



- the Complaint fails to allege facts sufficient to state a claim under N.C. Gen. Stat. § 75-1.1; and
- the Complaint fails to allege with particularity any aggravating factor that would support an award of punitive damages, as required by Rule 9(k) of the North Carolina Rules of Civil Procedure.

### **STATEMENT OF THE CASE**

Plaintiff Voyager Pharmaceutical Corporation (“Voyager”) filed its Complaint March 6, 2006 against Dr. Atwood and Defendant Richard L. Bowen (“Dr. Bowen”). Only 27 of the 174 paragraphs of the Complaint make reference to Dr. Atwood. Nevertheless, the Complaint alleges nine separate causes of action against Dr. Atwood,<sup>1</sup> including breach of fiduciary duty, breach of contract, defamation, tortious interference with contract and prospective business relations, unfair and deceptive trade practices, civil conspiracy, and aiding and abetting a breach of a fiduciary duty. Voyager also seeks preliminary and permanent injunctive relief against Dr. Atwood.

On March 17, 2006, John H. Stone, a Voyager shareholder, filed a motion to intervene in the action to file a third-party complaint. The proposed third-party complaint submitted with the motion alleges misrepresentations by Voyager management, overpayment of executive salaries, waste of corporate assets, and other breaches of fiduciary duties by Voyager management. The intervenor seeks to compel an inspection of Voyager’s books and records and to compel an annual shareholders’ meeting.

Dr. Atwood and Voyager agreed to a limited temporary restraining order until Voyager’s motion for preliminary injunction was heard by the Court on April 4, 2006. Pursuant to the Case

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<sup>1</sup>Although Voyager argued at the preliminary injunction hearing that Dr. Atwood has misappropriated trade secrets, Voyager’s Complaint does not allege a violation of the North Carolina Trade Secrets Act, and Voyager has not amended its Complaint to add such a claim.

Management Report agreed to by the parties, Dr. Atwood now files this motion to dismiss Voyager's claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

### **STATEMENT OF FACTS**

Dr. Atwood is a professor at the University of Wisconsin at Madison. Dr. Atwood met Dr. Bowen at a conference regarding Alzheimer's Disease ("AD") in July, 2001. Complaint, ¶ 32. Dr. Bowen shared with Dr. Atwood his theory about the role of hormones called gonadotropins in AD. Complaint, ¶¶ 22, 32. The Complaint does not allege that such theories were disclosed confidentially, and indeed, at that time, Dr. Bowen had a patent for the treatment of AD using leuprolide acetate to lower or eliminate gonadotropins.<sup>2</sup> Complaint, ¶¶ 27, 32.

In August, 2001, Dr. Atwood entered an agreement with Voyager to conduct research regarding the role of gonadotropins in the development and progression of AD. Complaint, ¶ 33. He further agreed to hold the experiments and all related results, discoveries, inventions or insights in confidence, and not disclose them without Voyager's prior written consent. *Id.* The Complaint does **not** allege that Dr. Atwood has disclosed any experiment, result, discovery, invention or insight without Voyager's prior written consent.

In addition to Dr. Atwood's research, Voyager alleges that it has conducted "extensive testing" of leuproide acetate, including a Phase I study completed in 2005, a 48-week Phase II clinical trial in women completed in 2005, and a Phase II clinical trial in men, which will be completed in 2006. Complaint, ¶ 38. The Complaint does not allege that Dr. Atwood was involved in any way in these studies and trials.

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<sup>2</sup>The existence of Dr. Bowen's patent belies any trade secret claim Voyager may attempt to assert in the future:

the owner of a valid patent will have disclosed the best method for practicing the invention, and thus no longer possess a valuable trade secret relating to the practice of the invention unless he later develops some unanticipated alternative practice.

*Glaxo, Inc. v. Novopharm Ltd.*, 931 F. Supp. 1280, 1298 (E.D.N.C. 1996), *aff'd* 110 F.3d 1562 (4th Cir. 1997).

On September 9, 2005, Voyager filed a registration statement with the Securities Exchange Commission (“SEC”) for an initial public offering (“IPO”) of approximately 5.9 million shares of Voyager stock to raise proceeds of approximately \$100 million. Complaint, ¶ 43. WR Hambrecht + Co. (“Hambrecht”) was the underwriter of the IPO and agreed to purchase the shares from Voyager and sell them to the public. Complaint, ¶ 44. On December 7, 2005, the IPO failed. The initial bids for the Voyager stock were 1 million shares and approximately \$35 million short of the amount registered with the SEC. Complaint, ¶ 63.

From December 8 to December 10, Voyager and Hambrecht planned to complete a second IPO, smaller than the one originally contemplated. Complaint, ¶¶ 64-65, 70. On December 12, Hambrecht raised concerns about allegedly false statements Dr. Atwood and Dr. Bowen made on December 9. Complaint, ¶ 71. Voyager, however, addressed those allegedly false statements, told Hambrecht they were false, and explained that the matters had previously been discussed with Dr. Bowen and resolved to his satisfaction. Complaint, ¶ 72. After that explanation, Hambrecht remained uncomfortable with **only one issue: “the apparent dissension of one of the three members of Plaintiff’s Board of Directors and its Chief Scientific Officer.”** *Id.* Voyager withdrew the second, smaller IPO on December 13.

Voyager alleges only one injury: it was “forced to withdraw its IPO.” Complaint, ¶ 75. *See also* Complaint, ¶ 137 (“Defendants’ statements to Hambrecht damaged Plaintiff by preventing it from completing its IPO”); ¶ 142 (“[a]s a result, Plaintiff was unable to complete its IPO”); ¶ 149 (“potential investors would have purchased . . . stock”). Any other references to damages are forward looking and speculative: Plaintiff “*believes*” defendant’s goal is to gain control of the company and cripple its ability to raise capital (Complaint, ¶ 74); Dr. Atwood *suggested* the formation of a new competing company (Complaint, ¶ 84); Dr. Bowen is

*preparing* to publish data (Complaint, ¶ 85); there is substantial *risk* that Dr. Atwood will disclose experiments, and related results, discoveries, inventions or insights (Complaint, ¶ 169).

These facts, as alleged by Voyager in its Complaint, are insufficient to state a claim for relief against Dr. Atwood. Consequently, Voyager's claims against Dr. Atwood should be dismissed.

## ARGUMENT

### **I. RULE 12(B)(6) STANDARD.**

To avert a dismissal, a complaint must allege facts sufficient to establish the substantive elements of a claim under a valid legal theory. *Harris v. NCNB Nat'l Bank of North Carolina*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). Dismissal under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is proper when one of the following is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint reveals on its face the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. *Oates v. Jag, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985). When considering a motion to dismiss under Rule 12(b)(6), a court is only required to accept a complaint's allegations of fact, not its legal conclusions. *See Jackson v. Bumgardner*, 318 N.C. 172, 174-75, 347 S.E.2d 743, 745 (1986). "Conclusory allegations or legal conclusions masquerading as factual allegations will not suffice to prevent a motion to dismiss pursuant to 12(b)(6)." *Parham v. PepsiCo., Inc.*, 927 F. Supp. 177, 178 (E.D.N.C. 1995), *aff'd*, 86 F.3d 1151 (4th Cir.), *cert denied*, 519 U.S. 953 (1996). *Accord Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970).

## II. VOYAGER HAS FAILED TO ALLEGE DIRECT AND PROXIMATE CAUSATION BETWEEN DR. ATWOOD'S ALLEGED ACTS AND VOYAGER'S WITHDRAWN IPO.

As noted, Voyager has attempted to allege numerous causes of action against Dr. Atwood. In each instance, however, Voyager has failed to allege an essential element of the claims. Each cause of action asserted requires that plaintiff allege and prove that its alleged injuries were caused by the acts or omissions of Dr. Atwood. *See, e.g., Claggett v. Wake Forest University*, 126 N.C. App. 602, 608, 486 S.E.2d 443, 446 (1997) (“To state a claim for breach of contract, the complaint must allege . . . that damages *resulted from* such breach”); *Dove v. Harvey*, 168 N.C. App. 687, 694, 608 S.E.2d 798, 802 (2005) (to state a claim for breach of fiduciary duty, plaintiff must “allege *proximate causation*”); *Tyson v. L’Eggs Products, Inc.*, 84 N.C. App. 1, 10-11, 351 S.E.2d 834, 840 (1987) (in order to state a claim for defamation, a plaintiff “must allege and prove that the defendant made false, defamatory statements . . . *causing* injury to the plaintiff’s reputation”); *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216, 220, 367 S.E.2d 647, 649-650 (1988) (to state a claim for tortious interference with contract, plaintiff must allege “that the outsider’s act *caused* the plaintiff actual damages”); *Cameron v. New Hanover Memorial Hosp., Inc.*, 58 N.C. App. 414, 440, 293 S.E.2d 901, 917 (1982) (for an interference with prospective business advantage claim, plaintiff must show that a future contract “would have ensued *but for* the interference”); *Drouillard v. Keister Williams Newspaper Services, Inc.*, 108 N.C. App. 169, 172, 423 S.E.2d 324, 326 (1992) (to recover under N.C.G.S. § 75-1.1, a plaintiff must show “(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) *proximately causing* actual injury to defendant or defendant business”); *Dove*, 168 N.C. App. at 691, 608 S.E.2d at 801 (to state a claim for civil conspiracy, plaintiff must “allege defendant’s actions *caused* plaintiff damages or that a different

outcome would have occurred *but for* the civil conspiracy”). Voyager has failed to allege this requisite element, and its claims must therefore be dismissed.

The Complaint states in conclusory fashion that Voyager suffered damages “as a result of” defendants’ conduct. A close reading of the actual allegations, however, reveals that Voyager does not allege any act by Dr. Atwood that caused injury to Voyager. Voyager has alleged only one injury: withdrawal of its second IPO. As of Monday, December 12, the day before the second IPO was withdrawn, Voyager had assured Hambrecht that the statements Dr. Atwood and Dr. Bowen allegedly made on December 9 were false. Complaint, ¶ 72. After that assurance, according to the Complaint, Hambrecht only had **one** remaining reservation: the “apparent dissension” of Dr. Bowen. *Id.*

The Complaint reveals that Voyager had every opportunity to alleviate Hambrecht’s concern. Dr. Bowen was ready, willing and able to discuss his “apparent dissension” with Voyager CEO Patrick Smith. Complaint, ¶ 74. Mr. Smith, however, never contacted Dr. Bowen. As Voyager admits in its Complaint, it was its own failure to satisfy its underwriter’s concerns – not any act by Dr. Atwood – that forced it to withdraw the second IPO. Complaint, ¶ 75.

Moreover, the intervening third-party complaint<sup>3</sup> reveals that Voyager announced publicly that it withdrew the second IPO “due to market conditions.” Third-Party Complaint, ¶ 28. That complaint also alleges numerous other causes for Voyager’s failure, including misrepresentations of management, overpayment of executive salaries and waste of corporate

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<sup>3</sup>The Court may take judicial notice of its own records without connecting the motion to dismiss to a motion for summary judgment. *See West v. G. D. Reddick, Inc.*, 302 N.C. 201, 202-03, 274 S.E.2d 221, 223 (1981) (recognizing that a court may take judicial notice of its own records in another interrelated proceeding); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991), *cert. denied*, 503 U.S. 960, 112 S. Ct. 1561, 118 L.Ed.2d 208 (1992) (recognizing that a court may consider public filings in ruling on a motion to dismiss, particularly when plaintiff has notice of their existence).

assets. All of these specific allegations belie Voyager's conclusory assertions that Dr. Atwood caused Voyager to withdraw its second IPO.

Because Voyager has failed to plead facts that show any act by Dr. Atwood – as opposed to its own failure to satisfy its underwriter – caused it injury, its claims must be dismissed.

### **III. VOYAGER HAS FAILED TO STATE A CLAIM FOR BREACH OF FIDUCIARY DUTY AS A MATTER OF LAW.**

Voyager alleges that Dr. Atwood breached his “fiduciary duties to Plaintiff.” Complaint, ¶¶ 109-116. However, the rule of law in North Carolina is clear – “[f]or a breach of a fiduciary duty to exist, there must first be a fiduciary relationship between the parties.” *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). Voyager's own allegations demonstrate that no fiduciary relationship existed at any time between Dr. Atwood and Voyager as a matter of law. As such, Voyager's claim must be dismissed.

#### **A. Voyager Fails To Allege That Dr. Atwood Occupied A Position To “Dominate And Influence” Voyager.**

A fiduciary relationship exists when “there has been a special confidence reposed” on a person which puts that person in a position to exercise “domination and influence on the other.” *Patterson v. Strickland*, 133 N.C. App. 510, 516, 515 S.E.2d 915, 919 (1999) (quoting authority). As a general rule, a fiduciary relationship does not exist between an employer and an employee. *Dalton*, 353 N.C. at 651, 548 S.E.2d at 708. *See also Reichhold Chemicals, Inc. v. Goel*, 146 N.C. App. 137, 155, 555 S.E.2d 281, 292 (2001) (noting that “our Supreme Court has recently indicated that a fiduciary relationship will generally not be found in the workplace”).

Moreover, this general rule applies even when the employee is a “confidant of his employer” and has been provided or has learned confidential information within the scope of his or her employment. *Dalton*, 353 N.C. at 651-652, 548 S.E.2d at 708. Knowledge of

confidential and proprietary information alone is simply “inadequate to establish” the existence of a fiduciary relationship in the workplace. *Id.* In fact, **a fiduciary relationship in the workplace can only be found when the employee’s position allows him or her to “dominat[e] and influence” his or her employer.** *Id.*

In its Complaint, Voyager has failed to pled any allegations even suggesting that Dr. Atwood has or had this type of influence or domination over Voyager. The Complaint does not allege that Dr. Atwood is an officer or director of Voyager. It does not allege that Dr. Atwood occupies a management position within Voyager or any other position where he could possibly exert the requisite influence or control over the decision-making at Voyager. Similarly, the Complaint does not allege that Dr. Atwood was or is a shareholder of Voyager.

In fact, the Complaint does not even allege that Dr. Atwood’s limited professional relationship with Voyager even rose to the level of an employer-employee relationship. Voyager simply asserts that Dr. Atwood entered into a contract with Voyager to conduct research on the role of hormones in the development and progression of AD. Complaint, ¶ 33. Certainly if a fiduciary duty does not arise from an established employment relationship, one does not arise from a mere research consultancy agreement.

Voyager has utterly failed to allege that Dr. Atwood was in any position to exercise domination and influence over Voyager. Under the rule of law set forth in *Dalton*, Plaintiff’s claim must be dismissed.

**B. Any Reliance By Voyager On Speck Will Be Misplaced.**

As in its motion for a preliminary injunction, Voyager may attempt to argue that *Speck v. N. C. Dairy Foundation, Inc.*, 311 N.C. 679, 319 S.E.2d 139 (1984), a case pre-dating *Dalton*, somehow supports the proposition that its Complaint sufficiently alleges that a fiduciary

relationship exists between Dr. Atwood and Voyager. Voyager's reliance on *Speck* will be misplaced. The sole issue facing the Court in *Speck* concerned the ownership of intellectual property rights between a university and two of its professors. 311 N.C. at 680, 685, 319 S.E.2d at 140, 143 ("the threshold issue ... on this appeal is whether the [professors] acquired any interests ... at the time they developed the secret process in question"). In holding that the professors were not entitled to ownership interests in the intellectual property, the Court actually determined that the university owed no fiduciary duty to the plaintiffs as a result of any confidential disclosures made by the plaintiffs to the university – a holding which clearly contradicts Voyager's position. 311 N.C. at 687, 319 S.E.2d at 144. Only in dicta, did the Court suggest that the professors may owe a fiduciary duty to the university. *Id.*

This one sentence in dicta does not state the law on fiduciary duty. Subsequent to this opinion, the North Carolina Supreme Court, in *Dalton*, articulated the standard for a fiduciary relationship in the workplace. As mentioned above, knowledge of confidential and proprietary information alone is simply "inadequate to establish" the existence of a fiduciary relationship in the workplace. *Dalton*, 353 N.C. at 651-652, 548 S.E.2d at 708. A fiduciary relationship in the workplace can only be found when the employee is in the position to "dominat[e] and influence" the employer. *Id.* Voyager has clearly failed to allege any facts even suggesting that Dr. Atwood was in any position whatsoever to exert domination or influence over Voyager, its management, or its shareholders.

#### **IV. VOYAGER HAS FAILED TO ALLEGE ANY DISCLOSURE BY DR. ATWOOD OF ANY EXPERIMENTS, RESULTS, DISCOVERIES, INVENTIONS OR INSIGHTS.**

In the Complaint, Voyager mechanically recites that "Defendant Atwood's actions, as set out above, constitute a breach of his contract." Complaint, ¶ 125. A careful reading of the

