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**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA
CIVIL DIVISION**

EMERY SMITH,

CASE NO. 15-CA-001620

Petitioner/Counter-Respondent,

-v-

EMCYTE CORP.,

Respondent/Counter-Petitioner

And

PATRICK PENNIE,

Respondent/Counter-Petitioner.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL JUDGMENT
(as to Counterclaim Counts I, III, VIII and IX)

On May 8, 2018, this Court conducted a non-jury trial on EmCyte Corp's Counterclaim Counts I, III, VIII, and IX. Appearances were made at the trial for EmCyte Corp. by Kenneth G.M. Mather of Gunster, Yoakley & Stewart, P.A., and Andrew Lennox and Casey Lennox of Lennox Law. Emery Smith ("Mr. Smith" or "Petitioner") appeared *pro se*. After hearing the testimony, examining the exhibits, prior orders of this Court and listening to the arguments presented by the parties, this Court finds as follows:

MATTER TO BE TRIED

At the Trial Docket Sounding conducted on May 3, 2018 and again pre-trial, the parties stipulated that EmCyte's equitable claims would be bifurcated from its legal claims and that the equitable claims would be tried first as a non-jury trial on May 8, 2018. EmCyte's equitable claims are Count I (Accounting), Count III (Breach of Contract – Injunction), Count VIII (Misappropriation of Trade Secrets – Injunction), and Count IX (Declaratory Judgment).

EmCyte's remaining claims of Count II (Breach of Contract – Damages), Count IV (Breach of Fiduciary Duty of Loyalty and Good Faith), Count V (Breach of the Covenants of Good Faith and Fair Dealing) and Count VII (Misappropriation of Trade Secrets – Damages) are reserved for later adjudication.

FINDINGS OF FACT

1. Cytonics Corporation is owned by Gaetano J. Scuderi, M.D.
2. Cytonics has a Platelet Rich Plasma (“PRP”) system known as the APIC PRP System (“APIC PRP”).
3. The APIC PRP System competes with the EmCyte PRP system.
4. A2Mcyte, LLC has an exclusive license to sell and distribute the APIC PRP System.
5. Petitioner's direct competition with EmCyte is reflected in his letter of Intent of May 16, 2015 to Dr. Scuderi wherein Petitioner sought to “... purchase an exclusive worldwide license for APIC System and have first rights of refusal for future Cytonics devices and equipment and patent licensing.” In fact, Petitioner claimed to have invested \$150,000 in expenses in two months in furtherance of his business enterprise which competes with EmCyte.
6. Petitioner has advised, consulted and represented the interests of A2Mcyte in direct competition with EmCyte.
7. Emery Smith concealed, hid and kept secret his involvement and participation in A2Mcyte.
8. In response to EmCyte's discovery request to Petitioner asking for identification of entities in which he was involved, Petitioner failed to disclose his relationship with A2Mcyte.

9. Prior to issuing an exclusive license to A2Mcyte, Cytonics issued a non-exclusive license to its APIC PRP System to A2M Bio, Inc.

10. A2M Bio is an entity that was claimed to be owned by Angel Oliferuk, the sister of Anna Stahl, but in which Petitioner actively participated.

11. Petitioner's participation in A2M Bio was concealed from EmCyte and Patrick Pennie.

12. LifeForm Healing Research, LLC was owned and controlled by Petitioner (50%) and Anna Stahl (50%). Anna Stahl was a former employee of EmCyte and was a distributor for EmCyte. Petitioner's ownership in LifeForm was concealed from EmCyte and Patrick Pennie.

13. LifeForm also held a non-exclusive license from Cytonics for the APIC PRP System.

14. While Petitioner was an owner, officer, director and employee of EmCyte, Petitioner secretly competed with EmCyte through his involvement in A2Mcyte, A2M Bio and LifeForm.

15. In response to EmCyte's discovery requests Petitioner failed to disclose his relationship with or in A2M Bio. He further refused to provide any personal financial information so that his profits from A2Mcyte, A2M Bio and LifeForm remain hidden from EmCyte and Patrick Pennie.

16. Petitioner's direct usurpation of EmCyte's corporate opportunities, conversion of assets and collection of secret profits to his personal benefit while intentionally damaging EmCyte is graphically exhibited his correspondence with Ray Johnson of Cytonics.

17. On September 15, 2014, Ray Johnson sent an e-mail to Petitioner and Dr. Scuderi stating, in part, "I want you to know that we are very excited about the opportunity to introduce

our APICS System through the EmCyte network of distributors and technical specialists.” Mr. Johnson transmitted a proposed Agency Agreement to be executed between Cytonics and EmCyte.

18. The business opportunity with Cytonics was received by Petitioner while he was an owner, officer, director and employee of EmCyte, but he usurped the opportunity by directing it to A2M Bio and never disclosed this opportunity to EmCyte or Patrick Pennie.

19. Instead of sharing the Ray Johnson Communication with EmCyte and Patrick Pennie, Petitioner transmitted the draft Agency Agreement to Anna Stahl and Angel Oliferuk explaining: “ok here is the agreement. I will change it from emcyte to lifeform.” Petitioner then directly usurped EmCyte’s corporate opportunity with Cytonics by directing Ray Johnson to substitute LifeForm for EmCyte in the Agency Agreement.

20. Petitioner’s intentional and secret breach of his fiduciary duties is further evidenced by his e-mail of March 30, 2015 to Dr. Scuderi, Anna Stahl and Angel Oliferuk wherein Petitioner bragged about his clandestine actions to Dr. Scuderi when discussing his purchase of a booth space for A2M Bio at a Naples convention. Petitioner communicated his intent to send “... every Doctor there to the (A2M Bio) booth...” Petitioner’s ongoing intent to deceive EmCyte and to disseminate false information concerning EmCyte is blatantly demonstrated by his statements that “... **My EmCyte partner may be floating around and some other EmCyte Spies, so we will work from the inside, I am dissolving EmCyte by September by the way, that’s confidential☺** LifeForm has a booth there so everyone that comes will be informed about this new system over there at the new A2M Bio booth☺) See LOGO Below ... should clean house nicely since we know the present and the entire board of directors are our friends.” (Emphasis Added).

21. To further the business of A2M Bio, Petitioner utilized known distributors of EmCyte. As the APIC PRP System competes with EmCyte's PRP System, the use of EmCyte's distributors negatively impacts EmCyte's business.

22. Petitioner aggressively marketed the APIC PRP System by traveling the country attending conventions, doing training and even television spots.

23. LifeForm was formed as a Texas limited liability company on or around January 31, 2014.

24. At its inception LifeForm was a distributor of EmCyte's PRP System. It was represented to EmCyte and Patrick Pennie that LifeForm was owned exclusively by Anna Stahl.

25. Under its Distribution Agreement with EmCyte, LifeForm was prohibited from distributing products that competed with EmCyte. LifeForm's relationship with Cytonics was concealed from EmCyte and Patrick Pennie.

26. LifeForm obtained a non-exclusive license to sell the APIC PRP System, which competes with the EmCyte PRP System.

27. While acting as a distributor for EmCyte, and prior to revealing Petitioner's involvement in LifeForm, it sold or distributed EmCyte products and failed to pay for them. LifeForm owes EmCyte \$147,739.07 for EmCyte products sold or distributed and not paid for by LifeForm. LifeForm ceased operating, making it unlikely that the debt to EmCyte will be paid.

28. When LifeForm failed to pay its debts to EmCyte in the summer of 2015, Anna Stahl revealed to Patrick Pennie for the first time that Emery Smith was an owner of LifeForm.

29. Upon further investigation EmCyte determined that LifeForm had been converting direct sale customers of EmCyte to direct sale customers of LifeForm without

EmCyte's knowledge or consent. The damage caused to EmCyte by LifeForm's conversion of EmCyte's direct sale customers is at least \$164,695.00.

30. LifeForm collected over \$2.5 million in revenue over the seventeen month period during which Petitioner was involved. Petitioner owned a half interest in LifeForm's \$2.5 million of revenue stream.

31. Petitioner's acknowledgement of his breach of his fiduciary duties to EmCyte and to Patrick Pennie was memorialized by his demand letter written on September 11, 2015 to Anna Stahl. Petitioner demanded that "I am a 50% owner of LifeForm. I'm a 50% shareholder, I have the rights to review any books and records of at any time." His correspondence of September 11, 2015 identifies himself as "Owner and Shareholder" of both LifeForm and EmCyte.

32. Petitioner's demand for LifeForm financial information that was directed to Anna Stahl was copied to Petitioner's counsel at the time, Rick Alvarez. However, in his initial response to EmCyte's Interrogatory Request No. 7, Petitioner refused to provide any information on LifeForm.

33. Anna Stahl voluntarily provided EmCyte with corporate and financial records of LifeForm after disclosing to Patrick Pennie that Petitioner owned 50% of LifeForm. All of the records provided by Anna Stahl were subsequently provided to Petitioner, since Mr. Smith claimed that he had no records of LifeForm.

34. In correspondence to Anna Stahl's attorney, Petitioner acknowledged the LifeForm debt to EmCyte and stated that "since I will be solely responsible for EmCyte's debt with LifeForm, approximately \$200,000, Ms. Stahl will need to pay all credit card debt (approx. 40K) and the remaining portion of her 50% debt from LifeForm owed to EmCyte will be paid to

myself relinquishing her responsibility to EmCyte.” No payments have been made to EmCyte by or on behalf of LifeForm.

35. In an effort to conceal his ownership interest in, and control over A2M Bio, Inc., Petitioner further demanded that his mother be “added on as a 50% shareholder in A2M Bio Inc.”

36. Petitioner has engaged in selling, promoting and distributing the APIC PRP System, in competition with EmCyte’s PRP System through LifeForm, A2M Bio and now A2Mcyte.

37. Bio Healix is an entity owned and controlled by Petitioner, however, when challenged over concerns about his ownership in Bio Healix by Patrick Pennie, Petitioner disavowed ownership therein. Specifically, Petitioner texted the following to Patrick Pennie in November of 2014: “Biohealix was to help a dire friend back on her feet with cosmetics no Biologics, its dissolved ! and cell cure never got up and was dissolved as well. All documented. I’m not going to compete with my own company, that is a wrong perception. I have nothing but EmCyte. I meet every day with docs for EmCyte, EmCyte is pat and emery so we benefit not just me or you.”

38. While telling Mr. Pennie that Biohealix wasn’t his (for a dire friend) and that it was dissolved, it was not only open and operating, but fully owned by Petitioner and directly competing with EmCyte. While telling Mr. Pennie that he wouldn’t compete with EmCyte, he was secretly involved with A2M Bio, LifeForm, Bio Healix, CRT/Ultra Intelligence. His false representations were designed to mislead Mr. Pennie while he was actually doing all that he could to benefit himself to the detriment of EmCyte.

39. Petitioner competed with EmCyte through his use of Bio Healix and used it as the vehicle to bill customers who were actually EmCyte customers (Paul Paredes, APM Spine and Sports Physicians and Juliet D. Burry) while denying its existence to Patrick Pennie. Petitioner continued to list ownership of Bio Healix, along with a number of other entities, on this LinkedIn page while this case has been pending.

40. Ultra Intelligence Corporation, LLC is a Delaware limited liability company ("Ultra Intelligence") formed by or on behalf of Petitioner on January 9, 2014.

41. Petitioner caused Ultra Intelligence to become a member of a limited liability company known as Canine Regenerative Therapies, LLC ("CRT"). CRT was initially formed through a filing with the State of New Jersey on or around March 21, 2014. New Jersey subsequently expunged the formation of CRT.

42. The role of Petitioner and Ultra Intelligence in CRT was knowingly concealed and secreted from EmCyte and Mr. Pennie. Petitioner misrepresented to CRT that he had the authority and permission of Patrick Pennie to participate in CRT.

43. Petitioner was an officer, director and shareholder in EmCyte during the time that he formed Ultra Intelligence and caused Ultra Intelligence to become a member of CRT.

44. Petitioner was an officer, director and shareholder in EmCyte and a member of CRT, through his ownership of Ultra Intelligence, when CRT negotiated and ultimately entered into a Distribution Agreement with EmCyte.

45. The negotiation and ultimate execution of CRT's Distribution Agreement with EmCyte was done without EmCyte or Mr. Pennie being informed of, or even aware of Petitioner's ownership interest in Ultra Intelligence or CRT.

46. Petitioner secretly executed a letter agreement on behalf of EmCyte with CRT on March 5, 2015, to create a new Distribution Agreement between CRT and EmCyte. Petitioner lacked corporate authority to execute the letter agreement and neither his actions nor the letter agreement were disclosed to Mr. Pennie or to EmCyte.

47. Petitioner's verified response to EmCyte's Interrogatory No. 6 asking him to "[I]dentify all entities in which you owned an interest in during the period commencing January 1, 2010, through the present" stated "SMITH owned an interest in the following entities after January 1, 2010: (a) EMCYTE CORP.; (b) Perfusion Partners & Associates, Inc.; (c) EmCyte Group, LLC; (d) Gian Biologics, LLC; (e) Bio Healix Research, LLC; (f) Ultra Intelligence Corporation, LLC; (g) CELLF Cure, Inc.; (h) Hydro Healix, Inc.; (i) The Human Cure Foundation, Inc.; and (j) LifeForm Healing Research, LLC.

48. Petitioner's LinkedIn webpage discloses his claimed ownership or participation in the following entities which were **NOT** included in his verified Interrogatory responses: (1) Gian Medical Ltd.; (2) Bakhtar Technologies, LLC; (3) XMS Research Laboratories; (4) Luminec Corp.; (5) Amnion Animal Science Corp; (6) Exactech; (7) CSETI; and (8) National Veterans Rights Association. Exactech is a customer and client of EmCyte.

49. Petitioner's "resume" identifies his claimed ownership or participation in the following entities which were **NOT** disclosed in **either** his verified Interrogatory responses or his LinkedIn webpage: (1) CardioGenesis Corp; (2) Animal Cure Foundation; (3) Canine Regenerative Therapies; (4) Electro Healix Research, LLC; and (5) Aqua Healix Research LLC.

50. Petitioner failed to disclose his ownership interest or participation in A2Mcyte or A2M Bio in his verified Interrogatory responses.

51. Mr. Smith claimed to be an owner, officer and director of EmCyte as of the filing date of his Petition initiating this litigation. Gian Biologics is a sister company to EmCyte.

52. Mr. Smith contributed no capital to obtain his ownership interest in EmCyte or Gian Biologics.

53. Mr. Smith has guaranteed none of the debt obligations of EmCyte or Gian Biologics.

54. Mr. Smith received and retained the following distributions from EmCyte and Gian Biologics:

	<u><i>Year</i></u>	<u><i>Amount</i></u>
1.	2010	\$130,635.00
2.	2011	\$290,435.00
3.	2012	\$526,823.00
4.	2013	\$709,724.00
5.	2014	<u>\$562,145.00</u>
	Total	\$2,219,763.00

55. Mr. Smith was permitted to operate EmCyte's sister company known as Gian Biologics as a distribution company for EmCyte for a limited period of time. During that time, Mr. Smith caused Gian to sell EmCyte products but kept profits of \$291,000.00 without paying EmCyte for the sold kits. Mr. Smith also ran up expenses while operating Gian, which EmCyte was forced to pay since Gian did not have the available funds. Mr. Smith's expenses exceeded \$200,000.00.

56. Mr. Smith continues to disregard this Court's prior Orders directing him to provide a full and complete disclosure of, and accounting for his relationships with his non-EmCyte business enterprises.

57. Mr. Smith testified at trial that he has only produced copies of his Federal Tax Returns for the years 2010, 2011, 2012 and 2013. He also produced limited income information

for the tax years 2014, 2015 and 2016. Mr. Smith has disclosed none of his financial information for the 2017 tax year.

58. Mr. Smith also testified that he has not filed Federal Tax Returns for the years 2014, 2015, 2016, and 2017. He initially claimed that his failure to file Federal Tax Returns was based upon his having had insufficient income to file. However, the limited financial information provided by Mr. Smith discloses his receipt of income in 2014 of \$943,839 (per K-1s), in 2015 of \$6,261 (per K-1), and in 2016 of \$97,620 (A2Mcyte \$41,500, Global Regenerative Technologies and Therapies, Inc. \$7,136, Synovus \$23,349, and Whitehorse Exploration and Discovery \$25,636).

59. Mr. Smith's testimony lacks any credibility as to his income and sources of income for the periods of time relevant to the case at bar.

60. Section 6.3 of the Shareholders' Agreement specifies, in part, that "[A]ny Shareholder who shall petition any Court for the dissolution of the Corporation, other than pursuant to the specific right to cause the Corporation to be liquidated and dissolved as provided in this Agreement, shall be deemed to have offered his shares for sale under the same terms and conditions as set forth in this Agreement." Section 9.1(a) of the Shareholders' Agreement provides, in part, that " . . . in the event a Shareholder seeks a judicial dissolution of the Corporation ("Dissolving Shareholder") pursuant to the Act, the Shareholder may purchase such Dissolving Shareholder's interest in exchange for a complete redemption of such Dissolving Shareholder's interest in exchange for the Purchase Price in accordance with Section 6.10."

61. Mr. Smith triggered the application of Sections 6.3 and 9.1 of the Shareholders' Agreement by filing his Amended Petition, which included Count IV wherein he sought Judicial Dissolution and Appointment of a Custodian or Receiver as to EmCyte. Under the express terms

and conditions of the Shareholders' Agreement, the only shareholder's right remaining in favor of Mr. Smith is the right to be bought out.

62. As such, due to Mr. Smith's:

- a) breach of the Shareholders' Agreement;
- b) misappropriation of EmCyte's Trade Secrets;
- c) his breach of his fiduciary duties as an officer, director, and shareholder;
- d) his disregard of prior orders of this Court directing him to provide an accounting for his non-EmCyte business enterprises; and
- e) his ongoing and continuing refusal to provide an accounting for his non-EmCyte business enterprises, his remaining right to have his one-half of one percent (0.5%) interest is subject to forfeiture or set off. Forfeiture of his remaining ownership right to be bought out is mandated based on Mr. Smith's ongoing and continuing breaches and knowing contempt of orders of this Court. If Mr. Smith complies with this Court's Orders and this Judgment, then his right to be bought out will be subject to and conditioned upon the application of a set off against any price to be paid for his interest by the amount of damages to be determined by this Court to have been caused to EmCyte by him.

CONCLUSIONS OF LAW

I. Emery Smith's Fiduciary Obligations to EmCyte Require Him to Provide a Full Equitable Accounting to EmCyte.

The case law in Florida elaborates the singular importance and significance of a director's duties to a corporation and a director breaches his fiduciary duties to the corporation by self-dealing.

As set for in the case of Cohen v. Hattaway, 595 So.2d 105 (Fla. 5th DCA 1992, the Court stated, in part, as follows:

Corporate directors and officers owe a fiduciary obligation to the corporation and its shareholders and must act in good faith and in the best interest of the corporation. Tillis v. United Parts, Inc., 395 So.2d 618 (Fla. 5th DCA 1981). These fiduciary obligors cannot, either directly or indirectly, in their dealings on behalf of the fiduciary beneficiary with others, or in any other transaction which they are under a duty to guard the interest of the fiduciary beneficiary, make any profit or acquire any other personal benefit or advantage, not also enjoyed by the fiduciary

beneficiary, and if they do, they may be compelled to account to the beneficiary in an appropriate action. Seested v. Southern Laundry, Inc., 149 Fla 402, 5 So.2d 859 (1942). See Tinwood, N.V. v. Sun Banks, Inc., 570 So.2d 955 (Fla. 5th DCA 1990). A fiduciary obligor breaches his fiduciary duties by self-dealing. As further restated in Cohen “[I]f a fiduciary obligor acquires in opposition to the corporation, property in which the corporation has an interest or tangible expectancy or which is essential to its existence’ he violates the doctrine of corporation opportunity. Farber v. Servan Land Co., Inc., 662 F.2d 371 (5th Cir. 1981). See Cohen at 107 & 108.

In the case of B&J Holding Corp. v. Weiss, 353 So.2d 141 (Fla 3d DCA 1977), the court described the fiduciary obligation owed by officers and directors to the corporation and its shareholders as follows:

“(the officer or director) is bound to act with fidelity and the utmost faith, he (or she) in accepting the office impliedly agrees and undertakes to give the corporation the benefit of his (or her) best care and judgment and to exercise his (or her) powers in the interest of the corporation and the stockholders; officers and directors are liable for damages to the corporation which results from a breach of their trust or the common law rule of the responsibility of an agent for injury to his principal. See Flight Equipment & Engineering Corp. v. Shelton, 103 So.2d 615 (Fla. 1958) and 7 Fla. Jur. Corporations §§299-300 (1956). See B&J at 143-44.

Florida corporate law requires a director to perform his duties:

- 1) in good faith;
- 2) With such care as an ordinary prudent person in a like position would exercise under similar circumstances; and
- 3) In a manner the director reasonably believes to be in the best interest of the corporation.

Florida officers and directors owe duties of loyalty and a duty of care to the corporation. See Kapila v. Clark, 431 B.R. 263 (Bankr. S.D. Fla 2010). By serving himself, a corporate officer or director breaches his duty of loyalty. The breach of a fiduciary duty is a tort for which tort damages are unrecoverable. See Kapila at 290.

In Kapila, Barbara Wortley was the shareholder, president, officer, director and registered agent of the corporation and was held to have a fiduciary relationship therewith. When a

fiduciary relationship is established, the burden falls upon the fiduciary to establish that his conduct was proper. See Kapila at 289; Restatement (Second) of Torts, §874, cmt. A (1979); Restatement (Second) of Trusts, §2, cmt. b (1959).

While Petitioner was an officer, director, shareholder and employee of EmCyte, he unquestionably owed fiduciary duties to EmCyte and its other shareholder, Patrick Pennie as a fiduciary, Petitioner was obligated to act with the utmost good faith and in the best interests of EmCyte. He was prohibited from acting secretly to enrich himself, especially when his actions directly and intentionally damaged EmCyte. Accordingly, Petitioner is strictly liable and accountable for his actions by, through and with A2Mcyte, A2M Bio, LifeForm, Bio Healix, Ultra Intelligence and all other entities with which he holds the same or similar relationships.

Officers and Directors are forbidden from usurping corporate opportunities, making secret profits, or deriving any personal advantage at the expense of the corporation.

Petitioner has engaged in usurpation of corporate opportunities in violation of his fiduciary duties as an EmCyte officer and director. As a fiduciary to EmCyte, Petitioner is precluded from acquiring for his benefit any business opportunity that belongs to EmCyte. See Cohen at 108. The appropriate remedy for usurping a corporate opportunity is disgorgement. See Florida Discount Props. , Inc. v. Windermere Condo, Inc., 786 So.2d 1271 (Fla 4th DCA 2001), citing Safety Int'l., Inc. v. Dyer, 775 F.2d 660, 662 (5th Cir. 1985) (citing Int'l Bankers Life Ins. Co. v. Holloway, 368 SW.2d 567, 577 (Tex. 1963) and Canion v. Texas Cycle Supply, Inc., 537 SW.2d 510, 513 (Tex. Civ. App. 1976)(stating that the officer or director holds the usurped opportunity as constructive trustee for the corporation)); see also Pruyser v. Johnson, 185 So.2d 516, 517, 521 (Fla.2d DCA 1966)(citing McGregor v. Provident Trust Co. Phila., 199 Fla. 718

162 So. 323 (Fla 1935) (finding that an officer cannot acquire title to or interest in the property, real or personal, prejudicial and adverse to the corporation)).

The prohibition against self-dealing as to an officer or director in Florida, was unequivocally set forth by the Pruyser Court as follows:

An officer cannot acquire title to or interest in any property, real or personal, prejudicial and adverse to the corporation. McGregor v. Provident Trust Co. of Philadelphia, 162 So. 323 (1935). He occupies a fiduciary relationship to the corporation, and will not be allowed to act in hostility to it by acquiring for his own benefit any intangible assets of the corporation, Jacksonville Cigar Co. v. Dozier, 1907, 53 Fla 1059, 43 So. 523. He cannot make a private profit from his position or, while acting in that capacity, acquire an interest adverse to that of the corporation. Seestedt v. Southern Laundry, Inc. 1992, 149 Fla. 402, 5 So.2d 859. He must act always with utmost good faith and cannot deal in funds or property of the corporation to his own advantage. Orlando Orange Groves Co. v. hale, 1932, 107 Fla. 304, 144 So. 674. Pruyser at 520-521.

The prohibition against an officer or director of a corporation making a secret profit out of their positions, or from corporate assets of any kind, that it is referred to as a “cardinal principle.” See Independent Optical Co. v. Elmore, 289 So.2d 34 (Fla. 2d DCA 1974)(citing Renpak, Inc. v. Openheimer (Fla. App. 1958) 104 So. 2d 642).

The court in Tinwood N.V. v. Sun Banks, Inc., 570 So. 2d 955, 959 (Fla. 5th DCA 1990), described the duties of a corporate officer or director as occupying”... a position of trust and confidence with respect to the corporation a fiduciary duty to exercise the utmost good faith and to make full disclosure of all facets within his knowledge pertaining to the transaction” (citing Pryor v Oak Ridge Development Corp., 97 Fla 1085, 119 So. 326 (1928); United Homes, Inc. v. Moss, 154 So.2d 351 (Fla. 2d DCA 1963). Officers and directors are precluded from making any secret profit or deriving any personal advantage at the corporation’s expense, Tinwood at 959. When an officer or director makes a secret profit, he will be required to disgorge it. Tinwood at

959-960 (citing Fort Myers Development Corp. v. J. W. McWilliams Co., 122 So. 264 (1929), on remand, 105 Fla. 788, 140 So. 902 (1932); United Homes, Inc. v. Moss Supra; See also Quinn v. Phipps, 113 So. 419 (1927)).

Florida's cardinal principle is that an officer or director of a corporation is not allowed to make a secret or undisclosed profit adverse to the corporation's interests. See United States v. De La Mata, 266 F.3d. 1275, 1297 (11th Cir. 2001). The Court in De La Mata also recognized that Florida law imposes liability for misappropriation of a corporate opportunity. See De La Mata at 1297 (Citing Florida Discount Properties v. Windermere Condo, Inc., 786 So. 2d 1271, 1272 (Fla 4th DCA 2001); See also Cohen at 108.

One of the more complete discussions of the legal consequences of an officer or director breaching fiduciary duties by converting corporate assets or opportunities to that person's individual benefit is the case of Welt v. Jacobson (In re: Aqua Clear Techs, Inc. 361 B.R. 567 (Bankr. S. D. Fla. 2007). In Welt, the court described Florida corporate law to require a director's duties to be performed: (1) in good faith; (2) with such care as an ordinary prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interests of the corporation. See Welt at 575; Fla. Stat. §607.0830(1). Further, Florida law imposes duties of loyalty and a duty of care to the corporation on officers and directors. See Welt at 575. The duty of loyalty is breached when a director "depart[s] from his corporate responsibility and start[s] serving himself." Welt at 575; Intercarga International De Carga, S.A. v. Harper Group, Inc., 659 So.2d 1208, 1210 (Fla.3rd Dist. Ct. App. 1995).

Similar to Petitioner's conversion of EmCyte's assets and usurpation of corporate opportunities, the Welt court dealt with conversion and misappropriation of business

opportunities. See Welt at 574. Specifically, the Court in Welt found that a misappropriation of a business opportunity is conversion. Welt at 574; In re Burress, 245 BR 871 (Bankr. D. Colo 2000). Petitioner's conversion of EmCyte's assets and business opportunities are breaches of his fiduciary duties and is tortious conduct for which an award of tort damages is appropriate. See Welt at 574.

II. Count I: Accounting

As an officer, director and shareholder of EmCyte, and pursuant to the Shareholders' Agreement, Mr. Smith owed fiduciary duties to EmCyte. See Fla. Stat. §§ 607.0830, 607.0831, 607.0832 and 607.0841. Mr. Smith misappropriated EmCyte's trade secrets to engage in secret enterprises, and to compete with EmCyte, all without the knowledge or consent of EmCyte or Patrick Pennie. The full extent of his activities have remained concealed by Mr. Smith. Despite being secretly involved in multiple competing business enterprises, including LifeForm, A2Mcyte, Bio Healix, and CRT/Ultra Intelligence, Mr. Smith continues to defy prior orders finding him in contempt for his failure to produce full and complete financial information as to his business enterprises since 2010. Despite having significant, although not fully disclosed income, Mr. Smith testified that he has not filed Federal Tax Returns since 2013.

The scope and nature of Mr. Smith's secret business enterprises requires his compliance with an equitable accounting directive so that the equities between the parties can be balanced by the Court. Under these circumstances, there is no adequate remedy at law for EmCyte given Mr. Smith's clandestine business enterprises. The full extent of the impact upon EmCyte from Mr. Smith's secret business enterprises cannot be determined without a full and complete accounting of the businesses. See Whittle v. Ellis, 122 So. 2d 237 (Fla 2nd DCA 196); Houstoun v. Albury, 436 So. 2d 224 (Fla 3d DCA 1983); Cushman v. Schubert, 110 So. 2d 703 (Fla 2d

DCA 1959); and Florida Software Sys. v. Columbia/HCA Healthcare Corp., 46 F. Supp. 2d 1276 (Dist. Ct. M.D. Fla 1999).

This Court recognizes that Mr. Smith is required to file Federal Tax Returns for the years 2014, 2015, 2016 and 2017 under the mandates of the Internal Revenue Code. Accordingly, Mr. Smith is hereby directed to file his verified Federal Tax Returns for the tax years 2014, 2015, 2016 and 2017 with the Internal Revenue Service and to provide copies thereof to the Court and counsel for EmCyte by June 15, 2018. Mr. Smith's failure to file the Federal Tax Returns, or to provide copies thereof, shall constitute a failure to provide the equitable accounting ordered by this Court.

For the entities in which Mr. Smith owns, or has owned an interest since 2010, which includes but is not limited to Bio Healix, LifeForm, Ultra Intelligence and CRT, Mr. Smith is hereby directed to file all applicable tax returns filed for such entities for the tax years 2014, 2015, 2016 and 2017 with the Internal Revenue Service and to provide copies thereof to the Court and counsel for EmCyte by June 15, 2018. Mr. Smith's failure to file the applicable tax returns, or to provide copies thereof, shall constitute a failure to provide the equitable accounting ordered by this Court.

For all revenues or distributions made to Mr. Smith since 2010 from enterprises in which he claims to not own an interest, whether actually made or accrued for later payment to him, Mr. Smith shall provide a full and complete accounting for all such funds and shall provide proof of the relationship or agreement that resulted in such revenue or distribution being attributable to him by June 15, 2018. Mr. Smith's failure to provide a full and complete accounting for all such revenues, whether distributed to him or not, or the failure to provide proof of his relationship or

agreements with third party entities, shall constitute a failure to provide the equitable accounting ordered by this Court.

III. Count III: Breach of Contract - Injunction

Mr. Smith breached the Shareholders' Agreement by usurping EmCyte's corporate opportunities.

Mr. Smith breached the Shareholders' Agreement by owning interests in or participating in entities that were in competition with EmCyte.

Mr. Smith breached the Shareholders' Agreement by undermining the authority granted to EmCyte's Chairman in the Shareholders' Agreement.

Mr. Smith has knowledge and is in possession of confidential trade secret information of EmCyte.

Mr. Smith has engaged in a pattern of using EmCyte's confidential trade information for his personal benefit and to the detriment of EmCyte.

An award of damages to EmCyte will be insufficient to compensate EmCyte for the injuries and damages caused by Petitioner.

Petitioner must be enjoined from engaging in any activities wherein he is usurping EmCyte's corporate opportunities, competing with EmCyte, disrupting EmCyte's business or undermining or causing conflict in the marketplace concerning the Chairman's authority.

EmCyte shall be granted a judgment in its favor and against Petitioner determining that Petitioner breached the Shareholders' Agreement and his fiduciary duties owed to EmCyte and that EmCyte is entitled to a judgment enjoining Petitioner from engaging in activities usurping the corporate opportunities of EmCyte, or competing with EmCyte, disrupting EmCyte's

business, or undermining the Chairman's authority, or engaging in any activities that are contrary to the best interests of EmCyte, plus costs, including a reasonable attorney's fee.

IV. Count VIII: Misappropriation of Trade Secrets – Injunction.

Applicant misappropriated the following proprietary information pursuant to Section 688.002, of the Florida Statutes:

- EmCyte's financial records;
- EmCyte's tax records;
- Information of manufacturing;
- Information on processes and procedures;
- Profit margins for EmCyte products;
- Pricing for EmCyte products;
- Information on EmCyte's customers;
- Information on EmCyte's distributors, which includes information on the following:
 - distributor pricing;
 - distributor profit margins;
 - distributor customers;
 - distributor sales volumes;
 - distributor territories; and
 - the fields of use into which each distributor was authorized to sell EmCyte products;
- (collectively the "Trade Secrets").

Each item described in the foregoing paragraph constitutes a trade secret because it derives independent economic value, actual or potential, from not being known to and readily ascertainable by proper means, by other persons who can obtain economic value from its use or disclosure; and, EmCyte has taken reasonable efforts to maintain its secrecy.

Mr. Smith has either taken the Trade Secrets from the business premises of EmCyte or maintained copies or reproduced this information from EmCyte, without EmCyte's consent, for the purpose of using the information for Mr. Smith's personal benefit in a competitive manner against EmCyte or disclosing the information to a third party, including LifeForm, Ultra Intelligence, Canine Regenerative Therapies, A2Mcyte, A2M Bio, or Bio Healix, to usurp

EmCyte's corporate opportunities or to obtain an unfair competitive advantage over EmCyte in order to take its business.

EmCyte has been damaged, and continues to be damaged in ways that are not fully compensable by an award of money damages under these facts and circumstances. His actions are, or will cause EmCyte irreparable harm as EmCyte can only speculate as to the damages the Mr. Smith's actions have caused or are continuing to cause.

Mr. Smith's actions as described above were and are willful and malicious.

EmCyte has a clear legal right to its Trade Secrets and is likely to succeed on the merits of its claim for misappropriation under Sections 688.002 and 688.003 of the Florida Statutes.

The entry of an injunction against Mr. Smith would serve the public interest as it is clear that Florida has a public interest in protecting trade secrets.

EmCyte shall be granted a permanent injunction against Mr. Smith prohibiting him from misappropriating or continuing to misappropriate EmCyte's Trade Secrets; and a final judgment against Mr. Smith for all costs and attorneys' fees pursuant to Section 688.005 of the Florida Statutes.

V. Count IX: Declaratory Judgment.

EmCyte's Count IX is an equitable action for declaratory relief to determine the nature, priority and extent of Mr. Smith's rights and obligations as a shareholder in EmCyte. EmCyte's claim for declaratory relief is equitable in nature and requires that Mr. Smith first comply with this Court's equitable accounting judgment set forth herein. Full and complete compliance with the equitable accounting requirements of this judgment is a condition precedent to any right that he has to have his shareholder interest purchased pursuant to the Shareholders' Agreement.

If Mr. Smith fails to fully and completely comply with the equitable accounting judgment terms herein, then Mr. Smith's right to have his one-half of one percent (0.5%) interest in EmCyte bought out shall be forfeited following notice of such failure filed with the Court by EmCyte.

If Mr. Smith fully and completely complies with the equitable accounting judgment terms herein, then Mr. Smith's right to have his one-half of one percent (0.5%) interest in EmCyte will be subject to set off for the damages caused to EmCyte by Mr. Smith and his non-EmCyte business enterprises. The amount of EmCyte's set off rights and the purchase price value attributable to Mr. Smith's one-half of one percent (0.5%) interest in EmCyte is reserved for subsequent determination by this Court in the event of Mr. Smith's full compliance with the terms and conditions of this judgment.

IT IS THEREFORE ORDERED AND ADJUDGED that based upon the enumerated findings and conclusions stated above that:

As to Count I of EmCyte's Counterclaim, final judgment shall be entered in favor of EmCyte and against Mr. Smith, as follows:

- 1) Mr. Smith is hereby directed to provide a full and complete accounting as to himself and the following business enterprises for the period commencing January 1, 2010 and continuing through May 8, 2018:
 - a. LifeForm Healing Research, LLC;
 - b. Bio Healix Research, LLC;
 - c. A2Mcyte, LLC;
 - d. A2M Bio;
 - e. Ultra Intelligence Corporation, LLC;
 - f. Canine Regenerative Therapies
 - g. Hydro Healix, Inc.;
 - h. Gian Medical Ltd.;
 - i. Bakhtar Technologies, LLC;
 - j. XMS Research Laboratories;
 - k. Luminc Corp.;
 - l. Amnion Animal Science Corp.;
 - m. CSETI;

- n. National Veterans Rights Association;
 - o. CardioGenesis Corp.
 - p. Exactech;
 - q. Animal Cure Foundation;
 - r. Electro Healix Research, LLC;
 - s. Aqua Healix Research, LLC; and
 - t. Any other business or enterprise from which he earned or received revenue during this time period.
- 2) Mr. Smith shall file verified Federal Income Tax Returns for the tax years 2014, 2015, 2016, and 2017 with the Internal Revenue Service and provide copies thereof to the Court and to counsel for EmCyte by June 15, 2018.
 - 3) Mr. Smith shall file verified applicable Federal Tax Returns for all entities in which he owns or has owned an interest since 2010, including but not limited to Bio Healix, LifeForm, Ultra Intelligence and CRT and provide copies thereof to the Court and to counsel for EmCyte by June 15, 2018.
 - 4) Mr. Smith's accounting shall include evidence of all revenues or distributions made to Mr. Smith since 2010 from enterprises in which he claims to not own an interest, whether actually made or accrued for later payment to him. Mr. Smith's accounting shall also include evidence of any other amounts paid directly or indirectly to him or his designees or to third parties for his benefit (including but not limited to reimbursement for travel, housing, automobile or other expenses) from such enterprises during the relevant time period. Mr. Smith shall provide a full and complete account for all such funds and shall provide proof of the relationship or agreement that resulted in such revenue, distribution or other amounts being attributable to him by June 15, 2018.
 - 5) Mr. Smith's failure to file all applicable tax returns referenced in this judgment, or to provide copies thereof to the Court and to counsel for EmCyte shall constitute a failure to provide an equitable accounting or to comply with this judgment.
 - 6) If Mr. Smith fails to provide the equitable accounting set forth in this judgment, then he shall forfeit any right to have his one-half of one percent (0.5%) interest in EmCyte bought out. Such determination will be made by this Court following the filing of a Notice by EmCyte of Mr. Smith's noncompliance.
 - 7) In the event of full compliance with all terms and conditions of this Judgment will Mr. Smith's right to be bought out under the Shareholder's Agreement be deemed to continue to exist and in that event, it is further determined that such right will be subject to a set off in favor of EmCyte as to any damages caused to EmCyte by Mr. Smith (including but not limited to attorneys' fees deemed recoverable by EmCyte or Mr. Pennie in this action), with the Court reserving jurisdiction to determine such amounts.

As to Counts III and VIII of EmCyte's Counterclaim, final judgment shall be entered in favor of EmCyte and against Mr. Smith as follows:

- 1) Mr. Smith shall be permanently enjoined from any further breaches of the Shareholders' Agreement.

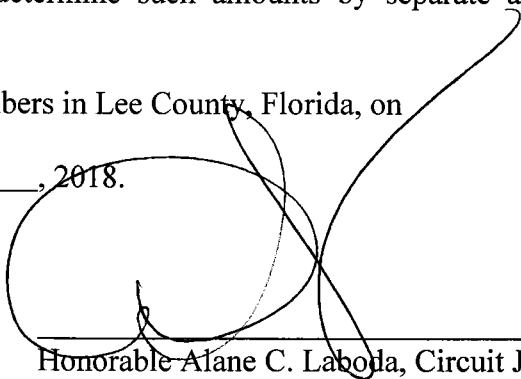
- 2) Mr. Smith shall be permanently enjoined from usurping any corporate opportunities of EmCyte, competing with EmCyte, disrupting EmCyte's business, undermining the Chairman's authority, or engaging in any activities that are contrary to the best interests of EmCyte.
- 3) Mr. Smith shall be permanently enjoined from using, disclosing or misappropriating any Trade Secrets of EmCyte (as defined herein).
- 4) Mr. Smith shall be permanently enjoined from referring to himself as having any affiliation with, or authority to act on behalf of EmCyte, and shall be prohibited from disparaging EmCyte or any of its personnel.
- 5) EmCyte shall be entitled to recover from Mr. Smith its reasonable attorneys and costs, with the Court reserving jurisdiction to determine such amounts.

As to Count IX of EmCyte's Counterclaim, judgment shall be entered in favor of EmCyte and against Mr. Smith, determining that:

- 1) Mr. Smith's only remaining right as a shareholder in EmCyte is to be bought out as set forth in the Shareholders' Agreement as a result of his initiation of the unsuccessful judicial dissolution action;
- 2) Mr. Smith's right to have his interest bought out under the Shareholder's Agreement is specifically conditioned upon his first providing a timely, full and adequate accounting pursuant to this judgment;
- 3) Mr. Smith's right to have his interest bought out under the Shareholder's Agreement will be forfeited for any failure to provide the full and complete equitable accounting mandated by this Judgment.
- 4) Mr. Smith's right to have his interest bought out under the Shareholder's Agreement will be subject to a set off in favor of EmCyte as to any damages caused to EmCyte by Mr. Smith (including but not limited to attorneys' fees deemed recoverable by EmCyte or Mr. Pennie in this action) with the Court reserving jurisdiction to determine such amounts by separate and subsequent orders.

DONE AND ORDERED in Chambers in Lee County, Florida, on

May 16, 2018.



Honorable Alane C. Laboda, Circuit Judge

Copies Furnished to:

- ✓ Kenneth G.M. Mather, Esq.
- ✓ Andrew Lennox, Esq.
- ✓ Casey Lennox, Esq.
- ✓ Emery Smith