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Don't Bake - Litigate: A Practitioner's Guide on How Walter White Should Have Protected His Interests in Gray Matter, and His Litigation Options for Building an Empire Business through the Courts, not the Cartel

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DON'T BAKE—LITIGATE! A PRACTITIONER'S GUIDE ON HOW WALTER WHITE SHOULD HAVE PROTECTED HIS INTERESTS IN GRAY MATTER, AND HIS LITIGATION OPTIONS FOR BUILDING AN “EMPIRE BUSINESS” THROUGH THE COURTS, NOT THE CARTEL

Michael C. Mims*

“It was my hard work. My research. And you and Elliott made millions off it.”¹

—Walter White arguing with Gretchen Schwartz about being “cut out” of Gray Matter Technologies.

[Q:] *Do you now think that Walt broke bad long before this show’s narrative started – maybe around the time he realized they’d given away a share of a billion-dollar company for \$5,000?*

[A:] *Yeah . . . In the case of Walter White, finding out in that first episode that he’s dying of terminal cancer frees him, as he puts it. It means that he is now awake, and this awakening from sleepwalking through the first five decades of his life, this sudden lack of constraint or inhibition, allows him to be the person that he truly is. Unfortunately, the person that he truly is is most definitely not all good.²*

—Vince Gilligan on Walter White.

INTRODUCTION

Young, shrewd entrepreneurs have become bigger players in the corporate marketplace than ever before, as indicated by the meteoric rise

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1. *Breaking Bad: Peekaboo* (AMC television broadcast Apr. 12, 2009).

2. Brian Hiatt, *Q&A: ‘Breaking Bad’ Creator Vince Gilligan Goes Deep on the Final Season*, ROLLING STONE, Sept. 6, 2012, available at <http://www.rollingstone.com/movies/news/q-a-breaking-bad-creator-vince-gilligan-goes-deep-on-the-final-season-20120906>.

of Mark Zuckerberg and Facebook,³ as well as the recent acquisitions of tech start-ups such as WhatsApp,⁴ Tumblr,⁵ and Instagram.⁶ But even Albuquerque junkies Badger and Skinny Pete could tell you that “mo’ money” often leads to “mo’ problems,” and partnerships between college roommates can quickly sour for any number of reasons. When relationships go bad, selling out might seem like the easiest option. However, without sophisticated legal counseling on the front end, what first looks like a sweetheart deal can quickly reveal itself to be highway robbery. In order to avoid seller’s remorse, selling entrepreneurs should give careful consideration to issues such as ownership of intellectual property (“IP”), the prohibition on the improper use of trade secrets, and the restrictions of any existing buy-sell or noncompete agreements.

Walter Hartwell White (“White”), a brilliant chemist specializing in X-ray crystallography, learned these lessons the hard way. Eager to distance himself from a workplace romance gone bad,⁷ White sold his one-third interest in the fledgling, yet promising Gray Matter Technologies (“Gray Matter”) — and apparently all of the IP that came with it — to co-founders Elliot and Gretchen Schwartz for a mere \$5,000.⁸ Years later the company would be valued at \$2.16 billion,⁹ and the Schwartz family would go on to publicly deny White’s status as a co-founder of the business.¹⁰ White admitted that he checked the company’s valuation weekly, and tortured himself about how cheaply he sold his “potential” and his “kids’ birthright.”¹¹ Instead, a strapped-for-cash White eventually took up the illegal production and distribution of methamphetamine—a business venture that led to tragic consequences for White and his family.

3. As of this writing, Facebook has a market capitalization exceeding \$220 billion. See NASDAQ.COM, *Facebook, Inc. Stock Quote & Summary Data*, (Feb. 23, 2015, 1:40 PM), <http://www.nasdaq.com/symbol/fb>.

4. See FACEBOOK, *Facebook to Acquire WhatsApp*, (Feb. 19, 2004) <http://newsroom.fb.com/news/2014/02/facebook-to-acquire-whatsapp/> (reporting that the acquisition was a \$16 billion deal).

5. See Henry Blodget, *Yahoo CEO Marissa Mayer Buys Tumblr—Her Boldest Move Yet*, YAHOO! (May 20, 2013, 11:05 AM), <http://finance.yahoo.com/blogs/daily-ticker/yahoo-ceo-marissa-mayer-buys-tumblr-her-boldest-150522231.html> (reporting a \$1.1 billion deal).

6. See Joanna Stern, *Facebook Buys Instagram for \$1 Billion*, ABC NEWS (Apr. 9, 2012, 1:28 PM), <http://abcnews.go.com/blogs/technology/2012/04/facebook-buys-instagram-for-1-billion/> (reporting a \$1 billion deal).

7. See *infra* Part I.A for a more detailed discussion of White’s motives for leaving Gray Matter Technologies, a company he co-founded.

8. *Breaking Bad: Buyout* (AMC television broadcast Aug. 19, 2012).

9. *Id.*

10. *Breaking Bad: Granite State* (AMC television broadcast Sept. 22, 2013).

11. *Breaking Bad: Buyout* (AMC television broadcast Aug. 19, 2012).

Part I of this article analyzes how White could have remained a player in the “empire business”¹² if only, before abandoning his interest in Gray Matter, he had “lawyered up” — and not with a small time “criminal lawyer,”¹³ but with a sophisticated business transactions attorney. Part I offers practical advice, based on today’s legal and business landscape, on how entrepreneurs situated similar to White can best protect their interests before selling out.

Part II analyzes an alternative question: what remedies are available to the entrepreneur who, like White, sells out for pennies only to see his work used to later generate massive profits for the remaining shareholders? Part II additionally offers strategies for aggressive litigation tactics for entrepreneurs who feel they have been “cut out,” and proposes that White could have asserted actions for patent infringement and minority shareholder oppression. It analogizes to recent litigation waged among the co-founders and early contributors of Facebook, as well as other recent start-up controversies, to demonstrate how aggrieved entrepreneurs such as White may seek hefty awards through court order or settlement.

I. PREPARING FOR THE END TIMES: SECURING LEGAL COUNSEL AND CREATING AN EXIT STRATEGY BEFORE SELLING OUT

Using Walter White as an example, this section explains the importance of understanding your client and his motivations when crafting a legal strategy, the consequences of selling out before consulting an attorney, and various tools that entrepreneurs can use to better protect their interests before they sell out.

A. *Know Your Client: Walter White and the Gray Matter Story*

One of the biggest keys to a successful attorney-client relationship is knowing your client—this includes not only the client’s short and long-term goals, but also his motivations, his strengths, and perhaps most importantly, his weaknesses.

12. *See id.* (Walter speaking to Jesse) (“Jesse, you asked me if I was in the meth business or the money business. Neither. I’m in the empire business.”).

13. *Breaking Bad: Better Call Saul* (AMC television broadcast Apr. 26, 2009) (Jesse speaking to Walter) (“When the going gets tough, you don’t want a criminal lawyer. You want a *criminal* . . . lawyer. Know what I’m sayin’?”); *see also Never Call Saul*, AIZMAN LAW FIRM, <http://www.lacriminaldefensepartners.com/never-call-saul/> (last visited Feb. 23, 2015) (documenting at least 69 separate crimes committed by Saul Goodman during *Breaking Bad* and concluding that “he ends up delivering just as much harm as he does good”).

This Article presents a hypothetical exercise: how might a lawyer have advised Walter White in an effort to protect his interests in Gray Matter, both before and after his decision to sell? To best explore that question, it's important to understand who Walter White was, what made him tick, and why Gray Matter was so important to him.

It's well known that White's life eventually spun out of control when he took up the illegal production of methamphetamine, creating enemies out of law enforcement, rival drug dealers, and a gang of violent Neo-Nazis. These events cost White his life, took the lives of many other innocents, and left White's family in shambles. This article is not about that story. However, White's choices during that period of his life provide valuable clues that will be used in the hypotheticals discussed in this article.

That brings us to Gray Matter. It seems White's time with the company started off with a string of successes: White was recognized for his role in a project that won the Nobel Prize,¹⁴ Gray Matter had a few promising patents pending,¹⁵ and he was dating fellow Gray Matter co-founder Gretchen Schwartz. But this success would not last. The exact details of White's departure from Gray Matter have not been made public. We know that during a weekend spent with Gretchen's family, White, suddenly and without explanation, walked out on Gretchen — to whom he was apparently engaged to be married.¹⁶ It has been suggested that upon meeting Gretchen's family and discovering their affluence and social status, White was overcome by his pride and jealousy — to such a degree that he ended the relationship in a fit of resentment and self-destruction, a trend that would come to haunt White later in life.¹⁷

White's troubles didn't end there. His sudden, destructive split with Gretchen apparently took its toll on Gray Matter. White has suggested that his fellow co-founders saw him as being toxic to the business and thus “cut [him] out.”¹⁸ Gretchen has dismissed White's portrayal of his

14. *See Breaking Bad: Pilot* (AMC television broadcast Jan. 20, 2008) (“Science Research Center, Los Alamos, New Mexico, Hereby recognizes Walter H. White, Crystallography Project Leader for Proton Radiography, 1985, Contributor to Research Awarded the Nobel Prize”).

15. *Breaking Bad: Buyout* (AMC television broadcast Aug. 19, 2012).

16. *Breaking Bad: Peekaboo* (AMC television broadcast Apr. 12, 2009).

17. *See* AMC, *Q&A – Jessica Hecht (Gretchen)* (May 5, 2009, 12:00AM), <http://blogs.amctv.com/breaking-bad/2009/05/jessica-hecht-interview/> (describing plot explanation given by creator Vince Gilligan) (“We were very much in love and we were to get married. And he came home and met my family, and I come from this really successful, wealthy family, and that knocks him on his side. He couldn't deal with this inferiority he felt — this lack of connection to privilege. It made him terrified, and he literally just left me, and I was devastated.”).

18. *Breaking Bad: Peekaboo* (AMC television broadcast Apr. 12, 2009)

departure as delusional, instead claiming that White simply abandoned the business in an inexplicable fit.¹⁹ Regardless of what actually happened, we know that White ultimately “took a buyout” and sold his 1/3 share of Gray Matter to his two co-founders for \$5,000.²⁰

Knowing what we do about White’s pride and arrogance, it’s not hard to imagine that he departed Gray Matter out of spite and under the impression that the company (and his ex-fiancée Gretchen) would be devastated without his irreplaceable talents. It’s also easy to imagine White smugly leaving Gray Matter convinced that he would soon accomplish bigger and better things elsewhere. That’s not how things worked out for White.

Instead, White struggled to hold down a job at various different chemical labs,²¹ while Elliot Schwartz’s face graced the cover of *Scientific American* as he and Gray Matter were hailed for “Flip[ping] the Molecular Switch.”²² White married a waitress, settled down in the suburbs, and struggled to remember which credit card hadn’t already been maxed out.²³ Schwartz married White’s ex-fiancée Gretchen, moved into a lush mansion, and hobnobbed with celebrities. White eventually fell out of the chemical research field altogether, settling for a job as a high school chemistry teacher, and worked part-time manning the cash register (and giving “wipe-downs”) at a local carwash.²⁴ Elliot and Gretchen built Gray Matter into a chemical research “empire” worth over two billion dollars.

Gretchen: What happened to you? Really, Walt? What happened? Because this isn’t you.

Walter: What would you know about me, Gretchen? What would your presumption about me be exactly? That I should go begging for your charity, and you waving your checkbook around like some magic wand is going to make me forget how you and Elliott – how you and Elliott – cut me out?

19. *Id.* (Gretchen speaking to Walter) (“What? That can’t be how you see it . . . That cannot be how you see it . . . You left . . . You left me . . . You left me . . . How could you say that to me? You walked away, you abandoned us.”).

20. *Breaking Bad: Buyout* (AMC television broadcast Aug. 19, 2012).

21. *Breaking Bad* makes reference to several different employers from White’s past. Before he entered the world of methamphetamine production, it appears that White worked for the following employers: Gray Matter, Application Labs, an unnamed chemical company, Sandia National Labs, J.P. Wynne High School, and A1A Car Wash. White eventually resigned and/or was terminated from each. *See, e.g., Breaking Bad: Cancer Man* (AMC television broadcast Feb. 17, 2008); *Breaking Bad: Full Measure* (AMC television broadcast June 13, 2010).

22. *Breaking Bad: Gray Matter* (AMC television broadcast Feb. 24, 2008).

23. *Breaking Bad: Pilot* (AMC television broadcast Jan. 20, 2008).

24. *Id.*

How did Walter White get here? What happened to his incredible talents? How did he go from being one of the brightest young minds in chemical research to struggling to make ends meet as a high school teacher? Why was he unable to create a Gray Matter of his own? There are likely many reasons. Perhaps White's pride and arrogance stood in the way of success. Perhaps he lost his ambition once it became clear that he wasn't as irreplaceable at Gray Matter as he once thought. Those seem like perfectly reasonable conclusions based on what we know about Walter White. But this article proposes a different explanation for White's failures — he didn't get a lawyer.

B. The Consequences of Selling Without Counsel

It's probably fair to assume that White convinced himself that bigger and brighter opportunities loomed ahead when he sold his interest in Gray Matter. It seems he struck out after trying his hand at multiple chemical research labs. Was it possible for White to have foreseen such shortcomings? Probably so. If White had sought out legal counsel — and, again, knowing White's haughty tendencies, we have little reason to believe he ever did — an attorney would have warned him of the various legal obstacles that could potentially impede his chances of success outside of Gray Matter. First, an attorney would have warned him that burning bridges with Gray Matter may trigger a buy-sell agreement compelling him to sell his stock under pre-negotiated terms. Second, an attorney would have warned him of the restrictions of any noncompete agreements that he almost certainly signed. Finally, an attorney would have advised him that he likely didn't own the IP rights to most of his work either created at Gray Matter, and even much of his work preceding Gray Matter.

1. White's Actions May Have Triggered a "Buy-Sell Agreement."

Whether he "abandoned" Gray Matter or was "cut out," why did White have to sell his interest in the company? Couldn't he have simply resigned, distanced himself from the unwanted drama, and held onto his 1/3 share as a lottery ticket? Also, how did White and Gray Matter come to agree on \$5,000 as the price for White's 1/3 share of the company? One very likely possibility is that White's actions triggered a "buy-sell agreement" (sometimes used interchangeably with "stock restriction agreement"), compelling him to sell his shares to Gretchen and Elliot under pre-negotiated terms.

A buy-sell agreement is a contract under which a shareholder agrees to transfer his stock in a company, under certain pre-negotiated terms, if certain "triggering events" occur, often the death or departure of a fellow

shareholder. Gray Matter's counsel would have likely suggested that the founders of the company enter into such an agreement, a vital safeguard for protecting a business's interests. The benefit is very clear — if a member of a company leaves for any reason, the agreement provides the remaining members with the ability to purchase the departing member's stock, thereby reducing the risk that his ownership interest will fall into undesirable hands — perhaps “their deceased partner's spouse, children, pets or, worse, a bankruptcy trustee, executor or unknown third party.”²⁵

Such an agreement would likely also contain a “stock restriction” clause that governs when shares of stock become “vested,” giving them their full value. Founders' stock typically vests over a period of three to five years under such agreements.²⁶ This protects the company because it ensures that the founders “earn” their shares. For example, if White quit Gray Matter after his relationship with Gretchen melted down, all of a sudden a third of the company's stock would be owned by an unproductive member of the company. The buy-sell and stock restriction clauses would guarantee Gray Matter the right to purchase White's shares if he quit, was fired, or otherwise became an unproductive member of the company.

We don't know for sure whether White “resigned” from Gray Matter or if he was “terminated,” but either would have likely triggered the buy-sell agreement. Under the agreement, the price would depend on several different factors. The agreement likely provided that White would receive “fair market value” for his vested shares, but may have provided far less favorable terms for any unvested shares.²⁷ The price for any unvested shares may have been the lesser of fair market value and the stock's original cost — the latter of which might be tricky to calculate given that White likely contributed only IP and future services in return for his shares.²⁸

There is good reason to think that many of White's shares may have been unvested. It appears his stint with Gray Matter was a short one, so he may not have lasted long enough for his shares to have vested. As will

25. See Nicole M. Vance, *From Once Upon A Time to Happily Ever After: Buy-Sell Agreements*, NEVADA LAWYER, Dec. 2012, at 10.

26. Jonathan Gworek & Jeffrey Steele, ORGANIZING THE EMERGING BUSINESS, SUAEM MA-CLE 2-1, at § 2.5.6 (2005).

27. *Id.*

28. Although the independently wealthy Gretchen may have contributed cash or other tangible assets in return for her shares, that was likely not the case for either White or Elliot Schwartz, who were reportedly living on a steady diet of 12-packs-for-a-dollar ramen noodles around the time they formed Gray Matter. See *Breaking Bad: Gray Matter* (AMC television broadcast Feb. 24, 2008).

be discussed in more detail below, it's true that oftentimes a founder will receive a portion of his stock vested upfront. It's also possible for a founder who leaves a company early to receive "accelerated" vesting of his stock if he is terminated "without cause." However, given that White received only \$5,000 for his 1/3 share of the company, we must assume that much of his stock was still unvested. If White had consulted an attorney before resigning from Gray Matter and/or provoking his termination, he would have been advised of these issues and may have acted more prudently, so as not to sacrifice his interest in the company for so little.

2. White Likely Signed a Noncompete Agreement.

Another issue that White may not have considered in his hasty decision to leave Gray Matter was whether he signed a noncompete agreement. Given the cutting edge nature of Gray Matter's work,²⁹ it seems likely that the company's attorneys would have recommended that all employees sign such an agreement. If White had not already signed a noncompete at the time he joined Gray Matter, the company's counsel would have almost certainly required that he sign one as part of his buy-out deal.³⁰ The agreement could have theoretically prevented White from competing with Gray Matter for a decade or more.³¹ This is a more than plausible explanation for White's checkered job history post-Gray Matter, and his eventual decision to settle down in the education field.

Could White have challenged the validity of any such agreement? It's true that some jurisdictions are extremely hostile to noncompete agreements.³² If White had consulted an attorney, he would have found

29. See *Breaking Bad: Buyout* (AMC television broadcast Aug. 19, 2012) (Walter speaking to Jesse) ("[W]e all knew the potential, how we were going to take the world by storm . . .").

30. See Albert O. "Chip" Saulsbury, IV, *Devil Inside the Deal: An Examination of Louisiana Noncompete Agreements in Business Acquisitions*, 86 TUL. L. REV. 713, 743 (2012) ("Without the restrictions provided under a noncompete agreement, a seller can significantly diminish the value of the business transferred in the transaction. If 'the vendor had the *unlimited* right to re-engage in a competitive business, he could attract his old customers to his new establishment and thereby destroy the value of the property right he has sold.'") (citing Alan B. Soclof, Note, *The Sale of a Business—Restraints upon the Vendor's Right To Compete*, 13 CASE W. RES. L. REV. 161, 162 (1961)).

31. See *Bowen v. Carlsbad Ins. & Real Estate, Inc.*, 1986-NMSC-060, ¶¶ 1–2, 104 N.M. 514, 724 P.2d 223 (upholding a noncompete agreement with a term of 15 years and covering a 15 mile radius).

32. See, e.g., CAL. BUS. & PROF. CODE § 16600 ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."); see also Saulsbury, *supra* note 30, at 744 (reviewing Louisiana's exacting requirements for noncompete agreements

out that New Mexico is not one of them. In *Manuel Lujan Insurance v. Jordan*, the New Mexico Supreme Court held that the employee was prohibited from even *accepting* business from his employer's customer, even when the employee had not solicited the business.³³ The court ordered that any commissions earned by the former employee from those customers were to be awarded to the former employer.

Another instructive New Mexico case is *Bowen v. Carlsbad Insurance & Real Estate*. In that case, the New Mexico Supreme Court upheld a noncompete agreement with a term of 15 years and covering a 15-mile radius.³⁴ The court rejected the former employee's argument that the noncompete agreement was void as against public policy, holding that the contract had a legitimate purpose: "The object of the restrictive covenant in this case was to protect Carlsbad against the competition of Bowen in the insurance business in Carlsbad, New Mexico for a fifteen-year period. There is no doubt that to some extent such an agreement will restrict competition, but it is valid because it is incidental to some legitimate business transaction."³⁵

For these reasons, it seems plausible that White's post-Gray Matter career was stifled by a noncompete agreement.

3. White Surrendered his Intellectual Property to Gray Matter.

Finally, without consulting an attorney, White may not have realized just how much his post-Gray Matter career would be hindered by IP constraints. It is well documented that White believed his ideas and research were responsible for Gray Matter's runaway success, and that he accused Gretchen and Elliot Schwartz of essentially stealing his work.³⁶ As set forth in Part II of this Article, White may have had some litigation options for asserting ownership of the works and materials he created while at Gray Matter. But as a general legal matter, White's view that he retained ownership of that work is almost certainly dead wrong.

From a practical perspective, White likely signed an "invention assignment agreement," whereby he agreed to assign the IP rights in his

and the courts' habit of striking them down upon finding the "slightest flaw or ambiguity in the noncompete agreement").

33. *See* *Manuel Lujan Ins., Inc. v. Jordan*, 1983-NMSC-100, ¶¶ 11–12, 100 N.M. 573, 673 P.2d 1306 (enforcing a noncompete agreement with ambiguities in the contract because employer's (plaintiff) conduct clearly indicated that employee was not to solicit or compete for employer's customers).

34. *Bowen*, 1986-NMSC-060, ¶¶ 1–2.

35. *Id.* ¶ 8.

36. *Breaking Bad: Peekaboo* (AMC television broadcast Apr. 12, 2009) (Walter speaking to Gretchen) ("It was my hard work. My research. And you and Elliott make millions off of it. . . . [You built] your little empire on my work.").

work to Gray Matter in exchange for his 1/3 share of the company.³⁷ This would have included the rights not only to the IP he would soon develop at Gray Matter, but also any of his past work that related to Gray Matter's field of research. At the time of incorporation, Gray Matter's attorneys would have almost certainly insisted that White sign such an agreement. The reason is very simple: a small start-up like Gray Matter would surely hope to one day attract the attention of venture capital investors ("VCs"), who would require a diligent IP audit to ensure the lack of any defects in the company's intellectual property.³⁸ Any questions as to the ownership of Gray Matter's IP portfolio (likely the most valuable asset of a small start-up) would be a major red flag to investors.³⁹ For this reason, any IP that White developed prior to the formation of Gray Matter, so long as it was arguably related to the purpose of the business, as well as any IP created while at Gray Matter, were likely assigned to the company.

This is especially true in the case of any patents that White helped secure for Gray Matter.⁴⁰ Although patents are required to bear the names of the individual inventors, they are often assigned to the inventors' employer. Long ago, "unassigned" patents (i.e., a patent that the inventor has not assigned to someone else) were once common in the U.S., but that is not the case today.⁴¹ In the 1980s, around the time that White worked for Gray Matter, 84 percent of U.S. patents were assigned to corporations, usually the employer of the actual inventor.⁴² By 2011, less than 8 percent of U.S. patents were unassigned.⁴³ As a matter of common legal practice, it seems very likely that Gray Matter was the assignee of the patent rights to any inventions created by White during his time with the company.

Additionally, even if White did not explicitly assign his IP rights over to Gray Matter, other legal doctrines would still likely grant Gray

37. See, e.g., 8 NEW YORK FORMS LEGAL & BUS. § 22:80 (2014).

38. See Ron Corbett, *IP Strategies for Start-Up Ecommerce Companies in the Post-Dot-Bomb Era*, 8 TEX. WESLEYAN L. REV. 643, 649 (2002) ("A strong IP portfolio helps attract and secure financing from investors. Investors want proof of exclusive and effective IP rights.").

39. See generally Gworek & Steele, *supra* note 26, at § 2.5.5.

40. See Henrik D. Parker, Note, *Reform for Rights of Employed Inventors*, 57 S. CAL. L. REV. 603, 606–08 (1984) (analyzing patent ownership issues under the common law and noting that employers began using written contracts in response to ambiguities in the common law).

41. See Joshua L. Simmons, *Inventions Made for Hire*, 2 NYU J. INTELL. PROP. & ENT. L. 1, 45 (2012).

42. *Id.*

43. *Id.*

Matter the right to use White's inventions.⁴⁴ The first is the concept of "shop rights." Under the "shop rights" doctrine, "where a servant, during his hours of employment, working with his master's materials and appliances, conceives and perfects an invention for which he obtains a patent, he must accord his master a nonexclusive right to practice the invention."⁴⁵ Similarly, under the "shop rights" doctrine, Gray Matter would be free to use any inventions patented by White, so long as White created them with company resources.⁴⁶

Second, Gray Matter would also benefit from the "hired to invent" doctrine. Under this principle, an employee hired "to solve a particular problem or to invent in a certain field" will forfeit his patent rights even without a written contract.⁴⁷ Whether White was "hired to invent" would hinge on the "specificity" of the requests made by Gray Matter and how closely White's inventions conformed to these requests.⁴⁸ To the extent

44. See generally ROGER M. MILGRIM, 1 MILGRIM ON TRADE SECRETS § 5.02 (2014).

45. *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 188 (1933). See *Gen. Paint Corp. v. Kramer*, 68 F.2d 40, 41 (10th Cir. 1933) ("Kramer invented such devices while in the employ of the Hill Company; the shop rights, if any, were acquired by that company."); *Simmons*, *supra* note 41, 12–14; *McElmurry v. Arkansas Power & Light Co.*, 995 F.2d 1576 (Fed. Cir. 1993) (holding that the company had acquired "shop right" in its employee's patented device, where employee invented device while working at company, consented and participated in installation of device for company, and company paid all costs and expenses associated with testing and implementing device).

46. However, under this doctrine, the patent would still remain in White's name, and he would still enjoy the right to use the invention. See *Simmons*, *supra* note 41, at 13.

47. See *id.* at 15 (citing *Standard Parts Co. v. Peck*, 264 U.S. 52 (1924); *Houghton v. United States*, 23 F.2d 386 (4th Cir. 1928); *Nat'l Dev. Co. v. Gray*, 55 N.E.2d 783 (Mass. 1944)).

48. David Loretto, *Employee Patents on Computer-Implemented Inventions: The Conundrum of Separate Ownership of Patent and Copyright*, 23 CARDOZO L. REV. 705, 727–28 (2002) (citing 2 PETER D. ROSENBERG, *PATENT LAW FUNDAMENTALS* § 11.04[1][b], at 11–41 (2d ed. 2001); 8 DONALD S. CHISUM, *CHISUM ON PATENTS: A TREATISE ON THE LAW OF PATENTABILITY, VALIDITY, AND INFRINGEMENT* § 22.03[3] (2001)). Other factors include:

- (1) previous assignments of patents on other inventions by the employee;
- (2) a customary practice within the company for other similarly situated employees to assign;
- (3) whether the invention was conceived during the period of employment;
- (4) who originally posed the problem solved by the invention;
- (5) the employee's authority within the company to determine to whom to give a problem for solution;
- (6) the relative importance of the idea to the employer's business;
- (7) a previous inconsistent position on inventorship by the employer;
- (8) an agreement by the employer to pay royalties to the employee;
- (9) payment of patent procurement expenses by the employer or em-

that any of White's ideas consisted of mere improvements on existing inventions owned by Gray Matter, the rights to White's improvements would belong to Gray Matter.⁴⁹

Third, some courts have employed a fiduciary duty analysis in ordering inventors to assign invention rights to their employers.⁵⁰ This theory has been applied when the inventor occupies a special relationship of trust and confidence to the business — such as a founder of the business, like White.⁵¹

To the extent White created any material that would be protected by copyright law rather than patent law, such material would be considered a “work made for hire” so long as it was created within the scope of his employment; this would vest “authorship” and hence ownership with Gray Matter, not White.⁵²

What about ideas that White developed at Gray Matter that were not disclosed in a patent application? Many of these would qualify as trade secrets, another type of IP. While patents protect a company's ideas by dedicating the information to the public in return for a limited monopoly, trade secrets protect ideas whose value is tied to their secrecy.⁵³ Often

ployee; and (10) the absence of initial interest by the employer when the employee first exposed the idea.

Id. at § 22.03[2].

49. *See* *Agawam Co. v. Jordan*, 74 U.S. 583, 602 (1868) (“[W]here a person has discovered an improved principle in a machine, manufacture, or composition of matter, and employs other persons to assist him in carrying out that principle, and they, in the course of experiments arising from that employment, make valuable discoveries ancillary to the plan and preconceived design of the employer, such suggested improvements are in general to be regarded as the property of the party who discovered the original improved principle, and may be embodied in his patent as a part of his invention.”); *St. Louis & O’Fallon Coal Co. v. Dinwiddie*, 53 F.2d 655 (D. Md. 1931), *aff’d*, 64 F.2d 303 (4th Cir. 1933); *Simmons*, *supra*, note 41, at 17–18 (citing *Agawam Co.*, 74 U.S. 583 (1868); *Int’l Carrier Call & Television Corp. v. Radio Corp. of Am.*, 142 F.2d 493 (2d Cir. 1944); *Larson v. Crowther*, 26 F.2d 780 (8th Cir. 1928)).

50. *See, e.g.*, *Great Lakes Press Corp. v. Froom*, 695 F. Supp. 1440 (W.D.N.Y. 1987).

51. *See id.*; Paul C. Van Slyke & Mark M. Friedman, *EMPLOYER’S RIGHTS TO INVENTIONS AND PATENTS OF ITS OFFICERS, DIRECTORS AND EMPLOYEES*, 18 *AIPLA Q.J.* 127, 147–50 (1990).

52. 17 U.S.C. § 201(b) (2014) (“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”); 17 U.S.C. § 101 (2014) (“A ‘work made for hire’ is (1) a work prepared by an employee within the scope of his or her employment.”). *See* *Simmons*, *supra* note 41, at 50.

53. R. Mark Halligan, *Trade Secrets v. Patents: The New Calculus*, 2 *LANDSLIDE* 10, 11 (2010).

a company's trade secrets cannot be patented because they do not possess the requisite novelty, usefulness, and non-obviousness factors required for patent protection,⁵⁴ for example, a client database.⁵⁵ Other times, a company deliberately chooses not to patent an idea, because trade secrets arguably have an advantage with respect to duration. Unlike patents, which generally have a term of 20 years from the date of filing a patent application,⁵⁶ a trade secret is protected for as long as the idea remains secret.⁵⁷

In White's case, as with his patent rights, there's a good chance that he explicitly assigned the rights to any trade secrets created by him to Gray Matter.⁵⁸ If not, Gray Matter may still have owned the trade secrets created by White under the "hired to invent" doctrine, discussed above, which applies to trade secrets as well.⁵⁹

Assuming that Gray Matter did in fact own these trade secrets, White would face serious consequences if caught using the trade secrets with future employers. The remedies that would be available to Gray Matter are set forth in the Uniform Trade Secrets Act ("the Act"), which New Mexico has adopted.⁶⁰ Under the Act, injunctive relief would be available to Gray Matter upon a finding that White "misappropriated"⁶¹

54. See generally Bernard Chao, *Moderating Mayo*, 107 Nw. U. L. REV. 423 (2012).

55. See, e.g., *Sasqua Group, Inc. v. Courtney*, No. CV 10-528, 2010 WL 3613855, at *22 (E.D.N.Y. Aug. 2, 2010) (denying trade secret protection to a client list which contained data readily available on Linked-In, Google, and Facebook); see also *Insure New Mexico, LLC v. McGonigle*, 2000-NMCA-018, 128 N.M. 611, 995 P.2d 1053; but see *Rapid Temps, Inc. v. Lamon*, 2008-NMCA-122, ¶ 22, 144 N.M. 804, 192 P.3d 799 (holding that a database of client names constituted a trade secret when it contained data that went "beyond . . . information that one could easily obtain by consulting a phone directory.").

56. 35 U.S.C. § 154(a)(2) (2014).

57. The classic example is the Coca-Cola formula, which has remained secret for over 100 years. Halligan, *supra* note 53, at 11.

58. See INTELLECTUAL PROPERTY LAW FOR BUSINESS LAWYERS § 11:11 (2014), available at Westlaw IPLBL ("It is now generally accepted that work performed by that employee, and thus any and all resulting "confidential information" is owned by the employer. Thus, an employee is normally not free to use trade secret information he or she developed for an employer after the employment relationship has ended.").

59. ROGER M. MILGRIM, 1-5 MILGRIM ON TRADE SECRETS § 5.02 (2014); 3 TRADE SECRETS THROUGHOUT THE WORLD § 40:51.

60. See NMSA 1978, §§ 57-3A-1 to -7 (1989); see also *Rapid Temps, Inc.*, 2008-NMCA-122, ¶ 27, 144 N.M. 804, 192 P.3d 799 (awarding compensatory and punitive damages arising from former employee's misappropriation of former employee's client database).

61. The Act provides various definitions of "misappropriate." NMSA 1978, § 57-3A-2 (1989). White, as a former employee with knowledge of Gray Matters trade

the company's trade secrets, or threatened to do so.⁶² Additionally, Gray Matter could seek damages, including "both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation."⁶³ Finally, if White were found to have willfully and maliciously misappropriated Gray Matter's trade secrets, a court could award punitive damages.⁶⁴

Even if White did not actually misappropriate Gray Matter's trade secrets or threaten to do so, his job opportunities may still have been limited because of the "inevitable disclosure" under the trade secrets doctrine. In this type of trade secret action, "the former employer alleges, in essence, that the employee knows too much and therefore cannot effectively perform in a new, competitive position without at least inadvertently drawing upon prior, proprietary knowledge of the ex-employer."⁶⁵ In such cases, possible relief includes not only enjoining the former employer from disclosing trade secrets, but also enjoining him from even taking a job in similar fields as the former employer for a certain amount of time.⁶⁶ This harsh injunctive relief essentially gives an employer an alternative means of obtaining the benefits of a noncompete agreement. If White joined a direct competitor after leaving Gray Matter, his former employer may have had a good argument that certain secrets were inseparable from White's talents. This could entitle Gray Matter to injunctive relief and limit White's employment opportunities.

secrets but no longer having a right to use them, would likely fall under Section 57-3A-2(B)(2)(b)(2) as a person who has used "a trade secret of another without express or implied consent by a person who . . . (b) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was . . . (2) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use." See also *Dionne v. Se. Foam Converting & Packaging, Inc.*, 397 S.E.2d 110, 114 (Va. 1990) (describing circumstances when a former employee was enjoined from using former employer's trade secret, despite the employee's contention that he created the trade secret; the employee knew that his knowledge of trade secret was "acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use" under the Uniform Trade Secrets Act).

62. NMSA 1978, § 57-3A-3 (1989).

63. NMSA 1978, § 57-3A-4(A) (1989).

64. NMSA 1978, § 57-3A-4(B) (1989).

65. William Lynch Schaller, *Jumping Ship: Legal Issues Relating to Employee Mobility in High Technology Industries*, 17 LAB. LAW. 25, 52 (2001).

66. See, e.g., *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995) (holding that former general manager of PepsiCo's California region could not oversee marketing of competitor without relying inevitably on his knowledge of PepsiCo's trade secrets and approving a six-month injunction that completely barred the marketing executive from working for the competitor during that time).

Without consulting an attorney, White may not have realized that Gray Matter could prevent him from using his own ideas, even those that did not result in a patent. In a field such as chemistry, there are any number of concepts that White may have created or learned at Gray Matter that would be deemed trade secrets and therefore unable to be used during future employment.⁶⁷ It seems questionable whether White considered any of this when he stormed away from Gray Matter.

Buy-sell clauses, noncompete agreements, patents, and trade secrets — these legal concepts likely received little consideration from a ticking “time bomb”⁶⁸ like Walter White. Knowing White, he probably left Gray Matter thinking he would bring all of his talents, and all of his research and ideas, elsewhere. For the reasons above, the law likely prohibited White from using much of his past work at a subsequent job and from competing with Gray Matter. This would explain White’s checkered job history post-Gray Matter and his eventual decision to abandon the chemical research field altogether.

C. Safeguards that Counsel can Provide Before Entrepreneurs Sell Out

If White had consulted with an attorney before selling out, he would have surely been advised of the many pitfalls described above, and perhaps he would have thought twice before walking out on Gray Matter. In addition to advising White on the legal barriers described above, an attorney also could have suggested ways that White could have taken the offensive to protect his interests. In order to best protect himself, White should have retained separate counsel very early on in the development of Gray Matter — specifically, at the time he decided to incorporate the company with his two co-founders.

Why would White need his own separate counsel? Wouldn’t he, Eliot, and Gretchen have already retained counsel to handle the incorporation of Gray Matter? Yes. However, their engagement letter would have

67. See *Salsbury Labs., Inc. v. Merieux Labs., Inc.*, 908 F.2d 706 (11th Cir. 1990) (finding that manufacturer’s multi-step process for manufacturing vaccine was a trade secret); *Travenol Labs., Inc. v. Turner*, 228 S.E.2d 478 (N.C. 1976) (finding a trade secret where pharmaceutical company slightly modified the textbook process “plasma fractionation,” which includes the extraction, processing and sale of human blood components, or plasma fractions used in medical treatment and research when the plaintiff performed the “plasma fractionation” process at precise temperatures which resulted in a greater yield); *Vitro Corp. of Am. v. Hall Chem. Co.*, 254 F.2d 787, 788 (6th Cir. 1958) (finding a trade secret existed in specific hydro-metallurgical process used by chemical company for extracting metal salts from scrap metal).

68. *Breaking Bad: Madrigal* (AMC television broadcast July 22, 2012) (meth industry associate Mike Ehrmantraut speaking to Walter) (“You are a time bomb, tick, tick, ticking, and I have no intention of being around for the boom.”).

made it very clear that the “client” was Gray Matter, *not* the individual founders of the company. White may have assumed that he didn’t need separate counsel, thinking that his interests and the company’s interests would be more or less aligned.⁶⁹ As illustrated in the section above, that is not always the case. Separate counsel could have helped protect White’s interests, beginning at the time of Gray Matter’s incorporation.

White’s separate counsel could have helped him prepare an exit strategy to protect his interests in the event that the Gray Matter venture didn’t work out. Specifically, an attorney would have helped White negotiate the terms of the buy-sell agreement he and his co-founders likely signed at the time of incorporation. Part I discussed the various ways a buy-sell agreement benefits a business and its remaining members. However, a well-negotiated buy-sell agreement can also benefit the departing member. First, it creates a market for his shares that might not otherwise exist. Second, it helps him receive a fair price, which the shares may not be able to fetch on the open market.⁷⁰

Why would Walter White think to enter into such an agreement during the honeymoon phase of Gray Matter when he and his co-founders were getting along perfectly? Counsel would have advised that the honeymoon phase is the perfect time to negotiate a buy-sell agreement. It is much easier to negotiate fair, reasonable terms when everyone is still on good terms, and no one knows which side of the table he will be sitting on when the buy-sell agreement is triggered.

In White’s case, we know he received only \$5,000 for his 1/3 share of the business. Part I suggested that this low price was likely the result of an unfavorable buy-sell agreement, which left White with mostly unvested shares that could be purchased cheaply by Gray Matter. If White had retained separate counsel, there are several ways they could have made the buy-sell agreement more favorable. Specifically, White’s counsel could have helped negotiate:

- As a founder of the company, what portion of White’s stock will be considered vested upfront at the time of incorporation?
- What is the rate at which the stock will vest?
- Under what scenarios will vesting accelerate?
- Will vesting accelerate if White is terminated “without cause”?
- Will vesting accelerate if White resigns for “good reason”?

69. An illustration of this misconception can be found in the film “The Social Network,” discussed further below, in which Eduardo Saverin laments “[i]t was insanely stupid of me not to have my own lawyers look over all of it. In all honesty I thought they were my lawyers.” *THE SOCIAL NETWORK* (Columbia Pictures 2010).

70. See Vance, *supra* note 25, at 11.

- How does the agreement define “cause” and “good reason”?⁷¹
- Will vesting accelerate if there is a “change of control” at the company?
- How will unvested shares be valued?
- How will vested shares be valued? “Fair market value”? How is that term defined?⁷²

An attorney could have helped White negotiate favorable terms in all of these areas. Again, the earlier these negotiations take place, the better. White would have a hard time negotiating favorable terms once the handwriting was already on the wall and it was clear that he was ready to split. In contrast, his chances would be much better early on in the company's history, because he, Elliot, and Gretchen would presumably all be starting on equal footing, unaware of which side of the table they would be sitting when a triggering event occurs.

White's IP rights are another area where an attorney could have helped. White likely assigned both his past and future IP rights to Gray Matter in return for his share of the company. Gray Matter's counsel would have drafted these clauses as broadly as possible so as to leave no question as to the ownership of the company's IP portfolio. Such a broad clause may have swept up White's ideas that were completely unrelated to his work with Gretchen and Elliot and that he did not intend to be owned by Gray Matter. An attorney could have helped him draft the IP invention assignment agreement with greater precision so as to make it very clear what IP he was assigning to Gray Matter and what IP he was retaining. White was assigning IP that was apparently essential to Gray Matter, yet he was a minority shareholder. White's attorney could have proposed that the invention assignment agreement include a clause to protect White from the risk of being wrongfully forced out of the business. Such a clause could provide that, in the event of termination without cause, White's assigned IP rights would revert back to him, perhaps with an obligation to license them to Gray Matter for royalties.⁷³

Counsel could also have recommended having a professional appraisal conducted for any IP being assigned to Gray Matter. An appraisal

71. See Gworek & Steele, *supra* note 26, at §2.5.6 (providing common definitions of these terms).

72. Buy-sell agreements can use any of several different methods of valuation, including a price fixed in advance, a future agreed-upon price, an independent appraisal, a formula based approach, etc. See Eric A. Manterfield, BUY-SELL AGREEMENTS, ST002 ALI-ABA 59 (providing a more elaborate discussion on these issues).

73. See Jonathan D. Gworek, *Protecting the Legal Interests of Founders in a Startup Emerging Technology Company* MORSE BARNES-BROWN PENDLETON PC (2005), http://www.mbbp.com/resources/business/pdfs/founder_rights.pdf.

would clarify the value of any IP being contributed by White. This step would prove advantageous to White in the future if Gray Matter exercised a buy-sell agreement, under which the price of White's stock could be based on the value of White's contributions to the business.

Lastly, counsel could help White negotiate a more favorable noncompete agreement that provided a narrower geographic scope, a shorter duration, and a more limited definition of prohibited fields of employment. Similar to the IP clause proposed above, counsel could advocate for a clause whereby the noncompete agreement would be voided if White were terminated without cause.⁷⁴ Counsel could also negotiate for the inclusion of a clause whereby White would receive severance pay for a term to run concurrently with the duration of the noncompete agreement.⁷⁵

The safeguards discussed above would have gone a long way in protecting White's interests in Gray Matter, assuming they were successfully negotiated by White's separate counsel. Of course, "*askin' ain't gettin'*," as the saying goes, and it's unlikely that White's counsel would be able to wheel and deal for each and every one of these protections. But so long as White planned ahead, and started the negotiating early on while everyone was still on good terms, he could have been able to equip himself with a solid, strategic exit strategy. If White had even the tiniest semblance of self-awareness, he would have recognized that planning ahead for a fiery exit was probably a good idea.

II. NO MORE HALF MEASURES: AGGRESSIVE LITIGATION TACTICS FOR OPPRESSED MINORITY SHAREHOLDERS

Part I of this article set forth all the reasons White should have consulted an attorney before selling out, and described some measures that White could have taken to better protect his interests before departing Gray Matter. However, all indications suggest that did not happen. Instead, it seems White stormed out, giving little consideration to the legal implications of his actions and apparently convinced that Gray Matter would go down in flames without his irreplaceable talents.

This proved not to be the case. White seemingly entered an endless spiral, slowly losing more and more of his ambition. He couldn't hold down a job at various chemical laboratories. He then left the chemical research field altogether and took a job teaching high school chemistry.

74. *Id.*

75. *Id.*

He worked part-time manning the cash register (and giving wipe-downs) at a local carwash.

By his 50th birthday, according to all accounts White had become a shell of a man, virtually sleep-walking through both his personal and professional lives.⁷⁶ Then, one day, White was diagnosed with inoperable lung cancer, and everything changed. Something awakened inside him that inspired him to do something radical — start producing and selling methamphetamine.⁷⁷ White was “a brilliant chemist, [who] unsurprisingly becomes somewhat of a Picasso of drugs: his meth is the purest on the market.”⁷⁸ The money quickly poured in.

White had long insisted that his decision to “break bad” was strictly for the benefit his family — he didn’t want to weigh down his soon to be widowed wife and fatherless children with the burden of paying for his exorbitant medical bills. But when White entered remission, the money continued piling up, and his justification for distributing illicit drugs became increasingly hard to believe. Eventually, White would admit his true motives. He cooked meth because he enjoyed the thrill. “I was good at it, and . . . I was alive,” he would admit, a feeling he likely hadn’t felt since the Gray Matter days.⁷⁹

Other commentators have offered even more cynical explanations for White’s motives. He resented his lot in life and wanted to prove that he was better than everyone else.⁸⁰ He needed to teach society a lesson for rejecting him.⁸¹ He craved “feeling an ownership over his shortening life, a sense of control over what he does and what direction the end of his life will take.”⁸² He sold meth because it meant “being no one’s bitch.”⁸³ He was intoxicated by the discovery “that he’s long had the

76. See generally *Breaking Bad: Pilot* (AMC television broadcast Jan. 20, 2008).

77. See *id.* (Jesse and Walter speaking to each other) (“Man, some straight like you, giant stick up his ass, all of a sudden at age, what, 60, he’s just gonna break bad?” . . . “I am awake.”).

78. Michelle Kuo & Albert Wu, *In Hell, “We Shall Be Free”: On “Breaking Bad,”* LOS ANGELES REVIEW OF BOOKS (July 13, 2012), <http://lareviewofbooks.org/essay/in-hell-we-shall-be-free-on-breaking-bad>.

79. *Breaking Bad: Felina* (AMC television broadcast Sept. 29, 2013).

80. Andy Greenwald, *Cigs, Lies, and Videotape in ‘Confessions’*, GRANTLAND, (Aug. 26, 2013), <http://grantland.com/hollywood-prospectus/breaking-bad-season-5-episode-11-recap-cigs-lies-and-videotape-in-confessions/>.

81. *Id.*

82. DAVID KOEPEL, *BREAKING BAD AND PHILOSOPHY* 49 (Open Court Publishing, 2012).

83. Kuo & Wu, *supra* note 78.

power to write and rewrite the world around him in spectacular ways.”⁸⁴ He “risk[ed] all to feed a ceaseless, self-destructive desire to be king.”⁸⁵

Similar motives have led other men to pursue another dark art: litigation. That is the topic of Part II of this Article. What if, instead of sitting idly by as his post-Gray Matter career floundered, White sought out the advice of a smart, aggressive litigator? This Part outlines various theories on which White could bring suit, and suggests disruptive litigation tactics whereby White could instill fear of bad publicity for Gray Matter, frighten potential investors, and ultimately secure a hefty settlement.

One more preliminary note: it is true that enduring the rigors of “scorched earth” litigation is not for the soft-spoken or the mild-mannered. Is it realistic to think that a meek, unassuming chemist like Walter White (the version before the cancer, the blue meth, and Heisenberg) would really possess the killer instinct needed to endure this sort of legal battle? The answer is, without a doubt, yes. Commentators now widely accept that the bitter, ruthless, and cunning nature that defined Heisenberg lived inside of Walter White all along.⁸⁶ It just took the right trigger, cancer, to awaken that potential inside of White.

White should have sought to “awaken” himself not through selling meth, but through a heated, intense bout of litigation with the aid of a sophisticated trial lawyer. We know that White, ever since he broke bad,

84. Andrew Lanham, *Walter White's Heart of Darkness*, LOS ANGELES REVIEW OF BOOKS (Aug. 11, 2013), <http://lareviewofbooks.org/essay/walter-whites-heart-of-darkness/#>.

85. Kuo & Wu, *supra* note 78.

86. See Hiatt, *supra* note 2.

[Q:] Do you now think that Walt broke bad long before this show's narrative started – maybe around the time he realized they'd given away a share of a billion-dollar company for \$5,000?

[A:] Yeah. I'm gonna do a bad job paraphrasing it, but one of the truest statements anyone's ever said about Hollywood is, “Success in Hollywood doesn't change you so much as it reveals who you really are, deep down inside.” That analogy could be applied to a lot of life-changing events. In the case of Walter White, finding out in that first episode that he's dying of terminal cancer frees him, as he puts it. It means that he is now awake, and this awakening from sleepwalking through the first five decades of his life, this sudden lack of constraint or inhibition, allows him to be the person that he truly is. Unfortunately, the person that he truly is is most definitely not all good.

Id. See also Greenwald, *supra* note 80 (“[T]he most horrifying part of *Breaking Bad* may be that Walt, at his core, didn't really transform at all. It wasn't greed or generosity or cancer or fear that fueled this reign of death and destruction. It was resentment. Seething, burning resentment, the kind that forms not due to poor treatment but due to an innate knowledge that you, the aggrieved, are *better* than said treatment, better than everyone who has somehow gotten the better of you over the years.”)

has been blessed with a heavy dose of “devil’s luck”⁸⁷ — and there’s no better time to take advantage of that than in litigation. While a proud, self-made man like White may have been repulsed by the idea of asking for help from “Dewey, Cheatem, & Howe,”⁸⁸ it certainly beats teaming up with Fring, Ehrmantraut, and Salamanca.⁸⁹

A. *Litigation Strategy*

1. “Elliott, if we’re gonna go that way, you’ll need a bigger knife.”⁹⁰

White proved that he was not afraid to intimidate the Schwartzes in order to get what he wanted. In his final hours, White stalked the Schwartzes, snuck into their house, and demanded that they hide \$9.72 million in drug money and funnel it to White’s wife and children.⁹¹ What was in it for the Schwartzes? White apparently made them an offer they couldn’t refuse — he waved his hand in the air, two red sniper dots appeared on Gretchen and Elliot’s chests, and White told them he had hired “the two best hit men West of the Mississippi,” who would kill the couple if they didn’t comply with White’s orders.⁹² Gretchen and Elliot, terrified, agreed to do White’s bidding, and White assured them “[c]heer up, beautiful people. This is where you get to make it right.”⁹³ White’s litigation strategy for reclaiming his lost fortune could follow a similar plan.

Below are several different legal theories upon which White could sue the Schwartzes and Gray Matter for damages. These causes of action, even when artfully pled by an experienced litigator, are not guaranteed to succeed. Some of them pose significant evidentiary hurdles, and, given our limited knowledge of the facts leading to White’s departure from Gray Matter, it is difficult to predict whether a favorable trial verdict

87. *Breaking Bad: Rabid Dog* (AMC television broadcast Sept. 1, 2013) (Jesse speaking to DEA Agent Hank Schraeder) (“Look, look, you two guys are just guys, okay? Mr. White he’s the devil. You know, he is, he is smarter than you, he is luckier than you. Whatever, whatever you think is supposed to happen. I’m telling you, the exact reverse opposite of that is gonna happen, okay?”); *Breaking Bad Insider Podcast*, AMC (Sept. 30, 2013) [hereinafter *Gilligan Podcast*], <http://www.amctv.com/shows/breaking-bad/insider-podcast-season-5> (“Walt has the devil’s luck. He’s got someone looking out for him. And he’s praying to somebody . . . I don’t know who he’s praying to exactly. I don’t know who would be so amenable to him getting his way, what supernatural deity or whatever, but he’s sorta got the devil’s luck.”).

88. A fictional law or accounting firm used in parody settings.

89. White’s sometimes allies in the meth business during the series.

90. Walter White speaking to former partner Elliot Schwartz. *Breaking Bad: Felina* (AMC television broadcast Sept. 29, 2013).

91. *Id.*

92. *Id.*

93. *Id.*

would have been likely. But it's important to remember, that's not the only way White could have won. As hesitant as he may have been to take another "buyout,"⁹⁴ White should have also considered the possibility of settlement.

Sources with intimate knowledge of Gray Matter's history were split over whether or not the Schwartzes forced White out of the business.⁹⁵ If they didn't force him out, and White's anger was just a simple case of seller's remorse, why would they ever make a substantial settlement offer to White? The answer lies in the mechanisms available to fund high-tech startups, and because sometime between Gray Matter's incorporation and its eventual valuation of \$2.16 billion, the company almost certainly secured funding from venture capital investors. And White's threatened litigation could have derailed those efforts.

Aggressive patent litigation could have instilled doubt as to who owned Gray Matter's IP, thereby creating red flags for potential investors. Likewise, via pre-trial discovery including depositions of the Schwartzes, White could have threatened to uncover any other skeletons lurking in Gray Matter's closets. This is a tried and true litigation strategy for encouraging settlement.⁹⁶ "The boss of any business never wants to testify. Especially in an adversarial setting, where a lawyer will be trying

94. *Breaking Bad: Buyout* (AMC television broadcast Aug. 19, 2012) (Walter speaking to Jesse) ("I have not been working this hard just to sell out. . . . [W]e have suffered and bled, literally for this business, and I will not throw it away for nothing.").

95. See *Gilligan Podcast*, *supra* note 87 ("I don't know that [Gretchen and Elliot] were really villains to begin with. Walter White is a pretty warped individual. Just because he says that they stole his life's work in an earlier episode doesn't mean it's necessarily true. . . . I'm not at all convinced that they're bad people or that they did Walt wrong, but he certainly believes that.").

96. Currently in the headlines as of this writing is an especially high-profile example of this litigation tactic in the legal aftermath of the National Football League's disciplining of former Baltimore Ravens running back Ray Rice. See Michael McCann, *Ray Rice, Roger Goodell face multiple legal options stemming from scandal*, SPORTS ILLUSTRATED, Sept. 10, 2014, available at <http://www.si.com/nfl/2014/09/10/ray-rice-roger-goodell-nfl-suspension-elevator-video-legal-options>.

While none of Rice's potential legal claims may ultimately prove successful, Rice may nonetheless be in a position to extract a settlement from the NFL that returns him to the field. The NFL knows that if Rice files a lawsuit and it advances past a motion to dismiss, Rice's attorneys would be in a position to force Goodell and other NFL officials to testify. Keep in mind, when Goodell speaks with [journalists], any lying or obstruction would not constitute criminal behavior. That is not to suggest Goodell lies to journalists, but rather that any lying would not carry legal risk.

It would be a different story for Goodell if he's forced to answer questions from Rice's attorneys while under oath. Intentionally lying in that circum-

to lay traps and to twist words.”⁹⁷ We know that Gray Matter, for all of its success, was not immune to criticism from the public, and more importantly, investors on Wall Street.⁹⁸

In order to wreak such havoc, White would just have to ensure that his lawsuit survive a Rule 12(b)(6) motion to dismiss,⁹⁹ sometimes known in state court as a demurrer. Gray Matter would likely file such a motion as its initial response to White’s lawsuit, in hopes of disposing of the suit cheaply and without allowing it to proceed to discovery. The purpose of a 12(b)(6) motion is to test whether a plaintiff’s complaint (where all allegations are assumed to be true) states plausible facts and a legally cognizable theory of recovery. If a court finds that it does, the case will proceed to discovery. If not, the lawsuit will be dismissed. The United States Supreme Court has held:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact).¹⁰⁰

stance could give rise to criminal charges of perjury and obstruction, both of which are felonies.

Pretrial discovery would also require the NFL to reveal emails and other sensitive documents. These materials could reflect poorly on Goodell and perhaps also NFL owners and coaches who were interviewed for the Rice investigation.

Id.

97. Mike Florio, *NFL wants to shield Goodell from testifying in Rice appeal hearing*, NBC SPORTS (Oct. 12, 2014), <http://profootballtalk.nbcsports.com/2014/10/12/nfl-wants-to-shield-goodell-from-testifying-in-rice-appeal-hearing/>.

98. See Andrew Ross Sorkin, *The Gray Matter of Charity*, N.Y. TIMES, Sept. 23, 2013, http://dealbook.nytimes.com/2013/09/23/breaking-bad-the-gray-matter-of-charity/?_php=true&_type=blogs&_php=true&_type=blogs&_r=1 (depicting a newspaper story related to Gray Matter’s charitable contribution in the episode titled “Granite State”) (“[T]he timing and backstory of the grant is raising red flags among some investors on Wall Street and prompting some to ask: Is the donation a publicity stunt meant to mask troubling news about the company [and its association with drug kingpin Heisenberg]?”).

99. See Fed. R. Civ. P. 12(b) (“Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion . . . (6) failure to state a claim upon which relief can be granted.”); Rule 1-012(b) NMRA (same).

100. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted).

In other words, to survive Gray Matter's inevitable 12(b)(6) motion, White would not have to prove that his allegations were true. He would simply have to allege plausible facts that would give rise to a legally recognized cause of action. An experienced litigator would have drafted White's complaint with these standards in mind, and would likely allege the causes of action described below.

B. *The Claims*

1. White's Patent Infringement Claim Against Gray Matter

A patent infringement claim would be perhaps White's greatest weapon in his litigation arsenal, as it would provide the most sure-fire way to catch the attention of the company's prospective VC investors.

Gray Matter reportedly "had a few patents pending" at the time White left the company.¹⁰¹ Would these patents have been filed in White's name, or the company's? A patent may list the inventor's employer as an "assignee," but prior to passage of the America Invents Act,¹⁰² a patent application was required to name the inventor as the "applicant." So, as to any patents for inventions developed by White, the law at the time would have required that White be named as the applicant. To the extent any of these patents failed to list Gray Matter as the assignee, White could assert a patent infringement claim against Gray Matter if the company was using any of those patents.¹⁰³

What about White's ideas that had not been included in a patent application when he left Gray Matter? For any of these ideas, White could file a patent application of his own. This would likely incite Gray Matter to file a declaratory action seeking a declaration that, under the assignments signed by White, it owned the patent and other IP rights to any such ideas.¹⁰⁴

Of course, as already discussed, Gray Matter probably had a good argument for claiming ownership of any IP created by White while at the company, as well as related IP created before that. Again, White likely

101. *Breaking Bad: Buyout* (AMC television broadcast Aug. 19, 2012).

102. See Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (codified as amended in scattered sections in 35 U.S.C.). This recent piece of patent reform went into effect on September 16, 2012, long after White's litigation would have been underway. Under the America Invents Act, corporate assignees may now be named as the applicant in a patent application. See 35 U.S.C. § 118 (2006).

103. The federal district courts would have exclusive jurisdiction over this suit, 28 U.S.C. § 1338(a) (2006), and venue would lie "in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b) (2006).

104. See Declaratory Judgment Act, 28 U.S.C. § 2201 (2006).

assigned his invention rights to Gray Matter, and the company would also benefit from the “shop rights” and “invented to hire” doctrines. Nevertheless, White may have had a good faith basis¹⁰⁵ for challenging Gray Matter’s ownership of some of his inventions.

First, in order to survive a 12(b)(6) motion, White would need to get around the patent assignment issue by alleging facts under which he would be legally entitled to relief in spite of that assignment.¹⁰⁶ Absent any argument regarding duress, which does not seem applicable to White’s case, his best chance of success would be if he could allege in good faith that certain inventions claimed by Gray Matter were invented by White and fell outside the scope of his invention assignment agreement. Depending on the terms of the assignment, this would include any inventions developed by White without using Gray Matter resources or not related to Gray Matter’s business.¹⁰⁷ Any such inventions also would not trigger the “shop rights” or “hired to invent” doctrines. As discussed above, the “shop rights” doctrine requires use of company resources, and the “hired to invent” doctrine requires that the employee be hired to invent the specific product or solve the specific problem at issue.

A regularly cited example of an employee successfully arguing such a claim is found in the case of *Mattel v. MGA Entertainment*.¹⁰⁸ Mattel is the manufacturer of the Barbie doll. The employee agreed to assign to Mattel any “inventions” he developed while working for the company. While working at Mattel, the employee devised an “idea” for a new line of fashion dolls, “Bratz,” which existed only in his head and through

105. See Fed. R. Civ. P. 11.

106. Some states, but not New Mexico, have placed statutory limits on the permitted scope of such agreements, allowing employees to retain more ownership of their creative output by prohibiting companies from requiring assignment of inventions unrelated to the employee’s work or the employer’s business. See Parker A. Howell, *Whose Invention Is It Anyway? Employee Invention-Assignment Agreements and Their Limits*, 8 WASH. J.L. TECH. & ARTS 79 (2012). See also state statutes regarding employee inventions: CAL. LAB. CODE §§ 2870 (1991), 2871–72 (1979); DEL. CODE ANN. tit. 19, § 805 (1984); 765 ILL. COMP. STAT. ANN. 1060/2 (1983); KAN. STAT. ANN. § 44-130(1986); MINN. STAT. ANN. § 181.78 (1977); N.C. GEN. STAT. ANN. §§ 66-57.1 (1981), 66-57.2 (1981); WASH. REV. CODE §§ 49.44.140 (1979), 49.44.150 (1979).

107. See, e.g., *Mattel, Inc. v. MGA Entertainment, Inc.*, 616 F.3d 904, 907–909 (9th Cir. 2010) (holding an employee who worked for Mattel, the manufacturer of Barbie dolls agreed to assign to Mattel any “inventions” he developed while working for employer, but the employee’s “idea” for a new line of fashion dolls, which existed only through employee’s sketches, fell outside the scope of the assignment, which defined “inventions” as all discoveries, improvements, processes, developments, designs, know-how, data computer programs and formulae, but did not mention “ideas.”).

108. 616 F.3d 904 (9th Cir. 2010).

“preliminary sketches, as well as a crude dummy constructed out of a doll head from a Mattel bin, a Barbie body and Ken (Barbie’s ex) boots.”¹⁰⁹ The employee eventually left Mattel, and went to work with a competitor, MGA, to develop the Bratz dolls. When Mattel found out, it filed a flurry of lawsuits. The employee eventually settled with Mattel, but Mattel and MGA continued to fight over which company owned the rights to the Bratz dolls, which instantly became a hot item.¹¹⁰

At issue before the Ninth Circuit was whether the Bratz idea was an “invention” under the assignment agreement the employee signed with Mattel. The court held that the idea for the Bratz dolls fell outside the scope of the assignment, which defined “inventions” as “all discoveries, improvements, processes, developments, designs, know-how, data computer programs and formulae, whether patentable or unpatentable” but did not mention “ideas.”¹¹¹ The court explained that “[d]esigns, processes, computer programs and formulae are concrete, unlike ideas, which are ephemeral and often reflect bursts of inspiration that exist only in the mind.”¹¹²

Other courts have found that ideas developed by inventors fell outside the scope of the invention assignment agreement in cases with similar facts to *Mattel*,¹¹³ as well as when (1) the contract was unartfully drafted,¹¹⁴ (2) when the idea was not related to the employer’s business,¹¹⁵ and (3) when the idea was developed outside the course of employ-

109. *Id.* at 907.

110. *Id.*

111. *Id.* at 909.

112. *Id.*

113. *See Jamesbury Corp. v. Worcester Valve Co.*, 443 F.2d 205 (1st Cir. 1971) (holding the employee’s idea was outside of scope of invention assignment agreement and did not require the assignment of patent rights when the contract failed to define “inventions” and, prior to termination, the only tangible development of the “idea” was the employee’s drawings of the patent concepts); *see also Evelyn D. Pisegna-Cook, Ownership Rights of Employee Inventions: The Role of Preinvention Assignment Agreements and State Statutes*, 2 U. BALT. INTELL. PROP. L.J. 163, 175 (1994) (discussing factors used by courts to hold pre-invention assignment agreements unenforceable for being unconscionable).

114. *See Ferroline Corp. v. General Aniline & Film Corp.*, 207 F.2d 912, 926 (7th Cir. 1953) (holding that the language of contract referred to one very specific chemical process and not to the carbonyl process used by employee).

115. *See Freedom Wireless, Inc. v. Boston Commc’ns Grp., Inc.*, 220 F. Supp. 2d 16, 18 (D. Mass. 2002) (holding that invention assignment agreement applied to “inventions, innovations or improvements in the Company’s methods of conducting business (including new contributions, improvements and discoveries)” but not to a prepaid wireless telephone billing system invented by employee that was not related to employer’s methods of conducting its satellite- and rocket-based business).

ment.¹¹⁶ Cases like these generally involve very fact intensive analyses and significant pre-trial discovery.

In White's case, the exact language of his invention assignment agreement with Gray Matter is unknown. However, if White was able to allege in good faith that he developed ideas without using Gray Matter resources, or that were unrelated to Gray Matter's specific business, he may have been able to survive a 12(b)(6) motion to dismiss and proceed to discovery on the issue of who owned the rights to those ideas.

If White had survived a 12(b)(6) motion on his patent claims, he could have wreaked some real havoc on Gray Matter's efforts to secure VC funding. Commentators have long observed that VC investors will treat IP assets with a "cloudy" title as a major red flag when deciding whether to invest in a business.¹¹⁷ Surveys have revealed just how careful VCs can be with funding businesses embroiled in IP controversies. This issue is well documented given the recent emergence of "patent trolls." The politically correct way to describe patent trolls is that they are entities "focused on the enforcement, rather than the active development or commercialization of their patents."¹¹⁸ A less polite, and perhaps more honest, definition is that they are companies who "use vague, threatening demand letters to coerce companies . . . into settling baseless lawsuits, regardless of infringement, by abusing the legal system's high cost of defense."¹¹⁹

Many have perceived an ongoing crisis over patent trolls, and this has led to greater research into the effects of patent litigation more generally. One recent study has concluded that VC investors would have spent \$21.772 billion more over the past five years if not for the frequent patent litigation asserted by "Patent Assertion Entities," i.e., patent

116. See *Rigging Int'l Maint. Co. v. Gwin*, 180 Cal. Rptr. 451, 454 (App. Ct. 1982) (holding that even though the invention assignment agreement was worded extremely broadly and applied to inventions created either "during or after usual working hours," the employee was not required to assign to employer rights to an improved twist-lock interlock system when employee developed it while on vacation, and the employer previously told the employee he was uninterested in the improved product).

117. See Corbett, *supra* note 38, at 649 ("A strong IP portfolio helps attract and secure financing from investors. Investors want proof of exclusive and effective IP rights.").

118. Colleen V. Chien, *From Arms Race to Marketplace: The Complex Patent Ecosystem and Its Implications for the Patent System*, 62 HASTINGS L.J. 297, 328 (2010).

119. See *The Impact of Patent Assertion Entities on Innovation and the Economy: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 113th Cong. 3 (2013) (statement of Danny Siegle, Director of Operations, FindTheBest.com).

trolls.¹²⁰ A survey of 200 VCs revealed that 100 percent of respondents indicated that, “if a company had an existing patent demand against it, they might refrain from investing.”¹²¹ Another report documents the case of a venture capitalist who could not continue to raise capital for a portfolio company after it was hit by two successive patent lawsuits.¹²²

All of this is to say that White realistically could have wreaked havoc with a prolonged, discovery-intensive patent claim against Gray Matter — even if his chances of a favorable trial verdict were slim. With such leverage, White could have compelled Gray Matter to enter into a potentially lucrative settlement offer with him. White certainly could have made various demands including cash, stock, and IP rights.

If White actually emerged victorious at trial on a patent infringement claim, he could have been entitled to both compensatory damages¹²³ and injunctive relief.¹²⁴ In “exceptional cases,” a court may award reasonable attorney fees.¹²⁵ White could have also sought extra-compensatory or “treble” damages, as federal law allows a court to “increase the damages up to three times the amount found or assessed,”¹²⁶ usually in the case of willful infringement or bad faith.¹²⁷

2. White’s Minority Shareholder Oppression Claim Against Gray Matter

The other action that White could wage against Gray Matter would be a claim for minority shareholder oppression and breach of fiduciary duties. White felt he was “cut out” of Gray Matter.¹²⁸ Perhaps that claim is pure delusion on his part, and his departure was completely voluntary.¹²⁹ Perhaps White was “cut out” because he wanted to distance him-

120. Catherine Tucker, *THE EFFECT OF PATENT LITIGATION AND PATENT ASSERTION ENTITIES ON ENTREPRENEURIAL ACTIVITY* 36 (2014), available at <http://cdn.arstechnica.net/wp-content/uploads/2014/06/Tucker-Report-5.16.14.pdf>.

121. Robin Feldman, *Patent Demands & Startup Companies: The View from the Venture Capital Community*, 16 *YALE J.L. & TECH.* 236, 243 (2014).

122. See COLLEEN V. CHIEN, *NEW AMERICA FOUNDATION, OPEN TECHNOLOGY INSTITUTE, PATENT ASSERTION AND STARTUP INNOVATION* 50 (2013).

123. 35 U.S.C. §§ 284–285 (2006).

124. 35 U.S.C. § 283 (2006).

125. 35 U.S.C. § 285 (2006); See *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1751 (2014).

126. 35 U.S.C. § 284 (2006).

127. *Yarway Corp. v. Eur-Control USA, Inc.*, 775 F.2d 268, 277 (Fed. Cir. 1985).

128. *Breaking Bad: Peekaboo* (AMC television broadcast Apr. 12, 2009). (Walter speaking to Gretchen) (“[Is money] going to make me forget how you and Elliott . . . cut me out?”).

129. *Id.* (Gretchen speaking to Walter) (“What? That can’t be how you see it . . . That cannot be how you see it . . . You left . . . You left me . . . How could you

self from a workplace romance gone bad, so he quit his job, and inadvertently triggered a buy-sell agreement, as discussed above. Or maybe, just maybe, Gretchen and Elliot really are the villains that White has portrayed them as. If they simply grew tired of White's arrogant, resentful nature, and decided that Gray Matter would be better off if they staged a "squeeze out" or "freeze out,"¹³⁰ then White may have had a compelling action for shareholder oppression.

Minority oppression claims are based on "a set of principles courts have established to protect minority shareholders in close corporations from the potential abuses of a controlling shareholder group."¹³¹ These claims typically involve an alleged breach of fiduciary duty. Perhaps the most widely recognized fiduciary duty is that duty that corporate directors owe to their shareholders — typically in the context of a public corporation. Fiduciary duty in a minority oppression claim differs slightly. These claims typically involve a closely held corporation (like Gray Matter), and the applicable fiduciary duty is the duty owed by the corporation's majority shareholders.¹³² Decisions related to minority oppression claims "hold majority shareholders to the enhanced fiduciary duties expected of partners, treating the close corporation as a partnership 'clothed' in corporate form."¹³³

The minority oppression doctrine developed as an attempt to cure a danger that is unique to closely held corporations. "Unlike publicly held corporations, closely held corporations tend to be small, local businesses owned by relatively few shareholders."¹³⁴ These shareholders are usually responsible for managing the company.¹³⁵ For tax reasons, these shareholder-managers typically choose to be compensated in the form of a sal-

say that to me? You walked away. You abandoned us."); *Gilligan Podcast*, *supra* note 87 ("Walter White is a pretty warped individual. Just because he says that they stole his life's work in an earlier episode doesn't mean it's necessarily true.").

130. Judd F. Sneirson, *Soft Paternalism for Close Corporations: Helping Shareholders Help Themselves*, 2008 WIS. L. REV. 899, 907 n.40 (2008) (citing *Donahue v. Rodd Electrotype Co.*, 505, 520 (Mass. 1975) ("The terms freeze out and squeeze out are interchangeable and describe the situation where holders of a majority of a company's shares cut off the financial return on a minority shareholder's investment (i.e., her salary and any dividends) so as to compel a stock sale to the majority at an inadequate price.")).

131. Jeffrey M. Leavitt, *Burned Angels: The Coming Wave of Minority Shareholder Oppression Claims in Venture Capital Start-Up Companies*, 6 N.C. J. L. & TECH. 223, 229 (2005).

132. *Id.* at 238–39.

133. Benjamin Means, *A Voice-Based Framework for Evaluating Claims of Minority Shareholder Oppression in the Close Corporation*, 97 GEO. L.J. 1207, 1210 (2009).

134. Sneirson, *supra* note 130, at 903.

135. *Id.*

ary rather than with corporate distributions.¹³⁶ Also in contrast to public corporations, “there is typically little or no secondary securities market on which to sell or buy shares of close-corporation stock; investments in close corporations can be, as a result, difficult to liquidate in the normal course.”¹³⁷ As White apparently found out the hard way, these characteristics can present many pitfalls for the minority shareholder that gets on his fellow shareholders’ bad side.

If the majority sees the minority shareholder as toxic, unproductive, or simply annoying, they can gang up and have the minority shareholder fired, thereby cutting off the salary that likely comprised his only form of compensation.¹³⁸ Because there is unlikely to be an outside market for the oppressed shareholder’s stock, he may find himself trapped, with his only option being to sell his shares at a severe discount.

That’s essentially what White has accused Gretchen and Elliot of doing: ganging up on him, cutting him out of the company, giving him pennies for his 1/3 share of the company, and building a chemical research empire based on his research. If that’s true, White may have had a textbook case of minority oppression.

Although the explosion of the venture capital industry has made minority oppression claims a hot topic, the basic doctrine is not new, and was available at the time White was cut out of Gray Matter.¹³⁹ The doctrine dates back to a 1919 case from New York,¹⁴⁰ and has been recognized in New Mexico since at least 1986—arising from a case that also began with a workplace romance gone bad.¹⁴¹

Perhaps the most instructive New Mexico case on this issue is *Walta v. Gallegos Law Firm*.¹⁴² In that case, the firm’s named partner, Gene

136. *Id.*

137. *Id.*

138. *Id.*

139. Leavitt, *supra* note 131, at 229.

140. *Kavanaugh v. Kavanaugh Knitting Co.*, 123 N.E. 148, 151–52 (N.Y. 1919) (“When a number of stockholders constitute themselves . . . the managers of corporate affairs or interest, they stand in much the same attitude towards the other or minority stockholders that the directors sustain generally towards all the stockholders, and the law requires of them the utmost good faith.”). *See also* Leavitt, *supra* note 131, at 238–39.

141. *McCauley v. Tom McCauley & Son, Inc.*, 1986-NMCA-065, 104 N.M. 523, 724 P.2d 232. *See generally* Gretchen Elsner, *Too Close for Comfort: Minority Shareholder Litigation Against Close Corporations After McMinn v. MBF Operating Acquisition Corp. and Peters Corp. v. New Mexico Banquest Investors Corp.*, 39 N.M. L. REV. 319 (2009).

142. 2002-NMCA-015, 131 N.M. 544, 551, 40 P.3d 449, 456. *See also* Camille Romero, Note, *The Fiduciary Duties Owed in A New Mexico Closely Held Corporation: Walta v. Gallegos Law Firm, P.C.*, 34 N.M. L. REV. 181, 190 (2004) (“Majority share-

Gallegos, owned 50 percent of the corporation's shares.¹⁴³ Attorney Mary Walta held 25 percent, and three other attorneys owned the remaining 25 percent.¹⁴⁴ Trouble arose when the firm found itself deep in debt, and Walta suggested to Gallegos that the firm was spending too much money on high-risk contingency fee cases.¹⁴⁵ Gallegos didn't take the criticism well, at one point firing back, "I am sick and tired of you nagging at me. You remind me of one of my ex-wives, and the same thing is going to happen to you that happened to her if you don't be quiet."¹⁴⁶

In what was apparently a deliberate attempt to get rid of Walta, Gallegos announced to the firm that he was leaving the practice of law.¹⁴⁷ He bought out all of the shareholders, and then rehired everybody except Walta.¹⁴⁸ In addition to feeling that she had been forced out of the firm, Walta felt that she had been unfairly compensated for her shares, which she valued at \$52,000.¹⁴⁹ Gallegos valued Walta's stock at only \$20,000, the amount she had paid to purchase it about four years earlier.¹⁵⁰

Walta brought suit, alleging that Gallegos' actions constituted minority oppression and breach of fiduciary duty. She alleged that he used a method of valuation clearly contrary to the shareholder agreement, and that he knowingly undervalued the shares by failing to disclose the amount of accounts receivable.¹⁵¹ The jury awarded Walta \$62,550 in compensatory damages for the value of her shares. The jury awarded an additional \$100,000 in punitive damages given Gallegos' failure to accurately calculate the value of the shares.¹⁵²

The court of appeals affirmed, and set forth the basis for New Mexico's minority oppression claim. The court adopted the Massachusetts approach, as embodied in *Donahue v. Rodd Electrotype Company*.¹⁵³ The court supported its decision by quoting a passage from that case "as the purest expression of the fiduciary duties owed by shareholders:"¹⁵⁴

holders, when taking action that significantly impacts minority shareholders, or vice versa, will be under the obligation of law to act in utmost good faith and fairness with respect to their fellow shareholders.").

143. *Walta*, 2002-NMCA-015, ¶ 4, 131 N.M. 544, 40 P.3d 449.

144. *Id.*

145. *Id.* ¶ 5.

146. *Id.* ¶ 6.

147. *Id.* ¶ 7–8.

148. *Id.* ¶ 23.

149. *Id.* ¶ 25.

150. *Id.*

151. *Id.* ¶ 45.

152. *Id.*

153. 328 N.E.2d 505, 515 (Mass. 1975).

154. *Walta*, 2002-NMCA-015, ¶ 35.

Because of the fundamental resemblance of the close corporation to the partnership, the trust and confidence which are essential to this scale and manner of enterprise, and the inherent danger to minority interests in the close corporation, we hold that stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another. In our previous decisions, we have defined the standard of duty owed by partners to one another as the “utmost good faith and loyalty.” Stockholders in close corporations must discharge their management and stockholder responsibilities in conformity with this strict good faith standard. They may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to the other stockholders and to the corporation.¹⁵⁵

Applying those standards to *Walta’s* case, the court concluded:

[W]e hold as a matter of New Mexico law that a majority shareholder, as well as an officer or director of a close corporation, when purchasing the stock of a minority shareholder, has a fiduciary obligation to disclose material facts affecting the value of the stock which are known to the purchasing shareholder, officer, or director by virtue of his position, but not known to the selling shareholder.¹⁵⁶

The New Mexico Supreme Court would later adopt the *Walta* holding in another minority oppression case, *McMinn v. MBF Operating Acquisition Corporation*, thus solidifying the availability of the cause of action in New Mexico.¹⁵⁷

Under the holdings of *Walta* and *McMinn*, White clearly could have had a claim for minority oppression if he could show that Elliot and Gretchen purchased his shares without disclosing material facts affecting Gray

155. *Id.*

156. *Id.* ¶ 45.

157. *McMinn v. MBF Operating Acquisition Corp.*, 2007-NMSC-040, 142 N.M. 150, 164 P.3d. 41 (explaining majority shareholders scheme to merge two close corporations to “freeze out” minority shareholder was oppressive and breached fiduciary duty). See *Peters Corp. v. New Mexico Banquest Investors Corp.*, 2008-NMSC-039, ¶ 45, 144 N.M. 434, 188 P.3d 1185; See also *Elsner*, *supra* note 141, at 339 (explaining that the denial of plaintiff’s oppression claim in *Peters Corp.* was partially based on fact that plaintiff was “a sophisticated player with other sources of bargaining power”).

Matter's value.¹⁵⁸ Under the holdings of other oppression cases, White may have also had a claim if he could allege any of the following:

- that Gray Matter purchased his shares without disclosing its impending plans to merge with another company,¹⁵⁹
- that Gray Matter fired him and refused to issue dividends, thereby leaving him without a source of income and with little choice but to accept the \$5,000 buyout,¹⁶⁰ or,
- that Gray Matter misrepresented the contents of the buyout agreement signed by White.¹⁶¹

If White could present good faith allegations of any of these scenarios, he would have hopefully been able to at least survive a 12(b)(6) and proceed to discovery. As *Walta* demonstrates, if White were to win at trial, under New Mexico law a trial court could have awarded both compensatory damages for the fair value of the stock as well as punitive damages.¹⁶²

Whether White would ultimately receive a favorable trial verdict could be a different story. The outcome could hinge on how the trial court views the sophistication of the parties. White could be in trouble if the finder of fact deems that he and the Schwartzes were (1) sophisticated shareholders, (2) in an adversarial relationship, and (3) represented by counsel in their buyout negotiations.¹⁶³ On the other hand, if the court determined that White was vulnerable, unsophisticated, and got duped by a savvier business partner, the court may find more favor in his arguments.

158. See also *Thorne v. Bauder*, 981 P.2d 662 (Colo. Ct. App. 1998) (reversing jury verdict because majority shareholders failed to disclose appraisal of company's stock, which was material information that the majority as fiduciaries were required to disclose).

159. See, e.g., *Michaels v. Michaels*, 767 F.2d 1185 (7th Cir. 1985) (affirming jury verdict in favor of former corporate shareholder who was defrauded into selling his shares and holding that defendants were obligated to disclose decision regarding firm merger, even though no agreement had been reached in principle on price or structure of deal).

160. See, e.g., *McCauley v. Tom McCauley & Son, Inc.*, 196-NMCA-065.

161. See, e.g., *First Amended Cross-Complaint of Cross-Complainant, TheFacebook, Inc. v. Saverin*, (No. 105 CV 039867), 2006 WL 6627814, at *15–16.

162. See, e.g., *Walta v. Gallegos Law Firm P.C.*, 2002-NMCA-015, ¶ 55, 131 N.M. 544, 40 P.3d 449.

163. See Amanda K. Esquibel, *The Finality of Buyout Agreements in the Close Corporate Context: What Recourse Remains for Aggrieved Sellers?*, 53 RUTGERS L. REV. 865, 877 (2001); Elsner, *supra* note 141, at 337 (observing that New Mexico minority oppression cases often hinge on the sophistication level of the plaintiffs).

In any event, his counsel would recommend that White strongly consider the possibility of settlement. White had intimate knowledge of the company. If pretrial discovery risked unveiling any skeletons in Gray Matter's closets, it's possible that the company could come "waving its checkbook" in hopes of silencing White.¹⁶⁴ The ever-prideful Walter White may have scoffed at the idea of settlement. His counsel would have advised otherwise.

a. The Facebook Litigation

One high-profile example that shows the potential value of settlement can be seen in the litigation waged among Facebook's co-founders. Although dramatized for the big screen in the film "The Social Network," the litigation was very real, and provides a helpful example for White's shareholder oppression claim.

Facebook was created by Harvard classmates Mark Zuckerberg, Eduardo Saverin, and Dustin Moskovitz. Initially, the three agreed to divide ownership of the company such that Zuckerberg owned a 65 percent share, Saverin a 30 percent share, and Moskovitz a 5 percent share.¹⁶⁵ As Facebook's efforts to secure VC funding ramped up, Saverin found himself on the losing side of a power struggle.¹⁶⁶ Apparently as part of a deliberate "washout" scheme to cut Saverin out of the company, Zuckerberg requested that Saverin sign various stock purchase agreements. When Saverin signed these documents, he surrendered his voting rights in the business and agreed that his stock in Facebook would be subject to dilution upon the issuance of new shares. He apparently was not aware that the shares of the other shareholders were not subject to dilution. When Facebook issued new shares of stock to VCs, Saverin's 30 percent stake was whittled down to less than 10 percent, and continued to shrink with each new issuance of stock. Saverin was eventually fired, and his co-founder listing was removed from Facebook's website.

Feeling he had been duped, Saverin got a lawyer and filed a lawsuit against Facebook and Zuckerberg, alleging breach of fiduciary duty,

164. *Breaking Bad: Peekaboo* (AMC television broadcast Apr. 12, 2009) (Walter speaking to Gretchen) ("[Do you think that] you waving your checkbook around like some magic wand is going to make me forget how you and Elliott — how you and Elliott — cut me out?").

165. See DAVID KIRKPATRICK, *THE FACEBOOK EFFECT: THE INSIDE STORY OF THE COMPANY THAT IS CONNECTING THE WORLD* 34 (2010).

166. See Nicholas Carlson, *How Mark Zuckerberg Booted His Co-Founder Out Of The Company*, BUSINESS INSIDER (May 15, 2012, 11:19 AM), <http://www.businessinsider.com/how-mark-zuckerberg-booted-his-co-founder-out-of-the-company-2012-5>.

fraud, negligent misrepresentation, interference with prospective economic advantage, and unjust enrichment.¹⁶⁷ Saverin's claim alleged that Zuckerberg misrepresented the nature of the documents presented to Saverin by failing to disclose that Saverin's shares would be diluted, and that this act constituted a breach of the fiduciary duties that Zuckerberg, a majority shareholder, owed to Saverin.¹⁶⁸

While this litigation was ongoing, Saverin reportedly approached Ben Mezrich, an author known for telling sensationalized tales of “non-fiction.” Saverin began feeding Mezrich the material that would eventually become “The Accidental Billionaires” — the book on which “The Social Network” is based. Sometime after Saverin started talking to Mezrich, Zuckerberg elected to settle the case. Although the terms of the settlement remain confidential, it has been suggested that the agreement required Saverin to stop talking to the press about Facebook.¹⁶⁹ In return, Saverin was re-listed as one of Facebook's founders,¹⁷⁰ and received approximately a 5 percent share of Facebook.¹⁷¹ He is currently estimated to have a net worth of \$4.2 billion.¹⁷²

The facts of the Facebook case bear resemblance to another big dollar settlement widely discussed in VC circles, *Kalashian v. Advent VI Limited Partnership*,¹⁷³ which involved a company called Alantec. In that case, three Silicon Valley venture capitalists agreed to pay \$15 million to settle a lawsuit by two founders of the company that they had “washed out.”¹⁷⁴ Much like Saverin, the Alantec founders were fired, stripped of any voting powers, and their shares were significantly diluted.¹⁷⁵ In 1996, the company was purchased at \$70 a share, or for \$770 million.¹⁷⁶ The “washed out” founders' share was worth \$600,000, while their pre-dilu-

167. See First Amended Cross-Complaint, *supra* note 161, at *10–*18. Although breach of fiduciary duty would likely have been the primary basis for White's lawsuit, some of these alternative causes of action may have been available to him as well. See 1 SHAREHOLDER LITIGATION § 10:1 *et seq.*

168. See First Amended Cross-Complaint, *supra* note 161, at *12.

169. See Carlson, *supra* note 166.

170. See *Founder Bios*, FACEBOOK, <http://newsroom.fb.com/founder-bios/> (last visited Feb. 23, 2015).

171. See KIRKPATRICK, *supra* note 165, at 322.

172. *Singapore's 50's Richest: #6 Eduardo Saverin*, FORBES (July 2014), <http://www.forbes.com/profile/eduardo-saverin/>.

173. No. CV-739278, 1996 WL 33399950 (Cal. Sup. Ct. Oct. 4, 1996).

174. Jose M. Padilla, *What's Wrong with A Washout?: Fiduciary Duties of the Venture Capitalist Investor in a Washout Financing*, 1 Hous. Bus. & Tax L. J. 269, 271 (2001).

175. *Id.* at 275 n.37.

176. *Id.* at 277.

tion interest of 8 percent would have been worth over \$40 million.¹⁷⁷ A settlement was reached after 18 days of trial testimony that tended to demonstrate that the VCs acted surreptitiously and in bad faith to “wash out” the founders.¹⁷⁸

The Facebook and Alantec lawsuits, and the amount of money they involved, may be extreme examples. But the basic fact patterns outline typical tales of minority shareholder oppression, and illustrate a perfect strategy that White could have followed.

Even if White voluntarily signed away his “potential” and his “kids’ birthright,”¹⁷⁹ just as Saverin did, the minority oppression cases discussed above demonstrate that he might not have been without a remedy. If he could show that Elliot and Gretchen did not negotiate in the “utmost good faith and loyalty,”¹⁸⁰ he would have had a real chance of recovery.

CONCLUSION

Sometime in 2010, long after his days with Gray Matter, Walter White went to work for a new employer in the chemical industry — this time, working for drug kingpin Gustavo Fring and his methamphetamine superlab. Just like White’s time at Gray Matter, the work began as a promising new endeavor, but before long, a stark reality set in. White found himself on Fring’s bad side, and it became clear that this once promising job would not last. Fring began training a replacement for White, chemist Gale Boetticher. As soon as Boetticher learned the ropes, White’s time with the organization would be over. Except Fring was not going to stage a “squeeze out” or “wash out” or some other corporate euphemism — he was going to kill White, and probably his family too. The only thing keeping White alive was the fact that Fring needed White cooking, and production rolling, until Boetticher was ready to take the reins. But Boetticher was a fast study, and White quickly realized his days were numbered.

In this bleakest of moments for White, he proved that he knew a thing or two about leverage. He was willing to kill Fring in order to save his life, yet he could never get close enough to him to seal the deal. But there was someone else, someone more innocent, more vulnerable, that White could get to—Gale Boetticher. The thought of killing Boetticher, an innocent man, was sickening to White, even at this stage of his moral deterioration, but his reasoning was sound: “[t]he cooking can’t stop.

177. *Id.*

178. *Id.* at 295.

179. *Breaking Bad: Buyout* (AMC television broadcast Aug. 19, 2012).

180. Romero, *supra* note 142.

That's the one thing I'm certain of – production cannot stop. Gus can't afford to. So if I'm the only chemist that he's got, then I got leverage and leverage keeps me alive."¹⁸¹

White's strategy was right on the money. He had Boetticher shot and killed, and Fring was left with no other choice than to make peace with White. Of course, "[i]f there's a larger lesson to [the story of Walter White,] it's that actions have consequences."¹⁸² Boetticher's murder became the central piece of a massive DEA methamphetamine investigation, which led to White. When the DEA caught up to White, at just the wrong time, it set off a massive powder keg that pitted White, his DEA agent brother-in-law Hank Schrader, and a gang of violent Neo-Nazis against each other. The fallout claimed the lives of White and Schrader, and left White's family crumbling as they — and the whole world — discovered the man White really was.

White could have avoided all of this — the bloodshed, the heartache, the shattered family — if only he had used his pride and his ego not to build a meth empire, but to fight for his rights in Gray Matter. White understood how to use leverage when his back was against the wall, and he should have used the leverage provided by the law, not the barrel of a gun.

An experienced litigator could have helped White pull it off. Starting from day one, separate legal counsel could have helped White negotiate a more favorable exit strategy from Gray Matter by better protecting (1) the value of his stock, (2) his right to compete, and (3) his ownership of his IP. If that strategy didn't keep him from being forced out, then White could have engaged in disruptive litigation tactics instilling fear of bad publicity for Gray Matter, frightening potential investors, and ultimately securing a hefty settlement for White.

Litigation isn't always pretty, and White surely would have made some enemies along the way. But if White needed an outlet for releasing his seething, burning resentment and his desire to prove he was better than everyone who got the better of him over the years,¹⁸³ then a heavy dose of litigation may have been the perfect elixir.

181. *Breaking Bad: Full Measure* (AMC television broadcast June 13, 2010).

182. David Segal, *The Dark Art of 'Breaking Bad'*, N.Y. TIMES, July 5, 2011, available at http://www.nytimes.com/2011/07/10/magazine/the-dark-art-of-breaking-bad.html?pagewanted=all&_r=0.

183. See Greenwald, *supra* note 80.

