a petition to call a Special Meeting of the membership to vote on proposed changes to corporation by-laws. The intent of changes is to improve corporate governance and enhance transparency of Board activities. He did not expect corporate resources to be used to stifle communications between members or to become the target of corporate retaliation for his efforts to improve communications between the members. Mr. Mencik is following the Board Chair's commitment, as noted in your letter, to work with "stakeholders"—members being the primary stakeholder of a non-profit corporation.

The heavy-handed tactics of the corporate officers to stifle the involvement of members in the governance of the corporation using as a tool an ill-suited and

Graham Jackson, Esq.  
General Counsel and Corporate Secretary  
(ISC)<sup>2</sup>  
February 23, 2023  
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unenforceable non-disclosure agreement as a condition to discuss with corporate officers a legitimate petition to amend corporate by-laws, are seen for what they are—retaliation against a corporate member for expressing an opinion on corporate governance. Mr. Mencik will not be intimidated by such tactics and will respond appropriately to any further attempts by (ISC)<sup>2</sup> to prevent him as a corporate member from speaking freely about corporate governance.

Considering the above and your statement (ISC)<sup>2</sup> will be forced to consider all available options including legal remedies, I remind you of your ethical obligations under Virginia Code § 8.01-271.1. In Virginia, the principal place of business for (ISC)<sup>2</sup>, the signature of an attorney on any pleading is a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonably inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Any legal action against my client would not be “grounded in fact” nor “warranted by existing law.” There is no factual basis to allege my client engaged in any potential or ongoing business transactions with (ISC)<sup>2</sup>, obtained any confidential information from (ISC)<sup>2</sup> regarding such non-existent business transactions, revealed any such confidential information relating to non-existent business transactions, or caused harm to (ISC)<sup>2</sup> from revealing any such non-existent confidential information. Should you institute legal proceedings against my client, we will seek sanctions to include, but not limited to, payment of my client’s attorneys’ fees.

Finally, to avoid any confusion regarding future discussions between Mr. Mencik and (ISC)<sup>2</sup>, notice is provided Mr. Mencik exercises his right pursuant to the NDA’s Section D3 to terminate the agreement so that no information provided to him henceforth by (ISC)<sup>2</sup> should be considered confidential unless expressly agreed otherwise.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Stephen C. Thienel", with a long, sweeping horizontal line extending to the right.

Stephen C. Thienel

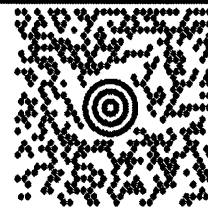
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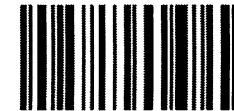
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**SHIP TO:**  
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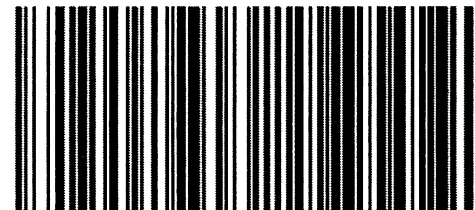
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