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

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Plaintiff Amalgamated Bank ("Amalgamated") as Trustee for the LongView MidCap 400 Index Fund, and Plaintiff Eric Meyer ("Meyer"), both shareholders of Tyson Foods, Inc. ("Tyson Foods" or the "Company"), submit the following response to Defendants' Motion to Dismiss the Consolidated Complaint.

PRELIMINARY STATEMENT

The defendants named herein are involved in a multi-faceted, secretive campaign of self-dealing at Tyson Foods in which the controlling Tyson family shareholders (and their insider friends) have been given virtually unlimited access to the Company's corporate treasury for their personal use. This problem has existed now for at least a decade at Tyson Foods. In 1995, the IRS assessed penalties against the Company for attempting to take illegal tax breaks on executive perks. In 1997, the Company resolved a shareholder suit involving virtually identical misconduct to that at issue in this case, promising to put the reigns on its abusive practices. And, most recently, in 2004, Tyson Foods consented to the entry of a cease and desist order of the SEC, which resulted in the assessment of stiff fines and penalties against the Company and its former Chairman Don Tyson. Unfortunately for Tyson's minority shareholders, the serious self-dealing problems at the Company appear to be getting worse instead of better. Plaintiffs have filed a nine-count, 65-page Complaint detailing the rampant and persistent looting of the Company which remains the apparent custom and hard-to-break habit for the Tyson family.

Defendants' motion to dismiss ("Def. MTD") is nothing more than an effort at obfuscation. By attaching over 600 pages of additional materials, and relying on assertions that appear nowhere in (and indeed contradict) the Complaint, Defendants challenge the veracity of Plaintiffs' allegations, flat-out misrepresent the terms of certain contracts at issue, and argue that Plaintiffs' claims amount to little more than claims of corporate waste that are predestined to fail in Delaware. According to Defendants' reading of Delaware law, if any rational business person possibly could justify the looting of Tyson Foods by the controlling Tyson family members and their insider friends, then regardless of whether the amounts taken are fairly disclosed to the public or not, the Plaintiffs' claims must be dismissed. Put simply, Defendants assert:

- It's okay to pay millions of dollars to corporate executives and "consultants" for personal expenses such as artwork, oriental rugs, theatre tickets, chauffeurs, the services of a boat crew, residential landscaping, and luxury vacation homes, yet tell the public shareholders that these dollars were spent on legitimate "business expenses."

- It's okay to conduct business in a way that leads to millions of dollars in fines and sanctions imposed by the SEC and then to foist the burden of those fines on the Company rather than upon the wrongdoers. And better yet, it's okay to *reward* the wrongdoers for their looting by giving them a substantial pay raise so that the fines levied against them by the SEC can come out of the corporate treasury as well.

- It's okay to cause the Company to enter into extensive deals with corporate insiders and friends of the Tyson family without *any* showing that the deals were on fair terms, and without implementing *any* policies to ensure that these deals were on fair terms to the corporation.

- It's okay to cause the Company to enter into 10-year multi-million dollar "consulting contracts" with senior executives that did not require any services to actually be performed, and to continue to pay on such contracts when the so-called "consultants" themselves publicly state their intent not to provide any such services.

- It's okay to pay "consulting fees" under one of these 10-year contracts after the so-called "consultant" has passed away and obviously, therefore, cannot perform any services in consideration for such payments.

- It's okay to use inside information that every corporate insider knows will have a materially positive impact on the price of the Company's stock when publicly disclosed in order to strategically time the issuance of stock options with favorable strike prices that will cost the Company millions of dollars upon exercise.

- It's okay to deliberately *and illegally* hide from public shareholders the true nature and extent of *all* of the payments listed above so as to expose the Company to millions of dollars in fines from the SEC for violating federal securities laws regarding the required disclosures of executive compensation.

- It's okay to seek to allay shareholder concern over compensation practices by requiring a senior executive to pay back $1.7 million in ill-gotten gains, but then to turn around and cause the *shareholders* to foot the bill by not only causing the Company to reimburse the funds the executive supposedly was to repay but actually giving that executive a $1.1 million *raise*.

- It's okay to ignore a settlement agreement with a minority shareholder, and an Order of this Court, so as to continue a pattern and practice of allowing controlling shareholders to strip funds from the corporate treasury for use on their personal whims.

But the Defendants' arguments do not stop there. In invoking the "demand futility" requirement of Court of Chancery Rule 23.1 in response to several claims, Defendants argue that even though the Company openly admits that it lacks a majority of disinterested directors, and even though virtually all of the directors have been the glad-handed recipients of concealed compensation, undisclosed insider deals, or are beneficiaries or potential beneficiaries of fraudulent "consulting contracts" mentioned above, these very interested directors somehow could be trusted to "impartially" consider the issue of a demand on the board to commence litigation against another director for wrongfully accepting the same kinds of improper benefits that they receive.

If this Court thinks that the Defendants are right in their belief that Delaware law is to be interpreted so as to permit corporate boards to funnel untold millions of dollars to the family and friends of the controlling stockholders while *deliberately concealing* the true nature and extent of these payments from the investing public, then perhaps all of Plaintiffs' claims should be dismissed. But if the Court is concerned that there's something rotten in the state of a company whose directors, rather than protecting the interests of the investing public, have permitted the friends and family of the controlling shareholders to literally loot the Company and expend corporate funds on personal expenses and unchecked interested transactions as they see fit, then Defendants' motion should be denied.

STATEMENT OF FACTS

I. <u>Procedural History</u>

On February 16, 2005, Amalgamated Bank commenced this action derivatively on behalf of Tyson Foods, and as a class action on behalf of itself and all other similarly situated public shareholders of the Company, against certain past and present members of Tyson Foods' Board of Directors.[1] Plaintiff Meyer had pursued a Section 220 books and records investigation of

[1] The defendants named herein are as follows: Don Tyson, John Tyson, Barbara Tyson, Lloyd V. Hackley ("Hackley"), Jim Kever ("Kever"), David A. Jones ("Jones"), Richard L. Bond ("Bond"), Jo Ann R. Smith ("Smith"), Leland E. Tollett ("Tollett"), Joe F. Starr ("Starr"), Neely

Tyson beginning in August 2004 covering some of the same improper transactions at issue in the Amalgamated action.[2] After almost a year of Tyson Foods refusing to produce the documents he requested, Meyer filed a complaint to compel an inspection that resulted in Tyson Foods producing a limited number of documents. Based in part on the records produced, Meyer filed a derivative complaint on September 22, 2005, which overlapped in certain respects with the already pending Amalgamated action.

This Court requested that Amalgamated and Meyer consolidate their actions on account of the similarity of the claims alleged. Amalgamated and Meyers ("Plaintiffs") therefore filed their Consolidated Complaint ("Complaint")[3] on January 11, 2006.

II. <u>Background And History</u>

Tyson Foods, a Delaware corporation, is the largest processor and marketer of protein products in the world. ¶ 8. Since its founding in the 1930s by John Tyson, Tyson Foods has remained under the firm control of the Tyson family. ¶¶ 8-10, 52-56. In steady succession, Tyson family members have served as senior executives of the Company, have served and continue to serve on the Company's board of directors, and have received lucrative "consulting" contracts upon their purported "retirement."[4] Through the Tyson Limited Partnership ("TLP"), the Tyson family

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E. Cassady ("Cassady"), Fred Vorsanger ("Vorsanger"), Shelby D. Massey ("Massey"), Donald E. Wray ("Wray"), Wayne B. Britt ("Britt"), Gerald M. Johnston ("Johnston"), Barbara Allen ("Allen"), Albert C. Zapanta ("Zapanta"), and Tyson Limited Partnership ("TLP") (collectively, "Defendants")

[2] The suspicions of both Amalgamated and Meyer were aroused primarily due to public revelation that the SEC had commenced a non-public investigation of wrongdoing at Tyson in March 2004 relating to the misuse of corporate assets by Tyson executives to fund personal, non-business related expenses.

[3] Citations to the Complaint shall appear throughout this memorandum as "¶ __."

[4] Don Tyson, the son of the Company's founder, sat on the Tyson Foods Board from 1952 to 2001, and served as the Company's CEO until 1991. ¶ 9. From 1995 to 2001, Don Tyson served as Senior Chairman of the Board, until he retired and became a highly compensated "consultant" to the Company. *Id.* Don Tyson's son, John, has sat on Tyson Foods' Board since 1984 and

effectively controls 80% of the voting power of the Company stock.[5] ¶ 54.

The Tyson family's control and voting power have allowed them to commit systemic self-dealing that has gone unchecked by the Board, which undoubtedly has been on notice of the wrongdoing since as early as 1995. Despite an Order of this Court that the Board install and maintain certain safeguards following the settlement of a shareholder derivative suit in 1997,[6] the Tyson family has continued to use the Tyson Foods' treasury as its personal piggy bank.

III. The SEC Investigates Tyson's Secret Compensation Schemes Resulting In The Payment Of Millions Of Dollars Of Fines.

In March 2004, the SEC began a formal, non-public investigation into the annual perquisites which were being provided to certain Tyson Foods executives and Board members and

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became Chairman of the Board in 1998. ¶ 10. John Tyson also serves as the Company's CEO, a position he has held since April 2000. *Id.* Barbara Tyson, the widow of Don Tyson's brother Randall, has sat on the Tyson Foods Board since 1988. ¶ 11. She also served as the Company's Vice President until 2002, when she retired and was awarded a 10-year "consulting" contract. *Id.*

[5] As set forth in the Complaint, Tyson Foods maintains a dual class equity structure despite shareholder opposition. ¶¶ 54-55. Tyson Foods' Class A shares receive one vote per share, while its Class B shares receive ten votes per share. ¶ 54. The TLP owns 99.9% of Tyson Foods Class B shares and thus controls 80% of the voting power at Tyson. ¶¶ 8, 28, 54. Don, John and Barbara Tyson are each general partners of the TLP. ¶¶ 9-11.

[6] In 1995, shareholders filed a derivative suit against executives and Board members of Tyson Foods challenging the fairness of certain related-party transactions, and the inadequate disclosure of certain executive perquisites and "other compensation" being paid to Company executives (hereafter, the "*Herbets* Action"). ¶ 57. Tyson Foods settled the *Herbets* Action in 1997 by agreeing to reduce the profits given to insiders from related-party transactions, and to reduce the amounts of perquisites given to Don Tyson. *See* Transmittal Affidavit of Samuel T. Hirzel, dated March 2, 2006 ("Hirzel Aff."), at Exhibit O. In addition, Tyson Foods agreed to have all related-party contracts reviewed annually by a committee of outside directors. *Id.* at p. 9. The settlement of the *Herbets* Action highlights Defendants' knowledge of the systemic wrongdoing at Tyson Foods in terms of inappropriate compensation and improper perquisites being usurped by Tyson family insiders, and most especially Don Tyson. Importantly, as part of the settlement, Tyson agreed to adopt and maintain strict structural and procedural protections, which were to include, among other things, an annual review of Don Tyson's requests for reimbursements. ¶¶ 57-59. However, as set forth throughout the Complaint (¶¶ 66-105), Tyson Foods' alleged compliance with these structural safeguards has been perfunctory at best and, at worst, a mere ruse to hide an ongoing problem that the Board simply accepts so that they, too, can partake in profit-mongering that goes along with being a Tyson family friend and corporate insider.

disclosed in the Company's public filings under the categories "other annual compensation" and "travel and entertainment costs." ¶ 115. The SEC's investigation culminated in a recommendation that formal action be taken against the Company, and on August 16, 2004, the SEC notified Tyson Foods that it intended to recommend a civil enforcement action against the Company and a separate action against Don Tyson based upon the Company's noncompliance with SEC disclosure regulations for the years 1997 through 2003. ¶ 118.

The SEC investigation revealed that Tyson Foods had failed to fully comply with federal regulations with respect to the disclosure over $3 million in of executive perquisites, including approximately $1.7 million to Don Tyson alone, as well as improper payments to other Tyson family members and friends not identified by name by the SEC. ¶¶ 118, 124. The SEC's investigation resulted in, among other things, Tyson Foods' consent to the entry of an "Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934 (hereafter, the "SEC Order"). ¶ 121. In the SEC Order, the SEC found that Tyson "made misleading disclosures of perquisites and personal benefits provided to Don Tyson" in "proxy statements filed with the [SEC] from 1997 to 2003." ¶ 122. It further found that not only did the company "fail to disclose over $1 million of perquisites" but that it "used the expression 'travel and entertainment' to describe perquisites that could not properly be so characterized." *Id.* In addition, the SEC Order concluded that from 2002 to 2003, Tyson "used the same misleading terms 'travel and entertainment' to describe the continuation of [Don Tyson's] perquisites pursuant to a retirement agreement and failed to disclose fully the nature and scope of those benefits." ¶ 123. The Order found nearly $3 million worth of undisclosed or inadequately disclosed perquisites paid to Don Tyson, or his family and friends, which included uses of the Tyson corporate credit cards for personal expenditures such as purchases of antiques, oriental rugs, vacations, a horse, and "other substantial purchases of clothing, jewelry, artwork, …and theater tickets." ¶ 124. Unnamed family members and friends of the Tysons also were given virtually unlimited use of company-owned aircraft, as well as the use of homes in the English countryside and in Cabo San Lucas, Mexico, which included the use of Company-paid chauffeurs, cars, cooks, housekeepers, landscapers, telephones, and a boat crew. ¶ 124. The SEC Order also found that the Company's proxy statements made false or inadequate disclosures regarding the perquisites and personal benefits paid to Don Tyson pursuant his consulting agreement by characterizing Don Tyson's perquisites as "travel and entertainment costs." ¶ 125. The SEC Order concluded that the 2002 and 2003 proxy statements made "no other disclosures describing the full nature and scope of the perquisites" paid to Don Tyson, and failed to disclose that he and many of his friends and family would continue to receive many of the "perquisites…which could not be characterized as either 'travel' or 'entertainment.'" *Id.* The SEC Order found that Tyson has violated proxy solicitation and reporting provisions required by the federal securities laws, and that Tyson "failed to devise and maintain a system of internal accounting controls over personal use of assets sufficient to detect, prevent, or account properly for Don Tyson's and his family's and friends' use of company assets." ¶ 126.

Given the fact that the SEC investigation exposed serious improprieties by Don Tyson during the period 1997 to 2003, and that many of these same improprieties already had been called to the attention of the Board in connection with the *Herbets* Action and settlement covering the time period prior to 1997, one would have expected the Board of Directors to act swiftly and with a heavy hand to punish Don Tyson for his continuous unfettered raid on Tyson Foods' corporate treasury. Pursuant to its own investigation, the Compensation Committee of the Board determined that Don Tyson should reimburse the Company for $1.7 million of improper benefits and expenses. ¶¶ 127, 128. But rather than have him actually pay this amount, the Board saw fit to give Don Tyson *a handsome raise of $2.8 million dollars* thereby reimbursing him for the $1.7 million he was supposed to give back to the Company, and providing him with an additional $1.1 million windfall for violating SEC rules, deceiving shareholders, and stealing. ¶ 129.

Because Don Tyson's substantial raise for looting the Company obviously would raise an eyebrow, or two, among shareholders, the Tyson Foods Board had an answer for that predicament, too. In the Company's 2004 proxy statement, they incorrectly advised shareholders that Don Tyson's "new contract provides that Mr. Tyson *will* continue to furnish up to 20 hours *per week* of advisory services" (emphasis added) when, in reality, Don Tyson's new contract only provides that he "*may*" furnish such services up to 20 hours *per month*. ¶ 130.

The SEC investigation, Order and resulting fines have already cost Tyson Foods and its shareholders millions of dollars, and somehow Don Tyson came out of it with an additional $1.1 million dollars of free Company money. By approving and/or turning a blind eye to the serious and repeated misuse of corporate assets by Tyson family members and their friends, the members of the Tyson Foods Board breached their fiduciary duties not only to the Company, but also to the Company's public shareholders.

IV. The Consulting Contracts

The improper self-dealing by Tyson family members and friends went far beyond those areas explored by the SEC. One form of self-dealing often abused by the Tyson family has been the adoption of "consulting" contracts by which the Tyson family has committed the Company to pay Tyson family members and friends tens of millions of dollars under the guise of "consulting services," when in reality these contracts are mere gifts exchanged for little or no actual work. ¶¶ 106-112. Defendants Don and Barbara Tyson, Wray, Tollett and former Board member Robert L. Peterson ("Peterson") were all recipients of such contracts and continue to receive their benefits. ¶¶ 9, 11, 17, 23, 26, 107-112.

In October 2001, Don Tyson stepped down as Senior Chairman and became a "consultant" to the Company. ¶ 9. Pursuant to his "consulting contract," the Company committed to pay Don Tyson $800,000 per year for 10 years, granted him one million shares of Tyson Foods stock, and agreed to cover his "travel and entertainment" costs "consistent with past practices," his estimated income tax liabilities, and his life and health insurance costs. ¶¶ 9, 107. In exchange for these benefits, Don Tyson *may* work "up to twenty (20) hours per month." *Id.* (which was misrepresented in the 2004 proxy, ¶ 130). Don Tyson's retirement salary of $800,000 was $200,000 higher than his salary had ever been when he performed full time work. *Id.*

Even while Don Tyson's 2001 consulting agreement was in effect, the true details of that contract were never fully disclosed to shareholders. First, the Defendants did not disclose the nature and likely extent of the "travel and entertainment" costs to be paid by the Company, despite the material amounts of such compensation. Indeed, the millions of dollars paid to Don Tyson, and his family and friends under the rubric of "travel and entertainment" costs was only first revealed in connection with the SEC's findings in 2004 that the Company "used the expression 'travel and entertainment' to describe perquisites that could not properly be so characterized." ¶ 107, 151-152. Thus, while the 2001 contract may not have been unlawful *per se*, the manner in which Defendants permitted Don Tyson to exploit the contract's terms to loot the Company's coffers constitutes a breach of their fiduciary duties.

For example, although the contract suggested that Don Tyson might work up to 20 hours per month, the *truth* of the matter is that he never had any intention of performing *any* services for the Company. This was alluded to when Don Tyson explained that he "looked forward to following [Tyson Foods] progress from my boat," and it was confirmed when the SEC's 2004 investigation revealed that Don Tyson was spending hundreds of thousands of dollars annually on purely personal expenses, like expenses for his boat and boat crew. ¶¶ 3, 122-123, 125. The fact that Don Tyson has no obligation (and no intent) to perform any "consulting services" in exchange for the $800,000-per-year payments is further evidenced by the fact that, if he dies before the expiration of the 10-year term, the payments and benefits payable under the contract would go to his survivors, *including John Tyson, the Chairman and CEO who approved and signed the "consulting" agreement on behalf of the Company.* ¶ 107 Thus, Don Tyson's "consulting contract" was little more than a thinly disguised scheme that has permitted the Tyson family to extract millions of dollars from Tyson Foods while duping the Company's public shareholders into believing that the Company was receiving valuable expertise from a former executive. Defendants' argument that Plaintiffs' allegations are somehow deficient by failing to allege that Don Tyson's so-called "consulting contracts" "are out of line with similar arrangements entered into by other corporations with their ex-CEOs" is absurd. Not only do Defendants fail to identify any such "similar arrangements" let alone any "other corporations," Defendants' argument misses the point entirely. The relevant question is whether Don Tyson was required to provide any services in exchange for the enormous payments extracted from the Company pursuant to these "consulting contracts." And, based on the allegations in the Complaint, the answer to this question is a resounding "no."

Moreover, as discussed above, in July 2004, after Don Tyson was caught with his hand in the corporate till by the SEC, the Board saw fit to reward him by replacing his 2001 contract with a fresh consulting contract that *raised* his annual draw to $1.2 million and provided him with numerous additional perquisites while still requiring no actual work. ¶ 129. In essence, although the Board attempted to deflect public criticism of its compensation practices by purporting to require Don Tyson to repay to the Company over $1.7 million in ill-gotten gains, the Board then caused the Company (*i.e.*, the shareholders) to pay Mr. Tyson an additional *$2.8 million* (over the term of the agreement) for "consulting services" he would never provide, as a means of not only reimbursing Don Tyson for the funds he purportedly was supposed to repay to the Company, but also granting him a windfall of $1.1 million for violating the shareholders' trust. ¶¶ 127-29.

Peterson, who joined the Tyson Foods Board in 2001 after the Company acquired Iowa Beef Packers Inc., was also the recipient of a "consulting" contract. In October 2001, at the same time Don Tyson received his first contract, the Tyson Foods Board approved and caused the Company to enter into a 10-year "consulting" contract with Peterson whereby he would receive a salary of $400,000 per year, plus bonus payments, annual country club dues, use of the Tyson Foods aircraft, and health insurance. ¶¶ 26, 111. Like Don Tyson's 2001 "contract," Peterson's contract also provided him with the benefit of perquisites "consistent with past practices." ¶ 111. But it was only in 2004, in connection with the SEC investigation, that Tyson Foods' public shareholders became aware that the Company was using such contracts and such contract terminology to justify payments to Peterson under the rubric of "travel and entertainment expenses" when they could not be reasonably characterized as such. ¶¶ 115-116, 122-125. Further, Peterson died in May 2004, and obviously has not performed any "consulting" services since that time. ¶ 111. Nevertheless, the Company has continued to pay Peterson's widow the "consulting" fees and other perquisites payable to Peterson under the terms of the contract. *Id.* Again, like Don Tyson's 2001 "consulting contract," the Company's contract with Peterson may not have been improper *per se*, but the Company's use of the contract to funnel to Peterson and his family millions of dollars in cash and perquisites that were deliberately hidden from shareholders constitutes a breach of fiduciary duty by the defendants.

Defendants appear to acknowledge the absurdity of consulting contracts that require no services from the "consultant" at all, and of the fact that Tyson Foods now is apparently paying for "consulting services" to be performed by a dead man, by attempting to characterize the consulting contracts as simply forms of deferred salary, "annuities" or lump sum bonuses that are otherwise within the Board's discretion. Def. MTD at 9, 11-12 (suggesting that Peterson's "consulting contract" should be evaluated in connection with Peterson's "total compensation," and characterizing the Company's decision to pay Peterson and his spouse over a 10-year period as "simply a matter of allocation"); *id.* at 12-13 (stating that the consulting compensation "was no different in effect than the common corporate practice of purchasing annuities as a component of executive compensation."); *id* at 14 (touting the supposed value of Don Tyson's "advisory services"). Even if the Company could pay a non-required departing bonus to an executive, that is simply *not* what Tyson Foods disclosed these payments were for. Delaware directors cannot lie to their shareholders and then when caught say, "What the heck, we could have paid it to him anyway for other reasons." Moreover, Defendants' post-hoc and self-serving characterizations of these consulting contracts is simply not to be believed. Defendants failed to disclose the true nature or purpose of these agreements because they were mere gifts, which provided a disguised form of compensation to Don Tyson and his family and friends.

V. <u>Disguised Or Undisclosed Executive Compensation</u>

In addition to so-called "consulting contracts," the Defendants devised other ways for the Tyson family to raid the Company's coffers in the form of undisclosed executive perquisites. As revealed through the SEC's investigation, and as Tyson Foods has now admitted in connection with the SEC Order, Don Tyson and his family and friends have been permitted virtually unlimited access to Company assets for personal use, which was simply passed off to stockholders as "other annual compensation" or "travel and entertainment" expenses in the footnotes of Tyson's proxy statements. ¶¶ 113-126. The 2004 Proxy Statement, for instance, described this category of compensation as travel and entertainment costs, insurance premiums, reimbursements for income tax liability related to the travel and entertainment costs and other items. ¶ 114. The Company now has admitted that the actual payments made under these categories served no legitimate business purpose and were not properly characterized as business related or "travel and entertainment" expenses at all. ¶¶ 119, 121-125.

The "other annual compensation" disclosure has appeared on Tyson's proxy statements since at least 1992, when Don Tyson was the sole beneficiary of this category of income. ¶ 113. In 1998, when John Tyson became Chairman of the Board, he began benefiting from the "other annual compensation" category as well. *Id.* Bond started reaping the benefits in 2001. *Id.* John Tyson and Bond had "other annual compensation" for the 2003 fiscal year totaling $325,286 and $183,548, respectively. ¶ 117. In 2002, John Tyson and Bond received $172,463 and $73,685, respectively, of "other annual compensation." *Id.* In 2001, Don Tyson, John Tyson, and Bond received $275,822, $125,146, and $61,566, respectively, in "other annual compensation." *Id.*

The Board of Directors, which was responsible for monitoring and approving these payments (supposedly with heightened scrutiny after the *Herbets* settlement) acquiesced or deliberately turned a blind eye to the admittedly improper nature of these payments and the Company's disclosures about them. In particular, pursuant to the 1997 settlement in the *Herbets* Action, a committee of the Company's outside directors was supposed to be carefully monitoring the perquisites being paid to Don Tyson, and was ordered to "review the reasonableness of Don Tyson's requests for reimbursement annually." *See* Hirzel Aff., Ex. O, at p. 9. This was not done, or if it was done, it was done so recklessly and without any care that the Company was subjected to a formal SEC investigation and to the payment of civil fines. ¶¶ 121-126.

VI. <u>The Timing Of Stock Option Awards Based Upon Inside Information.</u>

A third method of secret compensation that has been abused by Tyson family members and other insiders concerns the timing of stock option awards. Since as early as 1999, the Tyson Foods Board has manipulated, or approved the manipulation of Tyson Foods' stock option plan so that Tyson family members and insiders could receive favorably priced stock options awards based upon inside information. ¶ 2. This newly emerging form of insider trading[7] will cost the Company millions of dollars as these options are exercised at strike prices significantly lower than they otherwise would have been had the Company's executives not manipulated the timing of the awards to coincide with the release of market moving news to the investing public.

Tyson Foods' Stock Incentive Plan gives the Board authority to award Class A Tyson shares, stock options, or other incentives to employees, officers, directors, and others at the

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[7] *See* Charles Forelle and James Bandler, *The Perfect Payday*, THE WALL STREET JOURNAL, March 18, 2006, at A1 (detailing the SEC's current investigation of several companies relating to the suspicious timing of stock option grants) (attached to the accompanying Transmittal Affidavit of Michael J. Barry).

Company. ¶ 133. The Board's Compensation Committee has discretion as to when and to whom to distribute the stock awards, but the strike price of such options cannot be any lower than the fair market value of the Company's stock on the day of the grant. ¶ 134. In addition, as to the timing of when to grant executive stock options, Tyson discloses in each of its proxy statements that the Compensation Committee consults with and receives the "recommendations" of the Company's "Chairman and Chief Executive Officer [John Tyson]". ¶ 133.

It is true that for each grant of options challenged in the Complaint, the strike price is no lower than the publicly traded price of the Company's stock on the purported date the grant was made. However, the Company granted these options while in possession of information that both the Board and the stock option recipient *knew* would materially, and positively, impact the price of the Company's stock when disclosed. Thus, as alleged in the Complaint, Defendants timed the stock option grants to occur before the disclosure of this information, so that the grant recipients could take advantage of the lower strike prices. ¶ 135. This permitted the Company to conceal (by significantly understating) the true level of compensation paid to senior executives, while at the same time purporting to maintain facial compliance with the terms of the stock option plan. The Defendants knowingly approved and acquiesced to the scheme to grant favorably priced options because they too were option recipients. ¶ 135. This scheme, of course, was not disclosed to the public stockholders of Tyson Foods, and even the most diligent investor could not have connected the dots on this scheme until a definitive pattern emerged. ¶ 153.

In the first of these stock option grants, on September 28, 1999, the Compensation Committee (then comprised of Vorsanger, Massey, and Cassady) granted 150,000 options to John Tyson, 125,000 options to Wayne Britt (a former Tyson CEO), and 80,000 options to Greg W. Lee, Tyson's then-COO. ¶ 136. Tyson Foods granted the options at $15, nine cents over the closing price for that day. *Id.* The very next day, however, the Company announced that Smithfield Foods, Inc. had agreed to acquire Tyson Foods' Pork Group for approximately $80 million. *Id.* Not unexpectedly, the Company's stock rose rapidly on the news and it topped the Associated Press's "Big Movers in the Stock Market List." *Id.* Just days later, on October 4, 1999, the stock closed at $16.53, 10% higher than the strike price of the options granted less than a week earlier. *Id.* By December 1, 1999, the stock closed at $17.50 per share, approximately 15% higher than the strike price of the options in just two months. *Id.* This manipulation of the timing of the stock option grants will cost the Company at least $575,000 on exercise.

On March 29, 2001, the Compensation Committee (comprised of Massey, Hackley and Allen) granted 200,000 stock options to John Tyson, 100,000 stock options to Greg Lee, and 50,000 stock options to Steven Hankins, Tyson's then-CFO, at $11.50 per share, the closing price of the stock for that day. ¶ 137. The next day, Tyson Foods publicly cancelled its $3.2 billion deal to acquire IBP, Inc. *Id.* As the news hit the streets, Tyson Foods' stock price rose to $13.47. Had the issuance of these options not been manipulated to occur just before the stock price was driven up, the aggregate strike price of the options would have been at least $689,500 higher. *Id.*

In October of 2001, the Company did it again. The Company awarded options to John Tyson (200,000 options), Greg Lee (60,000 options), and Steven Hankins (15,000 options) with a strike price of $9.32. ¶ 138. Within two weeks, Tyson Foods announced that its 2001 fourth quarter earnings would be more than *double* the Company's expected earnings. *Id.* Not unexpectedly, this disclosure immediately drove up the price of Tyson Foods' stock, which closed at $11.90 by the end of November. *Id.* This manipulation will cost the company at least $709,500 when these options are exercised. *Id.*

Finally, on September 19, 2003, the Company granted stock options to a number of executives and directors, including 500,000 options to John Tyson, 280,000 options to Bond, and 160,000 options to Greg Lee, with a strike price of $13.33. ¶ 139. Within days of these transactions, Tyson publicly announced that earnings were expected to exceed analysts' expectations and the stock price rose to $14.25, increasing the value of the options by approximately seven percent. *Id.* Had the issuance of these options not been manipulated to occur just before the stock price was driven up, the aggregate strike price of the options would have been at least $864,800 higher. *Id.*

VII. <u>Related-Party Transactions</u>

The Tyson "friends and family" plan, however, was not limited to lavish "consulting" contracts and corporate payments for absurd perks as such home décor and personal boat crews. In addition, the Defendants have caused the Company to funnel millions in payments to corporate insiders and other friends of the Tyson family through a multitude of related-party transactions designed merely to enrich those fortunate enough to be in the good graces of the Tyson family, all at the expense of the Company's public shareholders. Perhaps most disturbing in this regard is the fact that Defendants previously agreed to curtail such improper payments through the establishment of a committee that was supposed to review each related party transaction and serve as a gatekeeper against improper payments. However, this committee, which was established pursuant to a Court-approved settlement in *Herbets*, failed to act as any gatekeeper at all (¶¶ 89-105), and the Defendants have continued to authorize (and conceal) millions of dollars of payments to related parties. Only when confronted with an independent investigation by the SEC in 2003 did the Company agree to terminate some of these contracts.

Published figures show that Tyson Foods' related party transactions amounted to over $160 million for the period 1998 to 2004. ¶ 68. That figure was more than 10% of the Company's $1.6 billion net earnings for that period. ¶ 69. Thus, related party transactions were material to Tyson Foods' bottom line. These related party transactions included farm lease payments, aircraft lease agreements, swine grow out, breeder hen research, poultry grow out, waste water treatment, leased warehouse space, cattle, cold storage and chicken products. ¶ 68.[8]

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[8] These transactions are described in detail at ¶¶ 74-88.

The recipients of these related party transactions included members of the Tyson family, as well as important Tyson Foods directors such as Tollett and Massey. ¶ 68.

The terms of these related-party contracts have never been disclosed to shareholders. ¶¶ 66-67. Instead, defendants only disclose in each year's proxy the aggregate amount of payments made to the related entities in the previous fiscal year and the most cursory description of the transaction. *Id.* What is clear, however, is that the Tyson Foods Board willingly turned a blind eye to these transactions. In this manner, the Board has allowed the Tyson family and friends to manipulate the Company into entering into a series of unjustified and unfair related-party transactions, some of which Tyson itself was forced to cancel following an internal review that was spawned by the SEC investigation. ¶ 78.

The Grow-Out Operations

In one type of related-party transaction – the poultry and swine "grow-out operations" – Tyson Foods sells related parties[9] baby chicks, swine, feed, veterinary and technical services, supplies and other items and services necessary to grow livestock to market age, and once the livestock reach market age the related parties then sell them either to Tyson Foods or to unaffiliated companies. ¶ 74. Despite the inherently interested nature of these "grow out" operations, the Tyson Foods Board of Directors *never employed any process to ensure that the transactions were "fair" to the Company*. ¶ 77. In fact, conceding the impropriety of these "grow out" operations, the Board terminated many of these deals in 2003 upon obtaining notice of the SEC investigation. ¶ 78. The cancellation of these contracts provides a strong inference that they were, in fact, unfair. *Id.*

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[9] According to the Company's proxy statements, the following related parties were involved in these grow out operations: Don Tyson; John Tyson; Carla and Cheryl Tyson (Don's daughters and John's sisters); Joe Starr; entities in which Joe Starr and Don Tyson's children, including John Tyson, are partners or owners; an entity owned by Gerald Johnston; a partnership in which Gerald Johnston and Donald Wray are partners; and a partnership in which Joe Starr's children are partners. ¶¶ 68-75. Don Tyson himself captured roughly 60% of all such operations. *Id.*

Farm Leases

The second category of related-party transactions involves farm leases. As set forth in the Complaint, in 2003, Tyson Foods paid $1,842,387 in lease payments to insiders and Tyson family members. ¶ 79.[10] In 2002 and 2001, Tyson Foods paid insiders and family friends a total of $2,288,179 and $2,451,264, respectively. *Id.*[11] Again, Defendants approved these related party farm leases without employing procedures to ensure the fairness of these transactions to Tyson Foods. ¶ 80. And, again, the fact that they cancelled at least five leases (with aggregate

[10] The 2003 leases were between Tyson Foods and the following:

(a) a partnership of which John Tyson and the Randal W. Tyson Testamentary Trust, are partners (aggregate lease payments of $211,056 in 2003);
(b) entities in which Starr and Don Tyson's children, including John Tyson, are partners or owners (aggregate lease payments of $327,456 in 2003);
(c) the Tyson Children Partnership, of which John Tyson is a partner (aggregate lease payments of $450,000);
(d) JHT, LLC, of which Don Tyson and the Randal W. Tyson Testamentary Trust are members (aggregate lease payments of $30,000 in 2003);
(e) Tollett (aggregate lease payments of $86,010 in 2003);
(f) Johnston (aggregate lease payments of $218,177 in 2003);
(g) Don Tyson (aggregate lease payments of $229,047 in 2003);
(h) entities in which Starr and Don Tyson's children, including John Tyson, are partners or owners (aggregate lease payments of $530,225 in 2003);
(i) the Randal W. Tyson Testamentary trust (aggregate lease payments of $50,504 in 2003); and
(j) certain entities controlled by Starr (aggregate lease payments of $37,548 in 2003).

See ¶ 68.

[11] Tyson Foods' lease payments for 2001 and 2002 break down as follows:

(a) $394,567 in 2002 and $392,652 in 2001 to Don Tyson;
(b) $211,056 in each of 2002 and 2001 to a partnership of which John Tyson and the Randal W. Tyson Testamentary Trust are partners;
(c) $675,060 in each of 2002 and 2001 to entities in which Starr and Don Tyson's children, including John Tyson, are partners or owners;
(d) $450,000 in 2002 and $615,000 to the Tyson Children Partnership, of which John Tyson is a partner;
(e) $75,756 in each of 2002 and 2001 to the Randal W. Tyson Testamentary Trust;
(f) $30,000 in each of 2002 and 2001 to JHT, LLC, of which Don Tyson and the Randal W. Tyson Testamentary Trust are members;
(g) $140,640 in each of 2002 and 2001 to Tollet;
(h) $64,368 in each of 2002 and 2001 to entities controlled by Starr; and
(i) $246,732 in each of 2002 and 2001 to Johnston.

See ¶ 68.

lease payments worth $596,218) when faced with the SEC investigation in 2003 provides a strong indication that the leases are not entirely fair to the Company. ¶ 79.

Other Related-Party Transactions With The Tyson Family and Friends

The widespread related party transactions that have become part of the fabric of Tyson Foods' business operations extend well beyond the "grow out" operations and farm leases. Indeed, Tyson family members and friends are also the beneficiaries of numerous other related-party transactions, including aviation services, wastewater treatment services, and real estate leases and sales:

- During the years 2001 through 2003, Tyson made over $3.5 million in aggregate lease payments to Tyson Family Aviation, LLC, of which Don Tyson, John Tyson, the Randal W. Tyson Testamentary Trust, and Starr are members. ¶ 81.
- Tyson Foods made payments to two wastewater treatment plants operated by entities controlled by Tyson family members totaling over $5.3 million in 2003, $5.5 million in 2002, and $6.1 million in 2001. ¶ 82.
- From 2001 through 2004, Tyson Foods leased offices and warehouses from entities in which Starr and Don Tyson's children, including John Tyson, are partners or owners for payments totaling $759,500. ¶ 83.
- On May 21, 2004, Tyson purchased a parcel of land for approximately $356,000 from JHT, LLC, a company of which Don Tyson and the Randall W. Tyson Testamentary Trust are members. ¶ 84.
- In 2002 and 2003, Tyson paid Shelby Massey Farms, owned by Defendant Massey, a total of $20 million for cattle. ¶ 86.
- Finally, in the years 2001 through 2003, a Tyson subsidiary paid defendant Tollett $624,077 per year for breeder hen research and development. ¶ 87.

All of the above transactions and agreements enriched Tyson family members and friends through the outlay of Company funds. Defendants approved all of these related-party transactions without employing procedures to ensure the fairness of these transactions to Tyson Foods, and the transactions were, in fact, unfair to the Company. ¶¶ 85, 88.

In addition to the related party transactions disclosed in Tyson's SEC filings, there was a significant undisclosed related party transaction uncovered during the course of the SEC investigation of Don Tyson. That investigation revealed Tyson Foods' entry into $5 million worth of contracts between 2001 and 2003 with a logo company whose principal owner was a close personal friend of Don Tyson. ¶¶ 102-105. The Tyson Foods Compensation Committee investigated these contracts in 2004 and concluded that they ought to have been reviewed but were not reviewed, and that no bid process had been conducted for those contracts. ¶ 104.

Additionally, the Tyson Foods proxy statement for 2004 disclosed that Tyson Foods' Governance Committee had approved without review the purchase by the Company of over one million shares of Don Tyson's Class A common stock at a purchase price of $15.11 per share for a total of $15.5 million. ¶¶ 131-132. There was no explanation for this related party transaction and no explanation as to why Don Tyson could not have sold those shares on the open market thereby saving Tyson Foods millions of dollars. *Id* Once again, Tyson Foods' directors provided a substantial benefit to Don Tyson at the expense of the Company and its shareholders.

VIII. The *Herbets* Settlement and Order

This is not the first time that the decision-making of the Tyson Foods Board has been subjected to shareholder and governmental scrutiny on account of its secretive self-dealing with Tyson family members and friends. In 1995, the Board faced substantially similar challenges, which resulted in the entry of a settlement agreement and order in the *Herbets* Action. ¶¶ 57-65, 194-202. Among other things, the settlement of the *Herbets* Action required the Tyson Foods Board to establish an independent committee of the Board to "(i) oversee and review related party and other special transactions between the Company and its directors, executive officers or their affiliates [including a "review of the reasonableness of Don Tyson's requests for reimbursements annually"]; (ii) review and recommend to the Board Corporate Governance Principles applicable to the Company; and (iii) review and recommend to the Board a Code of Conduct applicable to the Company." ¶¶ 58-59. The Board, however, has utterly failed to abide by the settlement and order in the *Herbets* Action, causing the Company to continue to suffer tens of millions of dollars in damages, year after year, as a result of unwarranted and unfair related-party transactions with insiders. ¶ 65. Most egregiously, the Board wholly failed to render any supervisory authority over Don Tyson as mandated, allowing him to continue looting the Company at will so as to purchase (according to the SEC) antiques, oriental rugs, vacations, a horse, clothing, jewelry, artwork, theatre tickets, and the services of chauffeurs, maids, landscapers, and a boat crew, among other purely personal expenditures, with corporate funds. ¶ 124.

Despite the Defendants' admission that the settlement in the *Herberts* Action required that "a committee of the Company's outside directors will review, at least annually, the terms and fairness of all transactions between the Company…and its directors, officers or their affiliates," (Hirzel Aff., Ex. O, at p. 9) , the Board in fact failed to institute adequate internal controls, failed to conduct good faith fairness reviews, and failed to appoint a committee of truly outside directors to handle these tasks. By way of example only, the Company's Board appointed Defendant Massey to the "Special Committee" which was created in the wake of the *Herberts* Action to handle the fairness review of related-party transactions. ¶ 57. Tyson Foods then turned around and handed out over $20 million to Massey for related-party cattle purchases from Shelby Massey Farms in 2002 and 2003 – literally buying his allegiance. ¶ 68. Also of note, the Special Committee, which later came to be called the Governance Committee, never met more than once annually during the fiscal years of 1999 to 2002, despite the fact that the Company paid out over *$99 million* in related-party transactions during those years. ¶ 60.

Not surprisingly, the fact that a member of the Special Committee was bought and paid-for, and the fact that the Committee never bothered to meet anyway, resulted in the Special Committee failing to review most of the related party transactions identified above. Of the more than $160 million in related party transactions between 1998 and 2004, the Special Committee and the Governance Committee reviewed less that 42% ($68 million). ¶ 72. The poultry grow out program alone, which was not reviewed, resulted in transactions valued at over $65 million. *Id.*

Thus, the Board's assertion in the Company's 2003 Proxy statement that "[a]ll existing related party transactions have been reviewed by the Governance Committee or its predecessor Committee [and that] [a]ny new related party transactions will be reviewed by the Governance Committee" (¶ 73) was just plain false. The Amended Complaint provides extensive factual allegations showing that the Special Committee and the Governance Committee failed to perform their tasks properly from 1998 through 2004. ¶¶ 89-96. In addition, even when the Special Committee attempted to perform its task it did so improperly by ignoring the advice of outside consultants. For example, in the spring of 2000, the Special Committee purported to review a contract between Tyson Foods and a sow farm that was partly owned by Don Tyson (the "Arnett Sow Complex"). Despite the fact that an outside consultant determined that the contract was unfair to the Company, the Special Committee made no special adjustments to the Company's arrangement with the Arnett Sow Complex. ¶¶ 98-99. Again in 2000, the Special Committee purported to conduct a review of a lease between the Company and a farm owned by the Tyson Children's Partnership (the CLS Farm). Although an outside appraiser determined that the lease "was not an arms length-market lease," and that the farm "suffered from incompetent management" (¶ 100), the Special Committee apparently approved a 10-year lease which obligated the Company to pay the full market value of the entire property in just six years. ¶ 101.

ARGUMENT

In Delaware, a complaint will be dismissed "only where the court determines with 'reasonable certainty' that the plaintiff could prevail on no set of facts that may be inferred from the well-pleaded allegations in the complaint." *Malpiede v. Townson*, 780 A.2d 1075, 1082-83 (Del. 2001). Moreover, notice pleading only is required. *Id.* at 1083 ("This standard [reasonable certainty] is based on the 'notice pleading' requirement established in Ct. Ch. R. 8(e) …."). The Amended Complaint provides extensive factual allegations based upon documents produced by Tyson to easily meet this Court's Rule 12(b)(6) standard and the notice pleading requirements.

The Complaint contains nine counts, each of which is legally sufficient to state a claim and each of which entitles Plaintiffs to the relief they seek. Defendants have moved to dismiss all Counts of the Complaint on separate but equally specious grounds that rely more upon Defendants' misreading and mischaracterization of the Complaint than on the actual facts and claims alleged. Defendants argue that Plaintiffs' derivative claims in Counts I thorugh VII and IX are either legally insufficient, time-barred, or improper because demand upon the Board is not futile. With respect to the class action claim in Count VIII, Defendants argue that this claim is either moot, or not properly asserted as a direct claim. Each of Defendants' arguments must be rejected.

I. DEMAND IS EXCUSED AS FUTILE ON ALL OF PLAINTIFFS' CLAIMS.

Defendants argue that certain of Plaintiffs' claims should be dismissed for failure to sufficiently allege demand futility. First, Defendants argue that Plaintiffs' breach of fiduciary duty claims relating to the non-disclosure of "other annual compensation" paid to Defendants Bond, John Tyson and Don Tyson (Count II) should be dismissed because no members of the Compensation Committee of the Tyson Foods Board "lacked independence from Don Tyson, John Tyson, or Bond." Def. MTD at 18-19. Second, Defendants argue that Plaintiffs' claims regarding stock option timing (Count III) must fail on demand futility grounds because, according to Defendants, the members of the Compensation Committee were not beholden to the option recipients, interested in the option grants, or lacking in independence. *Id.* at 23-24. Third, Defendants argue that the Plaintiffs have failed to plead particularized facts creating a reasonable doubt that Tyson Foods directors are disinterested and independent for purposes of considering four of the related-party transactions challenged by Plaintiffs (Count IV): Massey's cattle purchases, Tollett's breeder hen research, Johnston's cold storage lease, and the chicken products sale to Johnston's son. *Id.* at 29. Finally, Defendants state that Plaintiffs failed to adequately satisfy the demand futility test on their claims relating to the Board's exposure of the Company to

SEC penalties and fines (Count V) because, according to Defendants, Plaintiffs have not demonstrated that there is a "substantial likelihood" that a majority of the directors will be found liable. *Id.* at 40-42. None of these arguments has merit when the composition of the Board is considered in the context of the Complaint.[12]

A. The Tyson Board Is Comprised Of A Majority Of Interested Directors Who Are Beholden To Tyson Family Interests.

Plaintiffs did not make a demand on the Board prior to commencing this derivative action because Tyson Foods' current Board is comprised of a majority of interested directors who are beholden to Tyson family interests.[13] This is a fundamental and undisputed fact that dooms each of Defendants' demand futility arguments for dismissal.

The Tyson Foods' Board is comprised of ten members – Don Tyson, John Tyson, Barbara Tyson, Bond, Tollett, Hackley, Kever, Jones,[14] Smith and Zapanta. ¶ 140. Of these ten, Tyson Foods openly admits that five directors are not independent, namely: Bond, Tollett, Don Tyson, John Tyson, and Barbara Tyson. ¶ 142. With respect to any claims involving, implicating, or threatening any of the Tyson family's interests (namely, all of Plaintiffs' claims), demand is therefore futile because each of these five directors – admittedly – lacks independence and is beholden to the Tyson family. *See Beam v. Martha Stewart*, 845 A.2d 1040, 1046 (Del. 2004)

[12] Defendants do not contest the issue of demand futility in the context of all other Counts and claims.

[13] Defendants do not squarely contest demand futility in the context of Count I, thereby tacitly recognizing that the consulting contracts were awarded by an interested and/or not independent body of Tyson directors. While there is a veiled reference to the demand futility requirement in the context of the Peterson consulting contract (Def. MTD at 42), the Defendants cannot seriously state that the Tyson-dominated Board could fairly consider a claim regarding the Peterson contract, when Don Tyson and Barbara Tyson are both recipients of substantially similar deals. Any negative result in litigation on Peterson's consulting contract would necessarily impact the Tyson's consulting contracts in much the same way.

[14] Jones resigned his Board seat in June 2005. Since the original complaint was filed prior to Jones' resignation, it is appropriate to consider him as current member of the Board for demand futility purposes. *See Needham v. Cruver*, 1993 WL 179336, at *3 (Del. Ch.).

("If three directors of a six person board are not independent and three directors are independent, there is not a majority of independent directors and demand would be futile."), citing *Beneville v. York*, 769 A.2d 80, 85-86 (Del. Ch. 2000) ("holding that demand is excused where a board is evenly divided between interested and disinterested directors").

B. Demand Is Futile With Respect To The Claims Challenging "Other Compensation" Payments And Stock Option Timing.

The Defendants' arguments regarding the purported failure of Plaintiffs to sufficiently plead demand futility on Counts II and III are completely misplaced, because they are founded upon the incorrect premise that *only* the activities of the Compensation Committee are at issue, and that only the independence and disinterestedness of the Compensation Committee is therefore relevant for purposes of considering pre-suit demand for these claims. This is simply wrong.

First, in cases of demand futility, the makeup and interests of the full Board of Directors must be considered, not just a hand-picked committee selected by defendants for purposes of its briefing. In this case, it is abundantly clear in Count II that the "other compensation" payments received by Don Tyson and John Tyson are at the very heart of the claim, and that if Plaintiffs are successful in their suit, disgorgement damages will be appropriate to reimburse the Company for the money these top executives secreted away. Thus, if anyone is targeted for a lawsuit concerning "other compensation" payments, then the Tyson family's interests are clearly at issue, and the voting block of Bond, Tollett, Don Tyson, John Tyson, and Barbara Tyson is incapable of considering a demand to institute suit.

It is similarly clear in Count III that John Tyson was the largest recipient of each of the challenged option grants (¶¶ 136-139), and that a successful suit on Count III will render him at least liable for the difference between the strike price at which the stock option award was made and the price to which the stock price moved once the favorable market moving news was released. Thus, again, a Board that admittedly lacks independence from the Tysons and is beholden to Tyson family interests, as Bond, Tollett, Don Tyson, John Tyson, and Barbara Tyson are, cannot impartially consider a demand to institute such a claim.

C. Demand Is Futile With Respect To The Related Party Transactions Identified By Defendants.

Defendants claim that Plaintiffs have failed to sufficiently plead demand futility with respect to related party transactions involving Johnston (farm leases, poultry and swine operations with Wray, and chicken products purchases from Johnston's son), Wray (poultry and swine operations with Johnston), Tollett (poultry research),[15] Starr (poultry operation and warehouse lease with the Tyson children) and Massey (cattle purchases). Def. MTD at 28. There is, however, an obvious flaw to this argument: Although these particular transactions do not involve members of the Tyson family, they are part of a pattern of undisclosed compensation and insider deals which includes numerous transactions involving Tyson family members.[16] Thus, while Defendants artfully attempt to convince this Court that the Tyson family interests "involve entirely different subject matters" (Def. MTD at 29), nothing could be further from the truth. These sweetheart deals were awarded to the non-Tyson directors in exchange for their continued loyalty to the Tyson family interests (e.g., the $20 million cattle purchases from Compensation Committee Chairman Massey) (¶¶ 68, 86). Each of the related party transaction participants is therefore interested because a decision to institute suit against the Tysons for their involvement in similar related party transactions, necessarily would threaten their present and future ability to engage in similar related party deals. Starr's related-party transactions, moreover, involved the

[15] Tollett is identified by Tyson itself as lacking independence, so his presence on Defendants' list is a bit puzzling. Tollett not only was involved in common related party transactions with Tyson family members, but he is also the recipient of one of the Tyson Family's generous "consulting contracts." ¶¶ 17, 68, 87, 109.

[16] John Tyson, Don Tyson, and Barbara Tyson (along with other Tysons) are substantial participants in the same types of related-party transaction as the non-Tyson family member executives. *See* ¶¶ 68, 75 (several Tysons are involved in the same poultry grow out operations as Wray, Starr, and Johnston); ¶ 68 (several Tysons are involved in the same farm lease arrangements as Tollett, Johnston, Starr).

Tyson children. ¶ 68. For demand futility purposes, a director is "interested" in a transaction when "he receives a personal financial benefit that is not equally shared by the stockholders" or when "a corporate decision will have a materially detrimental impact on a director, but not on the corporation or the stockholders." *Ash v. McCall*, 2000 WL 1370341, at *6 (Del. Ch.) (citations omitted). Under the circumstances described above, Johnston, Massey, Tollett, Don Tyson, John Tyson, and Barbara Tyson each are recipients of "personal financial benefits" by virtue of their direct participation in related party transactions. Any corporate decision to pursue claims regarding the payment of improper "other compensation" or related-party transactions necessarily would have "a materially detrimental impact" on the majority of directors, but not on the corporation or its shareholders. *Rales v. Blasband*, 634 A.2d 927, 933 (Del. 1993) ("Directorial interest exists whenever divided loyalties are present, or a director has received, or is entitled to receive, a personal financial benefit from the challenged transaction which is not equally shared by the stockholders."); *Beam v. Martha Stewart*, 845 A.2d 1040, 1044-1045 (Del. 2004) ("Patrick's position as an officer and inside director, together with the substantial compensation she receives from the company, raised a reasonable doubt as to her ability objectively to consider demand.") Thus, demand is futile.

But even if these directors are not considered "interested" on these particular transactions, the Complaint contains sufficient allegations to excuse demand under the second prong of *Aronson* by raising a doubt that these transactions were the product of any business judgment at all. *See In re The Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 286 (Del. Ch. 2003) ("Plaintiffs may rebut the presumption that the board's decision is entitled to deference by raising a reason to doubt whether the board's action was taken on an informed basis or whether the directors honestly and in good faith believed that the action was in the best interests of the corporation.") Pursuant to the settlement in the *Herbets* litigation, *every one* of the Company's related party transactions were required to be reviewed by the Special Committee to ensure fairness to the Company. ¶ 57. But, as alleged in the Complaint, the Special Committee completely abandoned its oversight responsibilities, rendering any such reviews meaningless. ¶¶ 89-105. Based on these allegations, there is substantial doubt that any of the related party transactions, including those with non-Tyson family members, was the product of any valid exercise of business judgment, and demand is excused.

D. Demand Is Futile With Respect To The Breach Of Fiduciary Duty Claims In Count V Regarding Exposure Of The Company To SEC Sanctions And Fines.

Count V asserts a derivative claim against Defendants for breaching their fiduciary duties by engaging in misconduct that exposed the Company to SEC penalties and fines. Defendants argue that this claim, too, must be dismissed for Plaintiffs' failure to make a demand. Defendants are mistaken. The SEC fines were premised on the Company's misstatements in disclosures relating to the "other compensation" paid to Don Tyson and others.[17] Defendants argue that Plaintiffs must show a "substantial likelihood" that a majority of the directors will be found liable for this disclosure violation before they may be considered interested for purposes of Count V. Def. MTD at 40. They glean this standard from a selected quotation in *Rales v. Blasband*, 634 A.2d 927 (Del. 1993), but a closer reading of that decision reveals that the Court itself rejected the very standard Defendants attempt to rely upon here. *See Rales*, 634 A.2d at 934 ("we reject the defendants' proposal that … we adopt … a requirement that a plaintiff must demonstrate a reasonable probability of success on the merits."). Moreover, there is no reason to apply this onerous standard here because a majority of interested directors were on the Tyson Foods Board when all of the transactions challenged in the Complaint were approved and when all of the disclosure violations took place. Additionally, a majority of the current Board consists of interested directors who took part in the underlying transactions themselves. As inside Board members, these individuals participated directly in most of the harmful, self-dealing transactions

[17] Demand is excused on claims relating to these disclosures as well. *See supra* Sec. I.B.

that are the subject of the Complaint, and they also approved and concealed these transactions (and the similar, self-dealing transactions of their fellow inside Board members) that are the subject of Count V. Accordingly, the demand futility standards discussed above in Section I.C. apply with equal force to the claims at issue in Count V of Plaintiffs' Complaint, and Defendants' demand futility arguments must be rejected.

Even if the Court did adopt Defendants' onerous pleading standard on Count V, Plaintiffs' Complaint meets it. As stated in the Complaint, Tyson Foods was already forced to pay SEC fines for conduct that the Board was supposed to be closely monitoring on account of the Order in the *Herbets* Action. This failure, at least, represents gross negligence given the long history of the problems at Tyson Foods and the Board's consistent failure (for over a decade) to take meaningful corrective action.

II. PLAINTIFFS' DERIVATIVE CLAIMS ARE LEGALLY SUFFICIENT

A. Plaintiffs' Claims in Count I Regarding the Don Tyson and Peterson Consulting Contracts Are Legally Sufficient.

According to Defendants' self-serving reading, Plaintiffs' claims regarding the Don Tyson and Peterson consulting agreements constitute nothing more than claims for corporate waste which – according to Defendants – are legally insufficient under the "stringent waste standard" of Delaware law because the challenged consulting contracts *required* actual work to be performed as consideration. *Id.* at 10-16. This "work requirement" is either drawn from Defendants' imagination or from Tyson Foods' materially misleading proxy statements, because it is found neither in the contracts themselves nor in the Complaint. The fallacy of the "work requirement as consideration" argument is proven most clearly by the fact that Peterson's family continues to receive the full benefits of his contract even though Peterson died in May 2004, rendering him incapable (except, perhaps, with the aid of a Ouija board) of rendering the "required" advisory services supposedly called for by his agreement. ¶¶ 106, 111. And it is further confirmed by Don Tyson's statement that he looked forward to following Tyson Foods' progress from his boat. ¶ 3. While Defendants attempt to make light of this statement, it is difficult to ignore the findings of the SEC, which found that Don Tyson racked up tens or hundreds of thousands of dollars annually in personal expenditures (paid for by the Company under the guise of "other compensation") in Cabo San Lucas, Mexico, where he keeps his boat and the Tyson Foods-paid boat crew. ¶ 124.

Fairly read, Count I says: (1) the consulting contracts are really gifts that require no work or other consideration in return (¶¶ 106, 130, 158); (2) Defendants lied to the stockholders when they disclosed the consulting contracts because the Company really paid a lot more for a lot less than Defendants disclosed (¶¶ 107-108, 111, 125, 130, 161); and (3) the consulting contracts were related party transactions that Defendants cannot possibly show are entirely fair to the Company. *See* ¶¶ 106-112, 158-162.

On the first point, the Complaint alleges that there was a total failure of consideration for these consulting contracts, so much so that the contracts themselves amount to outright gifts. ¶¶ 106-111, 130, 162 ("The Board used the Don Tyson and Peterson consulting agreements to funnel corporate funds to Don Tyson, Peterson, and their families under the guise of 'consulting fees' when in fact those cash payments and perquisites were unrelated to any consulting services."). As further alleged, the so-called consulting contract originally awarded to Don Tyson paid him $8 million over 10 years, gave him 1 million Tyson Foods stock options, paid his life and health insurance and his travel and entertainment expenses, and provided other perks "consistent with past practices," yet it does not actually *require* any work or consulting at all from Don Tyson. ¶ 106-107.

Most disturbing of all, however, is Don Tyson's 2004 consulting contract. After the SEC found that Don Tyson was looting the Tyson corporate treasury for personal expenditures, rather than punishing Don Tyson (and even perhaps canceling his 2001 consulting contract through which the expenditures were paid), the Board not only let Don Tyson get away without repaying a cent, but it gave him an additional $1.1 million. The Board accomplished this by levying a sham $1.7 million repayment obligation on Don Tyson (which was widely publicized), but then replacing his 2001 agreement with an even more lucrative consulting agreement in 2004, which gave him a whopping $2.8 million raise over the 2001 agreement, while still not requiring him to provide one minute of consulting services. This was not only a gift, but it was a completely unjustified and improper gift given the serious misdeeds of Don Tyson that were turned up as a result of the SEC investigation. There is simply no rational business purpose for rewarding this type of misconduct, particularly when it has gone on now for over 10 years and been the subject of several government investigations and shareholder suits.

Taking these allegations as true – as this Court must – and ignoring the factual averments that do not appear in the Complaint (or the consulting contracts) but are included in Defendants' briefing, the Complaint sets forth a legally cognizable cause of action for corporate waste.[18] *See Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000) ("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.") (quoting *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997)). As the Court held in *In re National Auto Credit, Inc. S'holders Litig.*, 2003 WL 139768 (Del. Ch.), a claim that the board approved compensation packages that essentially paid executives for doing *nothing* states a claim for corporate waste. *Id.* at *14 ("It is not the mere

[18] Defendants have attempted to offer up an alternative explanation for the 2004 consulting contract, stating that it was merely an attempt by the Board to be more candid with shareholders. Def. MTD at 14-16. As unbelievable as it seems that a Board in good faith could give Don Tyson a raise after his serious improprieties were exposed by the SEC, at this stage in the proceedings Defendants' argument is premature. Plaintiffs have identified breaches of fiduciary duty based upon direct and circumstantial evidence surrounding the 2004 Don Tyson contract. These well-pled facts are within the four corners of the Complaint, are reasonable, and are entitled to deference for purposes of this motion.

allegation that [an executive] is being compensated some threshold amount that permits the Plaintiffs' waste claim to proceed; instead, it is that [the executive] is being paid a large sum of money to be the head of what essentially is a passive corporation.").

The claims in Count I are not limited to claims for corporate waste, as Defendants suggest.[19] Count I includes claims for breach of fiduciary regarding the Peterson and Don Tyson consulting contracts. Indeed, the Complaint specifically alleges that both the 2001 and 2004 consulting contracts, and the statements in SEC filings describing them, contain misleading or insufficient disclosures regarding the payments for personal expenses and other perquisites to both Peterson and Don Tyson (¶ 161) and, as a consequence, dramatically understate the actual Company money being paid out pursuant to the contracts (¶¶ 122-126), and dramatically overstate the consideration to be received by the Company in return. ¶¶ 130, 161.

Finally, with respect to the Don Tyson consulting contract, it obviously is a self-interested transaction and so Defendants must bear the burden of establishing its "entire fairness" to the Company. *Paramount Commc'ns Inc. v. QVC Network, Inc.*, 637 A.2d 34, 42 n.9 (Del. 1994) ("where actual self-interest is present and affects a majority of the directors approving a transaction, a court will apply even more exacting scrutiny to determine whether the transaction is entirely fair to the stockholders.") Indeed, it would be hard to imagine a more self-interested transaction that the one present here: Don Tyson's contract was approved and executed by John Tyson, who is a third-party beneficiary of the agreement he awarded to his father. ¶ 107. The Board members approving the Agreement included John Tyson, Barbara Tyson, Wray, Tollett, Starr, Peterson, Bond and Johnston, all of whom were interested directors either being paid large

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[19] Defendants state in a footnote to their briefing on Count I (Def. MTD at p. 10, n.4) that they respond to Plaintiffs' disclosure claims in Count I in connection with their response to Count V (relating to breaches of fiduciary duty for exposing Tyson to SEC fines and sanctions). However, in their briefing on Count V, Defendants attempt to confuse the issues by incorrectly asserting that Plaintiffs' disclosure claims must be somehow limited to the disclosure violations that have been confirmed by the SEC investigation. There is no authority for this and none is cited.

sums of money by Tyson for related party transactions (¶ 68), or, worse yet, being paid pursuant to lucrative "consulting" contracts of their own (¶¶ 11, 109-112). Under these circumstances, the Defendants must demonstrate the entire fairness of this contract and, at this stage in the proceedings, they simply cannot do so.[20]

B. Plaintiffs' Claims In Count II Regarding The Improper Payment And Non-Disclosure Of "Other Annual Compensation" and "Travel And Entertainment" Expenses Are Legally Sufficient.

Once again, Defendants attempt to cast all of the breach of fiduciary duty claims in Count II as something that they are not, by stating that the claims amount to nothing more than claims of corporate waste. Def. MTD at 17. Defendants then argue (without citation to any authority) that the only relevant consideration is the total compensation package of the executives who are alleged to receive wasteful compensation. *Id.* Defendants' repeated attempt to adopt this proposition as a controlling legal standard is without any support. Although Defendants may wish to juxtapose the total compensation of Ovitz in the *Disney* case which was recently found not to constitute waste with the total compensation packages here, that is not how the law on corporate waste operates in Delaware. Smaller compensation packages may constitute waste depending upon the nature of the consideration provided. Where there is no consideration and no business purpose served in exchange for a compensation package, even a relatively small amount of compensation could constitute waste.

In any event, Count II asserts claims based upon the Board's approval of and inadequate disclosures relating to "other annual compensation" and "travel and entertainment" costs and expenses paid to certain Tyson Foods executives and Board members. The Complaint states

[20] Defendants also suggest that any claim regarding Peterson's consulting contract is defective because Plaintiffs failed to name Peterson's widow as a party. Def. MTD at p. 13, n.6 (citing Del. Ch. Ct. R. 19(a)(2)(i)). Even if this were true, this argument provides no grounds for dismissal of any claim, as under the plain terms of Rule 19(a)(2)(ii), the appropriate remedy would be an order for joinder of Peterson's widow, if the Court deems her to be a party "needed for just adjudication." Del. Ch. Ct. R. 19(a).

clearly that these claims relate to Defendants' breach of their duty of disclosure, as well as their duties of care, good faith and loyalty. ¶¶ 115-116, 122-125. The Complaint alleges, among other things, that

> defendants have allowed and caused to be made materially misleading statements and inadequate disclosures in proxy statements regarding executive perquisites and personal benefits paid to Don Tyson, to other Tyson executives, and to Tyson family members and friends, which served no legitimate business purposes, and which were concealed from shareholders in advance of annual meetings of shareholders where shareholder votes were solicited. (¶ 5)

The Complaint further alleges that "[t]hese payments were reported to be reimbursed for travel and entertainment expenses, but actually were for these individual's personal expenses that were in no way business-related.… Due to the misrepresentation of the true purpose of this 'compensation,'… the SEC brought and settled a civil enforcement proceeding against the Company and issued a substantial monetary fine." ¶ 169-170. Wholly ignoring these allegations, Defendants once again baldly proclaim that Count II only asserts a claim for corporate waste. They are wrong. The law is abundantly clear in Delaware that a breach of fiduciary duty claim that is premised upon disclosure violations implicates the fiduciary duties of loyalty, care, and good faith. *See Shamrock Holdings of Cal. v. Iger,* 2005 Del. Ch. LEXIS 83 at *16 (Del. Ch.) (citing *Malone v. Brincat,* 722 A.2d 5, 9-12 (Del. 1998)); *see also Malpiede v. Townso*n, 780 A.2d 1075, 1089 (Del. 2001). Thus, any attempt to hold Plaintiffs to an inapplicable corporate waste pleading standard – without more – must be rejected.[21]

C. Plaintiffs' Claims In Count III Regarding The Improper Timing, Manipulation And Disclosure Of Stock Option Are Legally Sufficient.

Defendants argue for dismissal of Count III, regarding the improper manipulation and timing of stock option awards, on the grounds that: (i) the recipients and Board all knew of the

[21] Importantly, even if corporate waste is the standard, the reimbursement of Don Tyson's personal expenditures for his vacations, his boat crew, for jewelry, artwork, and the like, which serve no legitimate corporate purposes (and Defendants do not even claim otherwise), constitute pure gifts and corporate waste.

inside information, (ii) the Board consciously decided to use that information (*i.e.* to "exercise" business judgment), and (iii) the benefits received by the grantees are not so grossly large to constitute waste. Contrary to Defendants suggestions, Delaware law does not allow a Board to lie to its stockholders, give away stockholders' money and then say, "Hey, if it's not too big a give-away, there's no problem." Seen for what it is, Defendants' argument is wholly without merit.

The Complaint alleges sufficient facts that remove the stock option issuance from the realm of business judgment so as to place the burden on Defendants to establish the entire fairness of the stock option grants to the Company. Contrary to Defendants' arguments, the stock option grants in question were not approved exclusively by a committee of "outside directors" in the years 1999, 2001 and 2003. Rather, the Complaint alleges that "Tyson's Board of Directors knowingly approved and acquiesced in the scheme to grant favorably priced options because they too were option recipients." ¶ 135. In addition, the Complaint points out that the proxy statements that Defendants themselves rely upon in connection with their motion to dismiss disclose year after year that the Compensation Committee arrived at its recommendation to make the stock option grants based, in part, upon "the recommendation of the Chairman and Chief Executive Officer [*i.e.* John Tyson]." ¶ 133. This fact alone should dispel the myth that Tyson Foods insiders were not engaged in self-dealing by timing their stock option grants. The recipient of the largest of the favorably-priced stock option awards actually helped choose the date of his awards.

Finally, Defendants' argument that this claim is nothing more than a disguised waste claim may be summarily rejected. While the award of such favorably-priced stock options is certainly wasteful,[22] the crux of the claim is not the waste but the breaches of fiduciary duty that

[22] As alleged, the secret manipulation of stock option awards "gave the option recipients the benefit of this inside information before it was disseminated to the investing public, representing a potential cost to the Company of at least $5.8 million." ¶ 2. Tyson Foods is damaged "because it will receive a lower exercise price than it would have if the defendants had not manipulated the timing of the issuances." ¶ 118.

are incident to the manipulation of stock option awards to the detriment of the Company, and the failure to disclose the actual compensation being made to executives and directors of the company. Plaintiffs' claim is legally sufficient under Delaware law.

D. Plaintiffs' Claims in Count IV Regarding Related Party Transactions Are Legally Sufficient.

Defendants make a few misguided arguments in support of their motion to dismiss Count IV of the Complaint, regarding the related party transactions. Regarding transactions that supposedly were reviewed by the Special Committee, Defendants argue that the business judgment rule applies to protect any decision by the Special Committee to approve these transactions, and that the Complaint does not allege that the Committee members lacked independence or "otherwise failed to exercise legitimate business judgment." Def. MTD at 33. Defendants also challenge the veracity of Plaintiffs' allegation that the Special Committee failed to review the great majority of the related party transactions at issue, and argue that Plaintiffs have failed to allege the "unfairness" of any related party transaction in any event. Def. MTD at 33-39. Each of these arguments is without merit.

As an initial matter, Defendants cannot seek protection of the business judgment rule for related party transactions that were never reviewed by the Special Committee. *See California Pub. Employees' Ret. Sys. v. Coulter*, 2002 WL 31888343, *11 (Del. Ch.) ("*CalPERS v. Coulter*"). In *CalPERS v. Coulter*, for example, the Court held that the affirmative allegation that documents produced in response to a Section 220 demand failed to demonstrate *any* exercise of business judgment by the board was sufficient to excuse demand. *Id.* ("The amended complaint affirmatively alleges that the only document in Lone Star's corporate records related to the transaction is the signed resolution of the Stock Option Committee implementing the repricing. If this is true, and the Court must accept that it is for the limited purpose of ruling on a motion to dismiss, this could indicate that the Stock Option Committee failed to exercise business judgment when repricing employee options in January 2000. Such a failure excuses demand under the second prong of the *Aronson* test."). Plaintiffs here specifically allege that, based on the documents produced in response to Myers's Section 220 demand, the Special Committee failed to review almost 60% of the related party transactions involving the Company between 1998 and 2004. ¶¶ 68-73.

Defendants' do not challenge this legal point, but argue instead that Plaintiffs' allegations in this regard are simply wrong. Def. MTD at 34. Such an argument is wholly inappropriate in the context of a motion to dismiss. C*alPERS v. Coulter*, 2002 WL 31888343 at *11 n. 29 ("In their respective briefs, the parties dispute whether the failure of Lone Star to produce any documents evidencing such analysis in response to CalPERS' § 220 request to inspect books and records gives rise to an inference that such records do not exist because they dispute whether such records were within the scope of the records that Lone Star agreed to produce. For the purposes of this motion to dismiss, the Court declines to make any inference. Instead, the amended complaint's factual allegation that no such records exist is accepted."); *see also*, *Rales v. Blasband*, 634 A.2d 927, 931 (Del. 1993) ("The well-pleaded factual allegations of the derivative complaint are accepted as true on such a motion [to dismiss].").

In any event, Defendants' argument is baseless. Defendants' challenge to the factual accuracy of Plaintiffs' allegations is based on Defendants' assertion that they never agreed to produce all documents covering the period from 1998 to 2004, and thus that Plaintiffs' allegations that the Special Committee did not review certain items are not reliable. Def. MTD at 35-36. Unfortunately for Defendants, it is they who apparently have forgotten (or ignored) the scope of the documents produced. Not only did Tyson Foods produce documents going back to 1997, but it produced a 2004 review of related party transaction reviews going back to 1997.[23]

[23] The document production included the following: November 14, 1997 minutes of the Tyson Foods Board. T 4239; A 1997 report by Flake & Kelley, consultants to the Special Committee. T4282; November 18, 1999 minutes of the Special Committee. T 4309; November 19, 1999 Board meeting minutes. T 4247; May 5, 2000 Board meeting minutes. T 4258; November 16, 2000 minutes of the Special Committee. T 4374; November 17, 2000 Board minutes. T 4261;

Thus, all of the factual allegations in the Amended Complaint regarding related party transactions and meetings of the Special Committee and the Governance Committee from 1997 through 2004 are based upon documents produced by Tyson Foods. ¶¶ 45-50. Whether or not Tyson Foods produced *all* of the documents in its possession regarding related party transactions or minutes of Board sub-committees is wholly irrelevant at this stage in the proceedings. Plaintiffs are required to do no more than allege facts that provide the basis for a reasonable inference of breach of fiduciary duty; they have done so in great detail and no more is required.[24]

Regarding Defendants' argument that the Special Committee's supposed "review" of certain related party transactions is entitled to the protections of the business judgment rule, their argument is completely misplaced. The Complaint contains detailed allegations establishing that, despite the Board's public representations and the obligations imposed upon the Company pursuant to the settlement of the *Herbets* litigation, the Special Committee that was charged with

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November 29, 2001 minutes of the Special Committee. T 4501. November 30, 2001 Board meeting minutes. T 4266; November 14, 2003 Board minutes. T 4272; February 5, 2004 Governance Committee minutes. T 4503; Exhibit 1 of the February 5, 2004 Governance Committee minutes. T 4505; February 5, 2004 Board minutes. T 4279.

[24] Defendants also make a fleeting reference to "logo vendor transactions" and to Tyson Foods' "stock purchase from Don Tyson in 2004," Def. MTD at 35-36, concluding that the allegations regarding these transactions should not be given credence because Defendants never agreed to produce relevant documents. Once again, the Defendants are factually mistaken. The story of the vendor logo transaction was included in the first Tyson Foods production to Meyer, which included the story of the SEC investigation of Don Tyson's abuse of his Company perquisites. ¶¶ 102-105. The vendor logo company was run by a close friend of Don Tyson as described in the report of the Tyson Compensation Committee. ¶ 102. Moreover, it was the Compensation Committee that concluded that the transaction was a related party transaction that had not been reviewed, and not disclosed in Tyson Foods' SEC filings, and that future related party transactions would be handled in a different manner. ¶¶ 63, 103-104.

With regard to Tyson Foods' purchase of Don Tyson's stock for $15 million, Defendants again merely say there were no documents required to be produced on that subject. Def. MTD at 36. The Tyson Foods stock purchase was disclosed in Tyson's 2004 SEC Form 10-K. Presumably, if the Governance Committee had reviewed that related party transaction, Tyson Foods would have produced those minutes along with their motion to dismiss as they have so many other documents.

reviewing all related party transactions in fact was asleep at the switch. ¶¶ 89-105. Based on Plaintiffs' own investigation, including Meyer's Section 220 demand, Plaintiffs alleged that from 1999 through 2004, the Special Committee and its successor, the Governance Committee, met a total of 6 times (¶¶ 60, 62), and reviewed significantly less than half of the related party transactions involving the Company during that period. ¶ 72.

In addition, the Complaint makes detailed allegations regarding three specific related party transactions that reveal that even on the contracts that were reviewed, the Special Committee failed to exercise any meaningful oversight whatsoever. In the spring of 2000, the Special Committee was specifically informed that at least one transaction related to the "Arnett Sow Complex" (partly owned by Don Tyson) was grossly unfair to the Company. An outside consultant specifically informed the Special Committee that "the Arnett Sow Complex … was out of line when compared to the other facilities" by yielding a rate of return to its owners (*i.e.*, Don Tyson) nearly double that of comparable farms, even though it was in "poor condition." ¶ 98. Indeed, a Tyson subsidiary, the Tyson Pork Group, had urged an 85% reduction in monthly lease payments due to the poor condition of the pork industry. ¶ 99. Although generally reducing the lease payments to pork operations in general, the Special Committee made no special adjustments to the Arnett Sow Complex and largely ignored the plea for an 85% reduction in lease payments from Tyson's Pork Group subsidiary.

The second specific related party transaction identified in the Complaint related to a lease between the Company and a farm owned by the Tyson Children's Partnership (the CLS Farm). In 2000, purporting to "review" this lease, the Special Committee hired an independent appraiser, *but instructed the appraiser only to appraise the property itself, not the lease*. ¶ 100. This purported "review," therefore, was no more than a farce as the appraiser was "of the opinion that [the lease was] not an arms length-market lease," and that the farm "suffered from incompetent farm management." ¶ 100. Nevertheless, the Special Committee apparently permitted the

Company to continue to pay on a 10 year lease that guaranteed payment to the Tyson Children's Partnership the full market value of the property in just six years. ¶ 101.

Finally, in August of 2004, the Compensation Committee reported that Tyson Foods had paid millions of dollars to a "supplier of logo merchandise" that was owned by a "personal friend" of Don Tyson (Tyson's payments represented 80% of this supplier's business), and that the owner of this logo supplier had been given access to and use of a Tyson Foods credit card. ¶¶ 102-03. No bid process was ever used to determine the fairness of the payments to this logo supplier. ¶ 104. And although Don Tyson allegedly reimbursed the Company for charges made by his "friend," the fact that the Special Committee was apparently unaware that Don Tyson had given this "friend" a Company credit card demonstrates the complete lack of oversight by the Committee over related party transactions.

Thus, although in response to Meyer's Section 220 demand the Company did produce some documents that indicated the Special Committee (and its successor, the Governance Committee) purported to "review" certain related party transactions, the inescapable conclusion is that the Committee's work was cursory at best and, at worst, a mere whitewash designed to deceive shareholders into believing that the Company had exercised some level of control over related party transactions. In either case, Plaintiffs' allegations are sufficient to remove the presumption that the Special Committee's supposed "reviews" are entitled to the protection of the business judgment rule. *See iXCore, S.A.S. v. Triton Imaging, Inc.*, 2005 Del. Ch. LEXIS 102 at *3 (Del. Ch.) ("Allegations such as these [board approval of transaction without adequate consideration] that may indicate a violation of the fiduciary duty of care in considering all material information reasonably available before making a business decision, are sufficient to remove the presumption of business judgment.").

The Complaint also fairly alleges that *all* of the related party transactions were, in fact, "unfair" to the Company. Defendants ignore the numerous paragraphs in the Complaint that allege that the transactions were unfair to Tyson:

- "These lucrative related-party transactions [with members of the Tyson family and with past and present members of the Board] were consummated on financial terms that were unfair to the corporation and served to enrich corporate insiders to the detriment of Tyson." ¶ 67;

- "There is no valid business reason for selling these insiders the Company's raw product and everything needed to develop it, and then turning around and buying the finished product from them at a higher price…[especially when the insiders may] sell the livestock to Tyson's competitors." ¶ 76;

- "The farm lease payments made by Tyson to related parties were either not reviewed, or were inadequately reviewed by the Individual Defendants, and the leases were at a premium to market and were otherwise on terms that were unfair to Tyson giving the related parties an unjust windfall." ¶ 80;

- "In certain of the related party transaction reviews actually conducted by the Special Committee or the Governance Committee, warnings from outside appraisers that some deals were detrimental to the Company were ignored." ¶ 97; and

- "These transactions were substantively and procedurally unfair to Tyson, and were simply a means of diverting corporate funds and assets to corporate insiders, their families and friends." ¶ 182.

Moreover, Plaintiffs cannot be faulted for not providing the specifics of the unfairness of these related party transactions because the defendants have *breached their fiduciary duty of disclosure regarding these very transactions* by concealing the actual terms of the over $163 million worth of related-party transactions – no doubt, because they were so unfair and one-sided. *See* ¶¶ 66-69. In this regard, the Complaint alleges that "the terms of these [related-party] contracts have consistently been kept from Tyson's minority shareholders. Defendants simply disclosed in each year's proxy the aggregate amount of the payments made to the related entities … and the most cursory description of the nature of the transactions" despite the fact that the payments made to insiders "totaled a staggering $52,004,040 for the 2001 through 2003. From 1998 through 2004, the aggregate amount of related party payments made by Tyson totaled over

$97 million." ¶ 66. And further, "[b]ecause of the misleading, incomplete, and cursory nature of the disclosures…the disclosures that were made amounted to no disclosures at all." ¶ 67. Defendants' arguments, therefore, must be considered in light of the well-pled allegations regarding their own breaches of the fiduciary duty of disclosure, and must be rejected.[25]

In claims regarding related party transactions, the *Defendants* bear the burden of proving the entire fairness of the challenged transactions. W*einberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983) ("[t]he 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." *Id.*[26] In the present case, where the members of the Special Committee and the Governance Committee have breached their fiduciary duty to the Tyson Foods shareholders by failing to review the related party transactions, and where the remaining director defendants have stood on both sides of the related party transactions, the burden of showing the entire fairness of these related party transactions falls on Defendants. Plaintiffs' factual allegations regarding the "unfairness" of the challenged related party transactions are sufficient to withstand Defendants' motion to dismiss.

[25] Even the case law principally relied upon by Defendants to support their argument recognizes the potential impact of disclosure violations on the analysis of the sufficiency of allegations of unfairness. *See Solomon v. Pathe Commc'n Corp.*, 672 A.2d 35, 40-41 (Del. 1996) ("There is no well-plead allegation of any…false or misleading disclosures in the present case."). Similarly, Defendants' other purported authority fails to support their case. The *Joyce v. Cuccia* decision, for instance, cuts in favor of Plaintiffs, because in that case the court found that a single allegation of an insider who "subordinat[ed]…[the Company's] interests to [his] own, personal interests" in deciding to terminate the corporation's counsel and accountant set forth a legally sufficient claim for breach of the duty of loyalty. *See Joyce v. Cuccia*, 1997 WL 257448, at *5 (Del. Ch.). In *Steinman v. Levine*, there was no fairness challenge and so the case is inapposite. According to the *Steinman* court, the plaintiff there did "not even claim that the [challenged transaction] was not entirely fair." 2002 WL 31761252 at *12 (Del. Ch.).

[26] *See also Kahn v. Tremont*, 694 A.2d 422, 428 (Del. 1997) ("[W]hen a controlling shareholder stands on both sides of the transaction the conduct of the parties will be viewed under the more exacting standard of entire fairness as opposed to the more deferential business judgment standard.").

E. Plaintiffs' Derivative Claims In Count V Regarding The Defendants' Conduct That Exposed Tyson Foods To SEC Fines Are Legally Sufficient.

Defendants challenge the legal sufficiency of the breach of fiduciary duty claims in Count V. It is difficult to understand how Defendants can contest this claim with a straight face after the SEC investigated and fined Tyson Foods for, among other things, the disclosure violations committed by the Defendants themselves. The SEC's findings include that the Tyson family, and their friends, were permitted broad use of Tyson Foods corporate funds for purely personal expenses over a period of at least 6 years resulting in the loss of nearly $3 million to the Company. ¶ 124. The SEC found that the Board had "failed to devise and maintain a system of internal accounting controls over the personal use of assets sufficient to detect, prevent, or account properly for Don Tyson's and his family and friends' use of company assets." ¶ 126.

When the SEC's findings are viewed in the context of the *Herbets* Settlement and Order -- which required the Board to give heightened scrutiny and pay special attention to the self-dealing of Don Tyson, Tyson family members and friends, and required the Board to establish effective internal controls to prevent exactly this sort of self-dealing -- the sufficiency of Count V is beyond question. It is simply astonishing that $3 million more could have been looted from the Company after *Herbets*, but the Board let it happen and was at least grossly negligent, if not complicit, in allowing the Tyson family to continue taking money from the Company.

Defendants essentially raise two arguments. First, they argue that Count V only states a claim for negligence, or a breach of the duty of due care, which – according to them – is not actionable under the circumstances alleged and which is precluded by Tyson Foods' adoption of an exculpatory provision authorized by Section 102(b)(7) of the DGCL. According to Defendants, the Complaint does not plead gross negligence, and only gross negligence is actionable under Delaware law. Def. MTD at 43. In making this argument, Defendants improperly characterize Count V as only stating a claim predicated upon the breach of the fiduciary duty of due care. But Count V plainly is not just a due care claim, but a disclosure claim as well, and it therefore implicates the duties of both loyalty and care. *See Shamrock Holding*, 2005 Del. Ch. LEXIS 83 at *17 ("The duty to disclose is not an independent fiduciary duty but instead stems from, and is an application of, the general fiduciary duties of care *and loyalty.*" [emphasis added]) (citing *Malone v. Brincat*, 722 A.2d 5, 9-12 (Del. 1998); *see also, Malpiede*, 780 A.2d at 1086. Count V, moreover, incorporates all of the allegations in the Complaint and alleges that all of the secret self-dealing arrangements abused at Tyson Foods demonstrate "a consistent pattern and practice of failing to investigate and disclose self-dealing payments and schemes bent on enriching corporate insiders to the detriment of the Company." ¶ 188. This conduct, Count V alleges, "resulted in disclosure violations that exposed the Company to SEC sanctions and fines." ¶ 190. Such disclosures violations included "failure to disclose amounts of 'other compensation,'" amounts of "travel and entertainment" expenses paid to executives by the Company, amounts paid in related-party transactions. *Id.*

Since Count V implicates the duty of loyalty, Defendants' reliance on Tyson Foods' §102(b)(7) exculpatory provision is misplaced. Under Delaware law, the exculpatory provision only protects directors against pure duty of care claims. *See McMullin v. Beran*, 765 A.2d 910, 926 (Del. 2000) ("We also note … that such [exculpatory] provisions cannot provide protection for directors who breach their duty of loyalty."); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1165 n.17 (Del. 1995) ("Even [§102(b)(7)], however, does not provide protection against a breach of the duty of loyalty."). In any event, Since the §102(b)(7) exculpatory provision is an affirmative defense upon which Defendants bear the burden of proof (*see Emerald Partners v. Berlin*, 726 A.2d 1215, 1223-1224 (Del. 1999)), it is inappropriate to decide that issue in the context of a motion to dismiss.

F. Plaintiffs' Derivative Claim In Count VI For Breach Of Contract Is Legally Sufficient.

In Count VI, Plaintiffs allege a claim based upon the Defendants' breach of their contract (i.e., settlement agreement) in connection with the *Herbets* Action in three ways. First, Defendants violated the agreement by failing to "review, at least annually, the terms and fairness of all transactions between Tyson and its officers and directors (or their affiliates) which are required to be disclosed in the Company's proxy statement (i.e. the related party transactions)." ¶ 195. Second, Defendants violated the agreement by failing to review the requests for expense reimbursement of Don Tyson annually, and to reduce his bonuses by the amount of his expense reimbursements. ¶ 196. Indeed, rather than reducing Don Tyson's compensation as a result of his wrongful and undisclosed expenditures of corporate funds, the Board did the opposite and actually gave Don Tyson a substantial raise after it was determined that he looted the corporate treasury to the tune of $1.7 million. Third, Defendants violated the agreement by failing to keep track of the of use of the Tyson Foods boat at all times. ¶ 197. As made clear by the SEC Order, and by the complete lack of documentation provided in response the Meyer Section 220 demand, the Tyson Foods boat was consistently misused without any of the Board supervision required under the *Herbets* settlement agreement. Each of the Defendants, as past and present members of the Board, agreed and were obligated to perform the obligations identified above pursuant to the *Herbets* agreement, which under its terms "constituted the entire agreement among the parties." Hirzel Aff. Ex. O. at p. 16.

G. Plaintiffs' Derivative Claim in Count VII For Civil Contempt Is Legally Sufficient.

Citing to a decision from the Seventh Circuit and a federal rules hornbook, Defendants argue that there is no legal claim for civil contempt in Delaware. According to the Delaware Supreme Court in *DiSabatino v. Salicete*, 671 A.2d 1344 (Del. 1996), all Delaware courts, including the Court of Chancery have broad powers to fashion relief from contempt of a court order. *Id.* at 1348-49. The power to punish for contempt of a court order is inherent in all courts, and while most civil contempt actions are pursued by way of motion, or instituted *sua sponte* by the Court, there is no proscription in the Delaware rules or Delaware case-law limiting a plaintiff's ability to seek relief from contempt in any appropriate manner. This is, after all, the same Court in which the *Herbets* action was settled pursuant to court Order, and the derivative Plaintiffs here, as shareholders, have standing to step into the shoes of the former derivative plaintiff for purposes of enforcing the Order. Under Delaware law, all that is required is that plaintiffs "demonstrate that the defendants violated an order of this court of which they had notice and by which they were bound." *See Arbitrium Handels AG v. Johnston*, 1997 Del. Ch. LEXIS 132 at *9-10 (Del. Ch.). Plaintiffs have done so.

H. Plaintiffs' Derivative Claim In Count IX For Unjust Enrichment Is Legally Sufficient.

Defendants seek to dismiss Plaintiffs' unjust enrichment claim (Count IX) merely by asserting that it "alleges no misconduct and requests no relief distinct from that of the first eight counts of the Complaint" and should be dismissed as duplicative. Def. MTD at 50. Defendants are mistaken.

The Delaware Supreme Court has defined unjust enrichment as

> the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. To obtain restitution, the plaintiffs were required to 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. Restitution is permitted even when the defendant retaining the benefit is not a wrongdoer. Restitution serves to deprive the defendant of benefits that in equity and good conscience he ought not to keep, even though he may have received those benefits honestly in the first instance, and even though the plaintiff may have suffered no demonstrable losses.

Schock v. Nash, 732 A.2d 217, 232-233 (Del.1999). Count IX incorporates by reference and realleges all of the allegations previously made in the Complaint. ¶ 212. Based on the previous discussion, it is apparent that the Complaint adequately alleges facts demonstrating that 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. Through unjust and undisclosed compensation, improper and unfair related party transactions, and a history of self-dealing that has proceeded unchecked for over a decade, Defendants have permitted themselves and the Tyson family to loot the Company's coffers at the expense of Tyson Foods' minority shareholders. Plaintiffs, therefore, have stated a valid claim for unjust enrichment.

III. PLAINTIFFS' DERIVATIVE CLAIMS ARE TIMELY.

"Courts of equity do not normally apply statutes of limitations directly, but in appropriate circumstances they will apply the statute of limitations by analogy." *In re Maxxam Inc./Federated Dev. S'holders Litig.*, 1995 WL 376942, at *6 (Del. Ch.). As Defendants point out, Delaware applies a three-year statute of limitations to shareholder derivative claims seeking damages and other legal relief. *Halpern v. Barran*, 313 A.2d 139, 141 (Del. Ch. 1973). However, a complaint should only be dismissed on statute of limitations grounds in those cases where it is clear from the face of the pleadings that the claims are time barred. *Tuggle v. Dominick Fund, Inc.,* 1977 WL 23792 (Del. Ch.) (denying motion to dismiss on basis of statute of limitations because there were factual issues); *Hercules Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 1988 WL 912044, at *2 (Del. Super. Ct.) (denying motion to dismiss on basis of statute of limitations because all plaintiff had to do was set forth one fact that created an issue). Indeed, whether facts are sufficient to place a plaintiff on "inquiry notice" usually involves an intensive factual analysis, which is typically improper in the context of a motion to dismiss. *See Coleman v. PricewaterhouseCoopers*, *LLC,* 854 A.2d 838, 843 (Del. 2004). And a trial court should not consider material submitted by a defendant that is not integral to the complaint when determining whether the claims asserted therein, as pleaded, are time barred as a matter of law. *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 2004 WL 2520899, at *5 (Del.) (holding that it was error for the Court of Chancery to consider material submitted by the defendant for purposes of arguing that the plaintiff was on "inquiry notice" of claims more than three years before filing its complaint).

Further, under the circumstances of this case, there is serious doubt as to whether Defendants may even assert a statute of limitations defense under Delaware law. In *Yaw v. Talley*, 1994 Del. Ch. LEXIS 35 (Del. Ch.), the Court held that "as a substantive matter, fiduciaries who benefit personally from their wrongdoing, especially as a result of fraudulent self-dealing, *will not be afforded the protection of the statute." Id.* at *17 (emphasis supplied). *See also, Kahn v. Seaboard Corp.* 625 A.3d 269, 273 (Del. Ch. 1993). Since all of Plaintiffs' claims involve the conduct of self-dealing fiduciaries, Defendants should not be permitted to raise the bar of the statute of limitations as a defense at all.

To the extent, however, that the Court determines that Defendants may avail themselves of the protections afforded by any statute of limitations, Plaintiffs' claims are timely. Amalgamated Bank commenced this lawsuit by filing its original Complaint on February 16, 2005. After Tyson Foods finally produced documents in response to Meyer's Section 220 demand in the summer of 2005, Meyer filed a separate complaint on September 22, 2005. Plaintiffs filed the Consolidated Amended Complaint on January 11, 2006. Defendants do not dispute that Plaintiffs' claims based on conduct alleged from 2002 to the present date are timely, but argue that many of Plaintiffs' claims are barred because they relate to events that transpired from 1998 through 2001, and are thus barred by a three-year limitations period. Defendants are mistaken.

Even assuming any limitations period applies, it is tolled for Plaintiffs' claims based on Defendants' conduct that occurred between 1998 and 2001. Under Delaware law, three doctrines govern the tolling of a statute of limitations: the "discovery" rule applicable to "inherently unknowable" injuries, equitable tolling and fraudulent concealment. "Under the so-called 'discovery rule,' the statute of limitations is tolled where the injury is inherently unknowable and the claimant is blamelessly ignorant of the wrongful act and the injury complained of." *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 Del. Ch. LEXIS 100, at *61 (Del. Ch.). Equitable tolling applies when a fiduciary is charged with unfair self-dealing. "Under the theory of equitable tolling, 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." *See In re Dean Witter P'ship Litig.*, 1998 Del. Ch. LEXIS 133 at *21 (Del. Ch.). Fraudulent concealment "applies where a defendant is charged with having fraudulently concealed facts that are essential to the plaintiff's cause of action." *Maxxam*, 1995 WL 376942, at *6. "Fraudulent concealment requires a showing of (1) the defendants' knowledge of the alleged wrong, and (2) an affirmative act of concealment by the defendant thereby preventing the nonbreaching party from discovery and pursuing a cause of action." *Wright v. Dumizo*, 2002 WL 31357891, at *3 (Del. Super. Ct.). The statute of limitations does not run against claims while they are fraudulently concealed and is suspended until a plaintiff discovers his rights through the exercise of reasonable diligence. *Id.* (citing *Giordano v. Czerwinski*, 216 A.2d 874, 876 (Del. 1966))). Underlying these doctrines "is the policy that a defendant should not be permitted to use the statute of limitations as a shield where the defendant possesses information critical to the existence of an actionable claim of wrongdoing and prevents the plaintiff from discovering that information in a timely fashion." *Maxxam*, 1995 WL 376942 at *6.

As discussed below, to the extent that Plaintiffs' claims are based on events that transpired between 1998 and 2001, any limitations period applicable to these claims was tolled because either the cause of action did not arise until 2002 or after, the nature of the injuries were "inherently unknowable" prior the disclosure of the SEC investigation and Tyson Foods' document production in response to Mr. Meyer's Section 220 demand, or Defendants fraudulently concealed the facts giving rise to Plaintiffs' claims or are equitably barred from asserting any limitations defense.[27]

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[27] Defendants' argument that, based on Rule 11, Amalgamated Bank's original filing in February 2005 somehow compels a finding that Plaintiffs necessarily were on inquiry notice of their claims prior to Tyson Foods' document production in the summer of 2005 (Def. Br. at 27) is simply incorrect. The SEC's announcement of an investigation of Tyson regarding related party transactions was sufficient to permit Amalgamated Bank to file its initial complaint in February 2005 without violating Rule 11. That Mr. Meyer chose to pursue his inspection rights under Section 220 in no way vitiates the propriety of Amalgamated Bank's original pleading. Further, the allegations of the Consolidated Amended Complaint are considerably more detailed regarding both the related party transactions at issue and the failures of the Special Committee. ¶¶ 66-105.

A. **Count I Regarding the Don Tyson and Peterson Consulting Contracts Is Timely.**

Defendants argue that because the Don Tyson and Peterson consulting contracts were disclosed to the public in 2001, any claims relating to them are barred by Delaware's three-year statute of limitations applicable to breach of fiduciary duty claims. Def. MTD at 7-9.[28] Defendants' argument misses the point about what was and what was not disclosed in 2001.

The Don Tyson and Peterson consulting contracts, which were first disclosed as exhibits to Tyson Foods' Form 10K filed on December 21, 2001 (Hirzel Aff. Exs. D, E), purport to provide for payments from the Company in exchange for advisory or consulting services. In the Company's proxy statements filed thereafter, Defendants year after year incorrectly described these advisory or consulting services as being mandatory and required. *See* Hirzel Aff. Ex. J, p. 17-18; Ex. K, p. 14-15; Ex. L, p. 33; Ex. M, p. 37 (identifying Don Tyson's consulting contract only)). With respect to Peterson, it only became clear that no services were exchanged for the payments when Peterson died in May 2004. And with respect to Don Tyson, it only became clear in 2004 that his contract was not what was disclosed to shareholders, when the SEC turned up millions of dollars in undisclosed secret compensation that Don Tyson took, in part, through misrepresentations contained in his sham consulting contract.

Because Count I challenges the Board's failure to disclose the true nature of the compensation paid under these "consulting contracts," which payments necessarily occurred *after* the contracts were entered into, and likely varied from year to year, Plaintiffs' claims for breaches of fiduciary duties relating to these contracts also necessarily arose *after* the existence of the contracts were disclosed. Put another way, the mere disclosure of the existence of the contracts

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These facts were completely unknown to Tyson Foods' public investors prior to the Company's document production in response to Mr. Meyer's demands.

[28] Defendants do not challenge the Plaintiffs' claim in Count I relating to Don Tyson's 2004 consulting agreement on statute of limitations grounds.

did *nothing* to provide the investing public with notice that the Tyson Foods Board was funneling payments for patently non-business related expenses to these highly paid "consultants." These facts, which form the heart of Plaintiffs' claims in Count I, were only disclosed following the entry of the SEC Consent Order, which occurred in 2004, and after the death of Peterson in that same year. ¶ 152. Accepting the allegations in the Complaint as true, as this Court must, it is simply impossible to conclude that Plaintiffs had actual or constructive knowledge in 2001 of information that the Plaintiffs allege was not disclosed, and has yet to be disclosed, by Defendants.[29]

Furthermore, to the extent Plaintiffs' claims regarding the consulting contracts assert claims of corporate waste, Defendants' breach of their fiduciary duties in this regard is ongoing. Every time Defendants authorize the Company to make a payment for consulting "services" that have never been – and never will be – performed, defendants breach their fiduciary duties. *See In re National Auto Credit,* 2003 WL 139768, *14 (allegation that defendants authorized payment of executive compensation in exchange for no services constitutes corporate waste).

B. Plaintiffs' Claims In Count II Regarding The Improper Payment And Non-Disclosure Of "Other Annual Compensation" and "Travel And Entertainment" Expenses Are Timely.

Defendants' only argument regarding the timeliness of Plaintiffs' claims in Count II relates to the "other annual compensation" paid in 2001. According to Defendants, "the 'other

[29] Defendants' reliance on the decision in *Kahn v. Seaboard Corp.*, 625 A.2d 269 (Del. Ch. 1993) and *In re Marvel Entm't Group, Inc.*, 273 B.R. 58 (D. Del. 2002) is misplaced because both of these decisions involved contracts that were alleged to be *per se* (or by their terms) unfair. In this case, as set forth above, the Don Tyson and Peterson contracts are not alleged to be *per se* unfair to the Company (*i.e.*, the payments contemplated by the agreements would be reasonable under some circumstances but not that exist here). Rather, they were unfair because no consideration or consulting services were required and even more lucrative payments were being funneled to the so-called consultants than were disclosed under the rubric of reimbursement for "travel and entertainment" costs. This information was only revealed in connection with SEC investigation in 2004. *See also,* Sect. II. B.

compensation' paid in 2001 was disclosed in the Company's Jan. 2, 2002 Proxy Statement, over three years before this suit was brought." Def. MTD at 16. This is a red herring.

As Defendants know all too well, the SEC has already determined that Tyson Foods' proxy statements from 1997 to 2003 were incomplete and materially misleading in that they falsely characterized lavish personal perks paid to executives as business-related compensation or travel and entertainment expenses. ¶¶ 115-116, 151-152. Because Tyson Foods concealed the true nature of these payments from shareholders, Plaintiffs could not possibly have been on notice of any improper expenditures and reimbursements of Tyson family members and friends falling under the terms "other annual compensation" prior to the 2004 release of the SEC's findings.

C. Plaintiffs' Claims In Count III Regarding The Improper Timing, Manipulation, And Disclosure Of Stock Options Are Timely.

In Count III, Plaintiffs allege that Tyson Foods insiders and Board members engaged in a pattern and scheme to manipulate the issuance of stock option awards so as to award options at strike prices markedly lower than the Company's stock's fair market value on the date of such grants. ¶¶ 2, 133-139. Count III identifies four such fortuitously-timed stock option grants: September 28, 1999[30]; March 29, 2001; mid-October 2001; and September 19, 2003. ¶¶ 136-139. The Complaint further alleges that the investing public could not have been aware of this manipulative pattern or scheme until 2003, when the pattern of this conduct became apparent.

Defendants argue that any claims challenging the stock option grant in 1999 and the two stock option grants in 2001 are time-barred under Delaware's three-year statute of limitation applicable to breach of fiduciary duty claims. Def. MTD at 21-23. As alleged, however, neither Plaintiffs nor any member of the investing public could have made out a good faith challenge to one or even two of the fortuitously-timed stock option grants occurring in 1999 or 2001 because

[30] As defendants point out, the 1999 stock option grant was cancelled by Tyson Foods thereby rendering Plaintiffs' claim regarding that grant moot. Def. MTD at 23, n.15. Plaintiffs have investigated the purported cancellation of the 1999 option grant and agree that it is moot.

either, or both, could have been explained away as coincidence. Only through the emergence of a pattern of self-dealing in favorably priced options could any member of the investing public have any notion that Defendants were manipulating the system to enrich Tyson Foods executives.

Defendants confidently indicate in their briefing that they are aware of "no cases applying a 'third time's a charm'" approach to inquiry notice under Delaware law. However, courts have recognized in instances of concealed but concerted misconduct that it may take time for the pattern of wrongdoing to emerge. In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), for instance, a case that the Defendants acknowledge and attempt (unsuccessfully) to distinguish, the United States Supreme Court itself endorsed a "three-times" rule when uncovering a pattern and practice of inequitable conduct. According to the Court, a "pattern *requires* at least two acts….not that it means two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a pattern." *Id.* at 496 n.14 (internal quotations and citations omitted). There is more than sufficient legal support for the proposition that Tyson Foods' public investors could not have had notice of Defendants' manipulation of the dates of stock option grants until the existence of a pattern emerged, and that no such pattern emerged until the January 2003 disclosure of the third (October 2001) conspicuously timed grant.

In addition, even if Defendants could otherwise raise a statute of limitations defense, equitable tolling principles would apply to render each of Plaintiffs' claims timely. *See In re Dean Witter P'ship Litig.*, 1998 Del. Ch. LEXIS 133 at *21-22. As alleged in the Complaint, "Tyson[] [Foods'] Board of Directors knowingly approved and acquiesced in the scheme to grant favorably priced options because they too were option recipients." ¶ 135. Further, Defendants have deliberately concealed the fact that they have manipulated the option grant dates so as to maximize the costs to the Company in an effort to maximize profits for the recipients, and Tyson Foods' public shareholders could only discover Defendants' misconduct after a clear pattern emerged. In this regard, it is important to consider the option disclosures themselves. The first challenged option award occurred on September 28, 1999, which was subsequently canceled. *See supra* fn. 30. The second occurred on March 29, 2001. The third occurred on mid-October 2001, and the fourth occurred on September 19, 2003. None of these option awards were disclosed to shareholders on the dates the grants were made, and none were disclosed in connection with or at the same time as the release of market moving news. So the fortuitous timing of the grants, and their temporal connection to the release of positive, market-moving news was not something that would have been immediately apparent to even the most diligent of investors. Instead, information regarding the dates of the stock option grants was first disclosed to shareholders in connection with the relevant years' proxy statement. This is important because Tyson Foods' fiscal year concludes at the end of September, and so the third of the challenged option grants – *i.e.*, the one made in mid-October 2001 – was not disclosed to shareholders until the following fiscal year's proxy statement,[31] dated January 2003, which falls well within the three-year limitations period urged by defendants.

D. Plaintiffs' Claims In Count IV Regarding Related Party Transactions From 1998 Through 2001 Are Timely.

The Consolidated Amended Complaint asserts claims based on unfair and unreviewed related party transactions dating back to 1998. ¶ 180. In their motion to dismiss, Defendants do not challenge the timeliness of Plaintiffs' claims regarding the related party transactions dating to 2001, but argue that claims regarding related party transactions from 1998 to 2001 are barred by a three-year statute of limitations. Def. MTD at 26.

As an initial matter, as discussed above, Defendants cannot seek the protection of any limitations period to the extent they benefited personally from their approval of the related party

[31] Similarly, Tyson Foods' 2002 proxy statement (dated January 2002) covered the period up through September 29, 2001 and for the first time disclosed to shareholders the option award made in March 2001. Hirzel Aff. Ex. J, p. 22.

transactions. *Yaw*, 1994 Del. Ch. LEXIS 35 at *17. As the beneficiaries of millions of dollars in related party transactions, therefore, Defendants Don Tyson, John Tyson, Barbara Tyson, Starr, Tollett, Johnston, Massey, and Wray cannot be heard to argue that claims relating to these transactions are time-barred. In addition, Defendant Bond, as the recipient of improper "other compensation," personally benefited from his willingness to turn a blind eye to the Tyson Family's pillaging of the Company. He, too, should not be entitled to rely on any limitations defense.

In any event, Plaintiffs had no reason to believe that Defendants had breached their fiduciary duties with respect to the related party transactions between 1998 and 2001 until July 2005, when the Company begrudgingly produced documents in response to Meyer's Section 220 demand. This is particularly true given the Company's settlement in the *Herbets* litigation, wherein the Company committed to put the reigns on unchecked related party transactions, and installed a Special Committee that supposedly was charged with overseeing every related party transaction entered into by the Company. Plaintiffs allege that the Defendants, and each of them, knew that the Special Committee had failed entirely in its obligation to prevent unchecked related party transactions involving the Company and the Tyson family. *See* ¶¶ 77, 80, 85, 88, 89-96. Plaintiffs also allege that Defendants deliberately concealed both the Special Committee's failures and the details of the related party transactions from Tyson Foods minority shareholders for years. *See*, *e.g.*, ¶¶ 151, 154. It was only when Tyson Foods produced documents in response to Meyer's Section 220 demand that it could have been discovered that the Company's public representation, for example, that "[a]ll existing related party transactions have been reviewed by the Governance Committee or its predecessor Committee" (¶ 154), were just plain false. Moreover, prior to the production of these documents, Tyson Foods public investors had no way of knowing that the Tyson Foods Board repeatedly disregarded criticism of related party transactions (both internally and from outside consultants). *See* ¶¶ 97-105. Accordingly, any claims regarding the related party transactions were tolled by the doctrine of fraudulent concealment until at least June 21, 2005. *See Coleman v. PricewaterhouseCoopers, LLC*, 854 A.2d 838 (Del. 2004) (holding that there was no inquiry notice when defendant dissuaded plaintiff's investigation).

Defendants' incorrectly suggested that Amalgamated Bank's filing of its original Complaint on February 16, 2005, somehow compels the conclusion that Plaintiffs' claims based on transactions in 1998-2001 are time barred. Under the doctrine of fraudulent concealment, however, the statute of limitations is suspended until the plaintiff, in the exercise of reasonable diligence, *actually discovers* the facts giving rise to his claims. *See Wright v. Dumizo*, 2002 WL 31357891, at *3. There is no suggestion (nor can there be) that Plaintiffs actually knew of the full extent of Defendants' wrongdoing, or that it extended back to 1998, until Tyson Foods produced documents in response to Meyer's Section 220 demand in the summer of 2005. Indeed, the Defendants *still* have refused to disclose significant details regarding the $160 million worth of related party transactions the Company has authorized since 1998.

E. Plaintiffs' Claims In Counts VI and VII For Breach of Contract And Civil Contempt Relating To The *Herbets* Settlement Are Timely.

Plaintiffs' claims relating to Defendants' breach and violation of the *Herbets* settlement are timely as well. The Order approving the settlement of the *Herbets* litigation required Defendants to review "the terms and fairness of all transactions between the Company, on the one hand, and its directors, officers or their affiliates, on the other, which are required to be disclosed in the Company's proxy statements." Hirzel Aff. Ex. O, p. 9-10. As Meyers's Section 220 investigation revealed, Defendants have blatantly disregarded this obligation by (a) reviewing less than 42% of the related-party transactions from 1998 through 2004 (¶ 72), and (b) failing to maintain any semblance of control over the terms of these contracts to ensure that the transactions were entirely fair to the Company. *See e.g.*, ¶¶ 77, 80, 85, 88, 89-105. The timeliness of claims relating to Defendants' failure to comply with the terms of the *Herbets* litigation from 2003 to the present date is not disputed. And Plaintiffs' claims regarding Defendants' systemic violation of the *Herbets* settlement between 1998 and 2001 are timely under the doctrines of both equitable tolling and fraudulent concealment.

Following the *Herbets* settlement, Defendants consistently reassured the investing public (falsely) that the Company was in full compliance with its obligations under that agreement and that every related party transaction was reviewed and approved by a Special Committee consisting of truly independent directors. *See*, *e.g.* ¶ 154. As Plaintiffs' claims relating to Defendants' breach of the *Herbets* settlement amount to claims for "wrongful self-dealing," and Tyson Foods' public shareholders justifiably relied on Defendants to protect the interests of the Company, the doctrine of equitable tolling applies. *In re Dean Witter P'ship Litig.*, 1998 Del. Ch. LEXIS 133 at *21-22. Further, Plaintiffs only discovered that the Special Committee actually purported (or pretended) to review *significantly less than half* of the $160+ million in related party transactions when Tyson produced documents in response to Meyer's Section 220 demand in July 2005. ¶ 72. Accordingly, Plaintiffs' claims for breach of contract and civil contempt in Counts VI and VII were tolled under the doctrine of fraudulent concealment as well, and thus are timely. *See Wright*, 2002 WL 31357891, at *3.

IV. PLAINTIFFS' PUTATIVE CLASS ACTION CLAIM IN COUNT VIII IS A DIRECT CLAIM THAT IS NOT MOOT.

A. Plaintiff's Class Action Claims Are Not Moot.

Defendants argue that Plaintiffs' class action claims premised upon the inadequate disclosures in Company's 2004 Proxy Statement (Count VII) should be dismissed as moot because a subsequent director election was held. Def. MTD at 48. Defendants rely upon the Delaware Supreme Court's decision in *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135 (Del. 1997) and the Chancellor's Bench Ruling in *The M&B Weiss Family Ltd. Partnership of 1996 v. Davie*, C.A. 20303 (Bench Ruling Del. Ch. Apr. 12, 2005) to support their position.

Neither of these decisions supports Defendants' argument given the facts and circumstances of this case as set forth in the Complaint.

Courts in Delaware "have long held that inequitable conduct by directors that interferes with a fair voting process may be set aside in equity." *Millenco, L.P. v. meVC Draper Fisher Jurvetson Fund I, Inc.*, 824 A.2d 11, 19 (Del. Ch. 2002) (quoting *Linton v. Everett*, 1997 Del. Ch. LEXIS 117 at *9 (Del. Ch. July 31, 1997). Even the *Loudon* court itself acknowledged that "[i]njunctive relief in the form of corrective disclosures and resolicitation may be appropriate" in certain circumstances. *Loudon*, 700 A.2d at 141.

One of the "circumstances" which makes the relief of voiding past director elections appropriate is where, as here, the same directors who committed the disclosure violations in prior elections remain in office. *See, e.g., Millenco, L.P.*, 824 A.2d at 19 (holding that because "the election of directors at both the 2001 and 2002 Annual Meetings was procured by the use of materially false and misleading proxy materials, the appropriate remedy is to order new elections to fill the three director seats that were up for election at those meetings."); *see also Shamrock Holdings*, 2005 Del. Ch. LEXIS 83 *19 n.37. In the recent *Shamrock Holdings* case, for example, this Court upheld the remedy of voiding past director elections despite the fact that new elections had been held, where the facts showed that the same directors who were charged with disclosure violations remained in office. *Id.* In doing so, the Chancellor distinguished his holding in *M&B Weiss* on the precise factual grounds applicable here:

> Voiding the results of directorial elections and ordering a new election is an appropriate remedy when an election occurs using materially false and misleading proxy materials. My recent holding in *The M&B Weiss Family Ltd. Partnership of 1996 v. Davie*, C.A. 20303 (Bench Ruling Del. Ch. Apr. 12, 2005) is not to the contrary because the disclosure claims in that case were moot since, unlike here, the directors who committed the alleged disclosure violations were no longer in office.

Id. (internal citation omitted). Like *Shamrock Holdings*, in this case the same directors who breached their fiduciary duties by committing disclosure violations in connection with the solicitation for director votes in the 2004 proxy statement remain in office. Don Tyson (since 1952), John Tyson (since 1984), Barbara Tyson (since 1988), Hackley (since 1992), Kever (since 1999), Bond (since 2001), Smith (since 2001), Zapanta (since 2004), Jones (since 2000) and Tollett (since 1984), all remained directors of the Company when this action was brought, and all but Jones remain on the Board to this day. Under the factual circumstances present here, the equitable remedy of voiding past elections is available despite the fact that subsequent elections were held, and the Court should reject Defendants' argument that Plaintiffs' class action claims are moot.

B. Plaintiffs' Class Action Claim Is A Direct Claim Regardless Of The Requested Damages.

Defendants argue that Plaintiffs' request for damages in the form of disgorgement of funds paid to directors who were elected pursuant to defective proxies converts the class action claims into derivative claims that cannot be pursued by way of a direct class action. Def. MTD at 49-50. Defendants fail to cite any controlling authority to support this proposition. The law, in fact, is to the contrary.

The Delaware Supreme Court confirmed in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), that a shareholder has the basis for a direct action if *the duty* the shareholder claims was breached *was owed to the shareholder* and the shareholder can prevail in its action without demonstrating an injury to the corporation.[32] Under *Tooley*, the correct questions for separating direct from derivative harms are (1) whether the shareholder is claiming the breach of a duty owed to the shareholder, and (2) whether the shareholder can prevail on that claim without also showing an injury to the corporation. *Id.* at 1031, 1035, 1039. Accordingly, it

[32] *Tooley*, 845 A.2d at 1039 (describing as "[t]he proper analysis" the court's examination of "the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.").

is entirely possible for a direct claim to exist even if the harm claimed "fall[s] on all stockholders equally." *Id*. at 1037.

Plaintiff's class action claims involve breaches of the duty of disclosure in connection with the solicitation of votes for Tyson Foods Board members. According to the Complaint, Tyson Foods Board members breached their fiduciary duties by failing to disclose secret elements of compensation being paid to Board members and executives in the form of perquisites and personal benefits that were misleadingly disclosed, or not disclosed, under the rubric of "other annual compensation" and "travel and entertainment" expenses. ¶¶ 66-85.

Board disclosure of relevant information to shareholders in connection with the solicitation of director votes is a bedrock corporate governance principle. "It is imperative that a board seeking stockholder approval of a specific corporate action disclose all material facts relating to the requested action so that stockholders can make an informed decision." *Crescent/Mach I Partners, L.P. v. Turner,* 846 A.2d 963, 987 (Del. Ch. 2000). Shareholder claims based on directors' failure to disclose material information in connection with a transaction are usually considered direct claims. *See, e.g., Mills v. Electric Auto-Lite Co*., 396 U.S. 375 (1970); *Yamamoto v. Omiya*, 564 F.2d 1319 (9th Cir. 1977). Such "disclosure claims" are often "based in rights secured to stockholders by various statutes." *Dieterich v. Harrer,* 857 A.2d 1017, 1029 (Del. Ch. 2004). Under the first prong of *Tooley*, the stockholders are the beneficiaries of the duty of disclosure, making the claim direct. Under the second prong of *Tooley*, the damage is to the stockholder, who suffers an abrogation of his right to vote by virtue of the non-disclosure.[33] Since it is the stockholder who votes, and not the corporation, it is the

[33] *Cf. Manzo v. Rite Aid Corp.*, 2002 WL 31926606, at * 6 (Del. Ch.) (pre-*Tooley* case; "[A]ny breach of fiduciary duty claim based upon the *mere fact* of knowing misrepresentation is necessarily derivative. To state a *direct* claim on that basis, plaintiff must identify some resultant injury that either affects some shareholders disproportionately to their pro rata stock ownership, or affects those rights of shareholders that are traditionally regarded as 'incidents' of stock ownership.").

stockholder who suffers the harm. That is why claims for impaired or precluded voting rights are direct claims: because the shareholder plaintiff's right to vote is independent of any right the corporation possesses. *See Lipton v. News Int'l, Plc*, 514 A.2d 1075, 1079 (Del. 1986) (same); *Moran v. Household Int'l, Inc.*, 490 A.2d 1059, 1070 (Del. Ch.), *aff'd* 500 A.2d 1346 (Del. 1985); *In re Gaylord Container Corp. S'holders Litig.,* 747 A.2d 71, 84 (Del. Ch. 1999); *Williams v. Geier*, 1987 WL 11285, *3 (Del. Ch.); *Tse v. Ventana Med. Sys., Inc.,* 1998 WL 743668, *13 (D. Del.) (Failure to disclose "the existence and terms of the compensation package" which affected voting rights was held to be an actionable direct claim for breach of fiduciary duty of loyalty).

Because the gravamen of Plaintiffs' class action claims renders them direct claims, and not derivative, the nature or amount of the relief requested is of no moment at this stage in the proceedings. On a motion to dismiss,

> all that need be decided is whether a claim is stated upon which *any* relief could be granted. If that question is answered in the affirmative, the nature of the relief is not relevant and need not be addressed….At this stage to decide whether recession relief is (or is not) feasible would not only go beyond the scope of a motion to dismiss, but also would be imprudent, because the issue is fact driven and cannot be decided in the absence of an evidentiary record.

Chaffin v. GNI Group, Inc., 1999 Del. Ch. LEXIS 182 *22 (Del. Ch.) (emphasis added). Putting aside the prematurity of Defendants' argument, "Delaware law dictates that the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly," and the Delaware Supreme Court has instructed this Court to "discourage disloyalty" through the "strict imposition of penalties." *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 445 (Del. 1996). In fashioning remedies and awarding damages, the Court's "powers are complete to fashion any form of equitable or monetary relief as may be appropriate" and in cases of disloyalty "potentially harsher rules [on damages] come into play." *Bomarko, Inc. v. International Telecharge, Inc.*, 794 A.2d 1161, 1184 (Del. Ch. 1999). Regardless of the nature or measure of alleged damages, moreover, courts are to be guided by the well-established principal that the law "extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation." *Thorpe*, 676 A.2d at

445 (quoting *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939)). Accordingly, and based upon these principles, disgorgement damages – as well as other types of damages – are recoverable by the class action plaintiffs in this case.

CONCLUSION

For the foregoing reasons, the defendants' Motion to Dismiss should be DENIED.

Dated: May 8, 2006

Respectfully submitted,
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