

NORTH CAROLINA  
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
06 CVS 3184

VOYAGER PHARMACEUTICAL )  
CORPORATION, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
RICHARD L. BOWEN and CRAIG ATWOOD, )  
 )  
Defendants. )

\*\*\*\*\*

BRIEF IN OPPOSITION  
TO DEFENDANTS'  
MOTIONS TO DISMISS

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## TABLE OF CONTENTS

NATURE OF THE CASE .....	1
STANDARD OF REVIEW.....	1
STATEMENT OF FACTS .....	3
ARGUMENT.....	11
I-IV.    PLAINTIFF'S FIRST THROUGH FOURTH CLAIMS FOR RELIEF FULLY PLEAD ALL NECESSARY ELEMENTS OF DEFENDANT BOWEN'S BREACHES OF HIS DUTIES AS A DIRECTOR AND OFFICER OF PLAINTIFF.....	11
V.      THE COMPLAINT ALLEGES AMPLE FACTS TO SUPPORT ITS BREACH OF FIDUCIARY DUTY CLAIM AGAINST DEFENDANT ATWOOD .....	16
VI.      THE COMPLAINT AMPLY ALLEGES THE NECESSARY ELEMENTS OF BREACH OF CONTRACT BY DEFENDANT BOWEN.....	20
VII.    THE COMPLAINT ABUNDANTLY ALLEGES BREACH OF CONTRACT BY DEFENDANT ATWOOD.....	21
IX.      PLAINTIFF ADEQUATELY PLEADS A CLAIM FOR DEFAMATION .....	23
X.-XI.  THE COMPLAINT PLEADS ALL ESSENTIAL ELEMENTS OF TORTIOUS INTERFERENCE WITH PROSPECTIVE ADVANTAGE .....	26
XII.    THE COMPLAINT FULLY PLEADS A CLAIM FOR UNFAIR AND DECEPTIVE TRADE PRACTICES .....	29
XIII.   THE COMPLAINT ALLEGES ALL ESSENTIAL ELEMENTS OF CIVIL CONSPIRACY.....	31
XIV.-XV. THE COMPLAINT ALLEGES EVERY NECESSARY FACT TO SUPPORT A CLAIM FOR AIDING AND ABETTING BREACH OF FIDUCIARY DUTY BY DEFENDANTS BOWEN AND ATWOOD .....	33
XVI.    THE COMPLAINT SUFFICIENTLY ALLEGES PROXIMATE CAUSE.....	35

XVII. DEFENDANTS HAVE NOT SHOWN THAT THERE IS NO SET OF FACTS THAT PLAINTIFF COULD PROVE THAT WOULD ALLOW RECOVERY UNDER THE NORTH CAROLINA TRADE SECRETS PROTECTION ACT.....	37
XVIII. THE COMPLAINT ALLEGES AMPLE FACTS SHOWING THAT DEFENDANT ATWOOD COMMITTED FRAUD, ACTED MALICIOUSLY, WILLFULLY AND WANTONLY .....	42
CONCLUSION.....	44
CERTIFICATE OF SERVICE .....	46

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**NATURE OF THE CASE**

Plaintiff commenced this action on March 6, 2006, seeking damages and injunctive relief as a result of Defendants' breaches of their fiduciary duties, their threatened or actual breaches of their contractual obligations to maintain Plaintiff's confidential information, and torts committed by Defendants during their business relationships with Plaintiff. This cause is before the Court on Defendants' motions, served May 8, 2006, to dismiss for failure to state a claim upon which relief can be granted, pursuant to G.S. § 1A-1, Rule 12(b)(6).

**STANDARD OF REVIEW**

A generation ago, Justice (later Chief Justice) Sharp authored the seminal case on the standards to be applied by our courts in determining whether complaints are sufficient to withstand motions to dismiss for failure to state a claim upon which relief could be granted. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970). In that opinion, the following bedrock principles were established:

For the purpose of the motion, the well-pleaded material allegations of the complaint are taken as admitted.<sup>1</sup>

...

Under the "notice theory" of pleading contemplated by Rule 8 (a) (1), detailed fact-pleading is no longer required. A pleading complies with the rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and -- by using the rules provided for obtaining pretrial discovery -- to get any additional information he may need to prepare for trial.<sup>2</sup>

...

"Mere vagueness or lack of detail is not ground for a motion to dismiss." Such a deficiency "should be attacked by a motion for a more definite statement."<sup>3</sup>

Our courts have further noted that "The motion does not present the merits, but only whether the merits may be reached."<sup>4</sup> Further, in considering a Rule 12(b)(6) motion, the Court "evaluates all facts alleged and permissible inferences therefrom in the light most favorable to the [non-movant]." *Stephenson v. Town of Garner*, 136 N.C. App. 444, 447, 524 S.E.2d 608, 611 (2000) (emphasis added).

In subsequent decisions regarding the standard of review for Rule 12(b)(6) motions, the Court has stated:

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<sup>1</sup> *Id.*, 277 N.C. at 98, 176 S.E.2d at 163.

<sup>2</sup> *Id.*, 277 N.C. at 104, 176 S.E.2d at 167 (emphasis added).

<sup>3</sup> *Id.*, 277 N.C. at 102, 176 S.E.2d at 165 (citations omitted) (emphasis added). Defendants have filed no motions for more definite statement, thus indicating that they understand the nature of the claims against them and the bases for them.

<sup>4</sup> *Concrete Serv. Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 681, 340 S.E.2d 755, 758 (1986).

The system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss.

*Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985) (citations omitted) (emphasis added).

Thus, in considering these motions:

The court must construe the complaint liberally and "should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief."

*White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 292, 603 S.E.2d 147, 154 (2004), *discr. rev. denied*, 359 N.C. 286, 610 S.E.2d 717 (2005) (emphasis added) (citations omitted).

These holdings recognize that:

The policy behind the notice theory of the present rules is to resolve controversies on the merits, following opportunity for discovery, rather than resolving them on technicalities of pleading. Consequently, our courts have exercised great restraint in ruling on the factual sufficiency of pleadings.

*Smith v. City of Charlotte*, 79 N.C. App. 517, 528, 339 S.E.2d 844, 851 (1986) (emphasis added).

### **STATEMENT OF FACTS**

Plaintiff was formed in 2001 to develop a proprietary version of leuprolide acetate for use in slowing or halting the progression of Alzheimer 's disease (AD). (¶¶ 17, 28)<sup>5</sup>.

Plaintiff's goal was to take this product through the FDA approval process and to make it available to treat patients suffering from AD. *Id.* Plaintiff's initial board of directors consisted of Defendant Bowen, Patrick Smith, and David Corcoran. (¶ 29). Mr. Smith and Mr. Corcoran were principally responsible for managing the Company and attracting investors to finance its

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<sup>5</sup> All references in this Statement of Facts are to paragraphs in the Complaint. With few exceptions, the statements are verbatim quotes.

research and development activities. *Id.* Defendant Bowen was employed as Plaintiff's Chief Scientific Officer. (¶ 30).

In August 2001, Defendant Atwood entered into a contract with Plaintiff to conduct research on the role of gonadotropins in the development and progression of AD. (¶ 33). This contract provided that all discoveries, inventions, or know how developed as a result of or arising out of the experiments conducted under this agreement would belong exclusively to Plaintiff and that Defendant Atwood would hold these experiments and all related results, discoveries, and inventions or insights in confidence and not disclose them. (¶ 33).

To date, Plaintiff's research and testing efforts have been funded by the support of private investors. (¶ 42). In order to assist in funding the completion of the Phase III trials of Memryte and to raise some of the necessary funds to manufacture and market Memryte, Plaintiff planned a public offering of 5,900,000 shares of common stock, with hopes of raising approximately \$100,000,000.00. (¶ 43). This IPO was to occur in December 2005, and WR Hambrecht + Co agreed to serve as underwriter for the offering. (¶¶ 43, 44).

During the twelve months leading up to the planned completion of the IPO, Defendant Bowen's behavior deteriorated, and he became increasingly erratic and unreliable. (¶ 46). In May 2005, he took extended time off from Plaintiff to consider whether he wished to relocate to Charleston, South Carolina, and there to concentrate on purely scientific research for Plaintiff. (¶ 47). When he returned from this sabbatical, he resumed his traditional role of active involvement in the clinical development of Memryte. (¶¶ 47, 58).

During Plaintiff's annual planning meeting on September 20, 2005, Defendant Bowen demanded that Plaintiff's corporate mission statement be amended to add "the glorification of God" as Plaintiff's central mission. (¶ 48). When an employee questioned

whether this amendment was in Plaintiff's best interests or those of its shareholders, Defendant Bowen became angry and verbally abusive and stated that any employee or shareholder who did not agree with him should leave Plaintiff. *Id.*

On September 29, 2005, Mr. Smith tried to discuss Defendant Bowen's behavior at the planning meeting with him. (¶ 50). During these discussions, Defendant Bowen demanded that Plaintiff's mission statement be amended to add "the glorification of God" as Plaintiff's central mission. *Id.* Defendant Bowen also demanded that two directors, to be chosen exclusively by Defendant Bowen, be added to Plaintiff's board of directors. *Id.* Defendant Bowen said during this conversation that if these demands were not met, "I will go to the newspapers. I'll tell lies or do whatever I have to do in order to wreck the Company." *Id.* Defendant later repeated similar threats to destroy Plaintiff to Mr. Corcoran and to other employees of Plaintiff. *Id.*

Later that day, Plaintiff placed Defendant Bowen on paid medical leave. (¶ 51). Plaintiff informed Defendant Bowen that he could return to active employment only upon receiving a physician's clearance. *Id.* Thirteen days later, on October 12, 2005, Defendant Bowen's psychiatrist provided a letter to Plaintiff indicating that Defendant Bowen was then able to return to work medically, in a mutually agreeable capacity. (¶ 53). Shortly afterward, Defendant Bowen resumed his duties as Plaintiff's Chief Scientific Officer. *Id.*

On December 3, 2005, at Defendant Bowen's request, Mr. Corcoran met with Defendant Bowen and a stockholder over dinner to clarify two issues that Defendant Bowen had raised with Mr. Smith that afternoon. (¶ 57). First, Defendant Bowen stated that he believed that Mr. Corcoran had instructed Plaintiff's Director of Regulatory Affairs, Jamie Gault, not to audit the Phase I data until after the IPO. *Id.* Mr. Corcoran explained that this belief was incorrect,

and that the timing of audit of the data was wholly unrelated to the IPO. *Id.* Rather, the data would be examined at the conclusion of the study, in accordance with the standard procedures for the study. *Id.* Defendant Bowen then expressed relief that this misunderstanding had been straightened out. *Id.*

Defendant Bowen's other issue raised during the December 3, 2005, meeting was his professed concern about his role in the Company with regard to day-to-day clinical activities. (¶ 58). Mr. Corcoran assured Defendant that management valued his work and wanted him to continue in his traditional clinical role. *Id.* Defendant Bowen indicated that he might want to move to a pure research role in the future, but that he was pleased that Plaintiff supported his continuing in his traditional clinical capacity. *Id.*

Unaware of Defendant Bowen's secret activities and plans to damage Plaintiff, Mr. Corcoran and Mr. Smith both met with Defendant Bowen on December 4, 2005, to confirm Plaintiff's commitment to him to continue as Plaintiffs' Chief Scientific Officer in his traditional day-to-day clinical role with Plaintiff. (¶ 59). Mr. Smith and Mr. Corcoran and Defendant Bowen also discussed Defendant Bowen's possible eventual transition to a purely research-oriented role and agreed to continue discussion of that possibility in the months that followed. *Id.* It was agreed that regardless of whether his role evolved, Defendant Bowen would retain his title as Plaintiff's Chief Scientific Officer. *Id.* Defendant Bowen expressed his satisfaction with these discussions to Mr. Smith and Mr. Corcoran. *Id.*

Beginning on December 1, 2005, Defendant Bowen and others traveled to visit groups of potential investors in connection with the upcoming IPO. (¶ 60). Defendant Bowen participated in presentations to investors on December 1, 2, 5, 6, and 7, 2005. *Id.* During these presentations, Defendant Bowen held himself out as Plaintiff's Chief Scientific Officer and

enthusiastically endorsed Plaintiff and Memryte. *Id.* Defendant Bowen at no point expressed any reservations or concerns of any kind regarding Plaintiff, Memryte, or his role with Plaintiff. *Id.* Defendant Bowen affirmatively stated that the safety data for Memryte was superb and that there had been no safety problems in the Phase I trial. *Id.*

On December 7, 2005, Defendant Bowen, other members of Plaintiff's management team, and various stockholders gathered in New York City, in anticipation of the pricing of the IPO. (¶ 62). On the evening of December 7, 2005, Hambrecht reported to Plaintiff's management that the initial bidding results for the IPO were approximately \$65,000,000 in bids for 4.9 million shares, which was short of the initial \$100,000,000 goal. (¶ 63). The following day, December 8, 2005, Plaintiff's management conducted meetings to discuss strategy for the IPO, and to receive updates on the progress of the bidding from Hambrecht. *Id.* Defendant Bowen did not participate in these meetings and, unbeknownst to Plaintiff, was engaged in conduct aimed at advancing his own personal interests, which were detrimental to the best interests of Plaintiff and its shareholders. *Id.*

At approximately 4:30 p.m. on December 8, 2005, Hambrecht contacted Plaintiff's management and updated them on the bidding for the stock. (¶ 65). Hambrecht indicated that they would call management the following day to discuss the next steps in completing the IPO. *Id.* While Plaintiff's management was in the 4:30 p.m. conference with Hambrecht, Defendant Bowen was in a hospitality suite in the Marriott Marquis Hotel that had been set up to accommodate Plaintiff's shareholders. (¶ 66). There, Defendant Bowen told one or more shareholders that the IPO was not going to proceed, because "God had told him so," because Plaintiff had refused to add "the glorification of God" to its missions statement. *Id.* Defendant Bowen also told the shareholders present that day that any further attempts to

complete the IPO would fail until his demands were met, including giving credit to God in Plaintiff's mission statement. *Id.* Defendant also asked one of the shareholders whether he would be willing to serve as a director of Plaintiff "when I regain control of the Company." *Id.* Defendant Bowen also falsely told one or more shareholders at that gathering that there was a problem with the Phase I data that had not been resolved and also falsely stated that when he raised this issue with management, management had locked him out of his office. (¶ 68).

On Friday, December 9, 2005, Defendants Bowen and Atwood secretly went to Hambrecht's offices and met with Hambrecht's executives on Plaintiff's IPO account. (¶ 69). During that meeting, Defendants Bowen and Atwood falsely stated that there was a problem with the Phase I trial, and that Plaintiff's management had prevented Defendant Bowen from investigating it. *Id.* Defendants further falsely state that Defendant Bowen had been wrongfully excluded from participating in Plaintiff's management. *Id.* Despite knowing that these untrue statements would damage Plaintiff and its IPO, at no point either before or after the meeting did either Defendant advise Plaintiff's management of their meeting with Hambrecht or its results, effectively preventing Plaintiff's management from taking steps to minimize the resulting damage to the IPO. *Id.* In fact, Defendants took active steps to conceal their activities and plans from Plaintiff's management and the other Board members. *Id.*

On Monday, December 12, 2005, Hambrecht's account representatives on Plaintiff's IPO called Mr. Smith and Mr. Corcoran and informed them, for the first time, of Defendants' accusations the previous Friday. (¶ 71). Mr. Smith and Mr. Corcoran explained to Hambrecht that those statements were false, and that these matters had been discussed with Defendant Bowen on December 3 and 4 and resolved to his apparent satisfaction. (¶ 72). Hambrecht stated that they nonetheless remained uncomfortable with Hambrecht underwriting

the IPO, because of the apparent dissension of one of the three members of Plaintiff's Board of Directors and its Chief Scientific Officer. *Id.*

After the call with Hambrecht, Mr. Corcoran asked a shareholder who was friends with Defendant Bowen to approach him and to request that he contact Hambrecht and assure them that he supported Plaintiff and the IPO. (¶ 73). This stockholder contacted Defendant Bowen and then called Mr. Corcoran and informed him that Defendant Bowen had refused to contact Hambrecht, but that he would be willing to take a call from Mr. Smith to discuss his personal differences with Mr. Smith, all of which stemmed from Defendant Bowen's stated desire to take over control of the Company. (¶ 74).

Because Plaintiff was unable to satisfy Hambrecht's apparent concerns, Plaintiff was forced to withdraw its IPO. (¶ 75). Hambrecht would have been willing to underwrite the IPO if Defendants had not made the false statements to Hambrecht on December 9. (¶ 76).

Following the withdrawal of its IPO, Plaintiff undertook efforts to arrange private placement of its stock in order to generate capital to fund the completion of the Phase III clinical trials of Memryte. (¶ 78). During January and February 2006, Defendants continued to disseminate false and misleading information regarding Plaintiff and its management, as well as Memryte and the research regarding it, in order to damage the value of Plaintiff's intellectual property and to deter potential investors from purchasing Plaintiff's stock in the private placement. (¶ 79). During that period, Defendants participated in meetings with potential investors in an effort to disseminate false and misleading information about Plaintiff and its clinical trials and thereby to cripple Plaintiff's ability to raise capital. *Id.* Defendants' goal in these actions is to enable them to gain control of Plaintiff for their own personal, private gain. (¶ 79, 83).

Further, when Defendants learned in mid-to-late January 2006 that Plaintiff was discussing with Hambrecht the possibility that Hambrecht would assist Plaintiff in its current efforts to raise capital, Defendants orchestrated a concerted effort to thwart those discussions, including calls to Hambrecht by Defendant Atwood and others. (¶ 81). During this same period, Defendant Atwood was sending emails to Plaintiff assuring Plaintiff of his unqualified support for the Company. *Id.*

During January and February 2006, Plaintiff's management attempted to engage Defendants in meaningful discussions in order to end the continuing drain on Plaintiff's resources Defendants' conduct had entailed, as well as to end this continuing distraction from Plaintiff's mission of completing the development of Memryte as a treatment to halt the progression of AD. (¶ 82). Despite Plaintiff's management's efforts, Defendants continued to disseminate false and misleading information to Plaintiff's shareholders and others in an effort to satisfy their own, private, personal interests, to the great detriment to Plaintiff's interests and the interests of its shareholders. (¶ 83).

On January 23, 2006, Defendant Atwood suggested to Defendant Bowen that they set up a new company to attempt to patent certain inventions, discoveries, or know-how developed as a result of experiments conducted under Defendant Atwood's agreement with Plaintiff. (¶ 84). Defendant Atwood further suggested to Defendant Bowen that he violate his Proprietary Information and Inventions Agreement with Plaintiff. *Id.* On February 2 or 3, 2006, Defendant Bowen told a former employee of Plaintiff that Defendant Bowen was preparing to publish data belonging to Plaintiff, in violation of Defendant Bowen's Proprietary Information and Inventions Agreement with Plaintiff. (¶ 85).

## ARGUMENT

### I-IV. PLAINTIFF'S FIRST THROUGH FOURTH CLAIMS FOR RELIEF FULLY PLEAD ALL NECESSARY ELEMENTS OF DEFENDANT BOWEN'S BREACHES OF HIS DUTIES AS A DIRECTOR AND OFFICER OF PLAINTIFF.

Under Delaware law,<sup>6</sup> corporate officers and directors stand in a fiduciary relation to the corporation and its stockholders. *Gottlieb v. McKee*, 34 Del. Ch. 537, 107 A.2d 240 (1954). The specific fiduciary duties are due care, loyalty, and good faith. *See In Re: the Walt Disney Company Derivative Litigation*, 2005 Del. Ch. LEXIS 113, 35 Employee Benefits Cas. (BNA) 1705 (Del. Ch. Aug. 9, 2005). A breach of any of these three fiduciary duties overcomes the defense of the business judgment rule cited by Defendant Bowen. *Cede & Co. v. Technicolor*, 634 A.2d 345, 366, 1993 Del. LEXIS 398, Fed. Sec. L. Rep. (CCH) P97811 (Del. 1993).

#### A. Due Care.

In *Walt Disney, supra*, the Chancery Court exhaustively outlined the legal standards for establishing a violation of each of these duties. With regard to the fiduciary duty of due care, the Court held that this duty “requires that directors of a Delaware corporation ‘use that amount of care which ordinarily careful and prudent men would use in similar circumstances.’” *Id.* at 159. (citations omitted). A director is liable for breach of that duty if the facts show that the directors’ actions show “a ‘reckless indifference to or a deliberate disregard of the whole

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<sup>6</sup> North Carolina decisions generally support the “internal affairs doctrine,” applying the law of the incorporating state to matters involving the internal affairs of a foreign corporation. *See, Robinson on North Carolina Corporation Law*, ¶ 32.05 (7<sup>th</sup> Ed., 2005), and cases cited therein. Thus, Delaware law governs Plaintiff’s first four Claims for Relief.

body of stockholders or actions which are without the bounds of reason.” *Id.* at 162 (citations omitted).<sup>7</sup>

B. Loyalty.

In describing the standard for the duty of loyalty, the *Walt Disney* Court cited the seminal decision in *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 5 A.2d 503, 510 (1939):

Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. . . . 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 be no conflict between duty and self-interest.

*Id.* at 163-64 (emphasis added).

The Court further noted that “the duty of loyalty, in essence, ‘mandates that the best interest of the corporation and its shareholders take[] precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally.’” *Id.* at 164 (citation omitted). Under these standards, the *Walt Disney* Court held that a fiduciary negotiating his own termination was required to not abuse or manipulate the corporate process by which his termination was granted, and to act in good faith and “not advantage himself at the expense of the Disney shareholders.” *Id.*

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<sup>7</sup> The Court noted that while some Delaware cases had implicitly adopted a gross negligence standard for evaluating the duty of due care, at least one case had held that the standard was one of simple negligence. *Rabkin v. Philip A. Hunt Chem. Corp.*, 1987 Del. Ch. LEXIS 522, 1987 WL 28436, at 1-3 (Del. Ch. Dec. 17, 1987).

C. Good Faith.

With regard to the issue of good faith, the *Walt Disney* Court observed:

[A]n action taken with the intent to harm the corporation is a disloyal act in bad faith. A similar definition was used seven years earlier, when Chancellor Allen wrote that bad faith (or lack of good faith) is when a director acts in a manner "unrelated to a pursuit of the corporation's best interests." It makes no difference the reason why the director intentionally fails to pursue the best interests of the corporation.

*Id.* at 170. (citation omitted)(emphasis added).

Bad faith can result from "any emotion [that] may cause a director to [intentionally] place his own interests, preferences or appetites before the welfare of the corporation,' including greed, 'hatred, lust, envy, revenge, . . . shame or pride.'" *Id.* at 174. (citation omitted). While the Court noted that the necessity of proving motive to establish bad faith was unclear under the cases, several opinions had held that motive was irrelevant:

"The reason for the disloyalty (the faithlessness) is irrelevant, the underlying motive (be it venal, familial, collegial, or nihilistic) for conscious actions not in the corporation's best interest does not make it faithful, as opposed to faithless." . . . The duty of good faith, "if it is useful at all as an independent concept, [good faith's] utility may rest in its constant reminder . . . that, regardless of his motive, a director who consciously disregards his duties to the corporation and its stockholders may suffer a personal judgment for monetary damages for any harm he causes," even if for a reason "other than personal pecuniary interest."

*Id.* at 170, n. 453. (emphasis added) (citations omitted).

The Complaint in the present case is more than adequate to allege a claim for breach of fiduciary duty generally, as well as claims for breaches of the specific fiduciary duties of due care, loyalty, and good faith. Specifically, Plaintiff alleges that Defendant Bowen demanded that Plaintiff's mission statement be amended to reflect his personal religious convictions, and that two new directors of his choosing be added to Plaintiff's Board of

Directors. (¶ 50). When these demands were not met, he threatened to “tell lies or do whatever I have to do in order to wreck the Company.” *Id.*

Subsequently, Defendant Bowen traveled to New York with other members of Plaintiff’s management, to participate in events relating to the IPO, through which Plaintiff hoped to raise substantial proceeds to complete the critical Phase III trials, as well as to manufacture and market Memryte. (¶ 43, 62). On December 8, 2005, Defendant Bowen made comments to stockholders revealing his plans to thwart the IPO because his demands had not been met. (¶ 67). Specifically, Defendant Bowen told these stockholders that the IPO was not going to proceed, because Plaintiff had refused to add “the glorification of God” to its mission statement, and that the IPO would fail until his demands were met. *Id.*

The Complaint further alleges that the following day, December 9, 2006, Defendant Bowen made good on his threats when he and Defendant Atwood met with Hambrecht. (¶ 69). They told Hambrecht that there was a problem with the Phase I trial of Memryte, which was untrue (¶¶ 57, 69); indeed, Defendant Bowen had told investors the preceding week that there was no problem with the Phase I trial. (¶ 61). Defendants also told Hambrecht that Defendant Bowen had been wrongfully excluded from participation in Plaintiff’s management, which was also untrue.<sup>8</sup> (¶ 69). At the time, Defendant Bowen was serving as Plaintiff’s Chief Scientific Officer, and was still on the Board of Directors, although he had several days before expressed a desire to the other directors to move into a purely research oriented role in the future. (¶¶ 53, 57-59, 69).

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<sup>8</sup> Plaintiff alleges that on November 13, 2005, he and Defendant Atwood attempted to gain access to Plaintiff’s lab at midnight. (¶ 55). Plaintiff alleges that Defendant Bowen falsely told Hambrecht that he had been excluded from management (not the lab, as Defendant Bowen argues) at a time that he was actively serving as Chief Scientific Officer and on the board, and participating in meetings with investors.

As a result of Defendant Bowen's dissemination of false information, which was motivated by his personal desire to take over the Company (§ 74), Hambrecht became uncomfortable underwriting the IPO, because of the apparent dissension on the Board of Directors. (§ 72). Defendant Bowen refused to alleviate this concern, thereby forcing Plaintiff to withdraw the IPO. (§§ 73-75).

The Complaint further alleges that in the two months following the withdrawal of the IPO, Defendants continued to disseminate false information about Plaintiff and Memryte, in order to damage Plaintiff's intellectual property and to deter potential investors from purchasing Plaintiff's stock. (§ 79). Additionally, when Defendants learned in mid-to-late January that Plaintiff was discussing with Hambrecht the possibility that Hambrecht would assist Plaintiff in its current efforts to raise capital, Defendants orchestrated a concerted effort to spoil those discussions, including calls to Hambrecht and others. (§ 81). The Complaint also alleges that "Defendants have continued to disseminate false and misleading information to Plaintiff's shareholders and others in an effort to satisfy their own private, personal interests, to the great detriment to Plaintiffs' interests and the interests of its shareholders." (§ 83). Defendant Bowen engaged in this conduct, while continuing to serve on Plaintiff's Board of Directors until February 20, 2006. (§ 2).

In summary, the Complaint indicates that Defendant Bowen has undertaken a campaign of disseminating false information about Plaintiff, with the specific intent of damaging Plaintiff by interfering with its ability to raise the funds necessary to complete testing and to begin manufacturing and marketing Memryte. Further, the Complaint alleges that these false statements were made out of anger, ego, or vengeance because Plaintiff had not acceded to Defendant Bowen's demands to change Plaintiff's mission statement to reflect his personal

religious beliefs or to populate the board with directors of his choosing.<sup>9</sup> Thus, the Complaint alleges fact showing that Defendant Bowen placed his own personal desires and interests ahead of those of Plaintiff and its stockholders.

These factual allegations are sufficient to show “reckless indifference to or a deliberate disregard of the whole body of stockholders” sufficient to support a claim for breach of the fiduciary duty of due care. Further, the claim for breach of fiduciary duty of loyalty is amply supported by allegations showing that Defendant Bowen placed his own personal interests, which were not shared by the stockholders generally, ahead of the best interests of the corporation and its shareholders in raising funds.

Finally, the allegations that Defendant Bowen made false statements to Hambrecht with the intent to harm Plaintiff is a disloyal act in bad faith. *Walt Disney, supra*. It is not necessary that Plaintiff allege or prove that Defendant Bowen’s actions were in his pecuniary interests, as Defendant Bowen suggests. *Id.* Although specific allegations of motivation are not necessary, the Complaint is replete with allegations that support the reasonable inference that Defendant Bowen interfered with the IPO out of hatred, vengeance, or conceit. *Id.*

V. THE COMPLAINT ALLEGES AMPLE FACTS TO SUPPORT ITS BREACH OF FIDUCIARY DUTY CLAIM AGAINST DEFENDANT ATWOOD.

This Court recently construed the parameters of breach of fiduciary duty claims against employees of corporate plaintiffs. *Sunbelt Rentals, Inc., v. Head & Engquist Equipment, L.L.C.*, 2002 NCBC 4 (2002). In that case, the Court stated:

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<sup>9</sup> Plaintiff is not seeking damages for a legitimate effort to change the Board of Directors, as Defendant Bowen argues. Rather, Plaintiff is seeking damages caused by Defendant Bowen’s dissemination of false information about Plaintiff and Memryte.

For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between plaintiff and defendants. A fiduciary relationship "may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." The North Carolina courts have historically declined to adopt a rigid definition of a fiduciary relationship in order to allow imposition of fiduciary duties where justified. Therefore, "the relationship can arise in a variety of circumstances ... and may stem from varied and unpredictable factors."

...

As the *Dalton* court notes, however, a special gloss is required when examining the employer-employee relationship: "the broad parameters accorded the term [fiduciary duty] are limited in the context of employment situations. Under the general rule, 'the relation of employer and employee is not one of those regarded as confidential.'" This limitation necessarily follows from the basic fundament that a "fiduciary" obligation entails the presence of a degree of trust and confidence beyond that of ordinary commercial dealings.

...

This court will, therefore, follow the approach set forth in *Abbitt* and affirmed in *Dalton* and base its determination on a fact-specific inquiry that accounts for the *Dalton* court's admonition that more must be shown than the ordinary characteristics of the employer-employee relationship.

*Id.*, 2002 NCBC LEXIS at 12, 14, 16-17 (citations omitted) (emphasis added).<sup>10</sup>

Our Supreme Court, in *Speck v. N.C. Dairy Foundation, Inc.*, 311 N.C. 679, 319 S.E.2d 139 (1984), previously engaged in this fact-specific inquiry in concluding that a researcher hired to perform research for the purpose of developing an invention occupied a

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<sup>10</sup> The result of this fact finding mission in *Sunbelt Rentals* was Judge Tennille's conclusion that there was sufficient evidence to withstand summary judgment against three employees of the plaintiff. See 2002 NCBC LEXIS at 16-17.

position of trust and confidence “beyond that of ordinary commercial dealings,” when it observed:

As the secret process in question belonged to the University immediately upon its discovery by the plaintiffs, the plaintiffs never possessed any interest cognizable in equity or at law in the process. Therefore, the defendants owed no fiduciary duty to the plaintiffs as a result of the plaintiffs' confidential revelation to the University of the secret process it already owned. Indeed, any fiduciary duty owed with regard to the secret process was owed by the plaintiffs to the University in its capacity as the employer who had employed them to develop the process.

*Id.*, 311 N.C. at 687, 319 S.E.2d at 144 (emphasis added).

Defendant Atwood contends that *Speck* does not control here because it was decided before *Dalton v. Camp*, 353 N.C. 647, 548 S.E.2d 704 (2001). This Court's decision in *Sunbelt Rentals, Inc.*, however, observed:

Though the appellate court rulings in *Dalton* and *Reichhold* are recent additions to the body of case law on this subject, they did not effect any fundamental change in the longstanding North Carolina law governing fiduciary relationships.

*Id.*, 2002 NCBC LEXIS at 14 (emphasis added).

Thus, *Dalton*, while post-dating *Speck*, did not change our law. It merely interpreted a different fact pattern and arrived at a different result based on those distinctions. In the present case, Defendant Atwood has strived mightily to cast himself as a “mere employee” in order to fit within the *Dalton* holding. The employee in *Dalton*, however, was “. . . hired as an at-will employee to manage the production of a publication. His duties were those delegated to him by his employer, such as overseeing the business's day-to-day operations by ordering parts and supplies, operating within budgetary constraints, and meeting production deadlines.” *Id.* at 652, 548 S.E.2d at 708.

By contrast, “Defendant Atwood obtained substantial confidential and proprietary information belonging to Plaintiff in connection with his research for Plaintiff.” (¶ 34) (emphasis added). The Complaint thus shows that Defendant Atwood, far from being a mere at-will employee with no real power to influence the Company, was the possessor of sensitive, confidential information central to the research and development of Plaintiff’s most valued asset—its intellectual property, as well as the close confidant of Defendant Bowen. In his position as Defendant Bowen’s ally and co-conspirator, Defendant Atwood engaged in a plan or scheme to sabotage Plaintiff’s most ambitious fund-raising effort to date, threatened to disclose Plaintiff’s trade secrets, encouraged Defendant Bowen to engage in corporate espionage to misappropriate the fruits of Defendant Atwood’s research and to form their own separate company to develop this stolen knowledge, and further engaged in post-IPO efforts to derail Plaintiff’s private placement by intimidating Hambrecht into abandoning that effort.

Plaintiff placed its confidence and trust in Defendant Atwood by sharing their prior research with him and trusting him to fully disclose to it his research findings and not to attempt to conceal his findings from Plaintiff for his private gain. *Speck* recognized the vulnerability of an entity that contracts with another to perform experiments with a view to making an invention. Of necessity, the researcher will be in a superior knowledge position to the entity that retains him. Further, the entity will, by virtue of the researcher’s superior knowledge, be manifestly subject to the researcher’s domination if he or she chooses to act for his or her personal interests and to the entity’s disadvantage. Similar relationships recognized as fiduciaries include accountants, financial advisors, real estate brokers, and insurance agents.<sup>11</sup>

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<sup>11</sup> See *White v. Consol. Planning, Inc.*, 166 N.C. App. at 293-94, 603 S.E.2d at 155 (collecting cases).

Giving Plaintiff's allegations the benefit of "every doubt," as the standard of review dictates, they are more than ample to "permit the merits to be reached" through the discovery process.<sup>12</sup>

VI. THE COMPLAINT AMPLY ALLEGES THE NECESSARY ELEMENTS OF BREACH OF CONTRACT BY DEFENDANT BOWEN.

As Defendant Bowen concedes, the only elements of a claim for breach of contract are: (1) the existence of a valid contract, and (2) breach of the terms of that contract. *Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 792, 561 S.E.2d 905, 909 (2002). Both elements have been alleged here.

Plaintiff alleges that in his capacity as an employee of Plaintiff, Defendant Bowen entered into a contract wherein he agreed that he would keep in confidence, and would not disclose or use any proprietary, confidential information or know-how belonging to Plaintiff. (¶ 118). Defendant Bowen further agreed in his contract that any breach of the promises and agreements made therein would result in irreparable and continuing damage to Plaintiff, such that Plaintiff would be entitled to injunctive relief, and money damages where appropriate. (¶ 119).

Additionally, Plaintiff has alleged the breach of these agreements by the disclosure of confidential information concerning Memryte. Plaintiff alleges that on December 9, 2005, Defendants Bowen and Atwood met with employees of Hambrecht and discussed information concerning the Phase I trial. (¶ 69). Further, Plaintiff alleged that in the sixty days prior to the filing of this action, Defendants Bowen and Atwood had disseminated information concerning Memryte, the research regarding it, and the clinical trials. (¶¶ 79, 80).

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<sup>12</sup> *Concrete Serv. Corp. v. Investors Group, Inc.*, 79 N.C. App. at 681, 340 S.E.2d at 758.

Plaintiff alleges that Defendants Bowen and Atwood both agreed to obtain the written approval of Plaintiff prior to the submission of any research done for Plaintiff for publication. (¶ 130). Plaintiff is informed and believes that Defendants intend to publish research without seeking this permission, and that a breach of this agreement will cause Plaintiff irreparable harm. (¶ ¶ 131-33). These allegations are sufficient to state a claim for a preliminary and permanent injunctive relief. *Barr-Mullin, Inc. v. Browning*, 108 N.C. App. 590, 596, 424 S.E.2d 226, 230 (1993).

Defendant Bowen contends only that he was justified in disclosing this information, because securities laws require him to disclose truthful, relevant information in the sale of securities. In making this argument, Defendant Bowen carefully ignores a crucial allegation of the Complaint -- that the information Defendant Bowen provided to Hambrecht and potential investors about Memryte was **false**. (¶ ¶ 69, 79, 80). Thus, the alleged conduct was not sanctioned by securities laws; rather it was unlawful under 17 CFR § 240.10b-5.

VII. THE COMPLAINT ABUNDANTLY ALLEGES  
BREACH OF CONTRACT BY DEFENDANT  
ATWOOD.

The Complaint alleges:

33. In August 2001, Defendant Atwood entered into a contract with Plaintiff, in which Defendant Atwood agreed to conduct research on the role of gonadotropins in the development and progression of AD. This contract further provided that all discoveries, inventions, or know how developed as a result of or arising out of the experiments conducted under this agreement would belong exclusively to Plaintiff and that Defendant Atwood would hold the experiments, and all related results, discoveries, inventions or insights in confidence, and not disclose them to any other person without Plaintiff's prior written consent. This contract has been renewed annually.

It further alleges that:

69. On Friday, December 9, 2005, Defendants Bowen and Atwood secretly went to the offices of Hambrecht and met with Eric B. Cheng (“Mr. Cheng”) and Doug Cameron (“Mr. Cameron”), and perhaps others. During that meeting, Defendants Bowen and Atwood falsely stated that there was a problem with the Phase I trial

...

79. Plaintiff is informed and believes that within the sixty days immediately prior to the filing of this action, Defendants have continued to disseminate false and misleading information regarding Plaintiff and its management, as well as Memryte and the research regarding it, in order to damage the value of Plaintiff’s intellectual property and to deter potential investors from purchasing Plaintiff’s stock in the private placement.

...

84. On January 23, 2006, Defendant Atwood suggested to Defendant Bowen that they set up a new company to attempt to patent certain inventions, discoveries, or know-how developed as a result of experiments conducted under Defendant Atwood’s agreement with Plaintiff. Defendant Atwood further suggested to Defendant Bowen that Defendant Bowen violate his Proprietary Information and Inventions Agreement with Plaintiff.

(emphasis added).

These allegations, taken as true and construed in the light most favorable to Plaintiff, establish that Defendant Atwood revealed results and insights related to his experiments performed under his consulting agreement. Specifically, (1) he informed Hambrecht, falsely, that there were problems with the Phase I clinical trial data, which information undoubtedly relates to the subject of his research under the agreement; (2) he disseminated false and misleading information concerning Memryte and his research regarding it, and (3) he attempted to persuade Defendant Bowen to patent certain inventions or discoveries

developed as a result of experiments conducted under Defendant Atwood's agreement with Plaintiff. By the time of this latter act, Defendant Atwood was well aware that Defendant Bowen had been discharged by Plaintiff and was thus at odds with the Company. Defendant Atwood's consulting agreement obligated him to refrain from sharing any information with any other person, particularly one who had declared war on the Company, without Voyager's prior written consent. His deliberate act of discussing how he and Defendant Bowen might benefit themselves from research belonging to Plaintiff can hardly be said to be anything but a breach of his consulting agreement.<sup>13</sup>

IX. PLAINTIFF ADEQUATELY PLEADS A CLAIM FOR DEFAMATION.

To state a claim of defamation, a plaintiff must allege "that the defendant made false, defamatory statements of or concerning the plaintiff, which were published to a third person, causing injury to the plaintiff's reputation." *Tyson v. L'Eggs Products, Inc.*, 84 N.C. App. 1, 10-11, 351 S.E.2d 834, 840 (1987). The alleged defamatory statements made by the defendant "need not be set out verbatim in plaintiff's defamation complaint if alleged 'substantially *in haec verba*, or with sufficient particularity to enable the court to determine whether the statement was defamatory.'" *Andrews v. Elliot*, 109 N.C. App. 271, 274, 426 S.E.2d 430 (1993) (citing *Stutts v. Duke Power Co.*, 47 N.C. App. 76, 83-84, 266 S.E.2d 861, 866 (1980)).

As noted earlier, the Complaint alleges that, at the December 9 meeting with Hambrecht:

69. . . . Defendants Bowen and Atwood falsely stated that there was a problem with the Phase I trial, and that Plaintiff's management had prevented Defendant Bowen

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<sup>13</sup> Indeed, this breach is so obvious and egregious that Defendant Atwood now disavows it as a lie that he cooked up to try to "get Voyager off his back." Atwood Affid., 3/30/06, ¶¶ 21, 22.

from investigating it. They further falsely stated that Defendant Bowen had been wrongfully excluded from participation in the management of Plaintiff. Despite knowing that their untrue statements would damage Plaintiff and its IPO, at no point either before or after the meeting did either of the Defendants advise Plaintiff's management of the meeting or its results. . . .

(Emphasis added).

As discussed above, Plaintiff goes on to allege in detail how these false statements ultimately doomed the IPO, depriving Plaintiff of the funds that would have been raised, and damaging its reputation and good will. (¶¶ 70-76, 137). Thus, Plaintiff has alleged each of the essential elements of a defamation claim.

Defendants argue that Plaintiff has not alleged the content of the defamatory statements with sufficient particularity. Plaintiff has however, alleged precisely what it understands Defendants said to the Hambrecht employees; *i.e.*, that there was “a problem with the Phase I trial” and that Defendant Bowen had been “excluded from participation in the management” of Plaintiff. No further specificity in pleading is required under the Rules of Civil Procedure, or our Courts' opinions, as demonstrated by an analysis of *Stutts v. Duke Power*, *supra*, cited by Defendant Bowen.

In *Stutts*, the Plaintiff alleged that:

12. That the Defendant, Duke Power Company, through its employees and agents and the Defendant, Robert Acree, have on numerous occasions since on or about September 10th, 1976 told the Plaintiff's fellow workers at the McGuire Nuclear Construction Project and the Plaintiff's prospective employers that the Plaintiff was discharged from his employment with the corporate Defendant because of a dishonest act, saying that he was on the job when he was absent from work, and that said slanderous and defamatory statements are without foundation in truth, and

have caused the Plaintiff severe embarrassment, humiliation and pain and suffering, and have severely and permanently impaired the Plaintiff's good reputation and have seriously and permanently impaired the Plaintiff's ability to obtain other employment.

47 N.C. App. at 81-82, 266 S.E.2d at 865. (emphasis added). The Court of Appeals rejected the defendants' argument that it was necessary to quote the exact words used to adequately allege a defamation claim, and held that the language emphasized above was sufficient. Specifically, the Court stated that "under the notice theory of pleading, plaintiff's statement of a defamation claim was adequate." *Id.* at 84, 266 S.E.2d at 866.

The allegations of the defamatory statements in the Complaint in this case are just as specific as those alleged in *Stutts*. Thus, as in *Stutts*, Plaintiff's allegations are more than adequate to survive a motion to dismiss.

Defendants also argue that the statements alleged in the Complaint are true. Although Defendants may present evidence in discovery or at trial attempting to show that the statements that they made to Hambrecht are true, the Complaint specifically alleges that the December 9 statements were false. (§§ 61, 69).

The Complaint also alleges that the statements that Defendant Bowen was wrongfully excluded from participation in management were false. (§ 69). Curiously, both Defendants argue that, because Defendant Bowen was unable to gain access to Plaintiff's lab at midnight, this statement to Hambrecht was true. Plaintiff has not alleged, nor does it believe, that Defendant Bowen told Hambrecht that he could not get into the lab facilities after hours. Plaintiff alleges that Defendants falsely told Hambrecht that he had been excluded from participating in management. This was false at the time the statement was made. Although

Defendant Bowen had been temporarily relieved of management responsibilities months earlier, he had been fully reinstated to his position as Chief Scientific Officer long before his meeting at Hambrecht. (¶ 53). He had conversations with the other directors, leading them to believe that they were all in agreement with his role with Plaintiff. (¶¶ 57-59). Further, in the days prior to the Hambrecht meeting, Defendant Bowen had fully participated in meetings with investors, along with the other directors, endorsing Plaintiff and Memryte. (¶¶ 60-61).

X.-XI. THE COMPLAINT PLEADS ALL ESSENTIAL  
ELEMENTS OF TORTIOUS INTERFERENCE WITH  
PROSPECTIVE ADVANTAGE.

North Carolina recognizes a common law claim for tortious interference with prospective advantage. *Dalton v. Camp*, 353 N.C. 647, 548 S.E.2d 704 (2001). Specifically, "interference with a man's business, trade or occupation by maliciously inducing a person not to enter a contract with a third person, which he would have entered into but for the interference, is actionable if damage proximately ensues." *Id.* at 654, 548 S.E.2d at 709 (citing *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 559, 140 S.E.2d 3, 11 (1965)). It is not necessary for the plaintiff to prove the "prospect of obtaining a contract; it is enough if she has the probable prospect of economic gain." Logan & Logan, *N. C. Torts*, (2d ed. 2004), § 25.50, p. 649. Further, it is not necessary that the plaintiff "identify the specific target of his contracting efforts at the pleading stage." *Id.*

In *Johnson v. Gray*, 263 N.C. 507, 139 S.E. 2d 551 (1965), our Supreme Court described the nature of this claim as:

"We think the general rule prevails that unlawful interference with the freedom of contract is actionable, whether it consists in maliciously procuring breach of a contract, or in preventing the making of a contract when this is done, not in the legitimate exercise of the defendant's own rights, but with design to injure the plaintiff, or gaining some advantage at his expense. . . .

Maliciously inducing a person not to enter into a contract with another, which he would otherwise have entered into, is actionable if damage results.' The word 'malicious' used in referring to malicious interference with formation of a contract does not import ill will, but refers to an interference with design of injury to plaintiff or gaining some advantage at his expense."

*Id.* at 509, 139 S.E. 2d at 552 (emphasis added).

Plaintiff has alleged in the present case:

139. Plaintiff and Hambrecht had agreed that it would serve as the sole managing underwriter for the IPO.
140. Defendants knew about the agreement between Plaintiff and Hambrecht.
141. Defendants intentionally interfered with this relationship by making false statements to Hambrecht.
142. As a result, Plaintiff was unable to complete its IPO.
143. Defendants acted without justification, and acted with the intent to injure Plaintiff and to benefit themselves.
144. Defendants' conduct caused Plaintiff actual damages.
- ...
146. Plaintiff had a reasonable expectancy that investors would have purchased stock if the IPO had been completed.
147. Defendants knew that Plaintiff had a reasonable expectancy that investors would have purchased stock if the IPO had been completed.
148. Defendants interfered with these potential investments by providing false and/or misleading information to Hambrecht and thus precipitated the withdrawal of the IPO.
149. The potential investors would have purchased Plaintiff's stock, but for Defendants' interference.

150. Defendants acted without justification, and acted with the intent to injure Plaintiff and to benefit themselves.
151. Defendants' conduct caused Plaintiff actual damages.

Further, the Complaint alleges in detail the specific conduct at issue, how it prohibited the completion of the IPO, and that Hambrecht would have underwritten the IPO, but for Defendants' conduct. (¶¶ 69-76).

Defendant Atwood argues that the Tenth Claim for Relief is defective because Plaintiff did not allege that it had a contract with Hambrecht that was breached as a result of his conduct. It is not necessary to prove the existence or breach of an enforceable contract to support a claim for tortious interference with prospective advantage; it is sufficient to show that the defendant wrongfully interfered with the formation of a contract. *Johnson, supra; Brewer v. Hatcher*, 52 N.C. App. 601, 279 S.E.2d 69 (1981). Plaintiff's allegations in the present case are sufficient to survive a motion to dismiss. *See, Brewer, supra.*<sup>14</sup>

Defendant Bowen argues that these claims must fail because his statements to Hambrecht were justified. As discussed fully above, Plaintiff has alleged facts showing that Defendant Bowen's statements to Hambrecht were false, and were made for the purpose of destroying the IPO, and were made of anger, or to seek revenge for the refusal of the other directors to capitulate to his demands. These allegations are sufficient to raise an issue of lack of justification. *Owens v. Pepsi Cola Bottling Co.*, 330 N.C. 666, 412 S.E.2d 636 (1992).

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<sup>14</sup> The Court did not hold that it was necessary to allege or prove the destruction of a business relationship to support this claim in *Owens v. Pepsi Cola Bottling Co.*, 330 N.C. 666, 412 S.E.2d 636 (1992), as Defendant Atwood argues. Rather, the Court held that evidence that the defendant intervened in a relationship with the purpose of destroying it was sufficient to raise a question of fact as to whether defendant intervened for a legitimate purpose.

XII. THE COMPLAINT FULLY PLEADS A CLAIM FOR UNFAIR AND DECEPTIVE TRADE PRACTICES.<sup>15</sup>

Defendant Atwood contends that Plaintiff's Chapter 75 claim is inadequate because (1) the Complaint purportedly does not allege proximate cause, (2) there is no fiduciary relationship between Plaintiff and Defendant Atwood, (3) "mere" breach of contract does not amount to a violation of G.S. § 75-1.1, and (4) the Complaint purportedly reveals "the truth of [Defendant] Atwood's alleged misrepresentations."<sup>16</sup>

Defendant Atwood's proximate cause argument is dealt with in Section XVI of this Brief at pp.35-37, *infra*. His contentions regarding the purported absence of any fiduciary relationship are rebutted in Section V, at pp.16-20, *supra*.

The argument that the Complaint supposedly reveals the "truth" of Defendant Atwood's statements runs headlong into the central requirement of the standard of review for Rule 12(b)(6) motions, *i.e.*, that all facts alleged in the Complaint be treated as true and construed in the light most favorable to Plaintiff.<sup>17</sup> Further, Defendant Atwood's desperation to

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<sup>15</sup> Only Defendant Atwood challenges the sufficiency of Plaintiff's Chapter 75 allegations. *See* Defendant Atwood's Motion to Dismiss, at 2; Defendant Atwood's Memorandum in Support of Motion to Dismiss, at 20-21. Neither Defendant Bowen's Motion to Dismiss nor his Memorandum in Support of his Motion to Dismiss even mention Plaintiff's Chapter 75 claims; therefore, any arguments by Defendant Bowen concerning the sufficiency of those claims are waived. G.S. § 1A-1, Rule 7(b)(1) (requiring the grounds for motions be stated with particularity); Rule 12(h); BCR 13.2 (requiring that grounds for motions be stated with particularity); BCR 13.1 (requiring that all motions be supported by a brief).

<sup>16</sup> Defendant Atwood's Memorandum in Support of Motion to Dismiss, at 20-21. These contentions amplify Defendant Atwood's core assertion that Plaintiff's allegations do not constitute "unfair or deceptive acts." *Id.* at 20. Defendant Atwood does not contend that his actions were not "in or affecting commerce." *Id.*

<sup>17</sup> *Sutton v. Duke*, 277 N.C. at 98, 176 S.E.2d at 163; *Stephenson v. Town of Garner*, 136 N.C. App. at 447, 524 S.E.2d at 611.

find some colorable justification for taking up the Court's time and Plaintiff's resources with this motion is demonstrated by his misstatement of the Complaint's allegations cited in support of this argument. Specifically, he contends that ¶¶ 51 and 55 of the Complaint allege that Defendant Bowen had been excluded from management.<sup>18</sup> Those paragraphs instead aver that at one time, four months earlier, Defendant Bowen had been placed on medical leave because of his hostile and irrational behavior. (¶ 51). This of course overlooks that he was allowed to return to his full duties once he received a letter from his psychiatrist authorizing his return. (¶ 53). The latter allegation on which Defendant Atwood relies involves his apparent attempt, with Defendant Bowen, to break into Plaintiff's laboratory, (not its office), in the middle of the night. (¶ 55).

Further, North Carolina's established law indicates that the acts alleged in the Complaint constitute unfair and deceptive trade practices. First, "North Carolina case law has held that conduct which constitutes a breach of fiduciary duty and constructive fraud is sufficient to support a UDTP claim."<sup>19</sup> Second, defamation "impeaching a party in its business activities is an unfair or deceptive act in or affecting commerce in violation of N.C.G.S. § 75-1.1."<sup>20</sup>

Further, G.S. § 75-1.1:

. . . provides two independent grounds for liability, unfair acts and deceptive acts. A practice is unfair if it "offends established public

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<sup>18</sup> Defendant Atwood's Memorandum in Support of Motion to Dismiss, at 21.

<sup>19</sup> *Compton v. Kirby*, 157 N.C. App. 1, 20, 577 S.E.2d 905, 917 (2003) (partner in real estate brokerage firm never told anyone plaintiffs were his partners and that defendant had no intention of sharing with plaintiffs the benefits of ownership of partnership he acquired after merger with larger entity).

<sup>20</sup> *Ellis v. Northern Star Co.*, 326 N.C. 219, 226, 388 S.E.2d 127, 131 (1990) (defendant sending letter to plaintiff's customers stating that defendant never authorized plaintiff's price list for defendant's products).

policy" or is "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." The test for deceptiveness is whether the act "possesses the tendency or capacity to mislead, or create[s] the likelihood of deception." "Unfairness" is a broader concept than, and includes the concept of, "deception."

*McDonald Bros., Inc., v. Tinder Wholesale, LLC*, 395 F.Supp.2d 255, 269 (M.D.N.C. 2005).

In the present case, Plaintiff has alleged in great detail a scheme carried out by Defendants that (1) breached their fiduciary duties to Plaintiff, (2) defamed Plaintiff in its business activities, (3) was unquestionably "immoral," "unethical," and "unscrupulous," and (4) "possessed the tendency . . . to mislead or create[d] the likelihood of deception." (¶ 69-83; 94-115). Defendant Atwood's motion to dismiss this claim must be denied.

### XIII. THE COMPLAINT ALLEGES ALL ESSENTIAL ELEMENTS OF CIVIL CONSPIRACY.

"In order to state a claim for civil conspiracy, a complaint must allege 'a conspiracy, wrongful acts done by certain of the alleged conspirators, and injury.'" *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 416, 537 S.E.2d 248, 265 (2000); *Henry v. Deen*, 310 N.C. 75, 87, 310 S.E.2d 326, 334 (1984). The complaint must allege an overt act done by at least one of the alleged conspirators, in furtherance of the conspiracy. *Shope v. Boyer*, 268 N.C. 401, 150 S.E.2d 771 (1966).

In the present case, Plaintiff's Complaint alleges:

1. On December 9, 2005, Defendants secretly met with Hambrecht and falsely told them that (a) there was a problem with the Phase I data, (b) management had prevented Defendant Bowen from investigating it, and (c) Defendant Bowen had been wrongfully excluded from management in the Company, all the while knowing that these statements would damage Plaintiff and its IPO. (¶ 69).

2. During January and February 2006, Defendants together continued to disseminate false and misleading information concerning Plaintiff and its management, as well as Memryte and the research concerning it in an effort to damage Plaintiff's intellectual property and to deter potential investors from purchasing Plaintiff's stock. (¶ 79).
3. Defendants participated in meetings during January and February 2006 with potential investors in an effort to gain control of Plaintiff by disseminating false and misleading information about Plaintiff and its clinical trials and thereby to cripple Plaintiff's ability to raise capital. (¶ 80).
4. During January and February 2006, Defendants orchestrated an effort to dissuade Hambrecht from helping Plaintiff in further efforts to raise capital. (¶ 81).
5. Defendants have continued to disseminate false and misleading information to Plaintiff's shareholders to satisfy their own private, personal interests, to the detriment of Plaintiff's interests. (¶ 83).
6. Defendants agreed with each other to commit these acts. (¶ 156).
7. The conspiracy between Defendants resulted in injury to Plaintiff inflicted by both of them. (¶ 157).
8. Defendants intended to harm Plaintiff. (¶ 158).
9. The acts and resulting injury occurred pursuant to a common scheme. (¶ 159).

Thus, Plaintiff has expressly alleged a conspiracy, (¶ 156), as well as multiple overt wrongful acts done by both of them in furtherance of the conspiracy. (¶¶ 69, 79-83).

Plaintiff has also alleged injury as a result of these acts. (¶¶ 75-76; 83, 137, 144, 151, 154, 159).

XIV. – XV. THE COMPLAINT ALLEGES EVERY NECESSARY FACT TO SUPPORT A CLAIM FOR AIDING AND ABETTING BREACH OF FIDUCIARY DUTY BY DEFENDANTS BOWEN AND ATWOOD.

In several recent decisions, it has been acknowledged that:

“North Carolina law recognizes a cause of action for aiding and abetting breach of fiduciary duty.” The tort of aiding and abetting a breach of fiduciary duty has three elements: “(1) the existence of a [violation of a fiduciary duty]. (2) knowledge of the violation on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in the achievement of the primary violation.”

*Ivey v. Crown Memorial Park, L.L.C.*, 333 B.R. 76 (Bankr. M.D.N.C. 2005).<sup>21</sup>

Defendant Atwood argues that this Court’s decision in *Sompo Japan Ins. Co., Inc., v. Deloitte & Touche, L.L.P.*, 2005 NCBC 2 (2005), somehow vitiated the Court of Appeals holding in *Blow v. Shaughnessy*.<sup>22</sup> In that very decision, however, this Court drew a sharp distinction between a claim based on aiding and abetting breach of fiduciary duty and aiding and abetting fraud. The Court held that the latter claim was duplicative of the fraud claim because:

Were a jury to find that Deloitte knew that the Fortress Re defendants were defrauding plaintiff and intentionally prepared false financial statements to assist them in doing so, Deloitte would be guilty of fraud and there would be no need for an aiding and abetting claim.

2005 NCBC at 12 (emphasis added).

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<sup>21</sup> Citing *Moseley v. Arth*, 2003 Bankr. LEXIS 1437 (Bankr. M.D.N.C. 2003); *Blow v. Shaughnessy*, 88 N.C. App. 484, 364 (1988).

<sup>22</sup> Defendant Atwood’s Memorandum in Support of Motion to Dismiss, 17-18.

As to aiding and abetting breach of fiduciary duty, the Court observed:

The distinguishing factor in breach of fiduciary duty cases is that the abettor may not stand in a fiduciary relationship to the victim. Rather than altering or expanding the well-established definition of fiduciary relationships, the courts will likely use aiding and abetting breach of fiduciary duty as a better vehicle to accomplish liability for equally culpable acts. The same rationale does not apply to fraud, where the elements of proof are the same for fraud and aiding and abetting fraud. A claim for aiding and abetting fraud is duplicative and redundant since it requires the same scienter as a fraud claim. In contrast, a claim for aiding and abetting a breach of fiduciary duty may not be redundant if the abettor has no fiduciary relationship with the victim.

2005 NCBC at 11 (emphasis added).<sup>23</sup>

As demonstrated in Arguments I-IV and V *supra*, at pp. 11-20, the Complaint amply alleges the first element, existence of a violation of a fiduciary duty. As to the second element, knowledge of the violation by the abettor, the Complaint alleges that both Defendants attended the meeting at which the false statements were made to Hambrecht. (¶ 69). It further alleges that both Defendants orchestrated a concerted effort to thwart Plaintiff's association with Hambrecht in subsequent efforts to raise capital. (¶ 81). Plaintiff also alleges that Defendant Atwood attempted to persuade Defendant Bowen to try to patent intellectual property that belonged to Plaintiff. (¶ 84). Finally, the Complaint specifically alleges that each Defendant knew that the other's conduct constituted a breach of duty to Plaintiff. (¶¶ 161.b., 164.b.).

As to the final element, substantial assistance by the abettor, the Complaint alleges that both Defendants made false statements to Hambrecht at the December 9 meeting, that both Defendants collaborated in the effort to thwart Plaintiff's subsequent efforts to raise

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<sup>23</sup> See also *Branch Banking & Trust Co. v. Lighthouse Financial Corp.*, 2005 NCBC 3, 24 (2005) (holding that a claim for aiding and abetting breach of fiduciary duty is governed by the three-year statute of limitations and denying Rule 12(b)(6) motion).

capital, and that Defendant Atwood has attempted to assist and encourage Defendant Bowen in breaching his confidentiality agreement (§§ 69, 81, 84). The Complaint also alleges that each Defendant gave substantial assistance to the other in the other's breach of duty to Plaintiff. (§§ 161.b., 164.b.). Construing these allegations in the light most favorable to Plaintiff, these facts show that both Defendant Atwood and Defendant Bowen knew that the other owed fiduciary duties to Plaintiff, that each joined with the other and aided the other in persuading Hambrecht that there were problems with the Phase I data and that Defendant Bowen had been excluded from management when he tried to investigate this allegation, and that each Defendant aided the other in persuading Hambrecht to abandon subsequent efforts to assist Plaintiff in raising capital through private sources.

XVI. THE COMPLAINT SUFFICIENTLY ALLEGES  
PROXIMATE CAUSE.

As noted earlier, the allegations of the Complaint must be accepted as true and interpreted in the light most favorable to Plaintiff.<sup>24</sup> The Complaint alleges:

1. Defendants made the false statements at the December 9 meeting with Hambrecht knowing that they would damage Plaintiff and its IPO. (§ 69).
2. Plaintiff was forced to withdraw the IPO because it could not satisfy Hambrecht's concerns that resulted from Defendant's scheme. (§ 75).
3. Hambrecht would have remained willing to underwrite the IPO but for Defendants' false statements. (§ 76).

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<sup>24</sup> *Sutton v. Duke*, 277 N.C. at 98, 176 S.E.2d at 163; *Stephenson v. Town of Garner*, 136 N.C. App. at 447, 524 S.E.2d at 611.

4. When Defendants learned that Plaintiff was working with Hambrecht on a private placement of stock to raise capital, following the IPO, they pioneered a concerted effort to run off Hambrecht yet again, and thereby to foil that placement. (¶ 81).
5. Defendants also pursued a deliberate campaign of disseminating false and misleading information to dissuade potential investors from purchasing Plaintiff's stock in the private placement. (¶ 79).
6. Plaintiff sustained damages as a result of Defendant Atwood's breaches of his fiduciary duties to Plaintiff. (¶ 116).
7. Plaintiff sustained damages as a result of Defendant Atwood's breach of contract. (¶ 127).
8. Defendants' false statements to Hambrecht damaged Plaintiff by preventing it from completing its IPO, and by injuring Plaintiff's business good will and its relations with its stockholders. (¶¶ 137; 142, 144, 146).
9. Defendants knew that Plaintiff had a reasonable expectancy that investors would have purchased its stock if the IPO had been completed, Defendants' false statements precipitated the withdrawal of the IPO, and these potential investors would have purchased Plaintiff's stock, but for Defendants' interference. (¶¶ 146, 147, 148, 149).
10. Defendants acted with the intent to injure Plaintiff and to benefit themselves, and their conduct caused Plaintiff actual damages. (¶¶ 150, 151).

Plaintiff's Twelfth, Thirteenth, Fourteenth, and Fifteenth Claims for Relief incorporate these allegations by reference. (¶¶ 152, 155, 160, 163). Accepting these allegations as true and interpreting them in the light most favorable to Plaintiff, which the Court must for purposes of Defendants' Rule 12(b)(6) motions, Plaintiff unquestionably has alleged ample factual bases for its contention that Defendant Atwood caused damages to it by his attempts to sabotage the IPO and his efforts to prevent Plaintiff from obtaining investment funds through a subsequent private placement. Defendant Atwood attempts to contradict these allegations by contending that the proposed unverified Third Party Complaint attached to John Stone's failed motion to intervene somehow negates these allegations. That argument, however, would require the Court to take the allegations of those unverified attachments as true, and Plaintiff's verified Complaint as false. The law governing Rule 12(b)(6) motions does not permit this. *Sutton v. Duke*, 277 N.C. at 98, 176 S.E.2d at 163. Again, Defendants' motions present only the question whether the merits of Plaintiff's claims can be assessed through discovery. *Id.*, 277 N.C. at 104, 176 S.E.2d at 167. The Complaint is manifestly sufficient to meet that test.

XVII. DEFENDANTS HAVE NOT SHOWN THAT THERE IS NO SET OF FACTS THAT PLAINTIFF COULD PROVE THAT WOULD ALLOW RECOVERY UNDER THE NORTH CAROLINA TRADE SECRETS PROTECTION ACT.

Defendant Atwood cites two cases that he contends mandate dismissal of Plaintiff's claims under the Trade Secret Protection Act, G.S. § 66-152, *et seq.*<sup>25</sup> Neither of

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<sup>25</sup> *Combs & Assoc., Inc., v. Kennedy*, 147 N.C. App. 362, 555 S.E.2d 634 (2001); *Analog Devices, Inc., Michalski*, 157 N.C. App. 462, 579 S.E.2d 449 (2003).

those decisions, however, involved rulings on Rule 12(b)(6) motions.<sup>26</sup> Defendant Atwood's arguments center around his contention that:

Voyager fails to plead any facts supporting the contention that any work performed by [Defendant] Atwood for Voyager would not be readily ascertainable by those skilled in the art. Furthermore, Voyager has certainly failed to plead that Voyager used any efforts whatsoever to maintain the secrecy of any information relating to [Defendant] Atwood's research for Voyager. The Court should find, therefore, that Voyager has failed to plead or state a claim for misappropriation of trade secrets.

Defendant Atwood's Memorandum in Support of Motion to Dismiss, at 13.

Defendant Atwood also remarks that the Complaint currently contains no express reference to the Act. These arguments ignore both the applicable procedural law and the facts plead in the Complaint. As to the procedural issue, our Supreme Court long ago held:

. . . N.C. R. Civ. P. 54(c) requires that every final judgment, with the exception of judgments rendered by default, "shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Thus when the allegations in the complaint give sufficient notice of the wrong complained of an incorrect choice of legal theory should not result in dismissal of the claim if the allegations are sufficient to state a claim under some legal theory. Our interpretation of the concept of notice pleading embodied in N.C. R. Civ. P. 8(a) supports that conclusion.

*Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979) (citations omitted)

(emphasis added). Further, Defendant Atwood cannot argue in good faith that he is not on notice of Plaintiff's trade secret claims, having faced briefing on the issue at the hearing on Plaintiff's motion for preliminary injunction.

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<sup>26</sup> *Combs & Assoc., Inc.*, was an appeal from an order granting partial summary judgment. 147 N.C. App. at 365, 555 S.E.2d at 637. *Analog Devices, Inc.*, was an appeal from an order denying a motion for preliminary injunction on a Trade Secret Protection claim. 157 N.C. App. at 463, 579 S.E.2d at 464.

The Complaint avers:

84. On January 23, 2006, Defendant Atwood suggested to Defendant Bowen that they set up a new company to attempt to patent certain inventions, discoveries, or know-how developed as a result of experiments conducted under Defendant Atwood's agreement with Plaintiff. Defendant Atwood further suggested to Defendant Bowen that Defendant Bowen violate his Proprietary Information and Inventions Agreement with Plaintiff.
85. On or about February 2 or 3, 2006, Defendant Bowen stated to a former employee of Plaintiff that Defendant Bowen was preparing to publish data belonging to Plaintiff, in violation of Defendant Bowen's Proprietary Information and Inventions Agreement with Plaintiff. Later, on or about February 25, 2006, Defendant Bowen made this same statement to another stockholder of Plaintiff.

(Emphasis added).

Defendant Atwood clearly had no problem determining which trade secrets the Complaint was describing, inasmuch as he was able to prepare an affidavit within 24 days of the date this action was filed in which he disavowed the truth of the January 23, 2006, communication described in Paragraph 84 of the Complaint, now that it was convenient for him to do so in order to avoid compensatory and punitive damages and attorney's fees under the Trade Secret Protection Act.<sup>27</sup> Plaintiff, despite Defendant Atwood's now convenient denial, is entitled to put Defendant Atwood's doubtful veracity to the test through more complete discovery to determine whether he has indeed developed intellectual property that is rightfully Plaintiff's and which he now wishes to secrete until this action is resolved, at which time he can misappropriate that discovery without having to surrender it to Plaintiff pursuant to his consulting agreement.

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<sup>27</sup> Atwood 3/30/06 Affid. at ¶¶ 21, 22; G.S. § 66-154.

Defendant Atwood's quizzical argument that Plaintiff has failed to allege any efforts to maintain the secrecy of the information relating to his research for Plaintiff is belied by (1) Plaintiff's inclusion of a confidentiality clause in Defendant Atwood's consulting agreement (¶ 33); (2) Plaintiff's insistence on having Defendant Bowen sign the Proprietary Information and Inventions Agreement with Plaintiff (¶ 84)<sup>28</sup>; (3) the care with which Plaintiff's Complaint has been drafted to avoid revealing on its face the exact content of the confidential information so as not to void the very protection of that information that it is seeking to enforce.<sup>29</sup>

As to this last point, Defendant Atwood, in a stunning example of quoting from an opinion out of context, cites to *Glaxo, Inc., v. Novopharm Limited*, 931 F. Supp. 1280, 1298 (E.D.N.C. 1996), for the proposition that the existence of Plaintiff's patent for this method of use of leuprolide acetate vitiates its Trade Secrets Act claim.<sup>30</sup> In the present case, however, the specific trade secrets sought to be protected were illuminated to the Court in Plaintiff's Exhibits 1 and 2 filed under seal at the April 4, 2006, Preliminary Injunction hearing. The information outlined in those exhibits belongs to Plaintiff under its contracts with Defendant Atwood and Bowen; yet, they have threatened to reveal it or to steal it for their own benefit. Indeed, later in the *Glaxo* opinion, the Court points out the very risk of overpleading the content of trade secrets that Plaintiff seeks to avoid in the present case, where it holds that:

As a matter of law, information which a party wishes to maintain as a trade secret may be introduced as evidence only if it is absolutely necessary to do so, and only after asking the court to

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<sup>28</sup> See *Merck & Co. v. Lyon*, 941 F.Supp. 1443, 1454 (M.D.N.C. 1996) (holding that requiring employees to sign confidentiality agreements was reasonable means to maintain the secrecy of the plaintiff's trade secrets).

<sup>29</sup> See Complaint, ¶¶ 84, 85; Plaintiff's Exhibits 1 and 2, filed under seal at April 4, 2006, hearing on Plaintiff's Motion for Preliminary Injunction.

<sup>30</sup> Defendant Atwood's Memorandum in Support of Motion to Dismiss, at 3, n. 2.

maintain the trade secret's integrity by sealing the exhibits, conducting an in-camera hearing, or taking other appropriate steps.

...

“If an individual discloses his trade secrets to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished. . . . [R]elease of information in open trial is a publication of that information and, if no effort is made to limit its disclosure, operates as a waiver of any rights a party had to restrict its further use.

*Id.*, 931 F.Supp. at 1301 (emphasis added). Indeed, Defendant Atwood's argument appears to be part of a calculated effort to force Plaintiff to allege with great detail the contents of its trade secrets on the record so that he can then argue that, by those allegations, Plaintiff has waived its right to maintain the secrecy of its intellectual property. Given that “The law abhors an absurdity,”<sup>31</sup> it was hardly the intent of the Legislature or the Appellate Division to fashion such a snare for a litigant, *i.e.*, that one cannot pursue a Trade Secret Act claim without specifically pleading the content of the secret in the Complaint, yet, pleading the secret in detail waives the claimant's right to protect its confidentiality. Applying the Act this way would virtually eliminate a party's right to use it as a means to seek redress of the very wrong it seeks to remedy.

As noted earlier, if Defendants were dissatisfied with the degree of specificity of Plaintiff's allegations concerning the identity of its trade secrets, their remedy was a motion for more definite statement, not a dismissal of Plaintiff's trade secret claims prior to the opportunity for Plaintiff to pursue discovery to ascertain just what mischief Defendants have been up to. Having failed to demonstrate in their briefs that no set of facts exist under which Plaintiff could

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<sup>31</sup> *People v. Arnett*, 217 Ill. App.3d 626, 637, 577 N.E.2d 773, 779 (1991), *leave to app. denied*, 143 Ill.2d 640, 587 N.E.2d 1017 (1992).

prove their right to recover for Defendants' violation of the Act, this motion should be denied.

*See Sutton v. Duke, supra; White v. Consol. Planning, Inc., supra.*

XVIII. THE COMPLAINT ALLEGES AMPLE FACTS  
SHOWING THAT DEFENDANT ATWOOD  
COMMITTED FRAUD, ACTED MALICIOUSLY,  
WILLFULLY AND WANTONLY.

As previously set out, the Complaint alleges, with abundant detail, that Defendant

Atwood:

1. Secretly met with Plaintiff's underwriter of its IPO and falsely told them that there was a problem with the Phase I clinical trial data (§ 69)
2. At this secret meeting, falsely told Plaintiff's underwriter that Plaintiff had prevented Defendant Bowen from investigating the alleged problems with the Phase I data and had locked Defendant Bowen out of his office when he raised the issue (§ 68, 69);
3. At this same meeting, falsely told Plaintiff's underwriter that Defendant Bowen had been wrongfully excluded from participation in Plaintiff's management (§ 69);
4. Made these false statements with knowledge that they would damage Plaintiff and its IPO (§ 69);
5. During January and February 2006, continued to disseminate false and misleading information regarding Plaintiff, its management, Plaintiff's product, and the research concerning it in order to damage the value of Plaintiff's intellectual property and to deter potential investors from purchasing Plaintiff's stock in the private placement (§ 79);

6. Orchestrated a concerted effort to thwart discussions between Plaintiff and its underwriter in order to prevent Plaintiff from raising funds by a private placement (§ 81); and,
7. Undertook these acts in an effort to satisfy his own private, personal interests to the great detriment of Plaintiff and its shareholders (§ 83).

G.S. § 1D-5 sets out the following definitions:

- (5) “Malice” means a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant.  
  
. . .
- (7) “Willful or wanton conduct” means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. “Willful or wanton conduct” means more than gross negligence.

The facts alleged in the Complaint unquestionably show both a sense of personal ill will toward Plaintiff, as well as conscious and intentional disregard of and indifference to the rights and financial safety of Plaintiff and its shareholders that Defendant Atwood was directly aware would result in damage or other harm. These facts have been alleged specifically, and with considerable clarity.

Defendant Atwood’s argument glaringly and deliberately overlooks these allegations, stating glibly that:

Voyager has alleged a laundry list of supposed claims against Dr. Atwood, many of which simply boil down into two allegation: (i) Dr. Atwood has somehow breached his contract with Voyager and (ii) Dr. Atwood is somehow vicariously liable for the actions of Dr. Bowen. . . . A plaintiff is not entitled to punitive damages

solely on the basis of either an alleged breach of contract or vicarious liability.<sup>32</sup>

This deliberate disregard of these damning facts reveals the fatal insufficiency of Defendant Atwood's argument. Contrary to Defendant Atwood's assertions, Plaintiff's punitive damages claims are founded on Defendant Atwood's intentional, malicious efforts to damage Plaintiff, to prevent its IPO from succeeding, to run away potential investors, to frighten off its underwriter, all so that Defendant Atwood and his co-conspirator could engage in a shareholder war to attempt to seize control of Plaintiff for their own benefit. These facts are more than sufficient to establish Plaintiff's entitlement to punitive damages; therefore, this motion should be denied.<sup>33</sup>

### CONCLUSION

Plaintiff's Complaint carefully and fully alleges every element necessary for each of its Claims for Relief to state a claim upon which relief can be granted. Defendants' motions should thus be denied in their entirety.


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<sup>32</sup> Defendant Atwood's Memorandum in Support of Motion to Dismiss, at 22.

<sup>33</sup> See *Zubaidi v. Earl L. Pickett Enters.*, 164 N.C. App. 107, 595 S.E.2d 190, *app. disp'd., discr. rev. denied*, 359 N.C. 76, 605 S.E.2d 151 (2004) (evidence sufficient to support punitive damages where defendant engaged in willful and malicious conduct in breaching a lease agreement and converted plaintiffs' property); *Interstate Narrow Fabrics, Inc., v. Century USA, Inc.*, 218 F.R.D. 455 (M.D.N.C. 2003) (evidence sufficient to support punitive damages where defendant willfully concealed breaches of agreement so that plaintiff would continue to offer defendant product discounts).

This the 30 day of May, 2006.

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CERTIFICATE OF SERVICE

The undersigned attorney for Plaintiff certifies that on this day the following Brief in Opposition to Defendants' Motions to Dismiss was served upon the attorneys of record for the parties in this action by electronic mail, and addressed as follows:

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This the 30 day of May, 2006.

  
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