



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

_____)
 Walter E. Ryan, Jr., in the right of and the)
 benefit of MAXIM INTEGRATED)
 PRODUCTS, INC.,)
)
 Plaintiff,)
)
 v.)
)
 JOHN F. GIFFORD, JAMES R. BERGMAN,)
 B. KIPLING HAGOPIAN, A.R. FRANK)
 WAZZAN, ERIC P. KARROS, M.D.)
 SAMPELS,)
)
 Defendants,)
)
 and)
)
 MAXIM INTEGRATED PRODUCTS, INC.,)
)
 Nominal Defendant.)
 _____)

Civil Action No. 2213-N

**INDIVIDUAL DEFENDANTS' OPENING BRIEF
IN SUPPORT OF THEIR MOTION TO DISMISS OR STAY**

OF COUNSEL:
QUINN EMANUEL URQUHART
OLIVER & HEDGES, LLP
John M. Potter (Cal. Bar No. 165843)
50 California Street, 22nd Floor
San Francisco, California 94111
Tel: (415) 875-6600

POTTER ANDERSON & CORROON LLP
Peter J. Walsh, Jr. (DSB ID No. 2437)
Timothy R. Dudderar (DSB ID No. 3890)
Hercules Plaza, 6th Floor
1313 North Market Street
Wilmington, Delaware 19801
Tel: (302) 984-6000

Attorneys for Individual Defendants

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PRELIMINARY STATEMENT

Armed with nothing more than a Merrill Lynch analyst report that speculated about certain companies on the Philadelphia Semiconductor Index whose stock returns the analyst found "notable," plaintiff filed this derivative lawsuit against an officer and current and former directors of Maxim Integrated Products, Inc. ("Maxim" or the "Company"). According to plaintiff, "the Merrill Lynch research demonstrates that options were backdated." This case concerns plaintiff's assertion that the directors of Maxim breached their fiduciary duties because they allegedly approved and authorized backdated stock options to Jack Gifford, the Chairman of the Board and Chief Executive Officer of the Company. Plaintiff raced to the courthouse to file suit without meeting the procedural requirements of a derivative action.

Plaintiff's rush to the courthouse was too late. Four derivative actions are now pending in federal court in Maxim's home district in California. Maxim has also been sued derivatively in California state court. All of these knee-jerk lawsuits were apparently spawned by the same Merrill Lynch analyst report. Two of the federal actions were filed weeks before this action and all of them are now proceeding as a consolidated federal action. Moreover, the consolidated federal derivative action contains claims under the federal securities laws as well as the same state law claims asserted here.

The consolidated federal derivative action and the California state court action arise from the same core nucleus of operative facts involved in this action: allegations that old stock-option grants from the late 1990s and early 2000s were backdated. Resolution of the first-filed consolidated federal derivative action will either resolve all of the claims alleged in this action or will substantially narrow them.

This Court has repeatedly held that "justice is ill-served when litigation proceeds contemporaneously in a number of courts." *Basner v. Gillette Co.*, 1987 WL 12898, at *2 (Del.

Ch.). To avoid this result, the Supreme Court of Delaware held in *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281 (Del. 1970) that, as a general rule, litigation should be confined to the jurisdiction in which it is first filed. *Id.* at 283. *McWane* should be followed here and this action should be dismissed or stayed. If the Court declines to apply *McWane*, it should apply the *forum non conveniens* factors and stay the action on that basis.

In the event the Court does not dismiss or stay this action in light of the earlier-filed actions, it should dismiss it on the merits. Before initiating this derivative action, plaintiff was required to make a demand on the Company to request that the Board of Directors investigate his allegations. Plaintiff made no demand, blithely alleging that he was excused from making such a demand. This assertion fails, as plaintiff's boilerplate and conclusory demand futility allegations do not approach the standard Delaware requires to be excused from demand. Plaintiff's complaint fails on demand-futility grounds.

The complaint also fails because it does not meet the requirements of Delaware Chancery Court Rule 23.1, which requires that, to have derivative standing, a plaintiff must have owned stock in the subject corporation at the time *each* of the transactions alleged in the complaint. Plaintiff complains of nine (9) stock-option grants to Gifford during the period from 1998 through 2002. Plaintiff did not become a Maxim shareholder until April 11, 2001, when his shares of Dallas Semiconductor were converted by contract into Maxim shares at the time Maxim acquired Dallas Semiconductor. Only two of the subject option transactions occurred after April 11, 2001. Because Delaware law requires a derivative plaintiff to have been a stockholder at the time of the transaction he challenges, plaintiff lacks standing to assert claims concerning seven of the nine grants.

Furthermore, plaintiff's breach of fiduciary duty claim does not come close to overcoming the business judgment rule nor does it state a claim for breach of the duty of loyalty. Beyond the business judgment rule's strong protections, Delaware law further bars claims for breach of fiduciary duty unless a director violates his duty to the company by acting intentionally, in bad faith, or for personal gain. The complaint is devoid of any such particularized allegations.

Plaintiff's unjust enrichment claim similarly fails. He does not allege that Gifford ever exercised an option or sold a share of stock to become enriched. He also fails to articulate how Gifford was unjustly enriched to the detriment of Maxim.

Finally, plaintiff's claims are barred by the statute of limitations. Plaintiff complains of stock-option grants dating back nearly 10 years, yet the Merrill Lynch report on which the complaint is based was prepared using publicly-available information plaintiff could have reviewed years ago. The Court should not permit these stale claims to proceed.

FACTS ALLEGED IN THIS DELAWARE ACTION

Plaintiff Filed this Action in Mid-June 2006. Plaintiff filed this action on June 12, 2006.

Maxim Is a Successful Technology Company. Nominal Defendant Maxim is a publicly-held Delaware corporation. Maxim is a technology company in the business of developing, manufacturing and marketing linear and mixed-signal integrated circuits. Cmpl. ¶ 20.

The Individual Defendants. The six individual defendants are all current or former officers and/or directors of Maxim. *Id.* ¶¶ 14-19. Defendant Gifford, an entrepreneur, is a founder of the company and has been CEO since the Company's inception. *Id.* ¶ 14.

Plaintiff Became a Maxim Shareholder by Virtue of an Acquisition. Plaintiff is an Illinois resident. He was previously a shareowner of Dallas Semiconductor. *Id.* ¶ 13. He did not become a shareowner of Maxim until April 11, 2001 when Maxim acquired Dallas Semiconductor and plaintiff's shares were converted to Maxim shares. *Id.* ¶ 13.

Plaintiff's Unsubstantiated Backdating Allegations. Plaintiff's allegations in this lawsuit all center around his assertion that six members of the Board of Directors approved nine (9) stock option grants spanning from 1998 to 2002 to Defendant Gifford that were backdated. *Id.* ¶¶ 31-39. Specifically, plaintiff asserts that the recorded date of the stock option grants was not the actual date of the grants, but that the Company looked back in time to select the grant date because the stock was at a low point. *Id.* ¶ 28 & 42.

Plaintiff's "Evidence" of Backdating. Plaintiff grounds his backdating allegations on a Merrill Lynch report written by Merrill Lynch analyst Joe Osha. *Id.* ¶ 4 & Ex. A. Apparently on a whim, this analyst performed a review of companies on the Philadelphia Semiconductor Index to look for "excess returns" because according to this analyst, "[t]hat's the easiest and simplest way to measure how aggressive the timing of options grants has been." *Id.*, Ex. A, p. 1. According to the analyst, he believed that Maxim ranked as number 7 on his list of the 16 companies he studied and that several other companies' returns were also "notable." *Id.*, Ex. A p. 2-3. He cautioned that, "[w]e want to emphasize that we're not taking any position in this report on whether companies have actually backdated options or not—the records that we have access to aren't sufficiently detailed to reach that judgment." *Id.*, Ex. A p. 2 (emphasis added). Despite the lack of *any* evidence of backdating, plaintiff filed this lawsuit, alleging that "the Merrill Lynch research demonstrates that options were back-dated." *Id.* ¶ 9.

The Supposed Impact of the Alleged Backdating. Plaintiff alleges on information and belief that the backdating of stock options affected Maxim's financial statements. While plaintiff's allegations are unclear, he apparently means to allege that, pursuant to accounting rules in place at the time, Maxim should have taken a compensation charge if the effect of the alleged backdating was to grant options at below fair market value. *Id.* ¶ 44. Plaintiff also asserts vague allegations that Gifford was unjustly enriched to the detriment of Maxim because it received "less money from Defendant Gifford when he exercised his options at prices substantially lower than he would have if the options had not been back-dated." *Id.* ¶ 42.

Plaintiff Fails to Allege any Stock Was Sold. Plaintiff's allegations are specifically directed at options that were granted to Gifford. He fails to allege that any stock option was actually exercised or that any stock underlying such stock option grants was ever sold.

THE SIMILAR ACTIONS PENDING IN CALIFORNIA

The Earlier-Filed Federal Derivative Action

The Federal Action Was Filed First. On May 22, 2006, three weeks before this action was filed, a shareholder derivative suit was filed in the United States District Court for the Northern District of California by Robert McKinney, alleging that Maxim had improperly backdated stock options from 1995 to 2001. Declaration of Timothy R. Dudderar ("Dudderar Decl.") ¶ 2 & Ex. A. Two days later, on May 24, 2006, another plaintiff, Eugene Horkay, Jr., filed an identical derivative complaint in the Northern District of California, containing the same allegations. *Id.* ¶ 3 & Ex. B (collectively, "*McKinney* and *Horkay* complaints").

Subsequent Federal Actions Have Been Consolidated with the First-Filed Federal Action. On June 14, 2006, the *McKinney* and *Horkay* actions were consolidated, and, under the court's consolidation order, all future related actions would be consolidated with the *McKinney*

and *Horkay* actions. *Id.* ¶ 4 & Ex. C. The same day as the federal court entered this consolidation order, two additional derivative complaints were filed in the Northern District of California, one by alleged shareholder Elias Corey, and another by alleged shareholder City of Pontiac Policemen’s and Firemen’s Retirement System. *Id.* ¶¶ 5-6 & Exs. D & E (collectively, “*Corey* and *Pontiac* complaints”). Under the court’s June 14, 2006 order, these actions will be consolidated with the earlier-filed federal actions. All four derivative plaintiffs have also now stipulated to consolidate their actions and agreed to a lead plaintiff structure and lead counsel structure. *Id.* ¶ 7 & Ex. F (collectively, the “Federal Derivative Action”). The defendants have since entered into a stipulation—which has since been entered as a court order—with plaintiffs establishing a schedule for the filing of a consolidated complaint and a briefing schedule to attack that complaint in the Federal Derivative Action. *Id.*, Ex. G.

The Nature of the Federal Derivative Action. The Federal Derivative Action shares a common nucleus of operative facts with this action. The Federal Derivative Action, like this action, alleges that Maxim backdated stock options. *McKinney & Horkay* Cmpls. at 2; *Corey & Pontiac* Cmpls. at 1-2. The allegedly backdated options that are the subject of the Federal Derivative Action were allegedly granted not just to Gifford, but also to several other officers of Maxim. *McKinney & Horkay* Cmpls. at 7-8; *Corey & Pontiac* Cmpls. at 15-17.

The federal derivative plaintiffs’ allegations were based on an alleged pattern of option grants that occurred on dates when plaintiff asserts the stock price was low. The *McKinney* and *Horkay* complaints presented charts of Maxim’s stock-price fluctuations surrounding ten option grant dates. (These charts appear to have been cut-and-pasted from the same Merrill Lynch analyst report that the plaintiff in this action relies upon. Compare *McKinney & Horkay* Cmpls. at 9-12 with *Ryan* Cmpl., Ex. A.) Similarly, Corey and City of Pontiac also provided charts

showing the Maxim stock price fluctuations surrounding particular grants, and asserted that based on such charts, the timing of the options grants "was clearly more than merely coincidental." *Corey & Pontiac* Cmpls. at 17-19 & 29.

The Federal Derivative Action, like this action, further asserts that Maxim did not correctly follow its option plan, did not correctly incur a compensation expense for the allegedly backdated options, and did not correctly avail itself of provisions in the *Internal Revenue Code*. *McKinney & Horkay* Cmpls. at 8; *Corey & Pontiac* Cmpls. at 21-22.

The Federal Derivative Action Names Several Officers and Directors of Maxim as Defendants. The Federal Derivative Action asserted that several officers and directors of Maxim were responsible for the Company's alleged backdating of options. Derivative plaintiffs McKinney and Horkay alleged claims against several officers of Maxim: John Gifford, the Chairman of the Board and Chief Executive Officer, and also a member of the Board of Directors; Frederick Beck, a Vice President of Maxim; Tunc Doluca, a former Vice President and a current Group President; Ziya Boyacigiller, a former Vice President; Pirooz Parvarandeh, a former Vice President and a current Group President, and Richard C. Hood, a Vice President. *McKinney & Horkay* Cmpls. at 3-4. Derivative plaintiffs Corey and City of Pontiac also asserted claims against Gifford, Beck, Doluca, Parvarandeh, and Hood, and also brought suit against Carl Jasper, the Chief Financial Officer and Vice President. *Corey & Pontiac* Cmpls. at 4-7.

The federal derivative plaintiffs also brought suit against the members of Maxim's Compensation Committee at the time the option grants in the complaint were made: James Bergman, A.R. Frank Wazzan, and B. Kipling Hagopian. *McKinney & Horkay* Cmpls. at 4-5; *Corey & Pontiac* Cmpls. at 7-9. Corey and the City of Pontiac also asserted claims against

Michael Byrd and Peter de Roeth, both of whom are current Board members. *Corey & Pontiac* Cmpls. at 8.

The Federal Derivative Action Includes Federal Securities Claims. There are numerous state law claims in the Federal Derivative Action. Like in this action, the Federal Derivative Action asserts claims against both the director defendants and officer defendants for breach of fiduciary duty and unjust enrichment. The Federal Derivative Action also includes claims for aiding and abetting breach of fiduciary duty, abuse of control, gross mismanagement, constructive fraud and corporate waste. *Corey & Pontiac* Cmpls. at 32-35.¹

The federal derivative plaintiffs also alleged a claim against the officer and director defendants under section 10(b) of the Exchange Act and Rule 10b-5. *McKinney & Horkey* Cmpls. at 19; *Corey & Pontiac* Cmpls. at 30-31. Corey and City of Pontiac also alleged that the defendants violated section 14(a) of the Exchange Act and Rule 14a-9, concerning Maxim's proxy statements. *Corey & Pontiac* Cmpls. at 31.

The California State Court Derivative Action

Another plaintiff, Louisiana Sheriff's Pension & Relief Fund, has a derivative action in California state court. The California state court action, which names sixteen (16) defendants, including all of the defendants in this (Delaware) action, was filed on June 16, 2006. Dudderar Decl., Ex. H. It lodges similar allegations as the Federal Derivative Action and this action. *Id.*

¹ Plaintiffs have also brought insider selling claims under *California Corporations Code* section 25402 against most of the defendants, asserting that the defendants traded in Maxim's stock with material information regarding Maxim's allegedly improper accounting of the allegedly backdated options. *Corey & Pontiac* Cmpls. at 36-37. Corey and City of Pontiac also demanded an accounting of all stock option grants, and sought rescission of the allegedly backdated options. *Id.* at 32-33 & 36.

ARGUMENT

I. PRINCIPLES OF COMITY DICTATE THAT THIS ACTION SHOULD BE STAYED UNDER THE *MCWANE* DOCTRINE

The Court should dismiss or stay this action because it is already proceeding elsewhere. Under the "First-Filed Rule," this Court has broad discretion to stay litigation in favor of a prior action involving the same or similar parties and issues, which is pending in a court capable of doing prompt and complete justice. *See McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281 (Del. 1970).

While the decision to stay an action is discretionary, the Supreme Court held in *McWane* that, "as a general rule, litigation should be confined to the forum in which it is first commenced. . . ." *McWane*, 263 A.2d at 283. This result is compelled "by considerations of comity and the necessities of an orderly and efficient administration of justice." *Id.* (footnote omitted); *see also Schnell v. Porta Sys. Corp.*, 1994 WL 148276 (Del. Ch.).² As stated in *McWane*, the goal is to

avoid[] the wasteful duplication of time, effort, and expense that occurs when judges, lawyers, parties, and witnesses are simultaneously engaged in the adjudication of the same cause of action in two courts. Also to be avoided is the possibility of inconsistent and conflicting rulings and judgments and an unseemly race by each party to trial and judgment in the forum of its choice.

McWane, 263 A.2d at 283.

In recognition of these important policy considerations, this Court's discretion whether to grant a stay of its proceedings "should be exercised freely in favor of the stay . . ." *Id.*; *see also Marciano v. Nakash*, 1985 WL 11573, at *2 (Del. Ch.). The Court should exercise its discretion here and stay or dismiss the action.

² All unreported decisions cited herein are in the Compendium of Unreported Decisions filed concurrently herewith.

A. The Federal Derivative Action Can Adequately Protect the Alleged Interests of the Delaware Plaintiff.

It is axiomatic that the *McWane* doctrine is most useful in class and derivative actions because such actions present the greatest probability for identical claims to be presented to multiple courts at the same time. As such, a stay of this derivative action is clearly warranted. The federal district court in California has already consolidated four similar actions and the plaintiffs have agreed among themselves on a plaintiff and lead-counsel structure.

Moreover, it would be more efficient to have the Federal Derivative Action proceed first because this derivative action and the Federal Derivative Action share a common nucleus of facts; indeed, this action is narrower than the Federal Derivative Action and contains a subset of the facts alleged in California. As a result, it would be wasteful and inefficient for the same set of facts to be adjudicated in multiple fora.

B. Each McWane Factor Favors A Stay.

The Federal Derivative Action was filed first, and consideration of each *McWane* factor strongly weighs in favor of deferring to the federal proceedings.

1. The Federal Derivative Action Is First-Filed.

It is undisputed that the Federal Derivative Action is “first-filed.” Two of the four federal actions that constitute the Federal Derivative Action, *McKinney* and *Horkay*, were filed several weeks before this Delaware action.³ The federal court in California subsequently entered an order consolidating any future federal action that was filed in that court with *McKinney* and *Horkay* in one consolidated action, and two later derivative actions were then filed in the federal forum. Accordingly, any litigation related to the alleged wrongdoing of Maxim’s directors

³ The Court may take judicial notice of these complaints in connection with this motion. See D.R.F. 201(b); *In re Wheelabrator Techs., Inc. S’holders Litig.*, 1992 Del. Ch. LEXIS 196, *39-40 (Del. Ch.).

concerning alleged stock option backdating should be confined to the forum of first choice—the United States District Court for the Northern District of California. *E.I. du Pont de Nemours & Co. v. Cigna Property & Cas. Co.*, 1992 WL 171427, at *4 (Del. Ch.) (noting “strong preference for the litigation of a dispute between named parties in [the] forum in which suit is first instituted . . . ”); *Corwin v. Silverman*, 1999 WL 499456 (Del. Ch.) (granting stay in favor of first-filed class action in federal court).

2. The Federal Court in California Is Capable Of Doing Complete Justice.

There is no question that the federal court in California is capable of doing complete justice concerning the pending claims against the individual defendants. *See In re Westell Techs., Inc.*, 2001 WL 755134 (Del. Ch.) (noting “without hesitation” that federal court was capable providing complete justice to parties.). A federal court is an appropriate forum for deciding issues relating to the federal securities laws, and the first-filed Federal Derivative Action contains securities claims. *See Issen & Settler v. GCS Enter., Inc.*, 1981 WL 15131, at *4 (Del. Ch.) (where first-filed action in federal court alleges Securities Act violations, “U.S. District Court, which has exclusive jurisdiction over these matters, is the only forum capable of granting complete relief on all the issues arising out of the transactions which are the subject of this litigation”).

While the complaint here purports to raise issues of Delaware fiduciary-duty law, it is settled that federal courts are perfectly capable of applying Delaware law. *See Draper v. Paul N. Gardner Defined Plan Trust*, 625 A.2d 859, 868-69 (Del. 1993) (“It does not follow [] that the courts of Delaware are the only courts which may adjudicate questions of Delaware corporation law”); *Corwin*, 1999 WL 499456, at *6 (“To the extent plaintiffs fear that the [federal court] will do violence to Delaware law, this Court does not share that concern. Federal courts have

proven time and again their ability to apply and even extend Delaware law in appropriate ways”) (citations omitted). As a result, the mere presence of issues of Delaware corporation law should not factor against the applicability of the first-filed rule of *McWane*.

3. This Action and the Federal Derivative Action Involve The Same Issues Of Fact And Similar Issues Of Law.

The Federal Derivative Action and this action share a common nucleus of operative facts; indeed, the Federal Derivative Action is broader. In both actions, the pleadings allege that Maxim granted backdated stock options, that Maxim's directors breached their fiduciary duties in authorizing such options, and that defendant Gifford was a recipient of such options.

(a) Both Actions Center on Alleged Backdating.

Just as in the Federal Derivative Action, plaintiff here points to an alleged “multi-year pattern” of option grants that occurred on dates when the stock price was low. Cmpl. at 7. Plaintiff relied on a report produced by Merrill Lynch, which provided charts purporting to show this alleged pattern. *Id.* at 9. Like the Federal Derivative Action (and the California state action), plaintiff speculates that this purported pattern shows that backdating occurred: “The timing is too favorable on a repeated basis to be mere coincidence.” *Id.* at 9.

Similar to the Federal Derivative Action, plaintiff asserts here that the alleged backdating violated Maxim’s stock option plans. Cmpl. at 5. In addition, like the Federal Derivative Action, plaintiff alleged that Maxim did not take a proper accounting charge based on the backdated options, and that, as a result, Maxim misstated its financial statements from 1998 to 2002. *Id.* at 9-10. Finally, like the Federal Derivative Action and California state action, plaintiff suggests that, as a result of the allegedly improper accounting of the backdated options, Maxim improperly took a tax deduction. *Id.* at 6.

(b) This Action Focuses on Stock Options Granted to Only One Person.

Unlike the Federal Derivative Action, this action focuses solely on the stock options granted to one individual, Gifford. Plaintiff here does not allege that any options granted to other individuals were backdated. The Federal Derivative Action, by contrast, asserts that options granted to Beck, Doluca, Boyacigiller, Jasper, Parvarandeh, Hood, Huening, Hale, and Ullal—in addition to those of Gifford—were not correctly granted. *McKinney & Horkay* Cmpls. at 7-8; *Corey & Pontiac* Cmpls. at 15-17. Plaintiff's allegations here are therefore a mere subset of what the Federal Derivative Action alleges.

(c) The Federal Derivative Action Covers a Broader Timeframe.

The Federal Derivative Action, moreover, covers a broader timeframe than this action. The *McKinney* and *Horkay* complaints assert that grants issued from 1995 to 2001 were backdated, while the *Corey* and *City of Pontiac* complaints have alleged that the grants issued from 1995 to 2002 were backdated. *McKinney & Horkay* Cmpls. at 7; *Corey & Pontiac* Cmpls. at 8. Here, plaintiff has focused on a narrower time frame, from 1998 to 2002. Within that narrower time frame, plaintiff challenges many of the same allegedly backdated grants to Gifford alleged in the Federal Derivative Action.⁴

⁴ Both the Federal Derivative Action and this action have alleged that Gifford received a grant for 600,000 options that was backdated to March 15, 2000. Cmpl. at 8; *McKinney & Horkay* at 7. Both actions have also alleged that Gifford received a grant for 53,333 options that was allegedly backdated to September 17 or 18, 2000. Cmpl. at 8; *McKinney & Horkay* at 7. Likewise, both actions have alleged that Gifford received a grant for 59,590 options backdated to October 11, 2000, a grant for 600,000 options backdated to January 30, 2001, and another grant for 600,000 or 800,000 options backdated to September 27, 2001. Cmpl. at 8; *McKinney & Horkay* at 7.

(d) The Federal Derivative Action Alleges the Claims This Action Raises and also Includes Federal Claims.

Both of the two legal claims raised by this action—breach of fiduciary duty and unjust enrichment—were previously raised in the first Federal Derivative Action filed in the Northern District of California. Plaintiff’s breach of fiduciary duty claim is based on precisely the same conduct as the breach of fiduciary duty claims in the Federal Derivative Action and California state action: namely, that the defendants authorized or permitted the improper backdating of options to Gifford. Cmpl. at 12-13. Plaintiff’s unjust enrichment claim, which is asserted solely against Gifford, is likewise based on the same type of alleged wrongdoing as that alleged in the Federal Derivative Action and California state actions. Cmpl. at 13. In the Federal Derivative Action, however, there are a variety of federal securities claims over which the federal court has exclusive jurisdiction.

(e) In Light of the Overlapping Issues, Delaware Law Dictates that a Stay Is Warranted.

Where, as here, actions involving the same issues and parties are pending in multiple jurisdictions, the Court should defer to the first-filed action. *See McWane*, 263 A.2d at 283; *Schnell v. Porta Sys. Corp.*, 1994 WL 148276 at * 4 (Del. Ch.) (“while the claims in the two courts may be stated in different ways, they are actually the same claims and arise out of the same transactional facts.”); *see also Derdiger v. Tallman*, 773 A.2d 1005 (Del. Ch. 2000) (fiduciary duty claims derived from the same set of facts are similar even though “repackaged” as securities law claims); *Visual Edge Sys., Inc. v. Takefman*, 2000 WL 193107, at *2 (Del. Ch.) (noting that *McWane* analysis “applies equally to actions involving issues which, while similar, are not identical to the pending action[], provided that the actions arise out of the same set of operative facts”) (citation omitted).

The court's decision in *In re Westell Techs., Inc.*, 2001 WL 755134 (Del. Ch.) is dispositive. There, the court stayed a derivative action filed in Delaware in favor of prior-filed consolidated class actions in the United States District Court in Illinois. The Delaware derivative action and federal class actions both involved allegations that the defendant directors had misappropriated corporate information through trading on non-public information, wasted corporate assets, and grossly mismanaged the company. The derivative action asserted common law breach of fiduciary duty claims while the class actions asserted violations of Sections 10(b) and 20(a) of the Securities and Exchange Act of 1934. Notwithstanding those differences, the Chancellor held that a stay was appropriate because the claims arose out of the same facts. *Westell*, 2001 WL 755134, at *2. In granting the stay, the Court further reasoned that claims based on the same facts were similar even though they represented "repackaged" securities law claims. *Id.* (quoting *Derdiger*).⁵

As in *Westell* this Court should find that the claims asserted in this action are similar if not indistinguishable from the claims in the Federal Derivative Action. Accordingly, this action should be stayed in favor of the Federal Derivative Action.

4. The Delaware Actions And the Federal Actions Involve Substantially The Same Parties.

Because the parties to the Delaware Actions are the functional equivalent of the parties involved in the Federal Derivative Action, the Court should stay this action. *See Westell*, 2001

⁵ The Chancellor reached a similar result under similar facts in *Louisiana State Employees' Retirement Sys. v. Citrix Sys., Inc.*, 2001 WL 32638 (Del. Ch.). There, the Court found that state law claims alleging disclosure violations evidenced a "clear case where the plaintiffs have repackaged federal securities law claims as Delaware fiduciary duty claims." *Id.* at *4 (citation omitted). The Chancellor was also persuaded that both the federal and the state claims arose "from a common nucleus of operative facts [that] ought to be brought in the same court at the same time." *Id.* (citation omitted). For these reasons, the Court stayed the state claim in favor of the first-filed federal securities action addressing the same claims.

WL 755134 at * 2; ("substantial or functional identity is sufficient."); *AT&T Corp. v. Prime Sec. Distribs., Inc.*, 1996 WL 633300, at *2 (Del. Ch.) ("To grant a stay, it is not required that the parties . . . in both actions be identical. Substantial or functional identity is sufficient") (citations omitted).

Although the plaintiffs in this action and the Federal Derivative Action are technically different, as a legal matter, each plaintiff is purporting to sue on behalf of the same company, Maxim. For purposes of the *McWane* analysis, therefore, the two groups of plaintiffs are functionally identical. See *Westell*, 2001 WL 755134, at *2 ("While it is true that the plaintiff classes may differ slightly, they are functionally identical in that they all . . . complain of the same conduct.").

Moreover, while this action and the Federal Derivative Action name defendants that do not completely overlap, this divergence does not militate against a stay. Here, Gifford, Bergman, Hagopian, and Wazzan are all named as defendants in the Federal Derivative Action. Only two defendants (Karros and Sampels), are not so named (although they are named in the California state court action). This Court has entered stays in the absence of identical director defendants in the two actions. See *Westell*, 2001 WL 755134, at *2 ("Likewise, although the Federal Court class actions do not include two of the director defendants named in the Delaware action, this difference is not substantial. In *Schnell v. Porta Systems Corp.*, this Court found that the absence of five outside directors in the non-Delaware suit was not a material difference.") (citation omitted). The fact the defendants are not identical is of no importance here, where plaintiff's

allegations only concern options granted to defendant Gifford, who was named in the Federal Derivative Action.⁶

C. The Forum Non Conveniens Factors Also Favor a Stay.

In the event the Court declines to apply *McWane*, the factors applied in a *forum non conveniens* analysis—including the practical considerations thereunder—also weigh in favor of deferring to the first-filed Federal Derivative Action. *See Schnell*, 1994 WL 148276 (Del. Ch.) (considering *forum non conveniens* factors on motion to dismiss or stay in favor of first filed action). The *forum non conveniens* factors are: “[(1)] the applicability of Delaware law, [(2)] the relative ease of access to proof, [(3)] the availability of compulsory process for witnesses, [(4)] the pendency or non-pendency of a similar action or actions in another jurisdiction, and [(5)] all other practical considerations that would make the trial easy, expeditious, and inexpensive.” *Schnell*, 1994 WL 148276, at *3 (citations and quotation omitted). These factors bolster a finding that this action should be stayed in favor of the Federal Derivative Action.

1. The Pendency Of The First-Filed Federal Derivative Action Warrants A Stay.

This Court routinely applies the doctrine of *forum non conveniens* to stay state court litigation where, as here, “it makes little sense to duplicate the efforts of the federal district court.” *Friedman v. Alcatel Alsthom*, 752 A.2d 544, 555 n. 46 (Del. Ch. 1999) (“[C]ourts are more likely to dismiss a cause of action based on [forum non conveniens] if other jurisdictions are hearing a similar case, because it would be a waste of judicial resources to prosecute the

⁶ If there is a justifiable basis for doing so, the plaintiffs in the Federal Derivative Action could add Karros and Sampels to that action. *See Louisiana State Employees’ Retirement Sys.*, 2001 WL 32638, at *3 (“As is more thoroughly discussed in *Derdiger*, *Corwin* and *Schnell*, the absence of the outside directors as defendants to the Federal Action will not interfere with the Federal Court’s ability to do ‘complete justice’ nor does there appear to be any reason why the outside directors could not be added as defendants to the Federal Action should there be any truly viable claim against them.”).

same action multiple times”) (citation omitted). In *Friedman*, the plaintiffs filed suit in both state and federal court based on an allegedly misleading proxy statement. Applying a *forum non conveniens* analysis, this Court stayed the state action in favor of the simultaneously filed federal action, explaining that:

Most importantly, in consolidating the federal actions, the federal courts have already implicitly held that it would constitute significant, if not overwhelming, hardship and inconvenience to require defendants to defend against various actions in various venues – all of which allege the same principal facts and claims. The federal courts’ decision seems wise as it recognizes the parties’ and public’s interest in judicial economy; as such, I feel compelled to act as consistently with their findings as Delaware’s current case law will allow.

Id. at 556.

The same result is proper here. The first-filed Federal Derivative Action is predicated on the same facts and involves substantially the same parties as this action. Moreover, as in *Friedman*, the federal court in California has already entered a consolidation order in the Northern District of California. Finally, a stay of this action will serve the interests of judicial economy because most, if not all, issues should be resolved in a single forum—the federal court in California. A stay is also in the parties’ interest because they will not be forced to incur the significant costs associated with simultaneously litigating in multiple fora, all the while bearing the risk of inconsistent rulings.

2. The Federal Forum Offers Greater Ease Of Access To Proof.

The Federal Derivative Action and this action both purport to be derivative actions brought for the benefit of Maxim, a California-based corporation and its directors and officers. California is where Maxim maintains its headquarters, and therefore where it retains most of its documents and where the majority of its officers reside. Moreover, if defendants are ever required to produce documents or to submit to depositions, most of such activity will likely be in California.

Plaintiff, in turn, can offer no reason why Delaware would afford any greater access to proof. Although Delaware is Maxim's place of incorporation, plaintiff does not allege that either the Company or any of the individual defendants have any other relevant connection to the state, or that any of the individual defendants in the Federal Derivative Action or the Delaware Actions reside in this state. For that matter, the named plaintiff in this case, Walter Ryan, is a resident of Illinois, not Delaware. Plaintiff does not include a single allegation tying this case to Delaware. California is a more convenient forum for all parties. *See Boston VLCC Tankers, Inc. v. Bethlehem Steel Corp.*, 415 A.2d 492, 496 (Del. Super. 1980) (stay of Delaware action in favor of prior pending Rhode Island action warranted where substantially all of one defendant's operations and witnesses were located in Connecticut).

3. The Federal Forum Allows For Compulsory Process Over A Greater Number of Potential Witnesses.

The *forum non conveniens* analysis favors a stay “if another forum would provide a substantial improvement as to the number of witnesses who would be subject to compulsory process.” *Mt. Hawley Ins. Co. v. Jenny Craig, Inc.*, 668 A.2d 763, 769 (Del. Super. 1995) (citation omitted). Only the federal court has the right to nationwide service of process to compel the production of documents and attendance at depositions. *See, e.g.*, FED. R. CIV. P. 45. Because the federal court automatically commands nationwide discovery and service of process, this *forum non conveniens* factor weighs in favor of a stay.

4. Practical Considerations Of Judicial Economy And Fundamental Fairness Favor A Stay Of The State Action.

As this Court has recognized, allowing dual state and federal actions to proceed simultaneously would “waste the already strained resources of our court system.” *In re Chambers Dev. Co., Inc. S'holders Litig.*, 1993 WL 179335, at *8 (Del. Ch.) (staying state action

where, as here, “the federal action involves issues of fact and law which are necessarily related and duplicative of those in this action . . .”).

There is no legitimate reason to burden defendants or the courts with the significant costs of litigating the same claims in two forums. *See FWM Corp. v. VKK Corp.*, 1992 WL 87327, at *2 (Del. Ch.) (issuing stay where, as here, defendants would otherwise “be fighting the same battle on two fronts when, ultimately, the decision of only one of the courts will matter”). “Requiring the defendants to also defend this action and engage in parallel discovery here would be grossly inefficient as well as inconvenient.” *Chambers*, 1993 WL 179335, at *7.⁷

5. The Application of Delaware Law Is Not Conclusive.

The only factor plaintiff could arguably point to in the forum non conveniens analysis to argue against a stay is the sole fact that one claim in this action is a Delaware state law claim for the breach of the duty of loyalty. Courts recognize, however, that “the application of Delaware law is not conclusive in a *forum non conveniens* analysis.” *Chambers*, 1993 WL 179335, at *3 (citation omitted); *see also Texas City Ref., Inc. v. Grand Bahama Petroleum Co.*, 347 A.2d 657, 658 (Del. 1975) (“the fact of Delaware incorporation has not been established as a factor to be considered. . .”). Indeed, this Court has recognized that federal courts “have proven time and again their ability to apply and even extend Delaware law in appropriate ways.” *Corwin*, 1999 WL 499456, at *6 (citations omitted).

⁷ Policy considerations indicate that this Court should defer to the federal court for a decision on what are essentially “repackaged” claims under the federal securities laws. In *Friedman v. Alcatel Alsthom*, the Court noted: “Congress created the SEC intending that it would regulate the interstate exchange of securities. Therefore, the regulation of securities generally falls within the purview of federal regulators who look to the federal courts for enforcement.” 752 A.2d at 555. Moreover, in the 1998 Securities Litigation Uniform Standards Act of 1998, Congress expressed its intent that “securities class actions involving the purchase or sale of nationally traded securities, based upon false or misleading statements, . . . be brought exclusively in federal court under federal law.” *Id.* at 555. For this reason, the Court should stay this action in favor of the Federal Derivative Action.

Because this case presents no novel issues of Delaware law, and because the federal court is fully “capable of applying the Delaware law of fiduciary duty,” this *forum non conveniens* factor does not tip in plaintiff's favor. By contrast, all other considerations in this case overwhelmingly favor a stay.

D. The Result In California May Render The Delaware Actions Moot, And Therefore, It Should Be Stayed Pending The Completion Of The Federal Derivative Action.

Plaintiff's theory in this case is that the individual defendants breached their fiduciary duties by authorizing and approving backdated stock options to Mr. Gifford and Gifford was allegedly unjustly enriched. These issues are already pending in the Federal Derivative Action. This Court could more efficiently adjudicate the claims herein once the California federal court has decided whether the federal securities claims have merit.

This Court has held that, where the outcome of a foreign proceeding could render the Delaware proceeding moot, the Delaware proceeding will be stayed. *In the Matter of Application of Advanced Drivers Educ. Prods. & Training, Inc.*, 1996 WL 487940 (Del. Ch.); *see also Pence v. National Beef Packing Co.*, 1976 WL 1703 (Del. Ch.) (staying Delaware action in favor of federal proceeding that might moot Delaware action); Moreover, the “Supreme Court has admonished Delaware courts to freely exercise their discretion to stay Delaware proceedings pending the outcome of the foreign litigation.” *Advanced Drivers*, 1996 WL 487940, at *5. Because the claims stated in the Delaware Actions may be rendered moot by the Court's findings and rulings in the Federal Derivative Action, this action should be stayed in favor of the latter Action.

II. IN THE EVENT THE COURT DOES NOT STAY THE ACTION, IT SHOULD DISMISS IT BECAUSE THE COMPLAINT DOES NOT STATE A CLAIM

Plaintiff's complaint here suffers from numerous substantive defects. As a result, if the Court declines to apply *McWane* or a *forum non conveniens* analysis to stay the action, it should dismiss it for the substantive reasons established below.

A. Plaintiff Has Not Met His Burden of Pleading Demand Futility With Particularity.

To proceed with his derivative suit, plaintiff was required under Delaware law to first demand action from the corporation's directors or plead with particularity the reasons why such demand would be futile. *Aronson v. Lewis*, 473 A.2d 805, 809 (Del. 1984), *overruled on other grounds*, *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *Rales v. Blasband*, 634 A.2d 927, 932 (Del. 1993) (holding that stockholder may prosecute derivative claim only if "the stockholder has demanded that the directors pursue the corporate claim and they have wrongfully refused to do so or where demand is excused because the directors are incapable of making an impartial decision regarding such litigation."). In considering a motion to dismiss for failure to comply with the "demand requirement," a court limits its consideration of the facts to the particularized facts alleged in the complaint. *See Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000) (holding that plaintiff's complaint must comply with "stringent requirements of factual particularity"). Because of this particularity requirement, Plaintiff's burden is more onerous than that required to withstand an ordinary motion to dismiss.

Indeed, if a plaintiff fails to carry its pleading burden on the demand requirement, the complaint must be dismissed even if the claims are otherwise meritorious. *Haber v. Bell*, 465 A.2d 353, 357 (Del. Ch. 1983). Here, plaintiff's demand-futility allegations are vague and conclusory, and provide absolutely no reason why a demand would have been futile. The Court should dismiss the complaint without leave.

1. Plaintiff's Unsubstantiated Complaint Violates The Express Purpose of The Demand Requirement.

The heightened pleading standard required to show that a demand to the company's directors would be futile underscores the importance of the "demand requirement." The demand requirement is not merely a technical pleading hurdle, but instead "is a rule of substantive right designed to give a corporation the opportunity to rectify an alleged wrong without litigation, and to control any litigation which does arise." *Aronson v. Lewis*, 473 A.2d 805, 809 (Del. 1984) (citations omitted). As the Supreme Court has emphasized, the "purpose of the demand requirement is to afford the directors an opportunity to exercise their reasonable business judgment and waive a legal right vested in the corporation in the belief that its best interests will not be promoted by insisting on such right." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96 (1991) (internal quotation marks omitted); *see also Aronson*, 473 A.2d at 811 (noting that stringent demand requirement flows from "cardinal precept" that it is directors, not stockholders, who have right to manage business affairs of corporation).

Here, plaintiff fails to plead sufficient particularized facts to establish that demand would be futile. Instead, plaintiff raced to the courthouse based on little more than an untested Merrill Lynch analyst report, without first providing Maxim's directors the opportunity to consider plaintiff's demands and to make a decision furthering the best interests of the Company. This type of knee-jerk reaction is precisely the situation the demand requirement was intended to avoid. *See Beam v. Stewart*, 833 A.2d 961, 981-82 (Del. Ch. 2003) (lamenting that "litigants continue to bring derivative complaints pleading demand futility on the basis of precious little investigation beyond perusal of the morning newspapers") (footnote omitted).

2. Plaintiff's Conclusory Statements Fail To Rebut The Presumption That The Board Is Capable Of Acting In An Independent And Disinterested Fashion.

Under the controlling legal standards, plaintiff has failed to show that a demand made to Maxim's Board of Directors would have been met with anything other than an exercise of independent, disinterested judgment. To rebut the presumption that a majority of the board is disinterested, plaintiff must plead particularized facts establishing that a majority of directors face a "substantial likelihood" of personal liability for the wrongdoing alleged in the complaint. *Aronson*, 473 A.2d at 815. The "mere threat of personal liability" is not sufficient. *Id.*; *Rales*, 634 A.2d at 936.

The Maxim Board consists of six directors: Defendants Gifford, Bergman, Wazzan, and Hagopian, and directors Michael J. Byrd and Peter de Roeth. Cmpl. ¶ 50. For demand to be excused, plaintiff must plead with specificity that a majority of this Board is incapable of acting in an independent and disinterested fashion. *See Aronson*, 473 A.2d at 815. Plaintiff asserts that making a demand on this Board would have been futile because the defendants were involved in "authoriz[ing] and enabl[ing] Maxim to back-date stock options issued to Gifford." Ryan Cmpl. ¶ 51. Plaintiff further asserts that Bergman, Hagopian and Wazzan were on the compensation committee "that approved the option grants to Defendant Gifford." *Id.* ¶ 52. Plaintiff sums up its demand futility allegations by alleging: "Because the Defendants approved and/or accepted the benefit of the alleged back-dating, they are personally liable for the company's losses." *Id.* ¶ 53. Plaintiff makes no allegations concerning directors Byrd and de Roeth other than to note that they were "elected after the wrongdoing, in 2005." *Id.* ¶ 50.

These unsubstantiated assertions are plainly inadequate to excuse demand. Plaintiff has not made any claim that Byrd and de Roeth are interested, and, even assuming *arguendo* that

placing Gifford's stock-option grants at issue render him interested,⁸ plaintiff has made no showing that that Bergman, Wazzan, and Hagopian are incapable of exercising independent judgment. Accordingly, as shown below, Plaintiff has failed to raise a reasonable doubt as to the independence of a majority of Maxim's directors.

(a) **It is well settled that demand will not be excused based on mere allegations that a director participated in or approved alleged misconduct.**

Plaintiff's first claim, that Bergman, Wazzan, and Hagopian are interested because they were involved in authorizing and enabling the grants of options to Gifford is foreclosed by controlling law. It is well-settled that bare allegations that directors were involved in alleged wrongdoing are insufficient to show interest or a lack of independence. "Futility requires . . . more than mere approval or participation by directors in alleged wrongful conduct." *Greenspun v. Del E. Webb Corp.*, 634 F.2d 1204, 1210 (9th Cir. 1980). "[W]here mere approval of corporate action, absent self-interest or other indication of bias, is the sole basis for establishing the director's 'wrongdoing' and hence for excusing demand on them, plaintiff's suit should ordinarily be dismissed." *Id.*; see also *Lewis v. Sporck*, 612 F. Supp. 1316, 1322 (N.D. Cal. 1985) ("[T]here is no allegation that the [transactions] personally benefited the members of the board at [the corporation's] expense, nor any other indication of bias. All that is alleged is approval of corporate wrongdoing, which, by itself, is insufficient to justify a finding of futility under Rule 23.1."). As one federal court has reasoned, a "plaintiff 'may not bootstrap allegations of futility' by pleading merely that 'the directors participated in the challenged transaction or that they would be reluctant to sue themselves.'" *In re Sargent Tech., Inc. Derivative Litig.*, 278 F.

⁸ As discussed at greater length below, plaintiff has insufficient allegations that Gifford or any of the other defendants is financially "interested" in the stock option grants at issue in this case. Plaintiff never asserts that the stock options were exercised or any stock was sold.

Supp. 2d 1079, 1089 (N.D. Cal. 2003) (quoting *Blasband v. Rales*, 971 F.2d 1034, 1049 (3d Cir. 1992) (citing Delaware law)).

(b) Demand cannot be excused based on Plaintiff's breach of fiduciary duty claim because there is no substantial likelihood of liability.

Plaintiff's next attempt to excuse demand—that Bergman, Wazzan, and Hagopian are “personally liable for the company's losses,” Cmpl. ¶ 53—is also foreclosed by well-settled law. Because Delaware law exempts the directors from liability based on negligent or reckless conduct,⁹ plaintiff shoulders an especially heavy burden: he must show with particularity that Bergman, Wazzan, and Hagopian face a substantial likelihood of liability for *intentional*, and not merely negligent or even reckless, conduct. See *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 734 (Del. Ch. 1999); *Zirn v. VLI Corp.*, 681 A.2d 1050, 1061 (Del. 1996). Plaintiff has not sufficiently alleged an intentional breach of the duty of loyalty, as discussed in greater detail below, and cannot show that the a majority of directors face a substantial likelihood of liability for knowing misconduct. See, e.g., *Silicon Graphics*, 183 F.3d at 990 (explaining that plaintiff must plead particular facts showing that defendant's actions were “so egregious” that there is substantial threat of liability).

As a threshold matter, plaintiff has failed to identify how the individual directors would have known that stock compensation was being improperly accounted for or that false information was being disseminated—no illuminating documents, conversations, or other information have been specified. Nor has plaintiff pointed to any “red flags”—or flags of any

⁹ 8 Del. C. § 102(b)(7) precludes all claims for breach of fiduciary duty except where the director's conduct was the product of bad faith or disloyalty. Maxim's Certificate of Incorporation incorporates this provision of Delaware law, and protects its directors against liability except in cases of a knowing violation of the law or intentional misconduct.

hue—the directors failed to heed. *Guttman v. Huang*, 823 A.2d, at 507 (refusing to excuse demand where plaintiff failed to “plead a single fact suggesting specific red—or even yellow—flags were waved”). Simply stating that some of the directors were on a committee, here the Compensation Committee, is plainly insufficient. *See Kenney v. Keonig*, 426 F. Supp. 2d 1175, 1183 (D. Colo. 2006) (“A director’s mere membership of an audit committee during the relevant period does not suffice to create a substantial likelihood of liability.”) (applying Delaware law). Because plaintiff has failed to allege an intentional or knowing violation of the duty of loyalty based on particularized facts, a serious threat of liability cannot exist for the directors, and cannot excuse plaintiff for failing to make a demand before filing this lawsuit. *See Guttman*, 823 A.2d at 501; *In re Baxter Int’l. Inc. S’holders Litig.*, 654 A.2d 1268, 1270 (Del. Ch. 1995).

Plaintiff has failed to establish with particularity that a majority of the six directors “suffer from a debilitating interest or lack of independence.” *Kenney*, 426 F. Supp. 2d at 1187 (finding that plaintiffs had failed to excuse demand where they could not show that at least three of six directors were interested or not independent). Accordingly, the complaint must be dismissed for failure to comply with the stringent demand requirement of Rule 23.1.

B. Plaintiff Lacks Standing to Assert His Claims.

Plaintiff is not a proper plaintiff to bring this action on behalf of the company. Any plaintiff bringing a shareholder derivative action must allege that he or she owned shares in the company at the time of the transaction. 8 *Del. C.* § 327 (plaintiff must have been stockholder “at the time of the transaction of which such stockholder complains or that such stockholder’s stock thereafter devolved upon such stockholder by operation of law.”); *see also* Court of Chancery Rule 23.1. Moreover, courts have required “continuous ownership,” *i.e.*, a plaintiff must establish he owned stock continuously from the time of the transaction in question to and

through the prosecution of the lawsuit. *Lewis v. Anderson*, 477 A.2d 1040, 1046 (Del. 1984) (holding that plaintiff lost standing to pursue derivative action when company merged during pendency of lawsuit).

Plaintiff's allegations here reveal that he did not own Maxim stock until April 2001, when his Dallas Semiconductor shares were converted into Maxim shares at the time of Maxim's acquisition of Dallas. Only two of the nine transactions he challenges occurred when he was a Maxim shareholder. *See* Cmpl. ¶¶ 31-39. Moreover, plaintiff cannot assert that his stock "devolved" upon him "by operation of law." First, he acquired his shares by operation of contract: specifically, an acquisition contract. *Id.* ¶ 13. Second, the devolution prong of the statute is meant to apply where the stockholder had a pre-existing relationship to the successor corporation or an expectancy interest in it. *See Taormina v. Taormina Corp.*, 78 A.2d 473, 477 (Del. Ch. 1951) (when title to stock was bequeathed by will, it devolved on beneficiary by operation of law). Here, there is no allegation that plaintiff had ever so much as a thought about Maxim until the company he did own shares in, Dallas Semiconductor, was acquired by Maxim. He is not a proper plaintiff to seek redress for alleged wrongs that occurred long before he had any interest in the company. Accordingly, the motion to dismiss should be granted with respect to all grants that occurred prior to April 2001.¹⁰

C. Plaintiff Fails to State a Claim For Breach of Fiduciary Duty.

Officers and directors of a corporation are presumed to act in good faith and in the honest belief that their actions are in the best interests of the company. *In re Sargent Tech., Inc. Derivative Litig.*, 278 F. Supp. 2d 1079, 1093 (N.D. Cal. 2003). While plaintiff asserts that the

¹⁰ In the alternative, Maxim hereby moves to strike paragraphs 31-37 of plaintiff's complaint since he lacks standing to assert claims grounded on those allegations.

individual defendants have breached their fiduciary duty, he fails to plead facts sufficient to rebut the business judgment rule. *See In re Santa Fe Pac. Corp. S'holders Litig.*, 669 A.2d 59, 71 (Del. 1995) (the “presumption of the business judgment rule attaches *ab initio* and to survive [a motion to dismiss] a plaintiff must allege well-pleaded facts to overcome the presumption.”).

To overcome the business judgment rule and maintain a duty of loyalty claim, plaintiff must show that a majority of the Board had personal interests potentially adverse to the interests of the company and its shareholders. *See Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1168 (Del. 1995); *see also McMichael v. U.S. Filter Corp.*, 2001 WL 418981, at *14-15 (C.D. Cal. 2001) (applying Delaware law). As discussed above with respect to demand futility, plaintiff cannot show that a majority of the Board was interested in the disputed grants, and therefore the Complaint fails to overcome the business judgment rule.

In addition to the protections of the business judgment rule, Delaware law bars claims for breach of fiduciary duty unless a director violates her duty to the company by acting intentionally, in bad faith, or for personal gain. *Malpiede v. Townson*, 780 A.2d 1075, 1093-97 (Del. 2001); *Arnold v. Soc'y for Savings Bancorp., Inc.*, 650 A.2d 1270, 1286-88 (Del. 1994); *In re BHC Commc'ns, S'holders Litig., Inc.*, 789 A.2d 1, 9-10 (Del. Ch. 2001). Plaintiff's support for its contention that defendants knew of allegedly backdated options amounts to speculation based on a Merrill Lynch report he found to be compelling evidence of backdating, even though the Merrill Lynch report itself refused to take any position that its analysis evidenced that backdating had occurred. Cmpl., Ex. A, p. 2. Such conjecture is a far cry from the well-pleaded allegations required to withstand a motion to dismiss. *See In re McKesson HBOC, Inc. Securities Litig. I*, 126 F. Supp. 2d 1248, 1278.

While such speculation may provide interesting theories for Wall Street analysts to pursue and write reports about, it is inappropriate and insufficient as a basis for a complaint. As this Court has held, “under Delaware law, conclusory assertions that directors breached their fiduciary duty of care are inadequate; rather, the complaint must contain well-pleaded allegations to overcome the presumption that the directors’ decisions were informed and reached in good faith.” *McKesson*, 126 F. Supp. 2d at 1278; *see also Santa Fe Pac. Corp.*, 669 A.2d at 71. Because plaintiff has not alleged facts showing that defendants had knowledge that the disputed stock options grants were backdated, the assertions that defendants “collud[ed]” to prepare, disseminate, and file financial statements reproducing the alleged improprieties attending the disputed stock options must also fail. *See* Cmpl., ¶¶ 36, 38.

In sum, plaintiff has failed to show that any of the allegations of breach of fiduciary duty amount to intentional violations of the law or violations of the duty of loyalty.

D. Plaintiff’s Claims Are Barred By The Statute Of Limitations.

1. Plaintiff’s Breach of Fiduciary Duty Claim is Time-Barred.

Plaintiff’s breach of fiduciary duty claim is time-barred under the applicable three-year statute of limitations. *See* 10 Del. C. § 8106. “This statute, unlike [other Delaware statutes of limitations], is not a ‘discovery statute,’ and the limitations period begins to run from the time the cause of action accrues. . . This is so ‘even if the plaintiff is ignorant of the cause of action.’” *SmithKline Beecham Pharms. Co. v. Merck & Co.*, 766 A.2d 442, 450 (Del. 2000) (internal citations omitted). In this case, even if plaintiff did contend a discovery rule or “fraudulent concealment” tolled his claims, such a contention would be a *non sequitur*. The Merrill Lynch report plaintiff bases his claims on was prepared using publicly available filings and historical stock prices. Cmpl., Ex. A. The analyst report specifically notes that Merrill Lynch did not have access to detailed records, (*Id.*, Ex. A, p. 2), and that it relied exclusively on public disclosures.

As a result, plaintiff could not, on the one hand, claim fraudulent concealment while on the other hand base his claims on an analysis of public data.

As plaintiff's complaint makes clear, not a single challenged stock option grant occurred in the last three years. Cmpl., ¶¶ 31-39. The last transaction at issue accrued over four years ago. *Id.* The claim is therefore time-barred.

2. Plaintiff's Unjust Enrichment Claim is Time-Barred.

Plaintiff's unjust enrichment claim is also subject to a three-year statute of limitations. *Merck & Co. v. SmithKline Beecham Pharms. Co.*, 1999 WL 669354 at *42 (Del. Ch.). Accordingly, it is barred for the same reason as the breach of fiduciary duty claim is time-barred.

E. Plaintiff's Unjust Enrichment Claim Fails.

Plaintiff's third and final claim is for unjust enrichment, but plaintiff does not articulate how Gifford was unjustly enriched. Rather than allege how Gifford obtained a benefit to which he was not entitled to the detriment of another, plaintiff alleges in conclusory fashion that, "Gifford has been and will continue to be unjustly enriched at the expense of and to the detriment of Maxim." Cmpl., ¶ 63. As noted *supra*, however, plaintiff's complaint is absent of any allegation that Gifford ever exercised any allegedly backdated option or sold any stock. Plaintiff contends that the company suffered because it "receives less money from Defendant Gifford when he exercises his options at prices substantially lower that he would have if the options had not been back-dated," (*id.* ¶ 9), but his pleading makes clear it does not even know whether any option was exercised. Plaintiff in know way quantifies how the company suffered, or how much Gifford was allegedly unjustly enriched. This claim fails.


CONCLUSION

For the foregoing reasons, defendants respectfully submit that this action should be dismissed or stayed in favor of the first-filed California Federal Derivative Action. If the Court does not dismiss or stay it in light of that action, it should dismiss it on the merits.

POTTER ANDERSON & CORROON LLP

OF COUNSEL:

QUINN EMANUEL URQUHART
OLIVER & HEDGES, LLP
John M. Potter (Cal. Bar No. 165843)
50 California Street, 22nd Floor
San Francisco, California 94111
Tel: (415) 875-6600

By: 
Peter J. Walsh Jr. (DSB ID No. 2437)
Timothy R. Dudderar (DSB ID No. 3890)
Hercules Plaza, 6th Floor
1313 North Market Street
Wilmington, Delaware 19801
Telephone: (302) 984-6000

Attorneys for the Individual Defendants

Dated: August 2, 2006

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CERTIFICATE OF SERVICE

I, Timothy R. Dudderar, hereby certify that on August 2, 2006, a copy of the within INDIVIDUAL DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS OR STAY was served electronically via eFile on the following counsel of record:

Norman M. Monhait, Esquire
Rosenthal Monhait & Goddess, P.A.
919 Market Street, Suite 1401
Wilmington, Delaware 10900



Timothy R. Dudderar (DSB ID No. 3890)

743834/30491