

REPORT TO NISTAC BOARD OF DIRECTORS

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I. INTRODUCTION

In October of 2008, the Kansas Board of Regents, through its delegate the Kansas State University Foundation (the “Foundation”), engaged the accounting, tax and advisory firm of Grant Thornton LLP (“Grant Thornton”) to “assist with the performance of an exit analysis of certain accounts administered and/or controlled by President Wefald of Kansas State University (KSU) or his direct subordinates.”¹ Grant Thornton prepared a report titled “Confidential Exit Analysis Related to the Retirement of Dr. Jon Wefald President of Kansas State University,” dated April 27, 2009 (the “Grant Thornton Report”).

One section of the Grant Thornton Report concerned the National Institute for Strategic Technology Acquisition and Commercialization (“NISTAC”).² Grant Thornton described certain aspects of NISTAC, raising questions and recommending further review of NISTAC’s structure, its governance processes, and the circumstances surrounding the search for and establishment of a strategic partnership for a NISTAC affiliate, NutriJoy, Inc. Grant Thornton’s criticisms of NISTAC were made public. On July 28, 2009, the NISTAC Board of Directors engaged the law firm of Wildman, Harrold, Allen & Dixon LLP (“Wildman Harrold”) to conduct an independent assessment of the issues regarding NISTAC raised by the Grant Thornton Report and to make recommendations concerning those issues. This report contains Wildman Harrold’s findings and recommendations.

¹ Grant Thornton October 20, 2008 engagement letter.

² The Grant Thornton Report also separately covered a number of areas within the University itself, which are not within the scope of this review and report.

II. EXECUTIVE SUMMARY

As part of this review, Wildman Harrold reviewed a broad range of documents and interviewed a large number of people, including current and former Board members and officers of NISTAC and related entities. The amount of information reviewed and number of people interviewed greatly exceeded that undertaken by Grant Thornton. Overall, we did not find support for Grant Thornton's sweeping implications and suggestions of impropriety or conflicting interests at NISTAC. Consistent with Grant Thornton's financial testing, which did not identify any adverse findings, we did not find any reason to suggest that further financial transaction testing or auditing of NISTAC or related entities is necessary outside of the ordinary course of business. Throughout this report, we make findings regarding the structure, compensation and conflict of interest issues raised by Grant Thornton's Report. We also make specific recommendations throughout the report, implementation of which will improve NISTAC's transparency and conformance to emerging best corporate practices. A complete list summarizing our specific recommendations is included at the end of this report. The highlights of our findings and recommendations are described below.

A. Corporate Structure and Compensation

We found that NISTAC has taken steps to comply with our 2006 corporate structure and compensation recommendations. We did find areas where further work is needed on compensation issues, both in substance and in terms of improving NISTAC policies, processes and record-keeping.

We conclude that NISTAC has properly implemented our 2006 recommendations with respect to corporate structure. We found that the members of the NISTAC and MTM Boards generally are satisfied with the level of preparation, diligence, engagement and independence of

their boards, and that this sentiment translated into Board action to comply with our 2006 recommendations:

- The NISTAC and Mid-America Technology Management, Inc. (“MTM”) Boards promptly acted to ensure independence of the MTM Board from both NISTAC’s Board and Executive Committee.
- The NISTAC Board promptly amended its Bylaws to institutionalize an independent Compensation Sub-Committee to make compensation recommendations to the MTM Board.

We conclude that NISTAC has appropriately implemented many, but not all, of our 2006 recommendations regarding compensation. In this report, we advise the Board and make recommendations of the additional work that remains to reach full compliance on these issues:

- While NISTAC has established an annual dollar cap for bonus compensation paid to employees, it is uncertain whether the equity incentive component of compensation is subject to these annual caps.
- NISTAC has taken steps to ensure that some, but not all, aspects of incentive compensation are properly allocated. While a large component of *cash* incentives is properly allocated under the Bonus Policy, a smaller component appears to allow “other staff” to receive cash incentives without regard to contribution to a particular bonus-generating activity. Of greater concern, while MTM has a long-standing policy for allocating *equity* incentive compensation with Board approval, that policy has not always been followed since October 2006, resulting in the actual and proposed allocation of equity incentives without Board approval.

- For NISTAC-owned intellectual property, NISTAC appears to adhere to informal parameters with respect to the acceptance of equity as compensation for a license in lieu of cash. In practice, the decision to accept equity appears to flow from a reasoned, collective effort, subject to final approval by the President. Nevertheless, NISTAC should establish a formal policy setting such parameters and should ensure that the final approval of such parameters and transactions does not rest with individuals whose own compensation may be affected by the decisions. Acceptance of licensing terms for University-owned intellectual property is subject to KSURF approval.
- NISTAC has implemented some, but not all, aspects of our 2006 recommendation regarding annual review of the total compensation of officers and employees prior to the allocation of any equity grants. NISTAC annually reviews the salary and cash bonus compensation for its President (and Mr. Krause when he served as Executive Chair). But, NISTAC does not extend Board-level review to compensation of all officers and employees. NISTAC also does not review the equity sharing component of the President's compensation. Finally, while NISTAC has complied with our recommendation to take steps to ensure the total compensation paid to its officers and employees is comparable, improvement can be made in documenting the bases for these determinations.

B. Conflicts of Interest Policy and Procedures, including Potential Conflict of Interest Issues for the NutriJoy/Coca-Cola Transaction

We analyzed NISTAC's policy and practices, as well as Kansas law, in reviewing the statements made by Grant Thornton regarding NISTAC conflicts of interest specific to the NutriJoy/Coca-Cola transaction consummated in January of 2008, as well as more generally.

We found that NISTAC complied in material respects with its Conflict of Interest Policy in connection with the major element questioned in the Grant Thornton Report regarding the NutriJoy/Coca-Cola transaction: the 2005 subordination of return on NISTAC's non-cash shares in NutriJoy in favor of return on cash or other investments. We confirmed through Board minutes and the Assistant Secretary's notes that the interested directors – those who personally owned shares of NutriJoy stock – abstained from that board vote. While Board member recollections differ now regarding what and when they knew of specific Board member interests in NutriJoy, none of the Board members told us that they would have voted differently on the subordination issue had they known more at the time. All of the NISTAC Board members whom we interviewed continue to believe that the subordination decision was a good and valid business decision.

We found, however, that disclosure of Board member interests in NutriJoy and abstentions were not recorded for actions taken in 2007 to authorize the Executive Committee to negotiate a transaction involving NutriJoy, including with respect to eliminating the royalties that NISTAC was entitled to receive from NutriJoy. Even though interested Board members had disclosed and abstained in the past, we conclude that disclosures and abstentions should have been made at that time to conform to best governance practices and to the NISTAC Conflict of Interest Policy.

We did not find facts to suggest that any Board member or person involved in negotiating the NutriJoy/Coca-Cola transaction benefited at the expense of any other similarly situated person or at the expense of NISTAC. All Board members believe that consummation of the NutriJoy/Coca-Cola transaction was accomplished through excellent efforts of the negotiators and brings significant benefits to NISTAC, even beyond the specific terms of the transaction.

However, the absence of recorded disclosures and abstentions relating to some aspects of negotiations leaves room for hindsight review and questions. Thus, to remove the specter of any such doubt, we recommend that the disinterested Board members review and vote to ratify the NutriJoy/Coca-Cola transaction in order to bring it within the protections of the business judgment rule under Kansas law.

We also recommend that NISTAC review its Conflict of Interest Policy, practices and procedures and revise them as appropriate. Recognizing its need to attract both investment capital and experienced Board members, as well as improving transparency, NISTAC should consider whether its policy of disclosure and abstention remains sufficient to meet its needs with respect to Board member investments and positions in NISTAC client companies. Regardless of whether NISTAC adjusts the philosophy of its overall policy, improvements can be made to NISTAC's processes and record-keeping for the timing and substance of disclosures and abstentions due to potentially conflicting interests.

III. SCOPE AND APPROACH OF REVIEW

Wildman Harrold conducted an independent assessment of the issues raised by the Grant Thornton Report relating to NISTAC. Wildman Harrold's review was guided in scope by the NISTAC Board Resolution of July 28, 2009, which identified three issues of interest:

1. If the recommendations made in 2006 by Wildman Harrold, following its legal review of NISTAC and its affiliates were properly implemented;
2. If existing conflict of interest policies were followed in actions related to the establishment of a strategic partnership between NutriJoy, Inc. and The Coca-Cola Company; and
3. If any improper financial transactions were found, and particularly whether any individuals benefited from the NutriJoy/Coca-Cola transaction as a result of that person's position in NISTAC and in ways that either (a) were not provided to other investors or (b) disadvantaged public investments in NutriJoy via Kansas entities.³

NISTAC did not restrict Wildman Harrold's review to these particular issues and we comment on other issues raised by the Grant Thornton Report as circumstances require.

A. Grant Thornton Materials and Scope of Information Gathering

At the outset, Wildman Harrold requested that Grant Thornton make available the work product supporting its conclusions regarding NISTAC, in particular its work papers as they relate to NISTAC and its affiliates. We also requested interviews with Grant Thornton personnel who conducted the NISTAC inquiry. Wildman Harrold requested this information in order to fully understand the scope, sources and bases for Grant Thornton's statements relating to NISTAC. Without explanation, Grant Thornton denied Wildman Harrold's written and verbal requests for any information.⁴ Since our independent assessment of the issues concerning NISTAC led us to conclusions different from those found in Grant Thornton's Report, the information sought from

³ A copy of the NISTAC Board Resolution is attached to this report as Exhibit 1.

⁴ Wildman Harrold made its written request to Grant Thornton for information on July 31, 2009. After several follow up phone calls from Wildman Harrold, Grant Thornton declined the request in writing on August 19, 2009.

Grant Thornton might have shed light on the process that Grant Thornton employed and the bases for its conclusions with respect to NISTAC. Without Grant Thornton's cooperation, we relied on statements made in the Grant Thornton Report and on the information provided to Grant Thornton by NISTAC as a basis for analyzing Grant Thornton's statements.

The Grant Thornton Report states that Grant Thornton only interviewed three people affiliated with NISTAC or Mid-America Technology Management, Inc. ("MTM"), a management services company and wholly owned subsidiary of NISTAC: Mr. Robert Krause (former Executive Chair of NISTAC's Board of Directors), Mr. Kent Glasscock (President and CEO of NISTAC and MTM; member of NISTAC's Board of Directors), and Ms. Vicki Appelhans (NISTAC's Vice President of Finance and Chief Financial Officer).⁵ Grant Thornton does not suggest that it tried to contact any other employee or board member of NISTAC or MTM. No other NISTAC Board member or officer whom we interviewed was contacted by Grant Thornton for information.

NISTAC provided to Grant Thornton, in general, financial documents for NISTAC and certain affiliates for the fiscal years 2003 through 2008, Board of Director meeting minutes for those entities for the years 2001 through 2008, and employment contracts and compensation agreements for Messrs. Glasscock and Krause.⁶ A list of the documents that we understand NISTAC provided pursuant to Grant Thornton's request is attached to this report as Exhibit 2.

The Grant Thornton Report emphasizes that NISTAC could not provide it with the NutriJoy Stockholders' Agreement relating to The Coca-Cola Company's purchase of a controlling interest in NutriJoy because of confidentiality provisions in the agreement inuring to

⁵ Grant Thornton Report at p. 17.

⁶ Grant Thornton Report at p. 17.

the benefit of an unrelated corporation and various individual stockholders. The Grant Thornton Report states that its “interest in this document was to determine if the University and the Foundation, through their investments in and financial support of NISTAC, are being treated fairly in comparison to other classes of investors.”⁷ The Grant Thornton Report does not identify any attempts to seek a waiver of the confidentiality provisions of the agreement from other NutriJoy stockholders, or to obtain information regarding the rights of stockholders through other publicly available documents, such as the NutriJoy Restated and Amended Articles of Incorporation. Grant Thornton states that it was provided with verbal descriptions of the rights of various classes of NutriJoy stockholders connected with the transaction.⁸

B. Wildman Harrold Review

As part of our independent assessment of issues raised in the Grant Thornton Report with respect to NISTAC, Wildman Harrold reviewed a broad scope of documents from NISTAC and affiliated entities. In general, in addition to the materials requested of NISTAC by Grant Thornton, we reviewed documents relating to: corporate structure, board and officer composition, board and committee meeting materials for NISTAC, MTM and NutriJoy (including documents distributed to the board prior to meetings, meeting minutes, resolutions, and the handwritten notes of the Assistant Secretary from the meetings), executive and staff compensation (including compensation policies and approvals), the NutriJoy strategic partnership search and 2008 transaction with Coca-Cola (including transaction documents and the licensing amendments made in connection with the transaction and specifically the NutriJoy Stockholders’ Agreement relating to The Coca-Cola Company’s purchase of a controlling

⁷ Grant Thornton Report at p. 3.

⁸ Grant Thornton Report at p. 22.

interest in NutriJoy), and NutriJoy stockholdings and distributions to stockholders.

We formally interviewed 25 people (some more than once), including but not limited to current and former members of the NISTAC and MTM Boards of Directors,⁹ the current and former President and CEO of NISTAC and MTM, the Vice President of Finance and Controller for NISTAC and MTM, and the Vice President of Licensing for NISTAC. We also met with the Assistant Secretary of NISTAC and MTM regarding relevant documents.

NISTAC did not deny us access to any person or document. We are not aware of any document in the possession, custody or control of NISTAC, MTM or MHL that was not provided in response to our requests for documents. An inventory of the documents we reviewed is attached to this report as Exhibit 3. A complete list of the persons we interviewed is attached to this report as Exhibit 4.

⁹ Only Mr. Tracy Taylor (former member of the NISTAC and MTM Boards), Mr. Richard Gallagher (temporary member of the NISTAC Board for several months in 2007), and Ms. Tracey Debruyne (member of the NISTAC Board since October 2007) could not be reached for interview. We interviewed the 18 other members who served on the Boards of NISTAC and MTM since 2005.

IV. FINDINGS

A. Overview of NISTAC

In order to provide context to our review, findings and recommendations, we provide an overview of NISTAC's mission, history and overall operations.

1. NISTAC Mission

NISTAC, a 501(c)(3) not-for-profit Kansas corporation, constitutes a private/public sector partnership dedicated to creating and expanding technology-based, high growth enterprises and enabling the commercialization of university and under-utilized corporate intellectual property for regional economic and social benefits.¹⁰ NISTAC's mission is to create and sustain a formal network that will support technology advancement, technology transfer, education and scientific research. Through this mission, NISTAC strengthens the regional Kansas economy by facilitating: technology transfer to and from regional academic institutions, particularly Kansas State University ("KSU" or the "University"); the start-up and expansion of technology-based, high growth enterprises, particularly those based on technologies licensed from the University and other regional institutions; and the development of supportive infrastructure, including the improvement of regional access to risk investment capital and experience-based, educational programs in the fields of technology entrepreneurship and management.¹¹ NISTAC is described by personnel and Board members as a facilitator between the public and private sector by assisting the University in bringing research and innovation to the commercial market and in developing a reputation for the University and community for innovation and entrepreneurship, resulting in economic benefit to the University and region.

¹⁰ <http://www.nistac.org/>; Amendment to Agreement between City of Manhattan and NISTAC.

¹¹ "A Ten-Year Strategic Plan for the National Institute for Strategic Technology Acquisition and Commercialization."

2. NISTAC History and Members

NISTAC, originally known as the Mid-America Commercialization Corporation, was founded in 1994 by the State of Kansas (via the Kansas Technology Enterprise Corporation or “KTEC,” a statutory state entity established to promote technology-based economic development) and the University. NISTAC also receives support from the City of Manhattan and the regional business community, as represented by the Manhattan Area Chamber of Commerce.¹² The members of NISTAC are KTEC, the University, and the City of Manhattan.¹³

As the commercialization entity for KSU-developed technology, NISTAC works closely with new companies founded around or having a close relationship with KSU faculty, staff and core University developed technologies or competencies.¹⁴ Since 1995, through agreement with the Kansas State University Research Foundation (“KSURF”), NISTAC serves as the licensing agent for technologies derived from KSU research and markets and negotiates the license agreements for technologies held by KSURF on behalf of the University. NISTAC also has a portfolio of under-utilized technologies donated by various corporations, for which it seeks avenues for further development and commercialization.

To achieve these goals, NISTAC is involved in incubating local start-up companies to commercialize the University-developed or donated technology. NISTAC affiliated or incubated ventures are at various stages of development. Some of the ventures that NISTAC has been involved with are: AgRenew, Inc., GTLpetrol LLC, ICE Corporation, SIB, Global Lipidomics LLC, Veterinary Diagnostic Laboratory, Motiv Engines LLC, NanoScale Corporation, NutriJoy,

¹² Minutes of the Meeting: Board of Directors: NISTAC, January 15, 2008.

¹³ Minutes of the Annual Meeting of Members: NISTAC, October 16, 2007.

¹⁴ <http://www.nistac.org/>; “A Ten-Year Strategic Plan for the National Institute for Strategic Technology Acquisition and Commercialization.”

Inc., PharmCATS Bioanalytical Services, Scavengetech, LLC, and Sunflower Integrated Bioenergy.

Between 2000 and 2008, NISTAC created 138 new jobs for the region, with an average salary of \$44,800. NISTAC has pledged to create 200 more jobs by 2017.¹⁵ As of 2008, NISTAC initiatives have generated an inflow of more than \$175 million into the Manhattan region through product and service sales of start-up companies, investment capital, research funding, and income from technology licenses.¹⁶

NISTAC's affiliates are Mid-America Technology Management, Inc. ("MTM"), a management services company and wholly owned subsidiary of NISTAC; and Manhattan Holdings, LLC ("MHL"), a seed investment fund organized as a Kansas limited liability company and managed by MTM.¹⁷

MTM was created to deliver a full range of management services for NISTAC and its client companies. Some services provided by MTM include marketing and licensing of technologies, new company creation, market research, business and strategic planning, intellectual property management, business and technology valuations, procurement of financing, interim operational management, proposal preparation for federal and state contracts including the federal Small Business Innovative Research program, and accounting and human resource services.¹⁸ NISTAC and MTM together facilitate access to financing for start-ups and other

¹⁵ Manhattan Economic Development Opportunity Fund Accountability Checklist, August 2008.

¹⁶ "A Ten-Year Strategic Plan for the National Institute for Strategic Technology Acquisition and Commercialization."

¹⁷ "A Ten-Year Strategic Plan for the National Institute for Strategic Technology Acquisition and Commercialization."

¹⁸ "A Ten-Year Strategic Plan for the National Institute for Strategic Technology Acquisition and Commercialization."

businesses located in the region, which has historically had little access to venture capital.¹⁹

MHL operates a risk capital fund that primarily invests in local start-up or emerging technology-based enterprises with high growth potential. The Class A, voting members of MHL are KTEC Holdings, Inc., the City of Manhattan, and the Foundation. MTM is a Class B, non-voting member of MHL and its Fund Manager.²⁰ MHL was created to fill the market gap for early stage risk capital for regional companies and is an earliest stage investor, providing money to “seed” the start of development and procurement of additional funds by new ventures.²¹

3. NISTAC Board Composition and Actions

NISTAC has a large Board of Directors representing diverse segments of the University, the State of Kansas, and Manhattan area communities. Currently, there are 16 Directors on the NISTAC Board, all of whom are unpaid volunteers, except for the President and CEO of NISTAC, who also sits on the NISTAC Board. The Board includes slotted representatives from KTEC, the University,²² the City of Manhattan, and the Manhattan Area Chamber of Commerce. The Board also includes multiple members drawn from the private sector. Finally, the President of the Foundation acts in a non-voting advisory capacity to the NISTAC Board. NISTAC Board membership has remained fairly constant. The current Board includes 13 members who have served since at least 2005. The NISTAC Board has a five-member Executive Committee and a three-member Compensation Sub-Committee of the Executive Committee.

¹⁹ Per interviews of NISTAC Board members and personnel.

²⁰ Minutes of the Annual Meeting of Members: Manhattan Holdings, LLC, October 16, 2007.

²¹ Application for Manhattan Economic Development Opportunity Fund Advisory Board, 1995.

²² The Grant Thornton Report describes Mr. Krause as “the University’s representative to NISTAC.” (Grant Thornton Report at p. 19.) While Mr. Krause was a representative of the University on the Board, he certainly was not the only University representative on the Board. The deans of several of the University’s colleges, as well as a representative from the University’s Office of the President, also serve on the NISTAC Board.

The NISTAC Board meets quarterly and maintains minutes of its meetings, which are approved by the Board at the next regular meeting. Once a quorum of directors is present, NISTAC Board action can be taken by a majority of directors voting on an issue.²³ Unanimous approval is required for Board actions taken without a formal meeting.²⁴

The MTM Board has five members. Only one member of the MTM Board, the Chair of the NISTAC Board, also serves on the NISTAC Board (in a non-chair capacity). Currently, three members of the MTM Board are from the private sector.

The MTM Board meets annually and also maintains minutes of its meetings, which are approved by the Board at the next regular meeting. From time to time, both boards convene special meetings to consider action on particular issues.

B. Grant Thornton's Financial Transaction and Disbursement Testing

Grant Thornton performed financial testing of NISTAC by reviewing financial statements and general ledgers for NISTAC, MTM and MHL for the fiscal years of 2003 through 2008. Grant Thornton tested certain cash disbursements in excess of \$500. Grant Thornton also tested 105 other non-payroll cash disbursements in the excess of \$15,000. While the Grant Thornton Report indicates that Grant Thornton tested all described disbursements of MHL and a significant majority of the described disbursements of NISTAC and MTM,²⁵ Grant Thornton does not identify the particular disbursements or transactions reviewed.

The Grant Thornton Report does not make any findings or recommendations from its financial testing of NISTAC and its affiliates. We understand that Grant Thornton did not raise any questions as to the integrity or accuracy of financial statements or disbursements of either

²³ NISTAC Amended and Restated Bylaws, Art. III, Sec. 8 (approved on March 14, 2006).

²⁴ NISTAC Amended and Restated Bylaws, Art. III, Sec. 9.

²⁵ Grant Thornton Report at p. 17.

NISTAC or its affiliates. Because Grant Thornton declined Wildman Harrold's request to review its work papers and financial analysis relating to NISTAC, we cannot review or comment on its financial testing process or results. However, the Grant Thornton Report makes no adverse findings and raises no questions with respect to NISTAC's financial records and disbursements. Therefore, we believe the Grant Thornton Report does not suggest any need for NISTAC to engage in financial testing or auditing outside of the normal course of business operations.

C. NISTAC's Structure and Compensation Practices

Grant Thornton noted that NISTAC had engaged Wildman Harrold in 2005 to assess NISTAC's structure, operations and employee compensation policies.²⁶ Grant Thornton stated that Wildman Harrold found that the Boards of NISTAC, MTM and MHL were "too intertwined" and made "various findings" regarding "the manner in which equity compensation was awarded."²⁷ Grant Thornton does not identify what, if any, steps it took to investigate or confirm whether NISTAC addressed Wildman Harrold's 2006 recommendations.²⁸ Instead, Grant Thornton concluded that "NISTAC should obtain positive confirmation from Wildman Harrold or Husch Blackwell Sanders LLP (whose Kansas City office has done legal work for NISTAC) that the current composition of its various Boards of Directors, Committees and Sub-Committees and Advisory Boards conforms to the recommendations of the Wildman Harrold report and any subsequent changes in regulation and tax law."²⁹ Grant Thornton also

²⁶ Grant Thornton Report at p. 22.

²⁷ Grant Thornton Report at p. 22.

²⁸ The NISTAC and MTM Board members and employees with whom we met confirmed that Grant Thornton did not specifically inquire about the steps NISTAC took to comply with Wildman Harrold's 2006 recommendations.

²⁹ Grant Thornton Report at p. 24.

recommended that “NISTAC should continue working with Husch Blackwell Sanders LLP to revise its compensation policies to ensure compliance with all regulations and tax laws.” NISTAC’s Board Resolution of July 28, 2009 asked Wildman Harrold to determine, “If the recommendations made in 2006 by Wildman Harrold, following its legal review of NISTAC and its affiliates, were properly implemented.”

1. The Purpose of Wildman Harrold’s 2005/2006 Review of NISTAC

Before discussing the 2006 recommendations, it is important to understand why NISTAC engaged Wildman Harrold for that review. Grant Thornton states that NISTAC engaged Wildman Harrold in 2005 “to make an assessment of the structure of the NISTAC Cluster and its operations and employee compensation policies.”³⁰ While generally accurate, Grant Thornton’s statement omits important aspects of Wildman Harrold’s 2005/06 engagement.

First, Grant Thornton does not mention that NISTAC’s decision to engage Wildman Harrold was internally-driven and was not undertaken in response to or at the request of an external body or agency. Wildman Harrold was engaged to ensure that the structure of NISTAC, which had been in place since 1994 and was based on a KTEC template, still complied with current (and recently revised) regulations for tax-exempt entities.³¹ Messrs. Krause and Glasscock informed us that KTEC was a financial supporter of Wildman Harrold’s 2006 review – and received a copy of the report – because the findings might apply to other KTEC affiliated institutions.

Second, Wildman Harrold’s 2006 analysis focused on whether NISTAC’s structure was appropriate for its tax-exempt status; NISTAC did not then seek and Wildman Harrold did not

³⁰ Grant Thornton Report at p. 22.

³¹ This purpose was described by Dr. Ron Sampson (former President and CEO of NISTAC and MTM), Mr. Krause and Mr. Glasscock.

then perform a general corporate governance review. This focus is evident from the 2006 report, which generally concluded that “the current structure [of NISTAC] is still appropriate and necessary to satisfy many of NISTAC’s *tax-exempt purposes*.” (Emphasis added.) Thus, when the 2006 report stated that the Boards of NISTAC, MTM and MHL were “too intertwined,” this statement was made in the context of analyzing NISTAC’s tax-exempt status, not necessarily its structure as a matter of overall corporate governance or conflicts of interest. Grant Thornton’s Report appears to take the “too intertwined” language out of context.

2. Wildman Harrold’s March 2006 Recommendations

Wildman Harrold generally concluded that “the current structure [of NISTAC] is still appropriate and necessary to satisfy many of NISTAC’s tax-exempt purposes.” Wildman Harrold also made a number of recommendations to aid NISTAC in maintaining its tax-exempt status. The recommendations fall within two categories: corporate structure and compensation.

a. Corporate Structure Recommendations

An overarching theme of Wildman Harrold’s 2006 corporate structure recommendations was ensuring that NISTAC, a not-for-profit parent company, and MTM, a for-profit, wholly-owned subsidiary of NISTAC, maintain separate and independent corporate structures to preserve the distinct tax status of each entity.

A corollary purpose of maintaining distinct entities for tax purposes is the independence reflected in the work of each board. In this review, we found that, overall, the members of the NISTAC and MTM Boards are satisfied with the level of preparation, diligence, engagement and independence of their respective boards. For example, NISTAC Board member Dean Fred Cholick stated his belief that meetings of NISTAC and MTM boards reflect good delineation between the actions taken by each Board and that there is adequate separation. Mr. Dennis Mullin, member of the MTM Board, described the high level of MTM Board engagement and

scrutiny of compensation recommendations that are made by NISTAC's Compensation Subcommittee. No Board member expressed concern that any director failed to take his or her duties seriously or that the Boards failed to act separately.

Furthermore, consistent with Grant Thornton's Report, we did not find any indication that that NISTAC and MTM had failed to maintain corporate formalities. Each entity maintains separate boards of directors, separate meetings and separate minutes of those meetings. MTM, NISTAC and MHL maintain separate accounts, books and records, which appear to satisfy the requirements of federal and state tax laws.

Overall, NISTAC has properly implemented Wildman Harrold's recommendations with respect to corporate structure, as detailed below.

i. **The Majority of MTM's Board Should Be Independent from NISTAC's Board**

To maintain the corporate separation between the for-profit subsidiary (MTM) and not-for-profit parent company (NISTAC), Wildman Harrold advised NISTAC in 2006 that it should take steps to ensure that "a majority of MTM's board of directors should be independent from NISTAC's board." Wildman Harrold also advised that corporate formalities and segregation of funds should be maintained. NISTAC has properly implemented these recommendations.

At the time of Wildman Harrold's review in 2006, all three of MTM's Board members also were members of NISTAC's Board and Executive Committee. At the August 22, 2006 meeting of the NISTAC Board, Mr. Tracy Taylor and Mr. John Graham retired from the NISTAC Board (and from its Executive Committee), but remained on the MTM Board. NISTAC also recommended that the MTM Board be expanded from three to five members.³² By way of a September 29, 2006 Resolution in Lieu of a Meeting of the MTM Board, which was

³² Minutes of the Meeting: Board of Directors: NISTAC, August 22, 2006.

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executed by each of the then-MTM Board members, Mr. Dennis Mullin and Mr. Roger Sink were elected to serve on the MTM Board, effective October 1, 2006. Messrs. Mullin and Sink have never served on the NISTAC Board.

With expansion of the MTM Board, elections of Messrs. Mullin and Sink to the MTM Board, and retirement of Messrs. Graham and Taylor from the NISTAC Board, four of the five members of the MTM Board were independent from NISTAC's Board as of October 1, 2006. The only overlapping member is the Chair of NISTAC's Board, currently Dr. Ron Trewyn. Accordingly, as required by relevant tax laws, the Boards of MTM and NISTAC are sufficiently independent of one another. The board membership also satisfies governance best practices for independence. To ensure continued independence of the MTM Board, we recommend that members added to the MTM Board in the future be individuals who have not served on the NISTAC Board or as an employee of NISTAC/MTM within a certain preceding time frame (to be determined by the NISTAC and MTM Boards)³³ and that they not join the NISTAC Board for that same defined time frame after leaving the MTM Board.

ii. **NISTAC's Executive Committee Should Consist of a Super-Majority of Non-MTM Board Members**

To improve corporate governance and create additional independent oversight of the separate activities of MTM and NISTAC, Wildman Harrold recommended in 2006 that NISTAC's Executive Committee should consist of a super-majority of non-MTM Board Members. NISTAC has properly implemented this recommendation.

³³ The NISTAC and MTM Boards should consider and establish the appropriate time frame based on corporate needs and the potential availability of qualified individuals in the area, keeping in mind the need to have independent boards. For publicly-traded companies, a director generally is not considered independent if he or she was employed by the company during the prior three years. (*See, e.g.*, NASDAQ Rule 5606; NYSE Listed Company Manual 303A.) The appropriate time frame for NISTAC and MTM may differ.

At the time of the 2006 review, three of the five members of NISTAC's Executive Committee (Messrs. Graham, Krause and Taylor) also were members of MTM's Board. At the August 22, 2006 meeting of the NISTAC Board, Messrs. Taylor and Graham retired from the NISTAC Board (and from its Executive Committee). They were replaced on the NISTAC Executive Committee by Mr. Joe Downey and Mr. Kevin Carr, neither of whom has served on the MTM Board.³⁴ Thus, as of August 22, 2006, four of the five members of the NISTAC Executive Committee – a super-majority – were non-MTM Board members.³⁵ Accordingly, the NISTAC Executive Committee is sufficiently independent of the MTM Board. To ensure continued independence, we recommend that members added to the NISTAC Executive Committee in the future be individuals who have not served on the MTM Board within the same preceding time period discussed above.

iii. **The NISTAC Committee Responsible for Compensation Approval Should Be Formalized in NISTAC's Bylaws and Have No More Than One MTM Board Member and No MTM or NISTAC Employees**

At the time of Wildman Harrold's review in 2006, the compensation of NISTAC's senior officers was determined by a Joint Coordinating Committee comprised of the three MTM Board members and two NISTAC Board members. The Joint Coordinating Committee was established in practice, but not provided for in NISTAC's bylaws. To institutionalize corporate separation between NISTAC and MTM more formally, Wildman Harrold recommended in 2006 that NISTAC amend its bylaws to create a compensation committee of the NISTAC Board, and to

³⁴ Minutes of the Meeting: Board of Directors: NISTAC, August 22, 2006.

³⁵ It is our understanding that the President of KTEC, currently Kevin Carr, traditionally is asked to serve as a member of the MTM Board. Mr. Carr has informed us that he has not been asked to serve on the MTM Board to date. If he were asked (and agreed) to serve on the MTM Board, he would join Dr. Trewyn as the second member of *both* the MTM Board and the NISTAC Executive Committee. While such an occurrence would still leave three of five non-overlapping members – by some, but not all, measures a super-majority – we recommend that this situation be avoided to remove any possible doubt about the independence of the two boards.

authorize that committee to make compensation recommendations to the MTM Board. Wildman Harrold also recommended that the compensation committee should be comprised of independent directors and should contain no more than one MTM Board member and no MTM or NISTAC employees. NISTAC has properly implemented these recommendations.

On March 14, 2006, the NISTAC Board unanimously approved Amended & Restated By-Laws for NISTAC, which were submitted to the Internal Revenue Service on May 25, 2006. Section 22 of Article III creates a Compensation Sub-Committee of NISTAC's Executive Committee, and states that "[n]o member of the Sub-Committee shall be an employee or officer of MTM or [NISTAC]." The role of the Compensation Sub-Committee is clearly set forth therein:

The Sub-Committee shall be responsible for evaluating the performance and reviewing the compensation of all officers, contractors and employees of [NISTAC], including those that are licensed to [NISTAC] by MTM pursuant to a contract between MTM and [NISTAC]. At least annually and prior to the establishment of compensation for any given year, the Sub-Committee will review all aspects of compensation for each officer and employee of [NISTAC], including any equity or incentive compensation to be granted to such person and will make a recommendation to the Executive Committee as to the appropriate level of compensation for such individual based on comparable analysis of compensation for other similar employees of similar organizations.

At the August 22, 2006 meeting of the NISTAC Board, Executive Committee members Mr. Mike Daniels, Mr. Joe Downey and Mr. Richard Thiessen were unanimously appointed to serve as members of the Compensation Sub-Committee.³⁶ No member of the Compensation Sub-Committee of NISTAC is a member of the MTM Board or an employee of MTM or NISTAC. All members of the Compensation Sub-Committee come from the private sector.

³⁶ Mr. Thiessen retired from NISTAC's Board in August or September 2007. The NISTAC Board unanimously approved Mr. Kenny Wilk as his replacement on the Compensation Sub-Committee on June 24, 2008. Consistent with the Amended & Restated Bylaws, Mr. Wilk is not on the MTM Board or a MTM or NISTAC employee.

Accordingly, the Compensation Sub-Committee is sufficiently independent of NISTAC's management and MTM's Board under both relevant tax laws and governance best practices.

As shown above, NISTAC has properly implemented the 2006 recommendations regarding corporate structure.

b. Compensation-Related Recommendations

As part of its 2006 review, Wildman Harrold considered whether the principles underlying NISTAC's compensation policies and practices were consistent with its tax-exempt status and made a number of recommendations related to compensation. NISTAC has properly implemented many of those recommendations but, as discussed below, additional work remains to be done to implement other compensation-related recommendations.

i. Establish Annual Dollar Cap for Incentive Compensation

Total compensation for both the for-profit and the not-for-profit entities must be "reasonable." Reasonableness is determined by looking at whether similar enterprises would pay similar compensation for similar services. Compensation of all MTM employees³⁷ has three available components: salary, cash performance bonus, and equity incentive bonus. The equity incentive bonus consists of a portion of the equity NISTAC receives from third parties as compensation for licensing and other activities, which is then allocated to certain employees. All three components must add up to total compensation that is "reasonable." To help ensure that total compensation remained "reasonable," Wildman Harrold recommended in 2006 that NISTAC establish an annual dollar cap for incentive compensation to employees. While NISTAC has implemented most aspects of our recommendation that NISTAC establish an

³⁷ It was uniformly noted by persons we interviewed that all employees that perform services on behalf of NISTAC, other than summer interns, are employees of MTM, not NISTAC. NISTAC contracts with MTM for these services, with all compensation and benefits being paid by MTM, which then seeks reimbursement from NISTAC for these compensation expenses pursuant to the parties' Administrative and Consulting Services Agreement.

annual dollar cap for incentive compensation paid to employees, there is uncertainty as to whether the equity incentive component of compensation is subject to the annual compensation caps that were established in May 2006.

a) **MTM's Bonus Policy**

On May 18, 2006, the MTM Board unanimously approved the "Bonus Incentive Compensation Policy for Mid-America Technology Management, Inc." (the "Bonus Policy"), effective July 1, 2006. NISTAC's Executive Committee previously approved the Bonus Policy at its March 14, 2006 meeting. The Bonus Policy was "proposed to provide performance incentives to, and reward company staff for results achieved via licensing work implemented by company staff on behalf of" NISTAC. "No use of sponsor or public derived funds" would be used to pay any bonuses; instead, any bonuses paid would be "from new revenues generated for NISTAC via the licensing or assignment of technologies on behalf of NISTAC."

Pursuant to the Bonus Policy, licensing staff members collectively receive a percentage of any licensing "net cash revenues" – 10% in the first year, 2% in follow-up years, and 2% of any one-time transactions, such as a sale or assignment. This pool is to be distributed to individual members "as the licensing team considers appropriate and fair." In addition, licensing staff members are eligible to receive a "supplemental bonus" of 3-6% of salary "subject to the evaluation of the company's and individual's performance for the fiscal year." There is a limit on the "total bonus compensation" that any licensing staff employee can receive in any given year: "Total bonus compensation may be made up to 300% of a participant's fiscal year end base salary."

The Bonus Policy is not limited to licensing staff. All "other staff," which Mr. Glasscock confirmed includes all MTM employees other than licensing staff, collectively receive a percentage of any licensing "net cash revenues" – 5% in the first year, 1% in follow-up years, and

1% of any one-time transactions, such as a sale or assignment.³⁸ This pool is to be distributed “as management considers appropriate and fair.” Given the smaller percentage of licensing revenue available as a bonus to the “other staff,” they are eligible to receive a “primary bonus” of 15-25% of salary, subject to the evaluation of the company’s and individual’s performance for the fiscal year. As with the licensing staff, the Bonus Policy expressly limits “total bonus compensation” for the “other staff” to “up to 150% of a participant’s fiscal year end base salary.” Accordingly, with respect to *cash* bonuses, an annual dollar cap is in place.

The Bonus Policy, as written, is silent on whether *equity* that is allocated as incentive compensation, including to the President and CEO, is subject to the “total bonus compensation” cap set forth in the Bonus Policy. Mr. Glasscock and Ms. Appelhans (NISTAC’s Vice President of Finance) both told us that they understood that the Bonus Policy was written to only apply to net *cash* revenues received by NISTAC, not equity. Ms. Appelhans, Mr. Krause, Mr. Daniels, and Mr. Reader, however, all told us they understand that the “total bonus compensation” caps set forth in the Bonus Policy also apply in practice to *equity* that is allocated as incentive compensation. Mr. Glasscock and current Compensation Sub-Committee member, Mr. Downey, however, did not share this understanding and believe that equity is not subject to the dollar cap in the Bonus Policy. Since this internal difference of opinion as to whether equity allocated as incentive compensation is subject to an annual dollar cap stems from the absence of clear

³⁸ Though not stated in the Bonus Policy, Ms. Appelhans, Mr. Glasscock and Mr. Robert Reader (NISTAC Vice President of Licensing) understand that “other staff” are only eligible to receive a percentage of licensing revenues if the value of the transaction exceeds \$250,000. (Mr. Reader’s understanding is that the minimum value must exceed \$500,000.) Mr. Glasscock informed us that this floor was established because the Compensation Sub-Committee was concerned that only those employees who contribute to a project should receive a bonus from it. Mr. Glasscock indicated that, because a licensing transaction in excess of \$250,000 necessarily would entail contributions by employees beyond the licensing staff, the \$250,000 floor was appropriate. However, he does not believe that this floor was formally approved by either the NISTAC or MTM Boards. No such Board approval has been located. Nor has the Bonus Policy formally been amended to include this new requirement. Accordingly, Board approval for this floor should be secured, as required in NISTAC’s Amended & Restated Bylaws, before it is applied in the future.

direction in the Bonus Policy, this ambiguity should be corrected. To fully comply with Wildman Harrold's 2006 recommendations, the Bonus Policy should be amended to bring equity incentive compensation within the annual cap on compensation.

b) Mr. Glasscock's Employment Agreement

Currently, Mr. Glasscock, President and CEO of NISTAC and MTM, is the one employee with an employment contract.³⁹ Mr. Glasscock's Employment Agreement provides for compensation consisting of: (1) an annual base salary; (2) a cash performance bonus; and (3) an equity sharing incentive. The performance bonus is based upon NISTAC's overall performance and Mr. Glasscock's individual performance, as rated with respect to goals and achievement levels agreed upon by the MTM Board and NISTAC's Compensation Subcommittee. The performance bonus "shall not exceed twenty-five percent (25%)" of his annual base salary. Thus, the performance bonus component of Mr. Glasscock's employment contract has an annual dollar cap.

As "additional compensation" under his Employment Agreement, Mr. Glasscock is entitled to receive 12.5% of any equity received by NISTAC or MTM "in consideration for the services and/or licensing or transfer of intellectual property rights to be provided by [MTM] to its clients and/or other third parties and not including that received by cash investment or purchase."⁴⁰ Mr. Glasscock, Ms. Appelhans and others involved in compensation issues,

³⁹ Prior to resigning as Executive Chair of NISTAC in September 2008, Mr. Krause had an employment contract with MTM and NISTAC. Grant Thornton was provided with a copy of Mr. Krause's Employment Agreement.

⁴⁰ Mr. Krause's Employment Agreement had the same components of compensation. Mr. Krause's equity sharing component, however, gave MTM the *discretion* to award him a "proportional interest in equity that was allocated to all MTM Staff." Thus, while Mr. Glasscock's contract includes a mandatory grant of 12.5% of equity received in lieu of cash, Mr. Krause's contract did not provide a mandatory right to the equity. Mr. Krause explained that these contract provisions are different because Mr. Glasscock's contract was entered after NISTAC received the results of an independent compensation comparability study in 2008, which showed Mr. Glasscock's total compensation was within "fair value" limits.

understand this provision to apply to equity received in lieu of cash as compensation for NISTAC/MTM services or licensing activities.

Unlike the performance bonus component, there is no express dollar cap for the equity sharing component of Mr. Glasscock's compensation. Nor is there any provision in his Employment Agreement that his total compensation is subject to the Bonus Policy's annual compensation cap. Indeed, Mr. Glasscock, Dr. Sampson, Ms. Appelhans, Mr. Downey and others do not understand the Bonus Policy cap to apply to the equity sharing component of Mr. Glasscock's Employment Agreement, while Mr. Krause did not know whether the cap applied. Mr. Reader, however, believes that the equity component of *any* employee's compensation, including the President, is subject to the "total bonus compensation" cap in the Bonus Policy.

Consistent with our 2006 recommendations, the equity incentive component of all employment contracts should be subject to an annual cap on total compensation in order to ensure that total compensation remains "reasonable." The NISTAC and MTM Boards should address and clarify this issue.

ii. Allocation of Incentive Compensation

As part of our 2006 review, Wildman Harrold recommended that NISTAC take steps to ensure that incentive compensation was allocated properly. Proper allocation of incentive compensation involves ensuring that an employee only receives compensation for the work he or she has performed for that entity.⁴¹ NISTAC has complied with certain aspects of this recommendation. However, there is still work to be done to reach full compliance.

⁴¹ While the 2006 review focused on incentive compensation, the same principles apply to base compensation. Thus, we recommend that NISTAC should make efforts as part of its budget process with MTM to ensure that employee base compensation for each employee is aligned with contributions being made to each particular entity (i.e., MTM employees who perform no NISTAC-related work should not have their compensation reimbursed by NISTAC).

a) Cash Incentives

It is unclear whether the MTM Bonus Policy properly allocates *all* incentive compensation to only those employees who contributed to a particular project. While a portion of the overall cash bonus – supplemental bonus for licensing staff and primary bonus for other staff – is based upon “the evaluation of the company’s and individual’s performance for the fiscal year,” the Bonus Policy expressly makes licensing revenue available to non-licensing staff. Under the Bonus Policy, “other staff” – which Mr. Glasscock confirmed includes all employees other than licensing staff – are entitled to receive a small percentage of net cash revenues earned *from licensing*. While the distribution of this “pool” is subject to what “management considers appropriate and fair,” there is nothing within the Bonus Policy that requires management to pay incentives only to those who have contributed to the licensing transaction from which the “pool” of funds has been generated. We therefore read this component of incentive compensation to allow for an allocation of compensation beyond those who contributed to a particular activity.

The remaining component of cash performance bonus, however, does appear to be properly allocated. Under the Bonus Policy, licensing staff are eligible for a “supplemental bonus” of 3-6% of salary, “subject to the evaluation of the company’s and individual’s performance for the fiscal year.” “Other staff” are eligible for a “primary bonus” of 15-25% of salary, again, “subject to the evaluation of the company’s and individual’s performance for the fiscal year.” Employee evaluations and bonuses are conducted pursuant to MTM’s Staff Performance Review and Bonus Guidelines (“the Guidelines”), effective since October 18, 2004. The Guidelines provide a detailed explanation of how performance bonuses are determined on an annual basis: 50% of an employee’s performance bonus is based upon the company’s performance, and 50% is based upon the individual’s performance, which is determined by the President.

Therefore, NISTAC has taken appropriate steps to allocate the major aspect of the cash bonus component of compensation. We recommend, however, that the Bonus Policy be clarified so that only employees who contribute to a particular activity share in a performance bonus related to the success of that particular activity. We also recommend that, consistent with the Executive Committee's March 2006 approval of the Bonus Policy, the Compensation Subcommittee should be provided advance notice of any proposed distribution of cash incentives so that it has an opportunity to consider whether the incentives are appropriate.

b) Equity Incentives

It is less clear that NISTAC has implemented our 2006 recommendation regarding the allocation of *equity* as incentive compensation. While MTM has a long-standing policy regarding allocation of equity incentive compensation, that policy has not always been followed, requiring additional work by NISTAC and MTM to reach full compliance.

Since 2001, the "Equity Allocation Guidelines" have governed the allocation of equity incentive compensation. These Guidelines were approved by the MTM Board and NISTAC Joint Coordinating Committee in conjunction with the creation of the MTM Trust (the "Trust"), which held the equity-based incentive compensation allocated to employees for service to both NISTAC and MTM. Pursuant to the Equity Allocation Guidelines, the President would receive up to 25% of any equity received by NISTAC or MTM in exchange for its services or licenses.⁴² Up to 10% of the remaining equity – but adding up to a total allocation of no more than 33% of total equity that NISTAC received – was available for allotment to staff as incentive compensation to be held in the Trust.

⁴² At Mr. Glasscock's request, the amount of equity incentive compensation to which he is entitled in his November 2008 Employment Agreement was reduced from 25% to 12.5%.

Mr. Glasscock, Ms. Appelhans and Mr. Reader informed us that, acting on advice from the Husch Blackwell firm on ERISA and related issues, NISTAC abandoned the Trust as a means by which to hold equity allocated as incentive compensation in late 2006 or early 2007.⁴³ Equity held in the Trust was transferred to NISTAC and is now held separately in a “pool.”⁴⁴

Pursuant to the Equity Allocation Guidelines, the President would recommend to NISTAC’s compensation committee and MTM Board “an allotment and allocation of equity interests acquired or held by either or both MTM and [NISTAC]” on at least an annual basis. The allocation of equity was to be “based upon the time of service *and relative contributions of each employee for each specific venture.*” (Emphasis added.) Moreover, the “specific amount and allocation of equity in each venture for each individual staff person will be subject to specific approval by both the JCC and MTM Board.” Accordingly, through the Equity Allocation Guidelines, there was an established policy for allocating equity to staff commensurate with their contribution to a specific venture, as approved by the Joint Coordinating Committee and MTM Board.

It appears that the Equity Allocation Guidelines were followed and equity was properly allocated to staff and approved by the Joint Coordinating Committee and MTM Board through October 2006. The October 11, 2006 Minutes of the Joint Coordinating Committee and MTM Board indicate that “[p]roposed staff allocations for distributive interests of restrictive equity held in the Rabbi Trust . . . were reviewed. After discussion, a motion was made and seconded to approve the equity allocations as proposed.” The motion was approved unanimously.

⁴³ Wildman Harrold’s 2006 recommendation that the Trust documents be amended to reflect that NISTAC also contributed equity to the Trust is moot as the Trust was abandoned shortly thereafter.

⁴⁴ The “pool” essentially is an entry on NISTAC’s ledger, which sets forth the then-current allocations of equity to employees.

However, neither former NISTAC President, Dr. Sampson, nor current President, Mr. Glasscock, recalls that subsequent equity allocations to staff have been presented to the Compensation Sub-Committee or MTM Board for approval. This recollection is corroborated by packets provided to those boards and the minutes from the 2007 and 2008 meetings of the Compensation Sub-Committee and MTM Board. None include reference to proposed or approved equity incentive allocations. Thus, the last equity allocations presented to and approved by the MTM Board and Compensation Sub-Committee occurred in October 2006.

Equity incentive compensation has been allocated, or at least proposed for allocation, since October 2006 without presentment to or approval by the NISTAC Compensation Sub-Committee or MTM Board. For example, in December 2006, GTLpetrol, LLC compensated NISTAC with equity for a license. Pursuant to the Bonus Policy,⁴⁵ an aggregate of 15% of the GTLpetrol, LLC equity received by NISTAC was allocated to employees as incentive compensation. Likewise, in December 2008, equity received by MTM as compensation for its services to Scavengetech, LLC was allocated to Messrs. Glasscock, Reader and Williams. While Mr. Glasscock was entitled, pursuant to his Employment Agreement, to receive 12.5% of any equity received by NISTAC in lieu of cash, it is unclear who authorized the allocation of Scavengetech shares to Messrs. Reader and Williams.

Contrary to the Equity Allocation Guidelines, and to Article IV of the Amended and Restated Bylaws, which requires Board approval for all compensation to officers and agents of NISTAC, no record of Board approval for these allocations has been located and Mr. Glasscock confirmed that no such approval was sought. He believed that equity was allocated pursuant to

⁴⁵ It is unclear why the percentages set forth in the Bonus Policy, which applies to *net cash revenues* received from licensing, were used to allocate *equity* received from GTLpetrol, LLC. Nevertheless, if the Equity Allocation Guidelines had instead been used, up to 33% of the equity received from GTLpetrol, LLC could have been distributed, which is more than the 15% initially allocated.

the limits in the Equity Allocation Guidelines, but that Board approval was not necessary if the allocations fell within the policy limitations then in place.

Additional *proposed* allocations of equity as incentive compensation also are set forth on the “pool” ledger. Equity from Sunflower Integrated Bioenergy⁴⁶ and Santa Fe Trail BioScience are proposed to be allocated to employees as incentive compensation. Mr. Glasscock confirmed that Mr. Reader proposed these allocations and that he has approved them, though neither have been presented to the NISTAC or MTM Boards for discussion or approval.

In sum, Article IV of the Amended and Restated Bylaws and the Equity Allocation Guidelines have not been scrupulously followed since October 2006. We recommend that NISTAC and MTM return to the practice of having the President present *all* proposed equity allocations to the NISTAC Compensation Sub-Committee and the MTM Board for their consideration and approval *before* any allocations of equity take place.⁴⁷ Furthermore, as there is uncertainty over whether equity received from Sunflower Integrated Bioenergy should have been proposed for allocation as incentive compensation, the Compensation Sub-Committee and MTM Board should review the source of equity being allocated to ensure that, consistent with the Equity Allocation Guidelines and the terms of Mr. Glasscock’s Employment Agreement, equity that is received by NISTAC or MTM in exchange for cash (or an obligation to pay cash, such as a promissory note) is not part of the pool eligible for allocation as an incentive. This area, more than any other area addressed in this report, requires additional effort and Board oversight to comply with the 2006 recommendations.

⁴⁶ There is an internal difference of opinion as to whether NISTAC received the Sunflower Integrated Bioenergy equity in exchange for its \$95,000 investment, made after the company’s founding, or if the equity constitutes purely founders’ shares. If the former, all agree the equity should *not* be available for allocation as an incentive.

⁴⁷ Any allocations that have been made without prior Board approval should be presented to the NISTAC and MTM Boards for possible ratification before any payout to employees is made.

iii. **Establish a Policy Setting Broad Parameters for Acceptance of Equity in Exchange for Licensing of Intellectual Property**

As a licensor of intellectual property, NISTAC often must decide whether it is willing to accept equity as a component of compensation from the licensee.⁴⁸ Because employees receive as incentive compensation a percentage of any third-party equity received in lieu of cash, a real or perceived conflict of interest can exist in making the decision of whether NISTAC should accept equity as compensation for a license. To address this potential issue, we recommended in 2006 that NISTAC create a policy setting broad parameters for the acceptance of equity in licensing transactions, recognizing that this decision will depend upon a number of market factors, including whether the potential licensee has adequate cash from which to pay for a license. We further recommended that any person eligible to receive incentive compensation based upon this determination should be excluded from setting or implementing this policy.

While NISTAC appears to adhere to informal parameters with respect to the acceptance of equity as compensation for a license, all whom we interviewed agreed that NISTAC had not established a formal policy setting such parameters. Those involved in licensing decisions uniformly stated their general belief that each licensing opportunity is unique in terms of technologies, markets, margins and financial capabilities of potential licensees so that they believe it is not feasible to establish formal parameters for the acceptance of equity in lieu of cash.

While no formal parameters were established, it was uniformly noted by all whom we interviewed that the preference is for NISTAC to receive cash, not equity, in exchange for a license. Messrs. Glasscock, Reader, Sampson and Krause all indicated that the licensing team, along with Mr. Glasscock, Ms. Appelhans, and sometimes NISTAC's Chair, meet on a regular

⁴⁸ With respect to University-owned intellectual property, KSURF ultimately decides and approves the terms of any licensing transaction, including compensation.

basis to discuss potential licensing opportunities. When a potential licensee lacks funds to pay cash for the license, which is typical for the start-up companies, the team analyzes the opportunity by considering the financial position of the entity, the value of the intellectual property, and the overall value proposition of the deal to NISTAC. If the licensing team determines that a license should be offered, it presents the President with the proposed terms of the license and justification for the proposal. Mr. Glasscock, Ms. Appelhans, and others confirmed that Mr. Glasscock makes the final decision whether a licensing opportunity is pursued; whether NISTAC will accept equity, cash or some combination thereof for the license; and the terms of any license. Mr. Glasscock, however, cannot recall any situation where he disagreed or disapproved of the licensing team's proposal. It appears that, while no formal policy setting parameters for the acceptance of equity in licensing transactions exists, in practice the decision to accept equity for a license of NISTAC-owned intellectual property flows from a reasoned, collective effort, subject to Mr. Glasscock's final approval.

NISTAC, however, has not excluded Mr. Glasscock, Mr. Reader and others whose compensation may include equity received from third parties from the establishment or implementation of the licensing parameters when their own compensation may be affected by their decisions. As discussed, Mr. Glasscock is centrally involved in and, with the input of Mr. Reader and the licensing staff, ultimately decides whether equity should be accepted in exchange for a license. Mr. Krause, as Executive Chair, was apprised of proposed deals, and he indicated that he had the authority to veto any proposed licensing deal. Mr. Glasscock, however, informed us that licensing deals have not been taken to the NISTAC Board for ultimate approval.

Since Mr. Glasscock's Employment Agreement entitles him to 12.5% of any equity that NISTAC receives (other than from cash), we believe that Mr. Glasscock should not be the

ultimate decision-maker of whether NISTAC accepts equity for a license in lieu of cash. Dr. Sampson, Mr. Wilk and other NISTAC Board members told us that they recognize the potential for a conflict of interest in such a scenario.⁴⁹ Mr. Glasscock also said that, in the best-case scenario, someone other than he would decide whether to accept equity in lieu of cash as part of a licensing transaction, or the decision-maker would not get any percentage of equity, to avoid any perception of conflict.

Accordingly, while each licensing opportunity might be unique, we recommend that the NISTAC Board request that NISTAC's management present the Board with *general* written parameters for the acceptance of equity in lieu of cash for licensing of intellectual property for approval. We also recommend that, to the extent that NISTAC and MTM choose to continue to award equity as incentive compensation, the President and others who may directly benefit from such a decision do not have approval authority with respect to the acceptance of equity as compensation to NISTAC for either services or licenses. The latter recommendation could be achieved through designation of a separate, independent approval mechanism, in the form of a disinterested Board member or disinterested committee to approve the transaction.

iv. **Annual Review of Total Compensation and Documentation of Reasonableness**

Wildman Harrold recommended in 2006 that NISTAC annually review and analyze the total compensation (salary, cash bonus and equity incentive) of its officers and employees prior to the allocation of any equity grants. We also recommended that NISTAC take steps to ensure that total compensation is comparable to compensation of similar for-profit and not-for-profit

⁴⁹ More than one NISTAC Board member indicated that he or she was unaware that Mr. Glasscock's compensation included a portion of equity received by NISTAC from licensing deals. While the Compensation Sub-Committee is authorized by NISTAC's Bylaws to address matters of compensation on behalf of the Board, the Sub-Committee should keep the entire Board apprised of the general terms of its President and CEO's compensation package so that the overall reasonableness of total compensation can be monitored.

companies providing similar services, and to document steps taken to determine the reasonableness of total compensation each year. NISTAC has implemented some, but not all, aspects of these recommendations.

Article IV of the Amended and Restated Bylaws states that “[t]he compensation of all officers and agents directly employed or retained by [NISTAC] shall be approved by the Board of Directors.” Pursuant to Article III, Section 22 of the Amended and Restated Bylaws, the Compensation Sub-Committee:

shall be responsible for evaluating the performance and reviewing the compensation of all officers, contractors and employees of [NISTAC], including those that are licensed to [NISTAC] by MTM pursuant to a contract between MTM and [NISTAC]. At least annually and prior to the establishment of compensation for any given year, the Sub-Committee will review all aspects of compensation for each officer and employee of [NISTAC], including any equity or incentive compensation to be granted to such person and will make a recommendation to the Executive Committee as to the appropriate level of compensation for such individual based on comparable analysis of compensation for other similar employees of similar organizations.

Since October 2006, the Compensation Sub-Committee has met annually to evaluate the performance and review the compensation of NISTAC’s President and CEO, Mr. Kent Glasscock, and Executive Chair, Mr. Robert Krause. (Mr. Krause was subject to review in 2006 and 2007 only because he resigned as Executive Chair in September of 2008.) Prior to each meeting, members of the Compensation Sub-Committee are provided with a packet of materials to consider in making their compensation recommendations, including a detailed analysis of NISTAC’s goals for the prior year and the achievement of those goals. In 2008, the Compensation Sub-Committee also was provided with the findings of a compensation comparability study, performed by an independent third-party, of Mr. Glasscock’s total compensation. This study, which was commissioned in response to our 2006 recommendations as an additional way to determine the reasonableness of compensation, found that Mr.

Glasscock's total compensation fell within the 25th and 50th percentiles of comparable total compensation for executives in non-profit and for-profit companies, which was deemed to be "fair market" value.

At the annual Compensation Sub-Committee meeting, which also is attended by members of the MTM Board, the President presents NISTAC's performance for the year and answers any questions regarding NISTAC's performance or his individual performance. As reflected in the meeting minutes, and as uniformly noted by participants, the President and other senior officers of NISTAC then leave the meeting and have no further involvement with the compensation determination. The Compensation Sub-Committee then deliberates and considers detailed, written performance evaluations with the MTM Board. The Compensation Sub-Committee, along with the MTM Board, then determines NISTAC's overall performance achievement level for the year, usually expressed as a percentage. This percentage forms the basis for the President's annual performance bonus and, pursuant to the Staff Performance Review and Bonus Guidelines, is used as the basis for 50% of each employee's salary adjustment or bonus.⁵⁰

Based upon performance and compensation comparisons, the Compensation Sub-Committee then deliberates with the MTM Board about any adjustments to the President's salary. Members of the Compensation Sub-Committee told us that, in addition to relying on the findings of the 2008 comparability study, they also rely upon their experience in the private sector, as well as their understanding of what senior officers are paid at other KTEC institutions. Once the Compensation Sub-Committee members reach a consensus, they present their salary recommendation to the MTM Board members, who are present in the room during the Compensation Sub-Committee deliberations.

⁵⁰ Dr. Sampson and compensation documents confirmed that one component of the annual salary adjustment and cash bonus of other employees is based upon the performance achievement percentage. The second component is determined by the President based upon each employee's individual performance.

At that point, the MTM Board has the opportunity to test the Compensation Sub-Committee's recommendations. MTM Board member Mr. Dennis Mullin emphasized that the MTM Board does not "rubber-stamp" recommendations of the Compensation Sub-Committee, and that there is a hearty and thorough discussion with many questions asked before approval of compensation. He and MTM Board Chair, Mr. John Graham, specifically recalled many questions being asked about the bases for Mr. Glasscock's and Mr. Krause's compensation in 2007. These sentiments were echoed by Compensation Sub-Committee member, Mike Daniels, who recalled a "spirited" debate in 2007. Others recalled that Mr. Tracy Taylor, formerly a member of the MTM Board and NISTAC Executive Committee, was vocal about compensation recommendations. At the end of the deliberations, the MTM Board approves the President's salary and bonus compensation for the upcoming year in writing.

While NISTAC does annually review the salary and cash bonus components of compensation for its President (and Mr. Krause when he was Executive Chair of NISTAC) through the Compensation Sub-Committee of its Executive Committee, Messrs. Sampson, Glasscock and other have confirmed that NISTAC does not currently extend this Board-level review to compensation of all officers and employees. Instead, the current practice is for the President to review and decide the salary and bonus compensation of all other employees, subject to the total budget approved by NISTAC and MTM for compensation. Individual staff compensation determinations are not subject to board review or approval. This current practice does not comport with Article IV of the Amended and Restated Bylaws. The Compensation Sub-Committee should review the compensation of all officers and employees.

Moreover, the equity sharing component of Mr. Glasscock's compensation also is not subject to annual review by the Compensation Sub-Committee or MTM Board. Mr. Glasscock

confirmed that, as was true when Dr. Sampson was President and CEO of NISTAC, he does not present for approval any equity allocated to him pursuant to the terms of his Employment Agreement. We saw no evidence of self-dealing in the minutes or compensation decisions we reviewed. In the future, however, to institutionalize the independence and full foundation for these decisions, we recommend that the Compensation Sub-Committee of NISTAC be apprised of equity incentives that Mr. Glasscock is entitled to receive pursuant to the terms of his Employment Agreement before any allocation occurs.

Furthermore, while it appears that, *in practice*, NISTAC's Compensation Sub-Committee is working to provide an independent compensation assessment, its *process* for doing so can be improved to better align itself with best practices. For example, no member of the Compensation Sub-Committee recalls meeting separate and apart from the MTM Board prior to making compensation recommendations to the MTM Board. This process is not aligned with what the NISTAC Board was told about the compensation process at the January 16, 2007 Board meeting. At that meeting, the Board was told that "deliberations and recommendations were separated." Joint deliberations can lead to concerns that the two entities are not making compensation determinations independently, which was the purpose for creating a separate NISTAC committee charged with making compensation decisions independent of the MTM Board. Accordingly, we recommend that the members of the Compensation Sub-Committee meet independently of the MTM Board prior to presenting their recommended compensation for senior officers. This added step will remove any potential doubt as to whether NISTAC, through the operation of its Compensation Sub-Committee, is acting independently from MTM with respect to compensation recommendations

Finally, while NISTAC has complied with our recommendation to take steps to ensure the total compensation is comparable to compensation of similar for-profit and not-for-profit companies providing similar services, improvement can be made in documenting the bases for these determinations. For instance, the Compensation Sub-Committee minutes should reflect any written or oral opinions of compensation comparability and explain why the Compensation Sub-Committee deems the recommended compensation reasonable. The meeting minutes to date generally have reflected the bases for compensation decisions, but more detailed records regarding the comparisons used in compensation decisions would be beneficial, especially if non-documented sources are being used for comparison. These minor improvements in the annual review and documentation process will increase transparency and confidence in NISTAC compensation decisions.

Overall, with respect to compensation, NISTAC has appropriately implemented a number of the 2006 recommendations. As described above, NISTAC should continue its efforts with respect to the compensation related issues.

D. Board Member Conflicts of Interest

1. Investment or Service by NISTAC Board Members in “Client Companies”

The Grant Thornton Report notes that conflicts of interest exist when an individual or organization has interests that might compromise objectivity and reliability in dealing with corporate matters. The Report opines that “such a conflict exists relative to the NISTAC Cluster as directors of NISTAC and its affiliated entities are permitted to hold stock in and serve as directors/officers of investee companies. This can call into question their decision-making in situations such as that involving NutriJoy . . .”⁵¹ Kansas law, however, does not prohibit either

⁵¹ Grant Thornton Report at p. 19.

investment or service by a board member in an affiliated or client company. Instead, the salient issue in Kansas (and elsewhere) is not whether conflicts of interest exist, but whether they are disclosed and managed appropriately or, if there is a question, whether any resulting transaction is fair.

Kansas law imposes upon corporate officers and directors a fiduciary duty to act in the best interest of the corporation and its stockholders.⁵² Directors are legally presumed by the “business judgment rule” to have acted in the best interests of the corporation, even where the directors’ decisions ultimately turn out to be harmful to the corporation.⁵³ Directors may not be protected by the business judgment rule, however, when they have a personal interest affected by a corporate transaction. Under Kansas law, for interested directors’ decisions to be presumed to be in the best interests of stockholders: (1) the directors’ interests must have been disclosed or are known to the entire board and the transaction must be approved by a majority of the disinterested directors;⁵⁴ or (2) the interests must have been disclosed or are known to the entire board and the transaction must be approved by a majority of the shareholders; or (3) the transaction must be “fair” to the corporation.⁵⁵ If any one of the above conditions is met, the interested directors are shielded by the business judgment rule and they are presumed to have acted in the best interest of the corporation, despite any personal conflicting interest they may have.⁵⁶ Contrary to Grant Thornton’s suggestion, under Kansas law, a transaction may be

⁵² *Newton v. Hornblower*, 224 Kan. 506, 514 (1978).

⁵³ *Unrau v. Kidron Bethel Retirement Services, Inc.*, 271 Kan. 743, 759 (2001).

⁵⁴ Interested directors count for purposes of having a quorum present. K.S.A. § 17-6304 (2008).

⁵⁵ K.S.A. § 17-6304 (2008).

⁵⁶ Edwin W. Hecker, Jr., *Fiduciary Duties in Business Entities*, 54 Kan. L. Rev. 975, 1007 (citing *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 365–66 (Del. 1993)).

considered tainted by conflict only if the directors do not disclose their interest, the decision is not ratified by disinterested directors or shareholders, *and* if the transaction is unfair.⁵⁷

Every corporation must decide how best to address and manage conflicts of interest by its board members and officers. Some go beyond legal requirements and prohibit any personal investment in related entities. Others adopt policies to manage potential conflicts through disclosure and abstention from votes on issues affecting a board member's personal interest. Still others require interested directors to remove themselves entirely from the process when discussion or votes affecting those interests take place. There are numerous other variations of such policies.

NISTAC does not prohibit a board member from serving as an officer or director of its affiliated companies (subject to the requirement of independence for the MTM Board discussed above). Some NISTAC Board members have in the past or continue to serve as executives or on the Boards of NISTAC affiliated companies.

NISTAC also does not prohibit Board member or officer investment in its client companies or affiliates. A number of NISTAC Board members have personal investments in NISTAC "client companies," including NanoScale Corporation or NutriJoy, Inc. Other Board members choose not to invest in NISTAC client companies, either because they are not accredited investors, because policies of their affiliated organization or other employment prohibit it, or for other personal reasons. All whom we interviewed recognized Board member investment as potentially creating conflicts of interest for those Board members on NISTAC actions affecting the company in which they have invested. By virtue of the nature of its incubation mission, however, many of the Board members whom we interviewed also expressed

⁵⁷ The interested director is not prohibited from participating in the meeting or vote on the interested transaction if one of the required conditions of disclosure and ratification or fairness is met. K.S.A. § 17-6304 (2008).

the strong view that NISTAC needs Board members to invest in its ventures – particularly in a community with relatively few sources of investment capital – in order to provide the necessary financial support, to have “skin in the game,” and to give credibility to its ventures. Some Board members whom we interviewed recognize a possible public perception reflecting concern with such investments. All Board members expressed support for the idea that NISTAC should review and take steps to improve its policies, processes and procedures to address and manage potential conflicts of interest for its Board members.

2. NISTAC Conflict of Interest Policies

NISTAC addresses and manages potential conflicts of interest for Board members through a “declare and abstain” policy in its bylaws. Specifically, the NISTAC policy in place since March of 2006 provides that:

The Board must approve any agreement between the Corporation and another entity in which any member of the Board has a beneficial interest or serves such entity in the capacity of director, officer, employee, consultant, paid advisor or agent. Furthermore, any such board member shall declare their interests and/or engagement in advance to the other Directors and shall abstain from voting on any agreement of that nature with an entity in which they have a personal beneficial interest. The foregoing conflict of interest provisions are intended to comply with the Internal Revenue Code Section 4958 and the Board may take such further action as necessary to further such compliance efforts.⁵⁸

Prior to March of 2006, the NISTAC bylaws had a slightly different provision.⁵⁹ Even under the prior provision, however, abstention from votes in which a board member has potentially conflicting personal interests was required.

Some NISTAC personnel and Board members also are subject to certain conflict of interest disclosure obligations to KTEC as a condition of KTEC grants and funding. Under the

⁵⁸ NISTAC Amended and Restated Bylaws, Art. III, Sec. 14.

⁵⁹ NISTAC Bylaws, Art. III, Sec. 13, required 75% approval by the Board of agreements with any entity in which any Board members has a beneficial interest or serves in an executive or paid capacity.

KTEC Grant Agreement, any employee, officer, or other individual who receives wages or compensation from either NISTAC or MTM must submit a Disclosure of Substantial Interests statement to KTEC and the CEOs of NISTAC and MTM.⁶⁰ These disclosure documents must reveal any indirect or direct investment, business, compensation, or family interests with any entity or person having business dealings with NISTAC; and any position as a director, officer, committee chair or member, consultant or advisor, or employee of any person or entity having business dealings with NISTAC.⁶¹ The KTEC Grant Agreement also requires the covered individual to promptly notify the NISTAC Board of any potential conflict of interest that is subject to the NISTAC or MTM conflict of interest policies.⁶² While the KTEC disclosure documents are not shared with the entire NISTAC board, the KTEC Grant Agreement reiterates the NISTAC bylaw provision requiring disclosure of potential conflicts of interest to the NISTAC Board.

3. The NutriJoy, Inc. Transaction

The Grant Thornton Report suggests that potential conflict of interest questions surround actions and negotiations culminating in the January 2008 transaction by which The Coca-Cola Company acquired a 51% stock interest in NutriJoy, Inc. Grant Thornton focused on Mr. Krause and Mr. Glasscock (who led negotiations and also were stockholders in NutriJoy) and Dr. Wefald (who was an investor in NutriJoy), but while implying that the transaction was improper, Grant Thornton did not make a definitive finding that the transaction itself was unfair or that it was tainted by conflicts of interest. Guided by the NISTAC Board Resolution of July 28, 2009,

⁶⁰ We confirmed that Messrs. Glasscock and Sampson, the Board members covered by this policy, made the required disclosure statements for the current year.

⁶¹ Kansas Technology Enterprise Corporation Business Incubator FY2009 Grant Agreement, Conflicts of Interest Policy Guidelines.

⁶² Kansas Technology Enterprise Corporation Business Incubator FY2009 Grant Agreement, Article XIII.

Wildman Harrold reviewed the potential conflict of interest issues raised by the Grant Thornton Report, focusing on compliance with NISTAC's conflict of interest policy, as well as the structure and process of the NutriJoy transaction negotiations.

a. **Founding of and Investment in NutriJoy**

As indicated in the Grant Thornton Report, NutriJoy was founded in 2000 to develop and commercialize nutritional technologies initially donated to NISTAC by The Procter & Gamble Company and derived from University research.

NISTAC holds significant ownership interests in NutriJoy via NISTAC's licensing of intellectual property to NutriJoy and the conversion of NISTAC's loans to NutriJoy equity.⁶³ NISTAC, MHL, University of Kansas affiliated entities, and private or individual SEC accredited investors also are cash investors in NutriJoy.

The evolution of stock ownership in NutriJoy reflects the continuing efforts of NutriJoy to raise capital and attract new investment to sustain its operations and growth. NISTAC, KSURF and Dr. Sampson (initial and former President of NISTAC) were the first stockholders of NutriJoy, with their stock issued in exchange for cash and as compensation for the provision of services. In 2001, NutriJoy split its stock 100 for 1, substantially increasing the number of shares held by these stockholders but not affecting their percentages of overall ownership in the company. In early 2002, NutriJoy converted notes payable to MHL and KTEC to equity, diluting the individual shareholders. After another stock split (2 for 1) in May of 2002, NutriJoy offered new shares to accredited investors. KTEC, MHL and accredited individuals or private entities purchased NutriJoy shares for cash in connection with that offering. Additional cash also was raised from investors, with new stock offerings initiated in January 2004 and April 2005.

⁶³ NISTAC affiliates, such as MTM and MHL, also hold equity interests in NutriJoy, some of which were obtained in exchange for services or through conversion of notes and others via cash investment.

During that time frame, NutriJoy received cash investments from accredited individuals, KTEC, MHL and NISTAC. NutriJoy also converted some loans and other notes payable to equity for NISTAC and MTM. All of these transactions diluted prior stockholders who did not also purchase additional stock.

By June 30, 2006, there were 5,570,150 shares of NutriJoy stock outstanding, with 1,355,000 of those shares classified as “non-cash shares” and 4,215,150 shares classified as “cash shares” having a \$1 per share par value and purchase price. NISTAC held 843,750 non-cash shares and 519,065 cash shares.⁶⁴ KSURF held 100,000 non-cash shares after initial entry for services provided and two stock splits. KTEC held 500,000 cash shares, with its initial stock holdings increasing from the second stock split and subsequent cash investments. MHL held 520,750 cash shares, with its initial stock holdings increasing from the second stock split and subsequent cash investment. MTM held 100,000 cash shares. The other accredited cash investors included Mr. Krause, Mr. Glasscock, Dr. Wefald, and several other NISTAC Board members, among others.

b. NutriJoy’s Search for a Strategic Partnership

NutriJoy utilizes patented technologies to create and market nutritious beverages and snacks to appeal to the consumer market. The initial work of NutriJoy centered on development of the technologies and products. As a small start up company based on technology development, NutriJoy did not possess the resources or marketing expertise to enter the highly competitive consumer market. NutriJoy decided that a strategic partnership with a large, established food and beverage company was necessary to develop the potential of the technologies and products.

⁶⁴ In addition, NISTAC had 31,250 shares which were allocated to employees as equity incentives and held separately in the MTM trust.

In 2005, NutriJoy was actively searching for a strategic partner. Several candidates had been identified and discussions with some of them had begun. The 2005 discussions did not result in any transaction, but potential opportunities continued to be explored. In 2006, NutriJoy entered into a consulting services agreement with The Coca-Cola Company. In 2007, NutriJoy engaged in further discussions and negotiations concerning a strategic partnership. Ultimately, The Coca-Cola Company acquired a 51% equity stake in NutriJoy in January of 2008.

c. **NutriJoy's Financial Condition and Its Need for Additional Investment**

In the Spring of 2005, NutriJoy was experiencing cash flow difficulties severe enough to threaten its existence. Licensing fees, patent maintenance costs and royalties owed to NISTAC had accrued and were converted to notes payable, with no prospect of NutriJoy being able to pay those notes. NutriJoy had terminated staff and reduced marketing efforts to reduce cash outlays. NutriJoy also had obtained bridge loans for working capital from NISTAC and MTM. NutriJoy was running out of funds and needed additional cash investment to remain viable. All investments in NutriJoy up to that point were at risk for a total loss.

The failure of NutriJoy would have had negative implications, not only to NutriJoy stockholders (including NISTAC), but also to NISTAC's overall mission. While the licensing rights for the technology would revert back to NISTAC if NutriJoy failed, many directors and others we interviewed believed that NISTAC would essentially be placed back at square one in the commercialization of that technology. Correspondingly, NISTAC would suffer a setback in its overall mission and its reputation if NutriJoy failed. NISTAC also had significant cash and non-cash investment in NutriJoy that would become worthless if NutriJoy failed.⁶⁵ And, prior

⁶⁵ All NISTAC Board members whom we interviewed recall the financial difficulties that NutriJoy faced at this time and the concern about the potential loss of NISTAC's investment in NutriJoy.

investments by accredited investors, many of whom are University alumni, were at risk for loss, jeopardizing NISTAC's ability to raise future capital from this small pool of accredited investors.

NutriJoy needed to raise additional capital while its search for a strategic partner continued. NISTAC and MTM approved additional bridge loans to NutriJoy and agreed to convert the loans to equity, subject to NutriJoy raising at least double the loan amount in cash stock subscriptions through other sources. The processes followed in the decisions made by NISTAC and MTM to extend additional loans and to convert their loans to equity do not appear to be subject to question. NutriJoy made a stock offering to accredited investors in April of 2005. In January of 2006, the stock offering was closed when NISTAC invested cash to acquire the final 169,065 shares. The NISTAC Executive Committee recommended and the Board approved that January 2006 cash investment, with the Board members who personally owned NutriJoy stock abstaining from the Board vote.⁶⁶

d. **The NISTAC Action to Defer or Subordinate Return on its Non-Cash Investment in NutriJoy**

In 2005, some members of the NutriJoy Board expressed concern with the ability to raise additional cash from accredited investors. This concern stemmed from the fact that NISTAC, the largest stockholder of NutriJoy, owned the underlying intellectual property and could sell it to another company or otherwise make a profit on it ahead of or at the expense of other NutriJoy investors.

⁶⁶ The Grant Thornton Report notes that, in conjunction with this investment and the planned phased retirement of Dr. Sampson (then Chair of the NutriJoy Board), the NISTAC Executive Committee "strongly encouraged" the NutriJoy Board to invite Mr. Krause to join the NutriJoy Board. We note that the Executive Committee minutes expressly state that such an invitation to Mr. Krause was not a condition of NISTAC's further investment in NutriJoy. Mr. Krause was invited to join the NutriJoy Board and was elected to chair that Board, a position that he still holds today.

The NutriJoy Board⁶⁷ sought assurances through Dr. Sampson (who was Chair of the NutriJoy Board of Directors and a member of the NISTAC Board of Directors at that time) that NISTAC would not seek to profit on its non-cash investments in NutriJoy prior to or at the expense of other cash investors who had supported NutriJoy through its initial growth. This was the genesis of the action by which NISTAC agreed to defer or subordinate return on its non-cash investment in NutriJoy until “cash investors” recovered their initial investments through a sale of intellectual property or other agreement with a strategic partner for NutriJoy. Once the other investors in NutriJoy received a return equal to the \$1 per share they had paid for their stock, the subordination of return on NISTAC’s non-cash shares would end.

The subordination was accomplished in two steps. First, because of the urgent need for NutriJoy to raise cash and the impending stock offering, Dr. Sampson initiated a NISTAC Executive Committee Resolution in Lieu of Meeting on April 21, 2005. Dr. Sampson informed us that he believed convening a full meeting of the Executive Committee or the NISTAC Board was not possible in the time frame by which the NutriJoy Board required some assurance from NISTAC, even if not in the form of a binding action. The NISTAC Executive Committee Resolution discussed the expressed concerns of the NutriJoy Board regarding the possible disadvantage to cash investors in a future sale of intellectual property or strategic partnership and its effect on NutriJoy’s ability to raise cash. The Resolution recommended allocating future non-royalty returns from the sale or assignment of the NutriJoy licensed intellectual property first to NutriJoy cash stockholders if the initial proceeds are not sufficient for all stockholders to recover their investments. This allocation would apply to any transaction occurring within three years of the Resolution. Each member of NISTAC’s Executive Committee signed the Resolution. Mr.

⁶⁷ At that time, Mr. Krause was not a member of the NutriJoy Board. Mr. Glasscock had joined the NutriJoy Board in late February of 2005.

Krause wrote “disclosed as shareholder” above his signature to the Resolution to indicate that he was a NutriJoy stockholder.⁶⁸

The Resolution was presented to the full NISTAC Board for approval before being considered effective and binding. Thus, at the May 17, 2005 meeting, the NISTAC Board discussed the fact that NISTAC also was a substantial cash investor in NutriJoy and would receive the same priority return on its cash investment as other cash investors. The NISTAC Board approved the Executive Committee Resolution and subordination. NISTAC Board members who were cash investors in NutriJoy abstained from the vote.⁶⁹

We believe that the Board action taken at the May 17, 2005 meeting to subordinate NISTAC’s return on its non-cash NutriJoy shares to first allow a \$1 per share return to other investors in NutriJoy complied in material respects with the NISTAC conflict of interest policy in effect at that time. The NISTAC policy required disclosure of interests and abstention by interested directors from votes involving those interests. While the Executive Committee Resolution does not reflect “abstentions” by interested members, the Resolution required unanimous approval.⁷⁰ Moreover, the Resolution was not a Board vote or action and was not considered effective until full Board approval was obtained through a vote in which Board members holding personal interests in NutriJoy abstained. Although neither the precise nature and timing of disclosures of personal interests nor the identities of the persons who abstained from this vote are recorded in the final Board meeting minutes, the Assistant Secretary’s notes from the May 17, 2005 meeting reflect that those directors who owned NutriJoy stock did abstain from this vote. While we encourage NISTAC to improve its practices in this area by

⁶⁸ Resolution in Lieu of Meeting, April 21, 2005.

⁶⁹ Minutes of the Meeting: Board of Directors: NISTAC, May 17, 2005.

⁷⁰ NISTAC Amended and Restated Bylaws, Art. III, Sec. 9.

implementing more detailed policies and processes for the substance, timing and recording of disclosures of potentially conflicting interests and abstentions from votes, the subordination action reflected in the Assistant Secretary's notes and in the Board meeting minutes comply with NISTAC policy and will satisfy applicable Kansas law.

We also interviewed those Board members who participated in the subordination decision to determine whether there was any question that the Assistant Secretary's notes and the Board meeting minutes were incorrect. Recognizing that the passage of time and subsequent events might affect the specificity of memories, our interviews confirmed with a number of NISTAC's Board members that they knew at the time of the subordination action that other NISTAC Board members were NutriJoy stockholders and they recalled abstentions on NutriJoy votes. Some of the Board members cannot now recall when or in what context they learned of these ownership interests. Others had a more clear memory of this issue and stated their belief that it was well known to the Board who owned NutriJoy stock. Some are not certain at this point whether they knew the identities of specific directors who held NutriJoy stock before the time of the vote abstentions on the subordination issue. None of the Board members, however, indicated that they would have voted differently had they known more about the personal NutriJoy stockholdings of other directors. In our opinion, more detailed procedures on the substance, timing and recording of disclosures and abstentions would have been beneficial to NISTAC, both in hindsight and as a matter of good governance practices going forward.

All of the NISTAC Board members whom we interviewed continue to believe that the subordination decision was a good and valid business decision because it allowed NutriJoy to raise needed cash quickly to get to a point where a strategic partnership or buy-out could be reached. In fact, between April and July of 2005, NutriJoy raised approximately \$510,000

through its stock offering.⁷¹ Although a sale or strategic partnership was not consummated in 2005, the subordination action was explicitly made applicable to any such transaction occurring within three years. Thus, the NutriJoy transaction in January of 2008 was subject to the May 2005 subordination action by the NISTAC Board, and the Board members whom we interviewed understood this to be the case.⁷² A number of the NISTAC Board members believe that providing priority on return to NutriJoy cash investors was important not only to the specific survival of NutriJoy, but also to NISTAC's ability to fulfill its mission and to raise future capital in a small community and for projects and companies beyond NutriJoy. Virtually all NISTAC Board members also believe that the subordination action was necessary to prevent a total loss of all of NISTAC's cash and non-cash investment in NutriJoy.

e. The Creation of an Augmented Executive Committee in 2005

At the May 17, 2005 NISTAC Board meeting, the Executive Committee sought approval from the Board to make "quick and binding decisions involving a possible sale of intellectual properties and rights held by NISTAC and licensed to NutriJoy." This request was made because of the possibility of an urgent need to make binding decisions without sufficient time to convene a full Board meeting. At that time, there were ongoing discussions regarding several potential opportunities relating to NutriJoy.

The NISTAC Board approved this request and appointed additional Board members to augment the Executive Committee for decisions relating only to NutriJoy opportunities. No abstentions were noted in the minutes for this vote, but the vote to subordinate NISTAC's non-

⁷¹ Minutes of the Meeting: Board of Directors: NutriJoy, July 18, 2005.

⁷² The Grant Thornton Report states that the subordination decision was "reaffirmed" in August 2007 by NISTAC's Executive Committee. Although those meeting minutes (and others from 2006) reference discussion of the subordination decision and the reasons for it, the decision itself was effective as of the May 2005 Board approval action and remained binding at the time of the NutriJoy transaction in January 2008.

cash investment in NutriJoy, taken immediately prior to this discussion, did reflect abstentions from Board members with personal interests in NutriJoy. The Board minutes reflect that five Board members with no personal NutriJoy stockholdings or NutriJoy board or executive positions were appointed to serve on the Augmented Executive Committee, along with the existing Executive Committee members. Recollections of NISTAC Board members differ somewhat regarding the purpose of the Augmented Executive Committee.⁷³ Some recalled that, at that time, the majority of NISTAC's Executive Committee members held stock or board positions in NutriJoy, so including additional members who did not hold NutriJoy stock was considered prudent to address potential conflicts of interest which would preclude their voting on a transaction. Others recalled the Augmented Executive Committee's purpose as providing strategic direction and outside perspectives regarding potential opportunities for NutriJoy.⁷⁴

The Augmented Executive Committee met in June of 2005 and discussed various opportunities, but no partnership or other transaction occurred during that year. One of the issues discussed within the Augmented Executive Committee was the royalty rate from NutriJoy to NISTAC and the potential need to negotiate that element in any potential partnership or transaction for NutriJoy.

⁷³ The Grant Thornton Report states "[r]eportedly, the then Chairman of NISTAC and NutriJoy, Dr. Ron Sampson, was at odds with the remainder of the NutriJoy Board regarding the possible strategic partnerships. This led to the NISTAC Board creating an Augmented Executive Committee apart from the existing Executive Committee, for the purpose of making decisions in the NutriJoy situation only." (Grant Thornton Report at p. 21.) We did not find support for Grant Thornton's suggestion that friction between Dr. Sampson and the NutriJoy Board led to the appointment of a NISTAC Augmented Executive Committee. The Board minutes do not reflect this and none of the Board members whom we interviewed recalled this as a reason for establishing the Augmented Executive Committee. Moreover, Dr. Sampson was the NutriJoy Board chairman and a member of the NISTAC Board, but he never chaired the NISTAC Board. Grant Thornton also states that the Augmented Executive Committee members "were specifically chosen because they had no personal interest or involvement with NutriJoy," which incorrectly suggests that the Augmented Executive Committee did not include the existing Executive Committee members.

⁷⁴ For example, NISTAC Board member Sue Peterson states that she was appointed to the Augmented Executive Committee to bring her perspective on potential governmental opportunities based on her position as Director of Governmental Relations for KSU. Other members of the Augmented Executive Committee included private sector business people, including the President of the Manhattan Area Chamber of Commerce.

The Augmented Executive Committee was not re-engaged during the 2007 negotiations that ultimately led to the NutriJoy transaction. By this time, however, the composition of the NISTAC Executive Committee had changed and, unlike 2005, a majority of the Executive Committee's regular members did not have personal stock holdings in NutriJoy. Thus, the Executive Committee could act on NutriJoy in accordance with the views of disinterested members. Board members whom we interviewed expressed the view that an Augmented Executive Committee was no longer needed in 2007 for that reason and because the strategic direction already had been established and was being followed in serious negotiations with The Coca-Cola Company. With the benefit of hindsight, however, some Board members believe that augmenting the breadth of persons involved in such decisions in the future when there also are personal interests involved (even if fully disclosed and abstentions on votes are made) would be beneficial to enhance the transparency of Board decisions.

f. The 2007-08 Negotiations and Empowerment of the Executive Committee to Consummate a Transaction

In 2007, negotiations with several potential partners for NutriJoy, including The Coca-Cola Company, progressed to serious level. In April of 2007, the NISTAC Board was apprised of those negotiations, including possible issues regarding NISTAC's royalties from NutriJoy, stock warrants and stockholder agreements for NutriJoy. The NISTAC Board unanimously voted to empower the Executive Committee to negotiate and take action expeditiously on such a transaction. The minutes of that meeting do not reflect any abstentions from the vote.

In June of 2007, the NISTAC Board again met and discussed the fact that a transaction in which a multi-national company would acquire 51% equity stake in NutriJoy was close to being finalized. The benefits of such a deal to NISTAC's mission and long-term strategy were discussed. In addition, the need for action relating to royalties, debt and equity were addressed.

The NISTAC Board unanimously authorized the Executive Committee to address and resolve any issues related to this transaction, with no abstentions from the vote noted in the minutes. NISTAC Board members whom we interviewed believe that it was necessary to authorize the Executive Committee to act because those Board members had the detailed knowledge and experience with NISTAC and NutriJoy critical to consummating a deal, and because negotiations and decisions needed to occur more quickly than the full Board could accomplish in the time frame.

At the time of these Board actions, a majority of the NISTAC Executive Committee did not have personal interests in NutriJoy. While some Board members believe they were aware that other Board members had personal stockholdings in NutriJoy, other Board members cannot recall at this time whether there were disclosures of NutriJoy stockholdings specifically during these discussions. Kansas law does not require disclosures before every vote, as long as the interests of Board members are known and disinterested Board members approve the transaction, and NISTAC's Board composition at this point in 2007 was largely unchanged from the time of the May 2005 subordination decision⁷⁵ when the Board members who invested in NutriJoy disclosed their interests and abstained from the vote. As a matter of best governance practices, however, and consistent with the conflict of interest policy in its bylaws, the Executive Committee members who held NutriJoy stock should have disclosed those interests again and should have abstained from these votes.

g. The NutriJoy/Coca-Cola Transaction

In January of 2008, the NutriJoy transaction with The Coca-Cola Company was consummated, with The Coca-Cola Company acquiring a 51% equity stake in NutriJoy. The

⁷⁵ At the time of 2007 discussions and votes, 15 of the 16 directors had served on the NISTAC Board since the May 17, 2005 subordination vote during which directors with personal stockholdings in NutriJoy had abstained.

Coca-Cola Company also obtained certain sub-license rights in the intellectual property in exchange for royalty payments, including minimum annual royalties, to NutriJoy.

i. **Creation of Classes of Stock and Distributions to NutriJoy Stockholders**

To effectuate the transaction and the prioritization of return to cash investors, the NutriJoy Articles of Incorporation were amended and restated to create three classes of NutriJoy stock. All stockholders, except for NISTAC for its non-cash shares and The Coca-Cola Company, were issued Class A stock.⁷⁶ Class A stockholders hold 5,126,350 shares of NutriJoy stock. NISTAC holds 550,315 Class A shares from its cash investments, conversions of notes to equity, and including the 31,250 shares previously held by the MTM Trust and allocated to individual employees as incentive compensation. Class A stockholders also include other NISTAC or KSU-affiliated entities such as MHL, MTM and KSURF as well as individual accredited investors. NISTAC's stock holdings obtained as compensation for licensing activities comprise the totality of Class B stockholdings. NISTAC holds 843,750 shares of NutriJoy Class B stock. The new stock issued to Coca-Cola constitutes the Class C stockholdings. The Coca-Cola Company holds 6,541,635 Class C shares of NutriJoy stock.

Several thresholds for distributions to NutriJoy stockholders are set forth in the NutriJoy Amended and Restated Articles of Incorporation, on file with the Kansas Secretary of State. The NutriJoy Stockholders Agreement reflects these thresholds and the allocation of distributions based on them. Priority in cash distributions rests with the Class A stockholders until they receive a return of the \$1 par value for their shares. After that threshold is reached, but prior to reaching another threshold set forth in the Amended and Restated Articles of Incorporation, Class A stockholders and Class B stockholder (NISTAC's non-cash shares) receive priority in

⁷⁶ The Class A shares included cash investments as well as shares issued in return for services rendered (to KSURF, Dr. Sampson, and Dr. Yang) or allocated to employees as part of the equity incentive compensation trust or pool.

returns over the Class C stockholder (Coca-Cola). However, a portion of the distributions to the Class A stockholders during this period are reallocated to NISTAC's Class B shares so that those NISTAC shares receive a higher return than the Class A shares. After the second threshold is reached, all stockholders (Class A, Class B and Class C) receive returns on an equal basis per share.

The initial cash payment by The Coca-Cola Company was distributed to NutriJoy stockholders in accordance with these provisions. Class A stockholders received a 68¢ per share distribution shortly after the transaction closed. We confirmed the distribution amounts to all NutriJoy Class A stockholders. NISTAC received a distribution of \$375,725.76 on its 550,315 Class A shares. KTEC, KSURF, MHL and MTM each received sizeable distributions on their Class A shares. As noted in the Grant Thornton Report, Messrs. Krause and Glasscock and Dr. Wefald received distributions on their cash investments. These distributions amounted to the same 68¢ per share received by other Class A stockholders.⁷⁷

Several entities that were early investors in NutriJoy received the same 68¢ cents per share distribution as all Class A stockholders, but had a basis in those shares lower than \$1 per share because of stock splits occurring after their initial investments. Those entities, including NISTAC, KTEC, MHL, KSURF, and Drs. Sampson and Yang received an effective return on their investments of more than 68¢ per share. According to the City Manager, the City of Manhattan (which as a member of MHL, had an indirect investment in NutriJoy), has been made more than whole on its investment in NutriJoy. KSURF and Drs. Yang and Sampson obtained

⁷⁷ Mr. Krause paid \$1 per share for his 67,500 shares. Mr. Glasscock paid \$1 per share for 40,000 shares. Dr. Wefald paid \$1 per share for his 35,000 shares. The actual dollar amount of distribution checks to Mr. Krause, Mr. Glasscock and a few other individual officers or Board members of NISTAC reflect a total amount that would calculate out to less than 68¢ per share because those individuals used some of the funds to exercise previously vested options to purchase additional shares of NutriJoy at \$1 per share.

shares in return for services and also benefitted from early stock splits.

Certain NISTAC personnel, including Mr. Glasscock, received distributions from the Coca-Cola transaction based on NutriJoy shares allocated to employees and held in NISTAC's equity incentive pool. A total of 31,250 shares of NutriJoy stock (from the 550,315 NISTAC Class A shares) had been held in the MTM Trust and allocated to employees years before the Coca-Cola transaction.⁷⁸ NISTAC originally received those shares in return for the 2004 second licensing agreement with NutriJoy. These shares were categorized as Class A shares at the time of the NutriJoy/Coca-Cola transaction and received the same return as other Class A shares. The employees to whom these shares previously had been allocated received their respective portions of the cash distribution received by NISTAC for those shares.⁷⁹

We did not find facts to indicate that any NISTAC Board member or person involved in negotiation of the NutriJoy/Coca-Cola transaction received personal benefit from the transaction beyond that received by similarly situated NutriJoy stockholders. We also did not find facts to indicate that any person benefitted from this transaction at the expense of NISTAC.

ii. **License Agreement Amendments and Elimination of NISTAC Royalty**

As part of the NutriJoy/Coca-Cola transaction, NISTAC's license agreements with NutriJoy were amended in January of 2008. There were several aspects to the amendments, although the Grant Thornton Report focuses solely on elimination of the on-going royalty and license maintenance fees to NISTAC in exchange for the cash distribution reallocation formula

⁷⁸ When the MTM Trust was closed, the shares were transferred to NISTAC, but remained allocated to the individual employees as part of the equity sharing program.

⁷⁹ Dr. Sampson advised us that the 2005 subordination decision was to address concerns from the NutriJoy Board regarding the far larger block of NutriJoy shares received by NISTAC in exchange for the first licensing agreement in 2000 relating to the Cal-C technology and not the second, smaller licensing transaction relating to the Good Bites technology agreed to in 2004.

previously discussed.

There are two other elements to the license amendments that bring direct and immediate benefits to NISTAC. First, the January 2008 amendments reduce the exclusivity of NutriJoy's license rights on calcium fortified beverages, so that NISTAC regains an ability to enter into other licensing deals relating to that product. Second, the January 2008 amendments accelerate reimbursement to NISTAC of patent maintenance costs relating to technology licensed to NutriJoy so that NISTAC will be reimbursed in the current period for patent maintenance costs instead of accruing those costs in a note with no definite payment date, as was the case prior to the transaction. We are advised that, since the transaction, NutriJoy has remained current in paying on-going patent costs to NISTAC. The approximately \$298,000 note for previously accrued patent costs was given a definite schedule for payment, with the first payment having been made and the final payment due to be paid to NISTAC in 2010.

The Grant Thornton Report suggested potential concern about Messrs. Krause and Glasscock negotiating for the elimination of NISTAC's right to receive ongoing royalties from NutriJoy as part of the NutriJoy/Coca-Cola transaction. It is important to note that the prospect of reducing or eliminating NISTAC royalties from NutriJoy to facilitate a strategic partnership was discussed by the NISTAC Board and Executive Committee well before the time of the transaction. As early as June of 2005, the Augmented Executive Committee discussed the potential need to negotiate the royalty rate as part of a strategic partnership. By that time, NutriJoy was not able to pay the royalties already owed to NISTAC, which were accruing in a note. Moreover, during discussions in 2005 that did not result in a deal, The Coca-Cola Company had told NutriJoy that NISTAC's royalty was too high.

In March of 2006, the NISTAC Executive Committee again discussed the royalty issue, with the concern that potential institutional investors or partners generally are not willing to accept an on-going royalty payment, and that usually a capitalized return is accepted instead by the licensor. The Executive Committee noted that it may be necessary to eliminate the royalty from NutriJoy to NISTAC to conclude an agreement. At that time, the NutriJoy Board also was seeking clarification of NISTAC's intentions, including those with respect to the on-going royalty. The Executive Committee approved a resolution recognizing the need for flexibility and the willingness to engage in good faith negotiations to eliminate the NISTAC royalty, with due consideration given at the time of negotiations to the proportional value of NISTAC equity interests. This March 14, 2006 Resolution was passed unanimously, with three members abstaining from the vote, presumably due to their personal interests in NutriJoy stock.

In April of 2007, during the negotiations that ultimately resulted in the Coca-Cola transaction, the NISTAC Board was advised that negotiated items would likely involve, among other things, NISTAC's claim to royalties from NutriJoy.

In August of 2007, the NISTAC Executive Committee authorized Mr. Krause and Mr. Glasscock to negotiate on behalf of NISTAC a capitalized future return for eliminating the royalty requirement. The minutes of this meeting do not reflect any abstentions from the vote. When interviewed, a number of directors, including those on the Executive Committee at the time, believed that Messrs. Krause and Glasscock were the only two people with the knowledge and ability to successfully conclude a deal with The Coca-Cola Company. According to Messrs. Krause and Glasscock, who were empowered by the Executive Committee to negotiate regarding

the royalty, insistence on retaining an on-going royalty to NISTAC would have killed the deal because Coca-Cola insisted on elimination of the royalty to NISTAC.⁸⁰

Messrs. Krause and Glasscock stated that they recognized the need to obtain something in return for elimination of the NISTAC royalty, which led to agreement to reallocate cash distributions to prioritize return on NISTAC's Class B shares. Thus, after Class A stockholders have received \$1 per share return on their investments, NISTAC receives a priority return on its Class B shares until a second threshold amount is reached, at which time all classes of stockholders are treated on an equal basis per share.⁸¹

We believe the facts reflect that the agreement by NISTAC to eliminate on-going royalty payments was based on good faith negotiations and efforts to consummate a beneficial transaction. While the NISTAC conflict of interest policy was not scrupulously followed with respect to the August 2007 vote, we did not find facts to suggest that this deal term was improperly influenced or tainted by a conflict of interest on the part of the negotiators.

iii. Benefits to NISTAC of the NutriJoy/Coca-Cola Transaction

The NutriJoy/Coca-Cola transaction was complex and required lengthy negotiations. Many of the NISTAC Board members whom we interviewed believe that Messrs. Krause and Glasscock did a superb job in reaching a result that many had feared would never happen. The final terms of the transaction included some concessions by NISTAC, but also included benefits to NISTAC. Some of the specific terms are detailed above and include the subordination of return on NISTAC's non-cash shares, accelerated payment to NISTAC of accruing patent costs

⁸⁰ Mr. Glasscock indicated Coke's position was based upon both structural and economic issues. As a matter of structure, Coca-Cola pays royalties to its distribution network on a different basis (per case of product versus per dollar sales) and had never before entered into this type of transaction involving intellectual property. As a matter of economics, the percentage amount of the royalty was too high.

⁸¹ Neither Mr. Krause nor Mr. Glasscock could recall the specifics of how the formula for reallocation was negotiated, but clearly recall the purpose of it being in return for elimination of on-going royalties.

(at least \$298,000), a future reallocation of distributions to give priority on return to NISTAC's non-cash shares of NutriJoy stock, and the reversion of ability to sub-license some of the technology. Moreover, The Coca-Cola Company agreed to a minimum annual royalty to NutriJoy, which becomes available for distribution to NutriJoy stockholders to meet the stated return thresholds.

Our interviews revealed a wide-spread belief that the benefits to NISTAC of the NutriJoy/Coca-Cola deal are not limited to the particular transaction terms and that broader benefits to NISTAC's mission and operations have been realized. In the opinion of many, the failure of NutriJoy – NISTAC's first start-up venture – would have been detrimental to NISTAC's ability to raise capital and fulfill its mission in the future. This transaction was the first of its kind for The Coca-Cola Company, which had not previously invested in patented technology. The Coca-Cola transaction provides evidence of NISTAC's innovation in the Manhattan community, its attractiveness as a source of innovation to large multi-national companies, and builds NISTAC's reputation as an innovator and leader. According to NISTAC personnel and Board members, the NutriJoy/Coca-Cola transaction provides a foundation upon which future NISTAC projects and ventures can be built. NISTAC employees indicate that several opportunities have presented themselves or have become more realistic based on the ability to describe the success in consummating a transaction with The Coca-Cola Company.

We did not find evidence of self-dealing by NISTAC Board members in the NutriJoy/Coca-Cola transaction. However, as noted above, there were a few Board or Executive Committee actions taken with respect to the transaction (in particular, empowering the Executive Committee to complete a transaction and negotiate the royalty provision) without recorded disclosures of Board members interests in NutriJoy and vote abstentions, contrary to NISTAC's

Conflict of Interest Policy. Under Kansas law, approval by disinterested directors or “fairness” of the transaction will protect these Board actions under the business judgment rule. Therefore, we recommend that the NISTAC Board discuss the transaction and convene a vote of disinterested directors to ratify the NutriJoy/Coca-Cola transaction.

V. RECOMMENDATIONS

Throughout this report, we have made a number of recommendations regarding how NISTAC could improve its policies, procedures, processes and practices. We provide a summary of those recommendations here.

A. Structure and Compensation Issues

NISTAC has implemented many of the recommendations from Wildman Harrold's 2006 review regarding structure and compensation. There is still work to be done, however, to reach full compliance, and the following steps should be taken to improve the processes to conform with emerging best practices.

1. To ensure the continued independence of the NISTAC and MTM Boards of Directors, as a matter of corporate governance best practice, we recommend that any future member added to the MTM Board of Directors not have served as a member of NISTAC's Board or been employed by MTM/NISTAC for a period of time to be determined by the Board, and that they not join the NISTAC Board for the same period of time after leaving the MTM Board. Likewise, we recommend that any future member added to the NISTAC Executive not have served on the MTM Board within the same time period.

2. To ensure that NISTAC's Executive Committee continues to consist of a super-majority of non-MTM Board members, should Kevin Carr be offered and accept appointment to the MTM Board of Directors, he should either resign from NISTAC's Executive Committee or NISTAC's Executive Committee should be expanded from five to seven members, with five of those members not also serving on the MTM Board.

3. The MTM Bonus Policy should be amended to explicitly apply its annual compensation caps to any and all equity allocated or paid as incentive compensation. Moreover, Mr. Glasscock's Employment Agreement, and any other employment agreements that contain

equity sharing incentives, likewise should be amended to make explicit that they are subject to the total compensation caps of the MTM Bonus Policy.

4. NISTAC should amend its Bonus Policy to clarify that bonuses related to licensing activities are available only to those employees who contribute to the licensing activities. NISTAC should similarly make efforts as part of its budget process with MTM to ensure that employee base compensation is aligned with contributions being made to each particular entity (i.e., MTM employees who perform no NISTAC-related work should not have their compensation reimbursed by NISTAC).

5. NISTAC should return to the practice of having any and all proposed allocations of equity as incentive compensation presented to the Compensation Sub-Committee of NISTAC and the MTM Board for approval prior to any allocation taking place. Any allocations made or proposed without Board approval should be considered for ratification by the Compensation Sub-Committee and the MTM Board prior to any liquidity event involving those allocations.

6. NISTAC, through the Compensation Sub-Committee or another disinterested committee, should establish formal, written guidelines regarding the acceptance of equity in lieu of cash for licensing transactions and other services. The same committee, or its disinterested designee, should review and have final approval authority over the structure of licensing transactions involving equity compensation and over incentive compensation (equity or cash) related to licensing.

7. Annual oversight and approval of total compensation by the Compensation Committee of NISTAC and the MTM Board should be extended to include all employees. The Compensation Sub-Committee and MTM Board should be presented with and approve any and all salary adjustments, bonuses and proposed equity allocations to all employees, including to the

President. We also recommend that the bases for the Compensation Sub-Committee's recommendations be documented in greater detail so that one can more easily determine why such compensation was deemed reasonable.

B. Board Conflict of Interest Policy and Procedures

Although we did not find a basis to conclude that the NutriJoy/Coca-Cola transaction was tainted by conflicts of interest or conferred personal benefit to any particular person apart from those applicable to persons or entities in like situations, we do believe that there are steps that NISTAC can take to improve its policies and processes relating to possible conflicts of interest. Consistent with emerging best practices, implementation of the following steps will improve Board transparency, decision-making, and record keeping.

1. To remove any potential cloud over the NutriJoy/Coca-Cola transaction because some Board or Executive Committee actions are not documented as including disclosures of interests and abstentions on the vote, we recommend that NISTAC's Board convene a vote of disinterested directors to ratify the NutriJoy/Coca-Cola transaction.

2. We recommend that NISTAC consider whether its Conflict of Interest Policy remains sufficient to address and manage the apparent or actual conflicting interests for directors. Currently, NISTAC has a "declare and abstain" policy for votes on transactions in which a director may have a personal interest. Some directors we interviewed felt that such a policy is sufficient to manage conflicts of interest, particularly with this type of organization and small community where many of the people who possess the expertise and experience to serve on the board or be involved in management are also the ones with the means sufficient to be an accredited investor. Others have concerns over the public perception of such potential conflicts or make personal choices not to invest in any entities over which they have management or oversight responsibility. The NISTAC Board should consider these varying views and determine

whether its current policy serves its needs, both operationally and in the realm of public perception.

3. We recommend that NISTAC clarify its procedures for following the Board's Conflict of Interest Policy and improve its record-keeping when such potential conflicts are disclosed. Best practices suggest that disclosures of interests should be made at the beginning of discussion on a given subject and not solely by virtue of abstentions on votes. Disclosures should be made at each meeting in which the potentially conflicting interest is at issue so that knowledge of the interest is not diluted by the passage of time or missed by directors who were absent from some meetings or who are relatively new to the Board. Training for new directors and also on a periodic basis for all directors on policy and procedures, including those relating to conflicts of interest, would be beneficial.

4. We recommend that NISTAC include specific information in its meeting minutes detailing disclosures of potential conflicts of interest and identifying the directors abstaining from votes. This promotes transparency as well as accuracy in situations where a particular action might be reviewed in hindsight.

EXHIBIT 1

Report to NISTAC Board of Directors

NISTAC RESOLUTION

Wildman, Harrold, Allen & Dixon LLP has been engaged to conduct an in-depth assessment of concerns raised in the recent Grant Thornton review of NISTAC as part of the presidential exit analysis mandated by the Kansas Board of Regents. The Wildman Harrold team is led by Beth Fancsali.

RESOLUTION: To clarify and help address the issues raised by the recent analysis of NISTAC by Grant Thornton, and most particularly to help restore public confidence in NISTAC, the NISTAC Board of Directors recommends that President Schulz appoint a committee comprised of about five people to be convened as the NISTAC Review Panel. The Panel should be comprised of independent and respected individuals with the expertise needed to understand and assess the subject matter. The purpose of the Panel should be to assess the issues relating to NISTAC that arose from the Grant Thornton report by reviewing the follow-on Wildman Harrold completed analysis along with any recommendations the firm may suggest arising from that analysis. Specifically, Wildman Harrold will be seeking to determine and the Panel should help confirm:

1. If the recommendations made in 2006 by Wildman Harrold, following its legal review of NISTAC and its affiliates, were properly implemented;
2. If existing conflict of interest policies were followed in actions related to the establishment of a strategic partnership between NutriJoy, Inc. and The Coca-Cola Company; and
3. If any improper financial transactions were found, and particularly whether any individuals benefited from the NutriJoy/Coca-Cola transaction as a result of that person's position in NISTAC and in ways that either (a) were not provided to other investors or (b) disadvantaged public investments in NutriJoy via Kansas entities.

EXHIBIT 2
Report to NISTAC Board of Directors
Documents Reviewed by Grant Thornton

Documents Categorized by Company

MACC/NISTAC

Board of Directors Meeting Minutes from 2000–2008
General Ledgers and Audited Financial Statements FY2003–2008
Balance Sheet and Income Statement, current as of mid-November 2008
List of “test transactions”
NISTAC Staff listing
List of Affiliated Companies
Executive Committee Resolution 4/21/05
Executive Committee Minutes 1/11/06 and 8/15/07
MACC Bylaws
Amended & Restated Bylaws
NISTAC-NutriJoy License Agreement 7/1/00 and Amendments
NISTAC-NutriJoy License Agreement 4/17/04
NISTAC-MTM Services Agreement 6/30/04 and 8/20/96
Wildman Memorandum 3/8/2006
NISTAC Statement of Substantial Interest Forms
KTEC Grant Agreement FY2009, FY2008, FY2002

MTM

Board of Directors Meeting Minutes from 2000–2008
NISTAC-MTM NISTAC Compensation Sub-Committee/MTM Board Meeting
Minutes 10/15/07
General Ledgers and Audited Financial Statements FY2003–2008
Balance Sheet and Income Statement, current as of mid-November 2008
List of “test transactions”
MTM Deferred Compensation Plan for certain key employees 8/21/01 and 1/23/03
Amended & Restated Bylaws
Glasscock Employment Agreement
Krause Employment Agreement
Trust Under Mid-America Technology Management Inc. Deferred Compensation
Plan

Manhattan Holdings

Board of Directors Meeting Minutes from 2000–2008
General Ledgers and Audited Financial Statements FY2003–2008
Balance Sheet and Income Statement, current as of mid-November 2008

List of "test transactions"

Members & Investment Committee Minutes 7/20/05

Annual Member Meeting Minutes 10/17/06

Operating Agreement 10/17/06 and 6/24/97

Schedule of Distribution from Food Labs

NutriJoy

Redacted list of shareholders

EXHIBIT 3
Report to NISTAC Board of Directors
Documents Reviewed by Wildman Harrold

Documents Categorized by Company

MACC/NISTAC

- Board of Directors Meeting Minutes from 2000–2008
- Annual Members Meeting Minutes from 2000–2008
- Executive Committee Minutes 1/11/06, 3/14/06, and 8/15/07
- Executive Committee Report to the Board 1/12/06
- Resolution in Lieu of a Meeting 4/20/05
- Augmented Executive Committee Agenda 6/8/05
- Assistant Secretary's notes for Board, Executive Committee, Augmented Executive Committee, and Member from 2004 to 2008
- Packets of materials sent to directors prior to each meeting from 2005–2008
 - Draft versions of Meeting Minutes
 - President's Notes
 - Meeting Schedules
 - Meeting Agendas
 - Financial Statements
 - Licensing Board Updates
 - Balance Sheet Forecast
 - Budget & Expenditures
- List of Board members from 2000–2009
- General Ledgers and Audited Financial Statements FY2003–2008
- Balance Sheet and Income Statement, current as of mid-November 2008
- List of "test transactions"
- Bylaws
- Draft and Final Amended & Restated Bylaws
- NISTAC-NutriJoy License Agreement 7/1/00, Amendment 4/17/04, and Second Amendment 1/2/08
- NISTAC-NutriJoy License Agreement 4/17/04
- MTM-NISTAC Administrative and Consulting Services Agreement 6/30/04
- NISTAC Proposal for Reinstatement of Membership for the City of Manhattan
- Convertible Note Agreement
- KTEC Grant FY2009
- NISTAC-NutriJoy Promissory Notes 1/1/07, and superseded 1/1/07
- Consent to change of control at NutriJoy 1/25/08
- Statement of Substantial Interest Forms from 2008–2009
- Letter to Gary Hellebust 3/26/09
- CBIZ Compensation Study
- Memorandum Regarding Implementation of 2005–2006 Legal Review of NISTAC Structure and Operations 3/20/09

NISTAC Ten-Year Strategic Plan 2005–2014, Revised 2008
Memorandum Regarding Review of Structure & Governance for NISTAC & Affiliates
3/20/09
NISTAC Client Companies' Board of Directors List
NISTAC Performance Goals for FY2006
Review of NISTAC Performance vs. Approved Goals for FY2005–08
List of NISTAC/MTM Memberships
Kansas TADAC Program Brief
Corporate Policy Manual for NISTAC, MTM, MHL 3/2005
Manhattan Economic Development Opportunity Fund Accountability Checklist, 2004–
2008
NISTAC Organizational Structure
NISTAC Staff listing
Wildman Memorandum 3/8/06
List of Affiliated Companies
State Science and Technology Institute Whitepaper 6/98
News articles
Grant Thornton Engagement Letter
Grant Thornton Report

MTM

Board of Directors Meeting Minutes from 2005–2007
Annual Stockholders Meeting Minutes from 2005–2007
NISTAC-MTM Joint Coordinating Committee/Compensation Sub-Committee/MTM
Board Meeting Minutes from 2006–2008
Packets of materials sent to Compensation Sub-Committee and MTM Board prior to each
meeting from 2005–2008
Resolution in Lieu of a Meeting 5/18/06, 5/24/06, 9/29/06, 7/25/07
Assistant Secretary's notes for Board, Executive Committee, Shareholder, and
JCC/CSC Meetings for MTM from 2004–2008
List of Board members from 2000–2009
General Ledgers and Audited Financial Statements FY2003–2008
Balance Sheet and Income Statement, current as of mid-November 2008
List of "test transactions"
Amended & Restated Bylaws
Articles of Incorporation
Amended Articles of Incorporation
Bonus Incentive Compensation Policy for MTM 5/18/06
Glasscock Employment Agreement 10/1/05 and 10/1/08
Glasscock Employment Agreement Amendment 10/16/07
Krause Employment Agreement 1/1/07
MTM-NISTAC Administrative and Consulting Services Agreement 6/30/04
NISTAC-MTM-NutriJoy Services Agreement 1/30/08
MTM-NutriJoy Promissory Note 4/1/07
Technology Management Trust Guidelines

Technology Management Trust: Equity Allocation Guidelines
Technology Management Trust Proposal
MTM Trust Equity Allocations 10/06
Equity Allocations for Mid-America Harvest LLC
Equity Allocations for ScavengeTech LLC
Allocation of Pooled Equity Holding on Behalf of MTM Workers 8/09
Board Approvals for Salary Adjustments and Bonuses for Krause and Glasscock 2005–
2008
Cash Incentives Paid to Licensing Staff and Other Staff

Manhattan Holdings

Board of Directors Meeting Minutes 2006
Members & Investment Committee Minutes 7/20/05
Annual Member Meeting Minutes 10/17/06 and 10/16/07
Draft Annual Member Meeting Minutes 9/25/08
Annual Member Meeting Agendas from 2006–2008
Assistant Secretary's notes for Board and Member Meetings for MHL 2004–2008
General Ledgers and Audited Financial Statements FY2003–2008
Balance Sheet and Income Statement, current as of mid-November 2008
List of "test transactions"
Operating Agreement 10/17/06 and 6/24/97
Status of Fund 2/28/09
List of Investment Committee, Members, Advisory Board Members
Application for Manhattan Economic Development Opportunity Fund 9/95

NutriJoy

Board of Directors Meeting Minutes from 2001–2008
Annual Shareholders Meeting Minutes from 2001–2007
Assistant Secretary's notes for Board and Shareholder Meetings for NutriJoy from 2004–
2008
Amended and Restated Articles of Incorporation 1/4/08
Bylaws
The Coca-Cola Company Master Agreement for Consulting Services
Complete list of shareholders
Redacted list of shareholders
Distributions to Shareholders 1/31/08
Share Purchase Agreement between NutriJoy, Inc. and The Coca-Cola Company 1/7/08
Disclosure Schedules to Share Purchase Agreement
License Agreement between NutriJoy, Inc. and The Coca-Cola Company 1/29/08
The Coca-Cola Company deal proposals and notes
Stockholders Agreement for NutriJoy, Inc. 1/9/08
Nutritional Beverage Conceptual Proposal
NutriJoy Private Placement Memorandum and Business Plans from 2002–2005
A Provisional Proposal for an Investment in NutriJoy, Inc. by MHL 2/00

EXHIBIT 4
Report to NISTAC Board of Directors
Persons Interviewed by Wildman Harrold

- **Ms. Vicki Appelhans** Vice President of Finance and Controller of NISTAC and MTM
- **Mr. Lyle Butler** President and CEO of Manhattan Area Chamber of Commerce; Director of NISTAC and former Augmented Executive Committee member of NISTAC
- **Mr. Kevin Carr** Interim President of KTEC; Director and Executive Committee Member of NISTAC
- **Dean Fred Cholick** Dean of the College of Agriculture at Kansas State University; Director of NISTAC
- **Mr. Michael Daniels** Director, Executive Committee Member (Vice Chair), and Compensation Sub-Committee Member of NISTAC; Investment Committee Member of Manhattan Holdings
- **Mr. Joe Downey** Director, Executive Committee Member, and Compensation Sub-Committee Member of NISTAC; former Augmented Executive Committee member of NISTAC
- **Dean Yar Ebadi** Dean of the School of Business at Kansas State University; Director of NISTAC
- **Dean John English** Dean of the College of Engineering at Kansas State University; Director of NISTAC
- **Mr. Ronald Fehr** City Manager of the City of Manhattan; Director of NISTAC
- **Mr. Kent Glasscock** President & CEO, Director, and Executive Committee Member of NISTAC; President & CEO of MTM; Fund Manager of Manhattan Holdings; Director of NutriJoy
- **Dr. John Graham** Director and Chair of MTM; former Director, Chair and Executive Committee Member of NISTAC
- **Mr. Bruce Kent** Former legal counsel for the Kansas State University Foundation
- **Dr. Terry King** Former Dean of the College of Engineering at Kansas State University; former Director and former Augmented Executive Committee Member of NISTAC

- **Mr. Joseph Knopp** Private attorney in Manhattan, Kansas
- **Mr. Robert Krause** Former Executive Chair and Director of NISTAC; former Director of MTM; Director and Chair of NutriJoy
- **Mr. Dennis Mullin** Director of MTM
- **Sen. Lana Oleen** Director of NISTAC
- **Ms. Sue Peterson** Director of Governmental Relations at Kansas State University; Director and former Augmented Executive Committee Member of NISTAC
- **Mr. Robert Reader** Vice President of Licensing at NISTAC
- **Dr. Ronald Sampson** Director and Secretary of NISTAC; former President & CEO of NISTAC and MTM; former President, interim CEO and Director of NutriJoy
- **Mr. Bruce Shubert** Vice President of Finance at Kansas State University; Director of NISTAC
- **Mr. Roger Sink** Director of MTM
- **Mr. Richard Thiessen** Former Director, Chair, Executive Committee Member, and Compensation Sub-Committee Member of NISTAC
- **Dr. Ronald Trewyn** Vice President of Research at Kansas State University; Director, Chair, and Executive Committee Member of NISTAC; Director of MTM; former Director of NutriJoy
- **Rep. Kenny Wilk** Director and Compensation Sub-Committee Member of NISTAC; former Augmented Executive Committee Member of NISTAC