This session is intended to illustrate a more effective way to teach Business Ethics to MBA grad students. It does this by employing recent, real-life business ethics cases in the United States and a new analytical model. In the past Business Schools have relied on teaching Business Ethics by: (1) first exposing the class to the ethics of the Classical Moral philosophers e.g. Plato and Aristotle, Confucius and Immanuel Kant etc.; and (2) then doing classical historical business cases that have violated many of the ethical principles of these philosophers e.g. cases involving the "robber barons in the late 1800s (Jay Gould, Rockefeller, JP Morgan), manipulation of stocks in the 1920s that helped lead to the Great Depression, the early 2000s meltdowns of ENRON, WorldCom, and Tyco due to massive accounting fraud, and the huge banking scandals that led to the Financial Crisis of 2009. Most books end with the Dodd-Frank legislation that tried to reinforce and improve on the earlier Sarbanes Oxley legislation in the early 2000s.

 Today's business students are increasingly millennials and an increasing number below to Generation Z. In teaching business ethics today and for over 20 years, I have determined that these business students are less interested in historical examples. Instead, they are more interested in getting more in touch with the modern business world as it pertains to ethics. Ethical issues have expanded from such practices as bribing, insider trading, Ponzi schemes, and nepotism to include new issues such as sexual harassment, data privacy, fraudulent accounting practices and discrimination. The traditional issues cited become even more problematic and their fragrant violation have brought entire companies down.

 This session advocates a new approach to teaching business ethics which I have been using in my graduate MBA Leadership Class for the past two years. It reinforces the 'Bridges" Conference theme by suggesting a new approach to teaching ethics. This approach has three major changes from the traditional way I used to teach business ethics. Rather than trying to cover a long list of ethical thinkers the first change was to streamline the review of classical ethical philosophers into only a few that that are directly relevant to modern business ethics. I find that a quick review of Aristotle, Confucius and Kant is sufficient background for this. Secondly, I needed a book that is comprehensive and contains the absolute best modern ethical cases. My brother Steve Arbogast (Professor at the University of North Carolina, Chapel Hill) has written such a terrific book. It is entitled "Resisting Corporate Corruption: Practical Cases in Business Ethics from Enron through SPACs". This book contains the most recent corruption cases in the past ten years including Theranos, Volkswagen, the Wee Wok Case, Nikola, and Tesla. Lastly, the analytical model that I have the students use in doing these cases is new and challenging. It allows the students the freedom to readily explore the essentials and subtleties of each case. The model has six steps: (1) Identify the major Ethical Issues in the Case and the primary decision makers involved; 2) A statement of the Boundary Conditions that exist in the specific case e.g. what specific ethical conditions exist that delineate the latitude the decision makers in the case are constrained to stay within; (3) The potential personal consequences that exist for decision makers should they stray beyond the boundary conditions; (4) Alternative approaches that need to be considered by the decision makers including pros and cons for each approach; (5) The recommended alternative along with the rationale as to why it was selected; (6) Lastly, a plan to implement the recommended solution. I intend to take the professors present in this session through two of these recent cases using this analytical model.

 This class will be conducted as follows:

1. Goals of the session and rationale for why a new approach is needed for teaching business ethics (10 minutes)
2. Introduction of the Analytical Model (5 minutes)
3. “Fake it Until you make it with Patient Blood at Theranos” Case (25 minutes)
(1) Short summary of the case

(2) Application of the analytical model to the case by those in attendance

(3) Actual student solutions to the case

1. “Compliance and Chaos”at MF Global Case (25 minutes)
(1) Short summary of the case

(2) Application of the analytical model to the case by those in attendance

(3) Actual student solutions to the case

1. Summary of the Session (10 minutes)

Attachment A (Theranos Case)

# ***Fake it Till You Make it With Patient Blood at Theranos?***

A Case Study in ‘Unicorn Fraud’ and Whistleblower Suppression Tactics

Stephen V. Arbogast, Professor of the Practice of Finance

Kenan-Flagler Business School, University of North Carolina at Chapel Hill

It was 6 pm on a Friday evening. Erika Cheung was working late at her new employer, Antibody Solutions. As she got ready to wrap up her day, a co-worker mentioned that a man who had been sitting in his car for hours had then asked to see her. Erika immediately suspected that the stake-out related to her previous employer, Theranos. That firm’s HR head had been calling, leaving messages saying they urgently needed to talk.

As she left the building heading for her car, the man exited an SUV and approached. Moving quickly, he handed Erika an envelope, turned and departed. Erika looked at the envelope and immediately knew it meant trouble. It was addressed to her at a temporary address not even her mother knew about. Most likely, Theranos had her under surveillance and gleaned that address by following her home.

She opened the letter. A quick look confirmed her worst fears. The letter came from Theranos’ outside legal counsel, Boies Schiller, & Flexner, a firm known for its hard line legal tactics. In its first paragraph, the letter accused Erika of disclosing Theranos trade secrets without authorization, making false and defamatory statements, and threatened a lawsuit (see Attachment 1 for details). The letter was signed by David Boies, a ‘name partner’ of the firm. Boies also held a seat on the Theranos Board of Directors. 1

Erika had something to worry about. Earlier she had discussed her misgivings about Theranos with a journalist. Moreover, she also knew another Theranos employee who had done the same. Tyler Schultz, grandson of former Secretary of State George Schultz, had been talking to an investigative Wall Street Journal reporter. Erika had also joined Tyler in a session with George Schultz at the latter’s home. Erika and Tyler had tried to convince George, who was also on Theranos’ Board, that Theranos was not only practicing fraud but endangering patients’ lives. Erika was petrified that all this would come out if she met with the law firm. The consequences for Tyler could be serious. Even worse, Erika might be bankrupted by legal costs if the interview ended up with her being sued. Given Boies Schiller fearsome reputation, Erika might even found guilty of something.

Yet, Erika was deeply conflicted. She felt what Theranos was doing, providing live patients with highly unreliable blood test results, was unconscionable. Patients might be told they had a disease they didn’t have; even worse, they might be advised all was well when it was not. These concerns had caused Erika to quit her job doing ‘assay validations’ of Theranos’ Edison devices; these validations scored the reliability of their devices’ test results. Erika had even signed a new confidentiality agreement on the day she left Theranos; among the normal boilerplate, it warned against posting anything about that firm on social media. Obviously, ‘walking away’ was not the end of her story with Theranos. The firm was threatening serious actions against her; still Erika’s conscience kept nagging at her.

To avoid further harassment, Erika had left her apartment, moving in temporarily with a friend; soon she planned to move to Hong Kong. All of this was now in jeopardy. Erika needed time to think. She planned to leave the Bay area for the weekend, clear her head, and review what had happened at Theranos. Maybe then she could spot some way out of her threatening situation.

***Elizabeth Holmes wants to Change the World***

Some people just strike you as extraordinary. Elizabeth Holmes was one of those people. Her presence, demeanor and ability to articulate a story would enable her to captivate a striking collection of the most powerful men in America.

Above all, Holmes conveyed a strong sense of mission. She married that to a work ethic which conveyed that she would not quit until she had realized her vision. That vision began to take shape during the summer of 2002. Having completed her freshman year at Stanford, Holmes was working in the Genome Institute of Singapore’s lab testing for Severe Acute Respiratory Syndrome (SARS). The tests involved large blood samples drawn with syringes from veins in the arm. Holmes found the needle-in-veins process horrific, even barbaric. She began thinking about how to eliminate this painful, enervating and expensive process with something much simpler. During her freshman year, Holmes had studied chemical engineering. She began to think about how to combine nanotechnology and miniaturization with chemical tests to accomplish blood testing using much smaller samples. 2

Returning to Stanford, Holmes’ vision crystalized further. She would develop devices which could accomplish many blood tests based only on the blood drawn from miniature sticks. Achieve this and the medical testing world could be upended. Patients could not only be relieved of having large blood samples drawn, but might also get their test results in real time. This in turn would radically reduce costs. At present doctors had to prescribe blood work, for which large samples had to be drawn and shipped to labs. These facilities took days to run tests and even longer to report results. With blood tests easier, cheaper and less intimidating, patients could enjoy earlier detection of any problems. Lives would be saved and patient pocketbooks benefitted.

Back at Stanford, Holmes pitched her ideas to several of her professors. Most said what she had in minds couldn’t be accomplished. Basic fundamentals of physics and chemistry wouldn’t allow it. Most especially, blood in volume was required for multiple, reliable tests. Even routine physicals involve different types of blood tests to get multiple values and rule out problems ranging from diabetes to various cancers. The small blood volume from a finger stick would not allow this to be done.

Holmes vision did however win one convert, her freshman chemical engineering professor and associate dean of the Stanford college of engineering, Channing Robertson. He thought Holmes was onto something, a possible combination of science, engineering and technology that struck him as pure innovation. Already, Holmes had founded a start-up company. Robertson agreed to join its board. The firm that would become Theranos was off and running. 3

**The Technology – or Not**

Holmes first brainstorm was for a medical patch that would go on the arm, draw blood via micro sticks, transmit data via an embedded chip to an analyzer and then administer treatment via the same patch. Breathtaking in scope, it quickly was found to be wholly impractical. 4 Holmes however was not daunted. She was fond of quoting Thomas Edison on failing 10,000 times so that you could succeed on the 10,001 try.

Holmes’ next try involved micro-fluid technology. Recent engineering breakthroughs allowed the movement and handling of very small liquid samples. To Holmes’ engineering mind, this opened up the pathway to running many tests on a small amount of blood. Theranos (Holmes’ combo name from therapy and diagnosis) began recruiting serious technical people to convert this vision into a prototype. Unfortunately, while the nano-technology might enable the handling of small blood samples, accurate testing required bigger volumes. This was because each test required a minimum amount of blood sample to be reliable. Holmes’ aim was to deliver tens and eventually hundreds of tests from a single finger stick. This was literally impossible to achieve with the amount of blood from a finger stick. To get the blood volume up, the original sample had to be diluted with a saline solution. The dilute solutions then had to be reacted with reagents in a precise sequence. The engineering challenge was daunting and many samples were spoiled by leaks of one sort or another. Her technical people kept telling Holmes they needed more blood and a bigger box for their proto-type. She however insisted that the device be small enough to fit comfortably on a shelf at home. 5

While this effort was proceeding, a new group headed by Tony Nugent took a different approach. Tony’s idea was to use robotics to mimic the steps bench chemists performed in the lab. With the help of a glue-dispensing robot purchased from a New Jersey company, Frisnar, Tony’s team automated the bench chemist’s testing steps. 6 This they were able to do inside a container that met Holmes’ vision of a household device. Gradually the machine’s exterior took on more and more of an ‘Apple-esque’ look – silver and black with fingertip controls and neat ports for inserting cartridges. Theranos’ blood testing device, dubbed Edison 1.0 was ready. It was late 2007. Holmes now had a working prototype. She then canceled the micro-fluid approach; that engineering team was unceremoniously shown the door, but not before signing new non-disclosure/disparagement agreements as a condition of receiving severance. 7

Unfortunately, automating a lab chemist’s manual steps did not solve the problem of trying to run many tests with a very small blood draw. Even after diluting a finger-stick sample, the Edison could only perform a couple of tests, largely confined to immunoassays, e.g. tests measuring the presence of vitamins or certain indicators of illnesses like prostate cancer. Other common lab tests used completely different techniques; these were beyond Edison’s scope. 8

The Edisons had other problems as well. Jamming complex robotics inside a small container increased the risks of mechanical failures and losses of precision. Blood samples spilled, reagents got contaminated, the machines proved very heat sensitive and wireless connections were often unstable. All this complexity led to unreliable results when an Edison did run a sample. This was to prove a large scale problem. Laboratory test accuracy is the gold standard. This is so because the information sought is key to addressing patient health issues and possibly saving their lives. In sum, the Edison could do some blood tests accurately some of the time. This however, fell far short of what labs are supposed to provide and what Elizabeth Holmes was selling to investors and customers; that shortfall was about to present a big problem. 9

**Funding Theranos**

In 2004, Holmes put her startup company in a Stanford basement and starting peddling her vision to investors. Using a 26-page document describing how her adhesive patch would draw blood painlessly through the skin and analyze how much drug treatment to deliver, Holmes raised almost $6 million by year end. Much of the money came from family friends who also were well connected among the Silicon Valley venture capital community.

Holmes proved adept at convincing prominent figures to sign on at Theranos. A major supporter was Donald L. Lucas. A veteran venture capitalist, Lucas had developed Oracle’s CEO Larry Ellison and helped him take Oracle public. Lucas came aboard as Chairman of the Theranos Board. Both he and Ellison put money into Theranos and were frequent dispensers of advice to Holmes. The halo they provided helped Holmes raise Series B and then Series C funding. By 2007, a total of $47 M had come in the door at share prices which valued Theranos at $165 M. 10 At that moment Theranos essentially had no revenues.

It also barely had a working prototype. Its machines were so unreliable that for demonstrations Theranos prerecorded a result and had that flash up on the display; it dared not take the chance of trusting the machine to produce a valid result in real time with a fresh sample.

This did not stop Holmes from promising the sky’s the limit to investors. Her 2007 slide deck boasted of six deals with five pharmaceutical partners that would generate $120-300 M in revenue over the coming eighteen months. Another 15 deals with ‘under negotiation. Total revenues could then grow to $1.5 billion. Promising astronomical growth if everything falls into place is a way of life among Silicon Valley innovators and venture capitalists, so Holmes’ projections were certainly received with experienced skepticism. In point of fact, no deals with pharma companies had been inked. 11

By fall 2009, Theranos’ $47 M was spent. The company still was not generating revenues and was being kept afloat by a loan guaranteed by new ‘senior vice chairman’ Sunny Balwani. Desperate to break out of what seemed like a death spiral, Holmes pitched the Walgreens Drug Store chain on the idea of installing Theranos blood testing units in their stores.

There were many things about Holmes’ presentation that resonated with Walgreens. Holmes promised small devices capable of running any blood test in real time. She gave Walgreens a list of 192 blood tests that Theranos devices could run. Using blood pricked from a finger, these tests would could cost less than half that of what conventional labs charged. Moreover, the customer could order the test and the results would be available quickly. This vision, if realized, would open the door for Walgreens to move into the blood testing business, displacing reliance on both doctor prescriptions and established labs.

Locked in a heated competitive battle with CVS, eager for differentiation and new revenues, Walgreens jumped at the Theranos proposal. A contract to pilot Theranos machines was quickly reached. Walgreens agreed to purchase up to $50 M in Theranos equipment and loan the company a further $25 M. In return, Theranos would put their analyzers into thirty to ninety Walgreens stores in Arizona. A successful pilot could lead to a nationwide rollout. 12

This deal put the Edison machine’s limitations on the spot. There was no way these machines could back up Holmes’ promise to run almost 200 different tests and produce results in real time. Unbeknownst to Walgreens, Holmes and Balwani had prepared a workaround. Theranos had purchased conventional blood testing equipment from Siemens and other firms. This equipment was stashed in a separate room from that housing the Edisons. Theranos thus planned to use this equipment to run all tests beyond the Edison’s capabilities.

The gap between Holmes’ promises and what Theranos could deliver had become a canyon. Yet, it was do or die – Walgreens’ money not only kept the company afloat, it further burnished Theranos reputation as the coming disrupter of laboratory blood testing. Walgreens’ money gave Theranos a $1 billion valuation. Safeway stores soon signed up for a similar in-store pilot. Theranos was on its way financially. By 2014, another $400 M had been raised, giving the company a $9 billion valuation. 13 Elizabeth Holmes owned 50% of the firm. She also recruited a ‘dream Board of Directors’ that now included General James Mattis, Henry Kissinger, and former Secretary of State George Schultz. In short order Holmes would grace the cover of a national magazine holding up the tiny container of blood, the ‘nanotainer’ which symbolized Theranos’ vision of hundreds of tests conducted on one or two drops of blood.

**Walgreens Pilot Crashes, Staff Question, and Theranos looks to Shut Down Dissent**

The Walgreens pilot took time to launch, but that didn’t impede Holmes from building upon her initial marketing success. In June, 2012 she convinced Walgreens to sign a new contract. Walgreens paid Theranos a $100 M ‘innovation fee’ and provided a further $40 M loan. In return, Theranos promised to launch blood-testing services at the pharmacy stores by February, 2013. 14 Theranos had now committed to deliver what it had promised.

Theranos had been working on a new machine, dubbed the mini-lab, which would run tests which Edison could not. However, it was not ready. Having convinced Walgreens that Theranos could run up to 200 blood tests from a finger stick, and with only the Edisons able to perform any tests, Theranos went ‘live’ at two Walgreens locations in Phoenix. Patient blood would be drawn from a finger stick and then couriered to Theranos’ lab. The Edisons would run those tests they could handle; all others would be run on the Siemens industrial test machines. To assure that the finger stick blood sample provided enough volume for multiple tests, Theranos’ lab technicians were directed to dilute each sample twice with saline solution.

For Allan Beam, the Theranos lab director, going live on patients in this fashion was unethical and dangerous. For one thing, the Edisons were still error-prone. Tyler Schultz worked in Research and Development performing validation tests. These tests used blood known to be infected with certain diseases to see if the machines could correctly identify the illness. In one test for syphilis, the Edisons only identified the presence of the diseases in 65% of the cases. Conventional labs strive for success rates in the high 90’s%. Another type of standard involved ‘proficiency testing.’ Each year clinical labs must receive blood plasma samples three times from an accredited body like the College of American Pathologists. The labs are then asked to test for various analytes. For years Theranos had only run proficiency tests on its Siemens machines. Since Theranos was now testing real patients, Allan Beam and Erika Cheung decided to compare the Siemens results with parallel tests run on Edisons. The Edison’s results were erratic and different. Correctly identifying Vitamin D was a particular problem. Sunny Balwani then intervened, ordering that only the industrial machine results should be reported. 15

Problems were now piling up at both ends of Theranos ‘live’ testing chain. Down in Arizona, Theranos began informing patients that ‘the tests you requested require blood drawn from a vein.’ Patients expecting a finger stick and quick results now experienced something quite different – blood would be drawn from the arm in conventional volume and then Fed-Exed to Theranos’ lab in Palo Alto. Back at the lab, the double dilution effects and inherent unreliability of the Edisons led to many inaccurate results being returned to patients. One test showed such a high amount of potassium present that the patient should be deceased. Yet, Theranos was now providing patients with results for life-critical diseases like HIV and Hepatitis C. 16

It was becoming too much for Allan Beam, Tyler Schultz and Erika Cheung. Each independently drew the same conclusions – Theranos’ machines were not ready to be testing blood from real patients; the company was also cheating regulators by submitting results from non-Theranos machines and not showing inspectors its real labs. Finally, Theranos was lying to clients like Walgreens about what tests its proprietary equipment could actually perform and on the reliability of the results obtained.

The question now became what to do with these conclusions? Allan Beam failed to talk Holmes and Balwani out of running HIV tests on finger stick samples. What then is next? Beam, Schultz and Cheung each knew that whatever course they took, they would have to deal with Theranos’ severe protocols for dealing with any employee not deemed a ‘team player.’

**Theranos Playbook for Disgruntled Employees**

Tech firms are renown for being security conscious. Theranos was an outlier even by Silicon Valley standards.

To begin, employees had to sign non-disclosure and in many cases non-defamation agreements as a condition of employment. Theranos then prohibited them from using the company name on the LinkedIn profiles and could not use Google Chrome out of concern Google would use the browser to spy on the company. Theranos employed a large security force, many of them former military. These conspicuously wandered the building in dark suits with earpieces and accompanied visitors touring the facility. The Theranos headquarters was configured to guard state secrets. Windows were darkly tinted to prevent viewing from outside, an effect bolstered by taped sheets of opaque plastic. Surveillance cameras were everywhere. Theranos had two labs and the personnel from one were not allowed into the other. 17 The labs themselves were entered via fingertip scanners; if more than one person entered at a time, an alarm sounded and a picture was sent to security.

All of this might have been considered understandable, if slightly-over-the-top measures to protect trade secrets. Less defensible was the culture fostered by Holmes and Balwani. It had two prominent features: ‘give us total, blind loyalty or get out,’ and internal spying to detect evidence of disaffection. Balwani had the IT department monitor employee emails and phone conversations. Employees who questioned Theranos products or communications to clients would be confronted. Balwani was the enforcer. His message was ‘if you are not with us, you don’t belong here. Get out.’ More than a few were immediately frog marched to the front door. Their possessions might only be made available after a more stringent non-disclosure agreements was signed. Employees suspected of having talked to outsiders would be asked to name their contacts and threatened with legal action if they failed to comply.

Threatening legal action became a big part of Theranos’ method to protect its ‘secrets.’ Holmes made a significant move by convincing David Boies of the Schiller, Boies & Flexner to join the Theranos’ Board. Boies had a well-earned reputation as an attack attorney. His biggest claim to fame was in winning the government’s anti-trust lawsuit against Microsoft. In the course of winning this case, Boies had famously tied Bill Gates into knots during a deposition. By engaging his firm and putting Boies on her Board, Holmes sent the message that anyone crossing the company could expect an aggressive legal attack and expensive defense costs.

By late 2014, many Theranos employees had experienced this treatment. A prime example was lab director Alan Beam. After failing to talk Holmes and Balwani out of performing the HIV tests, Beam began sending work emails to his personal Gmail account. He did this to document his efforts to warn Holmes and Balwani. As lab director, Beam’s name was on the firm’s clinical lab (CLIA) license, and he wanted a paper trail showing he had warned his superiors. Beam also contacted a Washington DC whistleblower law firm. That conversation had not gone far, but Beam did send that firm one of the warning emails originally sent to Balwani. Three weeks later Bean decided he’d had enough and informed the company he was resigning. 18

Beam then found out how tough and litigious Theranos could be. Beam met with a disappointed Holmes and agreed to give Theranos a month to find a new director. He then took two weeks’ vacation. Upon returning, Beam was met at the door and escorted to a reception area just off the lobby. There he was met by Balwani and the head of HR. Beam was advised he was being terminated early. Balwani then passed him a legal document (Attachment 2). Among other things, it asked Beam to declare that he did not possess any electronic or hard copy Theranos information. Beam had the emails at home, so he balked at signing the document. Signing would enable Theranos to sue him successfully if they subsequently proved he did have company information. As Beam hesitated, Balwani told him:

*“We know you sent yourself a bunch of work emails. You have to let Mona (HR) access your Gmail account so that she can go through them and delete them.” 19*

Beam refused. After a tense confrontation, he handed over his company laptop and cellphone in return for his personal backpack and left. In the days that followed, Alan’s personal cell mailbox filled up with messages from Balwani and Mona. All said that Alan needed to come back, sign the affidavit and let the emails be deleted – or Theranos would sue him. Beam quickly sought and got a San Francisco lawyer, handing over a $10,000 retainer. Eventually, Beam deleted 175 company emails and then signed the affidavit.

Beam’s trials paled in comparison with those of Tyler Schultz. In one sense, this was strange. Tyler was a very junior employee. He was however, George Schultz’ grandson. His story became a major test case of Theranos’ playbook for dissenters.

Like Beam, Schultz was convinced that Theranos’ lab tests were unreliable and that it was lying about this to clients and patients. Schultz’ verification and proficiency testing gave him first hand evidence of this unreliability. Schultz took his concerns to Holmes, who told them they couldn’t be accurate and directed him to talk with another Vice President, Daniel Young. Schultz found Young’s logic unpersuasive, so he sent an anonymous email to Stephanie Shulman, director of the Clinical Laboratory Evaluation Program at the NY State Health Department. She replied that if Schultz’ information was accurate, the firm in question was engaging in ‘a form of PT (proficiency test) cheating’; she encouraged Tyler to file an anonymous complaint, which he did. He then went to see his grandfather and inform him of these testing facts.

Tyler told George Schultz that Theranos was failing at both quality control and proficiency testing. He also stated that Theranos was using its proprietary Edison devices for only a handful of the over two hundred blood tests it told clients it could run. Tyler then told his grandfather that he planned to resign. George Schultz urged him to give Elizabeth Holmes a chance to clear things up, and Tyler agreed. However, his attempts to follow-up with Holmes always ran into her busy schedule. Tyler then sent her an email detailing his concerns. Balwani replied for Holmes, belittling Tyler’s knowledge of lab science and concluding:

*“That reckless comment and accusation about the integrity of our company, its leadership and its core team members based on absolute ignorance is so insulting to me that had any other person made these statements, we would have held them accountable in the strongest way…” 20*

Tyler then decided to resign. He gave two weeks’ notice*,* but was informed by HR to leave immediately. Before leaving, he printed his email to Holmes and Balwani’s response, and carried them out under his shirt.

A short while later Tyler contacted Wall Street Journal reporter John Carreyrou. The reporter had received a tip that Theranos might not be all that Holmes’ adoring press reports were conveying, and had begun an investigation. Tyler advised Carreyrou of his concerns, the documents he had smuggled out, and the anonymous complaint he had filed with New York State. Carreyrou began to focus his investigation on the tests Theranos was performing for patients in Arizona.

Matters however, did not rest there. In May 2015 Tyler heard from his grandfather that Theranos had determined he was talking to a WSJ reporter. George Schultz urged Tyler to meet with Theranos lawyers and agree with their demands – otherwise his career might be ruined.

The meeting took place at George Schultz’ house. The Theranos lawyers were from Boies, Schiller & Flexner. They presented Tyler with three documents, a temporary restraining order, an order to appear in court in two days, and a letter stating Theranos believed Tyler had violated his non-disclosure agreement and was prepared to file suit against him.

Tyler denied talking to a reporter and the meeting broke up without resolution. George Schultz then attempted to broker a compromise. It was supposed to be a one-page document saying that Tyler would honor his confidentiality obligations. Instead, at the next meeting the attorneys presented Tyler with an affidavit stating that he had never talked to any third parties about Theranos and asking him to name all current and former employees who he knew had talked to the Wall Street Journal. Tyler refused to sign and set about seeking legal counsel.

Negotiations continued under threat of repeated orders to appear in court, which were always cancelled at the last minute. Tyler and his parents would end up incurring legal costs in excess of $400,000. 21

**Erika Cheung Considers Her Options**

Erika and Tyler had become friendly. They shared the same concerns about Theranos. Indeed, Erika had accompanied Tyler on one of his visits to convince his grandfather that Theranos was engaged in fraud. Erika was fully aware of the tactics Theranos was using to pressure Tyler and what it was costing his family to resist Theranos’ demands.

That had been Tyler’s problem until the day when Theranos handed her the Boies Schiller letter asking her to reveal what information she had disclosed to third parties and threatening a law suit if she refused to do so.

Erika hid out for a while to collect her thoughts. Like Tyler, she thought about getting a lawyer. As a junior employee, she lacked the funds to pay for top flight legal advice. Perhaps connecting with a whistleblowing law firm might provide the advice and protection she needed. A brief look at one law firm’s website provided a place to begin (Attachment 3)

She also wondered if she would be considered a whistleblower, and if so would that convey a needed status and certain protections. Some quick internet research turned up information about whistleblower protections embedded in the Dodd-Frank law (Attachment 4). Erika wondered if any of this applied to her situation and if so, could she possibly even pursue matters in such a way as to earn a bounty? There was also the wrongful dismissal angle. Erika had resigned, but perhaps she could make a case that she had been pressured to do so.

Finally, Erika had heard something about the False Claims Act. This pertained to law suits alleging that a firm was cheating the government or a government agency. Could Erika make that claim against Theranos?

Perhaps the right law firm could help chart a path forward and allow Erika to emerge from her bunker.

Attachment 1

(Text of Actual Letter)

BOIES, SCHILLER & FLEXNER LLP

June 26, 2015

Via Hand Delivery

Ms. Erika Cheung

926 Mouton Circle

East Palo Alto, California 94303

Dear Ms. Cheung:

 This firm represents Theranos, Inc. (“Theranos” or the “Company”). We have reason to believe that you have disclosed certain of the Company’s trade secrets and other confidential information without authorization. We also have reason to believe that you have done so in connection with making false and defamatory statements about the Company for the purpose of harming its business. You are directed to immediately cease and desist from these activities. Unless this matter is resolved in accordance with the terms set forth in this letter by 5:00 p.m. (PDT) on Friday, July 3, 2015, Theranos will consider all appropriate remedies, including filing suit against you.

As you are aware, during your employment at Theranos, you had access to Theranos trade secrets and other confidential information. As a condition of your employment, you executed an At Will Employment, Confidential Information and Invention Assignment Agreement, dated October 14, 2013, in which you agreed not to disclose without authorization any Theranos Confidential Information. Under that agreement, Confidential Information includes: “any non-public information that relates to the actual or anticipated business or research and development of the Company, technical data, trade secrets or know how”. Indeed, upon the termination of your employment with Theranos on or about April 16, 2014, you were specifically reminded and agreed in writing that those confidentiality obligations continued even after your departure.

We have reason to believe that you have violated your confidentiality obligations in connection with your efforts to disseminate false and defamatory statements about Theranos for purposes of harming its business. The Company is prepared to file suit against you to remedy and prevent further harm. If you wish to avoid litigation, prior to the deadline noted above, you must:

1. Immediately gather and return to this Firm any and all Theranos confidential information, in whatever form, that remains in your possession;

 BOIES, SCHILLER & FLEXNER LLP

June 26, 2015

Ms. Erika Cheung

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2. Identify and describe with particularity any and all Theranos confidential information disclosed by you without authorization or received by you since your departure from the Company;

3. Identify all persons to whom you have discussed or otherwise disclosed Theranos confidential information without authorization;

4. Identify all persons from whom you have received Theranos confidential information since your departure from the Company;

5. Agree to refrain from further violations of your ongoing confidentiality obligations to Theranos and from making any further false and defamatory statements regarding Theranos, its principals, or its business;

6. Submit to an interview by outside counsel for Theranos regarding, among other things, your actions, your compliance with these directives, the false and defamatory information disseminated by you, and the steps you must take to rectify your actions; and

7. Execute an affidavit, under penalty of perjury, certifying your compliance with items 1-6 above, and additional points to be discussed with Theranos’ attorneys during the in-person meeting described above.

You are also hereby on notice of potential litigation against you in connection with these matters. Accordingly, Theranos demands that you preserve all documents, tangible things, and electronically stored information potentially relevant to the issues in this matter, including electronic files and other data generated by and/or stored on your computers and storage media (e.g., hard disks, backup tapes, USB or other drives, CDs, DVDs, etc.), or any other electronic data, such as voice mail. Your failure to comply with this demand can result in severe sanctions being imposed on you for spoliation of evidence or potential evidence. Be advised that we are also contacting others whom we have reason to believe have breached their confidentiality obligations and/or defamed the Company.

A prompt response, either from you or your counsel, should be directed to my colleague, Meredith Dearborn, at 510-874-1211 or 650-208-2788.

Sincerely Yours,

David Boies

Attachment 2

(Historical Recreation)

(Theranos Letterhead)

AFFIDAVIT OF ALAN BEAM

I, Alan Beam, have been an employee of Theranos, Inc. (the Company) where I have acted in the capacity of lab director. In that capacity, my name has been on the CLIA License authorizing Theranos to undertake blood tests on patient blood samples. As part of being employed by the Company, I have previously agreed to and signed standard Company non-disclosure and non-defamation agreements.

As of this date, I am resigning from my position at the Company. As part of my separation from the Company, I affirm that I will not disclose any proprietary or confidential information gained during the course of my employment with the company to any third party without the express, written authorization of the Company.

In addition, I hereby declare and affirm that I do not have any electronic or hard copy information relating to Theranos in my possession in any location including personal email accounts, any personal laptops or desktops, trash/deleted folders, USB drives, home car, or any other location.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Alan Beam

SWORN BEFORE ME:

Date:

Notary Public

Attachment 3

# We Help Whistleblowers

## *Puryear and Lingle*

PLLC are North Carolina attorneys who champion those who do the right thing. We all want to believe that we would be brave enough to speak up if we knew of or were the victim of discrimination in the workplace, or if we learned that our employer was engaged in unlawful or dishonest activities that put our coworkers or the public at risk. Yet, the great personal stress caused by the conflict between your employer’s values and the need for job security is difficult to understand for those who have never had to make the choice between *insisting on what's right* or *looking the other way* and carrying on with their work in silence. The enormous power employers have to influence their employees to keep quiet has been recognized by lawmakers in the US Congress and in the North Carolina General Assembly, as well as by state courts. As a result, laws have been put in place to prevent employers from taking revenge against employees who report workplace discrimination, other violations of employee rights, or their employer’s unethical business practices. The attorneys at Puryear and Lingle, PLLC understand these important legal rights and can forcefully represent whistleblowers who have experienced such retaliation.

**Categories of Whistleblower Rights**

Federal and state laws prohibit retaliation against employees should they report unlawful conduct, cooperate with regulatory authorities or exercise their legal rights in other ways. The scope of these protections and the steps needed to utilize them depend on the particular set of circumstances:

**Discrimination and Harassment**

The Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act and all their state and local analogs have provisions that make it an offense for an employer to take unfavorable action against an employee because he or she:

• Filed a complaint

• Acted as a witness

• Cooperated with investigators

• Took any other legally protected action in response to discrimination and harassment in the workplace

**Wage and Hour**

Federal and state labor laws prohibit employers from retaliating against employees when they complain about illegal wage practices, filing agency complaints or lawsuits or simply cooperating with regulators.

**Workplace Safety**

Employees who refuse to violate safety regulations or oppose unsafe working conditions, or who report their employer’s creation of or refusal to correct unsafe working conditions, are protected from retaliation under both the federal and state Occupational Safety and Health Acts (OSHA), as well as North Carolina common law.

**Sarbanes-Oxley**

Since 2002, the Sarbanes-Oxley Act has made it easier for employees and contractors of publicly traded companies to report suspicions of fraud or SEC rules violations both within the company and to outside regulators.

**Dodd-Frank**

The newer Dodd-Frank Wall Street Reform and Consumer Protection Act allows whistleblowers who suffer adverse employment action as a result of their reporting to the SEC to sue for lost wages and other compensation. While this act is separate and distinct from Sarbanes-Oxley, there is still overlap between the two and in many ways, they work in tandem.