EFiled: Oct 30 2007 4:19PM EDT
Transaction ID 16870104
Case No. 2828-VCL

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

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

DEFENDANTS' REPLY BRIEF IN
<u>SUPPORT OF THEIR MOTION TO DISMISS</u>

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
William M. Lafferty (Del. Bar No. 2755)
John P. DiTomo (Del. Bar No. 4850)
1201 N. Market Street
Wilmington, Delaware 19801
(302) 658-9200
Attorneys for Individual Defendants Robert H. Swanson, Jr., Lothar Maier, David S. Lee, Leo T. McCarthy, Richard M. Moley, Thomas Volpe, David B. Bell, Paul Coghlan, Robert C. Dobkin, Donald Paulus, Alexander McCann, and Nominal Defendant Linear Technology Corporation

OF COUNSEL:

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
Douglas J. Clark, Esq.
Nicole M. Healy, Esq.
Dominique-Chantale Alepin, Esq.
650 Page Mill Road
Palo Alto, CA 94304-1050
(650) 493-9300

October 30, 2007

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules and Regulations

Miscellaneous

INTRODUCTION

Plaintiff's allegations that Linear granted spring-loaded and bullet-dodged options do not state a claim. Plaintiff's Answering Brief ("PAB") concedes that the options grants at issue complied with the terms of Linear's stock option plans. Plaintiff concedes that there was no *ultra vires* conduct. Plaintiff concedes that there was no misrepresentation about the terms of the grants, including dates, quantities, and strike prices, or the purposes for or circumstances in which options could be granted. Although the theory of this case now turns completely on whether Linear adequately disclosed its practices, PAB at 2-3, plaintiff does not dispute the exceptionally broad authority on which Linear's options could be granted, or that such authority was adequately disclosed both when shareholders approved the stock option plans and later in the annual Compensation Committee Reports accompanying Linear's proxy statements.

Plaintiff's Answering Brief admits that plaintiff used "20-20 hindsight," PAB at 17 n.9, in order to label a particular grant as bullet-dodged or spring-loaded. Even the use of hindsight cannot explain why supposedly spring-loaded grants resulted in stock price *decreases* or *immaterial* stock price movements. Moreover, plaintiff seeks to avoid a grant by grant review. A grant-by-grant review completely eviscerates the charges that option grants were spring-loaded or bullet-dodged. Even under plaintiff's theory, similar news announcements should have produced predictable results, but that clearly did not happen here. Under plaintiff's theory of what constitutes a positive announcement, he should have labeled 21 of the 22 grants as spring-loaded. But something else happened: plaintiff labeled 9 of those grants as *bullet dodged*. Plaintiff charges that there was a clear and striking pattern to Linear's stock option grants. In fact, there was no pattern at all.[1] Not surprisingly, *the SEC has terminated its investigation of Linear's stock option practices*.[2]

The concepts of spring-loading and bullet-dodging were not known or in existence before 2005. Plaintiff's First Amended Complaint ("FAC") fails to show that Linear engaged in spring-loading or bullet-dodging eleven years ago. Plaintiff cannot state a claim for breach of duty for failing to disclose a practice that plaintiff fails to plead was utilized.

ARGUMENT

I. PLAINTIFF CONCEDES THAT LINEAR'S STOCK OPTION PRACTICES WERE IN COMPLIANCE WITH LINEAR'S STOCK OPTION PLANS AND THAT THERE WERE NO *ULTRA VIRES* ACTS.

Defendants demonstrated that the FAC does not allege violations of Linear's stock option plans. There are no alleged violations of the fair market value restrictions for the strike price of options; there are no alleged tax violations resulting from any grant; there are no alleged violations of SEC rules; and there are no requirements that options be granted on pre-set dates or violations with respect to erroneous grant dates. Defendants' Opening Brief ("DOB") at 11-16. Defendants further demonstrated that although the FAC repeatedly and vaguely charges that the stock option practices violated the "purposes, spirit, intent and objectives" of Linear's stock option plans, FAC ¶¶ 33, 132, 148, 156, plaintiff has failed after two attempts to show how this is so. Indeed the FAC itself admits that Linear's stock option practices did not violate "the strict letter[] of Linear's applicable stock option plans." *Id.* ¶ 5. Plaintiff now concedes all of these points. *See* PAB at 45 ("Plaintiff does not allege that the challenged actions were *ultra*

1 Plaintiff's charge that Linear's annual excess return rate was 396% is completely false and unsupported. *See* Section IV.A, *infra*.

2 *See* Supplemental Affidavit of John P. DiTomo in Support of Defendants' Reply Brief ("Supp. DiTomo Aff."), Exhibit ("Ex.") 19.

vires or that . . . they violated tax laws, accounting rules, SEC Rules, or the strict letter of Linear's stock option plans").

Defendants also demonstrated that Linear's stock option plans authorized the granting of options "to attract and retain the best available personnel for positions of substantial responsibility, to provide additional incentive to Employees, Directors and Consultants and to promote the success of the Company's business."[3] Linear's stockholders understood and voted in favor of this authority. Plaintiff's only argument is that these "broad statements" do "not even specifically refer to options – as compared to other forms of compensation." PAB at 24. But this ignores that these statements are taken directly from *Linear's 1996 Incentive Stock Option Plan*. *See* DOB at 12 & n.10; DiTomo Aff., Ex. 3 at 3. Plaintiff does not seriously challenge that Linear's Stock Option Plan, which describes the "purposes of this Stock Plan," governs the granting of Linear's stock options.

In addition, the Compensation Committee Reports accompanying annual proxy statements, FAC ¶ 151, provided:

> Equity-Based Compensation. Stock options are granted periodically to provide additional incentive to executives and other key employees to work to maximize long-term total return to shareholders. The options vest over a five-year period to encourage option holders to continue in the employ of the Company.

These Reports described Linear's "compensation philosophy" as aligning "executive compensation with the Company's business objectives and performance and to attract, retain and reward executives who contribute both to the short-term and long-term success of the Company."[4] The Reports also provided, with respect to compensation in connection with tax purposes, and specifically 26 U.S.C. § 162(m), that:

---

[3] *See* DiTomo Aff., Ex. 3 at 1.

[4] *See* DiTomo Aff., Ex. 1 at 15, Compensation Committee Report, attached to Linear's Form DEF 14A filed with the SEC on October 3, 1996 (cited at FAC, e.g., ¶ 151).

> [T]he Company's policy is to qualify, to the extent reasonable, its executive officers' compensation for deductibility under applicable tax laws. However, the *Committee believes that its primary responsibility is to provide a compensation program that will attract, retain and reward the executive talent necessary to the Company's success*. Consequently, the Committee recognizes that the loss of a tax deduction may be necessary in some circumstances, as was the case in fiscal 1996.[5]

As defendants showed, plaintiff does not challenge any of Linear's stock option practices as *ultra vires.* DOB at 13-14. Plaintiff concedes this as well. *See* PAB at 3 ("Plaintiff does not disagree . . . that the Complaint does not allege . . . specific claims of *ultra vires* acts"); *id.* at 25 n.19 ("Plaintiff has never argued that the challenged conduct represented *ultra vires* acts that were not within the statutory power of Linear to perform"). Plaintiff does not dispute that Linear's stock option practices are consistent with Delaware law.[6]

II. NEITHER *TYSON I* NOR *TYSON II* PRECLUDES DISMISSAL HERE.

Plaintiff argues that the facts in *Tyson* are "far less compelling" than here. PAB at 2. Plaintiff does not and cannot support that assertion. The *Tyson* case was filed following the settlement of earlier unrelated litigation which required an independent committee to review compensation arrangements in a family-controlled company. Tyson had *consented to entry of a cease and desist order by the Securities & Exchange Commission* arising from misleading disclosures of perquisites and benefits provided to

---

5 *See* DiTomo Aff., Ex. 1 at 16 (emphasis added). Plaintiff argues that Linear's statement that it "complies with 26 U.S.C. § 162(m) strongly suggests that stock option grants are intended to award future performance only." PAB at 22 n.17. Plaintiff's suggestion is baseless. Section 162(m) is not limited to stock options, the section does not define performance in the way plaintiff characterizes, and Linear made clear that tax deductions would give way in any event to Linear's compensation goals and policies, which was not limited to incentives restricted to future performance.

6 *See* DOB at 13-14 (*citing*, *inter alia* Del. Code Ann. tit. 8, § 157(b); *Zupnick v. Goizueta*, 698 A.2d 384, 387 (Del. Ch. 1997) (stock options are not limited to '"motivat[ing] the recipient to continue to perform valuable service for the corporation'"); *Official Comm. of Unsecured Creditors of Integrated Health Servs., Inc. v. Elkins*, 2004 WL 1949290, at *18 (Del. Ch. Aug. 24, 2004) ("Delaware law recognizes that retention of key employees may itself be a benefit to the corporation") (*citing Beard v. Elster*, 160 A.2d 731, 738 (Del. 1960)).

Don Tyson from 1997-2003. *In re Tyson Foods, Inc.* ("*Tyson I*"), 919 A.2d 563, 579 (Del. Ch. 2007). Based on Tyson's disclosures of perquisites after the SEC's cease and desist order, new plaintiffs filed suit. In the second suit, plaintiffs asserted that the independent committee was not functioning as required. The board approved consulting contracts to corporate insiders, including a 10-year consulting contract to Don Tyson at $800,000 per year for a total of $8 million for ten years; spring-loaded stock options to chosen executives and members of Don Tyson's family; and related party transactions with insiders amounting to $163 million. On one occasion, the options in question were granted the day before announcing an acquisition of Tyson's Pork Group by Smithfield Foods; on another, the options were granted one day before Tyson cancelled a $3.2 billion acquisition of another company. 919 A.2d at 573-76.

In stark contrast to *Tyson*, Linear has not been the subject of an SEC cease or desist order. On the contrary, the SEC has terminated its investigation of Linear's stock option practices and took no action. Supp. DiTomo Aff. Ex. 19. Moreover, plaintiffs ignore, PAB at 23, that the *Tyson* stockholders had believed the stock option plan on which they voted authorized grants only to create incentives for future performance, and not to reward past performance. The Court repeatedly emphasized defendants' avoidance "of shareholder-imposed requirements." *Tyson I*, 919 A.2d at 593; *see id*. at 592 (it is inconsistent with duty for board "to ask for shareholder approval of an incentive stock option plan and then later to distribute shares to managers in such as way as to undermine the very objectives approved by shareholders"); *id.* at 575-76 & n.78 ("Performance-based compensation plans must be approved by a majority vote of shareholders"). *See Desimone v. Barrows*, 924 A.2d 908, 937 & n.98 (Del. Ch. 2007) (plans in *Tyson* had supposedly "been sold to stockholders as providing only incentives for future performance, not as a way to reward past performance, and that the spring-loaded issuances essentially breached an implied term of the plan"). Linear's shareholders, on the other hand, were told that stock options would be granted in many scenarios, to attract, retain, reward and to provide incentives to its personnel, with a long-term view to the future. *See* Section I, *supra*.

Plaintiff fully concedes Linear's broad authority to award compensation, including options, both for retrospective and prospective reasons. *See* PAB at 25 n.19 ("Plaintiff has never argued that the challenged conduct represented *ultra vires* acts that were not within the statutory power of Linear to perform"); *id.* at 3, 45. Linear disclosed the reasons, rationale, policies and purposes for awarding options both in the stock option plans themselves that shareholders approved as well as in the yearly Compensation Committee Reports that were included in Linear's annual proxy statements.[7] According to *Tyson I*, Tyson disclosed nothing of the sort when shareholders approved that stock option plan. Neither *Tyson* nor *Desimone* had the broad authority with respect to routine compensation practices that Linear had and neither company disclosed similar broad authority.

Both *Tyson II* and *Desimone* discussed a hypothetical situation *where the board wished to deviate from its standard policy*. The hypothetical assumed that the compensation committee wished to make "*special awards* of options *as bonuses* to the CFO and COO for their extraordinary efforts," arising from their successful and hard work in obtaining a merger agreement for their company. *Desimone*, 924 A.2d at 936 (emphasis added); *see In re Tyson Foods, Inc.* ("*Tyson II*"), 2007 WL 2351071, at *5 (Del. Ch. Aug. 15, 2007). Even where the stock option plans required grants to be made at fair market value, both Courts found nothing improper about such grants if the shareholders were told in a proxy that these special awards were "intended to permit the corporation to reward outstanding performance *and* to create incentives for superior future efforts." *Desimone*, 924 A.2d at 937; *Tyson II*, 2007 WL 2351071, at *5 (*citing*

7 *See* FAC ¶ 151 ("Each Proxy Statement filed by Linear between 1995 and 2006 contains a 'Compensation Committee Report' signed by the members of the Compensation Committee.").

Desimone, 924 A.2d at 937). Unlike the hypothetical, however, the Tyson shareholders were never told that any of the subject option grants were "intended to permit the corporation to reward outstanding performance *and* to create incentives for superior future efforts."

In contrast, Linear disclosed on a yearly basis that its routine option grants would serve these purposes, among others. Incredibly, plaintiff argues that Linear's stock option plans and Compensation Committee Reports "in no way clearly indicate that options can be given as both incentives for future performance and as a reward for past performance – the requirement needed to match the *Desimone* hypothetical." PAB at 24-25. Plaintiff's failure to confront the reality of Linear's stock option plans and Compensation Committee Reports does not make plaintiff's wishes come true. Linear's stock option plans authorized options "to *attract and retain* the best available personnel for positions of substantial responsibility, *to provide additional incentive* to Employees, Directors and Consultants and to promote the success of the Company's business." DiTomo Aff., Ex. 3 at 1 (emphasis added). The Compensation Committee Reports provided that Equity-Based Compensation sought also "to provide additional incentive to executives and other key employees to work to maximize long-term total return to shareholders" and that options vested over a five year period. *Id.*, Ex. 1 at 15. The Reports provided that executive compensation was to "*attract, retain and reward executives* who contribute both to the short-term and long-term success of the Company." *Id.* (emphasis added). The Reports reiterated that tax deductions would give way in order to "*attract, retain and reward the executive talent necessary to the Company's success*." *Id*. at 16 (emphasis added).

Linear's routine option grants, in contrast to the hypothetical and *Tyson*, were consistent with its stated practices and policies, so there was no need to make a one time disclosure announcing a deviation or to seek approval for a special option grant in conjunction with an extraordinary event such as the sale of the company pursuant to a merger agreement. Linear's disclosures, in its stock option plans, annual Compensation Committee Reports, and proxy statements and Form 4s which itemized the details of the grants, were neither "sparse," parsimonious, or lacking in candor. *Tyson II*, 2007 WL 2351071, at *4-5. Plaintiff's contention that *Tyson II* cannot be distinguished, PAB at 2, 13, 25, plainly fails.

III. THE FAC DOES NOT STATE A CLAIM FOR THE ALLEGED BULLET-DODGED GRANTS.

Defendants showed that *Desimone*, 924 A.2d 908, is the first and only case in Delaware to have considered bullet-dodged grants. The Court dismissed all claims arising from these grants, where options were granted to officers shortly after the announcement that Sycamore had missed its earnings estimate and the stock price fell. Plaintiff argues that because *Tyson I* made mention of the term "bullet-dodging," the decision "applies equally to bullet-dodging." PAB at 29 & n.25. The plain fact is that the *Tyson* Court did not consider grants alleged to have been bullet-dodged. Any reference to bullet-dodging in *Tyson I*, 919 A.2d at 593, was *dictum*.

Plaintiff further argues that *Tyson II* was "based on considerations of the duty of candor that were not addressed in *Desimone*." PAB at 29 n.26. Plaintiff argues that to "the extent that the Court finds the two opinions irreconcilable on this issue," the Court should follow *Tyson II*. *Id*. Completely apart from the complexities and concerns that arise from plaintiff's statement that *Tyson* and *Desimone* may be "irreconcilable," the *Desimone* Court clearly considered issues of disclosure both with respect to bullet-dodging and spring-loading. 924 A.2d at 930-38. Most pertinent to plaintiff's claims is the fact that when a "director grants options after a release of negative information, he does so at a time when the market has absorbed all existing information about the company." *Id.* at 944. As "to the fact that the Officer Grants were made after the issuance of bad news about the preceding quarter's results, nothing was hidden at all." *Id.* at 916. Clearly, a bullet-dodged grant cannot be actionable as a failure of disclosure where the grant is not even arguably made on the basis of inside information and only follows the public disclosure.

Plaintiff also argues that because he alleges a handful of bullet-dodged grants over a period of ten years, the outcome should differ from *Desimone.* PAB at 30. Plaintiff asserts that "the options plan in *Desimone* did not bar grants at below market prices, as the options here do." *Id*. *Desimone's* holding was not based on the number of bullet-dodged grants at issue. It squarely rejected the allegation that plaintiff makes in the FAC ¶ 4, and in the Answering Brief, that the option's market price and exercise price are lower than they would have been had the option been granted without delay. *See Desimone*, 924 A.2d at 948 ("*the exercise price of the options is equal to a market price on the date of the grant that incorporates all existing material information. Even when an option plan requires fair-market-value grants, such grants fully comply with that restriction*") (emphasis added).

Plaintiff suggests that the *Desimone* Court found a breach of duty for bullet-dodging where the directors manipulated the timing of grants and announcements in an effort to circumvent the option plan's terms. PAB at 30-31. *Desimone* found no breach of the non-discretionary plan that Sycamore followed. 924 A.2d at 948-49. In fact, the Court stated that "[u]nder the plan, the directors are entitled to options with exercise prices equal to the current value of the company's stock and are entitled to capture the full amount of any future price appreciation." *Id.* at 949. By the same token, there is no violation here. The stock option plans here, as plaintiff concedes, did "not require pre-set grant dates." PAB at 32 n.28. Plaintiff concedes that Linear never represented that grants would be made on pre-set dates or falsely misrepresented when options would be granted. PAB at 31-32.

Finally, plaintiff characterizes as a "red herring" *Desimone's* discussion that it would be poor corporate practice "to make a discretionary grant of market-price options when the board knows that the stock is actually worth less than the market price." *See*

Desimone, 924 A.2d at 944; PAB at 32. Plaintiff argues that he has never suggested that Linear must issue options before bad news. PAB at 32. This discussion is not a red herring. The issue is whether the board breaches a fiduciary duty when it grants options following a bad news announcement, *i.e.*, when there is no possibility of taking advantage of inside information. Plaintiff does not explain how that act gives rise to actionable conduct, including self-dealing or a breach of loyalty, when the options are at the market price.[8] PAB at 32-33. All claims based on bullet-dodging must be dismissed.

IV. THE FAC DOES NOT PLEAD THAT EACH DIRECTOR GRANTED OPTIONS KNOWING MATERIAL NON-PUBLIC INFORMATION AND INTENDED THEM TO BE HIDDEN BONUSES.

Plaintiff tries to argue that he has adequately pleaded that the directors intentionally granted spring-loaded options as hidden bonuses. Plaintiff argues that the 22 grants at issue (nine of which are allegedly bullet-dodged and cannot state a claim for breach of duty) present a "clear pattern." PAB at 14. Plaintiff's "pattern" argument falls apart, however, on analysis of each individual grant.

A. Plaintiff's Reliance On the Merrill Lynch Report Is Misplaced.

As part of plaintiff's assertion that there is a "clear pattern," he repeatedly cites to one Merrill Lynch Report and the ostensible conclusion that "management's annualized returns for its option grants exceeded typical investor returns by an astonishing average of 396%!" PAB at 2, 5, 17; *see id.* at 43 n.38. There are four fundamental errors with this report and its conclusions for Linear. Defendants' motion to dismiss does not hinge on these errors, however, because the FAC fails to plead bullet-dodging and spring-loading on its own terms. *See* Section IV.B-C, *infra*. While the Court need not reach this issue, plaintiff's reliance on this Merrill Lynch Report is clearly misplaced.[9]

[8] *See Desimone*, 924 A.2d at 916 (There is "no deception on the stockholders, the market, or regulatory authorities" and "the officers have the intended incentive to perform well in order to help the corporation's stock price improve from its level on the date of issuance, a level that reflects the negative information released").

[9] Defendants are aware that this Court stated in *Conrad v. Blank*, 2007 WL 2593540 (Del. Ch. Sept. 7, 2007), that "it is not persuaded that it should ignore

First, as plaintiff concedes, Merrill Lynch attempted to identify companies that were *backdating grants*. PAB at 43 n.38. Plaintiff does not (because he cannot) make that charge here. In fact, the SEC has terminated its investigation into Linear's stock option practices and took no action. Merrill Lynch never considered whether Linear was bullet-dodging or spring-loading grants, the claim here, and thus, the Report is irrelevant to plaintiff's allegations.

Second, Merrill Lynch never considered the 22 grants at issue in the FAC. Instead, the first Report addressed only a subset consisting of five grants (one of which is not even alleged here); in the third Report, Merrill Lynch addressed four grants.[10]

Third, Merrill Lynch made a fundamental error in its methodology. Instead of looking at Linear's actual stock price, which obviously was readily available, Merrill Lynch assumed a theoretical (and impossible) annualized return based on the notion that there are *360 trading days* in a year.[11] However, there are not 360 trading days in a year, as other statisticians have noted.[12] Not only does that error greatly exaggerate results, the

---

the plaintiff's study." *Id.* at *8 n.30 Clearly, the errors discussed here were not articulated to the Court in *Conrad*, which referenced the "same statistical methods" as alleged in *Ryan v. Gifford*, 918 A.2d 341 (Del. Ch. 2007). The Merrill Lynch Report, as explained herein, did not use the apples-to-apples trading day analysis that was used in the Wall Street Journal and cited in *Ryan*.

10 Plaintiff omits to note that Merrill Lynch issued two additional reports to review additional companies and significantly here, to purportedly account for stock volatility and stock option grant patterns . *See* Supp. DiTomo Aff., Ex. 20, Savita Subramanian & Joe Osha, Options Pricing for the S&P 500, Merrill Lynch, June 5, 2006 ("Third Report"), at 3.

11 In the first Merrill Lynch Report, Plaintiff's Exhibit 3 at 4, Linear's "management 20-day return" is noted at 28% (first chart) and the "management annualized return" is 497% (second chart). 497% = 28% x 18. 18 20-day periods = 360. The 20-day period Merrill used is a "20-Trading Day period." Supp. DiTomo Aff., Ex. 20, Third Report at 3.

12 The *Ryan* Court noted that an article in the Wall Street Journal, Supp. DiTomo Aff., Ex. 21, Charles Forelle and James Bandler, The Perfect Payday, Wall St. J., Mar. 18, 2006 ("Perfect Payday"), at A1, "sparked controversy" about the backdating of options. *Ryan*, 918 A.2d at 345. The Perfect Payday statisticians recognized that there are only about 252 trading days in a year. The methodology there made an apples-to-apples comparison using trading days to trading days, not trading days to calendar days:

results are even more distorted by the fact that Merrill Lynch compares this theoretical 360 trading day return (1.5 calendar years) to an actual return for one calendar year.

Fourth, the Third Merrill Lynch Report observed that the earlier first Report on which plaintiff relies failed to account for "stock volatility," which a "Z score" takes into account. Supp. DiTomo Aff., Ex. 20, Third Report at 3. The Z score is important because "[e]xcess returns post options pricing could be a function of stock volatility as opposed to options timing." *Id.*[13] The Third Report also observed that "[g]rant patterns should be taken into account." Third Report at 3. In other words, where a company follows a schedule in making grants, the analysis needs to account for this non-random pattern. Here, Linear did not make random grants.[14] To be significant, the Z score "must be greater than 0.7." Third Report at 5. Moreover, Merrill Lynch stated that to be significant, the "excess return must be greater than 2.4%." *Id.* Where all 22 grants are evaluated, *plaintiff cannot dispute that* Linear's Z score is below 0.7 (which is not statistically significant); and that over half of the 22 sets of grants had excess returns below 2.4% (not statistically significant). In other words, the returns on the 22 grants were not the product of manipulation but rather were the result of luck or chance.

> To quantify how unusual a particular pattern of grants is, the Journal calculated how much each company's stock rose in the *20 trading days* following each grant date. The analysis then ranked that appreciation against the stock performance in the 20 days *following all other trading days of the year*. It *ranked all 252 or so trading days* in a given year according to how much the stock rose or fell following them . . . .

Supp. DiTomo Aff., Ex. 21, Perfect Payday, at 5-6; *see In re CNET Networks, Inc.*, 483 F. Supp. 2d 947, 957 (N.D. Cal. 2007) (noting that Perfect Payday calculated "stock appreciation in the twenty *trading* days following the grant date [and] ranked against the appreciation in the same period measured from each *trading day in the year*") (emphasis added).

13 $Z = x - \mu / \sigma$. x is a raw score to be standardized; σ is the standard deviation of the population; μ is the mean of the population.

14 As Linear stated, it made grants "on a quarterly basis in connection with regularly scheduled board meetings. Board meetings are scheduled far in advance to coincide with the Company's quarterly earnings releases." DiTomo Aff., Ex. 4 at 10.

Plaintiff cannot dispute that had Merrill Lynch analyzed or accounted for all 22 grants alleged in the FAC and used actual price data for Linear, rather than hypothetical (and impossible) annualized returns, *the annual excess return rate would have been 11%, not 396%.*

B. Plaintiff's "Clear Pattern" Argument Fails, Even Apart From The Defects In The Merrill Lynch Analysis.

1. Plaintiff Cherry Picks The Pool Of Grants.

Completely apart from the fatal defects in Merrill Lynch's reporting as to Linear, plaintiff does not plead a clear pattern. Importantly, plaintiff cherry-picks *the pool* of option grants to review. Plaintiff takes issue with quarterly grants over the course of ten years in which there were 40 grant dates. *See* FAC 9 n.1 (acknowledging that there were 40 quarterly press releases during the relevant time period). But plaintiff ignores many, asserting that there are only 28 relevant grant dates. PAB at 2-3; *id.* at 4-5; FAC ¶ 37. Plaintiff deliberately reduces the size of the pool. Plaintiff selects a pool of 28 grant dates rather than 40 by ignoring the quarters in which rank and file employees, rather than officers or directors, were granted options. Courts have criticized plaintiffs for cherry-picking in this manner in an effort to make their statistics appear more favorable. *See Desimone*, 924 A.2d at 950 ("the complaint is conspicuously devoid of allegations regarding any grants . . . from other years during the relevant time period. . . . One suspects that the Outside Directors were not quite so fortunate in those other years.").[15]

---

[15] *See In re Openwave Sys. Inc. S'holder Derivative Liti*g., No. C 06-03468 SI, slip op. at 7 (N.D. Cal. May 17, 2007) (notwithstanding restatement, "The most glaring difference [from *Ryan*, 918 A.2d at 337] is that plaintiffs' Complaint here does not specify whether the 21 questionable option grants identified in the complaint represent all of the option grants to directors and top officers during the years at issue, or whether they were only a small fraction of the total option grants. . . . [If the latter] then plaintiffs' identification of the 21 option grants simply does not, alone, indicate backdating."); *In re Linear Tech. Corp. Derivative Litig.*, 2006 WL 3533024, at *3 (N.D. Cal. Dec. 7, 2006) ("Because plaintiffs provide no facts as to how often and at what times the Committee Defendants have granted stock options in the past, no 'pattern,' let alone a 'striking' one, is apparent"); *CNET Networks*, 483 F. Supp. 2d at 958 (plaintiffs "do not plead any facts as to when any other options were granted, or under what circumstances they were granted").

Moreover, plaintiff fails to consider each grant on its own merits, as other courts have done. *Compare* PAB at 15 *with CNET Networks*, 483 F. Supp. 2d at 959-62. When one considers each grant, *see* DOB at 22-29 and below, plaintiff's "clear pattern" argument disintegrates.

2. <u>Plaintiff Continues To Count Two Grants Where The Stock Price Fell.</u>

Defendants showed that Linear's stock *fell* rather than rose after the allegedly spring-loaded grants on July 20, 1999 and April 13, 2004. *See Desimone*, 924 A.2d at 945 (no causal relationship where "Sycamore's stock price traded *downward* during the first two days after the announcement!").

Plaintiff tries to attribute the stock decrease to factors other than Linear's announcement. PAB at 17 n.11. In a slightly different context, courts have refused to accept mere speculation about the causes of a stock price decrease where several factors, including market forces, are present.[16]

3. <u>Plaintiff Ignores That Most Grants Resulted In Immaterial Increases.</u>

Defendants showed that following most news announcements, the stock responded in amounts that courts have deemed immaterial as a matter of law. *See* DOB at 25 (July 22, 2003 grants, stock rose 0.17%; January 18, 2005 grants, stock rose 1.51%; July 20, 2004 grants, stock rose 4.27%; July 22, 1997 grants, stock rose 7.91%; January 14, 1997 grants, stock rose 8.38%).[17] Although there were some grants followed by

---

16 *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342-43 (2005) (rejecting pleading assertions that artificial inflation caused lower stock price; a "lower price [obtained] may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events"); *In re Intelligroup Sec. Litig.*, 468 F. Supp. 2d 670, 692-93 (D.N.J. 2006) (loss causation "excludes from the recovery all losses unrelated to the alleged fraud, including those "stemming from market forces"); *Weiss v. Amkor Tech., Inc.*, 2007 WL 2808224, at *6-7 (D. Ariz. Sept. 25, 2007) (dismissing with prejudice for failure to plead loss causation where plaintiffs relied on a mixed news announcement).

17 *See Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 546-48 (8th Cir. 1997) ("Defendants' alleged overstatement of assets by $6.8 million was immaterial as a matter of law. . . . [T]his amount represented only 2% of Gateway's total assets" and 10% of company's earnings); *Glassman v. Computervision Corp.*, 90 F.3d 617,

higher price movements (January 12, 1999, 11.91%; April 13, 1999, 12.53%; July 23, 1996, 12.87%; January 12, 1998, 12.88%), the *Desimone* Court noted that for volatile stocks, which plaintiff concedes Linear's was,[18] even price swings in excess of 10% are not uncommon. 924 A.2d at 945.

Incredibly, plaintiff argues that materiality is not measured by the response in the stock price. PAB at 17-18. But the stock price movement is the very basis of the contentions that stock option grants were spring-loaded and bullet-dodged.[19] In fact, plaintiff argues that "Linear's stock price . . . reacted (often quite dramatically) to these announcements." PAB at 4. Plaintiff's argument is further refuted by *Desimone*, in which the Court examined the stock price change in response to the news announcements. 924 A.2d at 945-46.[20]

4. Plaintiffs Ignore That The News Announcements Were Not Market Moving For Linear; That All Announcements But One Reported Expectations Were Exceeded; And The Stock Responded In Unpredictable Ways.

Plaintiff argues that the Court should look only at the news item itself (instead of the stock price response). PAB at 17-18. Plaintiff asserts that "what earnings results 'mean' for a company is highly contextual. It is specific to each company." *Id.* at 16 n.8. Plaintiff argues further that "*One can presume that earnings that beat market expectations would be perceived positively by the market*." *Id.* (emphasis added).

---

633 n.26 (1st Cir. 1996) (differential of 3-9% in backlog to revenue ratio held not material); *In re Convergent Techs. Sec. Litig.*, 948 F.2d 507, 514 (9th Cir. 1991) (prediction of net sales that proved to be "approximately 10%" lower held immaterial).

18 Plaintiff cites to Linear's Form 10-K for FY2006, which states that "'the Company's stock price is more volatile at and around earnings release dates.'" PAB at 23.

19 *See* FAC ¶¶ 42, 46, 50, 54, 58, 63, 67, 71, 76, 78, 82, 87, 91, 95, 99, 103, 107, 112, 116, 120, 125, 130.

20 *See also In re Merck & Co., Inc. Sec. Litig.*, 432 F.3d 261, 269 (3d Cir. 2005) ('"materiality of disclosed information may be measured post hoc by looking to the movement in the period immediately following disclosure, of the price of the firm's stock"') (*citing Oran v. Stafford*, 226 F.3d 275, 282 (3d Cir. 2000); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1417 (3d Cir. 1997)).

These arguments belie plaintiff's thesis that defendants were spring-loading or bullet-dodging grants. Of the 22 sets of announcements alleged in the FAC, only one earnings report reflects that Linear fell below analyst expectations. FAC ¶ 128 (July 26, 2005 press release). This cuts against plaintiff's theory in several critical ways. First, if the 21 other announcements should "be perceived positively by the market," the accompanying grants should all be characterized as spring-loaded options. But plaintiff has labeled only 13 out of 22 sets as spring-loaded; the remainder are bullet-dodged. Second, if Linear's investors were used to receiving routine reports that Linear regularly beat estimates, the announcements were more analogous to those "non-seismic positive announcement that hardly seemed likely to send Sycamore's stock price soaring to historic heights," *Desimone*, 924 A.2d at 916, 945, as opposed to the "clearly market moving" announcements in *Tyson I*, 919 A.2d at 576 (announcement that Smithfield Foods was acquiring Tyson's Pork Group, the decision to cancel a $3.2 billion deal to acquire IBP, Inc.). Third, as defendants showed, the market responded unpredictably to Linear's announcements. *See, e.g.*, FAC ¶¶ 81-82; DiTomo Aff., Ex. 12 at 2 (stock rose 30.86% upon announcement that revenues would decrease by 20%-[30]% in the subsequent quarter); Original Complaint ¶ 62 (stock fell following announcement devoid of negative projections); FAC ¶ 50 (stock rose following announcement of decreases in net sales and income compared to comparable quarter of prior year); *see also* DOB at 26-28. As defendants stated in their Opening Brief, "Given that one cannot explain the discrepancies in stock price movement *with the benefit of hindsight*, it is impossible for defendants to have known *in advance* that the news disclosures would have a material and positive effect on the price." DOB at 28.

C. <u>Plaintiff Fails To Refute The Relevance Of The Vesting Period.</u>

Defendants showed that Linear's vesting periods and restrictions on transferability of options are relevant facts that "undercut" the allegation that grants were intended as a "hidden bonus to be concealed from regulatory authorities and from

Sycamore's stockholders." *Desimone*, 924 A.2d at 916; DOB at 22-23. Options granted to Linear's directors vest over one year; options to Linear's officers vest over five years. *See* DOB at 23 n.20.[21] The *Desimone* Court found that a vesting schedule "prevented the recipients from realizing any immediate value from the options." 924 A.2d at 919; *see id.* at 921, 923. The Court rejected plaintiff's reliance on a "paper gain," *id.* at 922, the same argument plaintiff makes here. *See* FAC ¶ 177. The Court held that the positive "announcement would not have been likely to have had a substantial effect on the stock's trading price months later when the first of the options vested, much less on the bulk of the options, the last of which did not vest for three years." *Desimone*, 924 A.2d at 946.

Plaintiff tries to argue that the vesting period (and transferability restrictions) are not relevant. PAB at 19-20. Plaintiff ignores Vice Chancellor Strine's discussion, arguing that he was only concerned with the type of announcement made in *Desimone*, and whether it materially impacted the stock price. *Id.* at 19-20 & n.16. Plaintiff's narrow read of Vice Chancellor Strine's decision in *Desimone* is not supportable. The opinion discussed the effect of vesting, including the absence of immediate value, the absence of a substantial effect on the trading price upon vesting, and the refutation of an intent to grant a hidden bonus. *Desimone,* 924 A.2d at 916, 919-22 & n.18, 945-46.

Unable to distinguish *Desimone*, plaintiff instead argues that *Desimone* was wrongly decided. PAB at 20 n.16. Yet plaintiff acknowledges that "it may well be that a quarterly earnings announcement has no material impact on a company's stock price five years in the future." *Id.* at 20. By the time the option can be exercised the market would have absorbed the previously undisclosed information — as well as a great deal of other information — and incorporated all of that data into the share price. *Basic Inc. v. Levinson*, 485 U.S. 224, 241-42 (1988) (the price of a company's stock is determined by

[21] Plaintiffs' reference to a "six month" vesting period, PAB at 19 n.14, omits to state that for officer grants, *only 10%* of option grants vest every six months, for five years. DOB at 23 n.20.

the available material information regarding the company and its business). Moreover, although plaintiff makes vague complaints about the timing of option grants, he does not identify what the strike price allegedly should have been when any grants were made, nor does he quantify the amount of any proceeds to which the officers and directors supposedly were not entitled when they exercised any challenged options. Even more important, plaintiff's only theory of wrongdoing in this case is based on the failure to disclose. The vesting period is hardly irrelevant. The fact of the grants, including their date, number of options and exercise price, were clearly disclosed to the public in Form 4s and proxy statements, together with all quarterly announcements, well before options had vested and could be exercised.

In sum, the test announced in *Tyson I* and followed in *Desimone* requires among other things that plaintiff plead that the directors who approved the spring-loaded options possessed material non-public information soon to be released that would impact the company's share price, and that options were issued with the intent to circumvent stockholder approved restrictions. *Desimone*, 924 A.2d at 930 (*citing Tyson I*, 919 A.2d at 575-76).[22] The failure to plead material stock price movements, and that the directors intended to circumvent the plans, renders the FAC devoid of essential pleading elements that mandate dismissal. *See Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).

V. <u>MOST GRANTS ARE TIME BARRED</u>.

A. <u>There Is No Artifice Or Affirmative Act Of Concealment.</u>

Defendants argued in their Opening Brief that 16 of the 22 sets of grant dates are presumptively time barred because those options were granted and disclosed more than three years before plaintiff filed the action. DOB at 29-30. Plaintiff has failed to plead that tolling is available in that "the facts underlying a claim were so hidden that a

[22] Notably, plaintiff argues that mere receipt of a spring-loaded or bullet-dodged option is sufficient to breach a fiduciary duty. Plaintiff argues that accordingly, all defendants were properly named on this basis. PAB at 26-27. As shown, plaintiff misstates the law. *See also* DOB at 44-45.

reasonable plaintiff could not timely discover them." *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 1594085, at *18 (Del. Ch. June 29, 2005); *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5 (Del. Ch. July 17, 1998), *aff'd*, 725 A.2d 441 (Del. 1999). Plaintiff's Answering Brief offers no cogent response to this point.

Plaintiff simply has not pleaded that there was any fraudulent concealment. This is not a backdating case, where the grant dates were falsely represented. As this Court held, it is not enough to allege a mere failure to disclose, *Krahmer v. Christie's Inc*., 911 A.2d 399, 407 (Del. Ch. 2006), as plaintiff has done. FAC ¶¶ 35, 148, 160-62. The "evidence must show that the defendant engaged in some sort of 'actual artifice' to toll the running of the limitations period." *Krahmer*, 911 A.2d at 407; *Alex. Brown*, 2005 WL 1594085, at *19 ("[f]raudulent concealment requires an affirmative act of concealment"). Plaintiff simply relies on the decision in *Tyson I* to argue that tolling applies. PAB at 42-43. The *Tyson I* Court never identified any "actual artifice" to allow tolling. 919 A.2d at 590-91.

B. <u>Plaintiff's Admissions Of A Clear Pattern Distinguishes *Tyson I*</u>.

As a factual matter, plaintiff's reliance on *Tyson I* fails. Plaintiff makes much of the fact elsewhere in his brief that *Tyson* and *Desimone* lacked any pattern of suspect grants. PAB at 16. Here, in stark contrast, plaintiff repeatedly asserts a *clear and striking pattern* of spring-loading and bullet-dodging. *See id.* at 2 (grants followed a "clear pattern;" pattern is "striking"); *id.* at 4 ("pattern of manipulation was remarkably consistent;" grants followed a "general pattern"); *id.* at 13 ("consistent pattern of manipulation;" "decade-long pattern;" "multi-year pattern"); *id.* at 14 ("22 manipulated grants over the course of a decade with a clear pattern"); *id.* at 16 ("remarkably striking pattern"); *id.* at 17 n.8 ("consistent pattern"); *id.* at 29 ("consistent pattern"); *id.* at 29 n.24 ("extensive and consistent pattern"); *id.* at 30 ("consistent pattern;" "decade-long consistent pattern of manipulation"); *id.* at 43 ("decade-long pattern").

Plaintiff does not explain why the finding in *Tyson I* excusing plaintiff from "sift[ing] through a proxy statement . . . and a year's worth of press clippings . . . to establish a pattern," *Tyson I*, 919 A.2d at 591, should apply here. The FAC, which plaintiff ignores, concedes that Linear's grants were made in conjunction with quarterly Board meetings and earnings announcements, which occurred at the same time each year. FAC ¶ 35. Plaintiff refers to "28 publicly disclosed grant dates coinciding with Linear's quarterly earnings releases." PAB at 2. Thus, if plaintiff could and did determine a "clear pattern," it is hardly "pure nonsense" that a diligent shareholder could have uncovered the pattern and asserted claims in a timely fashion. PAB at 44 n.38.

C. <u>Publication Of The "Cold, Hard Figures" Triggers Inquiry.</u>

Defendants cited numerous decisions consistently holding that plaintiff's duty of inquiry is triggered when the figures themselves were reported in defendant's public filings. DOB at 32-33. Plaintiff appears to argue that to trigger the duty of inquiry, there must be a singular document that contains or "create[s] inherent discrepancies with other information." PAB at 44. The Delaware courts have not required that underlying hard figures and deceptive statements need to appear in the same document to trigger the duty of inquiry. *See Dean Witter*, 1998 WL 442456, at *7 (rejecting argument that plaintiffs were "put off the trail" where partnerships received reassurances that partnerships would return to profitability at the same time they were sustaining losses over the years). Courts have held that the disclosure of compensation in proxy statements or other public filings is sufficient to trigger a duty of inquiry. *See Official Comm. of Unsecured Creditors*, 2004 WL 1949290, at *8 (dismissing claim as time-barred where allegedly wrongful payment of bonus to CEO was disclosed in proxy statement; court rejected plaintiff's argument that proxy did not alert readers to process defects because disclosure "was enough to alert stockholders reasonably to a possible infringement of their rights"); *In re USACAFES, L.P. Litig.*, 1993 WL 18769, at *3-6 (Del. Ch. Jan. 21, 1993) (tolling did not apply as a matter of law where plaintiffs alleged that directors awarded themselves excessive fees, salaries and option grants but compensation issues were publicly disclosed in SEC filings, which put plaintiffs on inquiry notice). Plaintiff ignores this precedent.

VI. THE FAC DOES NOT STATE A CLAIM FOR BREACH OF DUTY FOR FALSE OR MISLEADING STATEMENTS IN LINEAR'S PUBLIC FILINGS.

A. Plaintiff Alleges No False Or Misleading Statement.

Plaintiff argues that four proxy statements made "material misstatements relating to the manner in which options were granted." PAB at 36; FAC ¶ 170; *id*. ¶¶ 171-74, 192-200. These proxies sought approval of the 1996 Plan and 2005 Plan and authority to add shares thereunder. FAC ¶¶ 170-74, 192-200. Plaintiff's argument is a jumble of inconsistent and contradictory statements and makes plain that dismissal is mandated.

Plaintiff admits that he "does not allege that the challenged actions . . . violated . . . the strict letter of Linear's stock option plans." PAB at 45. He admits that he "does not allege that the challenged actions . . . violated tax laws, accounting rules." *Id.* Plaintiff argues that Linear "repeatedly represented that the exercise price of all options may not be less than 100% of the fair value of Linear stock," *id.* at 6, yet does not allege that the options were not granted at the strike prices indicated or that grant dates were misrepresented.

Plaintiff argues that Linear's 2006 Form 10-K "went so far as to strongly (and falsely) imply that Linear's stock options were granted on pre-set dates" *Id.* at 6. As plaintiff well knows, that SEC filing was made well after the relevant period, on September 8, 2006. That SEC filing also included a *recent discussion of allegations* made in *pending derivative lawsuits* concerning allegedly backdated grants. *See* DiTomo Aff., Ex. 4 at 10. That discussion plainly does not suggest that options were granted on pre-set dates. DOB at 14. Indeed, plaintiff concedes elsewhere that Linear's stock option plan did "not require pre-set grant dates." PAB at 32 n.28; *id.* at 31 ("the option plans did not require pre-set dates").

Plaintiff argues that Linear conveyed the impression that the stock option plans "award[ed] future rather than past performance." *Id.* at 5, 6, 21-22, 25. This is completely erroneous. Plaintiff simply ignores abundant language in the plans on which shareholders voted, and yearly Compensation Committee Reports, stating that stock options would be granted in many scenarios, both to attract, retain, reward and provide incentives to Linear's personnel. *See* Section I, *supra*. Plaintiff fails to allege any false or misleading statement.

B. <u>Plaintiff Does Not Identify How A Duty For Greater Disclosure Is Triggered.</u>

Plaintiff's only argument, and the theory on which this case now turns, is that although Linear's conduct was consistent with shareholder approved plans, and there were no false statements in Form 4s or proxy statements concerning the date, quantity, and strike price of options, Linear nonetheless should have disclosed that option grants were awarded with the possibility that their value, either at the time of the grant, or when the options vested, might be enhanced, assuming no intervening factors. PAB at 2. Plaintiff cites no contemporaneous authority which supports his argument. *Id.* at 35-37.

Defendants showed that the SEC has never prohibited the bullet-dodging or spring-loading practices allegedly at issue in this case. DOB at 37. The SEC never required the specific disclosure that plaintiff claims was required back in 1996. Instead, the SEC determined in 2006 that public companies must begin making certain disclosures regarding the compensation of their executives on a prospective basis. *Id.* at 15-16. Plaintiff argues that the absence of an SEC rule requiring disclosure is irrelevant because plaintiff is not asserting a violation of the SEC rule, but rather asserts a breach of fiduciary duty based on a failure to disclose the specific alleged option practices. Plaintiff's Answering Brief, at 37, cites to *Lewis v. Vogelstein*, 699 A.2d 327 (Del. Ch. 1997).

But *Lewis* undermines, rather than supports, plaintiff's argument. As defendants discussed, DOB at 37-38, the *Lewis* plaintiff alleged the proxy statement was materially incomplete and misleading for failure to include an estimated present value of a one-time grant of options immediately exercisable to which directors might become entitled. Although the options were to be priced at the market price on the day the options were granted, the shareholders were not told the present value, under any pricing formula, of the compensation to the outside directors that the plan contemplated. Plaintiff argued that "the present value of the one-time options was as much as $180,000 per director and that that 'fact' would be material to a Mattel shareholder in voting whether or not to ratify the board's action in adopting the 1996 Plan." *Lewis*, 699 A.2d 327 at 331. Plaintiff argued that "the shareholders needed to have a specific dollar valuation of the options in order to decide whether to ratify the 1996 Plan." *Id.* The Court held that:

> estimates of option values are a species of "soft information" that would be derived from sources such as the specific terms of a plan (including when and for how long options are exercisable), historical information concerning the volatility of the securities that will be authorized to be optioned, and debatable assumptions about the future.

Id. The Court noted the difficulty of valuing options where among other things the term is uncertain because of varying exercise dates and the existence of restrictions, including the prohibition on assigning the options. *Id.* at 331-332 & n.8. The Court's analysis in *Lewis* was informed by whether the SEC required such disclosure. *Id.* at 332-33. This is so, *even though the Court was deciding whether plaintiff stated a claim for breach of fiduciary duty under Delaware law*. PAB at 37-38 n.33. *The Lewis* Court concluded that plaintiff had not stated a claim and that the SEC is better suited to "specify forms of disclosure, if appropriate." *Lewis*, 699 A.2d at 333.

Other courts have made similar observations and declined to extend the common law of disclosure where federal law defines the disclosure obligations. *See Frank v. Arnelle*, 1998 WL 668649, at *8 (Del. Ch. Sept. 16, 1998) (dismissing disclosure claim relating to how Dutch auction price range was derived where SEC determines what disclosures are required in issuer self tender offers and how disclosure is disseminated; court rejects argument that "state fiduciary law should override the federal regulatory scheme to require the Board to extend its offer in a way that is not required by federal law") (citations omitted); *In re Wheelabrator Techs. Inc. S'holders Litig.*, 1990 WL 131351, at *7 (Del Ch. Sept. 6, 1990) (rejecting claim that proxy should have disclosed company's one year budget forecast; "that information was not required by Federal law to be included in the Proxy Statement, and the plaintiffs have not shown why Delaware law should be held to require its disclosure"); *Kahn v. Roberts*, 1995 Del. Ch. LEXIS 151, at *20-22 (Del. Ch. Dec. 6, 1995) (rejecting disclosure claim; "[t]he federal security laws, not Delaware statutory or common law, police the market"). Here, the SEC did not address or require disclosures concerning specifics of executive compensation and stock option practices until 2006.

Plaintiff asserts that *Tyson II* requires "full disclosure of the challenged conduct." PAB at 36. Plaintiff fails to acknowledge that *Tyson II* suggests that the disclosure of Tyson's stock option plan was actually adequate at the time of shareholder approval. *Tyson II*, 2007 WL 2351071, at *2 ("The Plan itself clearly distinguishes between incentive and non-qualified stock option grants and Tyson made this distinction clear to shareholders when it sought approval in 2001."). Linear's stock option plan was more than adequate at the time the shareholders approved it. As discussed in Section II, *supra*, Linear's disclosures were far more ample and meaningful than those in *Tyson*. Linear's stock option plans disclosed the policies and purposes underlying its stock option grants. Plaintiff concedes that Linear's stock option practices were in conformity with those stock option plans.

Plaintiff's Answering Brief does not identify what event triggers the additional disclosure that plaintiff seeks. Plaintiff acknowledges that disclosure must be predicated *on specific shareholder action*. PAB at 35. Plaintiff does not cite to any specific shareholder action needed or sought to approve the grants at issue. *Id.*; *see Kahn*, 1995 Del. Ch. LEXIS 151, at *20 (rejecting disclosure claim where company "did not seek, nor did it need shareholder approval of the [company's] repurchase"). Plaintiff cites to the decision in *Malone v. Brincat*, 722 A.2d 5 (Del. 1998). PAB at 35. *Malone* is not helpful to plaintiff here. *Malone* addressed "misdisclosure," and recognized a duty to correct where defendants "knowingly disseminat[ed] to the stockholders false information about the financial condition of the company." 722 A.2d at 10. As shown above, plaintiff has not alleged any false statements, much less intentionally false statements by Linear. *See Orloff v. Shulman*, 2005 Del. Ch. LEXIS 184, at *52-53 (Del. Ch. Nov. 23, 2005) ("[t]o successfully state a duty of loyalty claim against directors for providing information in the absence of a request for stockholder action, a stockholder must allege that he received 'false communications' from directors who were 'deliberately misinforming shareholders about the business of the corporation'") (*citing Jackson Nat'l Life In. Co. v. Kennedy*, 741 A.2d 377, 389 (Del. Ch. 1999)); *Malone*, 722 A.2d at 10. Accordingly, plaintiff has failed to identify *any duty* to make broader disclosure eleven years ago or at the time of any of the option grants.

Defendants argued that Delaware law recognizes that directors cannot be held liable for violating evolving standards of corporate governance that did not exist at the time of a prior Board action. DOB at 37-38.[23] Plaintiff argues that under that reasoning, the decisions on backdating in *Ryan* and *Conrad*, for example, would "be invalid." PAB at 37. The practice of backdating "involve[s] plain lies about the option grant date." *Desimone*, 924 A.2d at 937 n.98. An officer or director would not need a court decision to understand that a deliberate change or fabrication in the date of a grant might be a breach of duty. In contrast, "spring-loaded options do not clearly violate the literal terms of a fair-market-value restriction because such options are issued at the fair market value prevailing in public markets on the date of issuance." *Id.* An officer or director would

[23] Clearly, the decisions on spring-loading are evolving. *Tyson II* changed *Tyson I*. *Tyson II*, 2007 WL 2351071, at *5 ("the test applied in the February 6, 2007 Opinion was, although appropriate to the allegations before the Court at the time, couched in too limited a manner"). Plaintiff notes the *Tyson* decision may be "potentially irreconcilable," PAB at 29 n.26, with *Desimone*, a decision that only first addressed bullet-dodging, on June 7, 2007.

have had no idea, back in 1996, that the practice would require explicit disclosure. Notably, there were no misrepresentations; the Form 4s and proxy statements accurately reflected the terms of the grants, including dates, quantities, and strike prices; and the Stock Option Plans and Compensation Committee Reports provided that options were authorized to attract, retain, reward and provide long term incentives to Linear's personnel. To rule that an officer or director breached his duty years back by failing to disclose when the SEC has only just required prospective disclosure is all the more troubling where the practice has never been declared unlawful or alleged to be in violation of Linear's stock option plans.

VII. THE FAC DOES NOT STATE A CLAIM FOR UNJUST ENRICHMENT, WASTE, BREACH OF GOOD FAITH, LOYALTY OR SELF DEALING.

Unjust Enrichment. Defendants argued that a claim for unjust enrichment is an equitable remedy that is unavailable under Delaware law where there is a governing contract between the parties. *See ID Biomedical Corp. v. TM Techs. Inc.*, 1995 WL 130743, at *15 (Del. Ch. Mar. 16, 1995); DOB at 34-36. Plaintiff cites to cases such as *Tyson* and *Ryan* which allowed unjust enrichment claims, PAB at 33, but this argument was not advanced, much less considered by the Courts.

Plaintiff also argues that an equitable theory is available where the "conduct does not directly violate the contract's terms." PAB at 34 n.31. The basic problem with the claim, and the FAC as a whole, is that plaintiff never identifies how the grants violated the terms of Linear's stock option plans in any respect. The Answering Brief appears to concede that there is no violation.

Nor does plaintiff plead how defendants were unjustly enriched at Linear's expense. Again, Linear's plans allowed the granting of options to attract, retain, reward and provide incentives to Linear's personnel. The shareholders approved these policies. And, plaintiff never alleges that a single recipient did not deserve a specific option grant. Plaintiff is hard-pressed to do so, where among other things Linear's percent of profit on sales was "more than five times the average for U.S. industrial companies," and "outpaced . . . profit powerhouses" including Microsoft and Google.[24]

Plaintiff never identifies the *wrongful* differential that any defendant received due to beneficial timing. Plaintiff is unable to do so. This is not a backdating case, where one can ascertain the excess price by substituting the correct date of the grant with the erroneous original date of the grant. Here, neither the dates nor strike prices were fabricated. Plaintiff argues that the strike price, although literally at the fair market value on the date of the grant, became artificially low because Linear's stock price might rise in some amount at some varying time after the announcements were disclosed (although disregarding that many options became underwater during the vesting period). Notably, plaintiff never suggests when options should have been granted, if not on the date of the grant. At best, plaintiff denies he is advocating a requirement that options be issued before bad news. PAB at 32. The failure to plead the necessary elements of unjust enrichment mandate dismissal.[25]

Waste. Plaintiff gives short shrift to his new claim for waste, arguing only that there was no "consideration for that additional amount that it would have received for properly priced options." PAB at 38. Plaintiff alleges that the options were not "properly priced," *id.*, but he does not identify how this was so; he never suggests that any defendant's performance was under par; and he never alleges that Linear performed poorly. Plaintiff does not allege that defendants were entitled to no options, only that they were

---

[24] DiTomo Aff., Ex. 17, George Anders, Pricing Power: In a Tech Backwater, A Profit Fortress Rises – Maker of Arcane Chips Earns Better Margins Than Google, Microsoft, Wall St. J., July 10, 2007, at 2.

[25] *See Palese v. Del. State Lottery Office*, 2006 WL 1875915, at *5 (Del. Ch. June 29, 2006) (dismissing plaintiff's claim for unjust enrichment where "Defendants' conduct was not 'absent of justification'; on the contrary, the Defendants acted within the bounds of their prescribed legal authority and in conformity with the governing statute and regulations.") (citations omitted); *Khoury Factory Outlets, Inc. v. Snyder*, 1996 WL 74725, at *11 (Del. Ch. Jan. 8, 1996) (dismissing plaintiff's claim for unjust enrichment where there was justification for the actions of defendant at issue).

excessive by some unarticulated amount. This is insufficient. *See* DOB at 39-41.

Breach Of Duty Of Good Faith And Loyalty And Self Dealing. Plaintiff argues that the entire fairness test should apply and that he has stated claims for breach of loyalty because "shareholders generally were not able to benefit from the use of insider information in the same manner as Director Defendants benefited from this information." PAB at 28, 32. This argument fails for several reasons. First, plaintiff ignores that McCarthy (now deceased) and Volpe *exercised none* of the options they received in the challenged grants. Defs.' July 17, 2007 Opening Brief at 12 & n.11. Lee and Moley exercised only two of the eight allegedly wrongful sets of grants (bullet-dodged and spring-loaded) they received.[26]

Second, plaintiff tries to amalgamate the concept of insider trading and granting of options. Yet the FAC concedes there is no insider trading claim, FAC ¶ 153, nor can there be as defendants explained in their May 25 Motion to Dismiss at 18-20; *see also* DOB at 41-42. Moreover, plaintiff's confusing discussion ignores that during the vesting period, the market will have absorbed all information, positive and negative, and such information will be reflected in the stock price. By the same token, shareholders are not recipients of options. And the shareholders here approved the stock option plans at issue, whose terms, purposes and goals had been disclosed. Plaintiff does not dispute that directors were entitled to options and does not articulate any wrongful differential received.

[26] Defendants made a typographical error at DOB at 29. The sentence "members of the Compensation Committee received four of twenty-two allegedly spring loaded grants," should read "members of the Compensation Committee received four of thirteen allegedly spring loaded grants." *See* DOB at 8 (*citing* FAC ¶¶ 52, 73, 101, 109).

Two sets of allegedly spring-loaded options are underwater (July 22, 2003 and July 20, 2004). DOB at 9. The remaining set of allegedly spring-loaded options are not even arguably spring-loaded. As plaintiff concedes, the alleged spring loaded options granted on July 20, 1999 were followed by a stock *decrease*. FAC ¶¶ 73-76. Moreover, two sets of allegedly bullet-dodged options are underwater (July 25, 2001 and July 27, 2005). DOB at 9.

VIII. THE FAC FAILS TO PLEAD DEMAND FUTILITY.

Plaintiff fails to address why the Board cannot consider demand as to the 14 sets of grants they did not receive. DOB at 45-46. Plaintiff does not contend that the members of the Compensation Committee are interested in grants received by others.

Plaintiff disregards out of hand the lack of particulars in the FAC. PAB at 38-41. Plaintiff has not alleged facts concerning each director's role in granting options; material non-public information each director supposedly possessed when each grant was made; what each director knew, understood, or believed about the likely effect on Linear's share price of the disclosure of such information; or, how such information affected each director's decision to make the challenged grants. Instead, plaintiff assumes that there is a clear pattern of spring-loading and bullet-dodging, PAB at 40, a claim that has not been pleaded or demonstrated in any way. That is insufficient. Plaintiff must plead that a majority of the board "knowingly granted" options that were spring-loaded or bullet-dodged. *Desimone*, 924 A.2d at 942. Plaintiff does not plead any violation of Linear's stock option plans, much less any director's knowledge that the grant of a single option was wrongful in any way. Nor does plaintiff address the inadequacy of the allegation that defendants "authoriz[ed], *or through abdication of duty* permit[ted]" the grants. FAC ¶¶ 1, 167, 185. Plaintiff has not met his burden of pleading particularized facts excusing demand. DOB at 7-8, 45-49.

CONCLUSION

For the foregoing reasons, defendants respectfully request this Court to dismiss the FAC in its entirety.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ William M. Lafferty
William M. Lafferty (Del. Bar No. 2755)
John P. DiTomo (Del. Bar No. 4850)
1201 North Market Street
Wilmington, Delaware 19801
(302) 658-9200
Attorneys for Individual Defendants Robert H. Swanson, Jr., Lothar Maier, David S. Lee, Leo T. McCarthy, Richard M. Moley, Thomas Volpe, David B. Bell, Paul Coghlan, Robert C. Dobkin, Donald Paulus, Alexander McCann, and Nominal Defendant Linear Technology Corporation

OF COUNSEL:

Douglas J. Clark, Esq.
Nicole M. Healy, Esq.
Dominique-Chantale Alepin, Esq.
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
650 Page Mill Road
Palo Alto, CA 94304-1050
(650) 493-9300

October 30, 2007

1299571