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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN RE TYSON FOODS, INC. CONSOLIDATED SHAREHOLDER LITIGATION	Consolidated C.A. No. 1106-N

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED COMPLAINT

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PRELIMINARY STATEMENT

Plaintiffs' brief in opposition to defendants' motion to dismiss rests on the faulty premise that the Court at this stage of the proceedings must simply accept as true plaintiffs' conclusory allegations and statements that are revealed to be false by the Complaint itself as well as by the very documents upon which plaintiffs expressly rely. But Delaware courts are clear that such matters should not, in fact, be credited on a motion to dismiss. *See Grobow v. Perot,* 539 A.2d 180, 187 n.6 (Del. 1988). Indeed, while plaintiffs protest that defendants included "over 600 pages" of materials with their motion (Pl. Opp. 1), it is plaintiffs' own mischaracterizations that led defendants to submit these materials, all of which are documents either referred to by the Complaint itself or otherwise properly the subject of judicial notice on this motion to dismiss.

Much of plaintiffs' opposition also consists of attempts to avoid dismissal by constantly obfuscating and shifting the target. For example, many of plaintiffs' claims allege that defendants breached their fiduciary duties by "approving" certain transactions. However, in the face of the business judgment rule and Delaware's stringent waste standards, plaintiffs now try to minimize their challenges to the "approval" of these transactions and instead seek to recharacterize their claims as asserting "primarily" disclosure violations. (*See, e.g.*, Pl. Opp. 32, 33, 35-36). Plaintiffs then seek to confuse the issues by repeatedly misrepresenting the scope of the SEC proceeding. Plaintiffs attempt to paint that proceeding as a broad attack on the adequacy of disclosures for all of the Company's related party transactions, when in fact the SEC proceeding (as the Complaint itself reveals) was narrowly focused on the extent of disclosures relating to Don Tyson's perquisites. It is thus no accident that most of plaintiffs' newly-expanded disclosure claims remain remarkably unspecific in most instances, consisting of little more than pejorative characterizations of information disclosed by Tyson itself in its public filings. Moreover, the fundamental disconnect between the SEC proceedings and the vast

majority of plaintiffs' disclosure claims also dooms those claims for the additional reason that plaintiffs fail to allege any independent harm stemming from the alleged disclosure violations, as opposed to the underlying transactions. In their opposition, plaintiffs simply ignore this requirement under Delaware law and persist in their misleading attempt to connect every alleged disclosure violation to the SEC fines.

While many of plaintiffs' claims must be dismissed for failure to comply with Delaware's three-year statute of limitations and/or its demand requirement for derivative claims, they are all also subject to dismissal for failure to state a claim:

> Count I. Plaintiffs' primary argument now is that the consulting contracts for Peterson and Don Tyson are objectionable because they did not require these individuals to provide *any* services to the Company. But each contract on its face clearly requires such services. Nor does Peterson's death change the fact that he provided consideration by promising to perform such services for so long as he was able.

> Count II. Plaintiffs' challenge to the "approval" of "other annual compensation" rests on a conclusory assertion that it had "no legitimate business purpose." But the "legitimate business purpose" was this being a form of compensation to full-time executives. Plaintiffs' waste claim therefore fails.

> Count III. While plaintiffs argue that certain option grants approved by the Compensation Committee, in full accordance with the Company's stock option plan, are "a newly emerging form of insider trading", this invented theory is nonsensical given that *every* party to the transaction had full knowledge of the relevant facts. Count III is thus nothing more than another inadequate attempt to state a waste claim.

> Count IV. Plaintiffs' challenge to various related party transactions is likewise deficient. For those transactions that were admittedly reviewed and approved by a committee of independent directors, plaintiffs simply persist in their conclusory allegations of unfairness, which come nowhere close to overcoming the business judgment presumption. Plaintiffs also ask the Court to infer that certain other transactions (dating back to 1999) were not reviewed by any committee because the Company did not produce documents evidencing such review pursuant to the Section 220 Stipulation.[1] But this negative inference is manifestly improper because the Section 220 Stipulation was expressly limited to documents relating only to certain transactions in 2003 and 2004. In

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[1] Abbreviations used herein are the same as those used in defendants' opening brief. Lettered exhibit references herein refer to exhibits to the Transmittal Affidavit of Samuel T. Hirzel (filed with defendants' opening brief, with Exhibits A-R) and the Second Transmittal Affidavit of Samuel T. Hirzel (filed herewith, with Exhibits S-T).

any event, regardless of review, plaintiffs still must plead *facts* tending to show substantive unfairness in order to state a claim. Plaintiffs essentially admit that they have not done so, erroneously seeking not to "be faulted for not providing the specifics of the unfairness of these related-party transactions." (Pl. Opp. 41).

Count V. Plaintiffs do not even address an overarching deficiency of their disclosure claims in Count V – the failure to allege any independent harm for disclosures other than those involving Don Tyson's perquisites. And, in any event, plaintiffs' conclusory assertions of inadequate disclosures as to these other matters are woefully inadequate. As for the disclosure of Don Tyson's perquisites, plaintiffs merely assert that their conclusory allegations add up to "gross negligence", but fail to point to any supporting facts, much less facts sufficient to implicate any exception to the Company's Section 102(b)(7) charter provision.

Counts VI-VII. Again, plaintiffs do not even respond to most of defendants' arguments, instead merely repeating their conclusory and inadequate allegations that the Herbets Settlement was breached while contradicting their own pleading and the underlying documents.

Count VIII. Plaintiffs' request to overturn the 2004 election is moot because, unlike in the cases plaintiffs cite, *all* of the current directors have since been reelected (twice). Plaintiffs' request for "disgorgement" damages ignores that such damages are not available to individual shareholders under Delaware law in these circumstances.

Count IX. Plaintiffs' claim for unjust enrichment cannot survive in the absence of any underlying wrongdoing, which the Complaint does not allege for all the reasons discussed in connection with Counts I-VIII.

When plaintiffs' Complaint and opposition are stripped of their rhetoric, demonstrable mischaracterizations and hyperbole, it becomes clear that the *factual* allegations do not adequately state any claim under Delaware law. And this is so despite the fact that plaintiffs Amalgamated and Meyer now have filed four separate complaints and have had the benefit of seeing defendants' arguments multiple times. Defendants therefore request that the Court dismiss the Complaint with prejudice under Court of Chancery Rule 15(aaa).

ARGUMENT

I. THE COURT SHOULD DISMISS COUNT I.

In Count I, plaintiffs allege that certain defendants breached their fiduciary duties by "approving the consulting contracts for Don Tyson and Peterson in 2001 and for Don Tyson in 2004." (Compl. ¶ 158). According to plaintiffs, the crux of their claim is that "the consulting contracts are really gifts that require no work or other consideration in return." (Pl. Opp. 30). This is a corporate waste claim, despite plaintiffs' attempts to avoid saying so, and plaintiffs must therefore allege facts supporting an inference that the contracts were irrational or "unconscionable" or that the consideration received was "so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade." *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000). Plaintiffs fail to do so here, and their factual predicate – that the contracts allegedly do not require *any* work – is flatly contradicted by the contracts themselves.[2]

A. Plaintiffs' Allegations Regarding the Peterson Contract Fail to State a Claim.

The Complaint fails to state a claim for waste with respect to the Peterson Contract because it alleges no facts suggesting that it was unreasonable for defendants to decide, in an arms-length transaction, that paying Peterson $4 million over ten years for consulting services and a non-compete agreement would be beneficial to the Company in the wake of its

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[2] Plaintiffs also attempt to transform Count I into a disclosure claim. (*See* Pl. Opp. 32). But Count I in its title explicitly states that it is "for approving" the contracts (Compl. p. 52), and the remedy sought – voiding the agreements – is one related to inception, not disclosure. While Count I contains an allegation that the alleged "approval" fiduciary breaches are "compounded" by the alleged inadequate disclosures of Don Tyson's costs, claims regarding disclosure of these "travel and entertainment" costs are the subject of Count V, and accordingly, are discussed below. *See* Section V, *infra*. The only other mention of a disclosure issue in Count I is in the last sentence of ¶ 161, *i.e.*, the inadvertent misdescription of the 2004 Don Tyson Contract as having a weekly rather than a monthly requirement. That too is discussed below, and plaintiffs have simply failed to respond to any of defendants' arguments regarding this minor error.

extraordinary $2.9 billion merger with IBP, inc. (*See* Def. Br. 11-12).[3] Indeed, plaintiffs now appear to admit that the Peterson Contract was neither unlawful nor wasteful on its face. (*See* Pl. Opp. 11 ("the Company's contract with Peterson may not have been improper *per se*"); *id.* 51 n.29). Instead, plaintiffs attempt to make out a claim for waste by renewing their inappropriate focus on Peterson's untimely death in 2004. (*Id.*).

Peterson's death in 2004 does not somehow transform the Peterson Contract into waste. Rather, the Court must examine the Peterson Contract *at the time it was entered* in order to determine if it constitutes waste. *See In re Walt Disney Co. Deriv. Litig.*, No. 411, 2005, slip op. at 87 (Del. Jun, 8, 2006) ("The payment of a contractually obligated amount cannot constitute waste, unless the contractual obligation itself is wasteful. Accordingly, the proper focus of a waste analysis must be whether the amounts required to be paid . . . were wasteful *ex ante*."). The fact that Peterson unexpectedly died does not mean that defendants made an unconscionable (or even bad) deal at the time the contract was entered and when Peterson was still alive.[4] (Def. Br. 12). And it certainly does not mean, as plaintiffs would have it, that the contract "require[d] no work or other consideration in return." (Pl. Opp. 30). Indeed, it is undisputed that Peterson

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[3] Count I is also defective as to the Peterson Contract because plaintiffs failed to join Peterson's widow as a party. (Def. Br. 13 n.6). Plaintiffs do not deny that this was improper, but instead claim that it is not grounds for dismissal because "the appropriate remedy would be an order for joinder of Peterson's widow." (Pl. Opp. 33 n.20). That argument begs the question, however, as plaintiffs do not contend that Peterson's widow is subject to jurisdiction in Delaware.

[4] The Company's agreement to spread out $4 million in cash payments over ten years irrespective of potential later incapacity – rather than, for example, purchasing an annuity at the beginning of the contract – is simply a matter of form and allocation. (Def. Br. 12-13). Lacking any substantive response to this point, plaintiffs blatantly mischaracterize defendants as arguing that the consulting contracts are "forms of deferred salary" or "non-required departing bonus[es]." (Pl. Opp. 11). But defendants did not argue that payments to Peterson or his widow constitute salary or bonuses for services pre-dating the consulting contract. Promising payments to Peterson (or his widow) over ten years was simply one way to provide Peterson with consideration for his promise to provide consulting services to Tyson and not to any competitor, for so long as he was able, during that entire ten years.

did provide services pursuant to his consulting contract while he remained physically able to do so, that the contract required him to provide such services as long as he was able, and that the contract conditioned the payments on Peterson not performing work for any competing company. (12/21/01 Form 10-K, Ex. 10.11 §§ 2, 7 (Ex. E)). Plaintiffs fail to allege facts suggesting that this arms-length agreement constituted waste.

B. Plaintiffs' Allegations Regarding the 2001 and 2004 Don Tyson Contracts Also Fail to State a Claim.

The Complaint likewise fails to state a claim for waste with respect to the 2001 and 2004 Don Tyson Contracts. (*See* Def. Br. 14-15). Plaintiffs make no attempt to defend the legal sufficiency of a claim that the amount of consideration promised Don Tyson under his contracts was "excessive" and merely should have been less. Instead, plaintiffs claim that a focus on the amount of consideration "misses the point entirely" because, according to plaintiffs, Don Tyson was not contractually required to do *any* work. (Pl. Opp. 2, 10, 30). As plaintiffs put it, "[t]he relevant question is whether Don Tyson was required to provide any services." (*Id.* 10).[5] Inventing their own recharacterization, plaintiffs then claim that all that Don Tyson promised was that he "*may*" work "up to twenty (20) hours per month" – implying that the matter was contractually left to *his* discretion. (*Id.* 9) (emphasis in original).

Plaintiffs' statements are demonstrably false, because the contracts themselves reveal that Don Tyson is required to provide services at the Company's request. *See Peter Schoenfeld Asset Mgmt. LLC v. Shaw*, 2003 WL 21649926, at *2 (Del. Ch.) (on a motion to dismiss, court does not accept as true "allegations contradicted by documents on which the complaint is based"). Specifically, both contracts provide: "During the Term, Employee *will*, upon reasonable request,

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[5] Puzzlingly, plaintiffs elsewhere appear to suggest that the 2001 Don Tyson Contract "may not have been unlawful *per* se." (Pl. Opp. 9).

provide advisory service to the Company as follows . . . . Employee may be *required* to devote up to twenty (20) hours per month to the Company." (12/21/01 Form 10-K, Ex. 10.10 at § 2 (Ex. D); 12/15/04 Form 10-K, Ex. 10.43 at § 4 (Ex. F)) (emphasis added). In other words, the Company has the power under these contracts to *require* Don Tyson to provide up to 20 hours of advisory service per month.[6] Thus, while plaintiffs take the word "may" out of context and imply that Don Tyson "may" decide for himself whether or not to perform services for the Company, the complete contracts contradict this proposition.

Plaintiffs also assert that "the *truth* of the matter is that [Don Tyson] never had any intention of performing *any* services for the Company." (Pl. Opp. 9). In support, plaintiffs do nothing more than once against cite Don Tyson's "quip" about following the Company's progress from his boat. (*Id.* 9, 30). However, plaintiffs still fail to allege any facts suggesting that this was anything but a "quip". *See California Pub. Employees' Ret. Sys. v. Coulter*, 2002 WL 31888343, at *7 (Del. Ch.) (rejecting claim that director's quips that "those that got most of the gold make most of the rules" indicated a lack of independence). Most notably, plaintiffs do not actually allege, nor could they, that Don Tyson has not in fact provided consulting services to the Company during the terms of his contracts.[7] In the absence of any such factual allegations, and in the face of contracts that *require* Don Tyson to provide services, plaintiffs' conclusory assertion that the 2001 and 2004 Don Tyson Contracts were "gifts" does not state a claim.

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[6] Because the 2001 and 2004 Don Tyson Contracts require Don Tyson to provide services at the Company's request, this case is nothing like *In re National Auto Credit, Inc. S'holder Litig.*, 2003 WL 139768 (Del. Ch.). Indeed, plaintiffs' own parenthetical reveals why *National Auto Credit* is inapposite – there, the executive was "being paid a large sum of money to be the head of what essentially is a passive corporation." (Pl. Opp. 31).

[7] In their opposition, plaintiffs point to the SEC proceeding and its findings regarding Don Tyson's boat. (Pl. Opp. 9, 30). But the fact that Don Tyson owned a boat and spent time on it in no way demonstrates that he failed to perform services for the Company. Moreover, the SEC proceeding only addressed the disclosure of perquisites. Plaintiffs do not and cannot allege that the SEC found that Don Tyson failed to provide any services to the Company under his contracts. (*See* Compl. ¶¶ 121-26).

With respect to the 2004 Don Tyson Contract, plaintiffs also argue "gift" on the grounds that the cash payments are larger than under the 2001 Don Tyson Contract. (*See* Pl. Opp. 31). But putting plaintiffs' conclusory assertions and rhetoric to one side, all plaintiffs are complaining about is that Don Tyson is being paid too much. That is a waste claim, which fails for the reasons discussed above. Plaintiffs' unsupported speculation that the purpose for revising Don Tyson's agreement in 2004 was to increase his compensation in the wake of the SEC proceeding (*id.*) is both irrelevant and demonstrably wrong, as Don Tyson does not in fact receive greater compensation under the 2004 Don Tyson Contract because it provides substantially fewer perquisites than his former contract provided. (Def. Br. 16 n.9).[8]

Lacking any factual support for their waste claim, plaintiffs attempt to evade the issue by claiming that the Don Tyson contracts were "self-interested" transactions because they were approved by the entire board, and that defendants therefore must prove "entire fairness." (Pl. Opp. 32). First, however, even if entire fairness were the standard, plaintiffs fail their threshold burden of pleading facts tending to show that the Don Tyson contracts are unfair. *See* pp. 28-29, *infra*. In that regard, all that they offer, apart from conclusory rhetoric, is their specious claim that no services at all were required.[9] Second, and even more fundamentally, the Complaint fails to allege facts demonstrating that the Don Tyson contracts were interested transactions to which

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[8] Plaintiffs suggest that it is "premature" to consider the entire 2004 Don Tyson Contract and that the Court should instead limit itself to the out-of-context portions of that contract cited in the Complaint. (Pl. Opp. 31 n.18). But plaintiffs are the ones who have brought the 2004 Don Tyson Contract into play, selectively citing some portions while misleadingly ignoring others. On a motion to dismiss, the Court may consider the full content of documents that are integral to plaintiffs' claims. *See McMillan v. Intercargo Corp.*, 768 A.2d 492, 500 (Del. Ch. 2000).

[9] Notably, plaintiffs do not allege that these contracts are out of line with similar arrangements entered by other corporations. (Def. Br. 14). In response to this point, plaintiffs again try to shift the burden by claiming that defendants "fail to identify any such 'similar arrangements' let alone any 'other corporations.'" (Pl. Opp. 10). But the burden is not on defendant to allege that the contracts are fair; rather, the burden is on plaintiffs to allege facts at the pleading stage sufficient to support their claim for breach of fiduciary duty. This they have not done.

an entire fairness standard of review would apply. The Complaint expressly acknowledges that the Company had a functioning Compensation Committee. (*See, e.g.*, Compl. ¶¶ 133, 136-39). Plaintiffs allege no facts supporting their conclusory and deliberately ambiguous suggestion that the entire board, rather than the Compensation Committee, approved Don Tyson's contracts. (Def. Br. 13 n.7).[10] Count I must therefore be dismissed.

C. Claims Regarding the 2001 Contracts Are Time-Barred.

As it relates to the Peterson Contract and the 2001 Don Tyson Contract, Count I is also barred by Delaware's three-year statute of limitations because these contracts were publicly disclosed in 2001. (Def. Br. 7). Each of plaintiffs' attempts to avoid this limitations bar fails.

First, citing *Yaw v. Talley*, 1994 WL 89019 (Del. Ch.) and *Kahn v. Seaboard Corp.*, 625 A.2d 269 (Del. Ch. 1993), plaintiffs state "there is serious doubt as to whether Defendants may even assert a statute of limitations defense under Delaware law" for self-interested transactions. (Pl. Opp. 47). However, plaintiffs simply ignore the numerous cases – including *Yaw* and *Kahn* themselves – which hold that the limitations period is tolled even for self-interested transactions *only until* the plaintiff is on inquiry notice of the alleged wrongdoing. (*See* Def. Br. 8). Here, plaintiffs were on notice of the alleged wrongdoing when the contracts were disclosed in 2001.

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[10] In response, plaintiffs weakly argue that by not contesting demand futility on Count I, defendants "thereby tacitly recogniz[ed] that the consulting contracts were awarded by an interested and/or not independent body of Tyson directors." (Pl. Opp. 24 n.13). This is unsupported nonsense. Whether or not a majority of the current board is disinterested and independent with respect to Don Tyson's contracts has no bearing on the fact that those contracts were approved by the disinterested and independent members of the Company's Compensation Committee. As elsewhere, plaintiffs have confused demand futility issues with the substantive effects of Compensation Committee approval. *See* p. 18, *infra*

Plaintiffs also misleadingly cite ¶ 107 of the Complaint as support for their assertion that John Tyson approved and executed Don Tyson's contract, under which John Tyson is a third party beneficiary. (Pl. Opp. 32). That paragraph only supports the latter half of plaintiffs' assertion, regarding John Tyson's third party beneficiary status. (*See* Compl. ¶ 107). The Complaint does *not* and could not allege that John Tyson (and not the Compensation Committee) approved Don Tyson's contracts.

Indeed, the gravamen of plaintiffs' complaints regarding approval of these contracts – *i.e.*, that they were "gifts" because the Peterson Contract provided for payments after death, and the 2001 Don Tyson Contract allegedly did not require any services – are claims based on contractual provisions every bit as apparent on the face of the contracts then as now. And even Don Tyson's quip (Compl ¶ 3) was made at the time of his retirement, *i.e.*, in 2001.[11]

Second, plaintiffs suggest that, when deciding whether these claims are time-barred, the Court should not consider the material submitted by defendants demonstrating public disclosure, *i.e.*, the Company's public SEC filings. (Pl. Opp. 47). Plaintiffs cite *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312 (Del. 2004), which held that the Court improperly took notice of newspaper articles and IRS technical advisory memoranda that had *not* been "publicly filed". *Id.* at 320. Here, by contrast, the Company's SEC Form 10-K which disclosed the contracts in 2001 *was* publicly filed and thus may be considered on this motion to dismiss. *See id.* at 320 n.28 (on a motion to dismiss, court may take judicial notice of publicly filed documents); *In re Dean Witter*, 1998 WL 442456 at *6 & n.46 (dismissing claim as time-barred where plaintiffs were on inquiry notice based on SEC filings).

Third, plaintiffs suggest that the facts underlying their claims as to the 2001 contracts were either concealed or not evidenced until much later. As to the former, plaintiffs argue that they were not on notice of their claims because the Company's proxy statements "year after year

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Further, whether or not John Tyson signed the contract does not affect the fact that it was the Compensation Committee that had approval authority.

[11] Plaintiffs claim that inquiry notice questions usually involve "an intensive factual analysis, which is typically improper in the context of a motion to dismiss." (Pl. Opp. 47). However, the case cited by plaintiffs, *Coleman v. PricewaterhouseCoopers, LLC*, 854 A.2d 838 (Del. 2004), made no such broad pronouncement. Instead, the Supreme Court stated only that inquiry notice "is necessarily based on the facts of each case" and found that competing inferences could be drawn from an email that allegedly triggered inquiry notice. *Id.* at 842-43. Here, by contrast, there are no such competing factual inferences because the contracts were disclosed in 2001. Dismissal on the grounds of inquiry notice is

incorrectly described these advisory or consulting services as being mandatory and required." (Pl. Opp. 50). This is both incorrect and irrelevant. It is incorrect because such services were in fact required. *See* pp. 6-7, *supra*. It is irrelevant because the contracts were disclosed in their entirety in 2001. Likewise, while plaintiffs claim that "it only became clear that no services were exchanged for the payments when Peterson died in May 2004" (Pl. Opp. 50), both contracts provide that payments will continue posthumously – and the fiduciary breach alleged here involved the original approval, not later developments. Further, while plaintiffs assert that they did not know the true nature of Don Tyson's contract until the SEC proceeding (*id.* 50, 51 n.29), the Complaint does not and cannot allege that the SEC proceeding had anything to do with whether services were required under the contract. (*See* Compl. ¶¶ 121-26). Nor does the Complaint allege that the SEC found that Don Tyson was not performing any consulting services for the Company or that Peterson did not perform any consulting services while he was alive.

Fourth, plaintiffs claim that the limitations period has not run because defendants continue to breach their fiduciary duties each time they "authorize the Company to make a payment for consulting services." (Pl. Opp. 51). However, once the Company enters a contract and incurs legal obligations, its directors have no power to "authorize" (or "de-authorize") payments which are required to be made under that contract. Thus, Delaware courts have held that, where a contract is alleged to be unfair, the limitations period begins to run upon execution of the contract – here, in 2001. (Def. Br. (*citing Kahn*, 625 A.2d at 271, and *In re Marvel Entertainment Group, Inc.*, 273 B.R. 58, 73 (D. Del. 2002)).[12]

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thus entirely appropriate. *See, e.g.*, *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *8-9 (Del. Ch.).

[12] Plaintiffs try to distinguish *Kahn* and *Marvel* on the grounds that the contracts in those cases were "*per se* (or by their terms) unfair," whereas here the contracts are not alleged to be *per se* unfair. (Pl. Opp. 51 n.29). But the crux of plaintiffs' argument that approval constituted a breach of fiduciary duty is that the contracts "were unfair because no consideration or consulting services were required." (*Id.*).

Finally, plaintiffs argue that the contracts "did *nothing* to provide the investing public with notice that the Tyson Foods Board was funneling payments for patently non-business related expenses to these highly paid 'consultants.'" (Pl. Opp. 51). However, the Peterson Contract contains a detailed list of personal perquisites to which Peterson and his widow are entitled. (*See* 12/21/01 Form 10-K, Ex. 10.11 at § 3(a)-(e) (Ex. E)). The 2001 Don Tyson Contract likewise specifically provides that Don Tyson will be entitled to certain personal perquisites "consistent with past practices." (*See* 12/21/01 Form 10-K, Ex. 10.10 at § 3 (Ex. D)). Plaintiffs were thus put on notice from the outset that such perquisites would be provided, and in 2001 plaintiffs could have inquired into the nature of the contractually referenced "past practices." More fundamentally, though, plaintiffs' argument once again ignores their own objections to the contracts – namely, the alleged lack of any requirement that Peterson and Don Tyson perform any work, and the fact that payments were to continue even in the event of death. Plaintiffs cannot avoid the limitations bar by pointing to the perquisites alone when their claim relates largely to an alleged lack of consideration affecting the contracts in their entirety.[13]

II. THE COURT SHOULD DISMISS COUNT II.

Count II alleges that certain directors breached their fiduciary duties by *approving* certain "other annual compensation" which was paid to Don Tyson, John Tyson, and Richard Bond at

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Whether consideration or services were required (and they were, *see* pp. 6-7, *supra*) can be determined by reference to the contracts themselves – which were disclosed in their entirety in 2001.

[13] In connection with their limitations arguments, plaintiffs make brief and general reference to the "inherently unknowable harms" tolling doctrine, but do not apply that doctrine to the consulting contracts or any other particular transaction. (*See* Pl. Opp. 48). And for good reason – none of the alleged wrongs here were "inherently unknowable," but instead could have been "discovered" at any time, including through inspection of Tyson's books and records. *See In re ML/EQ Real Estate P'ship Litig.*, 1999 WL 1271885, at *2 n.12 (Del. Ch.) (statute was not tolled where "all of the allegedly wrongful acts were readily discoverable from the books and records of ML/EQ"). In any event, the limitations period is tolled for "inherently unknowable" harms only until the plaintiff is on inquiry notice, which here was in 2001. *See Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 Del. Ch. LEXIS 100, at *61 (Del. Ch.).

various times from 2001 through 2003. (Compl. ¶¶ 167, 169). Plaintiffs' discussion of Count II in their opposition focuses almost entirely, however, on allegedly inadequate disclosures regarding such compensation (discussed in Section V, *infra*), rather than their challenge to the "approval" of the compensation in the first place.[14] The reason for plaintiffs' shift in focus is obvious; the Complaint does not come close to stating a claim for waste. (*See* Def. Br. 16-17).

Plaintiffs make two arguments in support of their approval claim. First, plaintiffs claim that "[w]here there is no consideration . . . even a relatively small amount of compensation could constitute waste." (Pl. Opp. 33). However, the Complaint does not allege – much less provide supporting facts – that those who received "other annual compensation" failed to provide any consideration in return. To the contrary, according to the Complaint, this "other annual compensation" was only paid to individuals who were working as full-time executives for the Company at the time – John Tyson and Bond from 2001 through 2003, and Don Tyson in 2001. (Compl. ¶¶ 9, 10, 15, 117). Further, while plaintiffs again refer to the SEC proceeding as support for their allegations, the Complaint itself reveals that the SEC proceeding addressed only whether Don Tyson's compensation and perquisites were adequately *disclosed*. (*Id.* ¶¶ 121-26). The proceeding did not address compensation paid to John Tyson or Bond, whether John Tyson, Bond, or Don Tyson provided services or other consideration to the Company, or whether *approval* of compensation was waste or otherwise improper. (*See id.*).

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[14] Without citation, plaintiffs accuse defendants of "baldly proclaim[ing] that Count II only asserts a claim for waste" and state that in fact Count II contains a duty of disclosure claim. (Pl. Opp. 34). Defendants made no such proclamation, but instead explained in their brief that they were addressing plaintiffs' challenge to the allegedly improper *approval* of other annual compensation in Section II, and plaintiffs' challenge to the allegedly inadequate *disclosure* of other annual compensation in Section V. (*See* Def. Br. 16 n.10).

Plaintiffs also reiterate their naked assertion that "no legitimate business purpose" was served by the "other annual compensation."[15] But the "legitimate business purpose" was to provide compensation for services rendered by the Company's executives. Because money is fungible, it make no difference that this compensation was in the form of payment for personal expenses, rather than a higher salary. (Def. Br. 16-17). Plaintiffs simply ignore this point.[16]

Second, plaintiffs do not dispute – indeed, effectively admit (*see* Pl. Opp. 23) – that the challenged "other annual compensation" was approved by the Compensation Committee. (*See* Def. Br. 17). Confusing the significance of this fact, plaintiffs argue that such approval does not suffice to excuse demand, given the composition of the full board. (Pl. Opp. 23, 25). This is a strawman, however, because defendants did not make a "demand required" argument with respect to Count II. Rather, defendants addressed the substantive adequacy of the purported claim and explained that where, as here, a committee awarded the compensation, plaintiffs must plead facts showing either (1) the committee members lacked independence, or (2) a failure to exercise legitimate business judgment. (Def. Br. 18).[17] Plaintiffs have done neither.

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[15] Plaintiffs inexplicably assert that "[t]he Company has now admitted that the actual payments made under these categories served no legitimate business purpose." (Pl. Opp. 12). However, plaintiffs do not cite or quote, either in the Complaint or elsewhere, the contents of any such "admission" by the Company.

[16] Similarly, plaintiffs persist in asserting that the Company's proxy statements misdescribed "other annual compensation" as being "business related" – without even acknowledging, much less responding to, defendants' pointing out that the proxy statements said no such thing. (*See* Def. Br. 17 n.11; *see also* p. 35, *infra*). Indeed, in the expenses were "business related", then the payments for those expenses would not be considered "compensation" to the executive.

[17] And even when an interested full board makes a decision, a fiduciary breach claim is only adequately stated if the Complaint contains factual allegations of substantive unreasonableness or unfairness. (Def. Br. 36-37). Count II contains no allegations demonstrating that the "other annual compensation" resulted in any total compensation amount that was unreasonable. Notably, the "other annual compensation" granted from 2001 to 2003 accounted for only between 3% and 16% of each executive's total compensation for that year. (*See* 1/2/02 Proxy at 17-18 (Ex. J); 1/2/03 Proxy at 12 (Ex. K); 12/31/03 Proxy at 31-32 (Ex. L)).

Plaintiffs make virtually no attempt to show that a majority of the Compensation Committee members were not independent; instead, plaintiffs devote their efforts to a board "voting block", none of whom was a member of the Compensation Committee. (Pl. Opp. 25). And far from pointing to pleaded facts sufficient to overcome the presumptive protections of the business judgment rule afforded the Compensation Committee, plaintiffs offer nothing more than wild, conclusory accusations unsupported by *any* pleaded facts. (*See id.* 13 (asserting, without citation, that the board as a whole "acquiesced or deliberately turned a blind eye to the admittedly improper nature of those payments and the Company's disclosures about them")).

Finally, regarding the approval of John Tyson's and Bond's "other annual compensation" in 2001, plaintiffs' claim is also time-barred because that compensation was disclosed in January 2002. (Def. Br. 16). Plaintiffs argue that the limitations period was tolled because they were not on notice regarding the improper nature of these payments until the SEC proceedings were disclosed in 2003. (Pl. Opp. 52). However, the SEC proceedings did not even address John Tyson's or Bond's compensation. (*See* Compl. ¶¶ 121-26). These claims are thus time-barred.

III. THE COURT SHOULD DISMISS COUNT III.

A. Claims Against Non-Compensation Committee Members Must Be Dismissed.

In Count III, plaintiffs allege that certain defendants breached their fiduciary duties by approving option grants with knowledge "that the Company was on the verge of making announcements that would drive the stock price (and therefore the option strike price) up." (Compl. ¶ 175). In both their Complaint and their opposition, plaintiffs admit that "[t]he Board's Compensation Committee has discretion as to when and to whom to distribute the stock awards." (Pl. Opp. 14; *see* Compl. ¶ 133). Plaintiffs try to sidestep their own admission that options were approved by this committee by pointing to a more general and vague allegation in the Complaint that the entire board "knowingly approved and acquiesced in" the option grants. (Pl. Opp. 35;

Compl. ¶ 135). However, the Complaint's specific factual allegations contradict this conclusory assertion.[18] *See In re General Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *29 (Del. Ch.) (disregarding conclusory allegation which was contradicted by more specific allegations elsewhere in the complaint). Count III should thus be dismissed, at the very least, as to those directors who were not on the Compensation Committee in the relevant years. (Def. Br. 21).

B. Claims Regarding Options in 1999 and 2001 Are Time-Barred.

Plaintiffs' claims regarding the grants in 1999 and 2001 are time-barred because the grants were disclosed in the Company's proxies more than three years before this lawsuit was filed. (Def. Br. 21). Plaintiffs do not dispute these disclosures, but instead toss out a scattershot series of tolling theories, in the process playing fast and loose with the facts.

First, plaintiffs claim that the limitations period somehow is equitably tolled because the board members "too were options recipients." (Pl. Opp. 53). But there is no claim here that either the Compensation Committee members or board members generally received any "well-timed" option grants. The options challenged in Count III are *not* the same options that all board members received as director compensation, and plaintiffs' attempt to conflate the two in order to claim "self-interest" is mere sleight of hand. (Def. Br. 24 n.16). Plaintiffs make no response to this point, and their underlying assumption – that the limitations period is somehow infinitely tolled for claims about self-interested transactions – is simply incorrect. *See* p. 9, *supra*.

Second, plaintiffs argue that the limitations period has been tolled because defendants "have deliberately concealed the fact that they have manipulated the option grant dates so as to maximize the costs to the Company in an effort to maximize profits for the recipients." (Pl. Opp.

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[18] Indeed, Count III in Amalgamated's initial complaint was brought only against the Compensation Committee members. (Def. Br. 20-21). Plaintiffs offer no explanation as to why they subsequently added the remaining directors as defendants in their amended complaints.

53). However, all of the relevant details on which plaintiffs base their claims – the recipient, the date granted, and the strike price – were disclosed in the Company's proxies for 1999 and 2001.[19] (*See* 12/5/99 Proxy at 15 (Ex. H); 1/2/02 Proxy at 13 (Ex. J)).

Third, plaintiffs argue that they were not on inquiry notice of the alleged wrongdoing until a "pattern" supposedly emerged with "disclosure of the third (October 2001) conspicuously timed grant." (Pl. Opp. 53, 54).[20] Astonishingly, plaintiffs continue to assert that this third option grant was not publicly disclosed until January 2003 – claiming that this must have been so because the Company's fiscal year ends in September. (*Id.* 54). But regardless when the fiscal year ended, the October 2001 option grants were in fact plainly disclosed on page 13 of the Company's January 2, *2002* proxy statement – over three years before this lawsuit was brought. (Def. Br. 22-23). (The page number to which defendants refer is on the upper-right corner ("13 of 33") of the proxy statement printout attached as Exhibit J to the Hirzel Affidavit.) And while this judicially-noticeable disclosure was clearly identified in defendants' opening brief and the relevant pages attached as an exhibit, plaintiffs simply ignore it and instead persist in their false statement that the October 2001 grant was not disclosed until January 2003. In short, plaintiffs

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[19] Plaintiffs also assert that, because the options were not in each case disclosed immediately after they were granted, but instead were disclosed in the Company's next proxy statement, the alleged "temporal connection to the release of positive, market-moving news was not something that would have been immediately apparent to even the most diligent of investors." (Pl. Opp. 54). But disclosure in the next proxy statement is the usual way that option grants are disclosed, and plaintiffs allege no facts suggesting that this was somehow unusual or misleading. And the question is not what was "immediately apparent", but what was known or knowable when such proxy statements were released. Plaintiffs cite no case law supporting their position that there was no inquiry notice under these circumstances, where all the relevant facts as to timing were publicly disclosed with respect to each grant.

[20] Plaintiffs are back to arguing the "three-times rule" first proposed in Amalgamated's initial complaint and have apparently abandoned the "four-times rule" that Amalgamated (inconsistently) tried to advance in its amended complaint. Of course, neither rule finds any support in the case law, and plaintiffs' reliance on *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1986), is seriously misguided because that decision addressed only whether a pattern of racketeering existed under RICO. (*See* Def. Br. 22-23 n.14).

fail even their own self-invented test. Plaintiffs' claims regarding the 1999 grants (which even plaintiffs concede are also moot (Pl. Opp. 52 n.30)) and 2001 grants are thus time-barred.

C. Count III As a Whole Fails to State a Claim.

Count III should also be dismissed in its entirety for failure to state a claim. In their opposition, plaintiffs try to confuse the issue of stating a claim with demand futility issues by arguing that demand was excused for Count III. (Pl. Opp. 25-26). But this is a strawman, as defendants never argued that Count III should be dismissed for failure to make demand. Instead, defendants explained that where, as here, option grants are approved by a Compensation Committee, plaintiffs can state a claim only if they (1) demonstrate that the committee members were interested or lacked independence, or (2) overcome the business judgment rule. (*See* Def. Br. 23-26). Plaintiffs do neither.

Plaintiffs do not argue that the Compensation Committee members were interested or lacked independence with respect to the option grants they approved. Rather, plaintiffs attempt to create the appearance of interest by asserting that John Tyson made option grant "recommendations" to the Compensation Committee. (Pl. Opp. 35). That allegation, however, does not change the admitted fact that the independent directors comprising the Compensation Committee had the ultimate authority to grant options (Compl. ¶ 133), and that this authority is therefore protected by the business judgment rule.

Plaintiffs attempt to overcome the business judgment rule by arguing that the option grants are a "newly emerging form of insider trading." (Pl. Opp. 13 n.7). The disingenuousness of that claim is underscored, however, by the sole citation plaintiffs provide: a news article in the Wall Street Journal about the entirely different matter of falsely backdating option grants – a practice which is not and cannot be alleged here. Notably, plaintiffs admit that the option grants complied with the Company's stock option plan because they were granted at or above the

closing price of the stock. (*See* Compl. ¶¶ 134-39; Def. Br. 25). Plaintiffs also do not deny that every party to the option grants – the Company, the Compensation Committee, and the recipient – possessed the same information regarding the allegedly impending rise in stock price. (*Id.*). In light of this full disclosure, this is *not* a situation akin to insider trading, where one party is able to take advantage of another party to the transaction due to an information disparity. (*Id.*).

Although plaintiffs attempt to avoid the language of waste by stating that "the crux of the claim is not waste but the breaches of fiduciary duty that are incident to the manipulation of stock option awards to the detriment of the Company" (Pl. Opp. 35-36), this is just playing with words. The "detriment of the Company" is nothing other than a claim of excessive largesse, and Count III is thus still no more than a waste claim that fails because the option recipients were full-time executives providing ample consideration to the Company.

Lacking any insider trading or waste claim, plaintiffs again try to shift the focus of their claim to disclosures, asserting for the first time that there was a "failure to disclose the actual compensation being made to executives and directors of the company." (Pl. Opp. 36; *see also id.* 14). However, the Complaint does not allege any facts (nor could it) suggesting that the Company concealed the pricing, amount, or timing of any of these option grants. To the contrary, as noted above, all of the option grant details upon which plaintiffs base their claims were plainly disclosed in the Company's proxies, and publicly-traded stock prices are available from any number of sources. *See* pp. 16-17, *supra*. (*See* 12/5/99 Proxy at 15 (Ex. H); 1/2/02 Proxy at 13 (Ex. J); 12/31/03 Proxy at 33 (Ex. L)).

IV. THE COURT SHOULD DISMISS COUNT IV.

A. Claims Against Non-Board-Members Must Be Dismissed.

As pointed out in defendants' opening brief (Def. Br. 26), Count IV impermissibly (and inexplicably) seeks to hold certain directors liable for certain related party transactions that pre-

dated their board membership. Plaintiffs make no response to this argument. Accordingly, the Court should dismiss plaintiffs' claims against Smith and Bond for transactions prior to their joining the board in 2001, against Jones and Allen for transactions prior to 2000, and against Kever for transactions before 1999. (*Id.* ¶¶ 13-16, 25).

B. Claims Regarding Transactions from 1998 through 2001 Are Time-Barred.

Each of the challenged related party transactions from 1998 through 2001 was publicly disclosed in the Company's proxy statements more than three years before this lawsuit was filed. (Def. Br. 26-27). Indeed, the chart contained in the Complaint – showing for each year "the nature of the transactions involving these related parties and the amount of money paid" – is, by plaintiffs' own admission, taken directly from the proxy statements. (Compl. ¶ 68). These claims are thus barred by the three-year statute of limitations. Plaintiffs' attempts to invent excuses for their delayed challenges to these long disclosed transactions are meritless.

First, as with Count I, plaintiffs argue that the statute of limitations does not apply at all to self-dealing fiduciaries. (Pl. Opp. 54-55). However, the Complaint expressly alleges that many of the related party transactions were approved by the Special Committee or Governance Committee (*see* Compl. ¶¶ 89-92, 95, 98), and there can be no argument that those transactions constituted self-dealing. Likewise, even as to the transactions plaintiffs allege were not reviewed by any committee, plaintiffs have simply lumped all the defendants together and ignored the fact that, with respect to any given transaction, the directors who were not party to that transaction cannot be considered self-dealing fiduciaries. In any event, Delaware courts have consistently held that the statute of limitations *does* apply even to self-dealing fiduciaries and is tolled only until the plaintiffs are on inquiry notice of the alleged wrongdoing. *See* p. 9, *supra*. Thus, the question here is when plaintiffs "knew or ha[d] reason to know of the facts constituting the wrong." *In re Dean Witter*, 1998 WL 442456 at *6.

Second, plaintiffs assert they had no reason to be on inquiry notice "until July 2005, when the Company begrudgingly produced documents in response to Meyer's Section 220 demand." (Pl. Opp. 55). This argument is not only legally meritless but it ignores much of plaintiffs' own allegations, both current and past. To begin, with but two exceptions (the Arnett sow complex and Tyson Children's Partnership farm lease), the Complaint's allegations as to the purported substantive unfairness of the 1998-2001 transactions rest largely on facts gleaned from the face of proxy statements themselves – in short, facts that were equally available years ago. For example, plaintiffs challenge the legitimacy of "growout transactions" dating back to 1998. (Compl. ¶ 68). But their criticisms of these growout transactions relate to their very nature (*id.* ¶ 76), a matter as evident years ago as now. The same is true of the aircraft leases, wastewater treatments plant leases, office leases, warehouse leases, and the great majority of farm leases, as to which the only facts plaintiffs allege are the total dollar payments, taken directly from the proxies. (*Id.* ¶¶ 81-83). Thus, plaintiffs' argument that the results of the Section 220 request alone gave rise to inquiry notice is contradicted by the face of the Complaint.

This point is underscored by the filing of Amalgamated's initial complaint, challenging these very same transactions, *prior* to the Section 220 request even having been made. Amalgamated's initial complaint contained allegations of wrongdoing regarding these transactions based almost solely on the Company's proxy statements. Plaintiffs respond by claiming that they did not know *all* the facts and details at the time of Amalgamated's initial filing.[21] (Pl. Opp. 50 n.27). But that is not the test for inquiry notice, which instead asks

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[21] Plaintiffs also conclusorily assert that the "[d]efendants still have refused to disclose significant details regarding the $160 million worth of related party transactions the Company has authorized since 1998." (Pl. Opp. 56). But plaintiffs fail to specify any such undisclosed "significant details," and elsewhere they claim that *even now* they are unable to do so. (*Id.* 41). This purported inability reveals their "equitable tolling" argument for what it is – a red herring, given that plaintiffs have now filed four complaints even without these hypothetical additional details. Equally fallacious is plaintiffs'

whether a plaintiff knew or should have known *sufficient* facts to put him on notice of potential claims. *See In re Dean Witter*, 1998 WL 442456 at *6. That Amalgamated believed it had sufficient facts to actually file a claim of wrongdoing in good faith indicates that, *a fortiori,* it was at the very least on inquiry notice based on the proxy statements – which for transactions from 1998 to 2001 were disclosed over three years before this lawsuit was filed.[22]

Indeed, even if, *arguendo*, the production of documents in response to the Section 220 request provided some additional details, that still begs the question of *inquiry* notice. A potential plaintiff cannot delay making a Section 220 request for years after related party transactions are disclosed, thereby unilaterally granting himself an unlimited tolling period with respect to those transactions. Instead, where, as here, the inquiry prompting the Section 220 request could itself as easily have been made years earlier, and the same information could have been obtained at that time, the results of such a belated inquiry will not cause the resurrection of an expired limitations period. *See In re ML/EQ Real Estate P'ship Litig.*, 1999 WL 1271885 at *2 n.12 (statute was not tolled where "all of the allegedly wrongful acts were readily

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conclusory assertion that defendants purportedly breached some fiduciary duty by not specifying in their public disclosures all of the details regarding all of the terms of the related party transactions. (*Id.*). There is no such disclosure duty, however, either under federal proxy law or under Delaware law – especially since shareholders were not being asked to approve or disapprove any such related party transactions, but instead were being asked to vote for directors. To the contrary, the Court has recently cautioned against requiring extensively detailed disclosures because they "may be come so extreme as to render proxies confusing and not particularity useful to shareholders in casting an informed vote." *See Khanna v. McMinn*, 2006 WL 1388744, at *33-34 (finding no duty to disclose details of an already approved business transaction, because such details were not material to proxy soliciting election of directors).

[22] In this regard, defendants do not claim that Meyer's more detailed pleading "vitiates the propriety of Amalgamated's original pleading." (Pl. Opp. 49). Rather, the point is that if the proxy statements alone provided a sufficient basis for Amalgamated to file its initial complaint in good faith, then it clearly was on inquiry notice based on those proxy statements.

discoverable from the books and records of ML/EQ"). Defendants made this point in their opening brief (Def. Br. 27), yet plaintiffs offer no response or contrary authority.[23]

Third, plaintiffs renew their assertion of fraudulent concealment – without, however, responding to many of the points initially made in defendants' brief.[24] The premise underlying plaintiffs' fraudulent concealment argument – that the Company falsely represented the committee had reviewed related party transactions – is based on a meritless negative inference sought to be drawn from the Company's Section 220 production, but which in fact is contradicted by the Court's own Section 220 order. *See* pp. 27-28, *infra.*

This alleged concealment claim, moreover, has nothing to do with those transactions from 1998-2001 that even plaintiffs admit *were* the subject of such committee review, including numerous farm leases, office space leases, wastewater treatment plant leases, and an aircraft lease. (Compl. ¶¶ 89-92, 95). Plaintiffs attack each of those transactions as nonetheless being *substantively* unfair. And, significantly, that claim of substantive unfairness is by no means limited only to the "reviewed" transactions. Instead, the gravamen of plaintiffs' claims regarding *all* of the related party transactions is an across the board attack on their purported substantive unfairness. (Def. Br. 28). This sweeping set of substantive challenges, first made in the initial Amalgamated complaint and contained again in the pleading's most recent iteration, is

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[23] The closest plaintiffs come is their naked assertion that their "suspicions" were aroused "primarily due to public revelation that the SEC had commenced a non-public investigation of wrongdoing at Tyson in March 2004 relating to the misuse of corporate assets by Tyson executives to fund personal, non-business related expenses." (Pl. Opp. 4 n.2) But the SEC investigation was never announced to be, and never was, a general investigation into related party transactions such as those challenged in Count IV. Rather, as the Complaint's own allegations reveal, the SEC investigation was narrowly focused on perquisites provided to Don Tyson. (*See* Compl. ¶¶ 113-126).

[24] Plaintiffs also misstate the law, claiming that when fraudulent concealment has occurred the limitations period is tolled until *actual* discovery of facts giving rise to the claim. (Pl. Opp. 56). This proposition is incorrect: "Where there has been fraudulent concealment from a plaintiff, the statute is suspended until his rights are discovered *or* until they could have been discovered by the exercise of reasonable diligence." *In re Dean Witter*, 1998 WL 442456 at *5.

fundamentally distinct from the subject matter of the alleged "concealment" – which is precisely why Amalgamated was able to file a complaint challenging these transactions on fairness grounds even before any Section 220 demand was made.[25] In short, there is a disconnect between the concealment assertion and fundamental aspects of plaintiffs' related-party transaction claims. (*See* Def. Br. 28). The fact is that much of what plaintiffs complain of relates to matters known or knowable well before the Section 220 demand; the claims concerning related party transactions occurring from 1998 through 2001 are therefore time-barred.

C. Count IV Also Fails to State a Claim.

1. The Court Should Dismiss Plaintiffs' Claims Regarding Transactions Admittedly Reviewed by the Special or Governance Committees.

The Complaint expressly alleges that several related party transactions were reviewed and approved by the Company's Special Committee or its successor, the Governance Committee. (Compl. ¶¶ 89-92, 95, 98; Def. Br. 31). In their opposition, plaintiffs do not even argue that committee members Hackley, Vorsanger, Cassady, Kever, Jones, Smith, and Zapanta were interested or lacked independence. Rather, plaintiffs argue only that Massey – a minority of one – lacked independence because he engaged in cattle transactions with the Company in 2002. (Pl. Opp. 21). The related party transactions at issue in this portion of defendants' argument, however, were reviewed and approved in 1998, 1999, 2000, 2001, and 2004. (Def. Br. 31). The cattle purchases in 2002 could not have tainted Massey's review from 1998 to 2001,[26] and Massey did not review any transactions in 2004 because he was no longer on the committee. (*Id.*

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[25] Thus, the circumstances here are significantly different than in *Coleman v. Pricewaterhouse-Coopers, LLC*, 854 A.2d 838 (Del. 2004) (Pl. Opp. 56), where the court found a lack of inquiry notice because the defendant's statements had successfully dissuaded plaintiffs' investigation.

[26] In this regard, plaintiffs do not allege that in 2001 or earlier years Massey had any expectation of engaging in cattle transactions with the Company in 2002. Indeed, it was not until the Company's merger with IBP ("Iowa Beef Packers") in late 2001 that the Company even *had* a cattle operation. (Compl. ¶ 53; 12/21/01 Form 10-K at 3 (Ex. S)).

32). Thus, each member of the Special Committee and Governance Committee was independent in each of the relevant years, and their approval of the related party transactions is protected by the business judgment rule (as well as Section 102(b)(7)). (*Id.* 32-33).

Plaintiffs attempt to overcome the business judgment rule by alleging repeatedly, in the most conclusory fashion, that the transactions were "unfair" to the Company. But conclusory allegations of unfairness do not state a claim for breach of fiduciary duty. Plaintiffs also try to use two specific transactions – a farm lease with the Tyson Children's Partnership and the Arnett Sow Complex lease[27] – as a device for generally extrapolating that the committee members did not perform their jobs with respect to *any* of the transactions. (*See* Pl. Opp. 39-40). However, plaintiffs' allegations regarding those two transactions are inadequate. *See* pp. 26-27, *infra*. Even more fundamentally, the committee's review of these two transactions says nothing about its review of the dozens of other transactions, and plaintiffs cannot use two examples as a way to gloss over their failure to allege any specific facts whatsoever with respect to the great majority of transactions reviewed by the Special Committee or Governance Committee.

Plaintiffs' reliance on *iXCore, S.A.S. v. Triton Imaging, Inc.*, 2005 Del. Ch. LEXIS 102 (Del. Ch.), is thus severely misplaced. (Pl. Opp. 40). There, the Court allowed a duty of care claim where the board allegedly approved a transaction without "considering all material information reasonably available." *iXCore*, 2005 Del. Ch. LEXIS 102 at *3. Here, with respect

[27] Plaintiffs also rely on their allegations regarding the Company's logo vendor. (Pl. Opp. 40). However, as plaintiffs point out, the Complaint alleges that the logo vendor transactions were not reviewed by any committee. (Compl. ¶¶ 102-05). Thus, defendants do not include these transactions in their arguments regarding transactions reviewed by the Special Committee or Governance Committee. Moreover, while plaintiffs try to demonstrate a lack of oversight by alleging that the Governance Committee was unaware that Don Tyson gave a company credit card to this logo vendor (Pl. Opp. 40), this has absolutely nothing to do with whether the committee adequately considered the related party transactions that *were* brought to its attention. Indeed, the Complaint reveals that the Compensation Committee took swift action when it became aware of these logo vendor transactions. (Compl. ¶¶ 102-05).

to transactions admittedly reviewed by the Special Committee or Governance Committee, plaintiffs make no such due care allegations regarding a failure to consider all material information (which, in any event, would still be subject to the protections of the Company's Section 102(b)(7) provision). Rather, the crux of plaintiffs' claim is that the contracts approved were "unfair" to the Company. But the committees' decision to approve a transaction based on the information reviewed is the essence of business judgment, and plaintiffs cannot state a claim merely on the ground that they disagree with that judgment.

Plaintiffs' somewhat more specific allegations with respect to the Tyson Children's Partnership lease also fail. Plaintiffs' repeat their assertion that an appraiser was inappropriately asked to appraise only the property and not the lease. (Pl. Opp. 39). But, as defendants explained in their opening brief, the limited appraisal misleadingly cited in the Complaint is merely an attachment to a more exhaustive report which, in fact, appraised the entire lease and specifically found it "to be fair and reasonable." (Def. Br. at 34). *See Peter Schoenfeld Asset Mgmt.*, 2003 WL 21649926 at *2 (court does not accept as true "allegations contradicted by documents on which the complaint is based"). In their opposition, plaintiffs simply ignore these facts and do not even address defendants' argument. (*See* Pl. Opp. 39-40).

With respect to the Arnett Sow Complex, plaintiffs allege that in Spring 2000 an outside consultant found that the lease yielded a rate of return nearly double that of comparable farms and advised that the committee "may wish to revisit the terms of this lease." (Pl. Opp. 39; Compl. ¶ 98). Notably, however, the Complaint does *not* plead that the Special Committee ignored this advice. To the contrary, the Complaint itself specifically pleads that the Company reduced lease payments by approximately 42.5% (*i.e.*, half of 85%). (Compl. ¶ 99). The Complaint alleges no facts suggesting that the Arnett Sow lease was "unfair" after this

reduction.[28] In any event, it is well established under Delaware law that mere allegations of unfairness do not rebut the business judgment rule, unless the transaction is so egregiously unfair that it amounts to waste. (*See* Def. Br. 33). The allegations do not establish waste here.

2. The Court Should Dismiss Plaintiffs' Claims Regarding Transactions Allegedly Not Reviewed by the Special or Governance Committee.

The Complaint also fails to state a claim with respect to related party transactions that allegedly were not reviewed by any committee. First, the Court should not entertain plaintiffs' attempt to erect an inference that any transaction not addressed in the documents produced by the Company pursuant to the Section 220 Stipulation must not have been reviewed. (Def. Br. 34-36). In their opposition, plaintiffs ask this Court simply to ignore the judicially entered Section 220 Stipulation. They cite *California Pub. Employees' Ret. Sys. v. Coulter*, 2002 WL 31888343 (Del. Ch.), as purported support for this blinkered approach. But *Coulter* is inapposite. There, the Court declined to draw any inferences, but instead relied on the plaintiff's affirmative allegation that there were no documents in the defendant's file regarding review of a particular transaction. *Id.* at *11 n.29. Here, however, plaintiffs make no such independent affirmative allegation of knowledge that there are no documents in the Company's files regarding review of the transactions. Further, in contrast to *Coulter*, where there was a dispute regarding the parties' private agreement as to what was to be produced (*id.* at *4), here there is a court order which expressly provides that the Company was only obligated to produce documents concerning

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[28] All that the Complaint offers in this regard is the bare assertion that lease prices remained "inflated." (Compl. ¶ 99). Further, plaintiffs' allegation that The Pork Group, a Tyson subsidiary, would have liked an 85% reduction in lease payments over two years (Compl. ¶ 99) is of no moment. A company's business units would always prefer more favorable transaction terms, and the fact that the unit made such a "proposal" does not mean that it was either realistic or in line with comparable market rates – much less that independent directors breached their fiduciary duties by not obtaining these "proposed" terms.

certain transactions from 2003 and 2004, specifically described therein. (*See* Hirzel Aff., Ex. O). Plaintiffs do not argue otherwise.[29]

On a motion to dismiss, the Court need not accept unreasonable inferences. *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *10 n.58 (Del. Ch.). The Court also "is hardly bound to accept as true a demonstrable mischaracterization and the erroneous allegation that flows from it." *In re Wheelabrator*, 1992 WL 212595, at *3 (Del. Ch.). Here, for reasons that plaintiffs cannot refute, plaintiffs' claimed negative inference from the Section 220 documents is manifestly unreasonable.

Second, even if, *arguendo*, plaintiffs had adequately alleged a lack of committee review, the Complaint still fails to state a claim because the Complaint's conclusory allegations of unfairness do not satisfy plaintiff's threshold pleading burden. (Def. Br. 36-39). Plaintiffs suggest that merely identifying a self-interested transaction suffices to state a claim, because the burden is then on defendants to prove its "entire fairness." (Pl. Opp. 42). This is not the law. Rather, even when a plaintiff challenges a self-interested transaction, the initial pleading burden is on the plaintiff to allege some facts suggesting that the transaction was unfair. (Def. Br. 36-37).[30] It is only after this initial burden is met that the burden shifts to the defendants to prove

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[29] Instead, plaintiffs play word games by asserting that "it is [defendants] who apparently have forgotten (or ignored) the scope of the documents produced", noting that defendants did produce some documents from prior to 2003. (Pl. Opp. 37). However, the question here is not what the Company voluntarily produced, but rather what the Court's order *required* the Company to produce. The Company admittedly produced some records from before 2003 because, in some instances, payments were made during 2003 or 2004 pursuant to multiple-year contracts that had earlier been reviewed and approved by the Special Committee or Governance Committee. But it remains undisputed that the Section 220 Stipulation did not require *all* documents from 1998 to 2002 to be produced.

[30] Plaintiffs' attempt to distinguish the cases cited in defendants' brief fails. For example, *Joyce v. Cuccia*, 1997 WL 257448 (Del. Ch.), expressly held that, "[t]o state a legally sufficient claim for breach of the duty of loyalty, plaintiffs must allege *facts* showing that a self-interested transaction occurred, *and* that the transaction was unfair to the plaintiffs." *Id.* at *5 (emphasis added). Plaintiffs argue that *Steinman v. Levine*, 2002 WL 31761252 (Del. Ch.), is inapposite because the plaintiff did "not even claim that the [challenged transaction] was not entirely fair." (Pl. Opp. 42 n.25). However,

"entire fairness." (*Id.*). Neither of the cases cited by plaintiffs holds otherwise. *See Kahn v. Tremont*, 594 A.2d 422 (Del. 1997); *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

For each of the related party transactions at issue here, plaintiffs' conclusory allegations of "unfairness" do not meet their initial burden to "allege some facts that tend to show that the transaction was not fair." *Solomon v. Pathe Communications Corp.*, 1995 WL 250374, at *5 (Del. Ch.), *aff'd by* 672 A.2d 35 (Del. 1996) (plaintiff's burden "cannot be satisfied by pleading conclusions such as that the transaction is 'unfair'. . . ."). Indeed, plaintiffs seem to admit this failure, arguing that they "cannot be faulted for not providing the specifics of the unfairness" because defendants "breached their fiduciary duty of disclosure regarding these very transactions by concealing the actual terms of the over $163 million worth of related-party transactions – no doubt, because they were so unfair and one-sided." (Pl. Opp. 41).[31] But plaintiffs do not cite a single fact suggesting that defendants misrepresented the terms of any related party transaction, nor do plaintiffs cite any authority suggesting that the proxy statement disclosures of these transactions were insufficiently detailed. Even more fundamentally, plaintiffs simply ignore the fact that they have had the benefit of Section 220. Delaware courts have repeatedly rejected excuses for conclusory allegations such as those made by plaintiffs here, given that information can be obtained through a Section 220 request and other such "tools at hand." *See, e.g.*, *Brehm v. Eisner*, 746 A.2d 244, 262 n.57 (Del. 2000). And here, Meyer in fact did make a Section 220

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the Court noted this failure in explaining that the plaintiff therefore failed to meet its initial burden of pleading facts tending to demonstrate unfairness. *Steinman*, 2002 WL 31761252 at *12 n.54.

[31] Plaintiffs claim that *Solomon v. Pathe Comm. Corp.*, 672 A.2d 35, 40-41 (Del. 1996) "recognizes the potential impact of disclosure violations on the analysis of the sufficiency of the allegations of unfairness." (Pl. Opp. 42 n.25). In the portion of the decision cited, the court found that a tender offer was "voluntary" because "there is no well-plead allegation of any coercion or false or misleading disclosures in the present case, however." *Solomon*, 672 A.2d at 39-40. The court did not, as plaintiffs suggest, excuse a failure to allege substantive unfairness on the basis that disclosure violations prevented plaintiffs from learning the relevant facts.

request concerning the related party transactions, and there is no claim that defendants have not fully complied with the Section 220 Stipulation. If plaintiffs still lack sufficient detail to adequately plead unfairness, that is either because Meyer did not request enough information in his Section 220 request (through no fault of defendants), or because the detail already supplied by the Company simply does not support the assertions that the transactions were unfair.[32]

In the few instances where plaintiffs make any attempt to address specific related party transactions, their arguments merely underscore the conclusory nature of their allegations. For example, with respect to the "growout" transactions, plaintiffs merely state that the Company "never employed any process to ensure that the transactions were 'fair' to the Company." (Pl. Opp. 17). But, the Complaint does not even allege that the growout transaction prices were anything but consistent with market prices (Def. Br. 39) – a point which plaintiffs simply ignore in their opposition. Plaintiffs likewise ignore the fact that the transactions entail the shifting of risk and financing burdens to third parties. (*Id.* 38-39). Moreover, the Herbets Settlement specifically provides that the Company itself shall retain 75% of any profits on growout transactions in excess of the Company's short-term borrowing rate. (Herberts Settlement § 3 (Ex. O)). Plaintiffs do not allege that the Company failed to follow this portion of the Herbets Settlement and do not allege that this agreement was unfair.

In an attempt to mislead the Court, plaintiffs assert that "the Board terminated many of these deals in 2003 upon obtaining notice of the SEC investigation. The cancellation of these

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[32] Plaintiffs also seem to suggest that they need not make *any* allegations of unfairness but instead can state a cause of action for breach of fiduciary duty based solely on the allegation that the Herbets Settlement required review of related party transactions. (Pl. Opp. 28-29, 42). However, whether plaintiffs adequately allege a breach of the Herbets Settlement (which they do not, *see* pp. 39-41, *infra*) is a separate issue from whether the defendants breached their fiduciary duties, which are grounded in equity rather than contract.

[growout] contracts provides a strong inference that they were, in fact, unfair." (Pl. Opp. 17).[33] But as discussed above, the Complaint's own allegations reveal that the SEC investigation had nothing to do with the related party transactions challenged in Count IV. *See* pp. 28-29, *supra*. The Complaint likewise does not plead any facts suggesting that the Company canceled any related party transactions as a result of the SEC investigation or any related "internal review."[34] And, contrary to plaintiffs' speculation, the Court cannot possibly infer that certain related party transactions were "unfair" from the mere fact that the Company ceased to engage in them.

Finally, plaintiffs again focus on the Company's stock purchase from Don Tyson in 2004. (Pl. Opp. 38). Yet plaintiffs still provide no explanation as to how a stock purchase *at market price* could possibly be viewed as unfair. (*See* Def. Br. 38).[35] The Complaint therefore fails to state a claim as to this (or any other) related party transaction, and Count IV should be dismissed.

D. Certain of Plaintiffs' Claims Fail to Satisfy the Demand Requirement.

Plaintiffs' claims regarding several related party transactions – Massey's cattle purchases, Tollett's breeder hen research, Johnston's cold storage lease, and a purchase of chicken products

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[33] Plaintiffs make a similar point regarding other related party transactions, stating "the fact that they cancelled at least five leases . . . when faced with the SEC investigation in 2003 provides a strong indication that the leases are not entirely fair to the Company." (Pl. Opp. 18-19).

[34] The only paragraphs of the Complaint concerning cancellation state: "[i]t seems that the SEC's turning its attention to Tyson made the Board nervous about these grow-out deals because they were terminated in later 2003" (Compl. ¶ 78); and "[i]n 2003, when the SEC began investigating Tyson, $596,218 worth of farm leases with related parties were terminated" (*id.* ¶ 79). These allegations fail to provide any factual support for a causal connection between the SEC investigation and the termination of these related party transactions. And neither allegation says anything about an internal review that "forced" cancellation. (*Compare* Pl. Opp. 16).

[35] Rather than explaining its unfairness, plaintiffs reassert their unsupported allegation that the stock purchase was not reviewed and speculate that "[p]resumably, if the Governance Committee had reviewed that related party transaction, Tyson Foods would have produced those minutes along with their motion to dismiss as they have so many other documents." (Pl. Opp. 38). However, plaintiffs do not dispute that the stock purchase was not among the transactions enumerated in the Section 220 Stipulation. (*See* Def. Br. 36). Defendants did not submit the relevant minutes with their motion simply because, unlike the other documents submitted by defendants, the committee minutes were not publicly filed and are not otherwise the proper subject of judicial notice on a motion to dismiss.

from Johnston's son – must also be dismissed pursuant to Rule 23.1 because plaintiffs admittedly failed to make demand. (Def. Br. 28). Plaintiffs fail to satisfy the demand futility test of *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984), because (1) the Complaint does not allege particularized facts creating a reasonable doubt that a majority of the board is interested in these transactions or lacks independence from Massey, Tollett, or Johnston; and (2) plaintiffs' conclusory allegations that these transactions were "unfair" do not overcome the business judgment rule. (Def. Br. 29-30).

In a transparent attempt to confuse the issues, plaintiffs mischaracterize defendants' demand futility argument as also being addressed to Johnston's farm leases, Johnston's poultry and swine operations, Wray's poultry and swine operations, Starr's poultry operation, and Starr's warehouse lease. (Pl. Opp. 26). The reason for this mischaracterization is obvious. Plaintiffs use these transactions to argue that that the Tyson family members are parties to the "same types" of transactions (*e.g.*, farm leases) and that therefore the Tyson family members would not be able to consider demand. (*Id.* 26-27 & n.16). However, defendants did *not* argue demand futility with respect to these transactions, but instead limited their argument to those transactions that cover entirely different subject matters than the Tyson family's transactions. Other than their conclusory and unsupported assertion that "[t]hese sweetheart deals were awarded to the non-Tyson directors in exchange for their continued loyalty to the Tyson family interests" (Pl. Opp. 26), plaintiffs make no argument as to why the board would be interested in or lack independence with respect to Massey's cattle purchases, Tollett's breeder hen research, Johnston's cold storage lease, and a purchase of chicken products from Johnston's son.[36]

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[36] Plaintiffs claim confusion as to why defendants have included Tollett's breeder hen research as one of the transactions as to which demand is not excused, given that "Tollett is identified by Tyson as lacking independence." (Pl. Opp. 26). But plaintiffs have it backwards. Whether Tollett is beholden to the Tyson family has nothing to do with whether the Tyson family (or any other board member) is

Plaintiffs also argue that they satisfy *Aronson*'s second prong by raising "doubt that these transactions were the product of any business judgment at all" because, according to them, the transactions were not reviewed by the Special Committee or Governance Committee. (Pl. Opp. 27). But with the exception of transactions occurring in 2002, plaintiffs allege only that certain transactions were not reviewed by a committee; they do *not* allege that the transactions were not reviewed by the full board. (*Compare* Compl. ¶ 93 *with* ¶¶ 88-92, 94-95). And regardless whether reviewed by the full board or an independent committee, these transactions are protected by the business judgment rule because a majority of directors approving the transactions were disinterested and independent. In any event, even if there was a complete absence of both committee and board action, that does not assist plaintiffs in avoiding demand. In the absence of any affirmative business decision, *Aronson*'s second prong does not even apply, and *Rales v. Blasband*, 634 A.2d 927 (Del. 1993), is applicable instead. Under *Rales*, demand is not excused here because, once again, the plaintiffs fail adequately to allege that a majority of directors are interested or lack independence with respect to these transactions, as discussed above.[37] Plaintiffs' claims should thus be dismissed pursuant to Rule 23.1.

V. THE COURT SHOULD DISMISS COUNT V.

A. Plaintiffs' Claims Unrelated To Don Tyson's Perquisites Should Be Dismissed.

Count V attempts to state a claim for breach of the duty of disclosure. In addition to Don Tyson's perquisites (discussed below), plaintiffs' disclosure claims appear to encompass

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beholden to Tollett, and therefore could not independently consider demand with respect to Tollett's breeder hen research transactions.

[37] Plaintiffs cannot establish interestedness under *Rales* merely by claiming that the directors face the possibility of liability. Rather, the complaint's particularized allegations must demonstrate a "substantial likelihood" of liability. *Rales*, 634 A.2d at 936. Here, other than reciting the mere existence of the cattle, hen research, cold storage, and chicken products transactions, the Complaint contains no factual allegations at all demonstrating a "substantial likelihood" of director liability.

compensation paid to other executives, the Peterson Contact, related party transactions, and a description of the 2004 Don Tyson Contract. These claims must be dismissed for several reasons – perhaps the most fundamental of which is plaintiffs' failure to allege any independent harm stemming from these other alleged disclosure violations.[38]

First, to state a disclosure claim, plaintiffs must demonstrate that the alleged disclosure violation itself caused actual harm. *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 141 (Del. 1997). Here, plaintiffs rely on two alleged harms: (1) SEC fines; and (2) harm to the Company from the underlying transactions that allegedly were inadequately disclosed. However, the Complaint and SEC Order reveal that the fines were based *solely* on disclosures relating to perquisites provided to Don Tyson. (*See* SEC Order (Ex. P); Compl. ¶¶ 121-26). Plaintiffs' reliance on harm from the underlying transactions is likewise misplaced. "[W]here the alleged omission was of purported wrongdoing that, if true, might give rise to relief itself," plaintiffs must identify an "independently remediable harm" flowing from the alleged omission rather than the underlying wrongdoing. *Brown v. Perrette*, 1999 WL 342340, at *6 (Del. Ch.). (*See* Def. Br. 42). Plaintiffs do not identify any such harm. Defendants raised these arguments in their opening brief, and plaintiffs simply ignore the harm requirement in their opposition. Incredibly, plaintiffs even ignore the Supreme Court's decision in *In re J.P. Morgan Chase & Co. S'holder Litig.*, 2006 WL 585606 (Del.), decided two months before they filed their

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[38] Moreover, plaintiffs' disclosure claims with respect to transactions other than Don Tyson's perquisites must be dismissed for failure to make demand. (Def. Br. 39-42). Plaintiffs argue that demand is excused because some of the directors participated in the alleged disclosure violations. (Pl. Opp. 28). But plaintiffs fail to plead particularized facts demonstrating any "substantial likelihood" of liability with respect to these disclosure claims. *Rales*, 634 A.2d at 936. Nor is demand excused with respect to these claims by plaintiffs' assertion that a "majority of interested directors" were on the Company's board when the underlying transactions were approved. (Pl. Opp. 28). This impermissibly confuses the issues of underlying approval and disclosure, and, in any event, no "substantial likelihood" of liability for approval has been shown either.

opposition. That decision squarely rejected a similar attempt to conflate a disclosure claim with the damages flowing from the separate and distinct underlying derivative claim. *Id.* at *6.

Second, even putting aside the issue of independent harm, the Complaint still fails to state a claim because it pleads no facts suggesting that the Company's disclosures regarding compensation paid to other executives, the Peterson Contact, related party transactions, or the 2004 Don Tyson Contract were materially misleading. *See Solomon*, 1995 WL 250374, at *4 (holding that a plaintiff's pleading obligations cannot be satisfied by conclusorily pleading "that disclosure is 'inadequate.'").[39]

Executive Compensation. Regarding compensation to executives other than Don Tyson, plaintiffs argue that the proxy statements incorrectly describe such compensation as being for "business expenses." (Pl. Opp. 2). However, the proxy statements did not in fact describe compensation as relating to "business expenses" – a fact which defendants noted in their opening brief (Def. Mem. 17 n.11) and which plaintiffs now simply ignore. (*See*, *e.g.*, 1/2/02 Proxy at 17-18 (Ex. J); 1/2/03 Proxy at 12 (Ex. K); 12/31/03 Proxy at 31-32 (Ex. L)). *See Peter Schoenfeld*, 2003 WL 21649926 at *2 (court does not accept as true "allegations contradicted by documents on which the complaint is based"). Indeed, plaintiffs' assertion does not even make sense; if "compensation" was reimbursement for business expenses, it would not be compensation at all.

Peterson Contract. Plaintiffs assert that the Company made "misleading or insufficient disclosures regarding the payments for personal expenses and other perquisites" under the

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[39] Plaintiffs characterize defendants as arguing "that Plaintiffs' disclosure claims must be somehow limited to the disclosure violations that have been confirmed by the SEC investigations." (Pl. Opp. 32). Defendants made no such argument, but merely pointed out that, contrary to plaintiffs' assertions, the SEC proceedings do not support plaintiffs' allegations of inadequate disclosures as to these matters. (*See* Def. Br. 40). Plaintiffs' apparent reliance on the Herbets Settlement (Pl. Opp. 43) is likewise misplaced, because that agreement does not govern what the Company is required to disclose.

Peterson Contract (Pl. Opp. 32) and used the contract "to funnel to Peterson and his family millions of dollars in cash and perquisites that were deliberately hidden from shareholders" (*id.* 11). However, the Peterson Contract was publicly disclosed and revealed that the Company would provide Peterson or his widow $400,000 per year and certain specifically enumerated perquisites for ten years. (12/21/01 Form 10-K, Exs. 10.11 at § 3(a)-(e)).[40] The Complaint does not allege any facts suggesting that the Peterson Contract's list of perquisites was insufficiently detailed, that the Company provided different perquisites than required, that the Company misrepresented or failed to disclose those perquisites, that Peterson failed to provide consulting services while he was alive, or that the Company misled the public regarding such services.

Related Party Transactions. Plaintiffs do not even endeavor to explain why the disclosures of related party transactions were allegedly misleading, nor do they cite any law requiring the disclosures to be more detailed. Indeed, this Court has recently cautioned against requiring overly detailed proxy disclosures regarding past transactions that are not being voted upon by the shareholders. *See Khanna*, 2006 WL 1388744 at *33-34; p.22 note 21, *supra*. Further, as discussed above, plaintiffs' assertion that the Company misrepresented whether all related party transactions were reviewed is based on an unsupported inference from the documents produced pursuant to the Section 220 Stipulation. *See* pp. 27-28, *supra*.

2004 Don Tyson Contract. Plaintiffs claim that a proxy incorrectly described the 2004 Don Tyson Contract as requiring 20 hours of work per week, when in fact the contract specifies that the Company may require 20 hours of work per month. (Compl. ¶ 161). But this apparent clerical/scrivener's error was not material – and thus is not actionable – because a copy of the

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[40] Plaintiffs' disclosure claims regarding the Peterson Contract as well as the related party transactions from 1998 to 2001 are also time-barred, because the challenged disclosures occurred more than three years prior to this lawsuit. (*See* Def. Br. 39; pp. 9-12, 20-24, *supra*).

entire 2004 Don Tyson Contract was disclosed to the public two weeks earlier. (Def. Br. 41). Plaintiffs make no response to this argument.

B. Claims Regarding Don Tyson's Perquisites Should Be Dismissed.

Count V should likewise be dismissed to the extent it relates to disclosures regarding Don Tyson's perquisites. *First*, as to all defendants other than Don Tyson, the most plaintiffs allege is that these defendants were negligent in failing to learn of and disclose the details of Don Tyson's perquisites. (Def. Br. 43). In their opposition, plaintiffs merely repeat their conclusory allegations and simply assert that these somehow add up to "gross negligence." (Pl. Opp. 43-44). But the insufficiency of plaintiffs' claim against these directors is not somehow cured by plaintiffs' reference to incorporated allegations and conclusory assertion of "a consistent pattern" of failing to "disclose self-dealing payments and schemes." (*Id.* 44). Piling conclusory allegations on top of one another does not somehow suffice to create a "pattern" of wrongdoing, and, of course, there is no obligation for a board to undertake "self-flagellating" disclosures. *See Khanna*, 2006 WL 1388744 at *29.

Yet even if, *arguendo*, plaintiffs had adequately pled gross negligence against the other directors, they would still fail to state a claim because such allegations implicate the duty of care and are barred by Tyson's exculpatory provision under Section 102(b)(7). (Def. Br. 43). Plaintiffs try to avoid this bar by arguing that it is not properly decided on a motion to dismiss, and that duty of disclosure claims *always* implicate both the duty of loyalty and the duty of care. (Pl. Br. 43-44). However, plaintiffs do not dispute the existence of the Company's exculpatory provision, and the Delaware Supreme Court has clearly held that "[t]he Section 102(b)(7) bar may be raised on a Rule 12(b)(6) motion to dismiss." *Malpiede v. Townson*, 780 A.2d 1075, 1092 (Del. 2001). This Court has also held that "disclosure claims do not always involve a breach of the duty of loyalty." *Orman v. Cullman*, 794 A.2d 5, 40 (Del. Ch. 2002). Plaintiffs do

not allege facts implicating the duty of loyalty, such as that defendants were actually *aware* that the disclosures were insufficiently detailed, or that defendants knowingly or intentionally misled shareholders regarding Don Tyson's perquisites. In the absence of any such allegations, plaintiffs' claims do not implicate the duty of loyalty and are barred by the Company's Section 102(b)(7) provision. *See Zirn v. VLI Corp.*, 681 A.2d 1050, 1061-62 (Del. 1996) (disclosure claim barred by Section 102(b)(7) provision because misstatements or omissions implicated only the duty of care, not the duty of loyalty); *McMillan*, 768 A.2d at 507 (same).

Second, even as to Don Tyson himself, plaintiffs again allege at most mere negligence, failing to identify any facts suggesting that any inaccuracies in the disclosures of Don Tyson's perquisites resulted from his own willfulness or bad faith, or that Don Tyson was even involved in any of the disclosure determinations. (Def. Br. 44). In a familiar pattern, plaintiffs provide no response to defendants' arguments regarding Don Tyson's alleged culpability. All of plaintiffs' disclosure claims should therefore be dismissed.

VI. THE COURT SHOULD DISMISS COUNTS VI AND VII.

Counts VI and VII assert claims for breach of contract and contempt, respectively, in connection with the 1997 settlement and final order in *Herbets v. Tyson, et al.*, No. 14231 (Del. Ch.). As an initial matter, Count VII is improper because the law does not recognize an independent cause of action for "contempt." (Def. Br. 45). Further, there can be no "breach of contract" claim where, as here, the settlement in question has been merged into a final court order and thus compliance questions become matters for the Court to decide – particularly where there are questions regarding the conduct of the very company on whose behalf plaintiffs purport to bring their claims. (*Id.*). In their opposition, plaintiffs make no response to the latter point and, as to the former, assert only that the court has "broad powers to fashion relief" relating to contempt. (Pl. Opp. 45). However, in both cases plaintiffs cite, the contempt claim was brought

in the same proceeding as the court order allegedly violated. *See DiSabatino v. Salicete*, 671 A.2d 1344, 1346; *Arbitrium Handels AG v. Johnston*, 1997 Del. Ch. LEXIS 132, at *2 (Del. Ch.). Neither case involved an independent cause of action for contempt.

There are more fundamental reasons as well why Counts VI and VII fail to state a claim. First, plaintiffs allege that defendants breached the Herbets Settlement by failing to appoint a committee of independent directors to review related party transactions. (Compl. ¶ 195). However, the Complaint itself concedes that such a committee was in fact formed. (*Id.* ¶¶ 57, 61). And as discussed above, plaintiffs concede the independence of all the committee members except Massey, and even as to Massey fail to demonstrate a lack of independence in the years he served on the committee. *See* pp. 24-25, *supra*. Plaintiffs do not respond to this argument.

Second, plaintiffs allege that defendants breached the Herbets Settlement by failing to have the committee annually review related party transactions. (Compl. ¶ 195). However, this claim against rests on plaintiffs' unsupported inference from the Section 220 production. *See* pp. 27-28, *supra*.

Third, plaintiffs allege that defendants breached the Herbets Settlement by failing to review the reasonableness of Don Tyson's requests for reimbursements, and to reduce his bonus eligibility by the amount of such reimbursements. However, the Complaint does not allege that Don Tyson received any bonuses in excess of the amount to which he was properly entitled. (Def. Br. 46). Plaintiffs argue that "rather than reducing Don Tyson's compensation as a result of his wrongful and undisclosed expenditures of corporate funds, the Board did the opposite and actually gave Don Tyson a substantial raise after it was determined that he looted the corporate treasury to the tune of $1.7 million." (Pl. Opp. 45). But the level of payments required under the 2004 Don Tyson Contract has nothing to do with the level of bonus which he was eligible to

receive while a full-time employee, and the Herbets Settlement only addresses the latter. Plaintiffs also fail to respond to defendants' arguments as to review of Don Tyson's requests for reimbursements – namely, that the SEC Order itself acknowledged such review, the Herbets Settlement does not encompass perquisites provided pursuant to the consulting contracts, the directors are not required to review personally every detail of every invoice, and there are no facts pleaded that the Compensation Committee or any other directors acted disloyally or in bad faith. (Def. Br. 47-48).

Fourth, and much more narrowly, plaintiffs allege that defendants breached the Herbets Settlement by failing to track and charge for use of the Company's boat for non-business purposes. (Compl. ¶ 197). However, the Complaint makes no factual allegations in support of this conclusory assertion. (Def. Br. 46). Plaintiffs also misread the Herbets Settlement, which requires only that directors be "charged imputed income at a rate of $1,000 per day" for use of the boat for non-business purposes. (Herbets Settlement § 4 (Ex. O)). This does not mean, as plaintiffs suggest, that the Company was supposed to *collect* $1000 per day for use of the boat (*see* Compl. ¶ 197); rather, its means that a director would be considered to have received an additional $1000 in income (*e.g.*, for tax reporting purposes) for each day the boat was used. The Complaint does not allege that the Company failed to impute income in this manner. In their Opposition, plaintiffs argue that their allegations are supported by the SEC Order and "the complete lack of documentation provided in response [to] the Meyer Section 220 demand." (Pl. Opp. 45). But the SEC Order states only that Don Tyson's "friends" used the Company's boat; it does not state that the Company failed to track such use and impute income to Don Tyson at a rate of $1000 per day. (SEC Order at 4 (Ex. P)). And Meyer's Section 220 Complaint did not

even request any documents regarding Tyson's boat.[41] Counts VI and VII thus fail to state a claim and should be dismissed.[42]

VII. THE COURT SHOULD DISMISS COUNT VIII.

In Count VIII, plaintiffs claim that the Company's December 31, 2003 proxy statement misrepresented details regarding certain transactions and that, had they known this information, the shareholders may not have re-elected the Company's directors in the February 6, 2004 election. (Compl. ¶¶ 205-06). Count VIII is defective for several reasons.

First, plaintiffs seem to suggest the possibility of relief in the form of a corrective disclosure and also ask the Court to void the 2004 election. (Pl. Br. 58). But these requests are nonsensical and moot, because new elections for all of the Company's directors were held on both February 4, 2005 and February 3, 2006. (Def. Br. 48; 12/30/05 Proxy at 3 (Ex. T)). *See Khanna*, 2006 WL 1388744 at *31 (rejecting plaintiff's request to overturn director elections, because such equitable relief is "impossible" where director terms had already expired). Plaintiffs argue that their claim is not moot because some of the "same directors who committed the disclosure violations in prior elections remain in office." (Pl. Opp. 58). However, those directors are currently in office due to the 2006 election, not the 2004 election. Overturning the 2004 election thus would have no effect on the current composition of the board. In contrast, in both cases cited by plaintiffs, the request to overturn a prior election was not moot because some or all of the directors remained in office pursuant to the allegedly tainted election and had not

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[41] Meyer's demand sought limited inspection of "Governance Committee minutes, and reports to the full Board of Directors, for the years 2003 and 2004, which discuss or consider the following related party transactions reported in the Company's Form 10-K for those years: farm lease payments, aircraft lease agreements, swine growout, breeder hen research, poultry growout, waste water treatment, leased warehouse space and cattle." (Meyer Compl., Ex. 5, at 3 (Ex. A)).

[42] Plaintiffs' claims in Count VI and VII regarding conduct prior to January 2003 are likewise time-barred, because plaintiffs could have made a Section 220 demand years ago. (Def. Br. 45).

since been re-elected in an untainted election. *See Millenco, L.P. v. meVC Draper Fisher Jurvetson Fund I, Inc.*, 824 A.2d 11, 13 (Del. Ch. 2002) (most directors elected in 2001 and 2002 elections had not be re-elected, because director terms were three years); *Shamrock Holdings of Cal. v. Iger*, 2005 Del. Ch. LEXIS 83, at *19 n.37 (Del.) (director election was at 2005 annual meeting, and there was no intervening untainted election).[43]

Second, both *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135 (Del. 1997), and *M&B Weiss Family Ltd. P'ship of 1996 v. Davie*, No. 20303 (Del. Ch. Apr. 12, 2005), dismissed disclosure claims based on the election of directors, because such elections did not impair the stockholders' "economic or voting rights." In their opposition, plaintiffs do not even address *Loudon* and do not argue (nor could they) that the election of directors pursuant to the December 31, 2004 proxy caused impairment to the economic or voting rights of stockholders.

Instead, plaintiffs blindly persist in their claim that they are entitled to "disgorgement" damages, apparently consisting of the directors' compensation. (Pl. Opp. 62). But such damages are simply not available, as previously held in *Loudon* and as confirmed recently in *In re J.P. Morgan*. In *In re J.P. Morgan*, the Supreme Court explained that compensatory damages for a direct duty of disclosure claim must be "logically and reasonably related to the harm or injury for which compensation is being awarded." *In re J.P. Morgan*, 2006 WL 585606, at *5. The Supreme Court affirmed dismissal of a direct disclosure claim because the damages requested "ha[d] no logical or reasonable relationship to the harm caused to the shareholders *individually* for being deprived of their right to cast an informed vote", but instead consisted only of amounts paid by the corporation. *Id.* The Court explained that there is "no authority that validates

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[43] Plaintiffs' assertion that *Shamrock Holdings* "upheld the remedy of voiding past director elections despite the fact that new elections had been held" (Pl. Opp. 58) is simply wrong. *See Shamrock Holdings*, 2005 Del. Ch. LEXIS 83 at *1 ("plaintiffs seek to have this Court, among other things, void the result of *the most recent* election of directors") (emphasis added).

conflating [plaintiffs'] individual direct claim of liability for a duty of disclosure violation with the compensatory damages flowing from the corporation's separate and distinct underlying derivative claim for waste." *Id.* Here, while plaintiffs characterize the harm alleged in Count VIII as being harm to the shareholders' right to a fully-informed vote, the disgorgement relief they request does not remedy that harm but instead remedies the alleged harm the *Company* suffered by paying compensation to wrongfully-elected directors. Under *In re J.P. Morgan*, this request for compensatory damages cannot support plaintiffs' direct disclosure claim, and Count VIII should be dismissed.

For related reasons, as explained in defendants' opening brief, Count VIII is defective because it is really a derivative claim, not a direct claim as plaintiffs assert. (Def. Br. 49-50). Plaintiffs argue that "claims for impaired or precluded voting rights are direct claims" because "the shareholder plaintiff's right to vote is independent of any right the corporation possesses." (Pl. Opp. 61). But rather than placing broad labels on certain types of claims, *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004), instructs the Court to examine the nature of each claim individually in order to determine whether it is derivative or direct. Specifically, the issue turns "solely on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the suing stockholders, individually)?" *Id.*[44] Here, while plaintiffs claim that they individually suffered harm due to

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[44] Rather than quote *Tooley* directly, plaintiffs describe the *Tooley* test as being "(1) whether the shareholder is claiming the breach of a duty owed to the shareholder, and (2) whether the shareholder can prevail on that claim without also showing an injury to the corporation." (Pl. Opp. 59). But this is not the test set forth in *Tooley*, as the above quote demonstrates. And while plaintiffs assert that "the nature or amount of the relief requested is of no moment at this stage in the proceedings" (Pl. Opp. 61), *Tooley*'s second prong in fact clearly contemplates that the Court should look to the requested relief in order to determine "who would receive the benefit of any recovery or other remedy." *Tooley*, 845 A.2d at 1033.

alleged impairment of their voting rights, the disgorgement relief requested does not remedy that alleged harm but instead remedies the alleged harm the Company suffered by paying compensation to wrongfully-elected directors. Under *Tooley*, plaintiffs' claim is derivative and not direct. Count VIII should thus be dismissed for this reason as well.

VIII. THE COURT SHOULD DISMISS COUNT IX.

Count IX for unjust enrichment should also be dismissed, because it is duplicative of plaintiffs' other counts which themselves fail to plead any underlying wrongdoing for the reasons discussed above. (*See* Def. Br. 50). Plaintiffs argue that their unjust enrichment claim can proceed even in the absence of any breach of fiduciary duty. (Pl. Opp. 46). However, while it is true that the scope of an unjust enrichment remedy may affect a non-wrongdoer, there still has to be *some* underlying liability as to *some* wrongdoer. For example, in *Schock v. Nash*, 732 A.2d 217 (Del. 1999), the Court found that a defendant had breached her fiduciary duty. Thus, the Court could order the individuals to whom she had transferred her ill-gotten gains to disgorge those gains under principles of unjust enrichment, even though those individuals had not themselves committed any wrongdoing. *Id.* at 231-32. Here, all of the individuals as to whom plaintiffs seek unjust enrichment relief are also parties to plaintiffs' other claims – and no additional relief is sought. And for all of the reasons discussed above, plaintiffs' other claims fail. In the absence of any underlying wrongdoing, Count IX likewise should be dismissed.

CONCLUSION

For all of the foregoing reasons and those set forth in defendants' opening brief, defendants respectfully request that the Court dismiss all claims asserted in the Complaint pursuant to Rule 12(b)(6). Defendants further request that the Court dismiss, pursuant to Rule 23.1, plaintiffs' claims in Count IV regarding Massey's cattle purchases, Tollett's breeder hen research transactions, Johnston's cold storage lease, and the chicken product sale to Johnston's son, and plaintiffs' disclosure claims in Count V regarding the Peterson Contract, a description of the 2004 Don Tyson Contract, related party transactions, and compensation paid to directors and executives other than Don Tyson.

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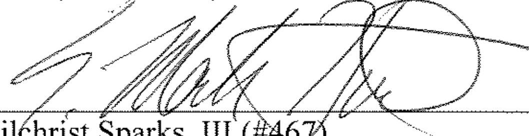

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