

PATENT ASSIGNMENT COVER SHEET

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Stylesheet Version v1.2

EPAS ID: PAT7955813

SUBMISSION TYPE:	RESUBMISSION
NATURE OF CONVEYANCE:	ASSIGNMENT
RESUBMIT DOCUMENT ID:	507794992

CONVEYING PARTY DATA

Name	Execution Date
JOSEPH FAYAD	12/07/2022

RECEIVING PARTY DATA

Name:	NEW SCIENCE HOLDINGS LLC
Street Address:	1604 HIDDEN SPRING DR.
Internal Address:	C/O J. SNYDER
City:	LAS VEGAS
State/Country:	NEVADA
Postal Code:	89117

PROPERTY NUMBERS Total: 22

Property Type	Number
Application Number:	61190818
Application Number:	61309991
Application Number:	12932633
Application Number:	13460753
Application Number:	14002642
Application Number:	14354744
Application Number:	14759283
Application Number:	15151358
Application Number:	15151400
Application Number:	15407394
Application Number:	15623734
Application Number:	15833360
Application Number:	15162941
Application Number:	15601497
Application Number:	15624275
Application Number:	16059199
Application Number:	16133322
Application Number:	16167892

PATENT

Property Type	Number
Application Number:	16285885
Application Number:	16369994
Application Number:	16598302
Application Number:	16686803

CORRESPONDENCE DATA

Fax Number: (844)670-6009

Correspondence will be sent to the e-mail address first; if that is unsuccessful, it will be sent using a fax number, if provided; if that is unsuccessful, it will be sent via US Mail.

Phone: 2484337200

Email: MMcGinnis@dickinson-wright.com

Correspondent Name: DICKINSON WRIGHT PLLC

Address Line 1: 2600 W. BIG BEAVER RD.

Address Line 2: SUITE 300

Address Line 4: TROY, MICHIGAN 48084-3312

ATTORNEY DOCKET NUMBER:	104004-50000
NAME OF SUBMITTER:	WILLIAM J. HURLES
SIGNATURE:	/William J. Hurles/
DATE SIGNED:	05/16/2023

Total Attachments: 53

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PATENT QUITCLAIM ASSIGNMENT

WHEREAS, Joseph Fayad, an individual residing in Clark County, Nevada, desires to quitclaim and assign any rights he may have in the patents and patent applications identified in Schedule A hereto to New Science Holdings, LLC; and

WHEREAS, Joseph Fayad is a 100% owner of Dalchris, LLC, a Nevada limited liability company;

WHEREAS, Dalchris, LLC desires to quitclaim and assign any rights it may have in the patents and patent applications identified in Schedule A hereto to New Science Holdings, LLC;

NOW, THEREFORE, for good and valuable consideration, receipt of which is hereby acknowledged, Joseph Fayad, and Dalchris, LLC, do hereby quitclaim, assign, grant, transfer, and otherwise convey to New Science Holdings, LLC, its successors and assigns, any and all rights, title and interest they may have in and to the patents and patent applications identified in Schedule A hereto.

JOSEPH FAYAD

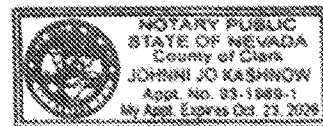
By: Joseph Fayad
Joseph Fayad

State of Nevada
County of Clark

This instrument was acknowledged before me on this 7th day of December, 2022, by Joseph Fayad, who acknowledged his signature on this instrument and that he executed this instrument as his free act and deed.

John J. Kashnow
Signature of Notary

[Seal]



DALCHRIS, LLC.

By: Joseph Fayad

Name: Joseph Fayad

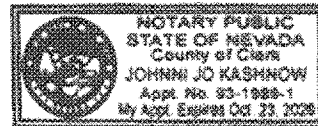
Title: Member

State of Nevada
County of Clark

This instrument was acknowledged before me on this 17th day of December, 2022, by Joseph Fayad, who acknowledged his signature on this instrument on behalf of Dalchris, LLC and that he executed this instrument as his free act and deed.

John J. Kashnow
Signature of Notary

[Seal]



Signature page to Patent Quitclaim Assignment

Accepted By:

NEW SCIENCE HOLDINGS, LLC

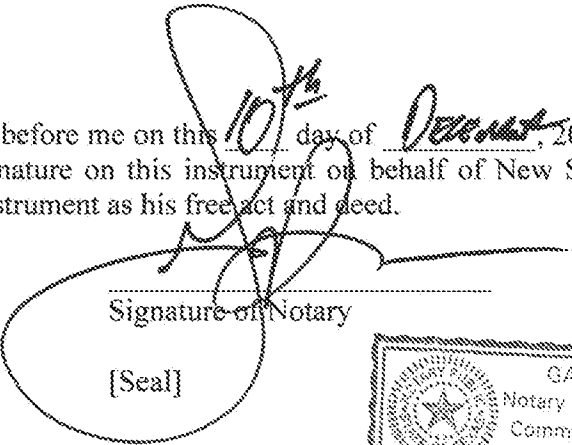
By: 

Name: Aaron Snyder

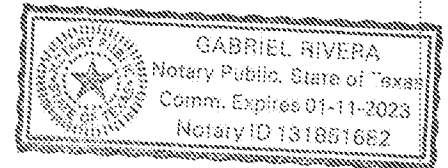
Title: Manager, WLNS Investments, LLC

~~Texas~~
State of ~~Nevada~~
County of ~~Clark~~ ~~Texas~~

This instrument was acknowledged before me on this 10th day of December, 2022, by Aaron Snyder, who acknowledged his signature on this instrument on behalf of New Science Holdings, LLC and that he executed this instrument as his free act and deed.


Signature of Notary

[Seal]



Schedule A

To

Patent Quitclaim Assignment

<u>Country</u>	<u>Application Number</u>	<u>Application Date</u>	<u>Pat. Number</u>	<u>Issue Date</u>
United States	61/190,818	09/03/2008	--	--
United States	61/309,991	03/03/2010	--	--
United States	12/932,633	03/02/2011	9,757,346	08/23/2017
United States	13/460,753	04/30/2012		
United States	14/002,642	08/30/2013	9,370,528	06/01/2016
United States	14/354,744	04/28/2014	--	--
United States	14/759,283	01/08/2014	--	--
United States	15/151,358	05/10/2016	--	--
United States	15/151,400	05/10/2016	--	--
United States	15/407,394	01/17/2017	--	--
United States	15/623,734	06/15/2017	--	--
United States	15/833,360	12/06/2017	--	--
United States	15/162,941	05/24/2016	9,730,951	07/26/2017
United States	15/601,497	05/22/2017	--	--
United States	15/624,275	06/15/2017	10,245,277	03/12/2017
United States	16/059,199	08/09/2018	--	--
United States	16/133,322	09/17/2018	10,624,913	04/21/2020
United States	16/167,892	10/23/2018	--	--
United States	16/285,885			
United States	16/369,994			
United States	16/598,302			
United States	16/686,803			
PCT	PCT/US2009/005016	09/02/2009		
PCT	PCT/US2012/026561	02/24/2012		
PCT	PCT/US2012/062306	10/26/2012		
PCT	PCT/US2014/010617	01/8/2014		
PCT	PCT/US2015/040879	07/17/2015		
PCT	PCT/IB2017/000780	05/22/2017		
Canada	2897448	07/7/2015		
Canada	2955425	01/17/2017		
EP	12752890.9	02/24/2012		
EP	12844463.5	10/26/2012		
EP	14737622.2	01/8/2014		
EP	15822742.1	07/17/2015		
Japan	20130556750	02/24/2012		
Japan	20170502821	07/17/2015		
Japan	20170228965	11/29/2017		

Schedule A to Patent Quitclaim Assignment

<u>Country</u>	<u>Application Number</u>	<u>Application Date</u>	<u>Pat. Number</u>	<u>Issue Date</u>
Japan	20190033502	02/27/2019		
China	20128021792	02/24/2012		
China	201910281848	02/24/2012		
China	104053450	02/24/2012		
China	201910530744	10/26/2012		
China	20158050102	07/17/2015		
Korea	20137026087	02/24/2012		
Korea	20187030127	02/24/2012		
Korea	20140093963	10/26/2012		
Korea	20177004581	07/17/2015		
Korea	20197025029	08/26/2019		
Korea	20207000460	01/07/2020		
India	2014CHENP3869	05/22/2014		
Thailand	1301004872	02/24/2012		
Russia	2017105150	07/17/2015		
Eurasia	20130091262	02/24/2012		
Israel	20130228259	02/24/2012		
Israel	250170	07/17/2015		
Australia	20120223528	02/24/2012		
Australia	2014205553	01/08/2014		
Australia	20150289511	07/17/2015		
Australia	20170202713	04/25/2017		
Australia	2018256656	11/02/2018		
Australia	2019201917	03/20/2019		
Mexico	20140004948	10/26/2012		
Brazil	20131122391	02/24/2012		
Brazil	20141110049	10/26/2012		

4858-5295-4176, v. 1

Schedule A to Patent Quitclaim Assignment



NJUD
Rory T. Kay (NSBN 12416)
Kiley A. Harrison (NSBN 16092)
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Telephone: (702) 873-4100
rkay@mcdonaldcarano.com
kharrison@mcdonaldcarano.com

*Attorneys for Plaintiff, WLNS Investments, LLC,
individually and derivatively on behalf of New
Science Holdings, LLC*

DISTRICT COURT
CLARK COUNTY, NEVADA

WLNS INVESTMENTS, LLC, individually and
derivatively on behalf of NEW SCIENCE
HOLDINGS, LLC,

Plaintiff,

vs.

JOSEPH FAYAD, an individual; DALCHRIS,
LLC, a Nevada limited liability company;
ALEXANDRE FAYAD, an individual;
DESERT SUPPLEMENTS, LLC, a Nevada
limited liability company; and DOES I through
X, and ROE CORPORATIONS I through X,

Defendants.

NEW SCIENCE HOLDINGS, LLC,

Nominal Defendant.

Case No.: A-20-813011-B
Dept. No.: XXVII

**NOTICE OF ENTRY OF STIPULATED
JUDGMENT ON FIRST CAUSE OF
ACTION FOR DECLARATORY
RELIEF BETWEEN PLAINTIFF
WLNS INVESTMENTS, LLC AND
DEFENDANTS JOSEPH FAYAD
AND DALCHRIS, LLC**

PLEASE TAKE NOTICE that a **STIPULATED JUDGMENT ON FIRST CAUSE OF
ACTION FOR DECLARATORY RELIEF BETWEEN PLAINTIFF WLNS**

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PATENT

REEL: 063661 FRAME: 0729

1 **INVESTMENTS, LLC AND DEFENDANTS JOSEPH FAYAD AND DALCHRIS, LLC**
2 was entered on the 9th day of December, 2022, a copy of which is attached hereto.

3 DATED this 9th day of December, 2022.

4 McDONALD CARANO LLP

5
6 By: /s/ Rory T. Kay
7 Rory T. Kay (NSBN 12416)
8 Kiley A. Harrison (NSBN 16092)
9 2300 West Sahara Avenue, Suite 1200
10 Las Vegas, Nevada 89102
11 rkay@mcdonaldcarano.com
12 kharrison@mcdonaldcarano.com

13
14 *Attorneys for Plaintiff, WLNS Investments, LLC,*
15 *individually and derivatively on behalf of New*
16 *Science Holdings, LLC*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on or about December 9, 2022, a copy of the foregoing **NOTICE OF ENTRY OF STIPULATED JUDGMENT ON FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF BETWEEN PLAINTIFF WLNS INVESTMENTS, LLC AND DEFENDANTS JOSEPH FAYAD AND DALCHRIS, LLC** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ CaraMia Gerard
An employee of McDonald Carano LLP

Heaven S. Hemin
CLERK OF THE COURT

STPJ

Rory T. Kay (NSBN 12416)
Kiley A. Harrison (NSBN 16092)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
rkay@mcdonaldcarano.com
kharrison@mcdonaldcarano.com

*Attorneys for Plaintiff, WLNS Investments, LLC,
individually and derivatively on behalf of New
Science Holdings, LLC*

DISTRICT COURT

CLARK COUNTY, NEVADA

WLNS INVESTMENTS, LLC, individually and
derivatively on behalf of NEW SCIENCE
HOLDINGS, LLC,

Plaintiff,

vs.

JOSEPH FAYAD, an individual; DALCHRIS,
LLC, a Nevada limited liability company;
ALEXANDRE FAYAD, an individual;
DESERT SUPPLEMENTS, LLC, a Nevada
limited liability company; and DOES I through
X, and ROE CORPORATIONS I through X,

Defendants.

NEW SCIENCE HOLDINGS, LLC,

Nominal Defendant.

Case No.: A-20-813011-B
Dept. No.: XXVII

**STIPULATED JUDGMENT ON
FIRST CAUSE OF ACTION FOR
DECLARATORY RELIEF BETWEEN
PLAINTIFF WLNS INVESTMENTS,
LLC AND DEFENDANTS JOSEPH
FAYAD AND DALCHRIS, LLC**

THIS MATTER (the "Civil Action") having been commenced by plaintiff WLNS Investments, LLC ("WLNS Investments"), directly and derivatively on behalf of nominal defendant New Science Holdings, LLC ("New Science") (collectively "Plaintiffs") by filing a Verified Complaint on March 30, 2020 and a First Amended Verified Complaint on November 11, 2020, and a Third Party Complaint by Defendants Dr. Joseph M. Fayad ("Dr. Fayad") and Dalchris, LLC (collectively "Joseph Defendants") filed November 24, 2020.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

PATENT

REEL: 063661 FRAME: 0732

1 4. Three other contracts filled out the contours of Dr. Fayad's contractual
2 relationship with New Science and his business relationship with WLNS Investments related to
3 the same. These are:

4 (a) a September 20, 2008, exclusive licensing agreement by which New
5 Science licensed the Intellectual Property to WLNS, LLC;

6 (b) a February 22, 2009 Assignment agreement by which Dr. Fayad assigned
7 all rights to U.S. Patent Application No. 61/190, 818 and the inventions
8 disclosed therein to New Science; and

9 (c) an April 14, 2010 Assignment agreement by which Dr. Fayad assigned all
10 rights to U.S. Patent Application No. 61/309,991 and the inventions
11 disclosed therein to New Science.

12 5. WLNS Investments has brought this action seeking a declaration of ownership of
13 the Intellectual Property in New Science, which the parties agree includes various patent
14 applications and patents identified in **Exhibit A** hereto, and which is collectively referred to
15 herein as the "At Issue IP."

16 6. Except with respect to the development of future new patents and intellectual
17 property that do not fall within the scope of the Intellectual Property Assignment Agreement
18 dated August 28, 2008, the Assignment dated February 22, 2009, and the Assignment dated April
19 14, 2010, Dr. Fayad and Dalchris agree that all other theories, ideas, invented products, and other
20 proprietary intellectual property that Dr. Fayad and/or Dalchris created related to the At Issue IP
21 belong to New Science under the Agreements' definition of "Intellectual Property". Nothing
22 contained herein prevents Dr. Fayad or Dalchris from working in the future or developing new
23 patents and intellectual property that do not fall within the scope of the above-mentioned
24 assignment agreements between Dr. Fayad and New Science.

25 7. In a prior litigation between Dr. Jerome Schentag and TheraBrake Inc. against
26 Dr. Fayad and Volant Holdings GmbH, entitled *Schentag v. Nebgen*, Civil Action No. 17 Civ
27 8734 (GHW) in the U.S. District Court for the Southern District of New York, by a Ruling dated
28 January 9, 2020, the Southern District of New York concluded that "Dr. Fayad never retrieved

1 his intellectual property from [New Science] and the Snyders, and therefore never validly
2 assigned it to TheraBrake.” Without admitting any liability or fault, Dr. Fayad and Dalchris agree

3 8. that they are bound to and estopped from contradicting the findings and judgment
4 of the Southern District of New York in Civil Action No. 17 Civ 8734 (GHW).

5 9. Joseph Defendants stipulate and agree that the At Issue IP created or invented by
6 the Joseph Defendants belongs to New Science under the Intellectual Property Assignment
7 Agreement dated August 28, 2008, the Assignment dated February 22, 2009, and the Assignment
8 dated April 14, 2010.

9 10. Joseph Defendants stipulate and agree that neither Joseph Defendants nor any
10 other party claiming rights by virtue of assignment from Joseph Defendants have any rights to
11 the At Issue IP.

12 11. As a result, the parties stipulate to the Court entering judgment in WLNS
13 Investments’ favor on WLNS Investments’ first cause of action for declaratory relief.

14 12. The parties anticipate addressing the other claims and defenses in this Civil
15 Action by separate stipulation and order.

16 Dated December 9, 2022.

Dated December 9, 2022.

17 McDONALD CARANO LLP

LEX TECNICA LTD.

18 By: /s/ Rory T. Kay

By: /s/ Adam R. Knecht

19 Rory T. Kay (NSBN 12416)
20 Kiley A. Harrison (NSBN 16092)
21 2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102

Adam R. Knecht (NSBN 13166)
Vincent Garrido (NSBN 15918)
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145

22 *Attorneys for Plaintiff WLNS*
23 *Investments, LLC, individually and*
24 *derivatively on behalf of New Science*
Holdings, LLC

Attorneys for Defendants Joseph Fayad,
Dalchris, LLC, Alexandre Fayad, and
Desert Supplements, LLC

25 ///

26 ///

27 ///

28 ///

ORDER

BASED ON THE FOREGOING STIPULATION OF THE PARTIES, IT IS HEREBY ORDERED AND ADJUDGED, and made effective as of this 9th day of December, 2022 ("Effective Date") as follows:

1. The Court has personal jurisdiction over Defendants Dr. Joseph M. Fayad and Dalchris, LLC ("Joseph Defendants").

2. Judgment is entered in favor of plaintiff WLNS Investments, LLC ("WLNS Investments") against Dr. Fayad and Dalchris, LLC on the First Cause of Action (Declaratory Relief – NRS Chapter 30) of the First Amended Verified Complaint. New Science Holdings, LLC ("New Science") is the owner of the At Issue IP identified in the parties' stipulation and as defined in **Exhibit A** to this Stipulated Judgment.

3. Neither of the Joseph Defendants nor any other party claiming rights by virtue of assignment from Joseph Defendants have any rights to the At Issue IP. Any purported transfer of the At Issue IP to any other party, including Therabrake, Inc. or Volant Holdings GmbH, is invalid and of no force or effect.

4. Each party will bear its own attorney fees and costs as to the First Cause of Action (Declaratory Relief – NRS Chapter 30).

5. The parties are instructed to dispose with their other claims and defenses through separate stipulation and order.

IT IS SO ORDERED.

Dated this 9th day of December, 2022

Nancy L Alf
MA

Submitted by:
McDONALD CARANO LLP

5CB 5D4 8422 6666
Nancy Alf
District Court Judge

By: /s/ Rory T. Kay
Rory T. Kay (NSBN 12416)
Kiley A. Harrison (NSBN 16092)
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
*Attorneys for Plaintiff, WLNS Investments, LLC,
individually and derivatively on behalf of New
Science Holdings, LLC*

EXHIBIT A TO STIPULATED JUDGMENT**Patent applications and Patents Included in the At Issue IP**

<u>Country</u>	<u>Application Number</u>	<u>Application Date</u>	<u>Pat. Number</u>	<u>Issue Date</u>
United States	61/190,818	09/03/2008	--	--
United States	61/309,991	03/03/2010	--	--
United States	12/932,633	03/02/2011	9,757,346	08/23/2017
United States	13/460,753	04/30/2012		
United States	14/002,642	08/30/2013	9,370,528	06/01/2016
United States	14/354,744	04/28/2014	--	--
United States	14/759,283	01/08/2014	--	--
United States	15/151,358	05/10/2016	--	--
United States	15/151,400	05/10/2016	--	--
United States	15/407,394	01/17/2017	--	--
United States	15/623,734	06/15/2017	--	--
United States	15/833,360	12/06/2017	--	--
United States	15/162,941	05/24/2016	9,730,951	07/26/2017
United States	15/601,497	05/22/2017	--	--
United States	15/624,275	06/15/2017	10,245,277	03/12/2017
United States	16/059,199	08/09/2018	--	--
United States	16/133,322	09/17/2018	10,624,913	04/21/2020
United States	16/167,892	10/23/2018	--	--
United States	16/285,885			
United States	16/369,994			
United States	16/598,302			
United States	16/686,803			
PCT	PCT/US2009/005016	09/02/2009		
PCT	PCT/US2012/026561	02/24/2012		
PCT	PCT/US2012/062306	10/26/2012		
PCT	PCT/US2014/010617	01/8/2014		
PCT	PCT/US2015/040879	07/17/2015		
PCT	PCT/IB2017/000780	05/22/2017		
Canada	2897448	07/7/2015		
Canada	2955425	01/17.2017		
EP	12752890.9	02/24/2012		
EP	12844463.5	10/26/2012		
EP	14737622.2	01/8/2014		
EP	15822742.1	07/17/2015		
Japan	20130556750	02/24/2012		
Japan	20170502821	07/17/2015		
Japan	20170228965	11/29/2017		
Japan	20190033502	02/27/2019		
China	20128021792	02/24/2012		
China	201910281848	02/24/2012		
China	104053450	02/24/2012		
China	201910530744	10/26/2012		

<u>Country</u>	<u>Application Number</u>	<u>Application Date</u>	<u>Pat. Number</u>	<u>Issue Date</u>
China	20158050102	07/17/2015		
Korea	20137026087	02/24/2012		
Korea	20187030127	02/24/2012		
Korea	20140093963	10/26/2012		
Korea	20177004581	07/17/2015		
Korea	20197025029	08/26/2019		
Korea	20207000460	01/07/2020		
India	2014CHENP3869	05/22/2014		
Thailand	1301004872	02/24/2012		
Russia	2017105150	07/17/2015		
Eurasia	20130091262	02/24/2012		
Israel	20130228259	02/24/2012		
Israel	250170	07/17/2015		
Australia	20120223528	02/24/2012		
Australia	2014205553	01/08/2014		
Australia	20150289511	07/17/2015		
Australia	20170202713	04/25/2017		
Australia	2018256656	11/02/2018		
Australia	2019201917	03/20/2019		
Mexico	20140004948	10/26/2012		
Brazil	20131122391	02/24/2012		
Brazil	20141110049	10/26/2012		

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 WLNS Investments, LLC,
7 Plaintiff(s)

8 vs.

9 Joseph Fayad, Defendant(s)

CASE NO: A-20-813011-B

DEPT. NO. Department 27

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Stipulated Judgment was served via the court's electronic eFile system
14 to all recipients registered for e-Service on the above entitled case as listed below:

15 Service Date: 12/9/2022

16 CaraMia Gerard cgerard@mcdonaldcarano.com

17 Brian Grubb bgrubb@mcdonaldcarano.com

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26 Claudia Morrill cam@morrislawgroup.com

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 JEROME SCHENTAG,

4 Plaintiff,

5 v.

17 Civ. 8734 (GHW)

6 GEORG NEBGEN, et al,

7 Defendants.

Decision

8 -----x
9 New York, N.Y.
December 17, 2019
9:30 a.m.

10 Before:

11 HON. GREGORY H. WOODS,

12 District Judge
13

14 APPEARANCES

15 ROSENBERG FELDMAN SMITH LLP
Attorneys for Plaintiff
16 BY: MICHAEL HOWARD SMITH
RICHARD BRUCE FELDMAN
17

18 SCHLAM STONE & DOLAN LLP
Attorneys for Defendants
19 BY: RICHARD HENRY DOLAN
THOMAS AQUINAS KISSANE
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1 THE COURT: This is Judge Woods.

2 Do I have counsel for plaintiff on the line?

3 MR. SMITH: Yes, your Honor. You have Michael Smith
4 and Richard Feldman.

5 THE COURT: Good. Thank you very much.

6 Do I also have counsel for defendants on the line?

7 MR. DOLAN: Yes, your Honor.

8 Good morning. It's Richard Dolan and Tom Kissane.

9 THE COURT: Great. Thank you very much.

10 So, first, thank you very much for joining this
11 teleconference. Thank you for your flexibility in rescheduling
12 this to take place today. I had something arise that caused me
13 to postpone this conference, so I appreciate your flexibility.

14 Let me tell you what I'd like to accomplish here. I
15 have reviewed the parties' submissions with respect to claim
16 five, as designated in the joint pretrial order at Docket No.
17 169. And I'm ready to issue my decision. My plan is to do so
18 orally, as permitted by Federal Rule of Civil Procedure 52. As
19 a result, my request would be that the parties place your
20 phones on mute while I deliver this decision. Please let me
21 know if at any point during this call you have any difficulty
22 hearing me. Let me apologize in advance. This is a relatively
23 lengthy decision, so, of course, the record will be available
24 to you if you do not all choose to sit through the entire
25 recitation of it.

1 So with that, counsel, can I ask you to please place
2 your phones on mute while I deliver my decision.

3 As a brief overview -- Plaintiffs Dr. Jerome Schentag
4 and TheraBrake filed this against Defendants Joseph M. Fayad
5 and Volant Holdings GmbH ("Volant"), alleging a number of
6 claims, many of which were dismissed after summary judgment or
7 were withdrawn by the parties. See Joint Pretrial Order Dkt.
8 No. 139. Counterclaim Plaintiffs Dr. Georg Nebgen and
9 Dr. Parviz Ghahramani, in turn, also alleged several claims
10 against Dr. Schentag, many of which were, again, withdrawn
11 before trial. *Id.* From November 4, 2019 to November 13, 2019,
12 I held a trial on the remaining claims. Plaintiffs' Claims 1,
13 2, 4 and 5 were tried to the Court, while Claim 3 and
14 Counterclaim Plaintiffs Counterclaim A were tried to the jury.
15 For Claims 1 and 2, the Court sought an advisory verdict from
16 the jury. After Plaintiffs rested, I granted Defendants'
17 motion for judgment under Federal Rule of Civil Procedure 50 on
18 Count 3. The jury returned an advisory verdict in favor of
19 Defendant Fayad on Claims 1 and 2, and found in favor of
20 Counterclaim Defendants on Counterclaim A. After trial, the
21 parties stipulated on the record that they would accept the
22 jury's verdict with respect to Claims 1 and 2, and requested
23 that the Court conduct no independent fact-finding or
24 evaluation of these claims. Plaintiffs also withdrew Claim 4,
25 leaving the Court to decide only Claim 5 -- Plaintiff

1 TheraBrake's claim against Defendant Volant for breach of the
2 Asset Purchase Agreement.

3 Some of the facts I asked the advisory jury to find
4 with respect to Counts 1 and 2 are relevant to the
5 determination I make with respect to Claim 5. "{A} trial court
6 may consult with an advisory jury during a bench trial so long
7 as the court retains the ultimate responsibility for findings
8 of fact and conclusions." *DeFelice v. Am. Int'l Life Assur.*
9 *Co. of New York*, 112 F.3d, 61, 65, (2d Cir. 1997). I have
10 reviewed the testimony and evidence presented at trial, and
11 have made my own findings of fact and conclusions of law.
12 Ultimately, they are consistent with the jury's advisory
13 verdict, and are as follows:

14 II. Findings of fact.

15 a. Doctor Fayad and the Snyders begin working
16 together.

17 Dr. Fayad was born in Beirut and attended medical
18 school at the University of Rome in Italy. Around 1980, he
19 moved to United States to conduct research in artificial
20 pancreases at the University of California, Irvine. after a
21 few months, the program at Irvine lost its funding, so he began
22 working at the State University of New York at Buffalo to
23 complete his residency, fellowship, and additional research in
24 gastroenterology. In 1986, he moved to Las Vegas, where he was
25 a professor at the University of Las Vegas Medical School and

1 maintained a private gastroenterology practice up until he
2 transitioned to serving as the Chief of Gastroenterology in
3 2013 at the Veteran's Hospital in Las Vegas.

4 Dr. Fayad began researching gastrointestinal hormones
5 in 1977. By 2006, he was far enough along in developing a pill
6 that might help stimulate insulin production for his work to
7 pique the curiosity of close friend and businessman, Jerome
8 Snyder. They decided to join hands: Jerome Snyder and his son
9 Aaron Snyder would fund and manage Dr. Fayad's work, and Dr.
10 Fayad would offer up his scientific expertise and research.

11 To that end, the parties signed a contract in August
12 2008. Plaintiff's Exhibit 1. Dr. Fayad agreed to transfer
13 "all of Assignor's right, title, and interest in and to
14 Assignor's intellectual property and all ancillary and
15 derivative rights associated therewith" in return for a
16 50-percent equity interest in New Science Holdings, LLC.
17 ("NSH"). Plaintiff's Exhibit 1, Sections 2.1 to 2.2. That
18 intellectual property included:

19 "Those ideas and discoveries based in the fields of
20 medicine (i.e., diabetes, insulin resistance, pancreatic and
21 liver disease, hormone discoveries), natural sciences, and/or
22 health of Assignor, (i) all of the registered and unregistered
23 patents, patent applications...and related applications,
24 copyrights, (whether registered or unregistered), copyright
25 applications (whether registered or unregistered) trade name,

1 droit moral or moral rights, trade secrets, confidential
2 information, know-how, process, technology, development tool,
3 ideas, concepts, design right, methodology, algorithm or
4 invention, including all improvements, enhancements and
5 additions thereto and modifications or derivations thereof
6 conceived and reduced to practice and related intangible rights
7 developed or created, alone or in concert with others, by
8 Assignor which exists as of the effective date of this
9 Agreement and which is created hereafter, and (ii) any and all
10 rights to use or exploit any of the Intellectual Property
11 referenced above.

12 *Id* at 3. The parties also agreed to jointly
13 capitalize another company, WLNS, LLC ("WLNS"); Aaron Snyder
14 would own a 66 and two-thirds percent equity interest, and Dr.
15 Fayad would own 33 and one-third percent.

16 The parties agreed that this contract would prohibit
17 Dr. Fayad from otherwise assigning this intellectual property
18 to anyone else.

19 "By executing this Agreement, Assignor agrees and
20 acknowledges that he is precluded from selling, assigning,
21 transferring, conveying, delivering, commercializing or
22 bringing to market any of the Intellectual Property. In the
23 event of the foregoing, Assignor shall be in breach of this
24 Agreement and NSH may seek any and all remedies provided by
25 law, including but not limited to, and not to the exclusion of

1 others, causing Assignor to cease and desist from performing
2 the foregoing actions and execute such instruments of transfer
3 and assignment as NSH may require to satisfy the purpose of
4 this Agreement.

5 *Id.* Section 2.3. Furthermore, the agreement
6 specified exactly how Dr. Fayad could terminate it and regain
7 his intellectual property:

8 "Assignor may terminate this Agreement in case after
9 final court order or bankruptcy or insolvency of NSH, or NSH
10 makes a general assignment of substantially all of its assets
11 for the benefit of creditors. In the event of termination of
12 this Agreement, all rights granted to NSH herein shall
13 immediately revert back to Assignor, and Assignor Share shall
14 revert back to NSH."

15 *Id.* Section 5.1. Three other contracts filled out
16 the contours of Dr. Fayad's relationship with the Snyders:

17 (1) a September 20, 2008 exclusive licensing agreement
18 by which NSH licensed the Fayad intellectual property to WLNS,
19 Plaintiff's Exhibit 2; (2), Dr. Fayad's assignment agreement,
20 dated the February 22, 2009, by which he transferred a patent
21 application -- serial number S1/190, 818 -- to NSH, Plaintiff's
22 Exhibit 3; and (3) Dr. Fayad's assignment agreement, dated
23 April 14, 2010, again, assigning another patent application --
24 serial number 61/309,991 -- to NSH, Plaintiff's Exhibit 4,
25 Plaintiff's Exhibits 3 to 4.

1 Dr. Fayad and the Snyders began manufacturing a
2 supplement called "Livea" soon after signing the 2008
3 agreement. Within six months, the company had made \$1.5
4 million off of the Livea sales, a good amount of which were
5 profits. But Dr. Fayad never received any dividends from the
6 company, and within two years, he was told that the company was
7 out of funds and couldn't even afford to continue to produce
8 the product any longer. Aaron Snyder was dubious about the
9 future solvency of the company, claiming that to stay afloat
10 Dr. Fayad would need to redirect his work on Livea into a
11 weight-loss supplement. Deeply passionate about his invention,
12 Dr. Fayad refused.

13 B. Dr. Schentag reconnects with Dr. Fayad and forms
14 TheraBrake.

15 Dr. Schentag received a Ph.D. in pharmacy from the
16 Philadelphia College of Pharmacy in 1975. He then moved to the
17 State University of New York at Buffalo to work as a
18 post-doctoral fellow in clinical pharmacokinetics for a few
19 years before joining the school's faculty. He was an assistant
20 professor at the State University of New York at Buffalo for
21 five years, then was promoted to an associate professor with
22 tenure, and five years later, was granted full professorship.
23 Over the course of his career, he authored hundreds of
24 scientific articles in the literature, five book chapters, and
25 three books. He retired in 2015, and now serves as an emeritus

1 professor.

2 In 1993, Dr. Schentag received a patent for the
3 SmartPill -- a plastic coated pill containing sensors to allow
4 doctors to map a patient's gastrointestinal tract. That patent
5 turned into a company cofounded with the engineer that helped
6 him develop it. For a few years the two sold the pill out of
7 SmartPill Corporation before they were bought by Given Imaging.
8 Given was then acquired by Covidien, which, in turn, was
9 acquired by Medtronic, a global medical device company.

10 In 2009, Dr. Fayad, an old acquaintance from their
11 days at Millard Fillmore Hospital in Buffalo, called
12 Dr. Schentag to discuss one of Dr. Fayad's inventions -- a
13 coated pill that delivers glucose to a certain point in the
14 digestive tract that simulates the ileum brake. Dr. Fayad
15 believed that Dr. Schentag's work on the SmartPill could help
16 with further developing Dr. Fayad's work.

17 Before they could discuss the particularities of Dr.
18 Fayad's invention, Dr. Fayad asked Dr. Schentag to sign a
19 nondisclosure agreement ("NDA"). See Plaintiff's Exhibit 5.
20 In doing so, Dr. Schentag learned that he was signing an NDA
21 with WLNS. Initially he thought nothing of WLNS, assuming that
22 Dr. Fayad had established a corporation with business partners
23 and was simply trying to work through the structure of the
24 organization they'd developed together. It wasn't until after
25 speaking with Dr. Fayad about his invention in more detail that

1 Dr. Schentag learned that Dr. Fayad had actually assigned his
2 patents and patent applications to the company.

3 At the time, Dr. Fayad and the Snyders were working
4 together to sell Dr. Fayad's product online as a nutritional
5 supplement. But Dr. Schentag thought the invention had far
6 more promise as a pharmaceutical. He brought on a post-doc,
7 Dr. Scott Monte, and started brainstorming potential
8 implications that Dr. Fayad's work had in diabetes
9 drug-development.

10 A year passed, and Dr. Fayad's relationship with the
11 Snyders began deteriorating. By 2010, Aaron Snyder had
12 completely taken over his father's share of the business and
13 wanted to redirect Dr. Fayad's research and reduce his shares
14 in NSH. Dr. Fayad was furious and began looking into ways in
15 he could dissolve his relationship with the Snyders --
16 considering everything from buyouts to lawsuits. Trusting his
17 new compatriot, Dr. Fayad forwarded emails he received with
18 advice or Dr. Schentag, seeking his advice.

19 First, in 2010, Dr. Fayad turned to Joe Mugan to help
20 him negotiate with the Snyders. See Plaintiff's Exhibit 6.
21 Aaron Snyder quoted one option floated one option -- Dr. Fayad
22 buying the Snyders' shares in NSH for \$900,000. Plaintiff's
23 Exhibit 7. Dr. Fayad rejected the proposal.

24 Then, in February 2011, Dr. Fayad consulted with an
25 attorney from Greenberg Traurig, LLP, who outlined methods by

1 which Dr. Fayad might retrieve the rights to his intellectual
2 property. Plaintiff's Exhibit 10. But Greenberg Traurig,
3 LLP's strategies were going to be too expensive, and the firm
4 required a \$50,000 retainer that Dr. Fayad could not afford.
5 So Dr. Schentag recommended that Dr. Fayad just "wait for the
6 Snyders to go bankrupt. Saves all the legal fees and you get
7 your patent back." Plaintiff's Exhibit 11.

8 Dr. Fayad next approached Phillip Kantor, who was
9 willing to help Dr. Fayad pro bono and again walk through Dr.
10 Fayad's options for retrieving his intellectual property from
11 NSH. See Defendant's Exhibit 25 at 3-4. Kantor also realized
12 that Dr. Fayad was about to miss the national phase of one of
13 his patent cooperation treaty ("PCT") applications because NSH
14 had not yet, among other things, paid a \$5,000 designation fee.
15 Although Dr. Fayad asked Dr. Schentag to pay the \$5,000 fee, he
16 took no steps to gain ownership over his intellectual property.

17 All in all, over the course of a year, Dr. Fayad
18 consulted with at least three attorneys but never took any
19 affirmative steps to regain his intellectual property in a
20 manner prescribed in the 2008 agreement between Dr. Fayad and
21 the Snyders. Dr. Fayad forwarded all of these emails to Dr.
22 Schentag. Again, Dr. Schentag knew that Dr. Fayad had assigned
23 his intellectual property to NSH and now also knew that Dr.
24 Fayad had taken no steps to recover it. Dr. Schentag even
25 advised Dr. Fayad to abstain from hiring lawyers or otherwise

1 taking the necessary steps to regain his intellectual property
2 because it would be too expensive. All of this evidence -- the
3 multitude of emails Dr. Fayad forwarded Dr. Schentag from
4 attorneys with whom he'd consulted and Dr. Schentag's repeated
5 testimony that he knew that Dr. Fayad had never actively worked
6 to regain title of his intellectual property -- proves that Dr.
7 Fayad never misrepresented the ownership status of his
8 intellectual property to Dr. Schentag. Still, Dr. Schentag
9 submitted a sworn affidavit as part of the plaintiffs'
10 opposition to defendants' motion to dismiss in this case,
11 stating that, to the contrary, "Fayad, had misrepresented to me
12 that he was the inventor of, and had rights to, the Fayad
13 Technology." Dkt. No. 49, paragraph 36. This sworn statement,
14 I find, was a lie.

15 When asked about the statement on cross-examination,
16 Dr. Schentag conceded its falsity, admitting that Dr. Fayad had
17 only represented that he intended to get the technology back.
18 See Trial transcript ("TR.") at 452:2-454:16 ("Q. In
19 particular, I want to start with the second sentence: 'Fayad
20 had misrepresented to me that he was the inventor and had
21 rights to the Fayad technology.' When did Dr. Fayad make a
22 misrepresentation to you about being the inventor of the Fayad
23 technology? A. I guess he didn't.")

24 Similarly, Dr. Schentag's complaint stated that prior
25 to February/March 2011, Dr. Fayad had represented that he owned

1 the "Patent Applications and the 10-gram Glucose Pill."
2 Amended complaint ("AC"), Dkt. No. 63, paragraph 42. Exhibits
3 and testimony at trial also prove this statement false. Now,
4 on direct examination, Dr. Schentag specifically testified that
5 in April 2011, he knew that Dr. Fayad had not regained title to
6 his intellectual property. Tr. 222:7-9; see also Defs. Ex.
7 303 (email dated October 2011 wherein Dr. Schentag asked
8 another lawyer to foreclose on the Snyders in order to wrest
9 away Dr. Fayad's intellectual property), Tr. 343:19 to 344:7
10 ("Q. Did you ever ask Dr. Fayad if there had been a bankruptcy
11 filing? A. He would have told me. He would have been
12 celebrating in the streets of Las Vegas if that happened"), Tr.
13 338:5-17 ("Q. Now, my question to you, sir, is I don't see an
14 email from you to Dr. Fayad where you ever ask Dr. Fayad, what
15 have you done to get the -- these patent rights back from the
16 Snyders? Did you ever write such an email? A. Probably not,
17 because I knew that he hadn't done anything. Q. Okay. A. He
18 told me he hadn't done anything. Q. Okay. A. Why would I
19 bother him about that. Q. When did he tell you that, sir? A.
20 Regularly. Q. Okay. A. He sent me all his lawyer
21 correspondence. After a while, the idea was just to ignore
22 it").

23 After Drs. Fayad and Schentag agreed to work together
24 and Dr. Schentag caused the formation of TheraBrake, Inc. on
25 April 8, 2011, the company was established to hold a suite of

1 patents, solicit funding for, and organize clinical trials of a
2 pharmaceutical iteration of Dr. Fayad's invention -- what the
3 parties were now calling the "Brake technology." Pursuant to
4 his agreement with Dr. Schentag, Dr. Fayad purportedly assigned
5 his entire portfolio of his intellectual property to TheraBrake
6 in August 2013 in return for shares in TheraBrake -- 51 percent
7 remaining with Dr. Schentag, and 49 percent going to Dr. Fayad.
8 Plaintiff's Exhibit 22. The 2013 assignment agreement between
9 Dr. Fayad and TheraBrake stated that:

10 "Whereas, Fayad has invented certain new and useful
11 improvements in the art of inducing satiety and treating
12 non-insulin dependent diabetes mellitus, prediagnostic
13 symptoms, insulin resistance and related disease, states and
14 conditions (the "Controlled Release Dosage Invention");

15 Whereas Fayad has filed to patent protection covering
16 Controlled Release Dosage Invention, including International
17 Patent Application No. PCT/US09/05016 and U.S. patent
18 Application No. 12/932, 633 published as U.S. Pub. No.
19 2011/0268795 (the "Patent Applications");

20 Whereas, Fayad intends to file continuation
21 applications or new patent applications as needed to cover his
22 ongoing discoveries in connection with his Controlled Release
23 Dosage Invention;

24 Whereas, Fayad lacks the time, inclination, experience
25 and resources to exploit the Controlled Release Dosage

1 Invention to its fullest potential;

2 Whereas, Fayad and another individual, Jerome
3 Schentag, formed TheraBrake to exploit the Controlled Release
4 Dosage Invention to its fullest potential;

5 Whereas, Fayad wishes to assign all of his right,
6 title and interest in the Controlled Release Dosage Invention
7 to TheraBrake;

8 Whereas, TheraBrake wishes to accept the assignment of
9 all of Fayad's right, title and interest in the Controlled
10 Release Dosage Invention;

11 Now, therefore, for good and valuable consideration,
12 Fayad, by these presents, does sell and assign and transfer
13 unto TheraBrake the full and exclusive right to the Controlled
14 Release Dosage Invention in the United States, and the entire
15 rights, title and interest in and to any and all patents which
16 may be granted therefor in the United States, including
17 pursuant to the Patent Applications, which are expressly
18 assigned by Fayad to TheraBrake hereunder. Fayad hereby
19 authorizes and requests the director of the U.S. Patent &
20 Trademark Office to issue any patent pursuant to the Controlled
21 Release Dosage Invention and the Patent Applications and to
22 transfer any provisional or non-provisional patent applications
23 for same, to TheraBrake, including the entire right, title and
24 interest in and to the same for its sole use and behoof, and
25 for the use and behoof of its successors and assigns, to the

1 full end of the term for which any such patent may be granted,
2 as fully and entirely as the same would have been held by Fayad
3 had this assignment and sale not been made. This assignment
4 expressly covers all continuation applications and new patent
5 applications filed by Fayad in connection with the Control
6 Release Dosage Invention and the Patent Application at any time
7 in the future...

8 * * *

9 Fayad does further sell, assign and transfer unto
10 TheraBrake the full and exclusive right to the Controlled
11 Release Dosage Invention throughout the world, including
12 pursuant to the Patent Applications and the entire rights,
13 title and interest in and to any and all patents which may be
14 granted therefor anywhere in the world as based on the PCT
15 system or any other treaty rights flowing from the Patent
16 Applications or otherwise..."

17 *Id* at 1-3. Even though Dr. Fayad agreed to assign the
18 exclusive rights to his intellectual property to TheraBrake, he
19 never recovered title from NSH, as required by the 2008
20 agreement. Thus, Dr. Fayad could not validly assign it to
21 TheraBrake in 2013. At best, Dr. Fayad assigned only whatever
22 residual interests that he might have in the intellectual
23 property at 100 percent of zero is, after all, still zero.

24 C. Asset purchase agreement.

25 In 2013, Dr. Schentag and Dr. Nebgen ran into one

1 another at a healthcare conference, and Dr. Schentag told Dr.
2 Nebgen about his work with the Brake technology. Dr. Nebgen
3 was fascinated. The technology was exciting, and while he
4 waited for review and some presentations and background
5 material on the technology, he admitted that his heart...was
6 already in." Tr. 840:16-18.

7 Dr. Nebgen was no stranger to developing and
8 commercializing intellectual property. He had spent years
9 developing biotechnology products for some of the largest
10 pharmaceutical corporations in the world. He also had a
11 masters in business administration, had worked in biotechnology
12 venture capital and had started his own consulting business.
13 So he started looking into potential investors for the
14 technology and floated Dr. Schentag some options for
15 structuring possible licensing deals.

16 Over time, Dr. Nebgen realized that Dr. Fayad was more
17 than just one of Dr. Schentag's colleagues working on the Brake
18 Technology -- he was the inventor. And yet, Dr. Nebgen had
19 been working on structuring deals that wouldn't directly
20 benefit Dr. Fayad at all, just Dr. Schentag. Concerned that
21 investors would find it suspicious if the Brake technology's
22 founder was excluded from deals involving that technology, Dr.
23 Nebgen decided that the three of them should formalize their
24 partnership. Dr. Nebgen joined TheraBrake for a third of the
25 shares of company, rolled up his sleeves and began

1 strengthening the corporation so that it was more attractive to
2 potential investors. He tapped into his professional network,
3 speaking with venture capital firms, investors and
4 high-net-worth friends, and gathered professionals to serve on
5 the company board and advise TheraBrake on regulatory
6 compliance requirements and clinical work.

7 In 2015, Dr. Nebgen asked Dr. Ghahramani to join the
8 other three of them in their business venture. Dr.
9 Ghahramani -- holding two doctorate degrees and two masters
10 degrees -- was what Dr. Nebgen considered the "last jewel
11 {he'd} need to have a good team" and was confident that with
12 Dr. Ghahramani, their work on the Brake technology would
13 finally be successful. Dr. Nebgen had also received a term
14 sheet from a German/Swiss investor who was valuing their work
15 at \$40 million, but who insisted on investing only in a
16 European corporation. So in 2015, TheraBrake sold its patent
17 portfolio to Volant Holdings -- the Swiss corporation that
18 would hold all of the intellectual property assets. The
19 details of the sale were codified in the Asset Purchase
20 Agreement (the "APA"), which was signed on October 15, 2013, by
21 Dr. Nebgen on behalf of Volant, and Dr. Schentag on behalf of
22 TheraBrake. See Plaintiff's Exhibit 17.

23 Section 1.1 of the APA states that:

24 "Subject to and upon the terms and conditions of this
25 Agreement, effective at the Closing, the Seller shall sell,

1 assign, transfer, convey, set over and deliver to the Buyer,
2 *free and clear of all liens*, and the Buyer hereby purchases and
3 accepts from the Seller all right, title, and interest of the
4 Seller in and to all assets of the Seller...including, but not
5 limited to, the following...

6 (c) all rights and interests in, to and under all
7 contracts, agreements, arrangements, commitments, mortgages,
8 deeds of trust, bonds, indentures, leases, licenses,
9 franchises, obligations, bids, options, warrants, instruments,
10 documents, and any other contract rights, including all study,
11 consulting, and other contracts related to the Acquired Assets
12 (in each case, whether written or oral and including in all
13 cases all amendments, modifications, or supplements thereto,
14 collectively, "Contracts") of the Seller following the Closing
15 Date specified on Schedule 1.1(b) (the "Assumed contracts");

16 (d) the Patent Portfolios...

17 *Id.* (emphasis added). Pursuant to the APA, TheraBrake
18 represented that it had no defects of title relating to or
19 involving the Fayad intellectual property. *Id.* at Section
20 4.1(d) ("Seller has and Buyer will receive at Closing good,
21 marketable, valid and legal title to the Acquired Assets, free
22 and clear of all Liens"), (i) ("TheraBrake as Seller represents
23 and warrants that "Seller owns all right, title and interest in
24 and to the Intellectual Property included in the Acquired
25 Assets and has the right to sell, assign and transfer the

1 Intellectual Property included in the Acquired Assets, as
2 contemplated herein, free and clear of all Liens.") As
3 consideration for TheraBrake's patent portfolio, TheraBrake
4 received a promissory note from Volant, (the "TheraBrake Note")
5 for \$566,510.

6 In turn, Volant was required to pay the Seller Five
7 Hundred Sixty-Six Thousand, Five Hundred Ten and 00/100 U.S.
8 Dollars (U.S. \$566,510.00) in the form of a promissory note
9 payable by the Buyer to Seller." Section 2.1, and "assume the
10 Assumed Liabilities," Section 2.2. The Assumed Liabilities are
11 defined as:

12 (i) The ordinary course liabilities of the Seller
13 arising under or out of the Assigned Contracts to the extent
14 relating to the period from and after the closing, including
15 but not limited to the Two Hundred and Fifty Thousand and
16 00/100 (U.S. \$250,000.00) payment. (The "Option Fee") due to
17 Desert Supplements, LLC ("DS") under that certain option
18 agreement by and between Seller and DS, dated October 30, 2013
19 (the Option Agreement) for exercising the option to terminate
20 the patent and technology license granted from Seller to DS
21 under that certain license agreement by and between Seller and
22 DS, dated November 20th, 2013 (the "License Agreement"), and
23 the obligations to University at Buffalo Office of Science
24 Technology, Transfer and Economic Outreach under the Assigned
25 Contracts, and (ii) all liabilities for filing or recordation

1 fees for transferring the ownership of the Acquired Assets
2 arising and accruing on and after the Closing and for
3 maintaining and continuing to pursue for the Buyer's benefit
4 any patents, registrations or applications relating to the
5 Acquired Assets."

6 Section 1.2. At trial the parties presented no
7 evidence about any of TheraBrake's liabilities for transferring
8 its intellectual property to Volant, and nor did the parties
9 present evidence about any maintenance or other patent-related
10 fees that arose or accrued after TheraBrake and Volant closed
11 on the 2013 deal.

12 To ensure that there were no issues with the transfer
13 of the intellectual property, and at Dr. Schentag's
14 recommendation, the parties hired DLA Piper LLP ("DLA Piper")
15 to conduct due diligence on the intellectual property
16 portfolio. Dr. Fayad had still never taken any affirmative
17 steps to regain the title to his intellectual property. Dr.
18 Schentag knew this. Yet, when speaking with the attorney from
19 DLA Piper, Dr. Schentag stated that there's no concern about
20 Dr. Fayad's ownership of his intellectual property -- the
21 contract between NSH and Dr. Fayad "said that he gets his
22 patent back if they dissolve the company." Plaintiff's Exhibit
23 47 at 2. The attorney noted that DLA Piper could perfect title
24 to Dr. Fayad's intellectual property in TheraBrake and then to
25 Volant Holdings GmbH "assuming that NSH did indeed go bankrupt

1 and Dr. Fayad took the necessary steps to reacquire ownership."
2 Defendant's Exhibit 67 at two. That assumption was critical;
3 to arrive at its conclusion, DLA Piper assumed facts that were
4 not, as it turned out, consistent with reality. Moreover facts
5 known by Dr. Schentag not to be true.

6 The APA was executed in 2015. TheraBrake "assigned"
7 its intellectual property to Volant, and Volant issued the
8 required promissory note for \$566,510.

9 As of September 1, 2017, NSH's business status was
10 permanently revoked for falling to file an annual filing
11 between August 2011 and August 2012 or paying the file fee and
12 its penalty. Defendant's Exhibit 28. Similarly, as of January
13 1, 2018, WLNS's business status was permanently revoked for
14 also falling to file an Annual Filing between December 2011 and
15 December 2012, and to pay the timing fee and associated
16 penalty. *Id.*

17 I also take judicial notice that a search on PACER
18 reveals that neither WLNS or NSH ever filed a petition for
19 bankruptcy in a United States Bankruptcy Court. I also
20 therefore find that neither company ever filed for a
21 bankruptcy.

22 III. Legal conclusions.

23 (a). Analysis of the claim.

24 The parties disagree whether TheraBrake's breach of
25 contract claim can be read as one alleging breach of the APA,

1 or as one also alleging breach of the Note. This, even though
2 the Plaintiff agrees that "there is no dispute that, as the
3 Count was titled in the amended complaint...TheraBrake sued for
4 'breach of the Asset Purchase Agreement' for Volant's failure
5 to pay the \$566,510 pursuant to the terms of the Promissory
6 Note." Rule 50(a) Mem, Dkt. No. 185, at 2.

7 In the amended complaint, Plaintiffs styled the claim
8 as a "Breach of Asset Purchase Agreement." See AC at 26. The
9 allegations are specific:

10 120. Plaintiffs repeat and reallege each and every
11 allegation contained in paragraphs one through 119.

12 121. The APA provided that in exchange for the
13 assignment of the Intellectual Property, Holdings would pay to
14 TheraBrake \$566,510 pursuant to a promissory note.

15 122. In the material breach of the Asset Purchase
16 Agreement, Holdings has not paid the \$566,510 or the interest
17 of 37,000 thereon, despite due demand.

18 123. In material breach of the APA, Section 1.2,
19 Holdings has not paid any of the liabilities of exceptions it
20 assumed.

21 124. Based upon the foregoing, TheraBrake is entitled
22 to return all of the consideration and things of value paid for
23 the securities issued to them and rescission of all agreements
24 executed with Nebgen, Holdings and Pharma, including but not
25 limited to the APA and the Patent Assignment, or, alternatively

1 to recover the \$556,510 plus interest thereon."

2 *Id.* paragraphs 120-124. Further, in the Joint
3 Pretrial Order, TheraBrake asserted "that Volant Holdings has
4 breached the Asset Purchase Agreement by not paying (a) the
5 agreed-upon sum of \$566,510 pursuant to a promissory note, and
6 (b) any of the liabilities or expenses it assumed, and
7 therefore, has not provided the consideration for which
8 TheraBrake assigned intellectual property to Volant Holdings."
9 Joint Pretrial Order at 3-4. As relief, TheraBrake requested
10 rescission of the Asset Purchase Agreement with Volant
11 Holdings, and all assignments by TheraBrake to Volant Holdings
12 because Volant Holdings' failure to pay the agreed-upon
13 consideration. As alternative relief to rescission of all such
14 agreements and assignments, TheraBrake seeks a monetary
15 judgment against Volant Holdings of \$566,510, (the Promissory
16 Note amount)." *Id.* at 23.

17 Despite TheraBrake's choice to frame this as a breach
18 of the APA, it now claims that "it does not matter whether
19 Count Five is viewed as one for breach of the APA or for breach
20 of the promissory note. The APA provided for payment under the
21 terms of the Note." This is incorrect. The APA provided only
22 that Volant would pay TheraBrake, "in the form of a promissory
23 note payable by the Buyer to Seller." And neither party
24 disputes that Volant issued the required note. Whether Volant
25 fulfilled its obligation under the note is a different question

1 than the one Plaintiff raised here.

2 Many of counsel's choices throughout this litigation
3 have left me perplexed but perhaps none more so than this one.
4 In choosing to bring this claim as breach of the APA alone,
5 rather than as a breach of the APA and the TheraBrake Note,
6 counsel wrote themselves into a corner. Perhaps Plaintiff
7 thought it more likely to receive an equitable remedy if this
8 claim was styled as one under the APA rather than the Note.
9 Regardless, a plaintiff is the master of this claim and the
10 Court must respect TheraBrake's framing of this litigation.

11 Rule 16(e) is clear: "The order following a final
12 pretrial conference shall be modified only to prevent manifest
13 injustice." Federal Rule of Civil Procedure 16(e). And "it is
14 an established procedural principle that a party's failure to
15 include a legal theory or defense in the pretrial order results
16 in its subsequent abandonment or waiver." *Colli v. Wirth*, 1996
17 WL 442835, at *1 (S.D.N.Y. Aug. 6, 1996) (citations omitted);
18 See also *Gowan v. United States Department of the Air Force*,
19 148 F.3d 1182, 1192 (10th Cir. 1998) (issue not raised in
20 pretrial order "was not part of the case before the district
21 court").

22 Although "a court may permit the pretrial order to be
23 amended when the danger of surprise or prejudice to the
24 opposing party is small and a failure to amend might result in
25 an injustice to the moving party, if the evidence or issue was

1 within the knowledge of the party seeking modification at the
2 time of the pretrial conference, then it may not be allowed."

3 *Potthast v. Metro-North R.R. Co.*, 400 F.3d 143, 154
4 (2d Cir. 2005) (quoting 6A Wright & Miller, Federal Practice
5 and Procedure § 1527 (2d ed. 1990)); see also *Brentlor, Ltd. v.*
6 *Schoenbach*, 2016 WL 7106029, at *2 (S.D.N.Y. Dec. 3, 2016).

7 The factors for the Court to consider in determining whether
8 the pretrial order should be amended are:

9 (1) the prejudice or surprise in fact to the opposing
10 party; (2) the ability of the party to cure the prejudice; (3)
11 the extent of disruption of the orderly and efficient trial of
12 the case; and (4) the bad faith or willfulness of the
13 non-compliance party. Prejudice to the party seeking amendment
14 or modification of the order is also relevant, as a trial court
15 should not refuse to modify a pre-trial order where manifest
16 injustice will result.

17 Here, I find no manifest injustice in holding
18 TheraBrake to its forming of Claim 5 in this case -- to the
19 contrary, Volant would experience manifest injustice if
20 TheraBrake was permitted to changes or horses after the end of
21 the race. After all, Volant relied on their (accurate)
22 understanding of the allegations in the complaint -- and made
23 even more concrete in the joint pretrial order -- in defending
24 this case at trial. Moreover, while TheraBrake chose not to
25 pursue claims under the Note in this case, the Court is not

1 aware of any barrier to TheraBrake doing so in a separate
2 action.

3 B. Choice of law.

4 The Asset Purchase Agreement clearly states that
5 Delaware state law governs its terms. APA Section 7.1.
6 Because this Court sits in diversity and must apply the
7 choice-of-law -- rules of the forum State-in this instance, New
8 York. *Cargill, Inc. v. Charles Kowsky Res., Inc.*, 949 F.2d 51,
9 55 (2d Cir. 1991). New York counts generally accord deference
10 to choice-of-law provisions in contracts. *Id.* But "even when
11 the parties include a choice-of-law clause in this contract,
12 their conduct during litigation may indicate assent to the
13 application of another state's law."

14 The parties cited to only New York law in their
15 post-trial briefing, and, before trial, stipulated that "New
16 York substantive law applies to all claims." Joint Pretrial
17 Order, Dkt. No. 169 at 25. Thus, despite the APA's choice of
18 law provision, the Court applies New York law to claim 5.

19 This too was a perplexing choice. Unlike New York
20 law, a breach of contract claim under Delaware law comprises
21 only three elements: (1) a contractual obligation; (2) a
22 breach of that obligation by the defendant; and (3) resulting
23 damage to the plaintiffs." *WaveDivision Holdings, LLC v.*
24 *Millennium Digital Media Systems, L.L.C.*, 2010 WL 3706624, *13
25 (Del. Ch. 2010) (citing *H-M Wexford LLC v. Encorp, Inc.*, 832

1 A.2d 129, 140 (Del. Ch. 2003). As I'll explain shortly, the
2 missing element under Delaware law -- plaintiff's
3 performance -- hamstring's TheraBrake's claim under New York
4 law. It is not the only reason I ultimately find plaintiff did
5 not prevail on its claim, but it certainly plays a role in my
6 decision.

7 (c) Breach of contract.

8 When claims are tried to the Court, "it is the Court's
9 job to weigh the evidence, assess credibility, and rule on the
10 facts as they're presented." *Bahrami vs. Ketabchi*, 2009 WL
11 513790, *9. (S.D.N.Y. Feb. 27, 2009) (quotation omitted); see
12 also *Mathie v. Fries*, 121 F.3d 808, 811-12 (2d Cir. 1997). A
13 "trial judge is in the best position to evaluate a witness's
14 demeanor and tone of voice as well as other mannerisms that
15 bear heavily on one's belief of what the witness says." *Donato*
16 *v. Plainview-Old Bethpage Central School District*, 96 F.3d.
17 623, 634 (2d Cir. 1996). When evidence is equally divided, the
18 party with the burden of proof loses. See *Bahrami*, 2009 WL
19 513790, at *9; see also *Mercury Partners LLC v. Pacific Med.*
20 *Bldgs., L.P.*, No. 02 Civ. 6005, 2007 WL 2197830, *8 (S.D.N.Y.
21 July 31, 2007) ("Under New York law, the burden of proof in an
22 action for breach of contract is on the plaintiff to prove the
23 elements of its complaint by a preponderance of the evidence.")
24 (citing, inter alia, *Enercomp, Inc. v. McCorhill Pub., Inc.*,
25 873 F.2d 536, 542 (2d Cir. 1989)).

1 In order to recover from a defendant for breach of
2 contract under New York law, "a plaintiff must prove by a
3 preponderance of the evidence, (1) the existence of a contract
4 between itself and that defendant; (2) performance of the
5 plaintiff's obligations under the contract; (3) breach of the
6 contract by that defendant; (4) damages to the plaintiff caused
7 by that defendant's breach." *Diesel Props. S.r.l. v.*
8 *Greystone Bus. Credit II, LLC*, 631 F.3d 42, 52, (2d Cir.
9 2011).

10 "A contract must be construed to effectuate the intent
11 of the parties." *MBIA Ins. Corp. v. Patriarch Partners VIII,*
12 *LLC*, 842 F. Supp. 2d 682, 704 (S.D.N.Y. 2012) ("MBIA I")
13 (citing *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d
14 1274, 1277 (2d Cir. 1989)); see *Law Debenture Tr.*, 595 F.3d at
15 467. ("As a general matter, the objective of contract
16 interpretation is to give effect to the expressed intentions of
17 the parties." (quoting *Hunt*, 889. F.2d 1274, 1277)). In
18 interpreting a contract, courts "should examine the entire
19 contract and consider the relation of the parties and the
20 circumstances under which it was executed. Particular words
21 should be considered, not as isolated from the context, but in
22 the light of the obligation as a whole and the intention of the
23 parties as manifested thereby." *MBIA I*, 842 F. Supp. 2d at 704
24 (quoting *Kass*, 91 N.Y.2d at 566). "[A] written agreement that
25 is complete, clear and unambiguous on its face must be

1 [interpreted] according to the plain meaning of its terms."
2 Law Debenture Tr., 595 F.3d at 467 (second alteration in
3 original) (quoting Greenfield, 98 N.Y.2d at 569).

4 Performance: First, that TheraBrake did not perform
5 under the contract. It could not have done so. The contract
6 required that TheraBrake deliver Fayad's intellectual property
7 "free and clear of all Liens," as defined by Section 4.1 of the
8 APA. See APA Section 1.1.

9 Section 4.1 (d) specifies that:

10 "The Seller has no, nor has created, suffered or
11 incurred security interests, mortgages, liens, claims, charges,
12 restrictions, encumbrances, or defects of title of any kind or
13 nature whatsoever (collectively, Liens) binding upon or
14 otherwise relating to or involving the Acquired Assets. The
15 Seller has and the Buyer will receive at Closing good,
16 marketable valid and legal title to the Acquired Assets, free
17 and clear of all liens...

18 APA Section 4.1(d) (emphases added). But Fayad had
19 never regained title to his intellectual property from NSH and
20 never validly assigned it to TheraBrake in the first place.
21 Thus, TheraBrake could not have assigned title "free and clear"
22 of defective title to Volant as required by Section 1.1 of the
23 APA.

24 TheraBrake argues that under Section 4.1(d) of the
25 APA, it "represented and warranted that it did not have and it

1 did not create any such liens, claims or encumbrances" on Dr.
2 Fayad's intellectual property. Rule 50(a) Mem. at 3. Not only
3 is this a misreading of the contract -- it is a red herring.
4 TheraBrake's obligation to perform under the APA is rooted in
5 Section 1.1, which demands that TheraBrake assign the Fayad
6 intellectual property "free and clear of all liens." The
7 definitional clause in Section 4.1(d) collects examples of what
8 the word "lien" encompasses: "Security interests, mortgages,
9 liens, claims, charges, restrictions, encumbrances or defects
10 of title of any kind or nature whatsoever." Section 4.1(d)
11 Thus, TheraBrake's failure to deliver the Fayad intellectual
12 property free and clear of any defect of title and failure to
13 perform under Section 1.1.

14 TheraBrake also claims that the doctrine of judicial
15 estoppel bars Volant from asserting that TheraBrake could not
16 have validly assigned the intellectual property to Volant
17 because Volant took the position that "(1), there was no longer
18 any potential claim by NSH or the Snyders because ownership of
19 the Fayad Technology had, in fact, been reacquired or because
20 the charters of NSH and WLNS had been permanently revoked...or
21 (2), all parties in this case knew about the potential of such
22 a claim and, nevertheless, proceeded forward with all
23 agreements." Rule 50(a) Mem. at 5.

24 But judicial estoppel applies, "only in situations
25 where a party both takes a position that is inconsistent with

1 one taken in a prior proceeding, and has had that earlier
2 position adopted by the tribunal to which it is advanced."
3 *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders*
4 *In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 407 F.3d
5 34, 45 (2d Cir. 2005). Even assuming *arguendo* Volant now
6 advances positions that are inconsistent with those taken
7 previously by other defendants in this litigation, I never
8 adopted those positions. In fact, in my findings of fact, I
9 decided the compact opposite: That Dr. Fayad had not recovered
10 title to his intellectual property and Drs. Nebgen and
11 Ghahramani didn't know about these potential claims when the
12 APA was executed. Thus, the requirements for invoking the
13 doctrine of judicial estoppel are not present here.

14 Breach: Second, TheraBrake did not prove but a
15 preponderance of the evidence that Volant breached the APA.
16 The agreement required that Volant pay \$566,510.00 in the form
17 of a promissory note, and to assume certain liabilities. APA
18 Sections 1.2, 2.1 to 2.2. Both parties agree that defendant
19 gave TheraBrake \$566,510.00 promissory note. I find that it
20 did. And Plaintiff offered no evidence that Volant failed to
21 assume the required liabilities under the contract.

22 Dr. Nebgen did testify that after Volant was formed,
23 the parties all paid for their "own expenses." Transcript
24 920:16-22. But this testimony pertained to Counterclaim
25 Plaintiffs' claim against Dr. Schentag for breach of fiduciary

1 duty. As part of that claim, Counterclaim Plaintiffs asserted
2 that Dr. Schentag, Fayad, TheraBrake and Ghahramani had formed
3 a "joint venture" and the joint venture had survived the
4 formation of various corporate entitles, including Volant
5 Holdings. To demonstrate that the joint venture existed, Dr.
6 Nebgen asserted that the parties shared profits and losses and
7 paid their own expenses. Counsel for TheraBrake failed to
8 establish that any of these shared expenses qualified as
9 assumed labilities" for the purposes of APA Section 1.2 --
10 mainly that they were "liabilities for filing or recordation
11 fees for transferring the ownership of the acquired assets
12 arising and accruing on and after the closing and for
13 maintaining and continuing to pursue for the Buyer's benefit
14 any patents, registrations or applications relating to the
15 acquired assets."

16 IV. Conclusions.

17 It is possible that TheraBrake could have proved that
18 Volant breached the Note. But that was not the claim posed to
19 the Court in the amended complaint, the joint pretrial order,
20 or even in post-trial briefing. Instead, TheraBrake asserted
21 that Volant breached the APA by failing to pay the note. But
22 this argument does not stand up to scrutiny. The APA itself
23 does not require that TheraBrake pay on the note.

24 Further, TheraBrake didn't fulfill its own end of the
25 bargain and assign valid title to the Fayad intellectual

1 property to Volant. It couldn't have. Dr. Fayad never
2 retrieved his intellectual property from NSH and the Snyders,
3 and therefore never validly assigned it to TheraBrake in the
4 first place. I therefore find that Plaintiff TheraBrake has
5 not proved by a preponderance of the evidence that Volant
6 breached the APA. And I will therefore enter judgment in favor
7 of Defendant Volant by separate order either later today or
8 tomorrow.

9 All of the outstanding claims in this case have now
10 been resolved. A jury trial was held in this case from
11 November 4 to November 13, 2019. At the close of plaintiff's
12 case the Court granted defendant's motion for judgment pursuant
13 to Federal Rules of Procedure 50 with respect to Count Three,
14 as designated in the amended joint pretrial order. Dkt. No.
15 169. The jury returned a verdict in favor of Defendant Fayad
16 against plaintiffs with respect to Counts One and Two as
17 designated in the amended joint pretrial order. Plaintiffs
18 thereafter requested on the record that the Court accept the
19 jury's determinations without further fact-finding or inquiry
20 by the Court on those counts. Defendant Fayad consented to
21 Plaintiffs' request. And I will, therefore, enter judgment on
22 the basis of the jury's determinations. With respect to
23 Counterclaim A, the jury returned a verdict in favor of
24 Counterclaim Defendants Schentag and TheraBrake.

25 The parties also stipulated on the record to

1 dismissing Plaintiffs' Count Four without prejudice pursuant to
2 Federal Rule of Civil Procedure 41(a)(1)(A)(ii).

3 Accordingly, I'll enter an order later today or
4 tomorrow directing the clerk to enter judgment in favor of
5 defendants on all of Plaintiffs' claims and in favor of
6 Plaintiff on Counterclaim Plaintiffs' Counterclaim A. I will
7 direct the clerk to close the case.

8 So thank you counsel very much for your patience as I
9 worked through that. I had hoped to deliver that opinion to
10 you sooner. Again, I apologize that I wasn't able to make this
11 time until now as the time that would work for all parties and
12 me. So thank you very much.

13 I will enter this separate order. It will point to
14 the record of today's conference for the reasoning behind my
15 decision with respect to this one remaining claim which was not
16 a result at or before trial. And you should feel free to
17 request a copy of the transcript of today's proceeding if you'd
18 like to have it available for your review in depth. Again,
19 thank you very much for your patience.

20 Is there anything that we need to take up now before
21 adjourn this conference?

22 First, counsel for plaintiff?

23 MR. SMITH: No, your Honor.

24 THE COURT: Thank you.

25 Counsel for defendants?

1 MR. DOLAN: No, your Honor. Thank you very much.

2 THE COURT: Thank you all.

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