

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
06 CVS 03184

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

ORDER

THIS CAUSE, designated a complex business case by Order of the Chief Justice of the Supreme Court of North Carolina, pursuant to section 7A-45.4(b) of the General Statutes of North Carolina, and assigned to the undersigned Special Superior Court Judge for Complex Business Cases, by Order of the Chief Special Superior Court Judge for Complex Business Cases, came to be heard upon the respective Defendants' Motions to Dismiss ("Motion(s) to Dismiss") the various Claims for Relief stated in Plaintiff's Complaint, pursuant to the provisions of Rule 12(b)(6), North Carolina Rules of Civil Procedure ("Rule(s)"); and

THE COURT, having considered the Motions to Dismiss, the Plaintiff's Complaint, the Parties' briefs and arguments, and the ends of justice, CONCLUDES:

I.

PROCEDURAL BACKGROUND

1. The Complaint of Plaintiff Voyager Pharmaceutical Corporation ("Voyager") was filed on March 6, 2006. The factual allegations of the Complaint were

verified as true by Patrick Smith, Voyager's President and Chief Executive Officer, on March 6, 2006.

2. The Motion to Dismiss of Defendant Richard L. Bowen ("Bowen's Motion") was filed on May 8, 2006.

3. The Motion to Dismiss of Defendant Craig Atwood ("Atwood's Motion") was filed on May 8, 2006.

4. The Motions to Dismiss each seek dismissal of all claims of Voyager's Complaint.

5. The court heard oral argument on the Motions to Dismiss on July 21, 2006.

II.

THE PARTIES

1. Voyager is a corporation organized under the laws of Delaware, with its principal place of business in Wake County, North Carolina. (Compl. ¶ 1.)

2. Defendant Richard L. Bowen ("Bowen") is a citizen and resident of Wake County, North Carolina. Bowen served as an officer of Voyager until December 13, 2005, and as a member of Voyager's board of directors until February 20, 2006. (Compl. ¶ 2.)

3. Defendant Craig Atwood ("Atwood") is a citizen and resident of Wisconsin. Starting in August 2001, Atwood served as a research consultant to Voyager. (Compl. ¶ 3.)

III.

VOYAGER'S COMPLAINT

1. Among other things, the Complaint alleges that:

a. Voyager 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"). (Compl. ¶¶ 17, 28.) Voyager's goal was to take this product through the FDA approval process and to make it available to treat patients suffering from AD. (Compl. ¶¶ 17, 28.)

b. Voyager's initial board of directors consisted of Bowen, Patrick Smith, and David Corcoran. (Compl. ¶ 29.) Mr. Smith and Mr. Corcoran were principally responsible for managing Voyager and attracting investors to finance its research and development activities. (Compl. ¶ 29.) Bowen was employed as Voyager's Chief Scientific Officer. (Compl. ¶ 30.)

c. In August 2001, Atwood entered into a contract with Voyager to conduct research on the role of gonadotropins in the development and progression of AD. (Compl. ¶ 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 Voyager and that Atwood would hold these experiments and all related results, discoveries, and inventions or insights in confidence. (Compl. ¶ 33.)

d. 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, Voyager planned a public offering of 5,900,000 shares of common

stock, with hopes of raising approximately \$100,000,000.00. (Compl. ¶ 43.) This IPO was to occur in December 2005, and WR Hambrecht + Co (“Hambrecht”) agreed to serve as underwriter for the offering. (Compl. ¶¶ 43, 44.)

e. In May 2005, Bowen took extended time off from Voyager to consider whether he wished to relocate to Charleston, South Carolina and concentrate on purely scientific research for Voyager. (Compl. ¶ 47.) When he returned from this sabbatical, he resumed his traditional role of active involvement in the clinical development of Memryte. (Compl. ¶¶ 47, 58.)

f. During a discussion with Mr. Smith on September 29, 2005, Bowen demanded that, among other things, two directors chosen exclusively by Bowen be added to Voyager’s board of directors. (Compl. ¶ 50.) He stated, “I will go to the newspapers. I’ll tell lies or do whatever I have to do in order to wreck the Company.” (Compl. ¶ 50.) Bowen later repeated similar threats to destroy Voyager to Mr. Corcoran and other employees. (Compl. ¶ 50.)

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

h. On December 3, 2005, at Bowen's request, Mr. Corcoran met with Bowen and a stockholder over dinner to clarify two issues that Bowen had raised with Mr. Smith that afternoon. (Compl. ¶ 57.)

i. The first issue raised by Bowen was that he believed that Mr. Corcoran had instructed Voyager's Director of Regulatory Affairs not to audit the Phase I data until after the IPO. (Compl. ¶ 57.) Mr. Corcoran explained that this belief was incorrect, and that the timing of the audit of the data was wholly unrelated to the IPO. (Compl. ¶ 57.) Rather, the data would be examined at the conclusion of the study, in accordance with the standard procedures for the study. (Compl. ¶ 57.) Bowen then expressed relief that this misunderstanding had been straightened out. (Compl. ¶ 57.)

j. The second issue raised by Bowen during the December 3, 2005 meeting was his professed concern about his role at Voyager with regard to day-to-day clinical activities. (Compl. ¶ 58.) Mr. Corcoran assured Bowen that management valued his work and wanted him to continue in his traditional clinical role. (Compl. ¶ 58.) Bowen indicated that he might want to move to a pure research role in the future, but that he was pleased that Voyager supported his continuing in his traditional clinical capacity. (Compl. ¶ 58.)

k. Mr. Corcoran and Mr. Smith both met with Bowen on December 4, 2005, to confirm Voyager's commitment to Bowen's continuing as Voyager's Chief Scientific Officer in his traditional day-to-day clinical role. (Compl. ¶ 59.) Mr. Smith, Mr. Corcoran and Bowen also discussed Bowen's possible eventual transition to a purely research-oriented role and agreed to continue discussion of

that possibility in the months that followed. (Compl. ¶ 59.) It was agreed that regardless of whether his role evolved, Bowen would retain his title as Voyager's Chief Scientific Officer. (Compl. ¶ 59.) Bowen expressed his satisfaction with these discussions to Mr. Smith and Mr. Corcoran. (Compl. ¶ 59.)

l. Beginning on December 1, 2005, Bowen and others traveled to visit groups of potential investors in connection with the upcoming IPO. (Compl. ¶ 60.) Bowen participated in presentations to investors on December 1, 2, 5, 6 and 7, 2005. (Compl. ¶ 60.) During these presentations, Bowen held himself out as Voyager's Chief Scientific Officer and enthusiastically endorsed Voyager and Memryte. (Compl. ¶ 60.) Bowen did not express any reservations or concerns of any kind regarding Voyager, Memryte, or his role with Voyager. (Compl. ¶ 60.) Bowen affirmatively stated that the safety data for Memryte was superb and that there had been no safety problems in the Phase I trial. (Compl. ¶ 60.)

m. On December 7, 2005, Bowen, other members of Voyager's management team, and various stockholders gathered in New York City, in anticipation of the pricing of the IPO. (Compl. ¶ 62.) That evening, Hambrecht reported to Voyager'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. (Compl. ¶ 63.)

n. The following day, December 8, 2005, Voyager's management conducted meetings to discuss strategy for the IPO, and to receive updates on

the progress of the bidding from Hambrecht. (Compl. ¶ 63.) Bowen did not participate in these meetings. (Compl. ¶ 63.)

o. At approximately 4:30 p.m. on December 8, 2005, Hambrecht contacted Voyager's management and updated them on the bidding for the stock. (Compl. ¶ 65). Hambrecht indicated that they would call management the following day to discuss the next steps in completing the IPO. (Compl. ¶ 65.)

p. While Voyager's management was in the 4:30 p.m. conference with Hambrecht, Bowen was in a hospitality suite in the Marriott Marquis Hotel that had been set up to accommodate Voyager's shareholders. (Compl. ¶ 66.) There, Bowen told one or more shareholders that the IPO was not going to proceed because "God had told him so," and because Voyager had refused to add "the glorification of God" to its mission statement. (Compl. ¶ 66.) 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 Voyager's mission statement. (Compl. ¶ 66.) Bowen also asked one of the shareholders whether he would be willing to serve as a director of Voyager "when I regain control of the Company." (Compl. ¶ 66.) 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. (Compl. ¶ 68.)

q. On Friday, December 9, 2005, Bowen and Atwood secretly went to Hambrecht's offices and met with the executives on Voyager's IPO account.

(Compl. ¶ 69.) During that meeting, Bowen and Atwood falsely stated that there was a problem with the Phase I trial, and that Voyager's management had prevented Bowen from investigating it. (Compl. ¶ 69.) Defendants further falsely stated that Bowen had been wrongfully excluded from participating in Voyager's management. (Compl. ¶ 69.) At no point either before or after the meeting did either Defendant advise Voyager's management of their meeting with Hambrecht or its results, effectively preventing Voyager's management from taking steps to minimize the resulting damage to the IPO. (Compl. ¶ 69.) Rather, Defendants took active steps to conceal their activities and plans from Voyager's management and the other Board members. (Compl. ¶ 69.)

r. On Monday, December 12, 2005, Hambrecht's account representatives on Voyager's IPO called Mr. Smith and Mr. Corcoran and informed them, for the first time, of Defendants' accusations the previous Friday. (Compl. ¶ 71.) Mr. Smith and Mr. Corcoran explained to Hambrecht that those statements were false, and that these matters had been discussed with Bowen on December 3 and 4 and resolved to his apparent satisfaction. (Compl. ¶ 72.) Hambrecht stated that they nonetheless remained uncomfortable underwriting the IPO because of the apparent dissension of one of the three members of Voyager's Board of Directors and its Chief Scientific Officer. (Compl. ¶ 72.)

s. After the call with Hambrecht, Mr. Corcoran asked a shareholder who was friends with Bowen to approach him and to request that he contact Hambrecht and assure them that he supported Voyager and the IPO.

(Compl. ¶ 73.) This stockholder contacted Bowen and then called Mr. Corcoran and informed him that 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 Bowen's stated desire to take over control of Voyager. (Compl. ¶ 74.)

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

u. Following the withdrawal of its IPO, Voyager 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. (Compl. ¶ 78.)

v. During January and February 2006, Defendants continued to disseminate false and misleading information regarding Voyager and its management, as well as Memryte and the research regarding it, in order to damage the value of Voyager's intellectual property and to deter potential investors from purchasing Voyager's stock in the private placement. (Compl. ¶ 79.) During that period, Defendants participated in meetings with potential investors in an effort to disseminate false and misleading information about Voyager and its clinical trials and thereby to cripple its ability to raise capital. (Compl. ¶ 79.) Defendants' goal in these actions was to gain control of Voyager for their own personal, private gain. (Compl. ¶¶ 79, 83.)

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

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

y. On January 23, 2006, Atwood suggested to 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 Atwood's agreement with Voyager. (Compl. ¶ 84.) Atwood further suggested to Bowen that he violate his Proprietary Information and Inventions Agreement with Voyager. (Compl. ¶ 84.)

z. On February 2 or 3, 2006, Bowen told a former employee of Voyager that Bowen was preparing to publish data belonging to Voyager, in violation of his Proprietary Information and Inventions Agreement with Voyager. (Compl. ¶ 85.)

2. Voyager's Complaint seeks relief from Defendants Bowen and Atwood under a variety of legal theories.

IV.

DISCUSSION

A.

Rule 12(b)(6) Standard

1. When faced with a motion to dismiss under Rule 12(b)(6), the trial court should accept all of claimant's allegations as true and review those allegations in the light most favorable to the claimant. *See Formyduval v. Britt*, 177 N.C. App. 654, 660, 630 S.E.2d 192, 196 (2006) *aff'd*, 361 N.C. 215, 639 S.E.2d 443 (2007). However, a claim is properly dismissed under Rule 12(b)(6) when it appears that the claimant can prove no facts that would entitle him to relief. *Sutton v. Duke*, 277 N.C. 94, 108, 176 S.E.2d 161, 169 (1970). This will happen when there is a want of law to support a claim of the sort made, an absence of facts sufficient to make a good claim, or the disclosure of some fact that necessarily will defeat the claim. *Orange County v. Dep't of Transp.*, 46 N.C. App. 350, 379–80, 265 S.E.2d 890, 909 (1980).

B.

Voyager's Claims for Relief

2. In considering the Motions to Dismiss, the court evaluates each of the claims pled in Voyager's Complaint.

i.

First, Second, Third and Fourth Claims for Relief
(Breach of Director Duties by Bowen)

3. Voyager claims that Bowen, as a member of Voyager's board of directors, owed it fiduciary duties—including a duty to act in good faith, a duty to use reasonable care, and a duty to act in Voyager's best interest¹—and that he breached those duties. (Compl. ¶¶ 93–108.)

4. Bowen argues, however, that Voyager's claims against him for breach of fiduciary duties fail as a matter of law. (Def. Bowen's Mem. Supp. Mot. Dismiss 11.)

5. The General Assembly of North Carolina has left the question of to what extent, if any, this State should regulate the internal affairs of a foreign corporation to determination by the courts on a case-by-case basis. See N.C. Gen. Stat. § 55-15-05 North Carolina Comment. (2005). To date, North Carolina jurisprudence provides little guidance on the applicability of the "internal affairs doctrine"² in this State.³ Given the

¹ Under notice pleading, the court interprets Voyager's allegation that Bowen breached "his duty to act in the best interests of the Plaintiff" (Compl. ¶ 107) to be a claim for breach of the fiduciary duty of loyalty.

² The internal affairs doctrine, as enacted in numerous states, holds that the law of the incorporating state should typically be applied to matters involving the internal affairs of a foreign corporation. Such "internal affairs" commonly include the election, qualification, duties and authority of officers and directors. Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 32.05 n.1 (7th ed. 2002). Notably, questions regarding the internal affairs of a foreign corporation may also raise issues of jurisdiction. See *Belk v. Belk's Dep't Store of Columbia, S.C., Inc.*, 250 N.C. 99, 104, 108 S.E.2d 131, 135 (1959). However, the facts here presented do not raise such issues. *Id.* (indicating that refusal to exercise jurisdiction over internal affairs of foreign corporation is typically predicated on efficiency or want of power to enforce any decree entered).

³ *But see First Union Nat'l Bank v. Brown*, 166 N.C. App. 519, 525–26, 603 S.E.2d 808, 814 (2004) (discussing the applicability of the North Carolina Business Corporations Act to foreign corporations and

context of the immediate claims (i.e. a director's duties to a corporation existing under the laws of Delaware) and the importance of the "internal affairs doctrine" to the consistent application of the corporate law of this State and other states, the court evaluates Voyager's claims of breach of fiduciary duties by Bowen under the substantive law of Delaware.⁴

6. Under Delaware law, corporate directors stand in a fiduciary relation to the corporation. *Gottlieb v. McKee*, 107 A.2d 240 (Del. Ch. 1954). Pursuant to such relationship, the director owes the corporation duties of due care, loyalty and good faith. *See In re Walt Disney Co. Derivative Litigation*, 102 A.2d 27 (2006).

7. Bowen's best argument is that Voyager has not pled facts sufficient to overcome the presumptions of the business judgment rule. (Def. Bowen's Mem. Supp. Mot. Dismiss 11–12).⁵ This argument, however, misapplies the business judgment rule.

concluding that section 55-8-32, governing loans made to directors by a corporation, was inapplicable to a Delaware corporation).

⁴ Alternatively, absent the application of the "internal affairs doctrine", the court applies the law of Delaware to the claims of breach of fiduciary duties by Bowen because the parties assume such applicability, (Def. Bowen's Mot. to Dismiss 11-12 (citing exclusively to Delaware law in its arguments against such claims); Voyager's Br. Opp. Mots. Dismiss 11 (arguing that North Carolina will apply Delaware law to such claims).). *See First Union Nat'l Bank*, 166 N.C. App. at 526–27, 603 S.E.2d at 814–15 (holding that court may proceed on the parties' assumption of applicable law without analyzing choice of law).

⁵ Bowen also argues that the only director duty arguably implicated in this matter is that of care. He bases this conclusion on a quote from *Orman v. Cullman*, 794 A.2d 5, 41 (2002) ("A claim for breach of the duty of disclosure may implicate *only* the duty of care 'when the misstatement or omission was made as a result of the directors' good faith, but 'erroneous judgment' concerning the proper scope of the disclosure.'"). (See Def. Bowen's Mem. Supp. Mot. Dismiss 11.) Bowen's theory being, presumably, that each of Voyager's breach of fiduciary duty claims are premised on his alleged statements, that such statements are "disclosures", and, accordingly, that such statements can only be used to support breaches of fiduciary duties if they violate the duty of disclosure. Such theory overlooks the source of such duties. *See Orman*, 794 A.2d at 41 ("board's fiduciary duty of disclosure . . . [is] not [an] independent dut[y] but the application in a specific context of the board's fiduciary duties of care, good faith, and loyalty.")(alterations in original). Even if Voyager did plead a claim of breach of duty of disclosure based on a statement—which does not appear to be the case—such claim would not preclude Voyager from pleading a claim for breach of duty of good faith or loyalty based on the same statement, under a disparate theory. Accordingly, *Orman* is not helpful to Bowen's position.

8. In general, the business judgment rule is a “presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company.” *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

9. Taking the allegations of the Complaint as true, Voyager has alleged that Bowen, during his tenure as a board member and in his capacity as a director, made false statements designed to materially affect Voyager without consulting or informing other board members. (See, e.g. Compl. ¶¶ 68–69.) Such conduct, even if well-motivated, does not constitute the type of “business decision” the business judgment rule is meant to insulate. See *W. Point-Pepperell, Inc. v. J.P. Stevens & Co.*, 542 A.2d 770, 781 n.5 (and cases cited therein). Accordingly, the business judgment rule does not render Voyager’s claim against Bowen for breach of fiduciary duties unfounded in law.

10. As Bowen provides no further grounds on which to dismiss the claims against him for breach of fiduciary duties (Compl. ¶¶ 93–108), Bowen’s Motion should be DENIED as to such claims.

ii.

Fifth Claim for Relief
(Breach of Fiduciary Duties by Atwood)

11. Voyager claims that Atwood, as a researcher with access to its confidential and proprietary information, owed Voyager fiduciary duties; and that he breached those duties, thereby causing damages to Voyager. (Compl. ¶¶ 109–116.)

12. Atwood argues that such claims fail as a matter of law because Voyager has not pled facts sufficient to establish that he owed Voyager any such duties.

(Atwood's Mem. Supp. Mot. Dismiss 8–10.) In this regard, Atwood relies heavily on the Supreme Court's instruction in *Dalton v. Camp* that an employer-employee relationship is generally not a fiduciary relationship absent a showing that the employee was in a position to dominate or influence the employer. 353 N.C. 647, 651–52, 548 S.E.2d 704, 707–08 (2001).

13. While Atwood is correct that it is difficult to prove that a fiduciary relationship exists in the work place, this does not render Voyager's claim that Atwood owed it a fiduciary duty unfounded as a matter of law. See *Sunbelt Rentals, Inc. v. Head & Engquist Equipment, LLC*, 2002 NCBC 4 ¶¶ 21–27 (N.C. Super. Ct. July 10, 2002), [http://www.ncbusinesscourt.net/opinions/2002%20NCBC%204%20\(Sunbelt\).pdf](http://www.ncbusinesscourt.net/opinions/2002%20NCBC%204%20(Sunbelt).pdf) (noting that under North Carolina precedent, including *Dalton*, the determination of whether a fiduciary relationship existed in the work place remains a fact-intensive inquiry). Accordingly, Voyager's allegations are sufficient, at this stage of the litigation,⁶ to support such a relationship. (Compl. ¶¶ 34, 109–16.)

14. Atwood further argues that Voyager's claim against him for breach of fiduciary duties fails to allege the necessary element of proximate causation. Despite this argument, Voyager has alleged that it was damaged by Atwood's alleged breach of fiduciary duties. (See, e.g. Compl. ¶¶ 79, 116.)

⁶ See *Clouse v. Chairtown Motors, Inc.*, 14 N.C. App. 117, 119, 187 S.E.2d 398, 400 (1972) (a complaint should not be dismissed if “the complaint contains a statement of the claim ‘sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved’ so as to meet the requirements of Rule 8(a). A claim should not be dismissed unless it appears that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.”)

15. As Atwood provides no further grounds on which to dismiss the claim against him for breach of fiduciary duties (Compl. ¶¶ 109–16), Atwood’s Motion should be DENIED as to such claim.

iii.

Sixth Claim for Relief
(Breach of Contract by Bowen)

16. Voyager claims that it and Bowen entered into a contract wherein he agreed to keep in confidence, and not disclose or use, any proprietary, confidential information or know-how belonging to Voyager; and that Bowen breached this contract, thereby causing damages to Voyager. (Compl. ¶¶ 117–23.)

17. Bowen argues that the Complaint fails to allege or identify disclosures to support its claim against him for breach of contract and that, therefore, such claim must be dismissed. (Bowen’s Mem. Supp. Mot. 15.)

18. The elements of a breach of contract are (a) the existence of a valid contract and (b) 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).

19. Voyager’s Complaint alleges: (a) the existence of a contract under which Bowen was to keep certain information defined in the contract confidential and (b) that Bowen disclosed information in breach of that contract. (Compl. ¶¶ 68–69, 79, 118 & 120.) Taking the allegations of the Complaint as true, Voyager has sufficiently pled its claim against Bowen for breach of contract.

20. As Bowen provides no further grounds on which to dismiss the claim against him for breach of contract (Compl. ¶¶ 117–123), Bowen’s Motion should be DENIED as to such claim.⁷

iv.

Seventh Claim for Relief
(Breach of Contract by Atwood)

21. Voyager claims that it and Atwood entered into a contract wherein he agreed to hold all relevant experiments and all related results, discoveries, inventions, or insights in confidence and not disclose the same to any person without the prior written consent of Voyager; and that Atwood breached this contract, thereby causing damages to Voyager. (Compl. ¶¶ 124–28.)

22. Atwood contends that the Complaint fails to allege any actual breach of such contract or any resulting damages and that, therefore, such claim must be dismissed. (Atwood’s Mem. Supp. Mot. 6, 11.)

23. Voyager’s Complaint alleges that Atwood made certain disclosures, and that those disclosures constitute a breach of his contract, resulting in damages to Voyager. (Compl. ¶¶ 33, 69, 79, 84, 124–27.) Accordingly, taking the allegations of the Complaint as true, Voyager has sufficiently pled its claim against Atwood for breach of contract.⁸

24. As Atwood provides no further grounds on which to dismiss the claim against him for breach of contract (Compl. ¶¶ 124–28), Atwood’s Motion should be DENIED as to such claim.

⁷ Though Bowen argues that any disclosures he made were of a type mandated by applicable laws, nowhere on the face of the Complaint or any other document properly before the court is there evidence that the “disclosures” complained of are of such type.

⁸ See, *supra*, note 6.

v.

Eighth Claim for Relief
(Preliminary and Permanent Injunctive Relief)

25. Voyager seeks to preliminarily and permanently enjoin the Defendants from publishing any research done for Voyager. (Compl. ¶¶ 129–34.)

26. Preliminary relief has already been ruled upon, and such rulings speak for themselves. (Order Granting Mot. Prelim. Inj. Against Bowen (Feb. 13, 2007); Order Denying Mot. Prelim. Inj. Against Atwood (Feb. 13, 2007).)

vi.

Ninth Claim for Relief
(Defamation)

27. Voyager claims that statements Defendants made about Voyager to Hambrecht were false and defamatory; and that Voyager was damaged by such statements. (Compl. ¶¶ 135–37.)

28. Defendants each contend that: (a) the Complaint indicates the truth of any statements it specifically alleges and, therefore, those statements cannot support a defamation claim; and (b) Voyager has failed to specifically allege the content of any defamatory statements. (Bowen’s Mem. Supp. Mot. Dismiss 12–13; Atwood’s Mem. Supp. Mot. Dismiss 15–16.)

29. Despite Defendants’ arguments, the Complaint does not disclose any fact that necessarily defeats the defamation claim. Defendants’ argument to the contrary presupposes analogous alleged statements to be necessarily identical. The court does not interpret the Complaint’s disclosure that Bowen was unable to gain access to a lab (Compl. ¶ 55) or was put on leave (Compl. ¶ 51) to prove the truth of the Defendants’

allegedly defamatory statements to Hembrecht (Compl. ¶ 69). Further, the Complaint alleges those statements to Hembrecht 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, 432 (1993).

30. Atwood further argues that Voyager’s claim for defamation fails to allege the necessary element of causation. Despite this argument, the Complaint alleges that the defamation caused Voyager damages. (See, e.g. Compl. ¶ 137.)

31. As the Defendants provide no further grounds on which to dismiss the claim of defamation (Compl. ¶¶ 135–37), the Motions to Dismiss should be DENIED as to such claim.

vii.

Tenth and Eleventh Claims for Relief
(Tortious Interference with Prospective Advantage)

32. Voyager claims that the Defendants, through their actions and statements, tortiously interfered with Voyager’s prospective advantage; and that Voyager was damaged by such interference. (Compl. ¶¶ 138–51.)⁹

33. A claim for tortious interference with prospective advantage is actionable when damages proximately result from one’s “interfere[nce] with a man’s business, trade or occupation by maliciously inducing a person not to enter a contract with a third

⁹ Addressing several of the allegations that Voyager contends support its claim for tortious interference with prospective advantage, specifically paragraphs 138–44 of the Complaint, Atwood argues that Voyager has failed to state a claim for tortious interference with contract because it has not alleged that Hembrecht ever breached a contract with Voyager. (Atwood’s Mem. Supp. Mot. Dismiss 12.) Voyager has not contended that it pled a claim for tortious interference with contract (Voyager’s Mem. Opp. Mot. Dismiss 26–28); accordingly, the court deems Voyager not to have pled such claim and, therefore, need not reach this argument.

person, which he would have entered into but for the interference” *Dalton*, 353 N.C. at 654, 548 S.E.2d at 709 (first alteration in original).

34. Bowen argues that Voyager’s claim for tortious interference with prospective advantage fails as a matter of law because he was justified, under applicable laws, in making the statements that Voyager relies on to support such claim. (Bowen’s Mem. Supp. Mot. Dismiss 14.) Despite this argument, Voyager has alleged that the statements were false or misleading, and were not justified. (Compl. ¶¶ 143, 150.) Accordingly, Bowen’s justification argument does not provide a basis, at this stage of the litigation, to dismiss Voyager’s claim of tortious interference with prospective advantage.

35. Bowen further argues that the Complaint fails to sufficiently plead any damages resulting from the alleged tortious interference with prospective advantage, and that any such damages could not have been proximately caused by the Defendants. (Bowen’s Mem. Supp. Mot. Dismiss 14.) Despite this argument, Voyager has alleged that the conduct of the Defendants induced third-parties to not enter contracts with Voyager that they otherwise would have entered. (Compl. ¶ 72, 149.)

36. As the Defendants provide no further grounds on which to dismiss the claim of tortious interference with prospective advantage (Compl. ¶¶ 138–51), the Motions to Dismiss should be DENIED as to such claim.

Twelfth Claim for Relief
(Unfair and Deceptive Trade Practices)

37. Voyager claims that the acts of the Defendants constitute unfair and deceptive trade practices under Chapter 75 of the General Statutes of North Carolina (“Chapter 75”). (Compl. ¶¶ 152–54.)

38. To state a claim for relief under Chapter 75, the plaintiff must show (a) an unfair or deceptive act or practice by the defendant, (b) in or affecting commerce, (c) which proximately caused actual injury to the plaintiff. *Wilson v. Blue Ridge Elec. Membership Corp.*, 157 N.C. App. 355, 357, 578 S.E.2d 692, 694 (2003).

39. Each Defendant contends that the Chapter 75 claims fail as a matter of law.¹⁰

40. Defendant Bowen argues that claims arising out of securities transactions do not fall within the scope of Chapter 75. (Bowen’s Br. Supp. Mot. 18.) In this regard, Defendant Bowen is correct. *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 275, 333 S.E.2d 236, 241(1985) (“We hold that securities transactions are beyond the scope of N.C.G.S. 75-1.1.”). Defendant Atwood argues that Voyager failed to plead that any unfair or deceptive trade practice of Defendant Atwood proximately caused Voyager damages. (Atwood’s Br. Supp. Mot. 20.)

41. Despite Voyager’s arguments regarding various contentions that support its Chapter 75 claim (Voyager Br. Opp. Mots. 29–31), the injuries Voyager contends it suffered as a result of the contended unfair and deceptive trade practices are all related

¹⁰ Despite Voyager’s argument to the contrary (Voyager Br. Opp. Mots. 29 n. 15), Defendant Bowen does challenge the sufficiency of Voyager’s Chapter 75 allegations (see Bowen’s Mot. (seeking dismissal of each of Voyager’s claims under Rule 12(b)(6)); Bowen’s Br. Supp. Mot. 18 (addressing Voyager’s Chapter 75 claims)).

to the failure of the IPO. The IPO, which is clearly a securities transaction, is beyond the scope of Chapter 75. *Skinner*, 314 N.C. at 275, 333 S.E.2d at 241.¹¹

42. Therefore, Voyager's claim for unfair and deceptive trade practices (Compl. ¶¶ 152–54) fails to state a claim upon which relief can be granted and the Motions to Dismiss should be GRANTED as to such claim.

ix.

Thirteenth Claim for Relief
(Civil Conspiracy)

43. Voyager claims that the Defendants entered a civil conspiracy to commit the unlawful acts Voyager alleges; and that it was damaged by such common scheme. (Compl. ¶¶ 155–159.)

44. “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). The underlying wrongful acts must be committed “pursuant to the common scheme and in furtherance of the common object.” *Muse v. Morrison*, 234 N.C. 195, 198, 66 S.E.2d 783, 785 (1951).

45. Both Defendants argue that Voyager has failed to adequately plead the existence of a common scheme or agreement. (Bowen's Br. Supp. Mot. 16–17; Atwood's Br. Supp. Mot. 14–15.) In this regard, each Defendant cites to *Shope v. Boyer* for the rule that the repeated use of conclusory allegations of an agreement are insufficient to state a cause of action for conspiracy. 268 N.C. 401, 405, 150 S.E.2d

¹¹ However, such conclusion does not of itself support Defendants' arguments that since the second IPO was withdrawn upon Voyager's own election, Defendants did not proximately injure Voyager. (Bowen's Br. Supp. Mot. 15; Atwood Br. Supp. Mot. 7).

771, 774 (1966) (dismissing claim for civil conspiracy because the complaint failed to allege any overt acts by any conspirator).

46. Voyager has, however, alleged an agreement between the Defendants to commit the unlawful acts alleged in the Complaint and has alleged that Defendants acted pursuant to a common scheme. (Compl. ¶¶ 156, 159.) Further, Voyager has alleged that it was injured by acts of the Defendants committed pursuant to the alleged conspiracy. (Compl. ¶ 157.) Accordingly, a conspiracy between the Defendants is alleged in the Complaint. *See Muse*, 234 N.C. at 198, 66 S.E.2d at 785. Whether Voyager will be able to prove these allegations of its Complaint is of no concern at this stage of the litigation. *Id.*

47. As the Defendants provide no further grounds on which to dismiss the claim of civil conspiracy (Compl. ¶¶ 155–59), the Motions to Dismiss should be DENIED as to such claim.

x.

Fourteenth and Fifteenth Claims for Relief
(Aiding and Abetting Breach of Fiduciary Duty)

48. Voyager claims that Bowen aided and abetted Atwood's alleged breach of fiduciary duties; and that Voyager was thereby damaged. (Compl. ¶¶ 160–62.) Similarly, Voyager claims that Atwood aided and abetted Bowen's alleged breach of fiduciary duties; and that Voyager was thereby damaged. (Compl. ¶¶ 163–65.)

49. Each Defendant argues that Voyager has failed to allege facts supporting its claims for aiding and abetting breach of fiduciary duty. (Bowen's Br. Supp. Mot. 18–19; Atwood's Br. Supp. Mot. 17–19.)

50. Bankruptcy Courts have determined that North Carolina will recognize a claim for aiding and abetting breach of fiduciary duty. *Ivey v. Crown Memorial Park, L.L.C.*, 333 B.R. 76, 80 (Bankr. M.D.N.C. 2005) (citing *Moseley v. Arth*, No. 00-10112C-7G, 2003 Bankr. LEXIS 1437 at *49 (Bankr. M.D.N.C. Oct. 10, 2003)). The tort of aiding and abetting a breach of fiduciary duty has three elements (a) the existence of a violation of a fiduciary duty by the primary party; (b) knowledge of the violation on the part of the aider and abettor; and (c) substantial assistance by the aider and abettor in the achievement of the primary violation. *Id.*; *Sompo Japan Ins. Inc. v. Deloitte & Touche, LLP*, 2005 NCBC 2 ¶12 (N.C. Super. Ct. June 10, 2005), www.ncbusinesscourt.net/opinions/2005%20NCBC%202.htm.

51. The North Carolina Court of Appeals has looked to the official comment to Section 876(b), Restatement (2d) of Torts, for guidance as to the meaning of “substantial assistance.” *Blow v. Shaughnessy*, 88 N.C. App. 484, 490, 364 S.E.2d 444, 447 (1988).¹² Such official comment defines “substantial assistance” as follows: “If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other’s act.” *Id.* The *Blow* court also found guidance in federal precedent, including *Metge v. Baehler*, 762 F.2d 621 (8th Cir. 1985). In this regard, *Blow* provides that the standard of substantial assistance requires a showing of “substantial casual connection between the culpable conduct of the alleged aider and abettor and the harm to the plaintiff, or a showing the encouragement or assistance is a substantial factor in causing

¹² Although this court has determined that the federal underpinning supporting the *Blow* decision has been removed, it has continued to look to *Blow* for guidance on the prerequisites of liability for aiding and abetting breach of fiduciary duty. *Sompo*, 2005 NCBC ¶¶ 10, 12.

the resulting tort.” 88 N.C. App. at 491, 364 S.E.2d at 448 (quoting *Metge*)(alterations omitted).

52. Taking the allegations of the Complaint in the light most favorable to Voyager, Voyager has alleged that the Defendants agreed to take, and took, certain actions which may constitute a breach of one or both Defendants’ alleged fiduciary duties; and that each Defendant actively and substantially assisted the other’s alleged breach of duty.¹³ Accordingly, Voyager has alleged facts sufficient to support its claims for aiding and abetting breach of fiduciary duty.

53. As the Defendants provide no further grounds on which to dismiss the claims for aiding and abetting breach of fiduciary duty, the Motions to Dismiss should be DENIED as to such claims.

¹³ The *Blow* court further quotes *Metge* for the following: “Most courts seem to agree that, if the aider and abettor owes the plaintiff an independent duty to act or to disclose, inaction can be a proper basis for liability under the substantial assistance test.” *Id.* (quoting *Metge*)(alterations omitted). Voyager may intend to show that each Defendant owed it an independent duty to act or to disclose and that, therefore, under *Blow*, each Defendant’s inaction substantially assisted the other’s breach. A fiduciary relationship is the only basis Voyager has alleged in support of such duty. Accordingly, to succeed in proving that either Defendant was obligated to take such actions or make such disclosures, Voyager would first have to succeed in proving its allegation that such Defendant owed it a fiduciary duty. Voyager may well succeed in proving that either or both of the Defendants owed it fiduciary duties; however, in proving that a Defendant owed such a duty, Voyager risks obviating its claim for aiding and abetting breach of fiduciary duty as to that Defendant. That is, Voyager will need to prove that a Defendant directly owed it a fiduciary duty to support its claim against the same Defendant for indirect fiduciary liability. See *Sompo*, 2005 NCBC ¶¶12–14 (providing that because a claim for aiding and abetting fraud is duplicative and redundant of a fraud claim—since each claim requires proof of the same elements—North Carolina will not recognize such claim; and further providing that a claim for aiding and abetting a breach of fiduciary duty may not be redundant because a non-fiduciary defendant could aid a fiduciary in breaching his duties). Accordingly, in the final analysis, under the facts alleged in this case, Voyager’s claim for aiding and abetting breach of fiduciary duty may become duplicitous and confusing for a jury. However, these issues are not ripe for disposition under Rule 12.

Sixteenth Claim for Relief
(Temporary Restraining Order)

54. Voyager seeks to temporarily restrain the Defendants. (Compl. ¶¶ 166–74.)

55. Preliminary injunctive relief has already been ruled upon, and such rulings speak for themselves. (Order Granting Mot. Prelim. Inj. Against Bowen (Feb. 13, 2007); Order Denying Mot. Prelim. Inj. Against Atwood (Feb. 13, 2007).)

Prayer for Punitive Damages

56. Defendant Atwood contends that Voyager’s prayer for punitive damages from Atwood (Compl. Relief ¶ 8) is not supported by sufficient factual allegations to support such an award (Atwood Br. Supp. Mot. 21–22). The punitive damages plea is not stated as a separate Claim for Relief. However, the court concludes that in the context of Atwood’s Motion, the facts alleged in Voyager’s Fifth, Ninth, Thirteenth, and Fifteenth Claims for Relief have potential to support an award of punitive damages, depending upon a further evidentiary showing at an appropriate time. *See Zubaidi v. Earl L. Pickett Enters.*, 164 N.C. App. 107, 112, 595 S.E.2d 190, 194 (2004). Consequently, Voyager’s prayer for relief for punitive damages against Atwood is not susceptible to dismissal under Rule 12(b)(6).

NOW THEREFORE, based upon the foregoing CONCLUSIONS it hereby is ORDERED, ADJUDGED and DECREED that:

1. Voyager has failed to state a claim upon which relief can be granted as to the Twelfth Claim for Relief of its Complaint. Accordingly, as to such Claim,

Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) is GRANTED, and the Twelfth Claim for Relief is DISMISSED.

2. The Eighth Claim for Relief and Sixteenth Claim for Relief of Voyager's Complaint do not require treatment at this stage of this civil action, and no ruling thereon is required.

3. No further ruling is necessary with regard to Plaintiff's prayer for relief for punitive damages. However, to the extent Defendants' Rule 12(b)(6) Motions to Dismiss are intended to extend to the prayer for relief, they are DENIED.

4. As to all other Claims for Relief stated in the Complaint in this action, Voyager has stated claims upon which relief can be granted. Accordingly, as to them, Defendants' Rule 12(b)(6) Motions to Dismiss are DENIED.

5. Counsel to the Parties shall appear before the court at 1:00 P.M. on Tuesday, May 6, 2008, for a conference regarding the status of case management issues and the February 21, 2007 Case Management Order entered in this civil action.

This the 15th day of April, 2008.

 /s/ John R. Jolly, Jr.
John R. Jolly, Jr.
Special Superior Court Judge for
Complex Business Cases