IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOHN S. DESIMONE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
TIMOTHY A. BARROWS, et al.,	)	
	)	
Defendants,	)	Civil Action No. 2210-N
	)	
And	)	
	)	
SYCAMORE NETWORKS, INC.,	)	
	)	
Nominal Defendant.	)	
	)	

DEFENDANT FRANCES M. JEWELS' OPENING BRIEF
IN SUPPORT OF HER MOTION TO DISMISS THE AMENDED COMPLAINT

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
William O. LaMotte, III (#460)
1201 N. Market Street
P. O. Box 1347
Wilmington, Delaware 19899
(302) 658-9200
Attorneys for Defendant Frances M. Jewels

OF COUNSEL:

Michael S. Gardener
Michael F. Connolly
MINTZ, LEVIN, COHN, FERRIS
GLOVSKY and POPEO P.C.
One Financial Center
Boston, Massachusetts 02111
(617) 542-6000

Dated: December 4, 2006

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

PAGE

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

UNITED STATES CONSTITUTION

STATE STATUTES AND RULES

NATURE AND STAGE OF THE PROCEEDINGS

On June 9, 2006, plaintiff John S. DeSimone ("Plaintiff") filed this derivative action against nominal defendant Sycamore Networks, Inc. ("Sycamore"), all six members of Sycamore's board of directors, one of Sycamore's current officers, and four of Sycamore's former officers. There are currently five other derivative suits -- based on the same types of allegations made in this action -- pending against several of these same defendants, including Frances M. Jewels, a former officer of Sycamore. Three of these cases are currently pending in the United States District Court for the District of Massachusetts.[1/] One case is currently pending in Massachusetts Superior Court. And the final derivative action is in the process of being transferred from the United Stats District Court for the Eastern District of New York, to the United States District Court for the District of Massachusetts.

In the current matter, on July 12, 2006, Sycamore moved for judgment on the pleadings and each of the other defendants moved to dismiss the Complaint. On August 16, 2006, Plaintiff filed a motion for leave to amend his Complaint. That motion was granted on August 21, 2006.

On September 5, 2006, all of the defendants, including Ms. Jewels filed a motion to dismiss the Amended Complaint. This is Ms. Jewels' opening brief in support of that motion.

1/ One of these cases was recently transferred to the District of Massachusetts from the United States District Court for the District of Delaware. Prior to the transfer, Ms. Jewels filed a memorandum in support of her motion to dismiss that raised the same personal jurisdiction arguments addressed herein.

SUMMARY OF THE ARGUMENT

1. The Amended Complaint against Ms. Jewels should be dismissed with prejudice because Ms. Jewels is not subject to the personal jurisdiction of the Court. Ms. Jewels was not served with process in Delaware, nor are there the requisite contacts with Delaware to exercise jurisdiction over her. In addition, Ms. Jewels' status as a former officer cannot be the basis for personal jurisdiction because Plaintiff cannot establish jurisdiction over Ms. Jewels through 10 Del. C. § 3114, as amended, ("Section 3114"), and any retrospective application of Section 3114 would violate the due process clause of the United States Constitution.

2. Plaintiff was not a Sycamore shareholder until February 4, 2002, and therefore lacks standing to pursue litigation on behalf of Sycamore challenging any alleged misconduct by Ms. Jewels that occurred prior to that date.

3. The Amended Complaint should be dismissed with prejudice because Plaintiff did not make pre-suit demand, and the Amended Complaint fails to allege with the requisite particularity facts demonstrating that demand would be futile.

4. The Amended Complaint should be dismissed because it fails to state any claim against Ms. Jewels for which relief may be granted.

   a. Plaintiff's fiduciary duty claims (Counts I & II) fail because they are wholly conclusory, and do not allege facts that entitle Plaintiff to relief.

   b. Plaintiff's unjust enrichment claim (Count III) fails because Plaintiff has not alleged facts establishing the necessary elements to state a claim for unjust enrichment.

c. Plaintiff's gross mismanagement and corporate waste claims (Counts IV & V) fail because they are wholly conclusory, and do not allege facts that entitle Plaintiff to assert these claims.

d. Plaintiff's breach of contract claim (Count VI) fails because the Amended Complaint fails to identify any contract to which Ms. Jewels was allegedly a party, and which she allegedly breached.

STATEMENT OF ALLEGED FACTS

Plaintiff alleges that he became a stockholder of Sycamore on February 4, 2002. Am. Compl., ¶ 13. The sole basis for Plaintiff's claims is that the defendants allegedly engaged in the "[m]odification of the stock option grant dates, including the practice of back-dating...." Am. Compl., ¶ 11. The latest alleged example of modifying or back-dating occurred on November 11, 2003, which is when Sycamore's Directors allegedly received options. Am. Compl., ¶ 48.

Plaintiff acknowledges that Ms. Jewels resigned from her position as an officer of Sycamore in 2004. Am. Compl., ¶ 24. Plaintiff admits in his Amended Complaint that he did not make pre-suit demand on Sycamore's Board of Directors prior to initiating this suit. Am. Compl., ¶ 68.

ARGUMENT

I. THE AMENDED COMPLAINT AGAINST MS. JEWELS SHOULD BE DISMISSED IN ITS ENTIRETY BECAUSE MS. JEWELS IS NOT SUBJECT TO THE PERSONAL JURISDICTION OF THIS COURT.

It is well-established that the Plaintiff bears the burden of proof to establish the existence of personal jurisdiction. *E.g.*, *Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d

318, 326 (Del. Ch. 2003). Plaintiff must first demonstrate that there is a statutory basis for the assertion of jurisdiction. *Id.* Plaintiff cannot make such a showing with respect to Ms. Jewels. Plaintiff has not, and cannot, allege that Ms. Jewels resides or has a usual place of business in Delaware, nor that Ms. Jewels has been personally served with service of process in Delaware. Because Plaintiff has not, and cannot, allege that Ms. Jewels has had any contacts with Delaware, beyond formerly serving as an officer of an entity incorporated in Delaware, but located elsewhere, "[j]urisdiction in this case must exist, if at all, through ... [10 Del. C.] § 3114." *E.M. Armstrong v. Pomerance*, 423 A.2d 174, 175 (Del. 1980).

As set forth more fully below, Plaintiff cannot establish jurisdiction over Ms. Jewels through Section 3114. Plaintiff cannot rely on Ms. Jewels' status as a former officer of Sycamore, since the alleged claims against Ms. Jewels are all based on conduct that allegedly occurred before the time when Section 3114 first allowed for personal jurisdiction -- based on implied consent -- over officers of Delaware corporations.[2/]

[2/] 10 Del. C. § 3114 provides, in pertinent part: "Every nonresident of this State who after January 1, 2004, accepts election or appointment as an officer of a corporation organized under the laws of this State, or who after such date serves in such capacity, and every resident of this State who so accepts election or appointment or serves in such capacity and thereafter removes residence from this State shall, by such acceptance or by such service, be deemed thereby to have consented to the appointment of the registered agent of such corporation (or, if there is none, the Secretary of State) as an agent upon whom service of process may be made in all civil actions or proceedings brought in this State, by or on behalf of, or against such corporation, in which such officer is a necessary or proper party, or in any action or proceeding against such officer for violation of a duty in such capacity, whether or not the person continues to serve as such officer at the time suit is commenced. Such acceptance or service as such officer shall be a signification of the consent of such officer that any process when so served shall be of the same legal force and validity as if served upon such officer within this (continued . . .)

Further, even if Plaintiff could bring Ms. Jewels within the statute, which he cannot, jurisdiction would still not lie because Plaintiff has not, and cannot, carry his burden of establishing that the exercise of personal jurisdiction would comport with the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *E.g.*, *Werner*, 831 A.2d at 326.

A. Ms. Jewels' Status as a Former Officer of Sycamore Cannot Be The Basis for Personal Jurisdiction.

Plaintiff cannot base any arguments for personal jurisdiction over Ms. Jewels on her status as a former corporate officer of Sycamore. Plaintiff has failed to allege any claims against Ms. Jewels based on alleged conduct that occurred after January 1, 2004, which is when Section 3114 first allowed for personal jurisdiction over officers of Delaware corporations based on their implied consent.

Section 3114, as amended, does not and cannot provide for personal jurisdiction of Ms. Jewels based on purported conduct that is alleged to have occurred prior to its effective date of January 1, 2004. It is well-established that implied consent statutes such as Section 3114 cannot be applied retrospectively to confer jurisdiction for claims based on conduct that allegedly occurred prior to the statute's effective date. *E.g.*, *CRI Liquidating REIT, Inc. v. A.F. Evans Co., Inc.*, 730 A.2d 1244, 1246 (Del. Ch. 1997); *Genaw v. Volkswagenwerk, A.G.*, 536 F.2d 1039, 1041-42 (5th Cir. 1976); *Bishop v. Emerson Elec. Co.*, 284 F. Supp. 760, 762 (S.D. Iowa 1968); *Mladinich v. Kohn*, 186 So.2d 481, 482-83 (Miss. 1966); *State ex rel. Clay Equip. Corp. v. Jensen*, 363 S.W.2d

---

(. . . continued)

State and such appointment of the registered agent (or, if there is none, the Secretary of State) shall be irrevocable ...."

666, 670 (Mo. 1963); *Nevins v. Revlon, Inc.*, 182 A.2d 634, 636 (Conn. Super. 1962); *Ravner v. Blank*, 189 F. Supp. 471, 472 (E.D. Pa. 1960); *Piscina v. City of New York*, 98 N.Y.S.2d 399, 401 (N.Y. Sup. 1950).

In rejecting the retrospective application of implied consent statutes such as Section 3114, courts have relied on two independent and equally dispositive grounds -- both of which are applicable here.

First, courts have determined that because implied consent statutes affect substantive rights, those statutes fall within the general prohibition against applying such laws retrospectively. *CRI*, 730 A.2d at 1247 (refusing to give retrospective effect to an implied consent statute, and citing to *Monacelli v. Grimes*, 99 A.2d 255 (Del. 1953) to hold that "'[i]mplied consent' statutes have been deemed to be 'substantive' in Delaware and elsewhere."); *State ex rel. Clay Equip Corp.*, 363 S.W.2d at 670; *Nevins*, 182 A.2d at 635. The court in *State ex rel. Clay Equip. Corp.* explained that "[t]o apply the statute retroactively would be to change the legal effect of past transactions." 363 S.W.2d at 670 (emphasis in original). This is because a defendant alleged to have committed a tort has no duty at that point in time to submit to personal jurisdiction if the implied consent statute has not yet been enacted. Similarly, the court in *Nevins* concluded that the implied consent statute "opened the door to a remedy of suit in [the forum state] against certain foreign corporations where, under prior law and under these circumstances, none existed." 182 A.2d at 635. Based on this reasoning, the court concluded that "[t]he right given under the statute is a fundamental one. It is a substantive right." *Id.* at 636.

This sound reasoning applies with equal force to Ms. Jewels, given the facts as alleged by the Plaintiff. It cannot be disputed that to apply Section 3114 retrospectively

would impermissibly change the legal effect of alleged past actions by making them subject to jurisdiction under a theory of implied consent. Moreover, application of Section 3114 to the current matter would "open the door," according to the reasoning in *Nevins*, for Plaintiff's suit against Ms. Jewels, where, before the amendment to the statute, no such door was open. Given that application of Section 3114 therefore clearly affects the substantive rights of Ms. Jewels, it cannot be applied retrospectively under settled Delaware law. *See CRI*, 730 A.2d at 1247 (citing *Monacelli v. Grimes*, 99 A.2d 255 (Del. 1953)).

The second and independent basis for refusing to give retrospective effect to implied consent statutes is that "[c]onduct by an out-of-state resident that preceded the enactment of a service of process statute based on implied consent, cannot fairly be deemed as even constructive consent." *CRI*, 730 A.2d at 1248. The court in *Piscina* observed that a "[l]ogical contention cannot be made that [an individual], by doing the acts specified, is to be considered as having indicated an agreement in advance to accept something of which it could not at the time have been apprised, of which it had no knowledge, and which was not even in existence." 98 N.Y.S.2d at 401. In other words, the legal fiction of constructive or implied consent cannot logically be manipulated in such a manner so as to apply to conduct that has already occurred, and for which no contemporaneous implied consent had been given. This principle squarely applies to the facts alleged in the Plaintiff's Amended Complaint. Prior to January 1, 2004, which is when all of the alleged conduct giving rise to Plaintiff's claims occurred, Ms. Jewels indisputably did not provide any implied consent to be sued in Delaware for claims based

on that alleged conduct because she was not apprised at that time that the imposition of jurisdiction could result from doing so.

This Court has been the only Delaware court to examine whether Section 3114 applies to conduct of officers that occurred prior to its amendment. *Teacher's Retirement Sys. of La. v. Scrushy*, 2004 WL 423122 (Del. Ch. March 2, 2004) (attached hereto as Ex. A). In *Scrushy*, this Court's rationale fully accords with the conclusion that the Delaware implied consent statute cannot operate retrospectively. In that case, this Court considered a motion to stay filed by several defendant directors and officers in a derivative suit. *Id.* at *1. In granting the motion to stay, this Court noted that the derivative complaint "alleges no acts that these former officers undertook in Delaware and they are sued for conduct that pre-dates our state's new service of process statute addressing corporate officers. It is probable, therefore, that this court cannot exercise personal jurisdiction over these defendants." *Id.* at *10. This Court's reasoning in *Scrushy* reflects the well-established law in Delaware (and elsewhere) discussed above, that implied consent statutes cannot reach conduct that occurred prior to their effective date. Accordingly, there is no reason for this Court to depart from its previous reasoning, and it should refrain from exercising personal jurisdiction over Ms. Jewels under Section 3114.

B. A Retrospective Application of 10 Del. C. § 3114 in This Case Would Violate the Due Process Clause of the United States Constitution.

An attempt to exercise personal jurisdiction over Ms. Jewels in Delaware under Section 3114 would also violate the Due Process Clause of the United States Constitution. U.S. CONST. Amend XIV. In order for Plaintiff to carry his burden of demonstrating that the exercise of personal jurisdiction over Ms. Jewels does not violate

the Due Process Clause, he must establish "minimum contacts" between Ms. Jewels and the forum state, "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The keystone of this analysis is a determination of whether a defendant's contacts with the forum state were sufficient so that the defendant "should reasonably anticipate being haled into court." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

On facts almost identical to the current case, the United States Supreme Court has held that in the absence of, *inter alia*, an implied consent statute that provides this critical notice to potential defendants, Delaware's assertion of personal jurisdiction over a director of a Delaware corporation violated the Due Process Clause. *R.F. Shaffer v. Heitner*, 433 U.S. 186, 216-17 (1977); *see also E.M. Armstrong*, 423 A.2d at 179-80 (holding that Section 3114, enacted after *R.F. Shaffer*, was constitutional because, in part, it provided notice to Delaware directors that they could be haled into a Delaware court based on their status as directors). The court in *CRI* also observed that retrospective application of an implied consent statute would pose due process concerns because the defendants were not on notice -- at the time they acted -- that they could be haled into court for such actions. 730 A.2d at 1246.

It cannot be disputed that at the time Ms. Jewels allegedly committed the acts attributed to her and the other defendants in the Amended Complaint, she had no notice that she could be haled into a Delaware court for any such alleged conduct.[3/] This is

---

3/ Whether or not a defendant had sufficient notice to satisfy due process is determined by examining whether she had notice at the time the alleged conduct (continued . . .)

because at the time she allegedly acted, there was no statute in place providing her with notice that she could be sued in Delaware for that alleged conduct, just as there was no statute in place in *R.F. Shaffer* that would have put the defendant directors on notice. To the contrary, the controlling law at that time under *R.F. Shaffer*, Section 3114, and *E.M Armstrong*, was that her status as an officer of a Delaware corporation alone was insufficient to satisfy due process in order to exercise jurisdiction. Accordingly, as articulated in *R.F. Shaffer*, *E.M. Armstrong*, and *CRI*, the exercise of personal jurisdiction over Ms. Jewels in the absence of this critical notice would undoubtedly violate the Due Process Clause.

II. PLAINTIFF DOES NOT HAVE STANDING TO CHALLENGE ALLEGED MISCONDUCT OCCURRING BEFORE HE BECAME A SYCAMORE SHAREHOLDER

Both Delaware Chancery Rule 23.1 and Section 327 of the Delaware General Corporation law require that a derivative plaintiff be a shareholder of the corporation at the time of the transaction or activity of which he complains. Del. Ch. R. 23.1 (requiring that the plaintiff must have been "a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter

---

(. . . continued)

took place. Accordingly, Plaintiff cannot argue that the amendment of Section 3114 somehow provides sufficient notice to Ms. Jewels. Even if the notice analysis could be expanded to a consideration of the amended version of Section 3114, Plaintiff's arguments would still fail because nothing in that amendment provides notice that past acts would now be subject to jurisdiction. First, there is nothing in the express language of Section 3114 that would put officers on notice that they would be subjected to personal jurisdiction for past acts. Second, as discussed above, the well-established law is that such implied consent statutes do not receive retrospective application.

devolved on the plaintiff by operation of law"); 8 Del. C. § 327 ("[i]n any derivative suit instituted by a stockholder of a corporation, it shall be averred in the complaint that the plaintiff was a stockholder of the corporation at the time of the transaction of which such stockholder complains"). Because Plaintiff acknowledges in his Amended Complaint that he has been a holder of Sycamore's common stock since February 4, 2002, he cannot pursue claims based on alleged transactions that occurred from 1999 through 2001. *See* Am. Compl., ¶¶ 11, 36-38, 42, 43, 45, 47.

III. PLAINTIFF DID NOT MAKE PRE-SUIT DEMAND AND DOES NOT ALLEGE WITH PARTICULARITY WHY HIS FAILURE TO MAKE DEMAND IS EXCUSED.

For the reasons set forth in the opening brief submitted on behalf of Defendants Barrows, Chisholm, Deshpande, Ferri, Gerdelman, Smith, Brearton, Trampedach, Kiel, Oye, and Sycamore (hereinafter, the "Barrows Brief"), demand was required and not excused. Since the arguments and reasoning in that brief apply equally to Ms. Jewels, she respectfully incorporates them by reference into this brief rather than burdening the Court with repetition.

IV. THE AMENDED COMPLAINT ALSO SHOULD BE DISMISSED BECAUSE IT FAILS TO STATE ANY CLAIM AGAINST MS. JEWELS FOR WHICH RELIEF MAY BE GRANTED.

A. Plaintiff's Amended Complaint Against Ms. Jewels Fails To State A Claim For Breach of Fiduciary Duty, or Aiding and Abetting a Breach of Fiduciary Duty (Counts I & II).

Simply put, Plaintiff's conclusory allegations of inappropriate acts are not only insufficient under the applicable pleading standards, but are contrary to existing

authority. It is axiomatic that a complaint should be dismissed where it fails to allege facts that entitle plaintiff to relief. *See, e.g., Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996). Neither inferences nor conclusions of fact unsupported by allegations of specific facts upon which the inferences or conclusions rest are accepted as true. *Id.* (quoting *In re Tri-Star Pictures, Inc., Litig.*, 634 A.2d 319, 326 (Del. 1993)). Therefore, conclusory allegations that "the transaction is 'unfair' or 'coercive' or that disclosure is 'inadequate'" do not satisfy a plaintiff's pleading obligation under Rule 12(b)(6) to state a claim upon which relief may be granted. *Solomon v. Pathe Commc'ns Corp.*, 1995 WL 250374, at *4 (Del. Ch. Apr. 21, 1995), *aff'd*, 672 A.2d 35, 38 (Del. 1996) (attached hereto as Ex. B). Moreover, a court "need not blindly accept as true all allegations, nor must it draw all inferences from them in plaintiff's favor unless they are reasonable inferences." *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999) (internal citations omitted), *aff'd sub nom., Walker v. Lukens, Inc.*, 757 A.2d 1278 (Table) (Del. 2000).

Plaintiff's general conclusions -- not specific to Ms. Jewels at all -- about how Sycamore's "officers" breached their fiduciary duties, or aided and abetted such breaches, are too conclusory and not supported by any other allegations in the Amended Complaint. For example:

- claims that officers "manipulated stock options," Am. Compl., ¶ 11, are not supported by any allegations showing why such alleged activity represented a breach of fiduciary duty; and

- claims that Sycamore's officers "knowingly aided and abetted the breaches of fiduciary duty committed by the Director Defendants," Am. Compl., ¶ 79, are not supported by any allegations showing what the officers were alleged to know, and what steps they allegedly took to provide substantial assistance to the Directors.

These bald and conclusory allegations in the Plaintiff's Amended Complaint simply do not satisfy the pleading requirements for his breach of fiduciary duty claims against Ms. Jewels.

B. Plaintiff's Amended Complaint Fails to State a Claim for Unjust Enrichment Against Ms. Jewels (Count III)

To state a claim for unjust enrichment, a plaintiff must allege (1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and the impoverishment; (4) the absence of justification; and (5) the absence of a remedy provided by law. *E.g., Jackson Nat'l Life Ins. Co. v. Kennedy*, 741 A.2d 377, 393 (Del. Ch. 1999). Plaintiff's Amended Complaint fails to include allegations that satisfy all of these elements. For example, Plaintiff has failed to allege any facts demonstrating why Sycamore's grant of options to Ms. Jewels was somehow "unjust." There are no allegations that the mere granting of options to Ms. Jewels, which was a publicly disclosed fact, *see* Barrows Brief at pp. 33-34, exceeded any reasonable amount of compensation due in consideration for her service as an officer of Sycamore.

C. Plaintiff's Amended Complaint Fails to State Claims Against Ms. Jewels for "Gross Mismanagement" and "Waste of Corporate Assets" (Counts IV and V).

In Counts IV and V of Plaintiff's Amended Complaint, Plaintiff purports to assert claims for gross mismanagement and waste of corporate assets against all defendants. These allegations are entirely unsubstantiated and conclusory and therefore fail as a matter of law. *In re: Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170-71 (Del. 2006) (affirming dismissal of plaintiff's claims for failure to state a claim because the allegations in the complaint did not support the conclusory statements contained therein).

The Amended Complaint contains no allegations that explain or support Plaintiff's conclusory statements that:

- Sycamore's officers "abandoned and abdicated their responsibilities and fiduciary duties with regard to prudently managing the assets and business of the Company," Am. Compl., ¶ 92; and that
- Sycamore's officers "caused the Company to waste valuable corporate assets solely for the financial gain of the Executive Officer Defendants." Am. Compl., ¶ 96.

D. Plaintiff's Amended Complaint Fails to State a Claim Against Ms. Jewels for Breach of Contract (Count VI)

It is well-established that the elements of a breach of contract claim are (1) the existence of a contract, (2) a breach of an obligation imposed by the contract, and (3) damages that result from that breach. *E.g.*, *VLIW, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

Plaintiff's Amended Complaint alleges that the "Executive Officer Defendants" somehow breached their "employment agreements" with Sycamore. Am. Compl., ¶ 99. But Plaintiff never specifically alleges that Ms. Jewels had an "employment agreement" with Sycamore. But even if his allegations could somehow be read in such a manner, it cannot be disputed that the Amended Complaint completely fails to allege or identify any obligation that this "employment agreement" imposed, and fails to describe any breach of any such obligation. Needless to say, given the complete lack of allegations on this count, it is impossible to even discern from the Amended Complaint whether Plaintiff has sufficiently alleged damages that resulted from this unidentified breach of an unidentified obligation imposed by an unidentified contract.

Bald allegations that Ms. Jewels somehow breached Sycamore's "stock option plans," *see* Am. Compl., ¶ 99, are also insufficient to state a breach of contract claim against Ms. Jewels. Indeed, the Amended Complaint in this case does not allege that the "stock option plans" constituted actual contracts, or that Ms. Jewels was a party to any such contract.

V. THE AMENDED COMPLAINT AGAINST MS. JEWELS SHOULD BE DISMISSED BECAUSE ITS CLAIMS ARE TIME BARRED.

For the reasons set forth in the Barrows Brief, nearly all six counts in Plaintiff's Amended Complaint are barred by the applicable statutes of limitation. Since the arguments and reasoning in that brief apply equally to Ms. Jewels, she respectfully incorporates them by reference into this brief rather than burdening the Court with repetition.

CONCLUSION

For all of the foregoing reasons, Ms. Jewels' Motion to Dismiss should be granted, and the Amended Complaint should be dismissed with prejudice in its entirety.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

William O. LaMotte, III (#460)
1201 N. Market Street
P. O. Box 1347
Wilmington, Delaware 19899
(302) 658-9200
Attorneys for Defendant Frances M. Jewels

OF COUNSEL:

Michael S. Gardener
Michael F. Connolly
MINTZ, LEVIN, COHN, FERRIS
GLOVSKY and POPEO P.C.
One Financial Center
Boston, Massachusetts 02111
(617) 542-6000

Dated: December 4, 2006

547979