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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GYNECONCEPTS, INC., a Delaware corporation, Plaintiff, v. NICHOLAS KIM, POPULATION BIOSCIENCES, LLC a Delaware limited liability company, and QUATERNION INVESTMENTS, LLC, a Delaware limited liability company, Defendants.	)	Case No. 4820-CC **CONFIDENTIAL AND FILED UNDER SEAL**

<u>PLAINTIFF'S PRE-TRIAL BRIEF</u>

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PRELIMINARY STATEMENT

Plaintiff GyneConcepts Inc. ("GyneConcepts" or the "Company") brings this action against its former CEO and Chairman of the Board, Nicholas Kim ("Kim"), and entities owned by him, for breach of fiduciary duty, misappropriation of trade secrets and related claims stemming from Kim's having misappropriated GyneConcepts' technology to compete directly against it.[1] Kim operated the Company as essentially a "one-man" show since his taking the reins in or about 1998 until he resigned in 2008. (Dunn Dep. 8.) The Company had no employees since at least the year 2000, and Kim ran the Company with help from an administrative assistant and assistant secretary of the Company who was a paid consultant, Jan Cooper. Kim was also paid through a consulting agreement with his wholly owned company, N. Hahn & Co., Inc., with funds provided by stockholders investing additional rounds of capital into the Company. (Kim Ex. 5.) That self-interested consulting agreement as extended in 2004, however, is void because it was not approved by unanimous written consent of the GyneConcepts' board. [2] (Dunn Ex. 2.)

Kim, as Chairman, did not call board meetings for the three-member board. Instead, if he needed something, he would have his chosen law firm, Einbinder & Dunn ("E&D"), prepare written consents for the two other Board members to execute. (Dunn Dep. 6-7; Dunn Ex. 1, 2.) Kim did not hold an annual stockholders' meeting for a decade. Kim kept stockholders in the dark about his activities until the Company needed more funds, at which time he would meet with stockholders, and advise of the latest progress regarding the Company's device. (2004 PPM; 2005 PPM; 2006 PPM.) While rarely communicating his activities during a 10-year

[1] This is GyneConcept's pre-trial brief, wherein it will summarize what GyneConcepts intends to show at trial.
[2] Kim had no other compensation contract with the Company.

period, he then announced to the two, disinterested Board members in 2006, that he "owned" the Company's improved device, which improvement had been developed on Company time with Company money. (Dunn Dep. 10-13, 32.) The R&D efforts undertaken on the Company's behalf with stockholders' money suddenly belonged to Kim according to him. Kim said his claim was based on what the Company's patent counsel, Boyd Cox, had opined -- that Kim owned the re-designed device. (Kim Dep. 110-112; Oct. 2008 Stockholders' Meeting Tr. at 126.) Mr. Cox, in deposition, disclaimed that he ever advised that Kim owned the rights to the Company's improved device. (Cox Dep. 27-30, 45; Dunn Dep. 12-13.) Not only did patent counsel never give the opinion Kim asserted, regardless of any such opinion under patent law, Kim's "ownership" claim is entirely inconsistent with Delaware law of fiduciary duties and Mr. Cox never looked into Delaware law on the subject. (Cox. Dep. 47; Dunn Dep. 12-13.)

Kim,using Company money from 1998 until about 2006, worked in a collaborative effort with Hammersmith Hospital ("Hammersmith") and the Company's engineering design firm, Mann-Horton & Associates Inc. ("Mann-Horton"), to develop a final version of the Company's product that could be brought to market. (Horton Dep. 8, 19, 29, 41, 46-47, 50; Horton Ex. 1, 5, 6, 9, 11, 12, 14, 20.) Kim had complete access to Company proprietary information, including testing results from Hammersmith. (Kim. Ex. 14.) [redacted] gotten [redacted] This was the very device shown to stockholders as the Company's device and [redacted]

[redacted] in efforts to raise money to bring the device to market. (Horton Ex. 4; 2004 PPM at NK02624; 2005 PPM at NK02564; Blackman Dep. 16-18.) This was the very device found on the designs of the Company's proposed product packages. (Horton Ex. 5, 21.) This was the very device which Kim had touted to GyneConcepts' shareholders as having had 100% efficacy in testing results and as already having saved two lives because it caught pre-cancerous cells in GyneConcepts' test patients at Hammersmith. (Lucher Dep. 9-10; Blackman Dep. 11; Kim Ex. 14.) This was the very device that Kim described in updates provided to GyneConcepts' lien creditors. (Kim Ex. 9; Kim Dep. 55-59; Cooper Ex. 4; Cooper Dep. 163.) This was the device whose progress Kim touted to the disinterested directors. (Kim Ex. 15.) Suddenly, it was no longer the Company's device; it was his.

[redacted]. Gerald Branchcomb, one of those two disinterested board members, was enraged at Kim's tactics and believed the design, having been developed on Company time and with Company R&D money and represented as such to stockholders, plainly belonged to the Company. (Dunn Dep. 52; Dunn Ex. 7; Cox Dep. 60-61 (the Company was being held for "ransom"). But, Kim's bad faith conduct left the disinterested directors with no real choice but to attempt to agree to a license. The two disinterested directors acquiesced to doing so and executed an Agreement to Negotiate License ("Agreement to Negotiate") on December 8, 2006 with Kim. (Kim Ex. 17.) That Agreement to Negotiate further benefited Kim by purporting to obligate the Company to pay for costs associated with obtaining patents for the improved device for the benefit of Kim's wholly-owned Company and patent assignee, Quaternion. GyneConcepts paid at least $215,000 toward the patent rights that Kim claims as his own. (Kim Ex. 21 at GYN0001551.)

The disinterested directors never conceded Kim actually owned the device, they were simply forced into attempting to obtain a license for the Company by Kim. The November 16, 2006 action by the Board authorizing the Agreement to Negotiate, however, as with Kim's compensation arrangement, is invalid under Delaware law because it was done without a board meeting by written consent, and without unanimous approval. (Dunn Ex. 2.)

The parties to the negotiation over the license ultimately could not agree to terms. [redacted] (Dunn Ex. 4.) While he eventually dropped that demand, he had provided detailed projections regarding his expectations of the revenues the Company would earn with the device that form the basis for the Company's damage claim in this proceeding for the delayed profits that should have been achieved but for Kim's breaches of duty. (March 19, 2008 letter ex. at ED0002542; Quaternion Royalty.NPV.) The disinterested directors obtained advice from an independent valuation firm, Adam's Capital, regarding fair terms for such a potential license (with Adam's Capital simply *assuming* that Kim actually owned the technology and could properly demand such a license). (May 7, 2008 Adam's Capital letter.) The parties could not reach agreement on the terms of a license because, among other things, demands made by Kim would have made it impossible to raise further needed capital for the Company according to Adam's Capital. (Dunn Dep. 18-19; May 20, 2008 email, ED0001684-85.)

After negotiations failed, Kim resigned from the Company, formed defendant Population Biosciences ("Population") to compete directly against the Company using the Company's own device. (Kim Ex. 24, 25, 26.) [redacted]

Undoubtedly he had no expectations it would survive to fight this case. [redacted]

The Court has seen this egregious conduct before. *See McGovern v. Gen. Holding, Inc.*, 2006 WL 4782341 (Del. Ch. June 2, 2006). *McGovern* was decided by this Court right at the time Kim began taking the position that he owned the Company's technology. As discussed below and will be shown at trial, this matter is every bit as egregious as *McGovern*. [redacted]

[redacted]

[redacted]

STATEMENT OF FACTS

GyneConcepts is a start-up Delaware corporation that holds 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. (2006 PPM.)

Kim is the former CEO[3] and Chairman of the Board of Directors of GyneConcepts. Population is a Delaware corporation created by Kim to carry on a business to compete directly against GyneConcepts. Defendant Quaternion Investments, LLC ("Quaternion") is a Delaware corporation created by Kim as a vehicle to hold intellectual property rights and technology covering a cervical sampling device that GyneConcepts claims in this litigation belongs to it.

Kim was at the now-defunct D.H. Blair and Company from 1991 to 1998 when he was let go. (Kim Dep. 6-12) Thereafter, he started N. Hahn & Co., Inc., an investment banking company [redacted] (Kim Dep. 7.) N. Hahn & Co. has closed no

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[3] Kim appears to make a meaningless distinction between being the former CEO versus being the former "acting CEO". Kim acted as the CEO, was the Company' s key executive officer, was the Company's agent in all respects with regard to his duties and held himself out as the Company's CEO to all the world. (*See, e.g.*, 2005 PPM at NK02597; *See also* Kim profile at NK02375.) He also referred to himself from time to time as the "Founding Chairman." (Kim Ex. 18 at GYN0001443.)

investment banking deals since its inception in 1998. (Kim Dep. 11.) While at D.H. Blair and Company, he worked on the GyneConcepts account, starting in about 1993. (Kim. Dep. 11.)

GyneConcepts entered into an agreement with N. Hahn & Co. on June 1, 1998 for Kim's company to provide financial services to the Company. (June 1, 1998 Agreement). Kim testified that its terms were discussed generally, but when asked whether the agreement itself had been circulated among the GyneConcepts' board, he said: "I don't know. I don't think so." (Kim Dep. 43.) The agreement is silent as to Kim's obligation to keep Company information and trade secrets confidential. Kim, however, knew well the importance of keeping such information protected for the benefit of the Company, because he was careful to do so when dealing with third parties other than himself and his own third-party affiliates. (Kim. Ex. 7.) There is no indication that Kim raised, or that the Board discussed protecting, the Company's intellectual property from Kim and N. Hahn & Co. when entering this agreement. Shortly thereafter, Kim took on the roles of CEO and Chairman of the Board of the Company. (Kim Dep. 11.)

The Company Embarks on Its Project for the Design, Confirmation, Enhancement, and Documentation of a Patented Privacy PAP Smear Device, a.k.a. Cervical Sampling Device

The Company's original cervical sampling device was covered by a broad United States patent, the '164 Patent issued on August 29, 1995. (Original Prototype; Kim Ex. 18 at GYN0001377; U.S. Patent, *See also* summary at NK 02374.) The Company had corresponding patents abroad. (Kim Ex. 18 at GYN0001377). The Company, which had formerly been named GyneTech, entered into an agreement in 1997 with Duke University to engineer prototypes of the cervical sampling device for in-human trials. (Kim Ex. 4; *See also* NK 2374.) The agreement with Duke was terminated and in 1999, E&D prepared an Engineering Project Agreement for

GyneConcepts to engage a chief investigator for testing prototypes. (Kim Ex. 6.) Only limited work was done by that investigator, but it is important to note that when dealing with third parties other than Kim, Kim and E&D took care to protect the Company's intellectual property. The agreement provided that all information was to remain confidential and all inventions belonged to GyneConcepts. (*Id.* at ED 0141.)

Thereafter, GyneConcepts turned to Hammersmith in the UK to do the human trials. Kim, on behalf of GyneConcepts, assembled a working team that included himself, Hammersmith (principally Pat Soutter) and Mann-Horton to develop and improve the device and to run tests on it. GyneConcepts paid for all the work by Hammersmith and Mann-Horton. (Kim Dep. 37, 48, 73; Horton Dep. 22; Oct. 2008 Stockholders' Meeting Tr. at 134.) Mann-Horton began work for GyneConcepts in this regard pursuant to a project contract the parties entered in 2001 for "The Design Confirmation, Enhancement, Development and Documentation of A Patented, Privacy Pap Smear Device, a.k.a. Cervical Tissue Sampling Device" ("Device Enhancement Project"). The discussions for the Device Enhancement Project included exchanging proposals in early February, 2001 with the contract entered on March 5, 2001. (Kim Ex. 7.) While the parties were negotiating the Device Enhancement Project, Kim forwarded his comments on the pending Mann-Horton proposal to E&D. He wrote: "Are we suitably protected w[ith] r[espect] t[o] the intellectual property ownership issue?" (Kim Ex. 7.) This protection for GyneConcepts was later confirmed by Jan Cooper when forwarding Mann-Horton's working drawings to Boyd Cox (the Company's patent counsel) and by Mann-Horton in deposition -- all work done by Mann-Horton was the property of GyneConcepts. (Horton Ex. 1; Horton Dep. 20.) Kim made sure GyneConcepts' key creditors knew well that Mann-Horton, who had been "commissioned to complete final design of Privacy Pap Smear device", also "assigned all right, title and interest in and to any and all designs, inventions, know-how, and every other form of intellectual property right to GyneConcepts." (Kim Ex. 9 at GYN0002003.)

GyneConcepts (through Kim), then began the Device Enhancement Project, which continued until the dispute over ownership and control of the device and the Company erupted in 2006. Pat Soutter of Hammersmith began to test the Company prototypes and to share the confidential results with Mann-Horton and Kim. The Device Enhancement Project was an entirely collaborative effort between Hammersmith, Mann-Horton and GyneConcepts. (Kim Ex 8; Horton Dep. 8, 19, 29, 41, 46-47, 50; Horton Ex. 1, 5, 6, 9, 11, 12, 14, 20.) Kim gained access to Hammersmith's confidential trials, including test results, photos and videotapes and he worked with Hammersmith and Mann-Horton to improve the device to bring to market. (Horton Ex. 6.)

GyneConcepts' status reports to key creditors tout the progress of *GyneConcepts'* device through a collaborative effort among the design engineers at Mann-Horton and the Hammersmith testing team. (Kim Ex. 9; Kim Dep. 55-60; *See also* Horton Ex. 6, 8, 9, 11, 12, 14.) As noted in the October 15, 2001 report: "Armed with the imaging trial data and additional insights gained through extensive consultation with all members of the Hammersmith clinical development team, our Mann-Horton design engineers have completed an "anatomically correct" next-generation device design." (Kim Ex. 9 at GYN0002016.) It was not until 2006 that Kim did an about face and claimed the key cervical sampling device improvements made were his own, personal property. Indeed, as he finally disclosed to shareholders at the contested, October 30, 2008 shareholders' meeting to elect directors: "Basically what it is from my perspective, I own the technology, so I'm going to exercise whatever rights I have in owning the technology." (Oct. 2008 Stockholders' Meeting Tr. at 139.)

Throughout the 2001-2006 period, GyneConcepts continued its Device Enhancement Project. (Kim Ex. 14, 15; Horton Ex. 20, 22, 23) Various designs were developed for components, including different tube designs and different brushes. (Horton Ex. 7, 8.) Kim worked with Mann-Horton in a number of areas toward bringing GyneConcepts' improved device to market, including brush design, product packaging, product instructions, logo design, product production, and they were looking toward extended human trials until Kim's focus shifted in 2006 toward attempting to document his "ownership". (Horton Ex. 4, 5, 16, 17, 21; Horton Dep. 4-78.) Consistently, the prototype shown on the packages and other designs of the Company's product incorporated the improvements that Kim now claims as his own. (Horton Ex. 5, 21.) The two features that distinguish the Company's original prototype from the one Kim claims as his own, but which were developed in collaboration with Mann-Horton and Hammersmith while Kim was Chairman of the Board and an officer of the Company, are: the angled slope of the front of the device, (sometimes referred to as a duck-bill), and the manner in which the brush is moved to collect a sample – front to back as opposed to in a circular motion. (Kim Dep. 22-23.) While the Device Enhancement Project team worked on the Company's device, they also worked with BUPA on improvements using focus/discussion groups. (Horton Ex. 18.)

Mann-Horton drew alternative designs incorporating the cervical sampling device's improvements and developed prototypes to test them. (Horton Ex. 7, 8.) The year 2004 was a watershed for the Company and the device. The latest improved device worked. In May 2004, Hammersmith's tests showed that the improved device collected samples successfully in each of the test subjects. (Horton Ex. 20.) These positive results were discussed in PPMs thereafter, including in the last PPM in 2006 circulated to certain (but not all) existing shareholders: "We also undertook companion clinical research and development activities at Hammersmith Hospital, leading to the successful completion of a pilot clinical trial of our preproduction Swan™ sampler prototype in 2004." (Kim Ex. 18 at GYN000 1398; 2005 PPM at NK02591-91.) As the 2006 PPM further explains, the Swan™ sampler device discussed is covered by a *GyneConcepts'* trademark application, No. 76/550,699. (Kim Ex. 18 at GYN1401.) That December 2006 PPM further explains to prospective shareholders that "We also intend to rely on trade secrets, unpatented know-how and continuing technological innovations … We intend to aggressively seek patent protection and rights for novel technologies developed in-house and as a result of any sponsored research conducted at Hammersmith Hospital." (*Id.*)

The Shareholders, Excited About Hammersmith Test Results Touted by Kim, Continue to Fund GyneConcepts Unaware Kim Would Lay Claim to the Improved Device

Kim would rarely communicate with stockholders. (*See, e.g.,* Dobson Dep. 14-15.) One annual stockholders' meeting was held during his tenure. One was held in October, 2008 (after he resigned) coming as a result of a fight for control of the Company and a Section 225 action in this Court. No annual reports were provided to stockholders. Allegedly based on old, corporate counsel advice, Kim was in constant money raising mode so he was constrained by securities law from communicating what was happening at the Company. (Kim Dep. 97-99.)

He would, however, when running low on funds, take a road show back to the existing stockholders and their friends, circulating whatever was the then most recent Private Placement

Memorandum to them. Kim's Company, N. Hahn & Co., did not do any investment banking deals itself and N. Hahn & Co. appears not to have been actively seeking to raise any money from its own known sources or contacts for GyneConcepts. (Lucher Dep. 8, 31, 33-35; Kim Dep. 10-11, 98-99.) Instead, Kim would ask existing shareholders to invest more and to share the opportunity with their friends. (Lucher Dep. 33-34; Blackman Dep.) The shareholders did the hard work of organizing these fundraising efforts. (Lucher Dep. 7-12; Blackman Dep. 6-7; Dobson Dep. 4.)

After Hammersmith's test results demonstrated the improved device worked, Kim went to stockholders during money-raising events and shared the details of the test results with them. (Lucher Dep. 9-11; Blackman Dep. 6, 10-11.) At no time did he disclose to them that he claimed ownership of the device that had been tested at Hammersmith. (Lucher Dep. 10-11; Blackman Dep. 12.) Indeed, he circulated to shareholders photographs of the Mann-Horton prototype that Kim now claims to own, referencing *the Company's '164 Patent number.* (Horton Ex. 4; 2004 PPM; 2005 PPM; Lucher Dep. 10-13; Blackman Dep. 17-18.) Kim plainly acknowledged the importance of the Hammersmith tests of the Mann-Horton prototype to stockholders, yet he never disclosed that the successful tests were conducted on a prototype *over which he claimed ownership.* (Kim Ex. 23 ("Obviously, this disclosure has been a/the key selling point of the deal").

Stockholders had never been told that Kim claimed ownership of the improved device that had been tested at Hammersmith and they were surprised to learn of that claim. (*Cf.* Lucher Dep. 11, 21.) Kim did not circulate the December 2006 PPM to all stockholders, but in efforts to raise money among some of them, he shared that document. Kim relies on the vague statement at page 39 thereof, that discusses the Agreement to Negotiate, as his defense to misrepresentation and breach of disclosure claims. That meager paragraph says nothing about Kim laying claim to the very improvements designed by Mann-Horton and tested at Hammersmith. That paragraph says nothing about the Company paying for all the development work at Hammersmith and Mann-Horton for the "Technology" that is mentioned, but never explained therein. That paragraph is entirely inadequate and misleading in light of all the other disclosures in the PPM regarding the Company's technology and references to the successes of the Company's Swan™ sampler device. Indeed, Kim acknowledged as much in a May 15, 2008 email to E&D: "every reference to the Swan™ device scattered THROUGHOUT THE ENTIRE PPM (approximately 55 references in all) that pertains to the final device being commercialized is referring solely to my device. . . . We will have to do a better job in future disclosure documents." (Kim Ex. 23.) (emphasis original).

Kim's Claim To Ownership Is Grounded In A Lie Regarding Patent Counsel's Advice

Kim's ownership claim derives from a sketch he did while working with Mann-Horton and Hammersmith in July 2001. On July 5, 2001, as part of ongoing Design Enhancement Project work, Kim faxed a sketch to Mann-Horton during regular business hours. (Horton 27.) Kim never diligently asserted an ownership or inventorship claim at the time, nor did he investigate at that time whether he had such a claim. He allowed the Company to continue to fund development of the device and remained silent. Cooper testified that what Kim later had expressed to her regarding the July 2001 sketch -- he simply hoped be listed as "co-inventor" with Mann-Horton's team. (Cooper Dep. 71-73.) It was only after the Swan™ sampler device had been proven successful that Kim began to claim that he "owned" the Swan™ technology based on that July 5, 2001 drawing. He asserts this claim came about as a result of the conclusion by the Company's patent counsel.

Here is what Kim said at the October 2008 stockholders' meeting on the subject of his ownership of the improved device:

> The whole thing didn't really to [sic] come to light until 2006 when I guess patent counsel [,Boyd Cox,] did an in-depth analysis of the whole thing at the behest of Michael's partner [,Terry Dunn,] when he sent around the due diligence sheet to prepare for the offering. Then we got into it, then it was like, okay, he finally came to the conclusion that I was the inventor and the owner.

(Stockholder's Meeting Tr. at 126).

Here is what Kim said in his deposition on the same subject:

> Q: And he [Boyd Cox] reached the conclusion, he told you it was you correct?
>
> A: Again, I'm not sure he used the exact words you, Nick Kim, own this. Yeah, okay, but, yeah, that's what happened … In the same breath, I think it was on the Boyd Cox phone call, but I said, once I had known, I had become aware, fully aware, known that, you know, about me being the owner, then I said, "Well, what I want to do is license it to the company."

(Kim Dep at 110-112.)

Here is what Boyd Cox said about ownership, in direct contravention of Kim's claim *made to shareholders* that Cox "came to the conclusion that I was the inventor and the owner":

Q: Did Mr. Kim provide any information to you about his belief as to inventorship of the modifications to the device?...

A: Yes. He told me that he was the inventor of the item shown in the sketches.

Q: Did he ask you … to give an opinion as to who was the owner of the improvements …?

A: No.

Q: Outside the context of a formal opinion, did he ask you whether he was the owner?

A: I don't recall if he asked a question that directly.

Q: Did he ask, effectively that question, circumspectly?

A: If he did, the answer is – or would be, in any occasion, that I – at no time have I had enough information to answer the question of ownership with respect to what is shown in these drawings.

Q: And do you believe that you communicated that to Mr. Kim, that at no time did you have sufficient information to draw a conclusion as to ownership?

A: Without question.

Q: Did Mr. Kim ever endeavor to supply you, as a follow-up, the types of information that you told him you would need to make an ownership determination?

A: No.

(Cox Dep. at 27-28, 30.)

Kim Ransoms the Company's Technology and Disinterested Directors Are Forced Attempt to Negotiate A License Agreement

Kim ran the Company. As counsel described, he was the active party "conducting all of the activities on behalf of the company that we were aware of and the board members Bill Dunn and Gerald were consulted when board approval was needed." (Dunn Dep. 8.) Outside counsel never attended any board meetings because there were none. The last board meeting had been a telephonic one held on June 17, 1999. (Dunn Ex. 1.) Five years later, E&D prepared and circulated, on August 20, 2004, written consents of the Board that Kim had wanted. (July 21, 2004 email ED0001453-54; July 19 email ED0001451; July 21 email ED0001452.) E&D's letter suggests, and Terry Dunn of E&D confirmed, that he was introducing himself to the disinterested directors with these consents. (Dunn Ex. 1; Dunn Dep. 7.) The Board then purported to adopt a resolution by written consent extending, and increasing the compensation under, the 1998 consulting agreement with Kim's company, N. Hahn & Co. (August 2004 Majority Consent.) That consent is invalid under Delaware law as it was not unanimous. Regardless of the fact that consent is void, there is no indication in the consent that the disinterested directors considered it important to adopt any protective measures with respect to the Company's technology and its confidential information vis-a-vis Kim or N. Hahn & Co.

That is not surprising, as these consents circulated by E&D were plainly *fait accompli* – Bill Dunn purported to execute his on August 15, 2004 – at least five days before he would have actually received it and 4 days before the footer on the bottom document shows that it was created. By this time, Kim had long since made the July 5, 2001 sketch upon which he bases his claim to ownership, Mann-Horton had developed working drawings and the prototype under its contract with the Company, and Kim would have known that the Hammersmith tests results of the Mann-Horton prototype of "his" device had been shown to prove the technology.[4] Yet, no disclosure was made of "his" interest in the technology at the time of the consent.

The same is true of the unanimous consent circulated at that time which says: "Kim has other outside business interests in which he is, or may in the future become involved, including interests involving firms that may be in competition with the business conducted with the Corporation." (August 2004 Unanimous Consent). Kim, who had been involved in the investment banking business, takes this boilerplate language about competition contained in a

[4] The initial 1998 contract with N. Hahn & Co. had expired, but it automatically renewed annually unless expressly terminated. Naturally, it had not been terminated -- its extension had not even been considered by the Board – no meeting having been held since 1999. At no time, from the time of its adoption to the time Kim left the Company, does it appear that Kim raised with the Board, or the Board considered, whether provisions to protect the Company's technology and confidential, proprietary information should be included in the contract. This stands in stark contrast to Kim's efforts to protect the Company's technology and confidential information from third parties to whom it would be disclosed, such as Mann-Horton.

written consent (by a Board that had not had a meeting in five years) and actually claims it allows Kim to personally benefit from the cervical sampling device developed while he was CEO and Chairman of the Board of the Company. He makes the claim despite the fact that no disclosure was made to the Board at the time of the consent of Kim's claimed interest in that technology even a full 3 years after the event that forms the bases of his claim -- his July 2001 sketch.

At the same time as he was touting the Company and its technology to stockholders to raise new money (Company funds that Kim intended to use to apply for patents for the improved device for Kim's sole benefit), Kim sought to force the Company to enter into a license with him for "his" improvement. Disinterested director Gerald Branchcomb referred to Kim's bad faith conduct as "ransom". (Cox Dep. 60-61.) Yet, to avoid expensive and distracting litigation which would further delay commercialization of the Company's device, the Company entered into the Agreement to Negotiate License dated December 8, 2006. The written consent of the board to enter into the Agreement to Negotiate is invalid, however, as a matter of Delaware law, having not obtained unanimous board approval. (Dunn Ex. 2.)

The Agreement to Negotiate 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).

There were no serious negotiations for nearly two years after the entry of the Agreement to Negotiate, although the parties had some discussions and a preliminary draft of a licensing agreement circulated in March of 2008. In the interim, Kim turned his attention to obtaining "his" patents and proceeded to make at least 4 U.S. patent applications, some of which were later abandoned. (Kim Ex. 1, 2, 3, 19, 20, 22; Kim Dep. 30.) Not surprisingly, nothing in the Agreement to Negotiate contemplates a claw-back of funds paid for abandoned applications. Kim and his assignee Quaternion have now been issued U.S. Design Patent No D588,695 for the improved device, and corresponding international patents have also issued. (Kim Dep. 30.) Kim also has pending two U.S. utility patents applications covering the device and a kit containing all the elements of the product, which patent applications he also assigned to Quaternion instead of to the Company. (Kim Ex. 19, 20, 22; Kim Dep. 30.)

The term of the Agreement to Negotiate was extended three times and was set to expire on May 1, 2008. Negotiations 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 disinterested members of the Board could not agree to the terms, 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 to Negotiate 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 disinterested board members received Adam's Capital's report on May 7, 2008. (May 7, 2008 Adam's Capital letter.) Adam's Capital's analysis proceeded *on the assumption* a license was warranted because Kim owned the device. (*Id.*)

Kim demanded terms that were not consistent with the Agreement, and according to Adams Capital, would interfere with the Company's ability to raise money. (Dunn Dep. 18-19; May 20, 2008 email from W. Dunn to Kim.) Kim's last demand in the negotiations for a license sought royalties for "his" improvement, including $400,000 in up-front fees, a 6% royalty rate and 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. (Dunn Ex. 4, 5.) Negotiations broke down thereafter. E&D summarized the state of the negotiations at the time in internal memos and to stockholders. (*Id.*) When the negotiations broke down, Kim 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. In connection with the negotiations, Kim prepared detailed analysis valuing "his" technology and his right to demand a license fee of $30,000,000 for it. (March 19, 2008 letter from F&R, exhibit; Quaternion Royalty NPV Final.)

The Stockholders Vote Against the Cooper/Kim Slate

When the negotiations over the license failed, Jan Cooper, who had worked closely with Kim for years, purported to remove the disinterested directors from the Board and filed a Section 225 proceeding in this Court in 2008. A stipulated order of the Court called for a stockholders' meeting to decide the issue, and a meeting was held in Delaware in October, 2008. In connection with that meeting, the Board had discovered, among other things, that Kim had led a first-class travel lifestyle when the start-up venture obviously could not afford it. (Kim Ex. 21.) Cooper also got certain shareholders, who had purchased shares and signed subscription agreements but who had not received share certificates, to sue the Company in Superior Court seeking to rescind their subscription agreements using Kim's Delaware counsel in this case as their lawyer. (Cooper Dep. 130-136). Those shareholders, however, settled the case through Kim's Delaware counsel in exchange for being issued their shares of stock in GyneConcepts and they only stand to benefit from that settlement if GyneConcepts wins this case, which Kim and their former lawyer obviously vigorously oppose.[5] Cooper's slate, with Kim's support in the background, lost the vote. (Kim copy of consenters list; Blackman Dep. 20-21.) At the stockholders' meeting, as noted above, Kim stated flat-out that he was taking the technology. (*See also* Lucher Dep. 20-21.)

Kim Starts Population With GyneConcepts' Shareholders' Money to Exploit the Cervical Sampling Device

It is unclear exactly when Kim started to develop plans to open a competing business, Population, and to use that new company to compete directly against GyneConcepts using the improved cervical sampling device. He has circulated subscription agreements for Population to potential investors, including primarily from GyneConcepts' existing stockholders. Some invested, but he has only raised $90,000. (Kim Dep. 174.) The consulting arrangement Kim has put in place between N. Hahn & Co. and Population is similar to what he did at GyneConcepts -- [redacted]

[5] The Court may take judicial notice of the prior Court of Chancery and Superior Court proceedings. Delaware Rule of Evidence 201, 202.

ARGUMENT

I. Under The Precedent of *McGovern*, GyneConcepts is Entitled to Return of Its Intellectual Property And Damages

This case closely parallels one previously decided by this Court, *McGovern.*, 2006 WL 4782341 (Del. Ch. June 2, 2006). Both have as their central dispute the claim that an inventor/company CEO who, after the company had invested millions of dollars for years of research and development to improve and commercialize a product (here the Company's sole product), and after having used the confidential information that was fruit of the company's efforts to perfect the company's product, wrongly claimed it as his own. While the facts and circumstances of *McGovern* necessarily differ in some respects, the legally operative facts are remarkably similar and warrant the same result – findings by this Court that Gyneconcepts' former CEO and Chairman of the Board, Nicholas Kim: (1) breached fiduciary duties he owed to the company by fraudulently misrepresenting and concealing material facts, misusing the Company's confidential information, misappropriating the Company's trade secrets, causing the Company to pursue a business plan that provided funding for research and development from which the Company would not profit, usurping the Company's corporate opportunity, converting the Company's property, and by participating in unfair trade practices; and (2) breached contracts he had with the Company.

II. Kim Breach Fiduciary Duties He Owed to The Company And Its Shareholders

Under settled Delaware Law, Kim, as a former officer and director of the Company, owed fiduciary duties of good faith, due care and utmost loyalty to the Company and its stockholders. *Guth v. Loft, Inc.,* 5 A.2d 503 (Del. 1939). The *Guth* Court explained:

> Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest. The occasions for the determination of honesty, good faith and loyal conduct are many and varied, and no hard and fast rule can be formulated. The standard of loyalty is measured by no fixed scale.
>
> If an officer or director of a corporation, in violation of his duty as such, acquires gain or advantage for himself, the law charges the interest so acquired with a trust for the benefit of the corporation, at its election, while it denies to the betrayer all benefit and profit. The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation. Given the relation between the parties, a certain result follows; and a constructive trust is the remedial device through which precedence of self is compelled to give way to the stern demands of loyalty.

Id. at 510. *See also* Edward P. Welch et al., *Folk on Delaware General Corporation Law* at § 141.2.1.2, at GCL-IV-26 (5th ed. 2006) ("The duty of loyalty embodies both an affirmative duty to protect the interests of the corporation and an obligation to refrain from conduct that would injure the corporation and its stockholders or deprive them of profit or advantage.") Thus, as this Court recently reiterated, "[a] breach of fiduciary duty occurs when a fiduciary commits an unfair, fraudulent, or wrongful act, including misappropriation of trade secrets, misuse of confidential information . . . or usurpation of the employer's business opportunity."). *Beard Research, Inc. v. Kates,* 2010 WL 1644177, at *18 (Del. Ch. Apr. 23, 2010) *citing Sci. Accessories Corp. v. Summagraphics Corp.*, 425 A.2d 957, 965 (Del. 1980). As is detailed below, Defendants have committed all of these wrongful acts and more. Return of the device to the Company, as well as damages for the delay in its future development since 2006 when Kim first laid claim to ownership, disgorgement of all funds Kim received and attorneys' fees for misappropriation of trade secrets are all appropriate remedies. *See McGovern,* 2006 WL 4782341 at ** 2, 22-23.

A. Kim Usurped the Company's Corporate Opportunity And Stole Its Technology

The corporate opportunity doctrine, as delineated by *Guth* and its progeny, holds that a corporate officer or director may not take a business opportunity for his own if: (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation. *Guth*, 5 A.2d at 511.

Plaintiff will demonstrate at trial that Kim, having virtually sole control of the development of the Company's technology for years, took gross advantage of the Company and its financial resources to conduct the necessary research and development to bring the product to market. Under like circumstances in *McGovern*, the Court found that the CEO/inventor "was not free to use [the Company's resources to pursue initiatives that would not benefit it and would only benefit [the CEO/inventor's wholly-owned company]" and "could not cause [the Company] . . . to pursue a business strategy that could only benefit himself personally, to the exclusion of [the Company] and its other investors. *McGovern,* 2006 WL 4782341, at **14-18. Significantly, the Court noted that "[i]t is difficult to conceive of a more outrageously disloyal act than the execution of a business plan by an entity that would involve its investment of capital in initiatives from which it could not profit." *Id.* at *17.

B. Kim Misappropriated Plaintiff's Trade Secrets by Wrongfully Assigning the Improvement Patents to Defendant Quaternion

As was the case in *McGovern*, here there is nothing in any of the Company's corporate governance documents or contracts which departs from "the common law expectation that a fiduciary inventor will assign patents to the fiduciary's employer." *Id.* (citations omitted). Moreover, under Delaware law, an employer's trade secrets are a protectable interest. *Beard Research, Inc.*, 2010 WL 1644177, at *8.

The Delaware Uniform Trade Secrets Act ("DUTSA"), defines a trade secret as:

> information, including a formula, pattern, compilation, program, device, method, technique or process that:
>
> a. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

6 *Del.C.* § 2001(4) (2006).

Thus, to qualify as a "trade secret," "information must both derive independent economic value from not being generally known or readily ascertainable and be subject to reasonable efforts to maintain its secrecy." *Beard Research, Inc.,* 2010 WL 1644177, at *8 (citations omitted).

DUTSA defines misappropriation, in relevant part, as:

a. Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

b. Disclosure or use of a trade secret of another without express or implied consent by a person who:

1. Used improper means to acquire knowledge of the trade secret; or

2. At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade [secret] was:

   A. Derived from or though a person who had utilized improper means to acquire it;

   B. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

   C. Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.

6 *Del. C.* § 2001(2). "DUTSA does not require, however, any showing that a former employee had a written employment contract or nondisclosure or noncompetition agreement to prove liability for misappropriation of a trade secret." *Beard Research, Inc.,* 2010 WL 1644177, at *8 (citations omitted).

At trial Plaintiff will show that the Company took reasonable steps, including the requirement that third parties participating in the research, design, development and testing of the device agree to maintain the confidentiality of the device's design, development, testing and market viability. By doing so, the Company sought to protect the economic value of the device it intended to commercially exploit. Plaintiff will also establish at trial that in knowing violation of his position as fiduciary as an officer and a director of GyneConcepts to maintain the secrecy of the device, the work by Mann-Horton and the testing at Hammersmith to protect the Company's economic interest. Kim wrongfully misappropriated the Company's trade secrets and intellectual property for himself in violation of DUTSA.

C. Kim Breached His Duty to Disclose And Defrauded the Company And Its Shareholders Through Affirmative Misrepresentations And Concealment of Material Facts

Under Delaware law, law fraud consists of: (1) a false representation, usually one of fact; (2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; (3) the intent to induce the plaintiff to act or refrain from acting; (4) the plaintiffs' action or inaction taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of such reliance. *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983). It may also arise from "deliberate concealment of material facts, or by silence in the face of a duty to speak. Thus, one is equally culpable of fraud who by omission fails to reveal that which it is his duty to disclose in order to prevent statements actually made from being misleading." *Id.* Kim owed fiduciary duties and the duty of candor. At trial Plaintiff will demonstrate that Kim breached his duty and committed fraud and misrepresentation in the furtherance of his schemes to take the device for his own.

Specifically, Plaintiff will show at trial that Kim initially made no claim of ownership of the Company's device, but rather, first raised this claim almost six years into the game when he apparently conceived of the selfish scheme to defraud the Plaintiff and its investors that funded the development to steal the Company's technology. Under Defendant Kim's version of events, it only dawned on him in 2006 that he "owned" the improvement. He did not disclose to shareholders, even in the December 2006 PPM, that he actually claimed the Company's device that had been developed with Mann-Horton and Hammersmith as his own. His post-hoc "ownership" claim has the same ring of untruth as those advanced by the defendants in *McGovern* which the Court used the terms "inventive," "pretext[ual]," and "conjured" to describe. *See McGovern,* 2006 WL 4782341, at *11. Kim never raised the issue of ownership in the 2005 PPM (after Hammersmith tests results had been confirmed) and, having finally made a vague reference to a claim to ownership of "Technology" in the December 2006 PPM, he had the duty to fully inform the Company and its stockholders therein about his claims. *Arnold v. Soc'y for Savings Bancrop, Inc.*, 650 A.2d 1270, 1280 (Del. 1994) ("having traveled down the road of partial disclosure … [he] had an obligation to provide the stockholders with accurate, full and fair characterization…"). Moreover, his claim to ownership itself is grounded in a false statement about what the Company's patent counsel advised. *Zirn v. VLI Corp.*, 681 A.2d 1050, 1056-58 (Del. 1996) (misleading partial disclosure regarding patent counsel opinion). Kim breached his duty and committed misrepresentations.

Again, the facts in *McGovern* are remarkably similar to those in this case. The *McGovern* defendants' ownership assertions rested on a 1989 License which the CEO defendant claimed to have 'come upon' some time in 2005. The Court found this delayed happenstance to be "not nearly as important as [defendant] claims" because the fact that the license was newly-found, coupled with the fact that the company President and General Counsel "always had believed that [the Company] had the right to exploit the [technologies] it had developed, suggested that the document was "never considered an operative document at the [Company]. *Id.* at 12. Here, Kim concealed his claim based on a July, 2001 sketch and then purportedly was able to transfer all ownership rights to the technology to Quaternion only much later.[6] Kim's newly-discovered claim only arose in 2006 when he suddenly announced to the Company that based it was based on alleged opinions of the Company's patent counsel that he, and not the

[6] Like the patent holding company in *McGovern*, Quarternion is just a patent assignee that did no work on the device – the Company paid for all that creative work. *See McGovern*, 2006 WL4782341, at *14.

Company owned the technology.[7] That statement, reiterated to shareholders at the meeting to elect directors in 2008 was false -- Boyd Cox flatly denied at deposition that he offered such an opinion. In any event, such an opinion would be entirely inconsistent with established Delaware fiduciary duty law. *See McGoven,* 2006 WL 4782341 at *17 (holding that "[e]ven if the 1989 License Agreement was operative [to assign the technologies to the CEO's company], [the CEO] would still have breached his fidiuciary duties . . . and [the Company] would still have the equitable right to control [the technology];" and finding the CEO's conduct "unconscionable and unlawful").

III. Defendants Population and Quaternion Aided and Abetted Kim's Breaches of Fiduciary Duty

Under Delaware law, a claim for aiding and abetting breaches of fiduciary duty requires: "(i) the existence of a fiduciary relationship; (ii) a breach of that relationship; (iii) knowing participation in that breach by a defendant who is not a fiduciary; and (iv) damages proximately caused by the breach. *McGowan v. Ferro*, 859 A.2d 1012, 1041 ((Del. Ch. Oct. 8, 2004) (citations omitted); *accord Gilbert v. El Paso Co.,* 490 A.2d 1050, 1057 (Del. Ch. 1984) *aff'd*, 575 A.2d 1131 (Del. 1990). As detailed above, Plaintiff will establish at trial that Kim used unfair trade practices and breached each and every fiduciary duty he owed as an officer and director to the Company. Defendants Quarternion and Population, as the vehicles through which Kim misappropriated the Company's property, are jointly and severally liable for those breaches.

[7] At trial Plaintiff will show that prior to this time, not only did Kim not tell his fellow directors that he owned the technology, but he frequently discussed the Company's technology with third parties and represented to those third-parties that the Company owned the technology and that he was acting on behalf of the Company with respect to that technology, leading all to believe that the Company controlled and would benefit from the technology being developed. *See id.* at **15-16.

See Kelly v. Blum, 2010 WL 629850, at **1, 15 (Del. Ch. Feb. 24, 2010) (denying motion to dismiss, Court held that plaintiff stated a cognizable claim for aiding and abetting fiduciary duties against parent company who knowingly participated in breaches "through the actions of its [officers] and two of its wholly-owned subsidiaries," one of which was the entity created to enable the challenged merger); *see also In re Nantucket Island Assocs. L.P. Unitholders Litig.*, 810 A.2d 351, 376 (Del. Oct. 8, 2002) (denying partial summary judgment on defense that investment vehicle entity not liable for aiding and abetting fiduciary duties in challenged rights offering, and stating, "it is precisely because the [entity] was formed . . . for the specific purpose of the Rights Offering that a reasonable inference of knowing participation can be drawn . . . the knowledge that the General Partner had about the Rights Offering can be fairly imputed to the [entity] because [the entity] was the instrumentality through which the General Partner's parent carried out its purchase of the Preferred Units.")

IV. Defendants Wrongfully Converted Plaintiff's Valuable, Proprietary Information and Property

Under Delaware law, "[c]onversion is the act of dominion wrongfully exerted over the property of another, in denial of his right, or inconsistent with it." *McGowan*, 859 A.2d at 1040 (*citing Arnold*, 678 A.2d at 536 (*quoting Drug, Inc. v. Hunt*, 168 A. 87, 93 (Del. 1933). The three elements of conversion are: (1) lawful acquisition of title to property; (2) a demand by the owner to deliver the property; and (3) refusal to deliver by the one in possession. *See Dondalski v. Bifferato*, 1983 WL 18010, at *2 (Del. Ch. Nov. 9, 1983). Demand is excused, however, when 'the alleged wrongful act is of such a nature as to amount, in itself, to a denial of the rights of the real owner." *CIT Commc'n Fin., Corp. v. Level 3 Commc'ns, LLC*, 2008 WL 2586694, at *2 (Del. Super. June 6, 2008).

Here, Kim's conversion of the Company's property is self-evident. He assigned the device patent to his solely-owned company, Quarternion, and boasts that the invention is his.

V. The Written Consents Purportedly Approving Defendant Kim's Compensation Contract And The Agreement to Negotiate a License Are Invalid As A Matter Of Law

Kim's claims rest, in part, on the validity of two agreements - Kim's purported compensation contract and The Agreement to Negotiate a License – both of which were allegedly agreed to by the Company's board by written consents dated August 2004 and November 16, 2006. As a matter of law, both Board actions are invalid. Section 141(f) of the Delaware General Corporation Law provides: "[u]nless otherwise restricted by the certificate of incorporation or bylaws, any action required or permitted to be taken at any meeting of the board of directors . . . may be taken without a meeting ***if all*** members of the board . . . consent thereto in writing . . .." 8 *Del. C.* § 141(f) (emphasis added); *see also* 2 Fletcher Cyc. Corp. §393. The Written Consents themselves demonstrate on their face they are invalid as Kim abstained from the vote. As a result, only two of the three-member board consented to the proposed resolutions to enter into the extension of the compensation agreement and the Agreement to Negotiate. In enacting that statute, the Legislature recognized that 'meetings should be required except where the decision is so clear that the vote is unanimous and in writing. This lack of unanimity renders the actions purportedly taken by written consent – approval of the two agreements – invalid. *See Solstice Capital II, Ltd. P'ship. v. Ritz*, 2004 WL 765939, at *1 (Del. Ch. Apr. 6, 2004) (granting summary judgment that written consents invalid where only majority of disinterested directors signed written consents and holding "[a]ction by written consent requires unanimity of the entire board, not just the unanimity of the disinterested directors."; *accord Tansey v. Trade Show News Network*, 2001 WL 1526306, at *4 (Del. Ch. Nov. 27, 2001)("The board purported to approve [the merger agreement] by unanimous written consent, but that consent was not signed by [a director]. Because only a unanimous board can act by written consent under 8 *Del. C.* § 141(f) and because the . . . board never met to consider the [merger], the [merger] was never validly approved.")

Moreover, even if The Agreement to Negotiate was not invalid under Delaware law, Defendant Kim and Quarternion would still be in breach. The terms of The Agreement to Negotiate specifically required that the negotiations be in "good faith." Because Kim usurped the Company's corporate opportunity; misappropriated its confidential information, trade secrets and intellectual property; and sought, through The Agreement to Negotiate to force the Company to accept a mere license instead, Kim acted in bad faith. The negotiations over a "fair" license were premised on, and assumed to include, the validity of Kim's ownership claim. Having gained all those advantages, Kim still would not enter a license on terms that would allow the Company to move forward according to Adam's Capital, hampering all future efforts to raise money for the Company. Assuming, *arguendo*, the Agreement to Negotiate is not void *ab initio*, Kim breached it.

CONCLUSION

For the foregoing reasons and based on the evidence to be presented at trial, Plaintiff respectfully requests the Court enter judgment in its favor on all counts.

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Dated: May 24, 2010

CERTIFICATE OF SERVICE

I, Michael A. Weidinger, Esq., hereby certify that on May 24, 2010, *Plaintiff's Opening Pre-Trial Brief* was served via Lexis/Nexis File & Serve on the following:

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