

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

WILLIAM B. CHANDLER III
CHANCELLOR

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: July 15, 2010
Decided: August 17, 2010

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Patricia R. Uhlenbrock
Pinckney, Harris & Weidinger, LLC
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David L. Finger
Finger, Slanina & Liebesman, LLC
One Commerce Center
1201 N. Orange St., 7th Floor
Wilmington, DE 19801-1186

Re: *GyneConcepts, Inc. v. Kim, et al.*
Civil Action No. 4820-CC

Dear Counsel:

This is my decision on the plaintiff GyneConcepts, Inc.'s, post-trial application for money damages. Each side to this dispute agrees that no further hearing on damages is necessary. Thus, I base my ruling on your letter submissions and on the trial record. In that regard, I have reviewed all of the exhibits, as well as the transcript of the trial testimony. Based on that review, and on my assessment of the witnesses' credibility, I am awarding plaintiff damages in the sum of \$1,181,708, plus pre-judgment interest at the legal rate. No interest is awarded on the amount (\$173,000) still owed by GyneConcepts to its counsel (Einbinder & Dunn and Boyd Cox).

The specifics of my damage award are as follows:

(1) Out-of-Pocket Loss. Although the defendant Kim was paid as a consultant, the payments were to his company, N. Hahn & Co., which is not a party to this lawsuit. Accordingly, I make no award to GyneConcepts based on

payments made to, or owed to, N. Hahn & Co. Given my earlier ruling on the invalidity of the written consent, it appears highly doubtful that GyneConcepts will be required to make further payments to N. Hahn & Co. I do find a basis to award GyneConcepts the value of its payments to Quaternion (Mr. Kim's wholly owned and operated LLC) for the "license" to the invention that Kim wrongfully usurped in breach of his fiduciary duties. GyneConcepts is awarded \$215,000—the amount that it paid to Quaternion as a result of Kim's faithless actions.

In addition, I award GyneConcepts \$173,000 for amounts it owes to lawyers (Einbinder & Dunn and Boyd Cox) for negotiations and patent licensing work in connection with Kim's assertion of ownership over the invention. GyneConcepts would not have incurred these bills otherwise; it was only as a direct consequence of Kim's wrongful seizure of property rightfully owned by GyneConcepts that these bills were incurred.

Finally, I award GyneConcepts \$43,708, which represents the total value of airplane flights and hotel room fees incurred by Kim (and paid by GyneConcepts) during his repeated visits to Raleigh, North Carolina. From May 2007 until February 2008, Kim stayed for approximately sixty nights at the Umstead Hotel in Raleigh, at an average nightly cost of \$443. The total hotel bill for Kim during this period, paid for by GyneConcepts, came to \$26,128. The fifteen airline flights (also paid by GyneConcepts) that Kim made (often from his home in New York) to Raleigh on American Airlines cost \$17,580, with the *least expensive* ticket priced at \$822. (*See* JX 151; JX 146). All of these lavish expenses were incurred at a time when Kim agreed the company could not even afford to hold a stockholders' meeting. These expenses were a frivolous waste of company resources. Contrary to the defendants' argument, I know waste when I see it, and no "expert" must testify "as to whether Kim's conduct was within the range of reasonable conduct of investment bankers seeking wealthy investors." (Letter to the Court from Mr. Finger, July 15, 2010 at 2 n.3). It clearly was not reasonable conduct, as any perusal of the transcript of this proceeding will amply demonstrate. *See* Trial Transcript, Vol. 1, June 1, 2010, at pages 126-134. Indeed, Kim is lucky that the Company did not press a waste claim regarding other trips to various locations, purportedly on Company business. The extravagant airline costs (least expensive ticket on Continental Airlines? \$1,014) and lavish hotel bookings (\$3,193 for three different hotels in Savannah, Georgia over four days between September 27-October 1, 2007) might easily have caused me to award additional damages to the Company. But the Company did not press this point, so I make no award for the spendthrift ways of Mr. Kim. GyneConcepts was an undercapitalized start-up medical technology company that operated on a shoestring budget. The type of

extravagant expenditures incurred in this case were wholly inappropriate. Worse still, Kim's explanations for his repeated trips to Raleigh were simply incredible, and I strongly suspect that his purpose for various trips to Savannah, Houston, San Francisco, Las Vegas, Chicago and Washington, D.C. would have engendered similar incredulity had the Company elicited testimony regarding them. In any event, I award GyneConcepts the sum of \$43,708 for waste of Company resources in connection with Kim's extended stay at the Umstead Hotel from May 2007 through February 2008.

(2) Lost Value Due to Delay (Lost Profits). It is impossible, unfortunately, to calculate the losses caused to GyneConcepts as a result of Kim's breach of fiduciary duty and wrongful assertion of ownership of the Company's medical device. GyneConcepts asks me to award it between \$23 million and \$43 million, based on the four year delay in bringing the device to market caused by Kim's wrongful assertion of ownership. This calculation, however, is based on Kim's proposed calculations of the revenue stream if the device were indeed marketed worldwide, and Kim's use of these calculations in negotiations with the Company were completely self-serving and (so far as I can tell) created from thin air. With no credible basis for accepting any of Kim's testimony, or his revenue stream calculations, I cannot turn Kim's excel spreadsheet (JX176) into a damage calculation of GyneConcepts' lost profits. GyneConcepts offered no other evidence at trial concerning its lost profits and, therefore, I cannot award money damages on that basis.

(3) Lost International Patent Rights. I am satisfied, based on all the testimony, that Kim's conduct (his wrongful assertion of ownership of the device) contributed to the loss of international patent rights regarding the medical device. Again, however, no credible evidence exists that would enable me to calculate, with any degree of precision, the potential revenues lost to GyneConcepts as a result of Kim's misconduct. The best measure of harm to the Company from the loss of the international patent rights is Kim's own assertion of the "replacement cost" of international patent protection as a single invention in the fifty largest countries of the world. That cost, according to Kim, is "roughly" \$750,000. (*See* Defendants' Motion to Sever and Expedite, Nov. 16, 2009, ¶ 12). Accepting that estimate, and given that any uncertainty in this determination should be shouldered by Kim and not GyneConcepts, I award to GyneConcepts the sum of \$750,000.

(4) Pre-judgment Interest. GyneConcepts asserted a claim for pre-judgment interest, and the complaint seeks such damages as established at trial, together with such further relief as requested or as justice requires. Pre-judgment interest is a

matter of right. *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992). No reason appears why an award of pre-judgment interest would be unfair or unjust. Therefore, I award GyneConcepts pre-judgment interest at the legal rate (1) on \$750,000 from March 1, 2010 when the international patent rights were lost, (2) on \$215,000 paid to Quaternion, from the dates such payments were made, (3) on the \$43,708 in “wasted” Company resources from the date of the last payment. Mr. Weidinger shall prepare an implementing order within five days from this date. Mr. Finger shall be allowed to file any objection to the proposed order within two days after it is served and filed.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III". The signature is written in black ink and is positioned above the printed name.

William B. Chandler III

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