FINGER & SLANINA, LLC
ATTORNEYS AT LAW

David L. Finger (DE Bar ID #
One Commerce Center, 1201 N. Orange St., 7th fl.
Wilmington, Delaware 19801-1186
Ph: (302) 573-2525 | Fax: (302) 573-2524
E-mail: dfinger@delawgroup.com
www.delawgroup.com

July 15, 2010

Via LexisNexis File and Serve
The Hon. William B. Chandler III
Court of Chancery
34 The Circle
Georgetown, DE 19801

Re: *GyneConcepts, Inc. v. Nicholas Kim, et al*
Del. Ch., C.A. No. 4820-CC

Dear Chancellor Chandler:

This letter responds to the letter from Mr. Weidinger dated July 9, 2010. Notwithstanding that plaintiffs submitted, and the Court entered, an Order for Judgment in the case, plaintiffs now request additional relief. Although it is unclear from the letter, plaintiff appears to ask the Court to award damages without a further hearing, which the Court indicated at trial would be necessary.

It is defendants' position that no further hearing is necessary and damages should not be awarded. First, plaintiff did not identify its special damages[1] or its theory of damages in the pretrial order, and so its claim for damages is waived. *Wilson v. Muckala*, 303 F.3d 1207, 1215 (10th Cir. 2002). To the extent that the Court chooses to overlook this, defendants state their position as to the amounts claimed.

A. *Out-of-Pocket Loss.*

Plaintiff first seeks to recover expense reimbursements paid to N. Hahn & Co. ("Hahn"). As plaintiff recognizes, Hahn is not a party to this case, and therefore any ruling in this case may not be applied to or enforced against Hahn.[2]

---

[1] Defendants refer to out-of-pocket loss and damages for delay (the latter of which is merely a claim for lost profits). These are both special damages. *In re Federal Asbestos Cases*, 734 F.Supp.2d 1563m 1567 (D. Hawaii 1990) (out-of-pocket losses are special damages); *Vineyard Brands, Inc. v. Oak Knoll Cellar*, Vt. Supr., 587 A.2d 77, 82 (1990) (lost profits are special damages).

[2] As the Court ruled that Mr. Kim had a fiduciary obligation to assign the patent to GyneConcepts, the ruling on the written consents serves no purpose other than as a vehicle to open the door for GyneConcepts to make a damages claim to recover payments from Hahn.

Plaintiff argues that the consent signed by all directors of GyneConcepts was declared invalid, and therefore Hahn is not entitled to these payments. This is incorrect. The contract with Hahn was entered into with full knowledge and approval of all directors of GyneConcepts. The only issue was that the procedure for director approval was deemed deficient, notwithstanding all directors consented to action by written consent, with one director not voting on the merits of one aspect of that consent.

Delaware law has long recognize that if a corporation enters into an agreement and obtains the benefit of that agreement, it cannot claim some flaw in the procedure as a basis to renounce the agreement after the fact. In *Mulco Products, Inc. v. Black*, Del. Supr., 127 A.2d 851, 856 (1956), the Delaware Supreme Court held that "even if authority was lacking yet the corporation received and retained the fruits of the loan it is estopped to deny authority...to borrow the money. This principle is settled beyond question."

Other courts have long-recognized this principle. *E.g., Haynes Chemical Corporation v. Staples & Staples, Inc.*, Va. Supr., 112 S.E. 802, 806 (1922) ("[a]dmitting that the making of the contract was irregular in its inception, those who governed the corporation will be held, by their conduct, to have waived such irregularity, and the corporation is estopped to rely on it..."); *Berry v. Maywood Mut. Water Co. Number One*, Cal. Supr., 88 P.2d 705, 708 (1939) ("[i]t is well settled, however, that when the corporation with knowledge of the contract accepts performance and makes payments on account thereof, there is a ratification of the contract, or an estoppel to deny its validity"); *Williford Lumber Co. v. Malakoff Brick Co.*, Tex. Civ. App., 113 S.W.2d 248, 252 (1938) ("[i]t is settled by the great weight of authorities, on sound principles of equity, that where a contract has been entered into between a corporation and another party and the other party has performed the contract and the corporation has received the benefits which it otherwise would not have received, it will not be heard to complain that on entering into the contract it exceeded its charter powers"); *Chafin v. Main Island Creek Coal Co.*, W.Va. Supr., 102 S.E. 291, 293 (1920) ("[w]here the rights of the public are not involved, a private corporation entering into a contract in excess of its powers, but which is not in violation of law or any settled rule of public policy, and receiving benefits thereunder, is estopped from setting up the defense that it was without power to make it, so far as such estoppels is necessary to do justice between the parties").

While the current board may be dissatisfied with performance under the Hahn agreement, that does not alter the fact that a fully informed board, with access to corporate counsel (not just patent counsel), agreed to the contract with Hahn, one of the directors signed the agreement on behalf of GyneConcepts, and GyneConcepts accepted services thereunder. Thus, GyneConcepts may not rely on the issue of the validity of the consents as a means of recovering amounts paid under the contract.[3]

---

[3] After trial, the Court offered the view that the expenditures relating to Raleigh, North Carolina constituted waste. Respectfully, and to preserve their position, defendants disagree. Over the years the Court has had many investment bankers, venture capitalists and other financiers testify before it. Notwithstanding that, what constitutes reasonable conduct in search

GyneConcepts next seeks recovery of legal fees incurred by GyneConcepts' counsel for services that were "related primarily (although not exclusively) to issues surrounding Mr. Kim's ownership claim to the technology and negotiations around the license." This claim is shameless. Mr. Kim did not require (much less force) GyneConcepts to incur those expenses. That decision was voluntarily made at a meeting of the other two directors (Mr. Branchcomb and Mr. Dunn) with both corporate counsel and patent counsel. In hindsight, the current board does not approve of that decision, but that does not mean it was not made knowingly and voluntarily. The former directors could have said "no" at the outset. With advice of counsel, they did not. As such, defendants are not responsible for those expenditures.

GyneConcepts also seeks recovery of amounts paid to Quaternion Investments, LLC. This is also shameless. Those expenditures were paid for shepherding the invention through the patent process. As such, they are expenses GyneConcepts would have had to incur anyway if it had the invention from the outset. GyneConcepts is asking the Court not only to give them Mr. Kim's invention (which the Court has done), but also to require Mr. Kim to pay all the costs associated with patenting it. Such "damages" are punitive, which is not permitted in this Court.

B. Lost Value Due to Delay (Lost Profits).

GyneConcepts seeks lost revenue from the time in 2006 that Mr. Kim first informed Mr. Branchcomb of his claim until the present. This claim suffers from the same defect as the claim for attorneys' fees above, namely that they delay was not caused by Mr. Kim, but by the other decision of the other directors to engage in licensing negotiation rather than claiming ownership of the invention. Again, the current board asks this Court to ignore the actions of disinterested former directors who had access to and called upon the advice of corporate counsel. That action must be binding upon GyneConcepts. Any delay, therefore, was a fully voluntary and informed decision by GyneConcepts, and defendants are not liable for delay resulting from GyneConcepts' own decision.

Additionally, there is no evidence in the record that, had there been no "delay," GyneConcepts would have been able to realize any profit. No one at GyneConcepts had any experience in bringing a medical product to market, or in shepherding a medical invention through the FDA approval process. More importantly, GyneConcepts did not have any money, and has a great deal of debt. There was no evidence establishing that there was a reasonable probability that GyneConcepts could raise the money (given its financial situation) and obtain the personnel, approvals and all other necessary things to monetize the invention. The absence of such evidence is fatal to GyneConcepts' claim for these damages. *See USH Ventures v. Global TeleSystems Group, Inc.*, Del. Super., 796 A.2d 7, 20-22 (2000), *aff'd mem.*, Del. Supr.,

---

of obtaining venture capital or similar investment is a matter requiring expert testimony. GyneConcepts did not offer any expert evidence, or any evidence beyond speculation. In the absence of any expert testimony as to whether Mr. Kim's conduct was within the range of reasonable conduct of investment bankers seeking wealthy investors, there can be no finding that the expenditures constituted waste.

781 A.2d 696 (2001) (absence of expert testimony establishing likelihood of obtaining financing fatal to damages claim).

The claim for "lost value," therefore, is speculative as well as factually unsupportable, and should be rejected by the Court.

C. Lost International Patent Rights.

Plaintiff's final claim is for damages due to the loss of international patent rights for non-payment of fees. This is the most shameless claim of all. Defendants brought a motion for an expedited trial for the express purpose of resolving this dispute in time to allow fundraising to pay to maintain the international patent rights. (D.I. 10). Plaintiff successfully opposed that motion. (D.I. 12, 14). Having done so, it cannot now claim the right to receive damages caused by the loss of those rights.

Further, subsequent to the denial of the motion to expedite, the parties engaged in communications, and defendants provided plaintiff with a statement of the money necessary to preserve the international patent rights. GyneConcepts took no action to protect itself and mitigate damages.[4] Nor did GyneConcepts submit any evidence that it would have been able to raise sufficient money to pay the fees. As such, this claim is unsupported and unmeritorious.

D. Pre-Judgment Interest.

Plaintiff did not request pre-judgment interest in either the Complaint or the Pre-Trial Order. As such, it is not entitled to it. *All Pro Maids, Inc. v. Layton*, Del. Ch., C.A. No. 058-N, 2005 WL 82689, Parsons, V.C. (Jan. 11, 2005).

* * *

Finally, it must be said that GyneConcepts' letter requesting damages comes with particular ill grace. The fact is that it was Mr. Kim that kept the company alive those years. He received no salary for his duties as a director and officer. Compensation under the Hahn agreement was, in large part, deferred, so that money raised could be used to develop the business (and it is a serious question whether GyneConcepts will ever be able to pay it). More importantly, it was Mr. Kim who invented the device that will allow GyneConcepts to survive and thrive if its directors and officers have the savvy to exploit it properly (a fact far from established). Mr. Kim receives nothing for that contribution. He will benefit, if at all, only as a stockholder, the same as any other stockholder, although his contribution is considerably more than that of any other stockholder. GyneConcepts now has the invention. But that is not enough to satisfy it. GyneConcepts also seeks to deny Hahn its rights under a fairly negotiated agreement with disinterested directors, and to require Mr. Kim to pay GyneConcepts for what it

[4] Concededly, this is not part of the record in the case. Nonetheless, as plaintiff is seeking damages for loss of international patent rights, candor from both sides requires that the Court have this information.

sees as bad decisions by Mr. Branchcomb and Mr. Dunn. That is not only inequitable, it is vulgar.

For all these reasons, defendants respectfully request that the Court reject plaintiff's damages claim outright.

Respectfully,

David L. Finger

cc: Michael A. Weidinger, Esq. (via LexisNexis FileandServe)