



DIVISION OF  
CORPORATION FINANCE

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

August 23, 2022

David F. Marx  
Dorsey & Whitney LLP

Re: Avinger, Inc. (the "Company")  
Incoming letter received May 17, 2022

Dear David F. Marx:

This letter is in response to your correspondence concerning the shareholder proposal (the "Revised Proposal") submitted to the Company by Michael Novesky et al. (the "Proponents") for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders. Because the Revised Proposal replaced the Original Proposal Language, as defined in your letter, our response addresses only the Revised Proposal.

The Revised Proposal would have the Company "[e]xplore options for merger and acquisition [sic] (M&A) within one year of the 2022 Annual meeting."

There appears to be some basis for your view that the Company may exclude the Proposal under Rule 14a-8(f) because the Proponents did not comply with Rule 14a-8(b)(1)(i). As required by Rule 14a-8(f), the Company notified the Proponents of the problem, and the Proponents failed to adequately correct it. Accordingly, we will not recommend enforcement action to the Commission if the Company omits the Proposal from its proxy materials in reliance on Rules 14a-8(b)(1)(i) and 14a-8(f). In reaching this position, we have not found it necessary to address the alternative bases for omission upon which the Company relies.

Copies of all of the correspondence on which this response is based will be made available on our website at <https://www.sec.gov/corpfin/2021-2022-shareholder-proposals-no-action>.

Sincerely,

Rule 14a-8 Review Team

cc: Prasanna Gulur



**Via Electronic Mail to [shareholderproposals@sec.gov](mailto:shareholderproposals@sec.gov)**

U.S. Securities and Exchange Commission  
Division of Corporation Finance  
Office of Chief Counsel  
100 F Street, N.E.  
Washington D.C. 20549

Re: Avinger, Inc. – 2022 Annual Meeting

Omission of Shareholder Proposal Submitted by Md Monowaruz Zaman and Prasanna Gulur, and the other shareholders identified on the signature page thereto

Ladies and Gentlemen:

Pursuant to Rule 14a-8(j) promulgated under the Securities Exchange Act of 1934, as amended, we are writing on behalf of our client, Avinger, Inc., a Delaware corporation (the “Company”), to notify the Securities and Exchange Commission (the “Commission”) that the Company intends to exclude from its proxy materials for its 2022 Annual Meeting of stockholders (the “2022 Proxy Materials”) the stockholder proposal set forth below (the “Proposal”), which includes both the Original Proposal Language and the Revised Proposal Language as described below, and which was received from Monowaruz Zaman, Prasanna Gulur, and the other shareholder proponents identified therein (collectively, the “Proponents”). A copy of the Proposal and related correspondence is attached to this letter as Exhibit A.

We hereby request confirmation that the Staff of the Division of Corporation Finance (the “Staff”) of the Commission will not recommend any enforcement action if, in reliance on Rule 14a-8, the Company omits the Proposal from the 2022 Proxy Materials.

On April 1, 2022, the Company announced that the Board of Directors (the “Board”) of the Company had scheduled the Company’s 2022 Annual Meeting for June 3, 2022, with a record date of April 6, 2022. Because the 2022 Annual Meeting was more than 30 days before the anniversary of the Company’s 2021 Annual Meeting, the Company also announced that the deadline for stockholder proposals submitted pursuant to Rule 14a-8 to be considered for inclusion in proxy materials for the 2022 Annual Meeting was April 11, 2022. Following the Company’s receipt of the Original Proposal Language, on April 8, 2022, and then the Revised Proposal Language on April 29, 2022, the Company announced a postponement of the Annual Meeting to a new date of October 14, 2022 to allow the Staff time to review this letter.

In accordance with Section C of Staff Legal Bulletin No. 14D (Nov. 7, 2008) (“SLB 14D”), we are emailing this letter and its attachments to the Staff at [shareholderproposals@sec.gov](mailto:shareholderproposals@sec.gov). In accordance with Rule 14a-8(j), we are simultaneously sending a copy of this letter and its attachments to the Proponents as notice of the Company’s intent to omit the Proposal from the 2022 Proxy Materials.

Rule 14a-8(k) and Section E of SLB 14D provide that shareholder proponents are required to send companies a copy of any correspondence that the shareholder proponents elect to submit to the Commission or the Staff. Accordingly, we are taking this opportunity to remind the Proponents that if they submit correspondence to the Commission or the Staff with respect to the Proposal, a copy of that correspondence should concurrently be furnished to the Company.

## **I. The Proposal**

On April 8, 2022, the Company received a letter from the Proponents requesting the inclusion of the below proposals in the 2022 Proxy Materials (the “Original Proposal Language”):

1. Get a strategic partner for commercialization of existing products leveraging its larger market footprint and funding for continuing development of coronary CTO.
2. Alternatively, sell the company to the highest bidder.

As described in greater detail below, on April 29, 2022, the Company received an updated Proposal, dated April 28, 2022, from one of the Proponents, Michael Novesky, in which Mr. Novesky appointed Prasanna Gulur as his representative and provided the below revised proposal language (the “Revised Proposal Language”):

“Explore options for merger and acquisition (sic) (M&A) within one year of the 2022 Annual meeting.”

A full copy of the Proposal and related correspondence with the Proponents is attached to this letter as Exhibit A. We have prepared the following analysis with respect to both the Original Proposal Language and the Revised Proposal Language.

## **II. Statement of Reasons to Exclude**

As described in greater detail below, the Company believes that the Proposal, in the form of the Original Proposal Language or the Revised Proposal Language, may be properly excluded from the 2022 Proxy Materials pursuant to

- (i) Rule 14a-8(b) and Rule 14a-8(f) because (A) the Proponents failed to establish with compliant documentation that at least one of the Proponents continuously held the requisite amount of the Company’s securities entitled to be voted on the Proposal at the Company’s 2022 Annual Meeting of stockholders and (B) the Proponents have not provided compliant documentation relating to the appointment of Prasanna Gulur as their representative;
- (ii) Rule 14a-8(i)(7) because the Proposal deals with matters relating to the Company’s ordinary business operations, and
- (iii) Rule 14a-8(i)(10) because the Company has substantially implemented the Proposal.

A. The Proposal, in the form of the Original Proposal Language or the Revised Proposal Language, may be omitted from the 2022 Proxy Materials under Rule 14a-8(b) and Rule 14a-8(f) because (A) the Proponents failed to establish with compliant documentation that at least one of the Proponents continuously held the requisite amount of the

Company's securities entitled to be voted on the Proposal at the Company's 2022 Annual Meeting of stockholders and (B) the Proponents have not provided compliant documentation relating to the appointment of Prasanna Gulur as their representative.

Rule 14a-8(b)(1)(i) provides that, to be eligible to submit a proposal for a company's annual meeting that is scheduled to be held on or after January 1, 2022, a proponent must have continuously held:

- At least \$2,000 in market value of the company's securities entitled to vote on the proposal for at least three years;
- At least \$15,000 in market value of the company's securities entitled to vote on the proposal for at least two years; or
- At least \$25,000 in market value of the company's securities entitled to vote on the proposal for at least one year.

Alternatively, under Rule 14a-8(b)(3), if a shareholder proponent held at least \$2,000 of the company's securities entitled to vote on the proposal for at least one year as of January 4, 2021, and the shareholder proponent has continuously maintained a minimum investment of at least \$2,000 of such securities from January 4, 2021 through the date the proposal is submitted to the company, the shareholder proponent may provide proof of meeting such ownership requirement. Under Rule 14a-8(b)(2) (or 14a-8(b)(3), if applicable), if a proponent is not a registered shareholder of a company and has not made a filing with the Commission detailing the proponent's beneficial ownership of shares in the company (as described in Rule 14a-8(b)(2)(ii)(B)), such proponent has the burden to prove that he meets the beneficial ownership requirements of Rule 14a-8(b)(1) by submitting to the company (i) a written statement from the "record" holder of the securities verifying that, at the time the proponent submitted the proposal, the proponent continuously held the requisite amount of such securities for the requisite time period and (ii) the proponent's own written statement that he intends to continue to hold such securities through the date of the meeting. If the proponent fails to provide such proof of ownership, the company may exclude the proposal, but only if the company notifies the proponent in writing of such deficiency within 14 calendar days of receiving the proposal and the proponent fails to adequately correct it. A proponent's response to such notice of deficiency must be postmarked or transmitted electronically to the company no later than 14 days from the date the proponent receives the notice of deficiency.

The Company received the Proposal on April 8, 2022. The cover letter accompanying the Proposal did not include proof of ownership of the requisite amount of shares and a statement that such Proponent intends to continue to hold the requisite amount of shares through the date of the 2022 Annual Meeting. None of the Proponents appear on the records of the Company as a registered shareholder.

Accordingly, because the Company was unable to verify the Proponent's eligibility to submit the Proposal, and in compliance with the timing set forth in Rule 14a-8, the Company sent a notice of deficiency, which is attached as Exhibit B to this letter (the "Notice of Deficiency"), to the Proponents on April 19, 2022, requesting that the Proponent provide the necessary proof required by Rule 14a-8(b)(2) (or Rule 14a-8(b)(3), if applicable) and a statement that the Proponents intend to continuously hold the requisite amount of shares through the date of the

2022 Annual Meeting, within 14 calendar days of receiving the Company's request. The Notice of Deficiency clearly set out what documentation would be sufficient to prove the requisite ownership.

The Notice of Deficiency was sent by e-mail on April 19, 2022 (and was followed by a courtesy hard copy, which was delivered on April 21, 2022). As shown in Exhibit A, the Proponents, by email, acknowledged receipt of the Notice of Deficiency on April 19, 2022 and requested advice from the Company regarding the procedures necessary for the Proponents to comply with the requirements of Rule 14a-8. On April 19, 2022, the Company responded to the Proponents' request for assistance, advising the Proponents to obtain the advice of their own legal counsel, offering to arrange a discussion between the Proponents' legal counsel and the Company's legal counsel, and offering to have a discussion between the Company and the Proponents regarding the nature of the Proposal. On April 27, 2022, the Proponents sent another email to the Company in which they indicated that the Proponents were considering revising the resolution included in the Proposal to state "Explore options for partnership with funding or selling the company to the highest bidder or both within 6 months."

On April 28, 2022, the Company spoke with the Proponents on a conference call, in which the Company reminded the Proponents of the procedural deficiencies of the Proposal described in the Notice of Deficiency and the requirement for the Proponents to satisfy the procedural requirements of Rule 14a-8 in order to have the Proposal included in the 2022 Proxy Materials. The Company again advised the Proponents to seek advice from their legal counsel. The Company also responded to questions from the Proponents relating to the Company's products, the Company's market, the competitive landscape and the Proposal.

On April 29, 2022, the Company received a letter (the "April 29 Letter") dated April 28, 2022, from one of the Proponents, Michael Novesky (who does not appear on the records of the Company as a registered shareholder), in which Mr. Novesky appointed Prasanna Gulur as his representative with respect to the Proposal. Mr. Novesky's letter also provided the Revised Proposal Language. The April 29 Letter included a statement that Mr. Novesky has "been holding minimum \$25,000 worth of Avinger's share (AVGR) for one year preceding and including April 8, 2022 and intend to continue holding the same through the date of the 2022 Annual Meeting, if [the] proposal is included in the proxy," and provided copies of periodic investment account statements detailing his beneficial ownership of shares of the Company's common stock at the end of such periods. The April 29 Letter did not include a statement from the record holder of Mr. Novesky's shares. In Staff Legal Bullet No. 14 (Jul. 13, 2011), the Staff stated that a shareholder's monthly, quarterly, or other periodic investment statements are not sufficient to demonstrate continuous ownership of the securities. Rather, "[a] shareholder must submit an affirmative written statement from the record holder of his or her securities that specifically verifies that the shareholder owned the securities *continuously* for a period of one year as of the time of submitting the proposal." The April 29 Letter did not include such statement from the record holder of Mr. Novesky's shares. Therefore, Mr. Novesky did not provide the documentation required under Rule 14a-8(b).

On April 30, 2022, the Company received a letter (the "April 30 Letter") from Prasanna Gulur, purporting to act as representative of the Proponents, also providing the Revised Proposal Language. The April 30 Letter did not provide compliant documentary proof of ownership or

statement of intent of a Proponent to continue to hold the required amount of shares through the 2022 Annual Meeting. The Proponents did not provide compliant documentation as required under Rule 14a-8(b)(1)(iv) relating to the appointment of a representative.

Accordingly, we believe the Proposal, including the Original Proposal Language and the Revised Proposal Language, may be excluded from the Company's 2022 Proxy Materials. See, e.g., Meta Platforms, Inc. (Jan. 18, 2022) (concurring in exclusion of proposal pursuant to Rule 14a-8(f) where the proponent did not provide proof of ownership to satisfy the eligibility requirements within the time set forth in Rule 14a-8), Cisco Systems, Inc. (June 11, 2021) (same); NortonLifeLock Inc. (May 7, 2021) (same); Union Pacific Corporation (Jan. 15, 2021) (same).

Further, since a statement of intent has only been submitted by one Proponent, we believe the Original Proposal Language may be excluded from the Company's 2022 Proxy Materials because it constitutes two proposals submitted by one Proponent:

1. Get a strategic partner for commercialization of existing products leveraging its larger market footprint and funding for continuing development of coronary CTO.
2. Alternatively, sell the company to the highest bidder.

In addition, according to Rule 14a-8(c), each person may submit no more than one proposal, directly or indirectly, to a company for a particular shareholders' meeting.

Further, under guidance provided in Staff Legal Bulletin No. 14F (Oct. 18, 2011), if a shareholder submits a revised proposal after the Company's deadline, the Company does not have to accept the revised proposal and may exclude the revised proposal under Rule 14a-8(e). On this basis, the Company believes that the Revised Proposal Language may be excluded under Rule 14a-8(e), because it was submitted after the shareholder proposal deadline of April 11, 2022.

B. Under Rule 14a-8(i)(7), the Proposal may be omitted because it deals with matters relating to the Company's ordinary business operations.

Rule 14a-8(i)(7) permits the exclusion of a shareholder proposal that deals with a "matter relating to the company's ordinary business operations." According to the Commission, the term "ordinary business" in this context "refers to matters that are not necessarily 'ordinary' in the common meaning of the word," but instead "is rooted in the corporate law concept providing management with flexibility in directing certain core matters involving the company's business and operations." Exchange Act Release No. 40018 (May 21, 1998) (the "1998 Release"). In the 1998 Release, the Commission outlined two central considerations for determining whether the ordinary business exclusion applies: (1) whether the subject matter of the proposal relates to a task "so fundamental to management's ability to run a company on a day-to-day basis that [it] could not, as a practical matter, be subject to direct shareholder oversight"; and (2) "the degree to which the proposal seeks to 'micro-manage' the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment."

- a. Assuming that the Original Proposal Language applies, the subject matter of the Proposal relates to the development, distribution, and marketing of the Company's products, which is a matter that is fundamental to management's ability to run the Company on a daily basis.

The Proposal requests that the Company “[g]et a strategic partner for commercialization of existing products leveraging its larger market footprint and funding for continuing development of coronary CTO” or, “[a]lternatively, sell the company to the highest bidder.” The Company is a commercial-stage medical device company developing and marketing intravascular image-guided, catheter-based systems for diagnosis and treatment of Peripheral Artery Disease (“PAD”), including the development and marketing of its family of chronic total occlusion (“CTO”) catheters. The core of the Company's business is the design, development and marketing and selling of such devices. Thus, as further discussed below, there is no question that the Proposal goes to the very heart of the Company's ordinary business operations. As a result, the Proposal may be excluded pursuant to Rule 14a-8(i)(7).

The Staff has consistently taken the position that decisions by companies as to the products that they sell and the manner in which those products are designed, developed, distributed and marketed are a fundamental part of a company's ordinary business operations and exactly the types of operational matters that the ordinary business operations exception was designed to cover. See, e.g., Pepco Holdings, Inc. (avail. Feb. 18, 2011) (permitting exclusion of a proposal encouraging the company to “aggressively study, implement and pursue” the market for solar technology as a way to increase profits because the proposal related to the company's ordinary business operations, specifically “the products and services offered for sale by the company”); Papa John's International Inc. (avail. Feb. 13, 2015) (permitting exclusion under Rule 14a-8(i)(7) of a proposal encouraging the company to expand its menu offerings to include vegan options to, in part, meet growing demand for plant-based foods because the proposal related to “the products offered for sale by the company”); Procter & Gamble Co. (avail. July 15, 2009) (permitting exclusion under Rule 14a-8(i)(7) of a proposal to requesting that the company cease making cat-kibble, encourage consumers to buy and suppliers to stock certain types of low carbohydrate pet food and consider what opportunities exist to develop its own non-carbohydrate pet food because it related to the “sale of a particular product”).

Like the proposals described above, this Proposal addresses matters clearly within the scope of the Company's ordinary business operations, particularly decisions as to the development, sale and marketing of its products. By calling on the Company to obtain a strategic partner for the commercialization of existing products and development of coronary CTO products, the Proposal directly relates to the Company's decision as to whether and how it should develop and sell its products. Such decisions are “so fundamental to management's ability to run [the C]ompany on a day-to-day basis that they [can] not, as a practical matter, be subject to direct shareholder oversight.” See 1998 Release. Accordingly, because the Proposal relates to management's decisions regarding the development, sale and marketing of the products offered by the Company, the Proposal may be excluded pursuant to Rule 14a-8(i)(7) as relating to the Company's ordinary business operations.

- b. Assuming that the Original Proposal Language applies, the Proposal is not limited to extraordinary transactions or significant social policy issues for purposes of Rule 14a-8(i)(7).

In Staff Legal Bulletin No. 14A, the Staff clarified that to constitute ordinary business, a proposal must not raise a “significant social policy issue” which transcends the Company’s ordinary business operations. The Proposal that the Company “[g]et a strategic partner for commercialization of existing products leveraging its larger market footprint and funding for continuing development of coronary CTO” or, “[a]lternatively, sell the company to the highest bidder,” does not raise a significant social policy issue, but instead deals with the management and operation of the Company.

If the Proposal constitutes ordinary business and does not raise a “significant social policy issue” it may be excluded under Rule 14a-8(i)(7). However, even if one aspect of the proposal involves an extraordinary corporate transaction, the Staff has consistently concurred with excluding proposals that also implicate the company’s ordinary business. The Proposal here deals with the Company’s ordinary business operations, because it is related to the Company’s approach to commercializing its existing products and developing new products or, in the alternative, seeking a sale of the Company, which does not transcend the Company’s ordinary business merely because it may include consideration of an extraordinary transaction.

The Staff has consistently found proposals which seek to increase shareholder value in ways not solely limited to extraordinary transactions excludable under Rule 14a-8(i)(7). In Donegal Group, Inc. (avail. Feb. 16, 2012), the Staff found that a proposal to hire an investment firm to “evaluate alternatives that could enhance shareholder value including, but not limited to, a merger or outright sale of DGI” was excludable, and stated that the “proposal appears to relate to both extraordinary transactions and non-extraordinary transactions.” The Staff further specifically stated: “Proposals concerning the exploration of strategic alternatives for maximizing shareholder value which relate to both extraordinary and nonextraordinary transactions are generally excludable under rule 14a-8(i)(7).” Similarly, in Analysts International Corp. (avail. Mar. 11, 2013), the Staff allowed the exclusion of a proposal requesting that the board of directors “immediately engage the services of an investment banking firm to evaluate alternatives that could enhance shareholder value including, but not limited to, a merger or sale of the company, and ... that the board take all other steps necessary to actively seek a sale or merger of the company on terms that will maximize share value for shareholders.”

Other examples include Anchor Bancorp, Inc. (avail. July 11, 2013) (permitting the exclusion of a proposal under Rule 14a-8(i)(7) that requested that the board consider engaging the services of an investment banking firm to evaluate alternatives to “maximize shareholder value, including, but not limited to a sale of the Company as a whole, merger or other transaction for all or substantially all of the assets of the Company”); and Central Federal Corp. (avail. Mar. 8, 2010) (permitting the exclusion of a proposal under Rule 14a-8(i)(7) that called for the board to both appoint an independent board committee and retain a leading investment banking firm to explore strategic alternatives for maximizing shareholder value, including the sale or merger of the company, and authorize the committee and the investment banker to solicit offers for the sale or merger of the company because “the proposal appear[ed] to relate to both extraordinary transactions and non-extraordinary transactions”).



Recent no-action letters continue this line of decisions that distinguish between exclusively extraordinary transactions and proposals that also involve some ordinary business decisions. In Cerus Corp. (avail. Apr. 13, 2018), the Staff did not concur with the exclusion under Rule 14a-8(i)(7) of the proposal, which requested that the subject company “begin an orderly process of retaining advisors to seriously study strategic alternatives, and empower a committee of its independent directors to evaluate those alternatives with advisors in exercise of their fiduciary responsibilities to maximize stockholder value.” The Cerus supporting statement clarified that the proposal was focused on the company becoming “part of a larger firm,” and only considered “strategic alternatives” in the form of a change in control transaction. However, in Bank of America Corporation (avail. Feb. 26, 2019), the Staff concurred with the exclusion under Rule 14a-8(i)(7) of the proposal, which requested that “the Bank of America begin an orderly process of retaining advisors to study strategic alternatives and empower a committee of its independent directors to evaluate those alternatives with advisors in exercise of their fiduciary responsibilities to maximize shareholder value,” essentially the same language as that used in Cerus. Unlike in Cerus, however, the statement of support in Bank of America did not specify that the only appropriate alternatives to be considered were change of control transactions. The Staff found that the Proposal related to “both extraordinary transactions and non-extraordinary transactions,” and did not recommend action if the proposal was excluded.

Here, the Proposal requires the Company to identify strategic partners to commercialize existing products and provide funding for continued development of new products, or, in the alternative, sell the Company to the highest bidder. Unlike the proposal presented in the Cerus Corp. letter, the Proposal is not limited to an extraordinary transaction. The Proposal provides the Company with latitude to identify strategic partnerships and other relationships to support the Company’s product commercialization and development efforts before the Board considers a sale of the Company. The Proposal does not “transcend” the Company’s day-to-day operations, because the Board considers strategic partnerships and other commercial relationships when evaluating the Company’s product commercialization and development efforts. As described above, the Staff has consistently stated that “Proposals concerning the exploration of strategic alternatives for maximizing shareholder value which relate to both extraordinary and non-extraordinary transactions are generally excludable under rule 14a-8(i)(7).” Accordingly, the Proposal may be excluded pursuant to Rule 14a-8(i)(7) as relating to the Company’s ordinary business operations.

- c. Assuming that the Revised Proposal Language applies, the Proposal seeks to micromanage the Company because it imposes a specific deadline by which the Proposal must be implemented that inappropriately limits the discretion of the Board and management.

According to the 1998 Release, with respect to determining whether a shareholder proposal “seeks to ‘micro-manage’ the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment,” the Staff will determine that a proposal seeks to micromanage a company when it specifies “intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies” that would cause the demands of the Proposal to displace the judgment of a company’s board of directors and/or management. In addition, Staff Legal Bulletin No. 14L (Nov. 3, 2021) (“SLB 14L”) clarified that in considering arguments for exclusion based on micro-management,

the Staff “will focus on the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management.” Furthermore, the Staff noted that the ordinary business exclusion “is designed to preserve management’s discretion on ordinary business matters but not prevent shareholders from providing high-level direction on large strategic corporate matters.”

Under the Revised Proposal Language, the Proposal requires the Company to explore options to effect a merger or acquisition involving the Company within one year of the 2022 Annual Meeting. As discussed in further detail below, because the Proposal imposes a specific deadline by which a strategic transaction must be implemented, it seeks to micromanage the Company by inappropriately limiting the discretion of the Board and management and may therefore be properly excluded from the Proxy Materials pursuant to Rule 14a-8(i)(7).

As noted above, the Staff states in the 1998 Release and SLB 14L that proposals demanding a specific timeframe or timeline can be interpreted as an attempt to micromanage the company by inappropriately limiting the discretion of the board of directors or management to manage complex matters with the flexibility necessary to fulfill their fiduciary duties. Here, the Proposal sets a specific deadline of one year from the 2022 Annual Meeting for a merger or acquisition, and provides neither the Board nor management with discretion in executing on this complex task.

Here, by imposing a specific deadline by which the Company must effect a strategic transaction, the Proposal micromanages the Company in the manner deemed impermissible by the 1998 Release and SLB 14L. If the Company’s stockholders approved the Proposal, the Board and management would be required to effect a strategic transaction within one year of the 2022 Annual Meeting. Their judgment and discretion in terms of when and how to maximize value for the stockholders in a strategic transaction would be limited by this strict deadline. Under ordinary circumstances, the Company’s Board and management would have flexibility to consider different options, weigh the advantages and disadvantages of each and determine which, if any, transaction the Company should pursue to maximize value for stockholders. As described in further detail below, the Board has, within the last several years, evaluated several opportunities for strategic transactions involving potential acquisitions by the Company, or combinations of the Company with a third party. In each case, the Board, given sufficient time to fully evaluate such opportunities, determined that they were not in the best interests of the Company or its shareholders. Requiring a merger or acquisition to take place within one year of the 2022 Annual Meeting would limit the Board to accepting the best option that becomes available in such timeframe, rather than a transaction that would be in the best interests of the shareholders, which makes it difficult for the Board and management to fulfill their fiduciary duties to stockholders. The Proposal, by imposing a strict and arbitrary deadline, strips the Board and management of discretion and judgment to determine the optimal timing or even the nature of a strategic transaction because it must occur under all circumstances no later than one year from the 2022 Annual Meeting. In this way, the Proposal seeks to micromanage the Company and may therefore be properly excluded from the Proxy Materials pursuant to Rule 14a-8(i)(7).

The deadline specified in the Proposal is completely arbitrary—the Proponents did not include a rationale or analysis for the choice of this deadline. Forcing the Company to meet an

arbitrary timeline inappropriately limits the Board's ability to exercise its discretion to act in the best interest of its stockholders. Thus, because the Proposal seeks to micromanage the Company by unduly restricting the authority of the Board to manage the timing and execution of a strategic review process in the performance of its fiduciary duties, the Proposal may be properly excluded from the Proxy Materials pursuant to Rule 14a-8(i)(7).

C. Under Rule 14a-8(i)(10), the Proposal, as revised in the Revised Proposal Language, may be omitted because the Company has substantially implemented the Proposal.

Rule 14a-8(i)(10) permits a company to exclude a stockholder proposal from its proxy materials if the company has substantially implemented the proposal. In explaining the scope of a predecessor to Rule 14a-8(i)(10), the Commission stated that the exclusion is "designed to avoid the possibility of shareholders having to consider matters which already have been favorably acted upon by the management." Exchange Act Release No.12598 (July7, 1976) (discussing the rationale for adopting the predecessor to Rule 14a-8(i)(10), which provided as a substantive basis for omitting a stockholder proposal that "the proposal has been rendered moot by the actions of the management").

At one time, the Staff interpreted the predecessor rule narrowly, considering a proposal to be excludable under this provision only if it had been "'fully' effected" by the company. See Exchange Act Release No. 19135 at §II.B.5. (Oct. 14, 1982). By 1982, however, the Commission recognized that the Staff's narrow interpretation of the predecessor rule "may not serve the interests of the issuer's security holders at large and may lead to an abuse of the security holder proposal process," in particular by enabling proponents to argue "successfully on numerous occasions that a proposal may not be excluded as moot in cases where the company has taken most but not all of the actions requested by the proposal." *Id.* Accordingly, the Commission proposed in 1982, and adopted in 1983, a revised interpretation of the rule to permit the omission of proposals that had been "substantially implemented." See Exchange Act Release No.20091, at §II.E.6. (Aug. 16, 1983) (the "1983 Release") (indicating that the Staff's "previous formalistic application of" the predecessor rule "defeated its purpose" because the interpretation allowed proponents to obtain a stockholder vote on an existing company policy by changing only a few words of the policy). The Commission later codified this revised interpretation in Exchange Act Release No. 40018 at n. 30 (May 21, 1998). Accordingly, the actions requested by a proposal need not be "fully effected" by the company to be excluded; rather, to be excluded, they need only have been "substantially implemented" by the company. Thus, when a company has already taken action to address the underlying concerns and essential objectives of a stockholder proposal, the proposal has been "substantially implemented" and may be excluded. See, e.g., Exelon Corp. (avail. Feb. 26, 2010) and Exxon Mobil Corp. (Burt) (avail. Mar. 23, 2009).

Applying this standard, the Staff has noted that "a determination that the company has substantially implemented the proposal depends upon whether [the company's] particular policies, practices and procedures compare favorably with the guidelines of the proposal." Texaco, Inc. (avail. Mar. 28, 1991). Even if a company's actions do not go as far as those requested by the stockholder proposal, however, they nonetheless may be deemed to "compare favorably" with the requested actions. See, e.g., Walgreen Co. (avail. Sept. 26, 2013) (permitting exclusion of a proposal requesting elimination of supermajority voting requirements in the

company's governing documents where the company had eliminated all but one of the supermajority voting requirements). Thus, differences between a company's actions and a stockholder proposal are permitted as long as the company's actions compare favorably with the guidelines of the proposal. See, e.g., Exxon Mobil Corp. (avail. Mar. 19, 2010).

In a line of responses relating to shareholder proposals requesting that companies retain investment banks or advisors to perform specific services, the Staff has consistently concurred with the exclusion of such proposals under Rule 14a-8(i)(10) where a company has already retained an investment bank to perform services that address the substance of the stockholder proposal. See, e.g., Alliance Bankshares Corp. (avail. Apr. 30, 2009) (permitting exclusion of a proposal requesting that the company retain an investment advisor to solicit offers from potential acquirers and effectuate a sale of the company by a specific date because the company was already consulting with a brokerage firm to solicit interest for possible business combination transactions, including a sale or merger); Angelica Corp. (avail. Aug. 20, 2007) (permitting exclusion of a proposal requesting that the company engage an investment banking firm to explore all strategic alternatives to increase stockholder value, including a sale of the company, because the company was already engaging with an investment bank to explore the strategic alternatives contemplated by the proposal); and BostonFed Bancorp, Inc. (avail. Mar. 17, 2000) (permitting exclusion of a proposal requesting that the company engage an investment banking firm to advise it on ways to maximize stockholder value, including a potential sale or merger, because the company had already substantially implemented the proposal through its engagement with an investment banking firm); see also Longview Fibre Co. (avail. Oct. 21, 1999) (permitting exclusion of a proposal requesting that the company engage an investment banker to explore all alternatives to enhance the company's value, including a sale or merger, because the company had already engaged an investment bank in response to the proposal).

In contrast, the Staff has denied the exclusion of similar shareholder proposals under Rule 14a-8(i)(10) only in circumstances where the scope of the investment bank's engagement did not satisfy the substance of the stockholder proposal's request. See, e.g., Capital Senior Living Corp. (avail. Mar. 23, 2007) (denying the exclusion of a proposal requesting that the company promptly engage an investment bank for the purpose of pursuing a sale or liquidation of the company where the company had previously engaged with an investment bank and determined, in consultation with such firm, that entering into a business combination at the time would not create stockholder value) and Gyrodyne Company of America (avail. Sept. 26, 2005) (denying the exclusion of a proposal requesting that the company promptly engage an investment bank to pursue a sale of the company where the company's engagement with an investment bank did not specifically explore the sale of the company as requested by the proposal).

While neither the Original Proposal Language nor the Revised Proposal Language propose that the Company engage an investment bank or other advisor, the precedents described in the two preceding paragraphs are instructive with respect to the analysis required to determine whether the Company's actions compare favorably with the actions requested under the Proposal.

The Company has substantially implemented the Proposal through its discussions with investment bankers to explore opportunities to pursue a strategic transaction with a third party, as well as through the Company's own efforts. The Proposal requests that the Company "explore

options” for a merger or acquisition involving the Company. As discussed in further detail below, because the Company’s current activities satisfy the essential objectives of the Proposal, the Company has substantially implemented the Proposal and the Proposal may therefore be properly excluded from the Proxy Materials pursuant to Rule 14a-8(i)(10). The Board regularly considers (i) the Company’s business, operations and financial condition, (ii) the current state of the Company’s industry and financial markets generally, (iii) potential strategic growth opportunities for the Company and (iv) other potential strategic alternatives. Management meets regularly with various investment banks to evaluate potential opportunities for strategic transactions, and discusses these efforts with the Board. Based on these conversations, the Board has determined that given the Company’s current stage and condition, such opportunities are not available on terms that would be in the best interests of the Company’s stockholders. In addition, over the last several years, the Company has also had discussions with specific third parties regarding opportunities for a combination of the Company with such third party. While the Board and management actively pursued such transactions, they were not consummated, for a variety of reasons. As in Alliance, Angelica, and the other precedents cited above, the Company has already addressed the essential objectives of the Proposal. Specifically, the Company has already substantially implemented the Proposal’s request that the Company “explore options” with respect to a merger or acquisition of the Company. As described above, the Company actively engages with advisors to explore potential mergers and acquisitions by evaluating market conditions, the Company’s operations and financial condition, and analyzing the anticipated effect on stockholder value of various opportunities. As opportunities for strategic transactions have arisen, the Board has pursued them appropriately. We believe the only meaningful difference between the Company’s current activities to “explore options” for mergers or acquisitions and the actions requested by the Proposal is that the Proposal requires such strategic transaction to be effected within one year of the 2022 Annual Meeting. Were the Proposal to be voted on and pass, there are no additional meaningful efforts that the Company could or would do in furtherance of the essential objectives of the Proposal.

The Proposal is clearly distinguishable from the engagements present in Capital Senior and Gyrodyne. In both of those situations, the proposals presented specifically requested that the issuer engage an investment bank to pursue a sale or liquidation. The Proposal requires only that the Company “explore options” to effect “a merger or acquisition” within one year of the 2022 Annual Meeting. In this case, the Company regularly talks with various investment banks and undertakes its own analyses and efforts to “explore options” for a variety of strategic transactions, just without the arbitrary deadline the Proposal seeks to impose. Thus, the Company’s activities would not warrant a denial of no-action relief based on the facts present in Capital Senior and Gyrodyne. For the reasons described above, the Company’s current efforts and the Board’s other activities satisfactorily addresses the Proposal’s essential objectives. Accordingly, the Company intends to exclude the Proposal under Rule 14a-8(i)(10), because the Company has substantially implemented the Proposal.

### III. Conclusion

The Company respectfully requests the Staff's concurrence with its decision to omit the Proposal from the 2022 Proxy Materials and further requests confirmation that the Staff will not recommend any enforcement action if the Company so omits the Proposal. For privacy reasons, we have redacted personally identifiable information provided by the Proponents in their correspondence, but we will provide the unredacted versions at the request of the Staff.

Please call the undersigned at (801) 933-7363 if you should have any questions or need additional information or as soon as a Staff response is available.

Respectfully yours,

A handwritten signature in black ink, appearing to read "David Marx", written in a cursive style.

David F. Marx

Attachment: Exhibit A; Exhibit B

cc: Monowaruz Zaman  
Prasanna Gulur  
Michael Novesky  
Avinger, Inc.

EXHIBIT A  
CORRESPONDENCE

On behalf of Avinger Inc. shareholders.

Monowaruz Zaman

Prasanna Gulur

**April 08, 2022**



Company's Secretary

Avinger Inc.  
400 Chesapeake Drive,  
Redwood City  
California 94063  
USA

**Subject: Proposal pursuant to Rule 14a-8 to be presented at the 2022 Annual Meeting**

Dear sir,

We are writing to you as shareholders and on behalf of the shareholders the company who have consented below with signatures.

As shareholders we are proud with Avinger's success in development of life saving optical coherence tomography (OCT) and peripheral artery disease (PAD) product portfolios and along with the recent upgrade of Lightbox 3. We as a shareholders funded these developments but at the same time we have lost 80%-90% of our investments that could be used for our families or paying bills such as mortgages.

We understand that the company wants to extend the portfolio to coronary Chronic Total Occlusion or coronary CTO but we are afraid that for funding this will further dilute our shares and our investment will be wiped out.

Unfortunately, the overall bio-tech capital market is not favorable for continuing this type of ventures alone.

To avoid this misery of the retail shareholders like us, we would like to propose the followings pursuant to Rule 14a-8:



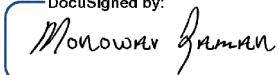
The Proposals are:

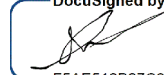
1. Get a strategic partner for commercialization of existing products leveraging its larger market footprint and funding for continuing development of coronary CTO.
2. Alternatively, sell the company to the highest bidder.

We would like to request you to present this proposal at the Annual Shareholders Meeting, 2022 and consider for the shareholders voting on June 3, 2022.

Thank you very much.

Best regards

DocuSigned by:  
  
102300916D8A489...  
Md Monowaruz Zaman

DocuSigned by:  
  
F5AE512B27C344B...  
Prasanna Gulur

**Consent of other Share Holders:**

Share Holders Name	Signature	Date
Bhaveshkumar Amin	DocuSigned by:  30DF2F3A1BD84A4...	4/8/2022   1:30 PM EDT
Phillip A. Prince	DocuSigned by:  D78CC3E6CE8444C...	4/8/2022   2:37 PM EDT
Max Tyler	DocuSigned by:  E6574E128E8D4E2...	4/9/2022   6:53 AM EDT
Maikel N. Roche	DocuSigned by:  C173CA1FAD24469...	4/9/2022   11:22 AM EDT
Nasima Akter	DocuSigned by:  81F842426CDB448...	4/9/2022   12:34 PM EDT

Michael Novesky



April 28, 2022

**Avinger Inc.  
Attn: Secretary  
400 Chesapeake Drive,  
Redwood City  
California 94063, USA**

**Subject: Shareholder's Proposal pursuant to Rule 14a-8 (f) for 2022 Annual Meeting**

Dear sir,

In response to your Letter dated, April 19, 2022 pursuant to Rule 14a-8 (f), I would like to request the following proposal in the company's proxy statement for the 2022 Annual Meeting.

**"Explore options for merger and acquisition (M&A) within one year of the 2022 Annual meeting"**

I designate the following person to be my representative:

Prasanna Gulur



I confirm that I have been holding minimum \$25,000 worth of Avinger's share (AVGR) for one year preceding and including April 8, 2022 and intend to continue holding the same through the date of the 2022 Annual Meeting, if my proposal is included in the proxy.

Thank you very much.

Best regards

A handwritten signature in black ink, appearing to read "Michael Novesky".

Michael Novesky

Attachment: Proof of holding min. \$25,000 worth of Avinger's shares



















AVGR

AVGR

Open P&L(USD)  
-31,550.63 -89.59%

Day's P&L(USD)  
+43.32 +1.20%

Market Value  
3,667.76

Total Cost  
35,218.39

Average Price  
24.39

Quantity  
1,444

Position Ratio  
100.00%

Last Price  
2.540

Bid	10	2,500	2,660	2,072	Ask
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### Filled Records

Side/Qty	Price	Position	Time
Buy 249	3.43	853.60	04/04/2022 10:37:09 EDT
Buy 3	2.88	8.64	03/15/2022 11:21:33 EDT
Sell 1,000	0.25	253.30	02/28/2022 13:08:10 EST
Buy 3,259	0.29	928.82	01/21/2022 16:18:35 EST
Buy 876	0.47	407.34	01/06/2022 08:37:16 EST

Sell to Close

Buy

Quotes

# < Avinger Inc



Quantity	Price	Time	Time
Buy 2,015	1.49 3,002.35	03/04/2021 09:53:15 EST	
Buy 1,833	1.69 3,097.77	03/03/2021 09:35:17 EST	
Buy 2,137	1.60 3,419.20	02/26/2021 16:49:17 EST	
Buy 2,196	1.59 3,491.64	02/26/2021 14:03:56 EST	
Buy 1,088	1.70 1,849.60	02/24/2021 15:58:59 EST	
Buy 1,943	1.67 3,244.81	02/23/2021 13:50:44 EST	
Buy 1,881	1.81 3,404.61	02/22/2021 15:56:05 EST	
Buy 2,000	1.83 3,658.40	02/16/2021 11:08:39 EST	
Buy 1,000	1.84 1,840.00	02/12/2021 15:24:58 EST	
Buy 1,000	1.99 1,990.00	02/10/2021 10:22:44 EST	
Buy 201	1.51 303.51	01/29/2021 11:31:42 EST	

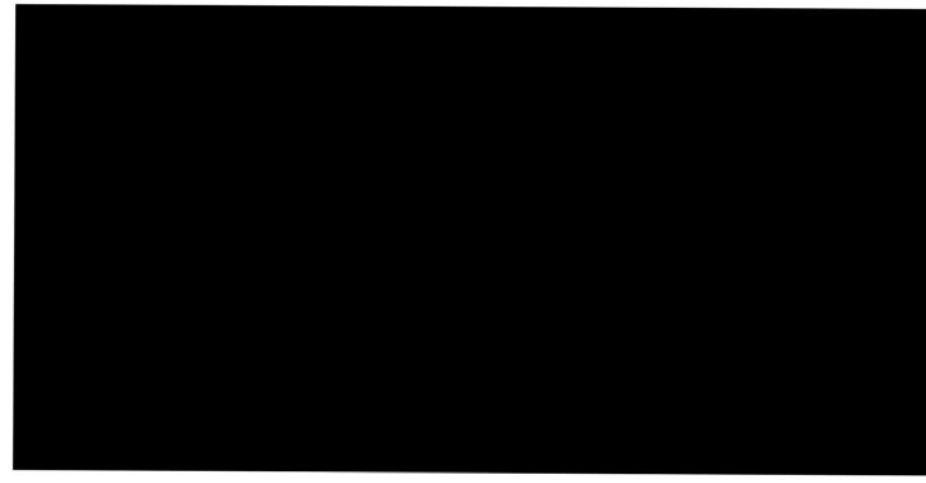
Sell to Close ▾

Buy

Quotes



Prasanna Gulur



April 30, 2022

**Avinger Inc.  
Attn: Secretary  
400 Chesapeake Drive,  
Redwood City  
California 94063, USA**

**Email: [corpsecretary@avinger.com](mailto:corpsecretary@avinger.com)**

**Subject: Shareholder's Proposal pursuant to Rule 14a-8 (f) for 2022 Annual Meeting**

Dear sir,

In response to your Letter dated, April 19, 2022 pursuant to Rule 14a-8, I confirm my support for following updated proposal in the company's proxy statement for the 2022 Annual Meeting.

**"Explore options for merger and accusation (M&A) within one year of the 2022 Annual meeting"**

I also confirm that I will represent the shareholders who signed the initial proposal and letter dated April 8, 2022 including Michael Novesky who proposed the above proposal.

I will be available for teleconference as required but between 5:30PM to 8:30PM Eastern Standard Time (EST) or 2:30PM-5:30PM PDT.

Thank you very much.

Best regards

A handwritten signature in black ink, appearing to read 'Prasanna Gulur', written over a light blue horizontal line.

Prasanna Gulur

**From:** MONOWAR ZAMAN [REDACTED]

**Sent:** Tuesday, May 3, 2022 10:03 AM

**To:** [REDACTED]; Mark Weinswig [REDACTED]

**Cc:** Jeff Soinski [REDACTED]; Marx, David [REDACTED]

**Subject:** Re: Avinger Response to Letter dated April 8, 2022

EXTERNAL FROM OUTSIDE DORSEY. BE CAUTIOUS OF LINKS AND ATTACHMENTS.

Hi Mark,

Good morning.

Will we get a case number, if our proposal goes to SEC for the decision?

I believe SEC will allow us to defend.

Thank you very much.

Best regards

Monowar Zaman

[REDACTED]

[REDACTED]

On Thursday, April 28, 2022, 11:43:57 PM EDT, Mark Weinswig [REDACTED] wrote:

Glad that we had a chance to have a joint call.

Please confirm that you wish to have us move forward with reviewing your proposal and possibly submitting to the SEC for possible inclusion in the Proxy for the Annual Meeting.

Note: If you would like to organize a call between your legal counsel and our counsel, we are happy to set it up.

Best regards



**Mark Weinswig**

**Chief Financial Officer**

Avinger, Inc.

400 Chesapeake Drive | Redwood City, CA 94063

Office 650.241.7903 |

[REDACTED]

**BEYONDPOSSIBLE.**

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**From:** MONOWAR ZAMAN [REDACTED]  
**Sent:** Thursday, April 28, 2022 1:30 PM  
**To:** Mark Weinswig [REDACTED]  
**Cc:** [REDACTED]; Jeff Soinski [REDACTED]  
**Subject:** Re: Avinger Response to Letter dated April 8, 2022

**[EXTERNAL]**

No, we don't have any counsel.

Thank you.

Monowar

On Thursday, April 28, 2022, 04:09:06 PM EDT, Mark Weinswig [REDACTED] wrote:

Will you have counsel available so we can include our attorneys?

Sent from my iPhone

On Apr 28, 2022, at 1:04 PM, MONOWAR ZAMAN [REDACTED] wrote:

**[EXTERNAL]**

Hi Mark,

We appreciate your response.

Prasanna and I am available any time between 5:30-7:30 PM Eastern Standard Time (EST).

Phone Number:

Prasanna: [REDACTED]

Monowar: [REDACTED]

Thank you very much.

Best regards

Monowar Zaman

[REDACTED]

On Thursday, April 28, 2022, 12:43:57 PM EDT, Mark Weinswig [REDACTED] wrote:

Monowar-

We are available to discuss your proposal.

We would like to have legal counsel on the line, so please plan accordingly from your side.

Let us know your availability.

Best regards



**Mark Weinswig**  
**Chief Financial Officer**

Avinger, Inc.  
400 Chesapeake Drive | Redwood City, CA 94063  
Office 650.241.7903  
[REDACTED]

**BEYOND**POSSIBLE.

---

**From:** MONOWAR ZAMAN [REDACTED]  
**Sent:** Wednesday, April 27, 2022 3:41 PM  
**To:** [REDACTED]; Jeff Soinski [REDACTED]; Mark Weinswig  
[REDACTED]



Cc: [REDACTED]

Subject: Re: Avinger Response to Letter dated April 8, 2022

[EXTERNAL]

Hi Mark,

As per your below e-mail, do we need to agree on the wordings of the proposal before sending our letter or our designated representative will get an opportunity to discuss with you in a meeting within 10-30 days of receiving the proposal.

By the way, we are thinking about the following proposal:

**"Explore options for partnership with funding or selling the company to the highest bidder or both within 6 months"**

Thank you very much.

Best regards

Monowar Zaman

[REDACTED]

On Tuesday, April 19, 2022, 05:35:02 PM EDT, Mark Weinswig [REDACTED] wrote:

Monowar-

These are questions that you will need to discuss with your representative and legal counsel. If your legal counsel would like to have a conversation with our legal counsel, we are happy to set that up.

If you want to talk about the proposals (vs the procedure, rules, process), we are happy to have a discussion on those as a separate topic with the Management team.

Best regards



**Mark Weinswig**  
Chief Financial Officer

Avinger, Inc.  
400 Chesapeake Drive | Redwood City, CA 94063  
Office 650.241.7903 | [REDACTED]

**BEYOND**POSSIBLE.

---

**From:** MONOWAR ZAMAN [REDACTED]  
**Sent:** Tuesday, April 19, 2022 1:47 PM  
**To:** [REDACTED]; Jeff Soinski [REDACTED]; Mark Weinswig

[REDACTED]  
Cc: [REDACTED]

Subject: Re: Avinger Response to Letter dated April 8, 2022

**[EXTERNAL]**

Really appreciate for allowing us to ask questions.

Here I've compiled the following for now:

1. Can anyone from us, who signed the letter be our representative?
2. If someone bought \$25K worth of shares (in current market value) at least one year back but sold & bought back in the middle, will he qualify
3. what document do you need to confirm the holding
4. is there a minimum number of proponents required, or should at least one person be enough?
5. can we add two proposals together like "get a partnership or sell to the highest bidder"?

Thank you very much.

Sincerely  
Monowar Zaman  
[REDACTED]

On Tuesday, April 19, 2022, 02:38:19 PM EDT, Mark Weinswig [REDACTED] wrote:

Monowar-

If you have any questions regarding the letter we sent, please send us your questions in a written response and we will determine how to best respond.

Please note that our external counsel is included.

If your questions relate to normal course investor-type questions, you can reach out to me or Matt Kreps.

Best regards



**Mark Weinswig**

**Chief Financial Officer**

Avinger, Inc.

400 Chesapeake Drive | Redwood City, CA 94063

Office 650.241.7903 |

[REDACTED]

**BEYOND**POSSIBLE.

---

**From:** MONOWAR ZAMAN [REDACTED]  
**Sent:** Tuesday, April 19, 2022 11:33 AM  
**To:** [REDACTED]; Jeff Soinski [REDACTED]  
**Cc:** Mark Weinswig [REDACTED]  
**Subject:** Re: Avinger Response to Letter dated April 8, 2022

**[EXTERNAL]**

Thank you so much, Jeff for responding to our email with detailed information.

We are looking into this and will provide the necessary documentation within the specified time frame.

Meanwhile, if we have any questions, who shall we contact?

Best regards

Monowar Zaman

[REDACTED]

[REDACTED]

On Tuesday, April 19, 2022, 12:01:57 PM EDT, Jeff Soinski [REDACTED] wrote:

Mr. Zaman and Mr. Gulur,

Attached please find Avinger's response to your letter dated April 8, 2022. You will also receive a hard copy of the letter via Federal Express.

Thank you for your interest in Avinger.

Sincerely yours,

Jeff Soinski



**JEFF SOINSKI**

**PRESIDENT & CEO**

Avinger, Inc.

400 Chesapeake Drive | Redwood City, CA 94063

[REDACTED]

**BEYOND POSSIBLE.**



**BEYOND POSSIBLE.**



**BEYOND POSSIBLE.**

EXHIBIT B  
NOTICE OF DEFICIENCY



April 19, 2022

VIA FEDERAL EXPRESS AND  
ELECTRONIC MAIL

Monowaruz Zaman



Prasanna Gulur



Dear Mr. Zaman and Mr. Gulur,

On April 9, 2022, Avinger, Inc. (the “Company”) received your letter dated April 8, 2022, requesting the inclusion of certain proposals in the Company’s proxy statement for the 2022 Annual Meeting of Shareholders (the “Proposals”) on behalf of yourselves and certain other Avinger shareholders (the “Proponents”).

We believe that the Proposals are excludable from the Company’s proxy statement in accordance with Rule 14a-8 of the Securities Exchange Act of 1934, as amended, and we reserve our right to request such relief from the staff of the Securities and Exchange Commission if you and the other Proponents do not choose to voluntarily withdraw the Proposals.

If you and the other Proponents wish to proceed with the Proposals, please be advised that the Proponents are required by Rule 14a-8(f) to provide us with a response to this letter, as detailed below. The SEC’s rules require that any response to this letter be postmarked or transmitted electronically no later than 14 calendar days from the date you receive this letter. Address any response to me by electronic mail at [corpsecretary@avinger.com](mailto:corpsecretary@avinger.com) and registered mail at Avinger, Inc., Attn: Secretary, 400 Chesapeake Drive, Redwood City, CA, 94063.

- 1) Please send us adequate proof that one or more Proponents have satisfied Rule 14a-8’s share ownership requirements as of the date that the Proposals were submitted to the Company. As explained in Rule 14a-8(b) and in SEC staff guidance, sufficient proof can be provided in the form of a written statement from the “record” holder of the Proponent’s shares (usually a broker or a bank) verifying that the Proponent continuously held the required amount of Company shares for the required period of time preceding and including April 8, 2022. Furthermore, each such Proponent must provide the Company with a written statement that they intend to continue to hold the requisite amount of shares through the date of the 2022 Annual Meeting. Proponents who do not provide such proof of ownership will be ineligible to co-file the Proposals.

Please note that no Proponent may aggregate their holdings with those of another Proponent, another shareholder or group of shareholders to meet the requisite amount of shares necessary to be eligible to submit the Proposals.



- 2) Each Proponent who designates you as their representatives must provide the written documentation required by Rule 14a-8(b)(iv).
- 3) Please also provide us with a written statement of your availability to meet with the Company in accordance with Rule 14a-8(b)(iii), which requires your availability in person or via teleconference no less than 10 calendar days, nor more than 30 calendar days, after submission of the Proposals. You must include your contact information as well as business days and specific times that you are available to discuss the Proposals with us between 9:00 a.m. and 5:30 p.m. PDT.
- 4) Rule 14a-8(c) specifies that each Proponent may submit no more than one proposal, directly or indirectly, for the 2022 Annual Meeting. As necessary, please let us know if you intend to submit Proposal (1) or Proposal (2).

Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Soinski".

*Jeff Soinski*  
*President & CEO*

cc: David Marx, Dorsey & Whitney LLP



On behalf of Avinger Inc. shareholders.

Monowaruz Zaman

PII

Prasanna Gulur

PII

**May 26, 2022**

**Via Electronic Mail to [shareholderproposals@sec.gov](mailto:shareholderproposals@sec.gov)**

U.S. Securities and Exchange Commission  
Division of Corporation Finance  
Office of Chief Counsel  
100 F Street, N.E.  
Washington D.C. 20549  
USA

**Subject: Avinger, Inc.-2022 Annual Meeting**

Response to the letter by David F. Marx, Dorsey, dated May 17, 2022 on behalf of Avinger Inc. regarding Shareholders Proposal

Dear Sir,

We are hereby responding to the letter sent to you (the “Letter”) by David F. Marx (the “Counsel”) on behalf of his client, Avinger, Inc. (the “Company”), requesting to exclude our Shareholders’ Proposal (the “Proposal”) from 2022 Annual meeting of stockholders (the “2022 Proxy Materials”) pursuant to Rule 14a-8.

We will sequentially address the three reasons mentioned in the Letter to exclude our proposal:

- (i) We would like to confirm that according to Rule 14a-8(b) and Rule 14a-8(f), the proponent Michael Novesky meets the minimum requirement of holding at least \$25,000 in market value of the Company’s securities entitled to vote on the proposal for at least one year.

When he requested his stock brokerage, Webull, to provide a written confirmation of his holding of the Company's securities (AVGR), they replied "Webull, does not generate custom statements. All the information you are looking for would be available in your monthly/quarterly statements, which you can access from the eDocument center." (See Schedule A)

Accordingly, the Webull Financial LLC statement he provided with his letter, dated April 28, 2022 clearly shows that He had 19,565 shares (AVGR), average price \$1.51 and market value \$29,543.15 between March 1-March31, 2021. He maintained minimum 19,565 shares over one year, which is equivalent to 979 shares post 20:1 reverse-split on March 14, 2022. Although his March 1-31, 2022 statement shows he had 1,195 shares.

He also provided screenshot that shows from 1/29/2021 to 03/04/2021 he purchased total 17,294 shares of AVGR in 11 transactions of corresponding total market value \$29,301.49. Afterward it also shows he kept of buying to average down until 04/04/2022.

Therefore the statement in the Letter "the Proponents failed to establish with compliant documentation that at least one of the Proponents continuously held the requisite amount of the Company's securities entitled to be voted on the Proposal at the Company's 2022 Annual Meeting of stockholder" is completely wrong.

- (ii) The second reason the Letter mentions that "Rule 14a-8(i)(7) because the Proposal deals with matters relating to the Company's ordinary business operations".

We believe, this reason refers to the first part of our proposal "Explore options for merger and accusation (M&A)". In case of the Company's ordinary business operations, the executives and board members must exercise of their fiduciary responsibilities to the shareholders to maximize shareholder value. However, in reality we see the opposite, the shareholders lost 89.56% of their investments in last one year (see Schedule B) and 99.93% in last five years (see Schedule C). This means instead of maximizing shareholder value, the way the Company is conducting ordinary business operations has destroyed the shareholder value. Please refer to our recent communication with the Company dated May 14, 2022 that further explains this matter (see Schedule D & E).

In fact, the failure of the board and executives to fulfil this fiduciary responsibility, triggers this proposal for exploring options for a partnership or a strategic collaboration with a big company such as Medtronic or Shockwave. Please refer to our recent communication with the Company dated May 15, 2022 (see Schedule F).

- (iii) The third reason the Letter mentions that “Rule 14a-8(i)(10) because the Company has substantially implemented the Proposal”.

Like any other valid proposal our proposal is time bound. Interestingly, although we are asking to implement our proposal “within one year of the 2022 Annual meeting”, the Company provides misleading statement that it has been substantially done. Retaining or meeting with investment banks may be a process for exploring options for merger or acquisition (M&A) but cannot be considered as substantial implementation or achievement.

The one year time line from the 2022 Annual Meeting for a merger or acquisition is not “as an attempt to micromanage the company” or restrict the discretion of the board but it actually emphasis the need of setting a timeline for the purpose of restoring the shareholder value due to following reasons:

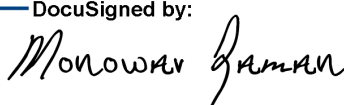
1. The existing cash on hand will last one year. Share price is at the bottom. Any further attempt to raise capital will further dilute and wipe our remaining investments.
2. The Company has reached to a cross road, where it is about to complete existing peripheral artery disease (PAD) portfolio and will begin development of a new coronary artery disease (CAD) portfolio. This new venture will require fresh new funding and resources.
3. The Company already restructured its debt with CRG, leaving no option for further debt financing.
4. The market is currently very unfavorable for bio-tech companies to raise additional capital.
5. As the Letter mentions the Company is already in a process in exploring the options for M&A as normal business operations for many years, one year time to make a definitive agreement is reasonable and achievable.

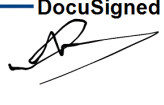
In our opinion, our proposal for the Annual Shareholders Meeting, 2022 is the only option left to protect the shareholder value from further destruction.

In case a decision is made to omit the Proposal from the 2022 Proxy Material and eventually shareholder value is further destroyed, we will request for your help investigate any deficiency from the part of Company's management to protect stockholder value.

Thank you very much.

Sincerely,

DocuSigned by:  
  
102300916D8A489...  
Md Monowaruz Zaman

DocuSigned by:  
  
F5AE512B27C344B...  
Prasanna Gulur

Attachments: Schedules A, B, C, D, E & F

Cc: Jeff Soinski, CEO, Avinger Inc

David F. Marx, Dorsey, Dorsey & Whitney LLP

Michael Novesky

Sincerely,

Ryan

Schedule A

Webull eService Representative

04/19/2022 19:46:11

Thank you Ryan. Have a great night



04/19/2022 21:09:50



Hi Michael,

Thank you for your waiting. We have checked it for you.

Webull does not generate custom statements. All the information you are looking for would be available in your monthly/quarterly statements, which you can access from the eDocument center.

Thank you for your understanding.

Sincerely,

Lucy

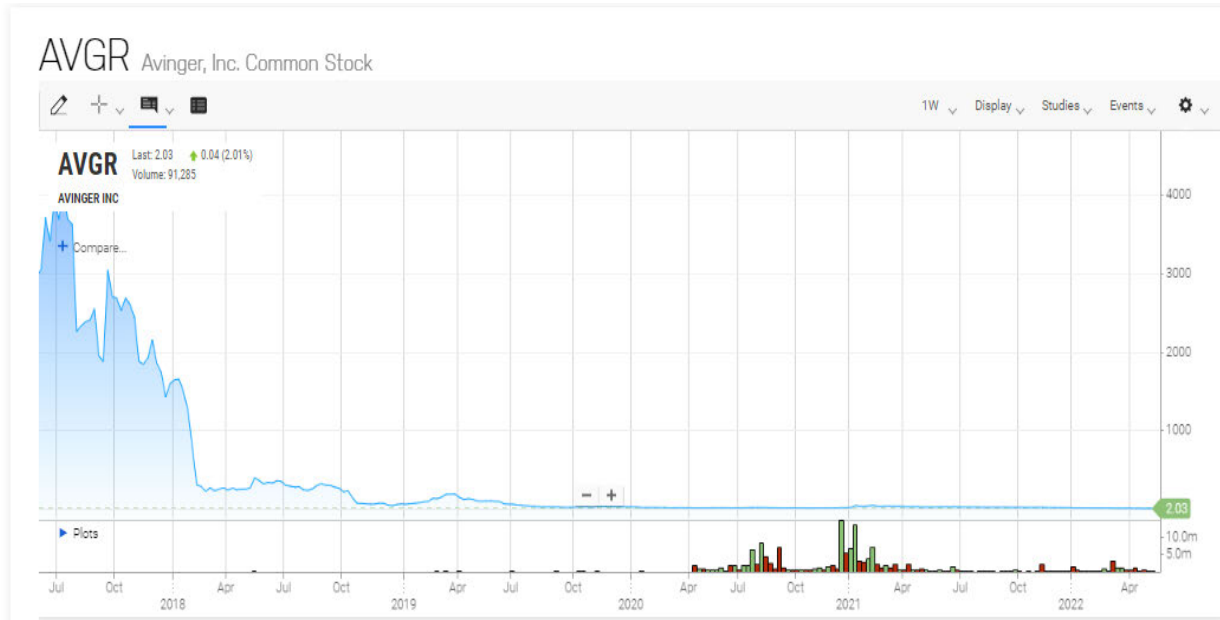
Webull eService Representative

# Schedule B



AVGR Share Price in last one year (down 89.56%)

# Schedule C



AVGR Share Price in last five years (down 99.93%)

## Schedule D

On behalf of Avinger's shareholders

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From: MONOWAR ZAMAN [PII]  
To: ir@avinger.com; jsoinski@avinger.com  
Cc: [PII]; [PII]; marx.david@dorsey.com  
Date: Saturday, May 14, 2022, 02:27 PM EDT

---

Dear Avinger Board of Directors,

We are following up on the proposal we submitted for the upcoming annual meeting on June 3rd, 2022 of Avinger Inc.

Most of us, who supported this company has lost 85%-96% of our investments even after averaging down.

What bad has happened with this company during this time?

Even the day Lightbox 3 was FDA approved, the share price went down suspiciously.

The next morning, the reason for suspicion was revealed when the announcement of the preferred D offering and a reverse split (RS) was published.

When we raised questions, we were rather blamed for preventing the earlier RS.

Finally, the RS has passed but unfortunately, we are now 85% down from there.

What did go wrong? The products are unique and real. The engineers are talented. The sales forces are dedicated.

Now, we feel like we are deserted and vultures are haunting us for the death of our investments.

The only hope is to wait for rescue through a merger and acquisition by a big company like Medtronic, Boston Scientific, Shockwave, or GE Health.

As board members, you know better than us and have witnessed everything.

We believe you can bring a rescue for us.

Please help.

Thank you very much.

Best regards

Monowar Zaman  
Brampton, Canada

Phone: [PII]



# Schedule E



AVGR Share Price in reaction of Lightbox 3 FDA Approval (!) and Reverse-Split with Preferred D with super-voting power announcement.

# Schedule F

Why not begin with a strategic collaboration?

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From: MONOWAR ZAMAN [REDACTED] PII

To: jsoinski@avinger.com; ir@avinger.com

Cc: [REDACTED] PII, [REDACTED] PII

Date: Sunday, May 15, 2022, 11:14 PM EDT

---

Dear Board of Directors of Avinger,

We are thinking about what could be the pathway to the proposed M&A so that the existing low stock price (\$1.7 per share) reaches an acceptable level.

Why not start with a strategic collaboration for the development of the coronary portfolio with a future acquirer?

Here we are giving two examples:

We believe the lumivascular technology of Avinger with Lightbox 3 is an evolution of directional atherectomy, which is also used by Medtronic. This means the surgeons who use SilverHawk can easily adopt Pantheris, which perhaps is happening already. The new sales rep. that Jeff Soinsky described may have approached a surgeon who is already familiar with directional atherectomy. This is why he was prompted to use Lightbox 3 the very next day.

No doubt that there is a synergy in making collaboration with Medtronic.

On the other hand, as Jeff mentioned in Q4, 2021 earning call "we are very, very complementary to Shockwave".

Doesn't it imply that there will be a synergy if Avinger collaborates with Shockwave, which will potentially make them the market leader in PAD as well as future CAD treatments?

Now the question is which deal will be good for shareholders and healthcare.

Thank you very much.

Best regards

Monowar Zaman  
Brampton, Canada

Phone: [REDACTED] PII