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Case No. 2828-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

FREDERICK WEISS, Plaintiff, v. ROBERT H. SWANSON, JR., DAVID S. LEE, RICHARD M. MOLEY, THOMAS S. VOLPE, LEO T. MCCARTHY, LOTHAR MAIER, PAUL COGHLAN, DAVID B. BELL, ROBERT C. DOBKIN, DONALD PAULUS and ALEXANDER MCCANN, Defendants, and LINEAR TECHNOLOGY CORPORATION, Nominal Defendant.	)	C.A. No. 2828-VCL

PLAINTIFF'S ANSWERING BRIEF
<u>IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS</u>

ROSENTHAL, MONHAIT & GODDESS, P.A.
Norman M. Monhait (Del. Bar No. 1040)
Jessica Zeldin (Del. Bar No. 3558)
919 North Market Street, Suite 1401
P.O. Box 1070
Wilmington, Delaware 19899-1070
(302) 656-4433
Attorneys for Plaintiff

OF COUNSEL:

Thomas G. Shapiro
Edward F. Haber
Michelle H. Blauner
Robert E. Ditzion
SHAPIRO HABER & URMY LLP
53 State Street
Boston, MA
(617) 439-3939

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NATURE AND STAGE OF PROCEEDINGS

Plaintiff Frederick Weiss filed the First Amended Derivative Action Complaint in this action (the "Complaint" or the "FAC") on August 10, 2007. Plaintiff did not make prior demand on the Board of Nominal Defendant Linear Technology Corporation ("Linear" or "the Company") asking the Board to initiate a similar suit, because such demand was excused as futile under Delaware Court of Chancery Rule 23.1. On September 19, 2007, Defendants moved to dismiss the FAC, arguing that the FAC fails to state any claim under Rule 12(b)(6), that many of the purported claims are time-barred, and that demand on the Board of Linear was not excused. Plaintiff submits this Answering Brief in Opposition to Defendants' Motion to Dismiss.

INTRODUCTION

Over the course of at least a decade, Defendants used insider information to grant Linear stock options just before anticipated good news announcements reasonably expected to cause a stock price increase ("spring-loaded" options), and just after anticipated bad news announcements reasonably expected to cause a stock price decrease ("bullet-dodged" options). By this scheme, Defendants enabled themselves and other company insiders to benefit from favorable exercise prices on the options, and thus improperly enriched themselves and others by millions of dollars at the expense of the Company and its shareholders. Despite their fiduciary duties to Linear's shareholders, Defendants actively concealed this practice, and continue to deny its existence.

Defendants provide a flurry of arguments as to why this insidious practice was somehow permissible, and, in the alternative, why Plaintiff has not presented sufficient facts to demonstrate the existence of this practice. These arguments misstate the law and the facts of this case in a number of important ways.

Perhaps most egregiously, Defendants' legal arguments ignore the most relevant opinion of this Court on the issues at bar. Although Defendants acknowledge the existence of Chancellor Chandler's recent second opinion in *In re Tyson Foods, Inc.*, 2007 WL 2351071 (Del. Ch.), they fail to discuss the substance of the opinion. Their deafening silence is presumably due to the fact that they have nothing substantive to say. In that opinion, with facts far less compelling than those presented in the FAC, the Chancellor firmly and decisively rejected most of the arguments advanced by Defendants in their opening brief ("Defs.' Mot."). As discussed in detail below, the Chancellor made clear that if company directors have a practice of using insider information to time stock option grants favorably, and those responsible for that practice do not candidly disclose that practice, this is a breach of fiduciary duty. This is true even if that practice itself would be permissible if disclosed, and even if the company's shareholder-approved option plans would both explicitly and implicitly allow such a practice. In the present case, Plaintiff has clearly demonstrated the existence of just such a practice, has shown that this practice was actively concealed (and certainly not candidly disclosed) by Defendants, and has even shown that (unlike in *Tyson*) this practice violated the purposes, spirit, intent, and objectives of Linear's shareholder-approved option plans. Unable to distinguish the second *Tyson* opinion in any (favorable) way, Defendants simply ignore it and apparently hope that the Court will do so as well.

Defendants' factual arguments are just as unavailing. The 52-page Complaint contains detailed descriptions of 22 Linear option grants between 1996 and 2005 and provides detailed descriptions of the manner in which each one of them was spring-loaded or bullet-dodged. These grants represent nearly 80% of the 28 publicly disclosed grant dates coinciding with Linear's quarterly earnings releases during this period. Each of these grants followed a clear pattern: *Grants were made just before the earnings announcement if the announcement was positive and just after the earnings announcement if the announcement was negative.* Faced with the clear facts laid out in the Complaint, Defendants attempt to chip away at the edges of Plaintiff's case. However, even if the Court were to agree with Defendants' critiques for a few individual grant dates, the pattern of manipulation is still striking. Additionally, any suggestion by Defendants that the decision whether to issue grants just after or just before earnings announcements was somehow arbitrary and not linked to inside information is belied by the remarkable performance that Linear's management obtained from their stock option grants. As noted in the FAC, Merrill Lynch found that between 1997 and 2002, management's annualized returns for its option grants exceeded typical investor returns by an astonishing average of 396%! Certainly for purposes of a motion to dismiss (which is the motion at bar), Plaintiff has more than adequately demonstrated a spring-loading and bullet-dodging scheme.

Defendants devote a great deal of their brief to spelling out what the Complaint *does not* allege. Plaintiff does not disagree (and a perusal of the Complaint makes clear) that the Complaint does not allege back-dating (as distinct from bullet-dodging and spring-loading), tax violations, specific SEC rules violations, or specific claims of *ultra vires* acts. However, none of these facts in any way take away from what the Complaint does allege: breaches of fiduciary duties, waste, and unjust enrichment. It is these claims that Defendants must demonstrate should be dismissed. And, for the reasons discussed above (and all of the other reasons discussed below) Defendants' arguments on this score lack merit.

Finally, Defendants relegate their discussion of demand futility to a few pages of boilerplate language at the end of their brief. This is presumably because, as discussed below, the entire current board received challenged options and three out of five current board members directly authorized all of the challenged options as members of the Compensation Committee.

STATEMENT OF FACTS

A. The Parties

Plaintiff Frederick Weiss has been a continuous shareholder of Linear stock since January 12, 1996. FAC at ¶ 9. Nominal Defendant Linear is a manufacturer of high performance linear integrated circuits. *Id.* at ¶ 31. The remaining Defendants are current or former officers or directors of Linear. *Id.* at 12-30. All Defendants received at least some of the challenged options. *Id.*

B. Spring-Loading and Bullet-Dodging

Stock options are considered "spring-loaded" if the options are granted just prior to a company's release of material information reasonably expected to drive the market price of the shares higher. FAC at ¶ 3. Conversely, the opposite effect, "bullet-dodging," is achieved by delaying the granting of options until shortly after the release by a company of materially adverse information reasonably expected to drive the market price of the shares down. *Id.*

The practices of spring-loading and bullet-dodging permit a company to choose a grant date that, from the option recipient's perspective, is favorably determined vis-à-vis material non-public information that, when disclosed, will positively or negatively affect the company's stock price. FAC at ¶ 4. When spring-loaded or bullet-dodged options are exercised, the employee pays less than he or she should for company stock, and the company receives less money for the stock than it would have had the options not been spring-loaded or bullet-dodged. *Id.*

C. <u>Linear's Spring-Loading and Bullet-Dodging Scheme</u>

From 1996 to 2005, Linear had a policy of consistently spring-loading and bullet-dodging its option grants to its directors and officers (including all of the Defendants). *Id.* at ¶ 33.

Linear generally granted its stock options in coordination with its quarterly earnings announcements. *Id.* at ¶ 35. As a general pattern, when the Directors believed that a quarterly announcement would be received favorably by the market, they granted options shortly before the announcement in order to take advantage of an expected rise in Linear's stock price. *Id.* at ¶ 35. However, when Directors believed that a quarterly announcement would be received unfavorably by the market, they granted options shortly after the announcement in order to avoid the impact of an expected decrease in Linear's stock price. *Id.*

The quarterly announcements were highly anticipated by Linear investors. *Id.* at ¶ 36. Linear's stock trading volume generally spiked (often quite dramatically) following these announcements. *Id.* at ¶ 36, 39-131. Linear's stock price also generally reacted (often quite dramatically) to these announcements. *Id.* The Director Defendants had advance knowledge of the contents of quarterly earnings releases that is not available to the public and were thus in a perfect position to take advantage of this information to issue spring-loaded and bullet-dodged stock options.

This pattern of manipulation was remarkably consistent. Of 28 grants identified by Plaintiff that appear to coincide with Linear's quarterly earnings releases from 1996 through 2005, at least 22 – a remarkable 78.5% – fit the pattern described above. *Id.* at ¶ 37. These 22 grants represent at least 8,424,379 split-adjusted options. *Id.* Not only was the spring-loading and bullet-dodging consistent, it was also highly profitable. A 2006 report by Merrill Lynch compared the annualized 20-day returns from the dates of Linear's management stock option grants with investor calendar year annual returns. *Id.* at ¶ 38. Merrill Lynch found that between 1997 and 2002, management's returns for these well-chosen option grant dates exceeded investor returns by an astonishing average of 396%. *Id.* Linear's current Directors alone have already made nearly $40 million in profit from manipulated options, and stand to earn over $10 million more from unexercised manipulated options. *Id.* at ¶ 177.

The Complaint in this action discusses each of the 22 challenged grants in detail. *See Id.* at ¶¶ 39-131. For each option grant, it details the date, exercise price, recipient, vesting schedule, and number of options granted. *Id.* It also details the date and contents of each corresponding quarterly announcement and the market reaction to each quarterly announcement (including trading volume spikes). *Id.*

D. <u>Linear's Stock Option Plans</u>

During the relevant time period, Linear had in place three stock option plans pertaining to stock options grants to the Company's officers and directors: the 1988 Stock Option Plan, as amended (the "1988 Plan"), the 1996 Incentive Stock Option Plan, as amended (the "1996 Plan"), and the 2005 Equity Incentive Plan (the "2005 Plan"). *Id.* at ¶ 132. Under all of these plans, the price of Linear's stock options could not be below the fair market value on the date of the option grant. *Id.* at ¶¶ 132-45. Decisions relating to option grants under the plan were the responsibility of the Board or of the Compensation Committee, and could not be delegated further. *Id.*[1] The spring-loading and bullet-dodging scheme described herein violated the purposes, spirit, intent, and objectives of these plans. *Id.* at ¶ 132.

E. <u>Defendants' Concealment of Linear's Stock Manipulation</u>

Defendants, through Linear, actively concealed Linear's stock manipulation. First, in numerous Proxy Statements and Forms 10-K between 1996 and 2006, Linear repeatedly and deceptively conveyed the impression that stock options had been granted in a manner consistent with the purposes, spirit, intent, and objectives of the plans (including awarding future rather than past performance), which they knew, or

[1] It appears that authority to administer the plans was delegated to the Compensation Committee, FAC at ¶¶ 132-45, with the possible exception of Director grants. *Id.* at ¶ 145. This exception is not significant at this stage of the litigation given that the Compensation Committee made up a majority of

absent recklessness should have known, was not the case insofar as the stock options had in fact been spring-loaded or bullet-dodged. *Id.* at ¶ 146-151. They not only repeatedly represented that the exercise price of all options may not be less than 100% of the fair value of Linear stock on the date of the grant, but they also repeatedly stated that the Company complied with § 162(m) of the Internal Revenue Code (which allows tax deductions only for options that reward future performance). *Id.; see* 26 U.S.C. § 162(m); 26 C.F.R. § 1.162-27(e)(2). Further, in Compensation Committee Reports, they discussed the use of stock options as "incentives" for future performance without mentioning the secret bullet-dodging and spring-loading. FAC at ¶ 151. The 2006 Form 10-K even went so far as to strongly (and falsely) imply that Linear's stock options were granted on pre-set dates, thus avoiding the possibility of manipulation. *Id.* at ¶ 35. Linear continued to deny any wrongdoing as recently as August 24, 2007 (well after the filing of the Complaint) when it stated in its most recent Form 10-K that the Company reviewed its option granting practices and "found no evidence of fraud or misconduct of any kind in the Company's practices in granting of stock options." *See* Exhibit 1.[2]

Additionally, Linear's Code of Business Conduct and Ethics, adopted by the Board (including most of the Director Defendants) on April 13, 2003, makes clear that insider-information cannot be used by Linear employees in stock transactions (which is exactly what the Defendants were doing at the time that they approved this Code). FAC at ¶¶ 152-53.

These false statements were not only intended to conceal ongoing wrongs, but also to facilitate shareholder approval for a number of specific actions involving stock options, including the approval of the 1996 and 2005 Plans and the reservation of shares under these plans. *Id.* at ¶¶ 170-74.

F. <u>The Actions of Specific Defendants</u>

Each Defendant received at least some of the challenged options. *See id.* at 33-131. Additionally, five of the Defendants (Swanson, Lee, Moley, Volpe, and McCarthy) served as Directors of Linear during

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the Board of Directors at all times.

[2] The Court may take judicial notice of this filing. *Ryan v. Gifford*, 918 A.2d 341, 356 n.38 (Del. Ch. 2007) ("'On a motion to dismiss, the court may take judicial notice of the contents of documents *required by law to be filed, and actually filed, with federal or state officials.*'") (emphasis in original) (citations omitted).

the entire time that the challenged options were granted. *Id.* at 12-16. Four of the Defendants (Lee, Moley, Volpe, and McCarthy) served on the Compensation Committee responsible for issuing grants during the entire time that the challenged options were granted. *Id.*

Linear's current Board consists of Defendants Swanson, Lee, Moley, Volpe, and Maier. *Id.* at ¶ 177. All of these Board members received challenged options. *Id.* Further, as noted above, all but Maier were on the Board at the time of granting of the challenged options, and three of the five (Lee, Moley, and Volpe) served on the Compensation Committee that issued all of the challenged options.

ARGUMENT

A. Legal Standards

Except for Defendants' demand futility arguments (addressed separately below), Defendants' motion to dismiss is governed by this Court's "well settled" Rule 12(b)(6) standards:

> (i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are "well-pleaded" if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and (iv) dismissal is inappropriate unless the "plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof."

In re General Motors, 897 A.2d at 168 (quoting *Savor, Inc. v. FMR Corp*., 812 A.2d 894, 896-97 (Del. 2002) (citations omitted)). "On a motion to dismiss pursuant to Rule 23.1, the Court . . . accepts well-pled allegations as true, and makes reasonable inferences in favor of the plaintiff . . . ." *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 833 A.2d 961, 976 (Del. Ch. 2003), *aff'd*, 845 A.2d 1040 (Del. 2004).

B. Plaintiff Has More Than Adequately Stated a Claim That All Defendants Breached Their Fiduciary Duties by Authorizing, Receiving, and/or Allowing Linear to Issue Spring-Loaded Options

1. The *Tyson* Opinions

Although Defendants note in a footnote that there were two opinions in *In re Tyson Foods, Inc.*, Defs.' Mot. at 2 n.4, they only discuss the first opinion. This is presumably because the second, broader opinion, makes even more clear that Defendants' arguments are contrary to Delaware law. Regardless, Plaintiff meets the standards set for allowing claims under both opinions.

In the first *Tyson* opinion, 919 A.2d 563 (Del. Ch. 2007) ("*Tyson I*"), Chancellor Chandler was faced with a motion to dismiss claims that four option grants were made just before favorable news about the company was released. *Id.* at 576. For purposes of the motion, the Chancellor assumed that the shareholder-approved stock option plan in question did not allow option grants at below the market value of the company's stock. *Id.* at 575. The Chancellor ruled in no uncertain terms that well pleaded allegations of such conduct were sufficient to state a claim:

> Plaintiffs were entitled to rely upon the competence and good faith of those protecting their interests. It is difficult to conceive of an instance, consistent with the concept of loyalty and good faith, in which a fiduciary may declare that an option is granted at "market rate" and simultaneously withhold that both the fiduciary and the recipient knew at the time that those options would quickly be worth much more. Certainly at this stage of the litigation, plaintiffs are entitled to the reasonable inference of conduct inconsistent with a fiduciary duty.

Id. at 590-91. The Chancellor found that a fiduciary who uses insider information to grant options at an unfairly low value cannot be acting loyally and in good faith:

> ***Granting spring-loaded options, without explicit authorization from shareholders, clearly involves an indirect deception. A director's duty of loyalty includes the duty to deal fairly and honestly with the shareholders for whom he is a fiduciary. It is inconsistent with such a duty for a board of directors to ask for shareholder approval of an incentive stock option plan and then later to distribute shares to managers in such a way as to undermine the very objectives approved by shareholders. This remains true even if the board complies with the strict letter of a shareholder-approved plan as it relates to strike prices or issue dates.***
>
> * * *
>
> The question before the Court is not, as plaintiffs suggest, whether spring-loading constitutes a form of insider trading as it would be understood under federal securities law.[3] The relevant issue is whether a director acts in bad faith by authorizing options with a market-value strike price, as he is required to do by a shareholder-approved incentive option plan, at a time when he knows those shares are actually worth more than the exercise price. A director who intentionally uses inside knowledge not available to shareholders in order to enrich employees while avoiding shareholder-imposed requirements cannot, in my opinion, be said to be acting loyally and in good faith as a fiduciary.

Id. at 592-93 (emphasis added). The Chancellor set forth the elements necessary to plead a case of breach of fiduciary duty through the manipulation of option grants using insider information:

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[3] For this reason, Defendants' argument, Defs.' Mot. at 15, that Plaintiff cannot state a claim because he does not plead a violation of SEC Rules must fail.

> This conclusion, however, rests upon at least two premises, each of which should be (and, in this case, has been) alleged by a plaintiff in order to show that a spring-loaded option issued by a disinterested and independent board is nevertheless beyond the bounds of business judgment. First, a plaintiff must allege that options were issued according to a shareholder-approved employee compensation plan. Second, a plaintiff must allege that the directors that approved spring-loaded (or bullet-dodging) options (a) possessed material non-public information soon to be released that would impact the company's share price, and (b) issued those options with the intent to circumvent otherwise valid shareholder-approved restrictions upon the exercise price of the options. Such allegations would satisfy a plaintiff's requirement to show adequately at the pleading stage that a director acted disloyally and in bad faith and is therefore unable to claim the protection of the business judgment rule. Of course, it is conceivable that a director might show that shareholders have expressly empowered the board of directors (or relevant committee) to use backdating, spring-loading, or bullet-dodging as part of employee compensation, and that such actions would not otherwise violate applicable law. But defendants make no such assertion here.

Id. at 590-93 (citations omitted).

After this ruling, Defendants moved for judgment on the pleadings on the spring-loading claims. *In re Tyson Foods, Inc.*, 2007 WL 2351071, at *1 (Del. Ch.) ("*Tyson II*"). By this point, the record before the Court indicated that the shareholder-approved option plans at *Tyson I* in fact did not require that the challenged grants have exercise prices at market price on the grant date, but rather granted discretion to the Compensation Committee to set the exercise prices. *Id.* at *2-3. Further, the *Tyson* plaintiffs now challenged only three grants. *Id.* at *1. These grants were:

- A March 29, 2001 grant one day before Tyson announced the cancellation of a $3.2 billion deal to acquire IBP, Inc. *Tyson I*, 919 A.2d at 57. The stock price rose 17% on the day of this announcement. *Id.*
- A grant "sometime in October 2001." *Id.* "Within two weeks," Tyson announced that its quarterly earnings would be more than double those expected by analysts, and the stock price "catapult[ed]" to a higher price by the end of November. *Id.*[4]
- A September 19, 2003 grant, issued just prior a September 23, 2003 announcement that earnings were expected to exceed Wall Street's expectations, "propelling the price" to a 6.9% increase. *Id.*[5]

[4] The opinion does not provide precise details of when the grants took place or at what exercise price they were granted, making it impossible to determine how much the stock rose following the grants. The Consolidated Complaint, filed on January 11, 2006 at ¶ 138 (attached as Exhibit 2) simply states that the grants were made in "mid-October."

There was no discussion in either *Tyson* opinion as to how many total option grants Tyson had made and what proportion of them were alleged to have been manipulated.

Despite the fact that the plaintiffs in *Tyson* now had weaker facts to support their case, Chancellor Chandler broadened his earlier opinion and ruled in very direct language that if stock option grants are manipulated, those responsible have a fiduciary duty candidly to disclose such practices. The Chancellor initially described the circumstances as he now understood them in light of new information since *Tyson I*:

> Based on the allegations now before the Court, the following circumstances may be reasonably inferred from the consolidated complaint. On three separate occasions between 2001 and 2003, defendants suspected that Tyson's share price would climb once the market learned what the board already knew. Armed with this knowledge, members of the Compensation Committee granted non-qualified stock options to select Tyson employees, ensuring that these options would shortly be in the money. When the option grants were later revealed to shareholders, however, defendants did not straightforwardly describe such strike-price prestidigitation. Rather, they provided minimal assurances to investors that these options rested within the limits of the shareholder-approved plan. The crux of defendants' argument is that a scheme that relies upon bare formalism concealed by a poverty of communication somehow sits within the scope of reasonable, good faith business judgment. At this juncture, and based solely on the pleadings and the public documents, I cannot agree.

Tyson II, 2007 WL 2351071, at *3. The Chancellor then made it clear that Delaware has an uncompromising standard of fiduciary duty for corporate directors. This rigorous standard is a necessary corollary to the faith that shareholders (and the Courts) place in directors in the management of corporations:

> Delaware law sets forth few bright-line rules guiding the relationship between shareholders and directors. Nor does the law require corporations to adopt complex sets of articles and bylaws that govern the method by which corporate decisions will be made. Instead, shareholders are protected by the assurance that directors will stand as fiduciaries, exercising business judgment in good faith, solely for the benefit of shareholders.
>
> Case law from the Supreme Court, as well as this Court, is replete with language describing the nature of this relationship. The affairs of Delaware corporations are managed by their board of directors, who owe to shareholders duties of unremitting loyalty. This means that their actions must be taken in the good faith belief that they are

[5] The opinion does not indicate over what time period the stock "propelled" higher. But the Court may take judicial notice that Tyson's closing stock price on September 23, 2003 was 6.9% higher than the closing price on September 19, 2003. Neither the opinion nor the Consolidated Complaint provides further detail on the earnings announcement.

> in the best interests of the corporation and its stockholders, especially where conflicts with the individual interests of directors are concerned. . . . When those same directors communicate with shareholders, they also must do so with ***complete candor***.
>
> ***Loyalty. Good faith. Independence. Candor*. These are words pregnant with obligation. The Supreme Court did not adorn them with half-hearted adjectives. Directors should not take a seat at the board table prepared to offer only conditional loyalty, tolerable good faith, reasonable disinterest or formalistic candor. It is against these standards, and in this spirit, that the alleged actions of spring-loading or backdating should be judged**.

Id. at *3-4 (emphasis partially in original and partially added). The Chancellor then made it clear that the defendants' parsimonious view of their duties to shareholders (similar to that presented by Defendants in this case) was utterly inconsistent with long-held principles of Delaware law:

> Defendants invoke an utterly different vision of Delaware law. Defendants' argument suggests a relationship between director and shareholder that falls beneath any reasonable conception of the fiduciary and into the merely contractual. The 2000 Tyson Stock Incentive Plan clearly stated that non-qualified stock options could be granted at any particular price. All SEC disclosures revealed the stated strike price to be the market price on the day of the grant. A preternaturally-attentive shareholder might have focused in upon the grant dates, matched them to Tyson press releases, and inferred from the relationship between them that the directors intended to issue what amounted to in the money options. All of this is purely to the letter of the agreement (runs defendants' reasoning), and no court should infer from this anything inconsistent with a duty of loyalty.
>
> When directors seek shareholder consent to a stock incentive plan, or any other quasi-contractual arrangement, they do not do so in the manner of a devil in a dime-store novel, hoping to set a trap with a particular pattern of words. Had the 2000 Tyson Stock Incentive Plan never been put to a shareholder vote, the nature of a spring-loading scheme would constitute material information that the Tyson board of directors was obligated to disclose to investors when they revealed the grant. By agreeing to the Plan, shareholders did not implicitly forfeit their right to the same degree of candor from their fiduciaries.
>
> Defendants protest that deceptive or deficient proxy disclosures cannot form the basis of a derivative claim challenging the grant of these options, asserting that "Tyson's later proxy disclosures concerning the challenged option grants are temporally and analytically distinct from the option grants themselves." At this stage, however, I am bound to give plaintiffs the benefit of every reasonable inference, not to give defendants the benefit of every doubt. Where a board of directors intentionally conceals the nature of its earlier actions, it is reasonable for a court to infer that the act concealed was itself one of disloyalty that could not have arisen from a good faith business judgment. The gravamen of Count III lies in the charge that defendants intentionally and deceptively channeled corporate profits to chosen executives. . . . Proxy statements that display an uncanny parsimony with the truth are not "analytically distinct" from a series of improbably fortuitous stock option grants, but rather raise an inference that directors engaged in later dissembling to hide earlier subterfuge. The Court may further infer that grants of spring-loaded stock options were both inherently unfair to shareholders and that the long-term

> nature of the deceit involved suggests a scheme inherently beyond the bounds of business judgment. FN18
>
>> FN18 . . . Sophism and guile on th[e] subject [of executive compensation] does not serve shareholder interests. When directors speak out about their own compensation, or that of company managers, shareholders have a right to the full, unvarnished truth.

Id.

Based on this discussion, the Chancellor revised his earlier requirement in *Tyson I* that required that a plaintiff show that there was at least an implicit violation of a shareholder-approved option plan in order to state a case for breach of fiduciary duty by manipulation of stock option timing:

> In retrospect, the test applied in the February 6, 2007 Opinion was, although appropriate to the allegations before the Court at the time, couched in too limited a manner. Certainly the elements listed describe a claim sufficient to show that spring-loading would be beyond the bounds of business judgment. Given the additional information now presented by the parties, however, I am not convinced that allegations of an implicit violation of a shareholder-approved stock incentive plan are absolutely necessary for the Court to infer that the decision to spring-load options lies beyond the bounds of business judgment. Instead, I find that where I may reasonably infer that a board of directors later concealed the true nature of a grant of stock options, I may further conclude that those options were not granted consistent with a fiduciary's duty of utmost loyalty.

Tyson II, 2007 WL 2351071, at *3-5 (citations omitted). Given the striking condemnation of the exact type of conduct challenged in the present case, it is no wonder that Defendants hope that the Court will ignore *Tyson II*.

2. The *Desimone* Opinion

Defendants rely almost entirely on *Desimone v. Barrow*, 924 A.2d 908 (Del. Ch. 2007), to exculpate their conduct. In that case, Vice Chancellor Strine was faced with a motion to dismiss allegations of a single grant that was allegedly both bullet-dodged and spring-loaded. Emphasizing the "utility of a cautious, non-generic approach to addressing the various option practices now under challenge in many lawsuits," 924 A.2d at 931, the Vice Chancellor found the complaint insufficient.

The plaintiff in *Desimone* alleged that on April 5, 2001, Sycamore Networks, Inc. (the nominal defendant corporation) announced disappointing third quarter revenue and earnings. 924 A.2d at 943. Within a day, the company's stock dropped from $9.06 to $7.25. *Id.* The company then granted its officers stock options on April 9. 2001, when the stock price was at $7.39. Sixteen days later, Sycamore announced that it had "secured the number one position with thirty two percent share [sic] in the European Metro DWDM market." *Id.* at 946. Over the next week, Sycamore's shares "trended generally upward, closing at a high of $12.02 on May 2." *Id.* at 943.

Unlike in the present case, there was no allegation in *Desimone* of directors themselves receiving this grant. Further, the Court found it "critical" that, unlike in *Tyson I*, the stock option plan in *Desimone* did not forbid granting options at below-market prices. *Id.* at 930. Additionally, there was no allegation of any consistent pattern of manipulation – much less a decade-long pattern involving 22 grants such as is alleged in the FAC. Contrasting the stronger case of *Tyson* with the weak allegations presented by plaintiff, Vice Chancellor Strine dismissed the claims. *Id.* at 916 ("Whereas in *Tyson* the plaintiffs pled a multi-year pattern of large grants occurring at random times of year that preceded large, market-moving announcements, here all Desimone pleads is that the corporation made the April 9, 2001 Officer Grants sixteen days in advance of a non-seismic positive announcement that hardly seemed likely to send Sycamore's stock price soaring to historic heights.").

3. Application of *Tyson* and *Desimone* to the Present Case

As discussed above, Defendants choose to ignore *Tyson II*. They do, however, make two main arguments as to why the *Tyson I* opinion (and the *Desimone* opinion) supposedly support their position. First, they argue that Plaintiff has not adequately supported his allegations that there was any option manipulation at Linear. Second, they argue that even if there was manipulation, Defendants' disclosures of Linear's option practices were fully consistent with Defendants' fiduciary duties. Both of these arguments lack merit. The present case has all of the elements of *Tyson II* that Chancellor Chandler found were sufficient to state a claim – and then far more.

a. Plaintiff Has More Than Adequately Demonstrated That Directors Did Have a Consistent Practice Manipulating Options at Linear

i. The Allegations of Manipulation in the FAC

Despite assertions from Defendants to the contrary, the FAC in this case contains allegations of spring-loading and bullet-dodging that are far more extensive than those found to be fully sufficient by Chancellor Chandler in *Tyson II.*

As discussed above, the present case involves 22 manipulated grants over the course of a decade with a clear pattern (and substantial statistical evidence) strongly suggesting manipulation. *Tyson II* involved allegations of three manipulated grants over a two and on half-year period with no discussion of any general pattern of manipulation beyond these grants and no statistical evidence supporting allegations of manipulation. The Consolidated Complaint in *Tyson* is dramatically sparser in its discussion of stock option manipulation than the FAC in the present case. *Compare* the Tyson Complaint (Exhibit 2 at ¶¶ 133-39) (seven paragraphs concerning four[6] alleged manipulated grants) *with* the FAC (¶¶ 33-131 providing details of 22 manipulated grants). For one of the three challenged option grants, the Consolidated Complaint in *Tyson* does not even clearly allege when the grant was made, what the exercise price was, or even when precisely the quarterly earnings announcement took place. *See* Exhibit 2 at ¶ 138.

Further, the insider information possessed by Defendants when they issued option grants was just as material in the present case as it was in *Tyson.* Two of the three grants in *Tyson* were tied (as all were tied in the present case) to quarterly earnings announcements – with one of the three merely being linked to earnings that were simply alleged (without more detail) to be “expected to exceed analysts’ expectations.” Exhibit 2 at ¶ 139. All 22 of the grants at issue in the instant case immediately preceded or immediately followed quarterly earnings announcements. These announcements were material to Linear’s stock price, as can be seen by the large volume spikes on the days that the market first reacted to almost all of the 22 earnings announcements. *See* FAC at ¶¶ 42, 46, 50, 54, 58, 63, 67, 71, 78, 82, 87, 91,

[6] As noted above, the *Tyson* plaintiffs later only challenged three of these four grants.

95, 99, 103, 111, 120, 125, 130. As can be seen below, the days following the 22 announcements were among the most active trading days of their respective years for Linear stock.[7]

Date of Initial Market Reaction to Announcement	Annual Rank of Trading Volume (1 = highest Volume of Year)
7/24/1996	130
10/16/1996	11
1/15/1997	71
7/23/1997	85
1/14/1998	4
7/22/1998	1
1/13/1999	1
4/14/1999	7
7/21/1999	10
1/17/2001	3
4/18/2001	5
7/25/2001	2
10/17/2001	1
7/24/2002	1
1/15/2003	12
7/23/2003	69
4/14/2004	4
7/21/2004	6
10/13/2004	1
1/19/2005	6
4/20/2005	1
7/27/2005	2

Additionally, the market response to the earnings announcements with respect to the alleged spring-loaded options was comparable to that in *Tyson.* In *Tyson*, the opinion (and the associated Consolidated Complaint) provided measurements of market reaction for only two of the three announcements. For those announcements, Tyson's share price increased in the short-term by 17% and 6.9%. In the present case, Linear's stock price responded to the earnings announcements associated with the alleged spring-loaded grants by an average of 9.24%, with a range from slight decreases in values up to a 30.86% increase. FAC at ¶82.

[7] This chart was assembled using stock trading volume information that is a matter of public record. While not all of the information in this chart is alleged in the Complaint, the Court may take judicial notice of such public information. *See Weiss v. Samsonite Corp.*, 741 A.2d 373, 375 (Del. Ch. 1999).

Despite the fact that the allegations in the Complaint here are far stronger than those in *Tyson*, Defendants insist that this case is more like *Desimone*, where the allegations were weaker than in *Tyson* than like *Tyson* itself. A review of the facts of *Desimone* demonstrates that Defendants are simply wrong. *Desimone* involved a single challenged grant. No pattern of numerous stock grants suggesting manipulation was alleged. Unlike in the present case, directors who issued the grants did not also receive them. Further, the announcement associated with spring-loading was not obviously significant and came 16 days after the grant.

ii. <u>Directors, While not Perfect, Were Remarkably Adept at Predicting How the Market Would React to Quarterly Earnings Announcements</u>

To state a claim for spring-loading, Plaintiff must show that Directors granted options when they "possessed material non-public information soon to be released that would impact the company's share price." *Tyson I*, 919 A.2d at 593. *See also Desimone*, 924 A.2d at 918 ("The practice of 'spring-loading' stock options involves making market-value option grants at a time when the company possesses, but has not yet released, favorable, material non-public information that will likely increase the stock price when disclosed."). Defendants argue that Plaintiff has not sufficiently met this burden to satisfy even the relatively low Rule 12(b)(6) pleading threshold. This argument lacks merit.

As shown above, Plaintiff has more than amply demonstrated that Linear's quarterly earnings announcements were material to the market. Further, the clearest evidence that Defendants manipulated option timing is the remarkably striking pattern followed for the overwhelming majority of grants – Linear managed to almost always issue options before news that led to stock price increases and after news that led to decreases. Defendants attempt to obscure this overwhelming evidence by arguing that if one looks at the earnings announcements quoted in the Complaint, it is hard to tell from the Company's statements alone whether a particular announcement would be perceived as being "good" or "bad" news.[8]

[8] Defendants fail to consider the fact that what earnings results "mean" for a company is highly contextual. It is specific to each company, for each period in the context of prior results, general market and economic conditions, and analysts' and the market's expectations. Despite Defendants' alleged confusion as to what announcements mean, the FAC places many of the earnings announcements in context. For example, Defendants argue that the April 17, 2001 announcement would have likely been

Defendants ignore the fact the evidence actually shows that Directors had a remarkable track record of accurately predicting market reactions to the Company's earnings announcements.[9]

Not only is the pattern of timing grants before or after announcements difficult to explain as anything other than manipulation (at least for purposes of a motion to dismiss) – but the FAC also alleges that Defendants achieved stupendous financial results from their manipulations. In 2006, in response to the emerging stock option back-dating scandal, Merrill Lynch issued a report that compared the annualized 20-day returns on Linear's stock options to management between 1997 and 2002 with the investor annual returns for the same calendar years. *See* Exhibit 3. The idea was that if there was no manipulation of grant dates, management should fare about the same as investors over a comparable period. *Id.* at 2. Merrill Lynch found that the return for Linear's management exceeded the return for investors by an astonishing average of 396%. *Id.* at 5.[10]

Defendants also misunderstand the claims asserted in the FAC when they argue that some of the stock price increases following quarterly news announcements were not "material."[11] What must be material is the news (which Directors actually knew) – not the response (which Directors could only

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perceived negatively – despite the undisputed fact that the market did, in fact, respond overwhelmingly favorably to the announcement. Defs. Mot. at 26; FAC at ¶ 82 (showing that Linear stock rose 30.86% following announcement). In stating that the announcement should have been perceived negatively, Defendants ignore the fact, stated in the Complaint, that the Company's earnings for that quarter were "ahead of Wall Street views." FAC at ¶ 81. One can presume that earnings that beat market expectations would be perceived positively by the market. Regardless, however, the important fact here is that there was a consistent pattern of granting options before earnings announcements that resulted in a stock price increase and after announcements that resulted in a stock price decrease.

[9] In this sense, Defendants' criticism of Plaintiff's use of "20-20 hindsight," Defs.' Mot. at 27, is misplaced. Plaintiff does use 20-20 hindsight – but only to show that Defendants were actually very good at predicting market reaction.

[10] This Court has found this specific Merrill Lynch report to be a reliable statistical indicator of option date manipulation (at least for purposes of a motion to dismiss). *See Conrad v. Blank*, 2007 WL 2593540, at *8 n.30 (Del. Ch.) (attached as Exhibit 7); *Ryan*, 918 A.2d at 354-55.

[11] The fact that some spring-loaded grants did not precede large increases, *see* Defs.' Mot. at 25, in no way diminishes the strength of the claims in the Complaint. The Complaint does not allege that Directors knew in advance exactly how much the market would go up – only that they used insider information to attempt to grant options in a manner that they believed would be profitable. As discussed above, they were extremely successful at doing this. The fact that they were not perfect in no way suggests that they were not trying to manipulate the grants, as Defendants suggest by pointing to two spring-loaded grants that preceded falls in Linear's stock price. As noted in FAC, the overall market was down following the July 20, 1999 grant, bringing Linear with it despite the positive quarterly announcement. FAC at ¶ 76. Similarly, a negative announcement from Intel kept Linear's stock level

expect would match their predictions). As noted above, the news itself was clearly material. A small response suggests only that damages are limited – which is clearly not the case here. *See* FAC at ¶ 177 (alleging millions of dollars in profits from manipulated options).

iii. <u>Defendants' Arguments as to Supposed Lack of Motive Are Frivolous</u>

Defendants argue that that Plaintiff fails to show a motive for Linear's directors to grant manipulated options and that this failure is somehow dispositive under *Desimone*. Defs.' Mot. at 29. Both arguments are frivolous.

First, Plaintiff has indeed shown a clear motive – greed. Defendants do not even deny that members of the Compensation Committee received challenged grants – or even that the amount of money involved in these options was substantial. This is because they cannot deny either fact. The Complaint alleges that Defendants Lee, Moley, and Volpe (the Current Director Defendants who served on the Compensation Committee when manipulated options were granted) have already earned a total of over $6 million dollars from manipulated grants, and stand to earn over $1.5 million more if they exercise manipulated options that they already hold. FAC at ¶ 177.[12] Defendants rather argue that the Compensation Committee members should be exonerated because they did not receive the most profitable manipulated stock options. Defs.' Mot. at 29. This argument is the equivalent of excusing the conduct of these directors because others profited from their wrongdoing more than they profited themselves. The very statement of this argument demonstrates its fallacy.

Second, while a lack of motive may be relevant for the Court in evaluating whether pleading standards have been met, Defendants misquote *Desimone* to imply that it is somehow relevant to this case on this issue. In *Desimone*, the Court pointed out that where two inside directors did not receive manipulated options themselves, and where these directors owned a combined 32% of the company, this suggested that it was difficult to infer any motive to manipulate options. 924 A.2d at 916, 946. The

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after the April 13, 2004 announcement and grant – despite positive news from Linear. FAC at ¶ 107.

[12] This figure includes only the current directors who served on the Compensation Committee when manipulated options were granted. It does not include any money made by Defendant McCarthy (who served on the Compensation Committee until 2006) or any of the other Defendants.

argument was that not only did these directors not make money personally from manipulation, but they themselves were sufficiently substantial shareholders that they would be the ones who would lose out if employees were unjustly enriched at the expense of shareholders. *Id*. at 946. These directors "would seem to have been highly motivated only to grant options to executive officers on terms that provided the recipients with a strong incentive to perform well." *Id.* Here, not only did the Compensation Committee directors themselves receive manipulated options, but there is no suggestion that they were such substantial shareholders that the harm caused to shareholders as a whole would greatly affect them personally.[13] Accordingly, the *Desimone* opinion with respect to motive does not support Defendants' position.

iv. <u>Defendants' Arguments Regarding Vesting Lack Merit</u>

Defendants argue that the fact that the challenged options were not immediately exercisable somehow negates any inference of manipulation.[14] In support of this argument, they cite to *Desimone.* This argument has no merit and is not supported by *Desimone*.

In *Desimone*, Vice Chancellor Strine dismissed a claim of spring-loading relating to a grant made sixteen days before the company announced that "it had secured that number one position with thirty two percent share [sic] in the European Metro DWDM market." 924 A.2d at 945. The Vice Chancellor pointed out that it was unclear what this announcement even meant,[15] that it did not appear to have an immediate positive impact on Sycamore stock values, and that, "[e]ven if the announcement did strangely cause a *belated* short-term spike in the stock price, given the price swings to which Sycamore's stock was susceptible, the announcement would not have been likely to have had a substantial effect on the stock's trading price months later when the first of the options vested, much less on the bulk of the options, the

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[13] In fact, according to the most recent Proxy Statement filed by Linear on September 26, 2007 (attached as Exhibit 4), Defendants Lee, Volpe, and Moley each own less than 1% of outstanding shares of Linear.

[14] Defendants assert that the FAC "concedes that vesting did not occur until one year [or more] after the grant issuance date." Defs.' Mot. at 23 n.20. This is true for some options, but the FAC is clear that others began to vest within 6 months or less. *See* FAC at ¶¶ 43, 51, 59, 64, 68, 72, 83, 92, 96, 100, 104, 108, 117, 121, 126.

[15] "Could the market have been researching what the 'European Metro DWDM Market' was during the several days after the announcement? "'Oh, now we get it, let's buy!'" *Desimone*, 924 A.2d at

last of which did not vest for three years." *Id.* at 945-46 (emphasis in original). The Vice Chancellor directly contrasted this kind of announcement with the more significant kinds of announcements at issue in the *Tyson* case. *Id.* at 945. The types of announcements in the present case are much more similar to those in the *Tyson* case than to the announcement in the *Desimone* case.

Defendants' vesting argument is also meritless for an entirely different reason. Their argument appears to be that whether options were granted just before or just after the announcements in question does not make any real difference as to how much cash option recipients will actually make on exercising the options, because by the time the options are actually exercisable, the effect of the quarterly announcement in question is muted by supposedly more important long-term stock trends. Defs.' Mot. at 23. This argument fails as a matter of logic. While it may well be that a quarterly earnings announcement has no material impact on a company's stock price five years in the future, it definitely has a material impact on the price of the stock around the time of the announcement– which is what the option exercise price is based on. If a grant recipient receives an option with an exercise price that is one dollar lower than it should be, he or she receives an extra dollar profit per share whenever the option is exercised – whether that exercise takes place immediately or in five years.[16]

Finally, Defendants' argument that many of the manipulated options are now underwater and never led to actual profits for any of the named defendants is irrelevant. *See* Defs.' Mot. at 23. They do not argue, because they cannot, that they never made any money on the challenged options. (In fact they have made many millions of dollars. FAC ¶ 177). In any event, it is clear that the manipulation of grant dates was intended to benefit the recipients. The fact that a manipulated grant subsequently may not have resulted in extra profit to the recipients does not mean there was not a breach of fiduciary duty at the time of the grant. At best, their argument goes to damages in this case and simply suggests that their breaches of fiduciary duty led to less unjust enrichment than they might have intended.

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945 n.127.

[16] Plaintiff reads the references to vesting periods in the *Desimone* opinion to simply be a comment that the announcement in question was not material, even in the immediate-term. To the extent that *Desimone* argues differently, Plaintiff respectfully submits that this aspect of the case was wrongly decided.

b. The Option Manipulation Practices at Linear Represented a Clear Breach of Defendants' Fiduciary Duties

Defendants argue that even if Linear's options were spring-loaded, this practice was entirely acceptable and did not represent a breach of fiduciary duty. Nothing could be further from the truth.

i. Defendants Have Never Candidly Disclosed Their Practice of Option Manipulation as Required by *Tyson II* and in Fact Continue to Deny any Manipulation

In *Tyson II*, Chancellor Chandler made it clear that Defendants had an affirmative obligation to disclose a policy of spring-loading:

> When directors seek shareholder consent to a stock incentive plan, or any other quasi-contractual arrangement, they do not do so in the manner of a devil in a dime-store novel, hoping to set a trap with a particular pattern of words. Had the 2000 Tyson Stock Incentive Plan never been put to a shareholder vote, the nature of a spring-loading scheme would constitute material information that the Tyson board of directors was obligated to disclose to investors when they revealed the grant. By agreeing to the Plan, shareholders did not implicitly forfeit their right to the same degree of candor from their fiduciaries.
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> * * *
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> Sophism and guile on th[e] subject [of executive compensation] does not serve shareholder interests. When directors speak out about their own compensation, or that of company managers, shareholders have a right to the full, unvarnished truth.

2007 WL 2351071, at *4, *4 n.18.

Defendants do not argue that they have openly disclosed their stock manipulation practice. In fact, they continue to deny that they have done anything wrong. *See, e.g.*, Exhibit 1 (Form 10-K filed August 24, 2007 stating that an internal review "found no evidence of fraud or misconduct of any kind in the Company's practices in granting of stock options."). There is, thus, no way consistent with *Tyson II* that this Court can find that Defendants met their fiduciary duties in their disclosures of spring-loading.

ii. Defendants' Public Discussions About Option Policies Strongly Implied That Options Were not Manipulated and Were Provided Solely as an Incentive for Future Performance

Even if this Court finds that *Tyson II* does not mandate full disclosure of stock manipulation, Defendants' arguments for dismissal still ring hollow.

As noted in the Complaint, Defendants made numerous statements strongly implying that options were not manipulated and were provided solely as an incentive for future performance:

- The option plans themselves did not permit option grants with exercise prices below fair market value. FAC at ¶¶ 132-43. Thus, any spring-loading violated the purposes, spirit, intent, and objectives of these plans. *Id*. at 132. The apparent existence of similar restrictions in the Tyson option plan was an important component of the *Tyson I* decision. *See Tyson I*, 919 A.2d at 592-3.
- Linear's publicly filed Proxy Statements and Forms 10-K from 1996 through 2006 reaffirm numerous times that options could not be granted with exercise prices of less than the market price on the date of the grant. FAC at ¶¶ 146-150.
- These same publicly filed documents conveyed the impression that option grants were administered consistent with the purposes, spirit, intent, and objectives of Linear's stock option plans (including awarding future rather than past performance). *Id.*
- Linear's Proxy Statements from 1996 through 2006 represented that the Company's policy was to comply with the limitations set forth in § 162(m) of the Internal Revenue Code, 26 U.S.C. § 162(m). *Id.* at ¶ 147. This is highly significant because § 162(m) is structured specifically to allow tax-deductions only for options that are granted in order to award future performance and where the exercise price of the options is no less than 100% of the fair market value on the date of the option grant.[17]
- Two of Linear's stock option plans are specifically labeled "incentive" plans: the 1996 Incentive Stock Option Plan and the 2005 Equity Incentive Plan. FAC ¶ 132.

[17] Under § 162(m), compensation in excess of $1 million per year, including gains on stock options, paid to a corporation's five most highly compensated officers is only tax deductible if it is directly linked to specific goals for future performance. Under the implementing regulations, stock options only qualify if they are "performance-based compensation." 26 C.F.R. § 1.162-27(e)(2)(iv). At a minimum, under these regulations, "the amount of compensation the employee could receive [must be] based solely on an increase in the value of the stock after the date of the grant or award." *Id.* Although Plaintiff does not specifically allege a violation of § 162(m), a statement by Linear that it complies with § 162(m) strongly suggests that stock option grants are intended to award future performance only. *See generally* 26 C.F.R. § 1.162-27(e)(2) (providing examples of performance-based compensation).

- Linear's 2006 10-K strongly implied that Linear's stock option grant dates were not manipulated to take advantage of insider-information. FAC ¶ 35. Specifically, the 10-K stated:

> The allegations [of back-dating] against the Company are largely based on statistical analyses where the underlying premise is that daily stock prices are essentially random. However, as is common with high growth technology companies, the Company's stock price is more volatile at and around earnings release dates. The Company granted its stock options on a quarterly basis in connection with its regularly scheduled board meetings. Board meetings are scheduled far in advance to coincide with the Company's quarterly earnings releases.[18]

- Linear's Code of Business Conduct and Ethics bans the types of manipulations of insider-information that are challenged here. FAC ¶¶ 152-53.

These facts are more than adequate to plead deceptive disclosures in breach of Defendants' fiduciary duties even under the narrow test initially established in *Tyson I* (and later broadened in *Tyson II*). There, the sole specific allegation of deceptive statements was the allegation (later shown untrue in *Tyson II*) that the company's stock option plan (whose strict letter was not violated, the Court found) required grants at no lower than the market price. *See Tyson I*, 919 A.2d at 575-76, 591-93; Exhibit 2 (Complaint at ¶¶ 133-39) (no allegations of deception other than circumvention of option plan). Nonetheless, the Court found that a sufficient claim of breach of fiduciary duty was made to satisfy Rule 23.1 (and not merely 12(b)(6)) because the plaintiffs had sufficiently alleged that directors that approved the option grants "issued those options with the intent to circumvent otherwise valid shareholder-approved restrictions upon the exercise price of the options." *Tyson I*, 919 A.2d at 593. In the present case, Plaintiff has shown the same deceptive circumvention of a stock option plan as well as far more indications of deception listed above.

[18] Exhibit 5. Defendants argue that this statement does not imply that Linear used pre-set grant dates. Defs.' Mot. at 14. A fair reading suggests the contrary, but, regardless, this statement is clearly intended to convey the message that Linear's grant dates were set in a consistent, objective, and non-manipulative manner. At the very least, an investor reading this statement would feel deceived to discover that the statement omitted the very material fact that, generally, when Directors expected the news regarding the Company, including its earnings release, to be favorably received by the market, they issued the options *in advance of* the earnings release, and when the Directors expected the news regarding the Company, including its earnings release, to be unfavorably received by the market, they issued the options *after* the earnings release.

Defendants argue that, despite these ample allegations, *Desimone* somehow counsels dismissal here – even under the lower 12(b)(6) standard. Defs.' Mot. at 20-22. Defendants' interpretation of *Desimone* is directly rejected by *Tyson II.* In *Desimone*, the option plan permitted grants at below market price. 924 A.2d at 920-21; *see also id.* at 930 (noting the contrast on this point between that case and *Tyson*: "[a]lso critical was the allegation that the stock option plan in *Tyson* required all option grants to be issued at fair market value.")). Nonetheless, in dicta, Vice Chancellor Strine considered a hypothetical scenario in which a company had an option plan that did not permit below-market value grants. *Id.* at 936-37. In that scenario, the CFO and CEO have missed "every important family vacation for four months" while working on a merger, and the company wishes to reward them by granting options in advance of the merger announcement. *Id.* at 936. In this hypothetical, the spring-loaded nature of the option grants is clearly disclosed in the merger proxy. *Id.* Further, shareholders were told that the fair market value pricing requirement for option grants was exclusively for tax purposes, and that the company granted options both as incentives for future work *and* rewards for past work. *Id*. at 937. This scenario, the Vice Chancellor found, would "arguably not give rise" to a spring-loading claim. *Id.*

Defendants attempt to squeeze the dissimilar facts in the present case into Vice Chancellor Strine's hypothetical. But here, there was a ten-year practice of manipulating grant dates, not a single grant in recognition of extraordinary and unusual efforts by the grant recipients, and, critical to the analysis, there was no candid disclosure. Defendants point to very general language in two publicly filed documents as an adequate disclosure, but these statements are a far cry from the explicit, candid disclosure posited in the *Desimone* hypothetical. The disclosures that that defendants point to are:

> The [Company's 1996 option] plan[] authorize[s] the granting of options "to attract and retain the best available personnel for positions of substantial responsibility, to provide additional incentives to Employees, Directors and Consultants, and to promote the success of the of Company's business." . . . The [Company's 1996 Compensation Committee] Report[] describe[s] the "compensation philosophy" as aligning "executive compensation with the Company's business objectives and performance and to attract, retain and reward executives who contribute to both the short-term and long-term success of the Company."

Defs.' Mot. at 12. These broad statements (the second of which does not even specifically refer to options – as compared to other forms of compensation) in no way clearly indicate that options can be given as both incentives for future performance and as a reward for past performance – the requirement needed to match the *Desimone* hypothetical.[19] This is all the more true given the context of a decade worth of statements to the contrary discussed above. Further, Defendants do not even argue, because they cannot, that the spring-loaded nature of the options challenged here was fully disclosed.

Moreover, Chancellor Chandler rejected a nearly identical argument in *Tyson II*. There, defendants attempted to argue that they qualified under the same hypothetical in *Desimone*. The Chancellor distinguished *Desimone* because (as here), the spring-loading was not fully disclosed. 2007 WL 2351071, at *3, *5. Further, although the defendants claimed that they also disclosed that they granted options both as incentives for future work *and* rewards for past work (as required by the *Desimone* hypothetical), these additional "disclosures" actually consisted solely of "minimal assurances to investors that these options rested within the limits of the shareholder-approved plan [which permitted below-market exercise prices]." *Id.* at *3. The Chancellor found that "based upon the actual allegations before the Court in this case, defendants' disclosures are too sparse to fit into either hypothetical analyzed by Vice Chancellor Strine in *Desimone*." The identical analysis applies here, and Defendants' arguments should be rejected.

[19] Defendants appear to make a similar argument in the section of their brief labeled "No Alleged Ultra Vires Violations," *see* Defs.' Mot. at 13-14, where they appeal to the broad statutory discretion given to directors in the granting of options. Plaintiff has never argued that the challenged conduct represented *ultra vires* acts that were not within the statutory power of Linear to perform. If fully disclosed, spring-loading and bullet-dodging could theoretically be permissible. The argument here is that the challenged conduct on the particular facts alleged in the Complaint constituted a breach of fiduciary duty, waste, and unjust enrichment.

4. **Plaintiff's Spring-loading Claims Apply to All Defendants**

Defendants make the remarkable assertion that the FAC does not state a claim for breach of fiduciary duty against the Officer Defendants or Defendant Maier because they are not alleged to have made the decisions to issue the challenged option grants.[20] The Court must reject this exceedingly narrow view of an officer's fiduciary duties.

The FAC alleges that each of the Defendants received manipulated grants on at least one occasion. FAC at ¶ 157.[21] Further, each Defendant knew that his options were improperly manipulated to his benefit and the corporation's detriment. FAC at ¶ 158. This alone is sufficient to state a claim for breach of fiduciary duty. In Delaware, corporate directors *and* officers have long been held to

> stand in a fiduciary relation to the corporation and its stockholders. A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers.
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> * * *
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> Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests.

Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939); *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1988) ("[C]orporate fiduciaries [must] absolutely refrain from any act which breaches the trust reposed in them, [and also must] affirmatively protect and defend those interests entrusted to them."); *see also In re Walt Disney Co.*, 2004 WL 2050138, at *3 (Del. Ch.) (attached as Exhibit 8) ("'[W]ith respect to the obligation of officers to their own corporation and its stockholders, there is nothing in any Delaware case which suggests that the fiduciary duty owed is different in the slightest from that owed by directors'") (citation omitted). Retaining and/or exercising improperly granted options that allow oneself to profit from insider-information at the expense of shareholders is surely a violation of these broad

[20] Plaintiff does not argue that any Defendant is responsible for any acts of granting options that took place before that Defendant became a fiduciary of Linear.

[21] Defendant Maier received numerous grants while he was an officer before he joined the Board of Linear. FAC at ¶¶ 93-126

duties. FAC at ¶ 163. Additionally, Officer Defendants and Defendant Maier had broad duties not only to not participate in concealing the challenged conduct, but also to affirmatively disclose the conduct and to take steps to stop it. FAC ¶¶ 159-62; *see In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006) ("A failure to act in good faith may be shown where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties."). Had the Officer Defendants and Maier not breached these duties, the challenged conduct may have ceased much earlier or never taken place to begin with.

5. Director Defendants Have not Demonstrated That the Manipulated Grants That They Received Were Entirely Fair to Linear

While all of the Defendants were bound by the duty of loyalty as discussed above, this duty provides extra requirements on Director Defendants (other than Maier and perhaps Swanson[22]), who were on both sides of the option grant process.

As noted above, directors owe an "an uncompromising duty of loyalty," *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983), to the corporation mandated by the "fundamental proposition that directors may not compete with the corporation." *Thorpe by Castleman v. CERBCO, Inc.*, 676 A.2d 436, 442 (Del. 1996). The law has long been clear that directors may not use their position to engage in self-dealing: "Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. . . . [A]n undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest." *Guth*, 5 A.2d at 510. Further,

> There is no "safe harbor" for . . . divided loyalties in Delaware. When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain . . . . The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.

Weinberger, 457 A.2d at 710. "Classic examples of director self-interest in a business transaction involve . . . a director receiving a personal benefit from a transaction not received by the shareholders generally." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362 (Del. 1993), *modified on other grounds on*

[22] As noted above, it is not entirely clear whether Defendant Swanson approved his own grants or

reargument, 636 A.2d 956 (Del. 1994). "In the typical situation, a fiduciary has used his office to effectuate a transaction with the corporation in which the fiduciary has an economic interest and in which the transaction is not substantially fair to the corporation." *In re Shoe-Town, Inc. Stockholders Litig.*, 1990 WL 13475, *4 (Del. Ch. 1990) (attached as Exhibit 9).

Director Defendants have not met their burden, and cannot meet their burden, of demonstrating that their conduct passes the entire fairness test.[23] The stock option manipulation challenged here was not the product of open and fair dealing. It was carried out in secret in contravention of numerous assertions by Director Defendants that options were not manipulated. The options were also not granted at a fair price. As discussed above, the company receives less money for each manipulated option exercised than it would receive if these options were not manipulated. Further, shareholders generally were not able to benefit from the use of insider information in the same manner as Director Defendants benefited from this information.

C. Plaintiff Has More Than Adequately Stated a Claim That Defendants Breached Their Fiduciary Duties by Authorizing, Receiving, and/or Allowing Linear to Issue Bullet-Dodged Options

Plaintiff has adequately stated a claim for breach of fiduciary duty related to Linear's bullet-dodged stock options. First, the *Tyson II* opinion applies equally to bullet-dodging as it does to spring-loading. Second, insofar as *Desimone* dismissed a claim of bullet-dodging, it involved facts and circumstances far different from those present here. Third, despite claims to the contrary, *Desimone* in no way endorsed the practice of bullet-dodging.[24]

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these grants were approved only by the Compensation Committee.

[23] Defendants cite to *In re 3Com Corp. S'holders Litig.*, 1999 WL 1009210 (Del. Ch.), for the principle that the entire fairness test does not apply in the context of stock options granted under shareholder approved plans. Defs.' Mot. at 43-44. However, *3Com* was based on the notion that shareholders consented to directors faithfully carrying out the stock option plan. *See 3Com*, 1999 WL 1009210, at *3. Here Plaintiff has alleged that Defendants "violated the purposes, spirit, intent, and objectives" of Linear's plans. FAC at ¶ 33. Further, *3Com* was specifically based on the notion that "shareholders knowingly set the parameters of the Plan." *See*, *3Com*, 1999 WL 1009210, at *3. Here, Plaintiff has alleged that the Proxy Statements seeking approval of Linear's plans contained material misstatements relating to the manner in which options were granted at Linear. FAC at ¶¶ 170-74.

[24] Defendants do not appear to challenge that Plaintiff has made out a factual case that there was bullet-dodging at Linear. Defendants' argument here is only that bullet-dodging, even if demonstrated,

1. **The *Tyson II* Decision Applies Equally to Bullet-Dodging and Spring-Loading**

As discussed above, Chancellor Chandler's opinion in *Tyson II* (addressing a situation in which the stock option plan did not require market price option grants) was based almost entirely on they duty of corporate fiduciaries to be candid with shareholders on material issues of executive compensation. *See, e.g.*, *Tyson II*, 2007 WL 2351071, at *4 n.18 ("When directors speak out about their own compensation, or that of company managers, shareholders have a right to the full, unvarnished truth."). Although the *Tyson* litigation involved spring-loading and not bullet-dodging,[25] Defendants' consistent pattern of bullet-dodging (intermixed with spring-loading) here was as equally undisclosed as Defendants' spring-loading, so all of the reasons discussed above as to why *Tyson II* applies to Defendants' spring-loading apply to the bullet-dodging as well.[26] Defendants do not address *Tyson II* in their brief.

2. ***Desimone* Involved Far Different Facts From the Present Case and in Fact Held That Option Grants Similar to Those Challenged Here Would be Improper**

Defendants fare no better under *Desimone* than they do under *Tyson II.* Vice Chancellor Strine was exceedingly careful to limit the holding of his case to facts presented to him in *Desimone*. He emphasized the "utility of a cautious, non-generic approach to addressing the various option practices now under challenge in many lawsuits." *Desimone*, 924 A.2d 908, 931. He also noted the "need for

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would not represent a breach of fiduciary duty. *See* Defs.' Mot. at 16-20. Regardless, the discussion above relating to spring-loading applies equally to bullet-dodging and demonstrates that the Complaint does sufficiently allege that Linear's options were bullet-dodged. The facts evidencing bullet-dodging are significant for this case even if the Court dismisses Plaintiff's bullet-dodging claims. This is because the extensive and consistent pattern demonstrated by the interplay of spring-loading and bullet-dodging – grants before good news and after bad news – clearly shows that the challenged conduct represented a deliberate effort by Defendants to use insider-information to grant stock options in the most favorable manner possible.

[25] Chancellor Chandler considered both spring-loading and bullet-dodging in his *Tyson* opinions. *See Tyson I*, 919 A.2d at 593 (holding, in setting pleading standard, that "a plaintiff must allege that the directors that approved spring-loaded *(or bullet-dodging)* options (a) possessed material non-public information soon to be released that would impact the company's share price, and (b) issued those options with the intent to circumvent otherwise valid shareholder-approved restrictions upon the exercise price of the options.") (emphasis added).

[26] *Tyson II* is based on considerations of the duty of candor that were not addressed in *Desimone* and that might suggest a different result from that in *Desimone*. As discussed below, Plaintiff does not believe that, especially in light of *Tyson II*, *Desimone* requires dismissal of the bullet-dodging claims in the case at bar. To the extent that the Court finds the two opinions irreconcilable on this issue, Plaintiff respectfully submits that the Court should follow the later-issued decision in *Tyson II*.

judicial caution" in assuming that all behavior labeled "bullet dodging" should be treated the same way. *Id.* at 938 ("Lumping context-specific behavior involving varying motivations into generic categories such as backdating, spring loading, and bullet dodging, and driving results by such labeling, seems unlikely to do justice.").

Vice Chancellor Strine's cautious approach was quite appropriate. *Desimone* involved "a bare allegation that a board of directors made a discretionary issuance of stock options at the market stock price after releasing negative information." 924 A.2d at 944. In that case a single option grant was alleged to be bullet-dodged, with no suggestion of any overall pattern of stock option manipulation as here. Here, by contrast, there are 22 manipulated option grants over a decade-long period. In addition, the options plan in *Desimone* did not bar grants at below market prices, as the options here do. There was also no evidence as there was here, of a consistent pattern (or any pattern) of deceptive statements implying that Linear did not engage in bullet-dodging. Plaintiff submits that under *Tyson II*, a policy of granting bullet-dodged options (as occurred here) is only acceptable if directors candidly inform shareholders that options are bullet-dodged – something that no one suggests occurred here. However, even if the Court disagrees with this reading of *Tyson II* and finds that *Desimone* permits undisclosed bullet-dodging in the abstract because "when a director grants options after the release of negative information, he does so at a time when the market has absorbed all existing information about the company," *id.* at 944, the specific facts here involve deceptive behavior that this Court should not sanction. Here, Defendants not only failed to candidly disclose their pervasive manipulation scheme, but, unlike in *Desimone*, they actively hid a decade-long consistent pattern of manipulation in a web of deceptive public statements strongly implying that they did not, in fact, manipulate stock option grant timing.

Vice Chancellor Strine himself recognized that bullet-dodging in circumstances similar to those present here would represent a breach of fiduciary duties. The *Desimone* opinion found that when option plans require that options be granted at fixed times, it would be a breach of fiduciary duty for directors to manipulate the timing of announcements to benefit option recipients, as was done in the present case. *See* *id.* at 948-50. This is because such plans carry with them "'for better or worse' signals,'" *id.* at 945 n.123. In this situation, there are "implicit assumptions underlying an option plan's terms" that option recipients will not abuse their "superior informational position" to enrich themselves at shareholders' expense. *Id.* at 949. Essentially, option recipients have tied their fate to the fate of the company, taking the bitter with the sweet. *Id.* at 949. The use of such option plans "implicitly requires the company to adhere to regular disclosure practices," to avoid such abuses. *Id.* at 949-50.

Here, while the option plans did not require pre-set dates, Linear represented that it granted options in connection with quarterly announcements in a manner that carried identical "'for better or worse' signals." Linear's 2006 10-K states: "The Company granted its stock options on a quarterly basis in connection with its regularly scheduled board meetings. Board meetings are scheduled far in advance to coincide with the Company's quarterly earnings releases."[27] In fact, as alleged in detail in the FAC, the timing of option grants was systematically manipulated in relation to earnings release dates in order to benefit the option recipients at the expense of the corporation. This manipulation was clearly a breach of fiduciary duty under the reasoning in Desimone.

Defendants now argue (presumably to distinguish their actions from those condemned in *Desimone*) that they were not required to grant options on pre-set dates and that Plaintiff does not "allege[] that Linear falsely stated that grants would be at a specific time but in actuality granted them at a different time." Defs.' Mot. at 15. While this is literally true, the fact remains that the FAC alleges that the directors deliberately manipulated option grant dates and did not disclose what they were doing. Just as in *Desimone*, while the hypothetical plan discussed by the Vice Chancellor did require pre-set grant dates, the breach of duty was not that directors violated any written terms of the plan or that they directly lied about when options were granted. *See Desimone*, 924 A.2d at 948-950. Rather, the breach of duty was that directors manipulated the timing of grants and announcements in a manner that was different from their implied understanding with shareholders that option grants would not be manipulated by the

[27] Plaintiff does not actually know whether Linear timed its stock option grants to coincide with its quarterly announcements or timed its quarterly announcements to coincide with its stock option grants. Either is possible, and the unfair outcome is identical either way.

use of insider information. The facts alleged here are no different in any practical way from the hypothetical in *Desimone*.

3. The Self-Dealing Grants to Directors Implicate the Duty of Loyalty in a Manner not Implicated in *Desimone*

For all of the same reasons (discussed above) that Director Defendants cannot meet the entire fairness test for their spring-loaded options, they also cannot meet this test for their bullet-dodged options. This concern was discussed by Vice Chancellor Strine in *Desimone.* There, the primary discussion of bullet-dodged options was confined to addressing a single grant made to officers. 924 A.2d at 943-46. However, the Vice Chancellor acknowledged that under "traditional corporation law principles . . . if the grantor board or committee was dominated or controlled by the options recipients, [a fiduciary duty] analysis would turn on whether the transaction involved unfair self dealing and the option recipients would bear the burden of establishing that the options grants were fair to the corporation." *Id.* at 944. Thus, even if the Court finds no other breaches of fiduciary duty involving bullet-dodging, the Court should still find that Director Defendants violated their duty of loyalty in granting bullet-dodged options to themselves.

4. Plaintiff Has Never Suggested That Linear Was Required to Issue Options Before Bad News

Defendants state that Plaintiff would somehow require Linear to issue options before bad news. Defs.' Mot. at 19. They then point out that *Desimone* makes clear that such a requirement would be detrimental to Linear's interests. *Id.* The Court should ignore this red herring. Plaintiff has never argued for any such requirement. Rather, Plaintiff submits merely that directors of a company have choices to make about how they grant options. If a company chooses to issue option grants "in connection with" earnings announcements,[28] it has two options. One option is to take care not to use insider information to manipulate the timing of these grants. The other choice is to bullet-dodge and/or spring-load freely – and

[28] And this is, indeed, a choice made by Defendants. As Defendants themselves note, Linear's stock option plans do not require pre-set grant dates and provide great flexibility as to the timing of option grants. Defs.' Mot. at 14-15. Defendants were obviously free to have established a policy that prevented the issuance of grants in proximity to any material announcements. Such a policy would have prevented

then candidly disclose that this is being done. Defendants in this case chose neither option. Rather, they presented Linear's grants as being "for better or worse" – and then in fact spring-loaded or bullet-dodged at least 80% of them over the course of a decade.

D. Plaintiff Has More Than Adequately Stated a Claim That All Defendants Were Unjustly Enriched

Although Plaintiff does not bring any direct contract claims in this action, Defendants nonetheless argue that because Linear issued its options under stock option plans, these plans govern the relationship between the parties and the equitable remedies associated with a claim for unjust enrichment are unavailable. Defs.' Mot. at 34-35. This argument flies in the face of numerous Delaware cases that have allowed unjust enrichment claims to proceed in the context of the manipulation of stock option grants governed by stock option plans. *See Conrad*, 2007 WL 2593540 (declining to dismiss claims of unjust enrichment); *Tyson I*, 919 A.2d at 602-03 (allowing unjust enrichment claims against recipients of spring-loaded options); *Ryan*, 918 A.2d at 361 (refusing to dismiss unjust enrichment claims relating to back-dating of stock options); *Louisiana Municipal Police Employees' Retir. Sys. v. Crawford*, 918 A.2d 1172, 1180 n.8 ("[I]n most cases the recipient of any ill-gotten gains [from the back-dating of stock options] will also be liable, if not under a theory of breach of fiduciary duty, then for unjust enrichment").[29] These claims are allowed to proceed "'even when the defendant retaining the benefit is not a wrongdoer' and 'even though he may have received [it] honestly in the first instance.'" *Tyson I*, 919 A.2d at 602 (quoting *Schock v. Nash*, 732 A.2d 217, 232-33 (Del. 1999)).[30] In other related contexts, this Court has held similarly. For example, in *Hills Stores Co. v. Bozic*, 769 A.2d 88, 110 n.74, this Court refused to grant summary judgment to defendants on claims of excess payment arising out of their employment, which

the conduct challenged in this action.

[29] The section of the *Espinoza v. Wu*, No. RG06298775 (Super. Ct. Alameda County Aug. 21, 2007), opinion cited by Defendants is extremely terse, but that case appears to be distinguished from the one at bar by the presence of direct contract claims not made here. To the extent that this case does conflict with the Delaware precedent described above allowing unjust enrichment claims in options manipulation cases, Plaintiff respectfully submits that it was wrongly decided.

[30] These cases also address Defendants' remarkable assertion that because many of the Defendants were "merely grantees" of spring-loaded and bullet-dodged options, the FAC does not state a claim against them. Defs.' Mot. at 45-46.

was governed by written employment agreements. Not only did this Court deny summary judgment on breach of fiduciary duty and contract claims, but the Court also denied summary judgment on unjust enrichment claims, holding that even if defendants could show "that they had no role in causing any excessive payments to themselves, they still would be unjustly enriched if they received them. Just as someone can't keep a mistakenly excessive tax refund or automatic teller pay out, these defendants cannot hold on to overpayments from the company to which they owed fiduciary duties." *Id.; see also Teachers' Retir. Sys. of Louisiana v. Aidinoff*, 900 A.2d 654, 671 n.24 (Del. Ch. 2006) (holding that even when a contract governed some portion of the parties' relationship, to the extent the money received by the defendants "resulted from fiduciarily-deficient behavior," a claim for unjust enrichment may exist); *In re HealthSouth Corp. S'holders Litig.*, 845 A.2d 1096, 1109 n.27 (Del. Ch. 2003) (granting summary judgment *to plaintiffs* on unjust enrichment claim despite existence of contract governing the challenged transaction).[31]

Defendants' additional argument that Plaintiff has not met the pleading standards for unjust enrichment is baseless. To obtain restitution for unjust enrichment, a plaintiff must "show that the defendants were unjustly enriched, that the defendants secured a benefit, and that it would be unconscionable to allow them to retain that benefit." *Schock*, 732 A.2d at 232.[32] Here, Plaintiff has shown all of these elements. The FAC describes in great detail exactly which options each Defendant

[31] The cases cited by Defendants state that Delaware law provides that an unjust enrichment theory is unavailable "if a contract 'is the measure of [the] plaintiff's right.'" *ID Biomedical Corp. v. TM Technologies, Inc.*, 1995 WL 130743, at *15 (Del. Ch.). The idea behind this policy is to prevent the use of the equitable remedy of unjust enrichment for what is "essentially a [legal] contract case." *Id.* If a contract governs a given situation, then the contract – the meeting of the minds between the parties – should govern what is "unjust" rather than leaving this determination to abstract principles. However, that proposition in no way supports the broad notion, propounded by Defendants, that the existence of a contract governing some aspects of a business transaction forecloses any remedy for unjust conduct in any part of the transaction as long as that conduct does not directly violate the contract's terms (however general or inapplicable to the challenged conduct these terms may be).

[32] Defendants' offer a similar, but somewhat different standard, stating that "a plaintiff must allege that the defendants were enriched, the plaintiff was impoverished, a relationship existed between the enrichment and the impoverishment, and there was neither justification nor a remedy provided by law," Defs.' Mot. at 35. However, as *Fleer Corp. v. Topps Chewing Gum, Inc.* 539 A.2d 1060, 1062 (Del. 1988) (cited by Defendants), makes clear, restitution for unjust enrichment may be appropriate "'even though the plaintiff may have suffered no demonstrable losses.'" (citations omitted). Regardless, Plaintiff has met all of the elements of either test – as any gain by Defendants represented an exactly

improperly received and why each of those options was improperly granted. *See* FAC at ¶¶ 33-131. It describes in great detail the precise misconduct that makes the retention of improper gains unconscionable. *See id.* at ¶¶ 132-74. It alleges clearly that Defendants stood to gain millions of dollars more in profits as a result of the conduct challenged in this litigation. *Id.* at ¶ 167. Further, Linear will receive less income than it should upon the exercise of the challenged options, and has suffered other damages from the issuance of these options. *Id.* at ¶ 168. Defendants provide no basis for their bald allegation that Plaintiff has not met the pleading requirement for unjust enrichment. *See* Defs.' Mot. at 35-36. Nor do Defendants provide any support for their assertion that, under a Rule 12(b)(6) standard, Plaintiff must somehow precisely quantify the unjust enrichment at this early stage of the litigation. *See id.* Further, this Court has already decisively rejected Defendants' argument that the issuance of improper options that are unexercised or underwater (as long as they are not expired and thus may have some future value) cannot lead to a claim of unjust enrichment. *See Ryan*, 918 A.2d at 361 (rejecting motion to dismiss unjust enrichment claims where improperly granted options were never exercised). Plaintiff's allegations of unjust enrichment are well pleaded and more than sufficient.

E. Plaintiff Has More Than Adequately Stated a Claim That Director Defendants Breached Their Fiduciary Duties as a Result of Misstatements

The duty to act with honesty in communications with shareholders is well entrenched in Delaware corporate law. Directors have a duty of disclosure to shareholders that arises out of their duties of loyalty and due care. *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998).

Director Defendants breached their fiduciary duty of loyalty by hiding the options manipulation scheme from shareholders while seeking votes re-electing themselves as directors and approving amendments to increase the authorized shares available under Linear's stock option plans. *See Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1277 (Del. 1994) (a fiduciary disclosure obligation "attaches to proxy statements and any other disclosures in contemplation of shareholder action."); *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992) (directors "are under a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action.").

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equivalent loss by the Company (on whose behalf Plaintiff is pursuing this litigation).

As discussed in greater detail above, this Court recently held in *Tyson II* that full disclosure of the challenged conduct was required. Specifically in the context of proxy statements seeking approval of option plans, this Court held:

> When directors seek shareholder consent to a stock incentive plan, or any other quasi-contractual arrangement, they do not do so in the manner of a devil in a dime-store novel, hoping to set a trap with a particular pattern of words. Had the 2000 Tyson Stock Incentive Plan never been put to a shareholder vote, the nature of a spring-loading scheme would constitute material information that the Tyson directors was obligated to disclose when they revealed the grant. By agreeing to the Plan, shareholders did not implicitly forfeit their right to the same degree of candor from their fiduciaries.

2007 WL 2351071, at *4 (emphasis added).

Based on this analysis, this Court held that where the directors lied to shareholders about the true grant date of options the directors breached their fiduciary duty of loyalty:

> Where a board of directors intentionally conceals the nature of its earlier actions, it is reasonable for a court to infer that the act concealed was itself one of disloyalty that could not have arisen from a good faith business judgment. The gravamen of Count III lies in the charge that defendants intentionally and deceptively channeled corporate profits to chosen executive (including members of Don Tyson's family). Proxy statements that display an uncanny parsimony with the truth are not "analytically distinct" from a series of improbably fortuitous option grants, but rather raise an inference that directors engaged in later dissembling to hide earlier subterfuge.
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> * * *
>
> I find that where I may reasonably infer that a board of directors later concealed the true nature of a grant of stock options, I may further conclude that those options were not granted consistent with a fiduciary's duty of utmost loyalty.

Id. at *4-5.

Among other things, as discussed above, Director Defendants disseminated proxy statements that contained material misstatements relating to the manner in which options were granted at Linear. *See* FAC at ¶¶ 146-51. They did so to serve their own interest in being re-elected as directors, as well as to seek shareholder approval of amendments to Linear’s stock option plans to increase the number of authorized shares available to make option grants to themselves as well as to the other Defendants.

Director Defendants’ misrepresentations are utterly inconsistent with their duty of loyalty, which among other things requires honest disclosure to shareholders “of all of the relevant terms and conditions of the proposed plan of compensation, together with any material extrinsic fact within the board's knowledge bearing on the issue." *Lewis v. Vogelstein*, 699 A.2d 327, 333 (Del. Ch. 1997).

Defendants make several arguments in defense of their conduct. First, they allege that Plaintiff has not adequately pleaded that Defendants engaged in the challenged conduct to begin with, so there was no obligation to disclose this conduct. Defs.' Mot. at 36. The adequacy of Plaintiff's pleading is addressed fully above. Second, they argue that Linear's stock option plans and Compensation Committee Reports already adequately disclose the possibility that Director Defendants might engage in the challenged conduct. *Id.* at 36-37. The totally inadequacy of the general "disclosures" in these documents is addressed above. Third, they argue that they were not required to disclosure Linear's stock manipulation because the SEC did not previously require such disclosures. *Id.* at 37. This argument confuses a claim for an SEC rule violation with a claim for breach of fiduciary duty (which is fully independent of SEC disclosure rules). Finally, Defendants argue that they cannot be held liable for violating "evolving standards of corporate governance that did not exist at the time of a prior Board action." *Id.* This argument ignores the fact that the duties of loyalty, candor, and disclosure are not new at all and were well established under Delaware law at the time of the challenged conduct. Under Defendants' way of reasoning, the *Tyson*, *Ryan*, and *Conrad* opinions would also be invalid, since no previous court decision had ever specifically held a defendant liable for backdating or spring-loading of options. On a more general level, under Defendants' theory, directors and officers of Delaware companies would never be held responsible for novel ways of breaching their fiduciary duties that had not been successfully challenged in court prior to the time of the actions. This circular absolution for bad behavior is utterly inconsistent with the broad fiduciary duties of officers and directors.[33]

[33] Not surprisingly, the cases cited by Defendants do not support their untenable position. Defendants' selectively quote *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 697 (Del. Ch. 2005), *aff'd*, 906 A.2d 207 (Del. 2006), for the proposition that applying new "notions of best practices" to decade old behavior may be inappropriate. Defs.' Mot. at 37. However, they neglect to note the that in the next two paragraphs of the opinion, the Court specifically distinguished the "aspirational" best practices of corporate governance that it referred in the passage quoted by Defendants with unchanging fiduciary duties. *See* 907 A.2d at 697-98 (noting that "[u]nlike ideals of corporate governance, a fiduciary's duties do not change over time," and then repeating, "Times may change, but fiduciary duties do not."). As Defendants themselves note, the other cases that they cite to in footnote 33 of their brief

F. **Plaintiff Has More Than Adequately Stated a Claim That Director Defendants Wasted Linear's Corporate Assets**

Plaintiff has adequately stated a claim for waste. Waste has been defined as follows:

> Roughly, a waste entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade. Most often the claim is associated with a transfer of corporate assets that serves no corporate purpose; or for which no consideration at all is received. Such a transfer is in effect a gift.

Brehm v. Eisner, 746 A.2d 244, 263 (Del. 2000).

Vice Chancellor Strine suggested in *Desimone*, that stock option manipulation might lead to a claim for waste, 924 A.2d at 916, and here, Plaintiff alleges that the challenged conduct represented conduct so egregious that it could serve no valid business purpose. *See Tyson II*, 2007 WL 2351071, at *4 ("The Court may further infer that grants of spring-loaded stock options were both inherently unfair to shareholders and that the long-term nature of the deceit involved suggests a scheme inherently beyond the bounds of business judgment."). Linear gave away millions of dollars in improper grants without any consideration for the additional amount that it would have received for properly priced options. The gift of this lost value by Director Defendants to themselves, the other Defendants, and other Linear executives was pure waste.

G. **Demand is Excused in This Case**

At the very end of their brief, in four boilerplate pages, Defendants argue that demand was not excused. Presumably this decision to downplay what would normally be a primary defense in a derivative lawsuit reflects the reality that, assuming the Court determines that Plaintiff has stated claim under 12(b)(6), there is very little argument that the Board here is not conflicted and that demand is not excused.

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address reliance on SEC rules or violations of specific NASD rules – not general issues of fiduciary duty. *See*, Defs.' Mot. at 37 n.33. Further, *Lewis v. Vogelstein* itself notes that its holding applies to a very technical and nuanced issue of option price calculation, and not to general principles of fiduciary disclosure duties. 699 A.2d at 332 ("But while it is unquestionably the case that corporation law plays an important part in the development of public policy in the area of directors' legal relations to corporations and shareholders, including disclosure law, it does not follow that the fiduciary duty of corporate directors is the appropriate instrument to determine and implement sound public policy with respect to this

Under Delaware Court of Chancery Rule 23.1, a derivative plaintiff seeking to bring claims on behalf of a company must first either make demand on the company's board that the board itself bring these claims or must show that demand would be futile. "[I]n determining demand futility the Court of Chancery in the proper exercise of its discretion must decide whether, under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984), *overruled on other grounds*, *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000).[34] Further, while the requirement of pleading "particularized facts" under Rule 23.1 is more "stringent" than standard notice pleading, "the pleader is not required to plead evidence." *Brehm*, 746 A.2d at 254.[35] This two-part test is satisfied on a number of bases as discussed below.

As alleged in the FAC, all five Linear board members at the time suit was filed received challenged options. FAC at ¶ 177. They face a substantial likelihood that they will lose millions of dollars in profits from these options and are thus not disinterested. *See, e.g., Pogostin v. Rice*, 480 A.2d 619, 624 (Del. 1984) (finding that a director is interested as a matter of law "whenever divided loyalties are present, or a director either has received, or is entitled to receive, a personal financial benefit from the challenged transaction which is not equally shared by the stockholders."), *overruled on other grounds*, *Brehm*, 746 A.2d at 254.[36]

Additionally, three of these five directors – Defendants Lee, Moley, and Volpe, were directly responsible for issuing the challenged options as members of the Compensation Committee. FAC at ¶

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technical issue.")

[34] It might be argued that insofar as the actions of the Compensation Committee and not the whole board are challenged in this action, the single prong test of *Rales v. Blasband*, 634 A.2d 927 (Del. 1994), would apply. However, because, as discussed below, three of the five current directors served on the Compensation Committee throughout the entire relevant period, the actions of the Compensation Committee are imputed to the entire board and the two-prong *Aronson* test is applied. *See Ryan*, 918 A.2d at 353.

[35] As noted above, most of Defendants' motion is covered by the more liberal 12(b)(6) standard. However, the substantial factual allegations presented in the Complaint more than meet the more stringent Rule 23.1 standard as well.

[36] Defendants' half-hearted argument that these directors are not conflicted for grants that they did not receive lacks merit. *See* Defs.' Mot. at 46. Any case brought by Linear for manipulated options would ultimately include all manipulated options, including those received by directors – so none of the

180. They thus face a substantial likelihood of liability for these actions and are conflicted. *See, e.g.*, *Conrad*, 2007 WL 2593540, at *8-9 (finding Compensation Committee members of Staples, Inc. to be conflicted where they approved allegedly back-dated options). Defendants argument that *Desimone* counsels a different result is meritless. In that case, Vice Chancellor Strine found that there were insufficient allegations as to what role the Compensation Committee members had in approving options and insufficient evidence to suggest that Compensation Committee members would have been aware that options were being back-dated. 924 A.2d at 938, 942. Here, however, as in *Conrad*, and not as in *Desimone*, the Compensation Committee had exclusive control over the challenged option grants and could not delegate its authority. *Compare Conrad*, 2007 WL 2593540, at *8 (Compensation Committee had full and exclusive control over option grants) *and* FAC at ¶¶ 134, 137, 156 (same), *with Desimone*, 924 A.2d at 942 (option granting likely delegated to non-directors). Further, here, as in *Conrad*, and not as in *Desimone*, there is substantial evidence to suggest that the Compensation Committee was fully aware that it was manipulating options. *Compare Desimone*, 924 A.2d at 942 (no facts pled that can lead to inference that Compensation Committee knowingly granted back-dated options) *with Conrad*, 2007 WL 2593540, at *8 (finding that more detailed allegations than were alleged in *Desimone* allow inference of knowing back-dating). In the case at bar, the Compensation Committee members were directly involved in both the options grants and (in their role as board members) the quarterly earnings releases – which were a focus of attention at Linear. FAC at ¶ 158. They received manipulated options themselves. *Id.* at ¶ 157. Further, the striking decade-long pattern of granting options before good news and after bad news is extraordinarily unlikely to have occurred by chance. The only way that Compensation Committee members could have approved the 22 challenged grants without being aware of their favorable timing vis-à-vis quarterly announcements would have been if Committee Members were fast asleep at the switch in gross abdication of their duties to Linear and its shareholders. *See id.* at ¶ 158; *see also Ryan*, 918 A.2d at 355 n.35 (noting that compensation committee members were surely aware (or should have

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directors are disinterested.

been aware) that the options that they granted were backdated and that granting these options violated their duty of loyalty)

Finally, despite protestations to the contrary by Defendants, *see* Defs.' Mot. at 46-47, the case law makes clear that the conduct challenged here could not be the product of a valid exercise of business judgment. In analyzing allegations of three spring-loaded options over the course of two and one half years, Chancellor Chandler stated in Tyson II, "[t]he Court may further infer that grants of spring-loaded stock options were both inherently unfair to shareholders and that the long-term nature of the deceit involved suggests a scheme inherently beyond the bounds of business judgment." 2007 WL 2351071, at *5. This comment applies all the more strongly to the allegations here, which cover 22 manipulated options over the course of a decade.

For all of the above reasons, as well as those additional reasons set out in the Complaint, *see* FAC at ¶¶ 175-81, demand is excused in this case.[37]

H. <u>The Claims in This Case are not Time Barred</u>

Plaintiff's claims are not time barred because the limitations period may be tolled, as Defendants openly acknowledge, where, as here, a plaintiff could not reasonably have discovered the injury at issue. *See, e.g., Ryan,* 918 A.2d at 359. Contrary to Defendants' contentions, Plaintiff has sufficiently demonstrated that the doctrines of equitable tolling and fraudulent concealment apply in this case and operated to toll the statute of limitations.

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[37] It is worth noting that the Company has already apparently conducted a review of its option practices and found noting wrong. According to the Company's most recent 10-K:

> The Company reviewed its historical option-granting practices and option grants with the assistance of outside counsel and an independent forensic accounting firm. The primary scope of the review covered the periods calendar year 1995 through 2006. Based on the findings of the review, the Company has concluded that there is no need to restate any previously filed financial statements. The review found no evidence of fraud or misconduct of any kind in the Company's practices in granting of stock options.

Exhibit 1. Insofar as this review was conducted by the current directors (the 10-K provides no details about this review), it may well be that these directors are conflicted from considering demand because they have already shown that they are not able to properly investigate this matter. *See Conrad*, 2007 WL 2593540, at *9 n.32 (noting the "interesting" question of the implications for demand futility of a whitewashed internal investigation of the same conduct challenged in litigation.)

The doctrine of fraudulent concealment "requires an affirmative act of concealment by a defendant-an 'actual artifice' that prevents a plaintiff from gaining knowledge of the facts or some misrepresentation that is intended to put a plaintiff off the trail of inquiry." *Ryan*, 918 A.2d at 360 (citing *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5-6 (Del. Ch.)). This Court has held, in the context of spring-loaded options, that allegations that a defendant knowingly manipulated stock-option grants "while maintaining in public disclosures that such options were issued at market rates" is more than sufficient to satisfy the requirements of fraudulent concealment. *Tyson I*, 919 A.2d at 590. In so ruling, the *Tyson* court noted that allegations of such partial, selective disclosure concerning option grants demonstrates sufficient trickery to establish fraudulent concealment. *Id; see also Ryan*, 918 A.2d at 360 (finding statute of limitations tolled in options back-dating case due to fraudulent concealment). As discussed above, the identical trickery is alleged in this case in the identical context. As such, Plaintiff has adequately pleaded fraudulent concealment. *In re Tyson*, 919 A.2d at 590.

Further, the allegations in the FAC also justify a finding of equitable tolling. Under this doctrine, the statute of limitations is tolled "for claims of wrongful self-dealing, even in the absence of actual fraudulent concealment, where a plaintiff reasonably relies on the competence and good faith of a fiduciary." *In re Dean Witter*, 1998 WL 442456, at *6. Again, the *Tyson* court has spoken directly to this issue, stating:

> It is difficult to conceive of an instance, consistent with the concept of loyalty and good faith, in which a fiduciary may declare that an option is granted at 'market rate' and simultaneously withhold that both the fiduciary and the recipient *knew* at the time that those options would quickly be worth much more.

In re Tyson, 919 A.2d at 590-91 (emphasis in original). As discussed above, this statement is equally applicable to the case at bar.

Not only does the *Tyson* decision squarely address the issue of tolling, but also the court expressly rejected the very argument Defendants have raised here. Defendants contend that the disclosure of the option grants and the corresponding grant dates along with the availability of the various press releases was sufficient to place Plaintiff on inquiry notice and that this information should have been analyzed by Plaintiff when it was made available. The *Tyson* court rejected this same argument, noting “it would be inappropriate to infer that plaintiffs were on inquiry notice of injury simply because *some* relevant information was in the public domain. *In re Tyson*, 919 A.2d at 591 (emphasis added). The Court further ruled:

> [I]t would be manifest injustice for this Court to conclude, as a matter of law, that ‘reasonable diligence’ includes an obligation to sift through a proxy statement, on the one hand, and a year’s worth of press clippings and other filings, on the other, in order to establish a pattern concealed by those whose duty is to guard the interests of the investor.

Id. at 591. Defendants’ contention that Plaintiff was on inquiry notice because he should have gone through the various public filings and analyzed the options grants in conjunction with the issuance of press releases is unsupported by the law in this area. *Id.* In fact, Defendants’ attempt to distinguish the *Tyson* case on this point is without merit. The only distinction proposed is that the grants at issue here are associated with quarterly earnings announcements – whereas those in *Tyson* were purportedly not. *See* Defs.’ Mot. at 31-32. In fact, two of the four *Tyson I* grants were made in conjunction with quarterly earnings announcements. Even if this were not the case, Defendants provide no indication why this supposed distinction makes any difference, since they do not allege, nor can they, that the options grants were publicly announced in the same documents as the quarterly earnings announcements, or that they were even announced contemporaneously – much less that any announcement mentioned a decade-long pattern of spring-loading and bullet-dodging.[38]

[38] Option grants were announced in separate Forms 4 that gave no indication of any connection to quarterly earnings announcements. Prior to 2002, corporate officers and directors were only required by law to report their receipt of these options to the SEC, on Form 4s, within 10 business days of the end of the month in which they received them. 15 U.S.C. § 78p (2001). For most of the challenged grants, these forms were available only in paper copy through a request to the SEC. The Court may take judicial notice that the earliest Form 4 available for Linear on the SEC’s Edgar Web site (http://www.sec.gov/edgar/searchedgar/companysearch.html) is dated July 24, 2003. Many grants were also not even properly reported on Forms 4. For example, the grant on October 16, 1996 to Louis Dinardo was not reported publicly anywhere until he filed a Form 4 on December 9, 1998 indicating that he had exercised some of these options on November 24, 1998. Finally, the particular pattern challenged here is subtle and involves manipulations of only a few days for each grant. Not only would Plaintiff have had to figure out that the grants were made in conjunction with quarterly earnings announcements, but also that the grants were made before positive announcements and after negative announcements. Analysts at Merrill Lynch, a world-class financial institution, failed to pick-up on this pattern and suggested instead that Linear Management’s favorable returns from their options were the product of back-dating. *See* Exhibit 3. Further, a suit was filed against Linear on June 7, 2006 in state court in California based on the theory that the same options challenged here were back-dated (rather than spring-loaded and bullet-dodged), and that complaint was not amended to allege spring-loading or bullet-

Finally, the cases relied on by Defendants are distinguishable. In those cases, many of the core facts in the plaintiffs' claims had been openly discussed in public filings. In the *Dean Witter* case, the court addressed allegations concerning the performance and management of a partnership. There, the partnership's annual reports had disclosed that capital and net income were declining and created inherent discrepancies with other information in those same reports, which should have raised red flags to the plaintiff. *In re Dean Witter*, 1998 WL 442456, at *6-8. Likewise, the *Albert v. Alex Brown Mgmt. Servs., Inc.*, 2005 WL 1594085 (Del. Ch.), decision, cited by Defendants, involved claims relating to the mismanagement of two exchange funds. In that case, the semi-annual reports had disclosed, among other things, that the funds were heavily invested in technology stocks and described the funds' hedging strategies, which were issues directly challenged by the complaint.[39] *Id.* Defendants' attempts to stretch those holdings and apply them to this case are baseless.

I. Defendants' Misplaced Arguments About a Lack of "Particulars" in the Complaint do not Detract From the Sufficiency of the Complaint

The first section of Defendants' brief provides a laundry list of items for which Plaintiff has supposedly not "provide[d] particulars." The arguments in this section are an irrelevant distraction to the issues presented in this case.

First, as noted above, the standard of Rule 12(b)(6) applies to all of Defendants' arguments except for the short section at the end dealing with demand futility, which is governed by Rule 23.1. Rule 12(b)(6) does not require pleading with particularity, and, as quoted above, "even vague allegations are 'well-pleaded' if they give the opposing party notice of the claim." Of course, as discussed throughout this brief, Plaintiff has adequately supported his spring-loading and bullet-dodging claims.

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dodging until after the initial complaint was filed in this case. *See* Exhibit 6 at 1-2. As this Court has previously held, the fact that no one uncovered a stock option manipulation scheme until years after it began is itself further evidence of fraudulent concealment. *See Ryan*, 918 A.2d at 360 n.60. For all of these reasons, Defendants' assertion that Plaintiff (or another diligent shareholder) could have easily uncovered the challenged option grant pattern starting back in 1996 (or even in 2005) if only he was a bit curious is pure nonsense.

[39] For the same reasons, the other cases cited by Defendants, *see* Defs.' Mot. at 34 n. 31, are likewise distinguishable from the circumstances and facts of this case.

Second, Plaintiff does not disagree that they do not provide particulars for many of the items on Defendants' list for the simple reason that these items do not form a part of the claims that Plaintiff does make. Whether Plaintiff might have filed a Complaint that did bring different claims is irrelevant to a motion to dismiss that claims that were brought. Some of Defendants' arguments in this section are addressed elsewhere in this brief as appropriate, but a few points are worth quickly noting here:

- The fact that Plaintiff did not sue Louis Dinardo, Robert Reay, Robert Swartz, Richard Nickson, and David Quarles, *see* Defs.' Mot. at 9, has nothing to do with the claims that Plaintiff brings against those Defendants that Plaintiff did sue. Defendants provide no authority for any challenge to Plaintiff's discretion as to who *not* to sue.[40]
- The fact that Plaintiff does not assert that any of the challenged options were classified for accounting purposes as Incentive Stock Options (ISOs) (as compared to Non-statutory Stock Options (NSOs)), *see* Defs.' Mot. at 11, is totally irrelevant to the case. As noted in the Complaint, the identical relevant restrictions apply to the pricing of both types of options. *See* FAC ¶¶ 132-45.
- The fact that Plaintiff does not allege that the challenged actions were *ultra vires* or that that they violated tax laws, accounting rules, SEC Rules, or the strict letter of Linear's stock option plans, *see* Defs.' Mot. at 1, 11-16 does not undermine or defeat Plaintiff's claims of breach of fiduciary duty, waste, and unjust enrichment should be sustained.[41]

In short, Plaintiff requests that the Court address the claims actually made in the Complaint before the Court and ignore Defendants' cavils as to other claims that might (or might not) have been made in a different complaint.

[40] Defendants' challenge to the decision not to include these individuals in the Complaint is thick with irony. In at least most cases, Plaintiff does not believe that there would be jurisdiction in Delaware over these individuals for the claims that are in the Complaint – a point that Defendants' counsel would surely have raised if claims against these individuals had been brought.

[41] Defendants never suggest, because they cannot, that the SEC or IRS has ever affirmatively endorsed practices like those challenged. At best, they argue that they did not violate the specific terms of any tax laws or SEC Rules. If anything, Defendants appear to concede that their lack of disclosure of the true nature of Linear's option granting practices would have violated the SEC's new disclosure rules if they had been in place at the time. *See* Defs.' Mot. 15-16.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully request that the Court deny Defendants' Motion to Dismiss.

ROSENTHAL, MONHAIT & GODDESS, P.A.

/s/ Jessica Zeldin

Norman M. Monhait (Del. Bar No. 1040)
Jessica Zeldin (Del. Bar No. 3558)
919 Market Street, Suite 1401
Citizens Bank Center
P.O. Box 1070
Wilmington, Delaware 19899
(302) 656-4433
Attorneys for Plaintiff

OF COUNSEL:

Thomas G. Shapiro
Edward F. Haber
Michelle H. Blauner
Robert E. Ditzion
SHAPIRO HABER & URMY LLP
53 State Street
Boston, MA 02109

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