



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GYNECONCEPTS, INC., a Delaware corporation,)	
)	
Plaintiff,)	
)	
v.)	No. _____
)	
NICHOLAS KIM,)	
POPULATION BIOSCIENCES, LLC)	
a Delaware limited liability company, and)	
QUATERNION INVESTMENTS, LLC,)	
a Delaware limited liability company,)	
)	
Defendants.)	

COMPLAINT

Plaintiff, GyneConcepts, Inc (“GyneConcepts” or the “Company”), hereby brings this action for breach of fiduciary duty, conversion, breach of contract, unfair competition, misrepresentation, fraud, and declaratory judgment, and states in support thereof based on knowledge, information and/or belief as follows:

1. GyneConcepts is a start-up Delaware corporation that holds valuable intellectual property rights, including but not limited to a United States patent number 5,445,164 (the “164 Patent”) for its original Swan™ sampler product. GyneConcepts’ ‘164 Patent relates to a device, the Swan™ sampler, which permits women to self-administer an in-home pap smear test. It is a testing device that simplifies in-office procedures and allows self administering in-home as well. The Company also has valuable proprietary information and trademarks related to the manner in which it planned to develop and bring the product to market, including but not limited to trademarks in the name Swan™ and p.p.t Pap Test™ (f/k/a Privacy Pap Smear®) and related internet domain names in the United States, the UK and South Africa.

PARTIES AND JURISDICTION

2. Defendant Nicholas Kim is a former officer and director of GyneConcepts. Mr. Kim's last known residence is 109 E. 73d Street # 6A, New York, NY 10021. As the former CEO and Chairman of the Board of Directors of GyneConcepts, Mr. Kim, while holding those positions, owed fiduciary duties to the Company and its stockholders, including the duty of utmost loyalty. As detailed herein, Mr. Kim engaged in a scheme to deprive GyneConcepts and its stockholders of the value of the Company, depleting its resources to fund his lavish lifestyle, misrepresenting the Company's technology to stockholders, and engaging in a series of wrongful acts and actions, detailed below, to squeeze from the Company its value so that he could compete against it using the Company's own technology and proprietary information that he took for himself. The Company seeks to redress these wrongs by this action.

3. Defendant Population Biosciences, LLC ("Population") is a Delaware corporation created by Kim to carry on a business to compete directly against GyneConcepts using intellectual property that rightfully belongs to the Company.

4. Defendant Quaternion Investments, LLC ("Quaternion") is a Delaware corporation created by Kim as a vehicle to hold intellectual property rights and technology as part of his scheme to expropriate GyneConcepts' technology. Kim had GyneConcepts pay for patent work and product development work that Kim later advised was the property of his affiliated company, Quaternion.

5. Defendants are subject to personal jurisdiction in Delaware. Population and Quaternion are Delaware entities. Kim is a former officer and director of the Company who consented to jurisdiction in Delaware by agreeing to such positions pursuant to 10 *Del. C.* § 3114.

FACTUAL BACKGROUND

6. Nicholas Kim is an investment banker with no technological experience or background. Mr. Kim became involved with GyneConcepts in 1996. At that time, he was employed by the firm (now defunct) of D.H. Blair and Company. He convinced the inventors of the Company's product to join forces with him stating that he could raise capital for the Company and bring its product to market. He and D.H. Blair executives received shares of stock based on their representations regarding their ability to raise capital for the Company and in exchange for their promises to do so. Kim received 875,000 shares that was based on his representations and alleged ability to raise capital through D.H. Blair. Neither D.H. Blair nor Kim ever raised funds from their own sources.

7. Kim later opened his own investment firm, N. Hahn & Co. The Company entered into an agreement with N. Hahn & Co., Inc. dated June 1, 1998 to have that company, owned solely by Kim, act as an investment advisor in exchange for a monthly engagement fee. N. Hahn & Co. was supposed to raise capital and find new sources of funds for the Company. Kim and N. Hahn & Co., however, did not. Rather, Kim simply relied upon existing stockholders to provide capital or to tap their own sources to find new investors. Kim himself never brought any new money from his own sources to the table for the Company. This June 1, 1998 agreement is the only written agreement entered into between the Company and Kim or his affiliates for services to be rendered, but Kim became the Company's CEO and Chairman of the Board in charge of the day to day operations of the Company along with its only employee, who was entirely beholden to Kim, Jan Cooper ("Cooper"). The term of that advisory services agreement expired on May 30, 2003, but Kim apparently caused it to be extended and continued to receive funds under it notwithstanding that he was not performing his services in good faith on behalf of

the Company. As noted, Kim was issued 875,000 shares of Company stock on the basis of his representations he made to it. As noted, he, along with Cooper, the Company's bookkeeper, ran the day to day operations of the business. The Company had no other employees (and Kim acted only "part time" on behalf of the Company). There was never a written employment agreement with Kim or any agreement to pay him a particular salary for his services as CEO, he appears to have set the terms of his compensation and to have continued to extract funds through the advisory agreement.

8. Having obtained the role as the key manager of the Company, Kim set out upon a scheme to defraud stockholders and the Company and to steal its technology as detailed below.

Kim's Alleged Improvement to the Company's Device

9. Kim, having learned about the details of the Company and its technology while acting in his fiduciary capacity and while seeking to raise capital to fund its start-up phase, purported to have a "eureka" moment, after normal business hours, where he allegedly came up with the idea for an improvement to the Company's device, the ("Improvement" or "Improved Device"). He then used Company funds to seek to develop the Improved Device and to obtain a patent for "his" alleged Improvement, which he advised was assigned to and owned by his affiliated company, Quaternion.

10. Kim sought and obtained United States patent number D588,695 (the "695 Patent") for the Improved Device, which patent expenses the Company paid for. The Company's third party engineering firm, did the design and development of the Improved Device and engineered the design and created a prototype pursuant to a contract between it and the Company. The Company paid for all of that design and development work for the Improved

Device, as more fully set forth in the '695 Patent. Kim admitted at the last Company shareholders' meeting that "GyneConcepts paid for ... [the] engineering work, yes."

11. Kim falsely advised the other, independent, directors on the Company's board that the Company's patent counsel had advised the Company that Kim owned the Improvement, notwithstanding that it was conceived while Kim was the Company CEO (and owed fiduciary duties to the Company) and that the design and engineering work for the Improvement was actually paid for by the Company. The independent members of the Company's board operated under a belief, based on Kim's misrepresentations and no disavowals by Company's patent counsel (which counsel had been hired by, and was working at the direction of, Kim), that Kim owned the exclusive right to patent, and be the sole owner of, the Improved Device. Kim also purported to not be bound by any agreement that would obligate him to confirm that any improvements to Company technology developed by him during his tenure as CEO and paid for with Company money nonetheless belonged to the Company.

12. Kim then advised, however, that he would agree to enter into a licensing agreement with the Company to license "his" Improvement back to the Company. On the basis of the false statements by Kim that he owned the Improvement and that the Company's patent counsel had advised him that he owned the Improvement to the exclusion of the Company, and seeking to avoid a dispute in order to move the business forward, the other members of the board agreed to enter into good faith negotiations to license the Improvement from Kim and Quaternion, Kim's affiliated company that was created for the purpose of holding "Kim's" patented Improvement technology.

At The Same Time As He Purports To Own The Improvement, Kim Defrauds Stockholders Into Believing That The Improvement Is Owned By The Company

13. At the same time as Kim purported to own the Improvement (created using Company funds), Kim sought to raise money from stockholders. In connection therewith, he distributed documents that showed the Improved Device as the Company's technology. He did not disclose to the stockholders from whom he sought to raise money that he, in fact, claimed the Improved Device entirely for his own. Kim also led those stockholders to believe that he was acting in the best interest of the Company, and convinced them, on the basis of false statements made by him and Cooper, to support Kim in connection with a contested annual meeting of the Company held on October 30, 2008, that the technology was to be contributed to the Company. Many of the stockholders who had invested on the basis of Kim's false representations supported him, and a group of such stockholders was encouraged by Kim and Cooper to, and they did, sue the Company in Delaware seeking to rescind their investments in GyneConcepts. The Company was forced to incur litigation expenses in connection with defending that litigation, which litigation was later agreed to be dropped by the stockholders when they learned that Kim was competing against the Company and had stolen the Company's technology and that they would not have an ownership interest in his new company. Cooper, under direction of Kim, even apparently expressly threatened that if stockholders did not provide additional capital to his separate venture and support him, they would be left with worthless stock in GyneConcepts because the shareholders who had sued the Company would bankrupt it.

Kim Acts in Bad Faith Regarding the Licensing of "His" Improvement

14. As noted above, at the same time as he was touting the Company and its technology to stockholders without disclosing that his focus was upon, and expenditures were being made to develop and to obtain patents for the Improved Device for the sole benefit of Kim,

Kim then advised that he was willing to enter into a license with the Company for “his” Improvement.

15. The Company entered into an Agreement to Negotiate License dated December 8, 2006 (“Agreement”) with Kim. The Agreement contemplated the Company would obtain a worldwide, exclusive license for the Improvement from Kim or his assignee Quaternion but that it required that the license be on “typical, fair market, verifiable standards”. In exchange for Kim’s purported promise to negotiate in good faith for a license, the Company agreed to pay Kim \$50,000 up front, plus \$50,000 per U.S. patent application filed by Kim, as well as to reimburse for the cost of obtaining a patent, (for which Kim’s affiliate Quaternion was apparently paid \$215,000 even though no license was ever entered into for the Improvement with the Company).

16. Kim, however, apparently had no intention of honoring his commitment to license “his” Improvement back to the Company on typical, fair market, verifiable terms.

17. There were no serious negotiations for nearly two years after the entry of the Agreement, although the parties had some discussions and a preliminary draft of a licensing agreement circulated in March of 2008. The term of the Agreement was, however, extended three times and was set to expire on May 1, 2008.

18. Negotiations finally commenced in earnest as the termination deadline approached, and Kim agreed to extend the Agreement a fourth time, on May 1, 2008, with a new expiration date of May 12, 2008 in exchange for which Kim demanded and received \$14,000. But when negotiations began in earnest in May, 2008, Kim’s demands remained draconian to license “his” Improvement back to the Company. The independent members of the Board could not agree to them, and they had hired an independent advisor, Adams Capital, (along with

GyneConcepts Corporate counsel), to investigate the market for similar licenses so that the “typical, fair market, verifiable” requirements of the Agreement were met and that any terms agreed upon by the Company would not make it impossible for the Company to raise capital going forward. The independent board members received Adam’s Capital’s report on May 7, 2008. The Company then proposed terms consistent with Adams Capital’s findings and the requirements of the Agreement in reliance upon their independent’ advisors’ recommendations. Kim, however, refused to consider the proposals presented by Adam’s Capital, and negotiations terminated.

19. Kim demanded terms that were not consistent with the Agreement, and according to Adams Capital, were not in line with similar patent license agreements. Adams Capital further advised the Company that Kim’s demands would make it impossible for the Company, going forward, to raise necessary start-up capital. Kim’s last demand in the negotiations for a license sought unreasonable royalties for “his” Improvement, including \$400,000 in up-front fees, a 6% royalty rate, and most critically, guaranteed payments as follows: \$50,000 per quarter upon signing, \$150,000 per quarter upon shipment of the first commercial purchase order, and \$400,000 per quarter upon first completed calendar quarter of positive net income. Thus, as soon as the Company earned a positive net income for a quarter, in whatever amount, including \$100, \$5 or even \$0.01, the Company would be obligated to pay Kim \$1,600,000.00 a year, regardless of whether or not the Company ever obtained another quarter with positive net income.

20. Negotiations broke down when Kim refused to agree to terms that were required by the Agreement and when he refused to direct Cooper to turn over to the board and its independent directors financial information to enable the board to fully examine the financial condition of the Company. When the independent directors refused to agree to Kim’s

unreasonable demands and the negotiations stopped, Kim then refused to attend board meetings unless the subject of his license was the topic. That bad faith decision by Kim paralyzed the Company's ability to move forward, because no action could be taken at the board level due to the lack of quorum.

21. At the same time as he was purporting to negotiate in good faith, however, Kim was developing plans to open a competing business, Population, and to use that new company to compete directly against GyneConcepts using the Improved Device. He has been raising or attempting to raise money touting "his" Improved Device. He has circulated subscription agreements for Population and a form of limited liability company agreement to potential investors.

Kim And Cooper Purport To Take Over The Company

22. When the independent directors on GyneConcepts board refused to accede to Kim's demands, he and Cooper, acting in concert, then attempted to oust the Board. They purported to obtain written consents to oust the independent board members and then filed litigation in the Delaware Court of Chancery seeking confirmation that they controlled the Company. As the Company's corporate counsel at the time pointed out, Kim and Cooper's written consents were insufficient to oust the independent directors from the board. Rather than litigate that purported entitlement to control the board, however, the parties agreed instead to hold an annual stockholders' meeting to elect directors. Kim's plans were thwarted when a majority of the voting stockholders elected the independent directors and their slate instead of voting for Cooper and Kim's slate.

23. As part of the Court proceedings, Cooper and Kim were also required to turn over the Company's assets and books and records. They ignored the Court order, and when they

ultimately did relinquish the records, the records were in total disarray. They refused attempts to retrieve the Company's computers and software paid for with Company funds. Cooper and Kim advised that they had recently purchased their own, new computers and that the computers that belonged to the Company were no longer functioning. Thus, whatever valuable records and technology that existed on the Company's computers were no longer available to the Company while, in the meantime, Kim moved on with his new computer (possibly containing Company records) and with his plans to compete against the Company using Population as his new entity.

Kim Extracts The Company's Remaining Funds To Fuel His Lavish Lifestyle

24. The Company's review of the documents turned over by Kim and Cooper pursuant to the Court of Chancery order showed that the vast majority of sums raised by the Company since its December 16, 2006 Private Placement Memorandum ("PPM"), which was its last successful capital raise, were purportedly committed to pay to Kim or companies controlled by Kim. Of the approximately \$1,140,000.00 raised in the 2006 PPM, over 90% (\$1,022,499.90), was purportedly paid to Kim, or a company controlled by Kim, for consulting fees, expenses for development and the patent applications for "his" Improvement, rent for a portion of Kim's home, and Kim's extravagant travel and lodging expenses. For example, he charged the Company for the following: an average of \$530 per night in Houston at Hotel Zaza (including weekends) and a total of 59 nights in a mere nine month period at the Umstead Hotel in Raleigh, at an average of \$443 per night, apparently to court a prospective female investor who never did agree to invest in the Company. In conjunction with Cooper, they manipulated the Company records in an effort to hide those facts from review.

The Improvement Belongs to the Company

25. The Company owns the Improvement. The Company paid for the Improved Devices' product design and development (and for legal expenses in connection with obtaining a patent, which patent has now been granted to Kim). The independent directors had been willing to accede possible ownership in the Improvement solely to Kim only on the condition that he license it back to the Company on fair and market rate terms and because of the false representations made by Kim that the Company's patent counsel had advised that the Improvement belonged to Kim. Rather than litigate with him, at that time, they preferred a business solution and entered into the Agreement. Indeed, the Company and its independent directors believe the Improved Device was required to be contributed to the Company because Kim sought to raise funds by circulating documents that showed the Improved Device as covered by the Company's '164 patent. Nonetheless, the Agreement, if honored by Kim (which it was not), would have resolved the parties' differences over ownership, eliminated the need for litigation, and allowed the Company to move forward.

26. Kim owed fiduciary duties to the Company, worked for the Company as its CEO, used Company funds to develop the design for the Improvement paid to the Company's engineering firm (pursuant to a contract with the Company). He also obtained a patent for the Improvement by use of Company funds. He raised funds from stockholders showcasing the Improvement as part of the Company' technology.

27. Now, Kim purports to own the Improvement and has created a company, Population, to compete against the Company using the Improved Device.

COUNT I - BREACH OF FIDUCIARY DUTY AGAINST KIM

28. Plaintiff repeats the foregoing as if fully restated herein.

29. Kim, as a former officer and director of the Company, owed fiduciary duties of the good faith, due care, and utmost loyalty to the Company and its stockholders.

30. Kim, acting for himself, breached his fiduciary duties to the Company and its stockholders, including but not limited to by:

- a. Stealing the company's technology;
- b. Competing against the Company using the company's proprietary information and technology;
- c. Wasting the Company's limited capital to fuel his lavish lifestyle;
- d. Using Company funds to develop the Improved Device while claiming it for his own;
- e. Making misrepresentations to the Company and its stockholders in connection with the ownership of the Improved Device;
- f. Acting exclusively for his own benefit and failing to act in good faith in connection with his employment with the Company;
- g. Stirring innocent stockholders to litigate against the Company to achieve his personal ends by making false statements to them;
- h. Destroying Company computer records or otherwise making such records unavailable to the Company;
- i. Acting generally as detailed above for his own personal benefit and not in the best interests of the Company and its stockholders.

31. Kim's breach of duty has caused the Company harm.

COUNT II – AIDING AND ABETTING BREACH OF FIDUCIARY DUTY AGAINST POPULATION AND QUATERNION

32. Plaintiff repeats the foregoing as if fully restated herein.

33. Quaternion and Population aided and abetted the foregoing alleged breaches of fiduciary duty engaged in by Kim. Quaternion and Population were aware of, and purport to receive the benefits of, the foregoing alleged breaches of duty. Quaternion and Population are entities created by Kim expressly for the purpose of diverting the Company's valuable technology and competing against the Company.

COUNT III- CONVERSION AGAINST KIM, POPULATION AND QUATERNION

34. Plaintiff repeats the foregoing as if fully restated herein.

35. Defendants have converted the Company's valuable, proprietary information including but not limited to the Improved Device and its planned methods of business for bringing the technology to market for their own use and benefit. Defendants' conversion has caused the Company harm.

COUNT IV – BREACH OF CONTRACT AGAINST KIM AND QUATERNION

36. Plaintiff repeats the foregoing as if fully restated herein.

37. Defendants Kim and Quaternion breached the December 2006 Agreement, as extended from time to time, to negotiate a license in good faith. Defendants demanded terms for the license inconsistent with the requirement that such license be typical, fair market and verifiable.

38. Defendants received substantial consideration up front in exchange for their agreement to negotiate in good faith.

39. Defendants also obtained reimbursement for patent expenses incurred which were used to obtain a patent when Defendants did not, however, enter a license agreement with the Company.

40. Defendants are now engaged in competing against the Company using technology which was the subject of the Agreement and which Agreement they have breached. Such breach has caused Plaintiff harm.

COUNT V – MISREPRESENTATION AND FRAUD AGAINST KIM

41. Plaintiff repeats the foregoing as if fully restated herein.

42. Kim made misrepresentations and false statements, relied upon by the Company and its stockholders to their detriment, as alleged above, including regarding:

- a. Ownership of the Improved Device; and
- b. Representing that the Company owned the Improved Device when he claims it for himself.

43. Kim's conduct has hampered the Company's ability to raise capital and has clouded its title to the Improved Device, caused a devaluation of the Company and its shares, and confused the market with respect to the Company's technology.

COUNT VI – UNFAIR TRADE PRACTICES AGAINST ALL DEFENDANTS

44. Plaintiff repeats the foregoing as if fully restated herein.

45. Defendant has engaged in unfair trade practices, including but not limited to using Company funds to develop the design and prototype for the Improved Device only to refuse to contribute such device to the Company, competing against the Company with Company proprietary information, and rendering the company's computers unable to be utilized.

WHEREFORE, Plaintiffs pray for an order and judgment as follows:

- A. Granting judgment in plaintiffs' favor;
- B. Declaring that the Improvement and the Improved Device belong to the Company and enjoining defendants from using the same;
- C. Disgorging the funds, profits and shares of common stock that Kim obtained from the Company in breach of fiduciary duty;
- D. Awarding damages to plaintiffs in an amount to be determined at trial; and
- E. Granting to plaintiffs such other and further relief as the Court deems just and appropriate.

PINCKNEY, HARRIS & WEIDINGER, LLC

/s/ Michael A. Weidinger

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