

**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.**

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**EMCYTE CORP.'S EXHIBITS, CASE LAW AUTHORITIES AND BRIEF  
IN SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER AND RELATED ISSUES**

Respondent/Counter-Petitioner, EMCYTE CORP., (“EmCyte”) by and through its undersigned counsel, and pursuant to Rules 1.280(c), Florida Rules of Civil Procedure, Section 688.002, Florida Statutes and Rule 90.506, Florida Rules of Evidence, hereby submits its exhibits, case law authorities and brief in Support of its Motion For Protective Order and other related issues argued at the hearing conducted by Magistrate Bocelli on December 21, 2015. In support of EmCyte alleges and states as follows:

**SUMMARY**

While Emery Smith was an officer, director, employee and shareholder in EmCyte, he secretly engaged in business enterprises for his personal financial windfall that consequently damaged EmCyte. Usurping corporate opportunities, manipulating profits and losses, and diverting customers away from EmCyte were all part of his clandestine business practices. His actions flagrantly breached his contractual and statutory duties, but he remains undeterred. His

current strategy is to use the discovery process to obtain access to the information that he needs to continue damaging EmCyte and EmCyte's business for his personal gain. EmCyte filed its Motion for Protective Order and Mr. Smith filed his Motion to Compel on the same day. EmCyte seeks to end the continuing damage to its business being caused by Mr. Smith's actions by obtaining a protective order that prohibits Mr. Smith from having access to EmCyte's trade secrets, confidential and proprietary information. Conversely, Mr. Smith seeks to bypass his statutory and contractual obligations and restrictions by characterizing this demand as a discovery dispute.

In line with his clandestine operations, Mr. Smith objected to discovery sought from third parties by EmCyte. These third parties are entities in which Mr. Smith has, or is believed to have some profit interest. While seeking to hide this information, Mr. Smith seeks discovery from third parties in contravention of prior settlement agreements, to which Mr. Smith was a signatory and a beneficiary, and on matters that are irrelevant to this dispute. Mr. Smith cannot be permitted to continue engaging in secret business enterprises while at the same time hiding his activities through the non-parties. Characterizing these matters as a discovery dispute is a blatant attempt to circumvent the fiduciary duties which he has steadfastly breached and continues to breach.

### **STATEMENT OF FACTS**

#### **A) Emery Smith's Duties owed to EmCyte Corp.**

1) EmCyte Corporation is a Florida corporation that was formed on or around February 19, 2008 ("EmCyte"). EmCyte sells medical device products directly to its customers ("direct sale customers") and it also has a network of distributors which sell EmCyte's products to distributor customers. See attached Exhibit "A."

2) Patrick Pennie was the founder of EmCyte and was an original owner of EmCyte, along with David Buzenius. Mr. Smith was not an original owner of EmCyte.

3) EmCyte was capitalized by Mr. Pennie. Mr. Smith contributed no capital to EmCyte.

4) A Shareholders' Agreement was executed by and between Mr. Smith, Mr. Pennie and EmCyte on or around July 1, 2010 (the "Shareholders' Agreement"). See Attached Exhibit "B" for copy of the original, signed Shareholders' Agreement. The original Shareholders' Agreement is in the possession and control of counsel for EmCyte.

5) According to the terms of the executed Shareholders Agreement, voting stock was issued to Mr. Pennie (51 shares) and Mr. Smith (49 shares). Mr. Pennie and Mr. Smith each owned Fifty (50) shares of common, non-voting stock. Mr. Pennie was designated to be EmCyte's Chairman and Treasurer. Mr. Smith was designated to be EmCyte's Chief Executive Officer and Secretary.

6) Mr. Pennie, in his capacity as Chairman, is authorized to execute "... any document ... and to take any other action that may be necessary or desirable in order to permit the Corporation to do business (or facilitate the doing of business in any jurisdiction)." See §2.6 of Exhibit "B."

7) Further, §5.1 of the Shareholders Agreement vested **sole** responsibility for EmCyte's management in Mr. Pennie, as Chairman. As Chairman, Mr. Pennie was granted "... the fullest right, power, and authority to manage, direct, and control all of the business affairs of the Corporation, to transact business on its behalf, take any action on behalf of the Corporation believed by the Chairman to be in the best interests of the Corporation, to sign for it or on its behalf and to otherwise secure the Corporation. See §5.1 of Exhibit "B."

8) Additionally, various actions were reserved to the Chairman's authority in §5.2, including but not limited to the following:

- a) the admission of an additional Shareholder, or any other sale of Stock of the corporation to another person or entity other than the then current shareholders; or the approval of disassociation or withdrawal of any Shareholder;
- b) the sale, lease, exchange, or other disposal of all, or substantially all, of the assets of the corporation;
- c) the authorization or issuance of additional stock or the transfer of Stock to a substitute or transferee Shareholder, as contemplated by the Agreement;
- d) the removal or addition of a personnel or entities.

**See** attached Exhibit "B."

9) Under the terms and conditions of the Shareholders' Agreement, Mr. Smith is without any authority to commence a judicial dissolution. Section 9.3 states that "[T]he death, retirement, resignation, expulsion, bankruptcy, dissociation, or dissolution of a Shareholder shall not cause the dissolution of the Corporation." The shareholders are not granted authority to initiate a judicial dissolution in the Shareholders' Agreement. However, by seeking a judicial dissolution, Mr. Smith inadvertently triggered a right in favor of Mr. Pennie to purchase Mr. Smith's interest under the terms of the Shareholders' Agreement and not the Florida Statutes. This right, amongst others, would clearly be trampled if Mr. Smith were allowed to proceed with a judicial dissolution.

10) On April 10, 2014, Mr. Pennie and Mr. Smith agreed in writing to continue to abide by the existing Shareholders' Agreement of July 1, 2010 without modification, amendment or supplement. Mr. Smith was individually represented by separate counsel at the time that he communicated his agreement to abide by the Shareholders Agreement to Mr. Pennie. **See** attached Exhibit "C." Mr. Smith's counsel at that time also helped him form the LifeForm legal entity.

11) During all times relevant to this dispute, Mr. Smith held himself out to the public as being an officer, director, shareholder and employee of EmCyte. In his Answer and Affirmative Defenses to the Amended Counterclaims of EmCyte (the “Smith Answer”), Mr. Smith admits that he” . . . is and was, at all material times, an officer, director and shareholder of EmCyte . . . .”

12) Mr. Smith made no challenge to the existence or enforceability of the Shareholders’ Agreement at any time prior to his commencement of this Lawsuit.

13) In reliance upon the existence and enforceability of the Shareholders’ Agreement, EmCyte distributed the following amounts to Mr. Smith during the referenced years and in the specified amounts: 2011 (\$290,435); 2012 (\$526,823); 2013 (\$709,724) and 2014 (\$562,145).

14) Mr. Smith received distributions from Gian Biologics, a sister entity owned with the same voting rights (Mr. Pennie – 51%, Mr. Smith 49%), during the referenced years and in the specified amounts: 2012 (\$100,000); 2013 (\$234,305) and 2014 (\$182,000).

15) In paragraph 134 of the Smith Answer, Mr. Smith admits that “. . . as the natural result of his status as a director, officer and employee of EmCyte Corp., **Emery Smith knows or possesses confidential trade information of EmCyte Corp.**” (Emphasis Added).

**B) Emery Smith’s Breaches of Duties and Wrongful Use of EmCyte’s Trade Secrets and Other Confidential and Proprietary Information.**

16) While Mr. Smith was an officer, director, shareholder and employee of EmCyte Corp., he had full, unfettered access to the financial records and business information of EmCyte. In violation of his duties owed to EmCyte, Mr. Smith converted the trade secret, proprietary and confidential information of EmCyte to his own purposes, and for his sole benefit, which was to the detriment of EmCyte. Mr. Smith had use of, and converted to his own use, the following information, which is not intended to be an exhaustive list:

- 1) EmCyte's financial records;
- 2) EmCyte's tax records;
- 3) Information of manufacturing;
- 4) Information on processes and procedures;
- 5) Profit margins for EmCyte products;
- 6) Pricing for EmCyte products;
- 7) Information on EmCyte's customers;
- 8) Information on EmCyte's distributors, which includes information on the following:
  - a) distributor pricing;
  - b) distributor profit margins;
  - c) distributor customers;
  - d) distributor sales volumes;
  - e) distributor territories; and
  - f) the fields of use into which each distributor was authorized to sell EmCyte products.

17) Armed with this confidential, proprietary, and trade secret information, Mr. Smith knowingly, intentionally and secretly utilized this information for his sole benefit and to the detriment of EmCyte. While making huge profits from EmCyte, Mr. Smith unilaterally sought to carve out a bigger share for himself through clandestine business ventures.

18) In a predatory fashion, Mr. Smith established himself in the following business enterprises, although this is not an exhaustive list either:

<u>Entity Name</u>	<u>Ownership</u>	<u>Relationship to EmCyte</u>
1) LifeForm	50%	Distributor selling to EmCyte
2) Bio Healix	100%	Customers though LifeForm
3) CRT/Ultra Intelligence	50%/100%	Distributor
4) Gian	50% non-voting	Distributor
5) CELLF Cure	50%	Distributor

See Attached Exhibit "D."

19) Mr. Smith was not content with his share of EmCyte's profits. With his knowledge of EmCyte's confidential, proprietary, trade secret information, Mr. Smith caused LifeForm and Bio Healix to:

- 1) take certain direct-sale customers from EmCyte;

- 2) run up accounts receivable to EmCyte and default (LifeForm); and
  - 3) interfere with EmCyte's other distributors.
- See Attached Exhibits "E" "K" and "L."

20) EmCyte estimates that \$164,695 in direct sale customers were taken from it by LifeForm while Mr. Smith was involved in both entities, albeit surreptitiously by him. Additionally, LifeForm owes EmCyte approximately \$147,739.07 for EmCyte products which were sold by LifeForm but for which LifeForm didn't pay EmCyte. Since LifeForm has apparently ceased operating, it is unlikely this debt will be paid. The full magnitude of the damage caused to EmCyte by Mr. Smith's involvement in LifeForm has yet to be determined but LifeForm collected over \$2.5 million in a seventeen month period. Mr. Smith owned a half interest in that \$2.5 million in revenue stream. See Attached Exhibits "F," "G," "H," "I," and "J."

21) Gian Biologics, LLC ("Gian") is a Delaware limited liability company authorized to conduct business in Florida. While Mr. Pennie and Mr. Smith are the owners of Gian, voting control rests in favor of Mr. Pennie (51%). See attached Exhibit "M."

22) During 2014 and 2015, Mr. Smith engaged in a pattern of reckless and exorbitant spending through Gian that EmCyte was involuntarily forced to subsidize. While purporting to conduct business on behalf of Gian, Mr. Smith incurred expenses primarily for his personal benefit and entertainment that EmCyte had to pay totaling over \$200,000, which Mr. Smith has refused to pay or to provide supporting documentation as to such purported expenses. See Attached Exhibits "N" and "O."

23) On November 3, 2014, Mr. Pennie sent a demand letter to Mr. Smith concerning Mr. Smith's exorbitant individual expenses. While living lavishly at EmCyte's expense, Mr.

Smith refused to even provide receipts or to account for his expenditures. See attached Exhibits “N” and “O.”

24) Mr. Smith also used Gian to distribute EmCyte products for which EmCyte has yet to receive payment. As of November 3, 2014, Gian, as a direct result of Mr. Smith’s actions, owed EmCyte approximately \$291,000. Mr. Smith has failed and refused to account for the EmCyte kits which have presumably been sold and distributed.

25) Similarly, Mr. Smith secretly formed Ultra Intelligence Corporation, LLC in Delaware on January 9, 2014. See Attached Exhibits “P” and “Q.”

26) Mr. Smith 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. CRT subsequently re-filed in Maryland and purports to be a Maryland limited liability company.

27) The role of Mr. Smith and Ultra Intelligence in CRT was knowingly concealed and secreted from EmCyte and Mr. Pennie.

28) Mr. Smith 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.

29) Mr. Smith was an officer, director and shareholder in EmCyte and a secret owner of CRT, through his ownership of Ultra Intelligence, when CRT negotiated and ultimately entered into a Distribution Agreement with EmCyte. Without disclosing his ownership in CRT, Mr. Smith influenced Mr. Pennie to provide CRT with below market rates in the Distribution Agreement that was ultimately executed. The variable terms for CRT meant a larger, albeit secret share of revenue for Mr. Smith. See attached Exhibits “R,” “S,” and “T.”



30) 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 Mr. Smith's ownership interest in Ultra Intelligence or CRT.

31) CRT had not been properly formed as a limited liability company under the laws of New Jersey as of the time that it had executed the Distribution Agreement with EmCyte.

32) Without giving notice to EmCyte of CRT's improper formation under the law of New Jersey, Mr. Smith secretly executed a letter agreement on behalf of EmCyte with CRT on March 5, 2015, to create a new Distribution Agreement between CRT, now formed in Maryland, and EmCyte. **See** Attached Exhibit "T." Mr. Smith had no legal authority to execute the letter agreement. The letter agreement was not disclosed to Mr. Pennie or to EmCyte. The letter agreement was done for the benefit of Mr. Smith individually and to the detriment of EmCyte.

33) The full extent of Mr. Smith's involvement in other entities, such as CELLF Cure (although Mr. Smith is shown on Sunbiz as an owner) (See attached Exhibit "U") or Cytonics (a competitor of EmCyte) is not yet fully disclosed or understood. Given his pattern of self-serving, secret profit taking conduct, it is not surprising that he seeks to block EmCyte's discovery efforts as to his full range of activities.

34) Mr. Smith has also been determined to have usurped corporate opportunities for his individual benefit, and to the detriment of EmCyte, as well as breached his contractual and fiduciary obligations to EmCyte through his ownership or involvement in the entities known as Bio Healix Research, LLC and CELLF Cure, Inc. Mr. Smith knowingly concealed his ownership of, or participation in these entities from EmCyte and Mr. Pennie.

35) In contravention of the Shareholders Agreement and his duties as an officer, director and shareholder of EmCyte, Mr. Smith has engaged in a pattern of conduct and course of

performance designed to undermine the Chairman of EmCyte and which resulted in Mr. Smith causing financial jeopardy to EmCyte. Mr. Smith's tactics including at least one attempt to "bully" Mr. Pennie and EmCyte. On or around April 30, 2015, a woman identifying herself as "Jill Lynch" presented herself at the EmCyte offices, along with another woman and a Fort Myers police officer. Ms. Lynch represented to Mr. Pennie that she and the woman accompanying her were lawyers. The reason for the police officer's attendance was unexplained.

36) Ms. Lynch represented to Mr. Pennie that she was at the EmCyte offices on behalf of Mr. Smith and Mr. Smith had clearly provided her with confidential information belonging to EmCyte. However, it was ultimately confessed by Ms. Lynch during the meeting that she was not licensed to practice law in Florida, and neither was her companion. Nevertheless, Ms. Lynch threatened legal action on behalf of Mr. Smith against Mr. Pennie and EmCyte.

**C) EmCyte Information Demanded by Emery Smith.**

37) Prior to Mr. Smith's filing of his Petition, he demanded information from EmCyte under § 607.1601 and § 607.1602, Fla. Stat. Section 607.1602(1) provides that a shareholder is entitled to inspect and copy the limited corporate information set forth in § 607.1601(5). **EmCyte has provided this information to Mr. Smith.** However, Mr. Smith also demanded information under § 607.1602(2), which is far more extensive and invasive into the company's financial and other records. So § 607.1602(2) requires the requesting party to comply with the good faith requirements of § 607.1602(3).

38) Section 607.1602(3) required Mr. Smith to show that his demand was made in good faith and for a proper purpose. It also required him to describe with reasonable particularity both his purpose and the records he required. Finally, he was required to show that

the demanded records were directly connected with the stated “proper purpose.” “Proper purpose” is defined at § 607.1602(9).

39) Section 607.1602(6) grants EmCyte the right to deny Mr. Smith’s demand for good cause. EmCyte did deny his demand by written correspondence date June 5, 2015 because Mr. Smith’s demand was made for an improper purpose. See attached exhibit “W.” Section 607.1602(6) specifically includes the following example of an improper purpose, which is directly applicable to Mr. Smith and it states “. . . has improperly used any information procured through any prior examination of the records of the corporation or any other corporation.”

40) Therefore, the prohibitions and restrictions applicable to Mr. Smith in relation to § 607.1602(2) restrain him from being able to demand the information that he is now demanding through discovery. Mr. Smith has breached his fiduciary duties as an officer and director of EmCyte and so his reliance upon the provisions of 607.1605 have been waived. EmCyte is entitled to be protected from this circumvention of the corporate statutes.

**D) Emery Smith Is Wrongfully Blocking Access to Relevant Non-Party Information.**

41) As indicated, EmCyte has learned of some of the clandestine business ventures of Mr. Smith, however that information was not volunteered by him. Mr. Smith has knowingly and intentionally continued to breach his fiduciary duties by keeping his conflicting and competing business activities a secret. EmCyte sought to serve non-party discovery on entities which EmCyte has reason to believe that Mr. Smith holds an ownership or profit interest of some type. These include the entities of A2M Bio, Inc., CELLF Cure, Inc., Cytonics Biotech, LLC, Cytonics Corporation, LifeForm Healing Research, LLC and Ultra Intelligence Corporation, LLC. EmCyte has demonstrated that Mr. Smith owns interests in CELLF Cure, LifeForm and Ultra

Intelligence. So the malicious intent of blocking discovery, even as to entities that it is undisputed that he owns, is exemplified.

42) Mr. Smith was untimely as to his objection as to LifeForm and LifeForm has voluntarily produced records to EmCyte. However, as to the others, discovery must be allowed to proceed so that information as to Mr. Smith's ownership and profit interests in conflicting and competing entities can be ascertained. There is no valid basis for Mr. Smith's objection to these non-party discovery requests.

**E) Emery Smith Seeks Information from Non-Party Entities in Contravention of Signed Settlement Agreement Documents to Further Damage EmCyte.**

43) Mr. Smith served Notices of Production from Non-Parties as to Perfusion Partners & Associates, Inc. ("PPAI"), The EmCyte Group, LLC and Gian Biologics, LLC. As discussed, Gian Biologics is similarly situated to EmCyte and both EmCyte and Gian will be damaged if Mr. Smith is allowed to obtain information relating to EmCyte's business. PPAI was the subject of a Mutual Release and Settlement Agreement and Mr. Smith will disrupt the terms and conditions of that Mutual Release if he is allowed to proceed. See attached Exhibit "V." Also, PPAI holds no relevant information as to this proceeding. The EmCyte Group was formed but never functioned, so there aren't any records relating to it to speak of.

**ARGUMENTS**

**1) EmCyte's Motion for Protective Order and Smith's Motion to Compel.**

**Emery Smith Fiduciary Duties owed to EmCyte**

44) As an officer, director and shareholder of EmCyte, Mr. Smith owes fiduciary duties to EmCyte, as well as to Patrick Pennie. The duties owed to EmCyte by Mr. Smith are both contractual (the Shareholders' Agreement) and statutory, including but not limited to those found at Fla. Stat. §§ 607.830(1), 607.831 and 607.0841.

45) The Shareholders' Agreement defined Mr. Smith's equity interest in EmCyte at 50%. However, voting control in EmCyte was vested in Mr. Pennie (51%) and Mr. Pennie was designated the Chairman of EmCyte as well. The authority of the Chairman of EmCyte is both extensive and exclusive, as detailed in Sections 5.1 and 5.2 of the Shareholders' Agreement. In reliance upon the enforceability of the Shareholders' Agreement, Mr. Smith received substantial financial distributions and he also relies upon it to claim his status as an officer, director and shareholder.

46) In addition to his duties under the Shareholders' Agreement, the Florida Statutes also impose duties upon Mr. Smith as an officer (607.0841) and as a director (607.0830). Florida Statutes prohibit director conflicts of interest, such as a director holding secret ownership interests in competing businesses. See Fla. Stat. § 607.0832.

47) As stated in the case of *Welt v. Jacobson (In re Aqua Clear Techs., Inc.)*, 361 B.R. 567 (Bankr. S.D. Fla. 2007), a director is obligated to perform his or her corporate 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 interests of the corporation. Fla. Stat. § 607.0830(1). Florida law has long recognized that corporate officers and directors owe duties of loyalty and a duty of care to the corporation. See *Cohen v. Hattaway*, 595 So. 2d 105 (Fla. 5<sup>th</sup> D.C.A. 1992); *B&J Holding Corp. v. Weiss*, 353 So. 2d 141 (Fla. 3d DCA 1978). Whenever a party is under a duty to act for or give advice to the benefit of another, a fiduciary relationship is found to exist. See *Kapila v. Clark*, 431 B.R. 263, 290 (Bankr. S.D. Fla 2010).

48) Once a confidential or fiduciary relationship is found to exist, then the burden falls upon the trusted party to establish and prove that his conduct was proper. See *Kapila* at

290. Similarly, Mr. Smith has an obligation to show good cause under § 607.1602(2) and (3) for the corporate records that he is seeking.

49) Mr. Smith admits to being an officer, director and shareholder of EmCyte. So the fiduciary duties applicable to officers, directors and shareholders of EmCyte under the Shareholders' Agreement or Florida Statutes apply to him. Mr. Smith therefore carries the burden of establishing that his conduct in relation to EmCyte has been proper and in furtherance of the applicable duties. This burden is impossible for Mr. Smith to achieve.

50) At the same time that Mr. Smith was being handsomely compensated by EmCyte and Gian Biologics, and while owing fiduciary duties to EmCyte, Mr. Smith embarked on a course of performance designed to benefit himself by engaging in secret business enterprises. Not only did he surreptitiously engage in these activities, but in order to benefit himself, he caused damage to EmCyte and put its entire business at risk. Since he kept these activities hidden from EmCyte and Mr. Pennie, and because he is stonewalling EmCyte's attempts to obtain discovery from the entities which Mr. Smith owns or controls, it is impossible to know of all of the business activities in which he has been, or is currently engaged.

51) Mr. Smith's wrongful, secret dealings that are known are sufficient to establish that he has breached, and continues to breach his duties under the Shareholders' Agreement and the Florida Statutes. Based upon these breaches, Mr. Smith cannot meet his burdens of proving good faith, or good cause. While he had free and unfettered access to all of EmCyte's information and records, he engaged in the clandestine activities that have only recently been discovered. If he is permitted to re-gain access to the business records and information of EmCyte, then there is no doubt that he will continue his wrongful conduct to the detriment of EmCyte.

52) Mr. Smith is in willful violation of one of the cardinal principles of law relating to officers, directors and corporations. As stated in the case of *United States v. De La Mata*, 266 F. 3d 1275 (11<sup>th</sup> Cir. 2001), “[I]t is a cardinal principle that an officer or director of a corporation will not be permitted to make out of his official position an undisclosed profit adverse to the corporation’s interests and because of their fiduciary character will not be permitted to acquire for their own advantage interests adverse or antagonistic to the corporation. See *Independent Optical Co. v. Elmore*, 289 So. 2d 24, 25 (Fla. 2<sup>nd</sup> DCA 1974). Indeed, Florida law continues to recognize official liability for misappropriation of a corporate opportunity. See *Florida Discount Properties v. Windermere Condo., Inc.*, 786 So. 2d 1271, 1272 (Fla. 4<sup>th</sup> DCA 2001); see also *Cohen v. Hattaway*, 595 So. 2d at 108.”

53) Stated in equally strong terms, the court in the case of *Tinwood N.V. v. Sun Banks, Inc.*, 570 So. 2d 955 (Fla. 5<sup>th</sup> DCA 1990) characterized the fiduciary duty owed to a corporation by an officer or director to be of “. . . the utmost good faith and to make full disclosure of all facts within his knowledge pertaining to the transaction.” Further, that “[I]n the absence of a showing that he acted with the consent of the shareholders, an officer or director is **precluded from making any secret profit or deriving any personal advantage at the expense of the corporation.**” (Emphasis Added). The penalty for an officer or director who makes a secret profit in contravention of these rules is **disgorgement.** (Emphasis Added). See *Tinwood* at 959, see also *Cohen v. Hattaway*, 595 So. 2d 105 (Fla. 5<sup>th</sup> DCA 1992).

54) As discussed in *Pruyser v. Johnson*, 185 So. 2d 516, 521 (Fla. 2d DCA 1966), an officer holds a fiduciary relationship to a 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.*, 1942, 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.”

55) Acknowledging the unquestionable existence of the fiduciary duties owed by Mr. Smith to EmCyte, together with the absolute, unconditional prohibition against an officer, director or shareholder self-dealing, is critical to these issues which Mr. Smith is presenting to this Court as a “simple” discovery dispute. When Mr. Smith had unfettered access to the confidential, proprietary, trade secret information of EmCyte he made use of such information for his own personal gain, to the detriment of EmCyte and in direct violation of his numerous fiduciary duties. Mr. Smith has continued to engage in these activities since his initiation of this action and there is no reason to believe that someone who has engaged in such wanton disregard of each and every duty owed by him will suddenly and miraculously become pure of intention. EmCyte’s confidential, proprietary, trade secret information must be protected or the company will be severely damaged or destroyed.

**EmCyte confidential, proprietary and trade secret information demanded by Mr. Smith.**

56) Mr. Smith directed his discovery to EmCyte’s confidential, proprietary and trade secret information. The disclosure of such sensitive information to someone who has already knowingly, repeatedly and continuously breached his fiduciary duties for his personal gain to the detriment of EmCyte would be lethal. In recognition of this type of danger, Florida protects trade secret information from discovery or disclosure under circumstances similar to these. Rule 1.280(c)(7) specifically authorizes the issuance of protective orders for trade secret information. A trade secret is defined in Fla. Stat. § 688.002(4) as “. . . information, including a formula,



pattern, compilation, program, device, method, technique, or process that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Mr. Smith admits that he is already in possession of trade secret information of EmCyte and his wrongful use of this information has been demonstrated herein. Interestingly, a “misappropriation” of a trade secret is defined in § 688.002(2) and Mr. Smith’s activities fall squarely within its confines.

57) An additional protection is provided in Florida under the Florida Evidence Code. Section 90.506 provides that “[A] person has a privilege to refuse to disclose, and to prevent other persons from disclosing, a trade secret owned by that person if the allowance of the privilege will not conceal fraud or otherwise work injustice . . . .” There has been no fraud alleged by Mr. Smith and the only injustice here is the injustice that he committed through his ongoing and continuing breaches of his fiduciary duties through his use of EmCyte’s trade secret and otherwise confidential and proprietary information.

58) The discovery information demanded by Mr. Smith constitutes confidential, proprietary and trade secret information of EmCyte. Mr. Smith admits that he is in possession of EmCyte trade secrets and we have demonstrated how he wrongfully used this information already. EmCyte is entitled to be protected from making further disclosures of its confidential trade secret information under Rule 1.280(c)(7), F. R.Civ.Pro. Section 90.506 of the Florida Statutes provides EmCyte with a privilege to refuse to disclose this information. The fact that the disclosure of this information will cause irreparable harm to EmCyte that cannot be remedied on appeal is also a significant consideration in favor of granting EmCyte protection from Mr.

Smith. See *Rare Coin-It v. I.J.E., Inc.*, 625 So. 2d 1277 (Fla. 3d DCA 1993); *Beck v. Dumas*, 709 So. 2d 601 (Fla. 4<sup>th</sup> DCA 1998); *Sea Coast Fire, Inc. v. Triangle Fire, Inc.*, 170 So. 3d 804 (Fla. 3d DCA 2014) (the disclosure of “cat-out-of-the-bag material” information such as trade secrets, can constitute irreparable harm).

59) The scope of Rule 1.280(c)(7), Section 90.506 and § 688.002(4) is broad in terms of protecting information relative to the circumstances of the parties. Items such as customer lists and other proprietary information that is “not readily ascertainable by the public can be a trade secret.” See *Bright House Networks, LLC v. Cassidy*, 129 So. 3d 501, 506 (Fla. 2d DCA 2014); § 688.002(4), Fla. Stat.; See also *Sea Coast Fire, Inc. v. Triangle Fire, Inc.*, 170 So. 3d 804 (Fla. 3d DCA 2014) (trade secrets include confidential business information such as a customer list, when the list is not just a compilation of information readily available to the public, but rather acquired or compiled through the owner’s industry).

60) Given these standards relating to confidential, proprietary and trade secret information, along with Mr. Smith’s acknowledgement that he possesses trade secret information, the burden is on Mr. Smith to prove a reasonable necessity for the requested material. Mr. Smith has wholly failed to establish a reasonable necessity. Mr. Smith’s knowing abuse of EmCyte’s trade secret information, both before and after his commencement of this litigation, increases the likelihood that irreparable harm will be caused to EmCyte, so the burden of proof on Mr. Smith must be strictly enforced. See *Beck* at 603; *Sea Coast* at 809.

**Mr. Smith’s Counts are insufficient to support his demand for trade secret information.**

61) Further support for EmCyte’s request for a protective order results from reviewing the nature and context of Mr. Smith’s Amended Petition causes of action. The Amended Petition alleges three (3) counts against EmCyte and two (2) counts against Mr.

Pennie. The first count against EmCyte is a demand for full access to EmCyte's financial books and records that is based on Mr. Smith's capacity as a director and shareholder under Fla. Stat. § 607.1602(2) and § 607.1605 (the "Records Count"). Count IV seeks to institute a judicial dissolution against EmCyte pursuant to Fla. Stat. § 607.1430 (the "Dissolution Count"). Mr. Smith's final count is Count V seeking injunctive relief against EmCyte (the "Injunction Count").

62) As to the Mr. Smith's counts against EmCyte, he will not be prejudiced if he is required to establish an entitlement under those counts before any further documents, records or other confidential information must be produced by EmCyte. For the reasons which will be discussed herein, Mr. Smith will be unable to establish claims against EmCyte under the counts as alleged.

63) First and foremost, Mr. Smith's undisputable breaches of his fiduciary duties to EmCyte constitute a "first breach" thereby relieving EmCyte of any further obligations that it might have otherwise owed to Mr. Smith in his capacity as an officer, director or shareholder.

64) Additionally, as to the Records Count, EmCyte already produced the records identified in § 607.1602 in a gesture of good faith and cooperation, but while reserving its rights. However, as to the remaining provisions of § 607.1602, the burden is on Mr. Smith to prove his good faith and valid purpose. Given his record of ongoing and continuing breaches of his fiduciary duties, this will be an impossible hurdle for him to clear.

65) The Dissolution Count and the Injunction Count are based upon similar, although flawed grounds. In support of the Dissolution Request, Mr. Smith relies exclusively on § 607.1430. He alleges that:

- a. The ultra vires acts of Pennie are causing material and irreparable injury to EmCyte; and

- b. Furthermore, Smith and Pennie, as the only two directors and shareholders of EmCyte Corp. are effectively deadlocked in the management of the corporation.

As established herein, both of these assertions are false. However, even if accepted as true for purposes of these pleadings, they are insufficient grounds to trigger the judicial dissolution provisions of § 607.1430.

66) The Shareholders' Agreement is binding upon the parties and controlling on the issue of dissolution. Mr. Smith has neither alleged nor established a basis under the Shareholders' Agreement to cause a judicial dissolution. He has also failed to establish grounds for circumventing the Shareholders' Agreement on this point. Moreover, the alleged "ultra vires acts of Pennie" that Mr. Smith complains of are the types of acts which were expressly rejected as being the premise for a dissolution under §9.3 of the Shareholders' Agreement.

67) The Shareholders' Agreement also sets forth the rights of the parties as to voting. With Mr. Pennie holding 51% of the EmCyte voting rights and Mr. Smith holding 49%, it is impossible for the voting, or management of EmCyte, to be "deadlocked." Moreover, Mr. Pennie's authority as the Chairman of EmCyte is extensive. Given the defined magnitude of the rights of the Chairman to act solely and exclusively on virtually every conceivable issue that EmCyte might face, the management of EmCyte, again, cannot be "deadlocked." It is also necessary to point out that the purported "ultra vires acts of Pennie" identified in paragraph 59(a) – (p) of the Amended Petition are actions, if accepted as true for purposes of these pleadings, that Mr. Pennie was authorized to take in his capacity as the Chairman and holder of 51% of the voting rights in EmCyte. Finally, there is no basis for the bare bones allegations of Mr. Smith that the alleged ultra vires acts of Pennie are causing EmCyte "material and irreparable injury." Mere recitations of language from the statute without factual basis or support are insufficient.

68) While Mr. Smith's counts are unsustainable under the terms and conditions of the Shareholders' Agreement, they also fail to meet the statutory requirements of § 607.1430(3)(a) and (b). The first prong of § 607.1430(3) is "(a) The corporate assets are being misapplied or wasted, causing material injury to the corporation." The Amended Petition contains no evidence whatsoever that EmCyte's assets are being misapplied or wasted. The only misapplication or waste of EmCyte's assets has been at the hands of Mr. Smith. The second prong of § 607.1430(3) is "(b) The directors or those in control of the corporation have acted, are acting, or are reasonably expected to act in a manner that is **illegal or fraudulent**." Even if Mr. Smith's allegations are taken as being true, the alleged ultra vires acts of Mr. Pennie do not rise to the level of being "illegal or fraudulent" especially in light of the express authority granted to him as Chairman of EmCyte, along with his voting majority.

2) **Emery Smith's Objection to Non-Party Discovery Sought by EmCyte**

69) Mr. Smith's objections to EmCyte conducting non-party discovery as to entities in which EmCyte has a good faith belief that Mr. Smith either owns an interest, or has a profit interest in, is an extension of his ongoing and continuing breaches of his fiduciary duties. Unbeknownst to EmCyte and Mr. Pennie, Mr. Smith has constructed an entire shadow business enterprise and EmCyte will be unable to fully recover for the ongoing and continuing damages being caused to it until all information relating to Mr. Smith's business transactions are disclosed. Therefore, this Court should overrule Mr. Smith's objections and allow EmCyte to conduct discovery of the non-parties: A2M Bio, Inc., CELLF Cure, Inc., Cytonics Biotech, LLC, Cytonics Corporation, and Ultra Intelligence. Mr. Smith was untimely in objecting to EmCyte's requested discovery of LifeForm and LifeForm has voluntarily produced certain records.

**3) Emery Smith Wrongful Notice of Production from Non-Parties in Contravention of Signed Settlement Agreement Documents.**

70) EmCyte's objection to Mr. Smith's Notices of Production from Non-Parties should be sustained as to Perfusion Partners & Associates, Inc. ("PPAI") and Gian Biologics, LLC. The prejudice and potential, irreversible damage to EmCyte outweighs Mr. Smith's discovery needs as to Gian Biologics and PPAI. Further, PPAI was the subject of a Mutual Release and Settlement Agreement, that was executed by and is binding upon Mr. Smith, and allowing discovery will disrupt the terms and conditions of that Mutual Release if he is allowed to proceed. See attached Exhibit "V." Also, PPAI holds no relevant information as to this proceeding. The EmCyte Group was formed but never operated, but EmCyte agreed at the December 21, 2015 hearing to produce whatever records are available.

WHEREFORE, EmCyte seeks an order of this Court: 1) granting its Motion for a Protective Order concerning Mr. Smith's First Request for Production of Documents; 2) Denying Mr. Smith's Motion to Compel; 3) Granting EmCyte's Notice of Production from Non-Parties; 4) Denying Mr. Smith's Notice of Production from Non-Parties and for such other relief as this Court may equitably allow.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing, along with a copy of

EmCyte's Exhibits and Case Law Authorities, has been e-mailed to Magistrate Bocelli and notice will be served electronically to all counsel of record on this 8<sup>th</sup> day of January, 2016.

Respectfully Submitted,

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