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11 Attorneys for Plaintiff

12 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

13 **IN AND FOR THE COUNTY OF MARICOPA**

| | | | |
|----|---------------------------------|---|----------------------------------------|
| 12 | PRIMUS PHARMACEUTICALS, INC., a |) | Case No: CV2012-001143 |
| 13 | Delaware corporation, |) | |
| 14 | |) | |
| 14 | Plaintiff, |) | FIRST AMENDED VERIFIED |
| 15 | |) | COMPLAINT |
| 15 | v. |) | |
| 16 | RAYMOND DUGAN PRATER, an |) | (Assigned to the Hon. Arthur Anderson) |
| 17 | individual. |) | |
| 18 | |) | |
| 18 | Defendants. |) | |
| 19 | _____ |) | |

20 Plaintiff Primus Pharmaceuticals, Inc. (“Primus”), for its First Amended Verified
21 Complaint against Defendant, alleges as follows.

22 **Parties and Jurisdiction**

- 23 1. Primus is a Delaware corporation with its principal place of business in Maricopa
24 County, Arizona.
- 25 2. On information and belief, Defendant Raymond Dugan Prater (“Prater”) resides in
26 Birmingham, Alabama.

1 3. Defendants John and Jane Does 1-10, and Black and White Companies A-Z are
2 persons or entities that may be responsible for some or all of the events giving rise to Primus'
3 claims in this action, or may otherwise bear legal responsibility for some or all of Primus'
4 damages herein, but whose identity is presently unknown to Primus. Primus will seek leave to
5 amend the Complaint to name any such persons or entities upon learning their identity.

6 4. The contract that is at issue in this dispute, entitled "Confidentiality, Non-
7 Solicitation, and Non-Compete Agreement" (the "Agreement"), contains at Section II(Q) a
8 jurisdiction and venue provision that provides:

9 Consent to Jurisdiction, Service of Process, and Venue. Employee consents to
10 venue and jurisdiction in the Superior Court of Maricopa County, State of
11 Arizona, and in the United States District Court for the District of Arizona, and to
12 service of process under Arizona law, in any action commenced to enforce this
13 Agreement.

14 A true and correct copy of the Agreement is attached hereto as Exhibit "A."

15 5. By signing the Agreement, Prater consented to this Court's jurisdiction, and agreed
16 that venue is proper in this Court.

17 General Allegations

18 **Prater's Employment at Primus**

19 6. Primus is in the business of developing and marketing prescription pharmaceutical
20 and medical food products to medical providers and facilities throughout the United States.

21 7. Primus' products are sold through a network of employee sales representatives,
22 known as Territory Managers, who are assigned defined geographic territories throughout the
23 United States.

24 8. Territory Managers report to Regional Sales Managers, who oversee sales
25 activities in several territories within a specified region.

26 9. Primus hired Prater as a Territory Manager on March 24, 2004.

1 10. Primus promoted Prater to a Regional Sales Manager role on May 1, 2007. He
2 remained in this position until his resignation, effective October 28, 2011.

3 11. As Regional Sales Manager, Prater oversaw Primus' sales activities and its sales
4 force within his assigned region. At the time of Prater's resignation, Prater was assigned the
5 Central Region, which encompassed 11 sales territories and 11 Territory Managers.

6 12. Prater was one of three Regional Sales Managers employed by Primus at the time
7 of his resignation.

8 13. Primus employed approximately 30 Territory Managers at the time of Prater's
9 resignation.

10 14. As Regional Sales Manager, Prater had access to internal Primus sales
11 performance data pertaining to the other two Regional Sales Managers and the Territory
12 Managers, both inside and outside his region.

13 15. As Regional Sales Manager, Prater worked closely with and evaluated the
14 performance of the Territory Managers under his supervision. He became familiar with their
15 competencies, professional strengths and weaknesses, credentials, career objectives, work history,
16 compensation, and sales performance activity.

17 16. As Regional Sales Manager, Prater was entrusted with access to non-public
18 information about Primus' clients, products (both being sold and under development), strategic
19 plans, marketing strategies, financial condition, and sales activity.

20 17. As Regional Sales Manager, Prater had direct contact with Primus' clients and
21 prospective clients. He, along with the assigned Territory Sales Manager, personified Primus to
22 its clients and was responsible for safeguarding Primus' industry good will and reputation.

23 18. As Regional Sales Manager, Prater participated in the recruitment, hiring, and
24 training of Primus' sales personnel.

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1 19. Primus rewarded Prater for his entrusted service through a promotion and regular
2 pay increases and bonuses.

3 20. Prater was a highly trusted, valued and compensated employee by virtue of his key
4 management position and long tenure with Primus.

5 21. At the time of Prater's resignation, he was earning compensation of over \$100,000.
6 He was eligible for a bonus of up to 30% of his salary and employee benefits.

7 22. Prater voluntarily resigned from Primus on October 14, 2011. His resignation was
8 effective October 28, 2011.

9 23. Primus has paid Prater all the compensation and provided him all the benefits to
10 which he is entitled. Prater is owed nothing further from Primus related to his employment.

11 **The Agreement**

12 24. On January 12, 2006, Prater signed and agreed to remain bound by the Agreement.

13 25. The Agreement is a condition of employment for Primus' sales employees.

14 26. The purpose of the Agreement is to safeguard the Company's information and
15 relationship with its employees and clients.

16 27. Prater signed the Agreement without objection, and did not request any
17 modifications to its terms during the remainder of his employment at Primus.

18 28. Upon signing the Agreement, Prater expressly acknowledged that, in his capacity
19 as Regional Sales Manager, he performed essential services for Primus that provided him with the
20 opportunity to meet, work with and develop close working relationships with Primus' clients on a
21 first-hand basis, gain valuable insight into Primus' clients' need for service, and access to Primus'
22 confidential business information.
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1 29. Prater further acknowledged that Primus' personnel have been trained by and are
2 valuable to Primus, and that Primus would incur substantial administrative expenses if it was
3 required to hire new personnel or retrain existing personnel.

4 30. Section II(G) of the Agreement provides:

5 Nonsolicitation of Employees and Consultants. During Employee's
6 employment, and for a period of twelve (12) months following cessation of
7 employment for any reason, Employee shall not, either alone or as an
8 agent, employee, partner, representative, affiliate, or in any other capacity
9 on behalf of any person or entity, directly or indirectly, go into business
10 with or hire any Company Employee or Consultant or solicit, induce, or
11 recruit any Company Employee or Consultant to end his/her relationship
12 with the Company for the purpose of having such Company Employee or
13 Consultant engage in services that are the same, similar or related to the
14 services that such Company Employee or Consultant provided for the
15 Company, except as expressly permitted in writing by President, CEO, or
16 Chairman.

17 31. Section II(E) of the Agreement provides, in part:

18 Confidentiality. Employee shall not directly or indirectly disclose, utilize,
19 or authorize any disclosure of Confidential Information to any third
20 person, either during his/her employment or following his/her cessation of
21 employment for any reason, except as expressly permitted in writing by
22 President, CEO, or Chairman....

23 32. The term "Confidential Information" is defined in the Agreement and includes, but
24 is not limited to, information concerning Primus' customers and personnel.

25 **Prater's Breach of the Agreement**

26 33. After resigning from Primus, Prater joined SuccessEHS as its Vice President of
Sales, where, upon information and belief, he remained employed until December 31, 2012.

 34. SuccessEHS is a medical software company headquartered in Birmingham,
Alabama. It sells its products and services to medical providers.

 35. Primus hired Robert Healy as a Territory Manager on October 17, 2005. He was
promoted to West Regional Sales Manager on February, 16, 2008. He remained in this position
until his resignation on December 5, 2011. After resigning from Primus, Healy joined
SuccessEHS in a sales capacity and reported directly to Prater.

1 36. Primus employed Kimberly Costanzo as a Territory Manager assigned to the
2 Atlanta North Territory from March 5, 2007, to December 7, 2011. After resigning from Primus,
3 Costanzo joined SuccessEHS in a sales capacity and reported directly to Prater.

4 37. Primus employed Brad Dreyer as a Territory Manager assigned to the Indianapolis
5 Territory from February 19, 2008, to December 9, 2011. After resigning from Primus, Dreyer
6 joined SuccessEHS in a sales capacity and reported directly to Prater.

7 38. Primus employed Brian Stewart as a Territory Manager assigned to the
8 Connecticut Territory from January 28, 2008, to December 9, 2011. After resigning from
9 Primus, Stewart joined SuccessEHS in a sales capacity and reported directly to Prater.

10 39. During Prater's employment by Primus, he was involved in the recruitment, hiring
11 and/or training of Healy, Costanzo, Dreyer and Stewart.

12 40. Costanzo and Dreyer reported directly to Prater at the time of Prater's resignation
13 from Primus. Prater interacted with Costanzo and Dreyer on a regular basis. He evaluated their
14 performance and monitored their sales activity.

15 41. Prater was satisfied with the performance of Costanzo and Dreyer. Prater
16 considered them to be high quality and smart people and assets to Primus' sales team.

17 42. Prater also worked and/or interacted with Healy and Stewart during their
18 employment at Primus. Prater had access to sales performance data regarding Healy and Stewart.

19 43. Costanzo, Dreyer and Stewart were consistently among the top performing
20 Territory Managers at Primus during their respective periods of employment, as measured by
21 Primus' internal sales performance data.

22 44. Prater was not aware of Primus taking any steps to terminate the employment of,
23 or planning to terminate, Costanzo, Dreyer, Healy or Stewart as of the time he resigned.

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1 45. Upon information and belief, Healy, Costanzo, and Dreyer are currently employed
2 by SuccessEHS in sales capacities. Upon information and belief, Stewart and Prater are no longer
3 employed by SuccessEHS.

4 46. Upon information and belief, in Prater's former role as Vice President of Sales for
5 SuccessEHS, his compensation was impacted by the sales performance of the sales employees
6 who reported to him, including Healy, Costanzo, Dreyer and Stewart.

7 47. Upon information and belief, Healy, Costanzo, Dreyer, and Stewart have called on
8 clients on behalf of SuccessEHS within the same geographic sales territories to which they were
9 assigned during their employment at Primus.

10 48. Upon information and belief, Healy, Costanzo, Dreyer, and Stewart have called on
11 some of the same clients they called on during their employment at Primus.

12 49. Upon information and belief, Prater, on behalf of SuccessEHS, either directly or
13 indirectly, hired, solicited, recruited and/or induced Healy, Costanzo, Dreyer and Stewart to end
14 their employment with Primus and join SuccessEHS in a sales capacity.

15 50. Upon information and belief, Prater encouraged and induced other Primus
16 employees to end their relationship with Primus and to pursue employment as sales
17 representatives with other companies.

18 51. Prater did not seek permission from Primus' President, CEO or Chairman to hire,
19 solicit, induce or recruit Healy, Costanzo, Dreyer, Stewart to join SuccessEHS, or to encourage or
20 induce other Primus employees to leave Primus.

21 52. Upon information and belief, Prater used Primus' proprietary and confidential
22 information to facilitate the hiring, solicitation, and/or recruitment of Healy, Costanzo, Dreyer
23 and Stewart on behalf of SuccessEHS.

24 53. Prater did not seek permission from Primus' President, CEO or Chairman to
25 disclose, utilize, or authorize the disclosure of Primus' proprietary and confidential information.

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1 54. Upon information and belief, Prater, Healy, Costanzo, Dreyer and Stewart used
2 the training, skills, and knowledge they acquired during their employment at Primus, and the
3 client relationships they developed, to benefit SuccessEHS.

4 **Prater’s Tortious Interference with Primus’ Contractual Relations**

5 55. On March 1, 2007, Costanzo executed a Confidentiality, Non-Solicitation, Non-
6 Compete Agreement (the “Costanzo Agreement”) which imposed certain restrictions and
7 obligations on Costanzo both during and after her employment at Primus.

8 56. The Costanzo Agreement contains the same obligations and restrictions contained
9 in Prater’s Agreement.

10 57. Section II(A) of the Costanzo Agreement required Costanzo to devote her “full
11 business time and best efforts to the performance of the duties assigned” to her by Primus and to
12 refrain from engaging in “any work, paid or unpaid, that creates an actual or potential conflict of
13 interest” with Primus.

14 58. Section II(B) of the Costanzo Agreement prohibits Costanzo from removing “any
15 records, documents, data files, or any other items from the premises of the Company, in either
16 original or duplicate form, except as is needed in the ordinary course of conducting business for
17 the Company.”

18 59. Section II(E) of the Costanzo Agreement required Costanzo to safeguard Primus’
19 confidential information, which is defined to include, but not limited to, customer orders, product
20 usage, product volumes, financial results of operation and selling activities.

21 60. While Costanzo was still employed and being compensated by Primus, she sought
22 customer referrals for SuccessEHS and lined up a sales appointment with at least one Primus
23 customer, Dr. Dipalma, on behalf of SuccessEHS. Dr. Dipalma was a physician Costanzo called
24 on during her employment by Primus. Costanzo engaged in these activities on behalf of
25 SuccessEHS with Prater’s knowledge, encouragement and support.

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1 of time by targeting Primus' key sales personnel and by concealing the intentions and plans to
2 hire Primus key sales personnel.

3 **COUNT TWO**

4 **(Tortious Interference with Contractual Relations)**

5 69. Primus repeats and incorporates the allegations of this Complaint set forth above.

6 70. Primus' employment relationship with Healy, Costanzo, Dreyer and Stewart was
7 contractual in nature.

8 71. Primus had a reasonable expectancy that Costanzo would comply with the
9 contractual obligations contained in the Costanzo Agreement.

10 72. Prater was aware of the contractual obligations contained in the Costanzo
11 Agreement, including Costanzo's obligation to perform services exclusively for Primus, not
12 engage in any work that would create a conflict of interest, and safeguard Primus' confidential
13 information.

14 73. Using improper motives and means, Prater intentionally interfered with Primus'
15 enjoyment and benefit of its contractual relationship with Costanzo by the actions described
16 above.

17 74. As a result of Prater's intentional conduct, Primus has suffered and will continue
18 to suffer irreparable harm and damages in an amount to be proven at trial.

19 75. Prater acted with an evil mind and with an intent to injure Primus, justifying an
20 award of punitive damages.

21 **COUNT THREE**

22 **(Aiding and Abetting Breach of Duty of Loyalty)**

23 76. Primus repeats and incorporates the allegations of this Complaint set forth above.

24 77. While she was employed by Primus, Costanzo owed Primus the utmost duty of
25 loyalty, trust, good faith and fair dealing.

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1 78. At all times, Prater knew that Costanzo owed Primus the utmost duty of loyalty,
2 trust, good faith and fair dealing.

3 79. Prater provided substantial assistance to Costanzo in breaching such duties by,
4 among other things, aiding, abetting, participating in, encouraging and/or assisting Costanzo's
5 improper disclosure of Primus' confidential information to Prater and improper performance of
6 services for SuccessEHS while still employed by Primus.

7 80. In aiding and abetting Costanzo's breach of her duty of loyalty to Primus, Prater
8 acted in his own financial interest, to the detriment of Primus.

9 81. As a direct and proximate result of Prater's improper assistance, Primus has
10 suffered damages in an amount to be proven at trial.

11 82. Prater acted with an evil mind and with an intent to injure Primus, justifying an
12 award of punitive damages.

13 **Demand for Jury Trial**

14 Primus demands a trial by jury as to all matters with respect to which it is entitled to a trial
15 by jury as a matter of right.

16 **WHEREFORE**, Primus prays for Judgment of and from Prater as follows:

- 17 (a) for actual and reasonably foreseeable potential damages in an amount to be proven at
18 trial, including, but not limited to, lost sales, loss of client good will, and recruiting,
19 training, administrative and overhead expenses;
- 20 (b) for punitive damages as provided for under applicable law;
- 21 (c) for disgorgement of the compensation and value of benefits paid to Costanzo during
22 the period Prater tortuously interfered with the Costanzo Agreement and aided and
23 abetted Costanzo's breach of her duty of loyalty;
- 24 (d) for all court costs and reasonable attorneys fees as provided by Section II(M) of the
25 Agreement and applicable law;
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- (e) for pre and post judgment interest at the maximum rate allowed by law;
- (f) for such further and other relief, both general and special, at law or in equity, as the Court deems appropriate, including the issuance of an injunction to restrain Prater's continuing breach of his obligations under the Agreement and interference with Primus' agreements with its other existing or former employees.

RESPECTFULLY SUBMITTED this 24th day of January, 2013.

By: s/ Stacy Gabriel
Stacy Gabriel
GABRIEL & ASHWORTH, P.L.L.C.
Attorney for Plaintiff

ORIGINAL of the foregoing
e-filed this 24th day
of January, 2013.

COPY of the foregoing
mailed this 24th day
of January, 2013 to

David L. O'Daniel
Gordon & Rees LLP
111 W. Monroe Street, Suite 1600
Phoenix, AZ 85003
Attorney for Defendant


s/ Stacy Gabriel

VERIFICATION

1
2 STATE OF ARIZONA)
3 COUNTY OF MARICOPA)
4

5 I, Kathleen Arendt, hereby declare under penalty of perjury that the facts contained in the
6 attached the First Amended Verified Complaint in the above-captioned action are true and correct
7 to the best of my knowledge, information and belief.

8
9 DATED this 23 day of January, 2013.

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11 
12 Kathleen Arendt