



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

WALTER E. RYAN, JR., In The Right Of
And For The Benefit Of MAXIM
INTEGRATED PRODUCTS, INC.,

Plaintiff,

v.

JOHN F. GIFFORD, JAMES R. BERGMAN,
B. KIPPLING HAGOPIAN, A.R. FRANK
WAZZAN, ERIC P. KARROS, M.D.
SAMPELS,

Defendants,

and

MAXIM INTEGRATED PRODUCTS, Inc.

Nominal Defendant.

Civil Action No. 2213-N

**PLAINTIFF'S ANSWERING BRIEF IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS OR STAY**

ROSENTHAL MONHAIT & GODDESS, P.A.
Norman M. Monhait (#1040)
919 Market Street, Suite 1401
Citizens Bank Center
P.O. Box 1070
Wilmington, Delaware 19899-1070
(302) 656-4433
Attorneys for Plaintiff

OF COUNSEL:

KRISLOV & ASSOCIATES, LTD.
Civic Opera Building, Suite 1350
20 North Wacker Drive
Chicago, IL 60606-2902
(312) 606-0500

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NATURE AND STAGE OF PROCEEDINGS

An article in *The Wall Street Journal* on March 18, 2006 revealed that many companies had implemented and then long concealed a fraudulent executive compensation practice – falsely dating stock option grants to coincide with market lows so as to reduce strike prices and inflate the value of stock options that were already enriching management compensation. While *The Wall Street Journal* article was based on statistical analyses, subsequent investigations by regulatory bodies and board special committees forced several companies to acknowledge that they had engaged in and concealed such backdating of option grants. Stock analysts and other interested groups applied similar analytical techniques to publicly available information gathered through extensive research to identify many other companies as likely participants in the backdating practice.

Maxim Integrated Products, Inc. (“Maxim”) was one of many companies identified as a likely victim of backdating perpetrated by directors with the acquiescence of officer beneficiaries. On May 22, 2006, Merrill Lynch issued a report compellingly demonstrating that officers of a number of companies, including Maxim, had benefitted from repeated backdating of option grants over an extended period of time in violation of stock option plans. Less than three weeks after the Merrill Lynch report, plaintiff Walter E. Ryan, Jr. (“Ryan”) initiated this derivative action to recover for Maxim’s benefit the losses it had sustained as a result of the backdating practice.

Within two days of the issuance of the Merrill Lynch report, two other Maxim shareholders had filed derivative actions concerning backdating in the United States District

Court for the Northern District of California (“California plaintiffs”). On June 14, 2006, two days after plaintiff Ryan filed this action in Delaware, the California actions were consolidated with defendants’ cooperation. Also on June 14, 2006 and again on June 16, 2006, other Maxim stockholders filed derivative actions for the benefit of Maxim in California state and federal courts.

Scizing on the fortuity of the California litigations, defendants request a stay of this action to avoid the courts of Maxim’s legal home. Alternatively, defendants raise a number of specious defenses to plaintiff’s well-plead derivative claims: failure to plead demand futility; lack of standing; failure to state a claim; and statute of limitations. Plaintiff submits this answering brief demonstrating that the Court should deny defendants’ motion.

STATEMENT OF FACTS¹

Maxim is a Delaware corporation, based in California that designs, develops and manufactures integrated circuits (Complaint ¶20). Plaintiff Ryan has been a Maxim shareholder continuously since April 2001 when his stock in Dallas Semiconductor Incorporated was converted to Maxim shares upon Maxim's acquisition of Dallas Semiconductor (Complaint ¶13).

Maxim maintains a shareholder-approved stock option plan to enhance compensation for its executives. The plan, at least since 1994, provided that the exercise price of each option would be no less than the closing market price for Maxim stock on the date of the grant. The plan also provided that it would be administered by Maxim's board of directors. A 1999 amendment permitted the board to designate a committee to administer the plan. The board designated such a committee composed of defendants James Bergman, B. Kipling Hagopian, and A.R. Frank Wazzan. (Complaint ¶¶11,15-17, 22-27, 51-52.)

Defendant John R. Gifford is a founder of Maxim and has served as a chief executive officer and chairman of the board since its inception in 1983. As part of his compensation, between 1998 and mid 2002 Gifford received options to purchase approximately five million shares of Maxim's common stock (Complaint ¶¶14, 21, 30-39). Many of these grants were at market lows in a contemporaneous time period and, for many of the grants, the market

¹This Statement of Facts is taken from plaintiff's Complaint which serves as the record on this Motion, e.g. *Vanderbilt Income and Growth Associates, LLC v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 612 (Del. 1996). References are to paragraphs of the Complaint.

price of Maxim's stock quickly and substantially exceeded the exercise price (Complaint ¶¶ 31-40, Ex. A, p. 14). While many companies make their stock option grants at a fixed time each year, a practice that eliminates the potential for surreptitious backdating, Gifford received his stock option grants at irregular times throughout the five-year period (Complaint ¶¶ 29-39).

On May 22, 2006, Merrill Lynch issued an analysis of stock options grant timing for the semiconductor and semiconductor equipment companies that comprise the Philadelphia Semiconductor Index ("SOX") (Complaint ¶4, Ex. A). To analyze the integrity of purported dates of option grants, Merrill Lynch analyzed the extent to which annualized stock price returns for the twenty day period subsequent to options pricing diverged from stock price returns for the calendar year in which the options were granted (Complaint ¶6, Ex. A, pp. 1-2). The theoretical premise of the study was that, if the timing of option grants was at arm's length, there should not be a material difference between the two measures of return. What Merrill Lynch found was that for the 1997 to 2002 period studied, returns during the twenty days following the option grants reviewed consistently and substantially exceeded calendar year returns (by 204%). Specifically, Merrill Lynch found that the twenty day return on option grants to Maxim's management averaged 14% over the five-year period, an annualized return of 243% (Complaint ¶7, Ex. A, p. 4), almost ten times higher than the 29% annualized market returns in the same period (Complaint ¶8). While Merrill Lynch carefully noted that the records to which it had access were not "sufficiently detailed" to reach a judgment as to whether backdating had actually occurred, it concluded that "managements

for our universe of companies seem remarkably effective at timing options pricing events.” (Complaint Ex. A, p. 2). In an environment where this type of report and resulting investigations have led several public companies to acknowledge publicly a long-standing surreptitious practice of options backdating,² plaintiff Ryan has alleged that the Merrill Lynch research demonstrates that Maxim’s directors was also complicit in the industry practice of backdating option grants. (Complaint ¶9.)

Options backdating adversely effects its corporate victims in at least two ways. First, Maxim lost the cash it should have received on exercise of options had they not been backdated. (Complaint ¶¶2, 42, 59.) The second adverse effect results from tax and accounting rules. Options priced below a stock’s fair market value on the date of grant bring the recipient an instant paper gain. Under accounting rules, that is the equivalent of additional compensation and must be treated as a cost to the company, reducing reported earnings. Because the options backdating practice was surreptitious, Maxim did not account for the amount by which the market price of its stock, on the date the options were in fact issued, exceeded the exercise price as an expenses. Thus surreptitious backdating would result in an overstatement of profits. Correction of surreptitious backdating necessitates revision of a company’s financial statements, and potential tax effects from the failure of

²See, e.g., Affiliated Computer Services Inc. Form 10-Q filed May 15, 2006, pp. 7-8 (excerpt attached as Exhibit A); Cablevision Systems Corporation, Form 10-K/A filed on September 21, 2006, pp. 20, I-19-21 (excerpt attached as Exhibit B); Sanmina-SCI Corporation Press Release dated August 14, 2006 (attached as Exhibit C). The Court may take judicial notice of the fact that these companies made these disclosures. *Vanderbilt v. Arvida/JMB Managers*, 691 A.2d at 612-613; D.R.E. 201 n.5.

proper withholding and tax reporting (Complaint ¶¶25, 44). In addition, defendant Gifford and other recipients of surreptitiously backdated options are unjustly enriched due to receipt of compensation on terms contrary to Maxim's stock option plans (Complaint ¶¶43-45, 63).

Accordingly on June 12, 2006, plaintiff Ryan instituted this action derivatively for the benefit of Maxim to recover its losses sustained through the options backdating that was regularly and repeatedly practiced for several years prior to the enactment of Sarbanes Oxley.³

In the California cases defendants favor, other plaintiffs, purporting to be Maxim shareholders, were less deliberate in their analysis of the Merrill Lynch report. On May 22, 2006, the same day Merrill Lynch issued the report, and two days later on May 24, 2006, two persons who allege only that they were shareholders of Maxim "all relevant times," acting through the same California counsel, filed virtually identical derivative action complaints in the United States District Court for the Northern District of California (Decl. of Timothy R. Dudderar ("Dudderar Aff."), Exs. A and B). On June 14, 2006, *after* plaintiff Ryan had filed his complaint, the California Court entered an Order supported by defendants, consolidating the two actions and appointing lead counsel. (Dudderar Aff., Ex. C). Also on June 14, 2006, again *after* plaintiff Ryan filed his complaint in Delaware, two more people purporting to have been Maxim shareholders at "all relevant times" filed derivative actions in the California federal court (Dudderar Aff., Exs. D ¶12 and E ¶12). On July 6, 2006, without

³Options backdating necessarily ceased after changes to the federal securities laws in 2002 which, among other things, required companies to disclose option grants within two days (Complaint ¶45).

notifying counsel in this case, the parties in the California federal cases sought and obtained an Order consolidating the four federal actions and appointing co-lead counsel. On June 16, 2006, again after plaintiff Ryan had filed his complaint, yet another entity, which claimed only that it “currently owns” Maxim shares, filed a derivative complaint in California state court (Dudderar Aff., Ex. H ¶12).

ARGUMENT

I. DEFENDANTS' ARGUMENTS CONCERNING DEMAND FUTILITY AND FAILURE TO STATE A CLAIM ARE FRIVOLOUS

This Court's decision in *Sanders v. Wang*, 1999 WL 1044880 (Del. Ch.), requires rejection of defendants' arguments concerning demand futility and failure to state a claim.

The plaintiffs in *Sanders* alleged that the board of directors of Computer Associates International Inc. had awarded certain officers more shares than permitted by express terms of a shareholder approved key employee stock ownership plan. This Court first held that the claim that directors had failed to honor an unambiguous provision of a shareholder approved compensation plan established demand futility under the second prong of *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984) because the allegation raised a reasonable doubt that the board had validly exercised business judgment. *Sanders v. Wang*, 1999 WL 1044880 at *5. This Court further held that such an allegation sufficiently establishes claims for gross negligence, waste of corporate assets and a breach of fiduciary duty." *Id.* at *1. *See also id.* at *5-*6. Finally, this Court upheld the claim that director executives who received the invalid award "must disgorge the benefit received in order to avoid being unjustly enriched." *Id.* at *10. The Court so ruled without regard to whether or not the executives had sold their improperly obtained stock; it was sufficient that for an unjust enrichment claim that the stock itself, like the options here, had value.

Thus the Court should readily dispose of these three bases of defendants' motion.

II. DEFENDANTS CANNOT VALIDLY ASSERT A STATUTE OF LIMITATIONS DEFENSE

The Court can make equally short shrift of defendants' statute of limitations contention.

As an initial matter, the statute of limitations defense is not available to corporate officers and directors who personally profit from their own misconduct. *Halpern v. Barran*, 313 A.2d 139, 142-43 (Del. Ch. 1973). The Complaint charges defendant Gifford with having accepted stock option grants that he must have understood to have been backdated.⁴ Having profitted from fiduciary misconduct, he should not receive the benefit of a legal defense in equity.

Second, plaintiff is entitled to the benefit of Delaware's well established discovery rule which holds that when an inherently unknowable injury has been suffered by one blamelessly ignorant of the act or omission and injury complained of, and the harmful effect thereof develops gradually, over time the injury is sustained when the harmful effect first manifests itself. *Layton v. Allen*, 246 A.2d 794, 797 (Del. 1968). Originally articulated in a medical malpractice case, the discovery rule has been applied in the commercial context, particularly where the relationship between the plaintiff and defendant was such that the plaintiff rightfully reposed confidence in and reliance on the expertise, ability and integrity

⁴At a minimum the Complaint raises an issue of fact as to Gifford's knowledge. Since a plaintiff is entitled to all reasonable inferences that can be drawn from the Complaint, e.g. *Vanderbilt Income v. Arvida/JMB Managers*, 691 A.2d at 612, and given the frequency and timing of the options grants at issue, it is a more than reasonable inference that Gifford was well aware that the exercise prices were not the market price of the stock on the date of grant.

of the defendant. *Isaacson, Stolper & Co. v. Artisan's Savings Bank*, 330 A.2d 130, 132-34 (Del. 1974); *Pack & Process, Inc. v. Celotex Corp.*, 503 A.2d 646, 650-51 (Del. Super. 1985). Of course, shareholders are entitled to repose such confidence and reliance in corporate directors.

Here, there was no reason for plaintiff to know of or even suspect that Maxim's directors were backdating options grants, and plaintiff had every reason to rely on the integrity of Maxim's directors. Defendants claim that because the Merrill Lynch report was developed from publicly available information plaintiff could have ferreted out the backdating practice. In essence, defendants' contention is that shareholders of a Delaware corporation have an obligation to invest the time and expense necessary to investigate directors' conduct on an ongoing basis. Such a contention falls of its own weight. A shareholder must be entitled to rely on the integrity of corporate directors, at least to the extent that they will honor corporate plans for which they have sought shareholder approval. Even if a shareholder has some generalized unease about directors' integrity, no shareholder has the resources to investigate every possible area of misfeasance. Denying plaintiff here the benefit of the discovery rule would require shareholders regularly to suspect and investigate directors' management of all aspects of corporate affairs, in order to preserve the possibility of seeking relief if some misdeeds are revealed.

Yet a third doctrine – fraudulent concealment – denies defendants the benefits of a limitations defense. See *Halpern v. Barran*, 313 A.2d at 139. The Complaint here alleges

that in documents publicly filed with the Securities and Exchange Commission defendants caused Maxim to represent that the exercise price of all of the stock options it granted pursuant to its stock option plans would be no less than the fair market value of Maxim's common stock measured by the publicly traded closing price for Maxim stock on the date of the grant (Complaint ¶22.)⁵ Shareholders should be entitled to rely on such public representations by their directors in the name of the corporation. Inaccurate public representations as to how directors are conducting corporate business constitute fraudulent concealment of wrongdoing sufficient to toll the statute of limitations.

III. PLAINTIFF HAS STANDING TO MAINTAIN THIS ACTION

Defendants concede, as they must, that plaintiff has standing to maintain this action with respect to events after April 11, 2001 (Complaint ¶13.) The Individual Defendants' Opening Brief In Support Of Their Motion To Dismiss Or Stay ("D. Br."), p. 28. Defendants argue for a wooden application of 8 *Del. C.* §327 to preclude plaintiff's standing to bring claims with respect to their earlier misconduct. This Court's case law demonstrates far more subtlety in the application of §327.

⁵The Court may also take judicial notice of Maxim's SEC filings representing that option grants are pursuant to the stock option plan. *Vanderbilt Income v. Arvida/JMB Managers*, 691 A.2d at 612-613; D.R.E. 201. *See, e.g.*, Proxy Statement filed October 21, 2001, p. 6 ("The Compensation Committee . . . awards stock options . . . under the Company's stock option plans . . .")(excerpt attached as Exhibit D); Proxy Statement filed October 6, 2000, pp. 4-5 (same)(excerpt attached as Exhibit E).

Almost 60 years ago, in *Rosenthal v. Burry Biscuit Corporation*, 60 A.2d 106, 111 (Del. Ch. 1948) Chancellor Seitz wrote that the purpose of §327 was “to prevent what has been considered an evil, namely, the purchasing of shares in order to maintain a derivative action designed to attacked a transaction which occurred prior to the purchase of the stock.” Chancellor Seitz also held that “rigidity is not needed when the equitable owner of stock is seeking to protect the corporate interests.” *Id.*, A.2d at 112. More recently, then Vice Chancellor Hartnett wrote, “It is clear that the provisions of 8 Del. C. §327 are not inflexible standards and this Court, as a Court of Equity, must carefully examine the particular circumstances of each case.” *Shreiber v. Carney*, 447 A.2d 17, 22 (Del. Ch. 1982). *See also*, *Jones v. Taylor*, 348 A.2d 188, 191 (Del. Ch. 1975) (“§327 should be liberally construed in situations where its primary purpose will not be frustrated thereby.”)

Respecting plaintiff Ryan’s standing will in no way frustrate the purpose of §327. Mr. Ryan did not purchase Maxim stock – he obtained it in an exchange brought about by a merger. Moreover, as set forth above, he had no reason to know of the extensive and ongoing options backdating practice. As Chancellor Seitz wrote in *MacLary v. Pleasant Hills, Inc.*, 109 A.2d 830, 833 (Del. Ch. 1954), while §327 “should be construed so as to reasonably effectuate its primary purpose – to discourage a type of strike suit – it should not be construed as to unduly encourage the camouflaging of transactions and thus prevent reasonable opportunities to rectify corporate aberrations.” Here, defendants camouflaged options backdating until the Merrill Lynch report revealed it. There is no reason to believe

that any person who acquired Maxim stock in 2001 did so to bring a derivative suit years later. Given the expected turnover in Maxim's stockholder base, a plainly aberrant corporate practice would likely go unchallenged if §327 is applied rigidly.

In their well regarded treatise, *Corporate and Commercial Practice in the Delaware Court of Chancery*, Messrs. Wolfe and Pittinger elaborate on the flexibility of this Court's application of §327. *Id.* §9-2(b). They observe that the statutory exception to the contemporaneous ownership requirement – “that shares not owned by the derivative plaintiff at the time of the wrong devolve upon him thereafter by operation of law – has not yet been satisfactorily defined by the Delaware case law. The mere statement of the exception itself would seem to bespeak an intention to include situations in which the ownership interest is acquired by some mechanical or automatic legal process that is not dependent upon (at least not importantly so) the volitional act of the new owner.” *Id.* at p. 9-32. While an obvious example is hereditary succession, the exception is not limited to that as defendants contend. To the contrary, this Court has applied this exception in the context of a corporate reorganization. *See Helfand v. Gambee*, 136 A.2d 558 (Del. Ch. 1957); *Shaev v. Wyly*, 1988 WL 13858 (Del. Ch.), *aff'd*, 719 A.2d 490 (Del. 1998). Here, as in *Helfand*, the plaintiff “was not a direct party to a transaction” which made him a stockholder. *Id.*, 136 A.2d at 562. Here, plaintiff acquired his Maxim shares as a result of a merger over which he had no direct

control,⁶ there is no abuse of the type the statute seeks to prevent, and permitting the action to proceed is not contrary to the underlying purpose of §327.⁷ See *Wolfe and Pittinger* §9-2[b] at p. 9-35.

The second exception to a rigid application of §327 is where “the asserted harm to the corporation cannot be consigned to a single and specific date” – the so called continuing wrong exception. *Id.* Unlike *Elster v. American Airlines Inc.*, 100 A.2d 219 (Del. Ch. 1953), where the plaintiff challenged the adoption of a stock option plan and two discrete grants of options pursuant to that plan, all of which occurred before he became a shareholder, plaintiff Ryan here is challenging a deliberate practice of violating a shareholder approved stock option plan repeatedly implemented over a five year period, at least two instances of which occurred after he became a shareholder through a merger and without any knowledge of the underlying wrongdoing.

Here, a combination of factors supports the conclusion that plaintiff has standing to challenge all the illicit option grants:

⁶In *Helfand*, the Court deemed the plaintiff’s vote for the reorganization as immaterial to the standing issue, 136 A.2d 558.

⁷But see, *Saito v. McCall*, 2004 WL 3029876 (Del. Ch.). The plaintiffs there were pre-merger shareholders of a company acquired in a merger who charged pre-merger officers and directors of the acquiror with having failed to act on knowledge of pre-merger accounting improprieties at the target. The target and the plaintiff shareholders, however, were already injured in any event by the pre-merger conduct of the target’s fiduciaries. Moreover, pre-merger shareholders of the acquiror would have standing to claim that their fiduciaries had overpaid for the target, so the asserted wrong would not necessarily go unchallenged.

- the purpose of §327 would be served because plaintiff could have no knowledge of options backdating when he became a Maxim shareholder;
- Ryan acquired Maxim stock in a share exchange merger in which he was only an incidental participant;
- options backdating was a continuing wrong over a four year period during which Ryan became a Maxim shareholder;
- unless a shareholder like Ryan has standing, deliberate disregard of Maxim’s stock option plans will likely go unchallenged.

This Court has held that Section 327 was not enacted “to prevent the correction of corporate wrongdoing.” *MacLary v. Pleasant Hills, Inc.*, 109 A.2d at 833; *Helfand v. Gambee*, 136 A.2d at 561; *Shaev v. Wyly*, 1998 WL 13858 at *4. The Court should find that Ryan has standing to maintain this action fully.

IV. FORUM NON CONVENIENS IS THE PROPER ANALYSIS FOR DEFENDANTS’ STAY APPLICATION AND REQUIRES ITS DENIAL

A. McWane Is The Wrong Analytical Approach

Defendants premise their stay motion principally on the doctrine of comity afforded to the first filed actions principally articulated in *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng’g Co.*, 263 A.2d 281 (Del. 1970). This Court, however, has not regarded *McWane* as controlling the forum decision in representative litigation. “Where one person seeking to act in a representative capacity chooses to litigate in Delaware and another

in a different forum, there is little reason to accord decisive weight to the priority of filing, at least where no prejudicial delay has occurred. Other factors bearing on the convenience of the parties and the interests of Delaware in resolving the dispute will be more important.” *Biondi v. Scrushy*, 820 A.2d 1148, 1159 n.22 (Del. Ch. 2003). See also *Dura Pharmaceuticals Inc. v. Scandipharm, Inc.*, 713 A.2d 925, 929 (Del. Ch. 1998); *Silverstein v. Warner Communications Inc.*, 1991 WL 12835 (Del. Ch.) at *3; *Jim Walter Corp. v. Allen*, 1990 WL 3899 (Del. Ch.) at *4; *Sanders v. Wang*, 1998 WL 842281 (Del. Ch.) at *3.

There is a second and independent reason *McWane* is not applicable; the California actions do not deserve first filed status. Only two of the complaints filed in California chronologically preceded the filing of plaintiff’s complaint in Delaware. The first of those was filed the day the Merrill Lynch report was issued. The second, filed two days later by the same California counsel, was virtually identical to the first, and the two were quickly consolidated (although after Ryan’s complaint was filed) with the consent of defendants. These facts demonstrate that these complaints were hasty, coordinated filings designed to create an argument of temporal primacy.

This Court, however, properly awards no prize to the winner of the race to the courthouse except, of course, where the circumstances require immediate action to protect client interests. See *Rapoport v. The Litigation Trust of MDIP Inc.*, 2005 WL 3277911 (Del. Ch.) at *2; *Azurix Corp. v. Synagro Tech. Inc.*, 2000 WL 193117 (Del. Ch.) at *3. Thus here, where the first California action was filed less than three weeks before Ryan’s complaint,

other California actions were filed after Ryan’s complaint, and there was no exigency mandating prompt action to protect shareholder interests, all these actions should be regarded as contemporaneously filed. See *In re Chambers Development Co. Inc. Shareholders Litig.*, 1993 WL 179335 (Del. Ch.) at *7 (holding that a complaint filed two weeks after a first complaint would be considered contemporaneously filed) and *Rapoport* , *supra* (treating a case filed two weeks later as contemporaneous).⁸

For both reasons, *McWane* does not apply and forum non conveniens doctrine provides the appropriate analysis.

B. Defendants Have Not Shown An Overwhelming Hardship In Litigating In Delaware

Defendants cannot satisfy the high burden that a forum non conveniens stay demands. “[A]pplications to stay derivative actions are not favorably received on the ground of forum non conveniens....” *Weisberg v. Hensley*, 278 A.2d 334, 338 (Del. Ch. 1971)(refusing to stay derivative action).

It is defendants’ burden to show “with particularity” that one or more of the so-called *Cryo-Maid* factors, *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964)(articulating factors), individually or together, impose an “overwhelming hardship” on the defendant. *Mar-Land Indus.Contractors v. Caribbean Petro. Refining*, 777 A.2d 774,

⁸*In re Westell Techs., Inc.*, 2001 WL 755134 (Del. Ch.), on which defendants rely, is not the contrary. The earliest filed federal action was set to begin trial three months after the decision to stay and was sufficiently advanced that the Delaware litigation would have been rendered moot in any event.

777-778 (Del. 2001). *See also, Ison v. E.I. du Pont de Nemours & Co.*, 729 A.2d 832, 837 (Del.1999) (stating that analysis of a motion to dismiss for forum non conveniens “has been guided since at least 1964 by what has come to be known as the ‘*Cryo-Maid*’ factors[.]”) The *Cryo-Maid* factors are:

- (1) the relative ease of access to proof;
- (2) the availability of compulsory process for witnesses;
- (3) the possibility of the view of the premises;
- (4) whether the controversy is dependent upon the application of Delaware law which the courts of this State more properly should decide than those of another jurisdiction;
- (5) the pendency or nonpendency of a similar action or actions in another jurisdiction; and
- (6) all other practical problems that would make the trial of the case easy, expeditious and inexpensive.

Litigating in Delaware would not constitute any, let alone an “overwhelming hardship.” Defendants do not even argue that position. Rather, they argue that it would simply be more convenient for them to litigate in California. This alone, however, is not enough to defeat the plaintiffs choice of forum. *Grenko v. Wussler*, 2004 WL 3048776 (Del. Ch.) at *2 (noting that “more appropriate forum” is not the “appropriate inquiry.”)

Defendants similarly have not shown that California is a more appropriate forum, but rather make the usual, cursory assertions, that do not “tip the balance” in favor of the Defendants. D. Br. at 21. The six *Cryo-Maid* factors clearly favor litigating in Delaware.

1. Relative Ease To The Access Of Proof

The Supreme Court of Delaware recently set a high standard as to this factor. In *Berger v. Intelident Solutions, Inc.*, 2006 WL 1132079 (Del. Ch.) at *2 (refusing to dismiss a complaint on the grounds of forum non conveniens) the Court specifically addressed this factor in a similar situation:

“As often happens in corporate litigation, all of the documents and all of the likely witnesses in this dispute are located outside of Delaware....but [Defendants] have not identified any specific pieces of evidence necessary to their defense that they will not be able to produce in Delaware...or established that requiring them to move forward in Delaware would impede access to the testimony of witnesses.”

Id.

Just as in *Berger*, the documents and witnesses are outside of Delaware. This Court should follow the analysis in *Berger* because the reality of corporate law today that not all of the documents or witnesses will be present in the plaintiff’s forum should not prevent this Court from exercising jurisdiction. This factor does not militate in support of a stay.

Defendants’ argue that Plaintiff cannot offer a reason why Delaware would afford greater access to proof. D. Br. at 19. This is not the correct inquiry. Rather, the *Berger* court specifically addressed Defendants’ argument: “[w]hile they may find Delaware

inconvenient [Defendants] will not be subjected to overwhelming hardship based on the location of documents and witnesses.” *Id.*

Defendants’ argument that Maxim’s chosen Delaware place of incorporation should be ignored or denied as a convenient forum, D. Br. at 19, is quite startling. Defendants’ citation for this, *Boston VLCC Tankers v. Bethlehem Steel Corp.*, 415 A.2d 492, 496 (Del. Super. 1980) was a tort action arising from a series of events in Rhode Island, and not a representative action based on Delaware fiduciary law. This assertion is nothing more than a veiled personal jurisdiction argument, in an attempt to cloud the forum non conveniens issue.

Indeed, Delaware’s personal jurisdiction jurisprudence specifically contradicts defendants’ argument. The Delaware Supreme Court has held that defendants accepted their power to act in their directorial capacity exclusively under the Delaware corporation statutes, and defendants knew they could be haled into a Delaware court based on alleged breaches of the duties imposed on them by the very laws which empowered them to act in their corporate capacities. *Armstrong v. Pomerance*, 423 A.2d 174, 176 (Del. 1980)(holding that non-resident directors were subject to Delaware personal jurisdiction.) Thus, by accepting Maxim directorships, the defendants knew that they would be subject to litigation in Delaware. Moreover, their argument would lead to an absurd result. Under their rationale, fiduciary duty litigations based on Delaware law would not be properly venued in Delaware courts unless the conduct involved occurred in Delaware. Clearly the access to proof in

Delaware would not be an overwhelming hardship on defendants.

2. Availability Of Compulsory Process For Witnesses

In order to prevail on a forum non conveniens motion to dismiss, defendants must identify the inconvenienced witnesses and the specific substance of their testimony. *Monsanto Co. v. Aetna*, 559 A.2d 1301, 1308 (Del. Super. 1988)(denying motions to stay or dismiss). Defendants did not name the witnesses they deemed necessary to call; or demonstrate their number; or show their relationship to the case; or explain why their testimony could not be presented in Delaware by deposition. Defendants simply failed to sustain their burden of proof in this regard. *See States Marine Lines v. Domingo*, 269 A.2d 223, 225-226 (Del. 1970); *See also, Berger*, 2006 WL 1132079 at *2 (stating that “[a]lthough it would be more convenient for Florida witnesses to give testimony in Florida, they could testify in Delaware by deposition or appear here voluntarily.”)

Defendants’ only argument is that a federal court has the right to nationwide service of process to compel production of documents and attendance at depositions. Though the commission process, Delaware courts routinely obtain documents and testimony from out-of-state sources. This factor weighs in favor of litigating in Delaware.

3. Possibility Of View Of The Premises

There is no need for a view of the premises. Even if there were, photographs or other audio-visual aids could be used, “without any undue inconvenience.” *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 577 A.2d 305, 309 (Del. Super. 1989)(holding that dismissal on grounds of forum non conveniens was not warranted). Defendants do not raise

this inquiry, and it weighs in favor of the plaintiffs.

4. Applicability Of Delaware Law

Defendants do not dispute that Delaware law controls this dispute. To say that California courts are capable of applying Delaware law is insufficient, however. As former Chancellor Allen wrote, on questions of Delaware corporation law, this Court :

“by reason of its constant exposure, has developed a ‘feel’ that might not be duplicated elsewhere. While I do not regard the law to be applied as the most significant of the factors that are evaluated on a forum non conveniens motion, I do think the application of Delaware law does explain plaintiff’s choice of foun and is entitled to some weight.”

Jim Walter Corporation v. Allen, 1990 WL 3899 at *5.

Moreover, the options backdating scandal has only recently surfaced, and Delaware courts have not yet had occasion to address it. The initial application of Delaware statutory requirements⁹ and fiduciary duty principles to newly uncovered practices should occur in this Court, not in courts more focused on resolving the dispute before them, rather than on developing a coherent and consistent exposition and application of corporate doctrine. *See MacAndrews & Forbes Holdings v. Revlon*, 1985 WL 21129 (Del. Ch.) at *2 (denying a motion to stay and stating “[t]here can be no question but that MacAndrews’ claims involve novel and substantial issues of Delaware corporate law and that **these issues are best resolved in a Delaware court.**”)(emphasis added); *Johnston v. Caremark Rx Inc.*,

⁹The Section 327 issue, addressed above, deserves exposition in this Court, because it is novel and the facts underlying the issue in California are opaque given the California plaintiffs’ boilerplate pleading of Maxim stockholdings “at all relevant times.” Dudderar Aff., Ex. A ¶6; Ex. B ¶6; Ex. D ¶12; Ex. E ¶12.

2000 WL 354381 (Del. Ch.)(granting stay to non-novel issue of corporate law, but noting that there is a compelling interest for Delaware to litigate claims that involve novel and substantial issues of corporate law.)

In a related context, Delaware’s interest in subjecting directors of domestic corporations to Delaware law, the Delaware Supreme Court commented that:

“If it be conceded, as surely it must, that Delaware has the power to establish the rights and responsibilities of those who manage its domestic corporations, it seems inconceivable that the Delaware Courts cannot seek to enforce these obligations but must, rather, leave the lion’s share of the enforcement task to a host of other jurisdictions with little familiarity or experience with our law, jurisdictions which may or may not even choose to apply Delaware law depending on the vagaries of each jurisdiction’s choice of law rules. We find nothing in ‘traditional notions of fair play and substantial justice’ which compels such anomalous results.”

Armstrong v. Pomerance, 423 A.2d at 177.

There is no doubt that Delaware has a compelling interest in applying its own domestic law to its own domestic corporations. This factor strongly favors litigating in Delaware.

5. Pendency Of Similar Action

While a similar action certainly exists, the defendants rely on *Friedman v. Alcatel*, 752 A.2d 544, 555 n.46 (Del. Ch. 1999), for the proposition that courts will routinely stay state court decisions in favor of federal jurisdiction. In *Friedman*, the simple existence of a federal action was not dispositive; rather, the federal action was more procedurally

advanced. *Id.* That is not the case here.¹⁰

6. Delaware Is The Appropriate Forum For This Litigation

Here, lawyers geographically proximate to Delaware and who are accustomed to litigating in this Court made a tactical decision to bring a Delaware law based derivative action in California, in service of their own agendas. Defendants, who would certainly have a soundly based motion to stay the California action, instead are seeking to avoid litigating in the state of Maxim's legal residence. The choice for this Court then is whether it is prepared to cede the development of Delaware corporate jurisprudence to federal and other states' courts at the behest of defendants who accepted their corporate positions knowing full well that Delaware law would govern their conduct and that Delaware courts have historically provided an efficient and effective forum for the resolution of claims of shortcomings in the exercise of fiduciary responsibilities. Plaintiff Ryan respectfully submits that there is no compelling argument for this case to be in California and the Court should deny defendants' stay application.

¹⁰Defendants' argument that the result in California may render this action moot, D. Br. at 21, presumes that the California case will be decided first. The record offers no reason for such an assumption. Presumably defendants will move to dismiss the consolidated amended complaint in California if and when it is filed. *See Dudderar Aff., Ex. G.* Thus, if this Court denies defendants' motion, this action will be into discovery well ahead of California. Moreover, the California actions contain federal securities claims which will broaden the scope of discovery and require more time to develop.

CONCLUSION

Plaintiff respectfully submits that for the reasons set forth above the Court should deny defendants' motion to dismiss or stay in its entirety.

ROSENTHAL MONHAIT & GODDESS, P.A.

By: 

Norman M. Monhait (#1040)
919 Market Street, Suite 1401
Citizens Bank Center
P.O. Box 1070
Wilmington, Delaware 19899-1070
(302) 656-4433
Attorneys for Plaintiff

OF COUNSEL:

KRISLOV & ASSOCIATES, LTD.
Civic Opera Building, Suite 1350
20 North Wacker Drive
Chicago, IL 60606-2902
(312) 606-0500

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