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July 9, 2010

### **VIA LEXIS NEXIS FILE & SERVE AND FIRST CLASS MAIL**

The Honorable William B. Chandler, III  
Court of Chancery  
Sussex County Courthouse  
34 The Circle  
Georgetown, DE 19947

RE: *GyneConcepts, Inc v. Nicholas Kim, C.A. No. 4820-CC*

Dear Chancellor Chandler:

Pursuant to the Court's directive, attached is GyneConcepts' letter statement regarding damages it seeks in connection with the trial. Where the evidence relied upon is trial testimony, the trial transcript is not presently available, so the analysis is based on counsel's recollection. The damages fall into three categories: (a) out-of-pocket loss; (b) lost value due to delay that has occurred in bringing the product to market; and (c) lost international patent rights. Plaintiff also requests the Court award (i) interest at the legal rate from the date of the breach, calculated from when Mr. Kim first advised independent director Gerald Branchcomb in June of 2006 of Kim's claim to ownership; and (ii) costs. In breach of duty cases, the Court is free to "fashion any form of equitable and monetary relief as may be appropriate." *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983); *see also Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 440 (Del. 2000).

#### A. Out-of-Pocket Loss.

The evidence for the out-of-pocket loss is found at JX 146, JX 151, JX 99 and the testimony of Elizabeth Klein.

JX 146 was prepared by Elizabeth Klein from the Company's books and records. It includes only payments from December 16, 2006 (after Kim disclosed in June 2006 to Gerald Branchcomb that he claimed the technology) to September 19, 2008.

<u>Payee</u>	<u>Amount</u>	<u>Bates Page</u>
N. Hahn & Co. <sup>1</sup>	<b>\$674,024.16</b>	GYN0001530
Quaternion	<b>\$229,000</b>	GYN0001530

JX 151 was prepared by Adam's Capital with Ms. Klein's assistance and was presented to shareholders at the contested October 2008 shareholders' meeting. The presentation is a summary of the Company's books and records. Its data shows lavish, first class accommodations for Mr. Kim's stays wherever he went, purportedly on Company business. The Court heard testimony regarding the trips to Raleigh North Carolina and stays at the Umstead hotel from Mr. Kim. The least expensive airline ticket to Raleigh as set forth in JX 151 was \$822 and Mr. Kim made 15 trips there. The total is **\$12,330**. The Umstead hotel itself cost **\$26,128**.  
*Id.*

Mr. Kim testified that JX 99 showed that the Company's patent counsel was working with respect to the issues surrounding the proposed license. The total bill amount is **\$14,830.29**.

Ms. Klein testified to the amounts owed to Boyd Cox and to Einbinder & Dunn, as well as to the fact that such debts were still outstanding and were related primarily (although not exclusively) to issues surrounding Mr. Kim's ownership claim to the technology and negotiations around the license. The total approximate amounts still owed were **\$75,000** and **\$98,000** respectively according to Ms. Klein.

The total of the foregoing amounts in bold and which are claimed as out-of-pocket losses is \$1,129,312.45. *See, e.g., Strassburger v. Earley*, 752 A.2d 557, 579 (Del. Ch. 2000) (out-of-pocket loss as traditional compensatory remedy).

B. Lost Value Due to Delay.

From the time Kim first asserted his ownership claim in the spring of 2006, no progress has been made on bringing the device to market. Plaintiff claims damages for that delay for the period June 2006 (when Mr. Branchcomb was first advised of the ownership claim) until the present, a full four years.

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<sup>1</sup> N Hahn & Co. is not a party to the case, and while its rights have not been adjudged in this proceeding, the consent upon which Kim bases his claim to payment has been decreed invalid. Mr. Kim claims N. Hahn & Co. is owed over \$2,000,000: *see* JX 151 (\$2,325,280 as of May 31, 2008).

In negotiations for a license, Mr. Kim proffered calculations regarding the revenue stream that the Company would generate from the device and used those calculations purportedly in good faith negotiations regarding the proper payments under a license. He testified regarding those calculations, which were found in JX 110 at ED0002542. A copy of the electronic, excel spreadsheet file that Kim used to do the calculations was also produced in discovery, and a copy of that corresponding spreadsheet is found at JX 176.

The net present value of the revenue stream created by the license itself at a 5.8% royalty rate (as opposed to the full value of the Company's revenue stream), according to Mr. Kim, ranged from \$31.90 to \$72.71 million.<sup>2</sup> In negotiations with the Company, he explained the reasonableness of his position and that the amount was not "speculative". (JX 110 at ED0002544-45.) Kim negotiated for a \$30 million up-front payment on the basis of those calculations and testified the sum was intended to constitute a reasonable liquidated damages amount, although Einbinder & Dunn plainly took the demand as one for \$30 million. Mr. Kim explained that the firm misunderstood him. (*Compare* JX 140, file memo from T. Dunn regarding negotiations).

It is a straightforward exercise to calculate the cost of a four-year delay based on the record evidence, and that calculation is attached as Exhibit A. Exhibit A takes Kim's excel file as shown in JX 110 and JX 176 and, using all the same inputs and discount rates, simply moves the stream of cash to be received out by four years. The net present value difference between that amount and the amounts contained in JX 110 and JX 176 equals the damages at Kim's different discount rates, which damages range from \$23.31 to \$43.49 million. Mr. Kim's electronic file updated to include this damage calculation has been provided to Defendants and it can be supplied to the Court upon request. *See, e.g., Beard Research, Inc. v. J. Kates, ASDI, Inc.*, 2010 WL 1644177, at \* 30-32 (Del. Ch. Apr. 23, 2010) (loss in cash flow and business value appropriate measures of damages).

### C. Lost International Patent Rights.

Mr. Kim, in addressing the foregoing license revenue calculations, advised that they would be negatively impacted by the loss of international patent rights. Mr. Kim's conduct did cause the loss of such rights. While the design patent has been issued in some foreign jurisdictions according to Mr. Kim, the corresponding international patent rights to the pending U.S. utility patent applications have been lost due to the failure to make necessary payments in

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<sup>2</sup> While the present value of the royalty stream is a fraction of the value of the revenue stream the device would generate for the Company according to Kim's calculations, using the 5.8% royalty rate number is a conservative means to estimate damage.

February and March of 2010. The international application, commonly called a PCT, has now expired. (JX 143.) He allowed this to lapse without paying necessary fees.

To the extent the Court does not award lost profits on the basis set forth in item B above, another measure of the loss of those rights is available to the Court from Kim's motion to expedite filed on November 16, 2009. (ID 28064147). That is the replacement cost thereof, estimated by him to be \$750,000. (*Id.* ¶ 12.) Although those rights cannot be resurrected and that sum is hardly adequate to compensate for the loss, cost basis is an alternative means of calculating damage.

In addition to the foregoing, Plaintiff requests interest and costs be awarded to it.

Respectfully,

*/s/ Michael A. Weidinger*

Michael A. Weidinger (#3330)

MAW/smg

cc: Register in Chancery (via Lexis Nexis)  
David L. Finger, Esquire (via Lexis Nexis)