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

JOHN S. DESIMONE,	:	
Plaintiff,	:	Civil Action No. 2210-N
v.	:	
TIMOTHY A. BARROWS, et al.,	:	
Defendants.	:	

DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION TO DISMISS

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Dated: December 4, 2006

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PRELIMINARY STATEMENT

On June 9, 2006 -- and without first making the requisite pre-suit demand on nominal defendant Sycamore Networks, Inc.'s ("Sycamore Networks" or the "Company") board of directors (the "Board") -- plaintiff John DeSimone ("Plaintiff") filed this shareholder derivative action (as amended on August 16, 2006). The amended complaint ("Amended Complaint" cited as "Am. Compl.") derivatively asserts claims against all six members of the Board, four former officers and one current officer of Sycamore Networks for alleged breaches of fiduciary duties, gross mismanagement and waste of corporate assets, all premised upon conclusory allegations of participation in and/or knowledge of transactions primarily during 1999 to 2001 in which Company granted stock options that were purportedly "modified" or "back-dated."[1]

Where, as here, a derivative plaintiff fails to make pre-suit demand, the complaint must satisfy Chancery Rule 23.1 and allege, with particularity, why pre-suit demand was futile. Rule 23.1 requires plaintiffs seeking to avoid the pre-suit demand requirement to allege particularized facts that create a reasonable doubt that either (i) a majority of the board was disinterested or (ii) a majority of the board does not face a substantial likelihood of personal liability. The Amended Complaint in this case does neither.

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[1] The Amended Complaint describes modification or "back-dating" of stock options as a process whereby Company issued stock options are deliberately dated prior to the date that the stock option was actually granted. (Am. Compl. ¶¶ 5, 11.) The Amended Complaint further alleges that backdating increases the value of the option because the fair market value of Company stock on the earlier date is lower than the fair market value of Company stock on the date the option was granted. (Id.)

Plaintiff's allegations of director interest concern the grant of stock options to the non-management Board members in December 2001 and December 2003 that Plaintiff conclusorily asserts were "backdated." (Am. Compl. ¶¶ 47-48.) Absent from the Amended Complaint, however, are such necessary particulars as what was the Company's practice in granting stock options to outside directors and when were the decisions made to grant those options. Plaintiff's failure is not surprising, Sycamore Networks' public filings (which are expressly referenced and incorporated into the Amended Complaint) make plain that stock option grants to outside directors automatically occur every year on the date of the annual shareholders meeting. Accordingly, as a matter of law, those options cannot be backdated or otherwise modified.

The Amended Complaint's allegations of a substantial likelihood of personal liability also fail to demonstrate that demand was futile. Those allegations are all premised upon the same conclusory contention that the Board approved of or participated in the alleged misconduct, and therefore demand would be futile because, at bottom, the Board would not vote to sue themselves. In the alternative to direct participation, Plaintiff also alleges that the Board breached their fiduciary duties for inadequate supervision, but nowhere supports that contention with particularized facts sufficient to demonstrate a "sustained or systematic failure" to exercise oversight. To the contrary, Plaintiff's allegations demonstrate that as soon as the Board learned of potential accounting irregularities associated with certain stock option grants, it initiated an investigation into those allegations. In short, the Board did (and still is doing) exactly what it was supposed to do and, accordingly, demand is not excused.

Separate and apart from the Amended Complaint's dispositive failure to allege demand futility with particularity, the Amended Complaint should be dismissed for the additional reason that it fails to state a claim. All counts of the Amended Complaint are impermissibly premised upon wholly conclusory allegations of participation in or knowledge of a scheme to modify stock options for personal profit (see, e.g., id. ¶¶ 2, 4, 68), but not a single fact is alleged to support any of those claims against any defendant. Further, Counts I, III, IV and V should be dismissed as to the Board because the exculpatory provision of Sycamore Networks' Certificate Of Incorporation releases its directors from personal liability for the kinds of breaches of fiduciary duty alleged here. The lack of any particularized factual allegations to support a claim of bad faith or a knowing violation renders the exculpatory provision dispositive of those claims as a matter of law.

The Amended Complaint should be dismissed for the further independent reason that almost all claims are barred by the applicable three-year limitations period. Plaintiff's entire case is based upon the allegation that certain of Sycamore Networks' officers and directors must have been granted modified or backdated stock options because those options were granted at exercise prices near the quarterly or monthly low stock price. (See, e.g., id. ¶¶ 42, 43, 49.) But Plaintiff was in possession of that information long ago. Indeed, as a matter of law, Sycamore Networks' public filings put Plaintiff on inquiry notice of his claims not later than 2002 -- four years prior to filing this action.

NATURE AND STAGE OF THE PROCEEDINGS

On June 9, 2006, Plaintiff filed the original shareholder derivative complaint (the "Original Complaint") on behalf of Sycamore Networks against all six members of the Board -- Timothy A. Barrows, Paul W. Chisholm, Gururaj Deshpande, Paul J. Ferri, John W. Gerdelman and Daniel E. Smith (the "Director Defendants") -- one current officer (Kevin J. Oye) and three former officers of Sycamore Networks (Anita Brearton, Kurt Trampedach and Jeffry A. Kiel) (the "Officer Defendants") (collectively with Sycamore Networks and the Director Defendants, "Defendants").[2] The Original Complaint also named as a defendant Sycamore Networks' former Chief Financial Officer Frances M. Jewels. On July 5, 2006, Sycamore Networks filed its Answer and Affirmative Defenses. On July 12, 2006, nominal defendant Sycamore Networks moved for judgment on the pleadings, and all other defendants filed motions to dismiss the Complaint.

On August 16, 2006, Plaintiff filed a motion for leave to amend the Original Complaint, which was granted on August 21, 2006. On September 5, 2006, Defendants filed a motion to dismiss the Amended Complaint. This is their opening brief in support of that motion.

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[2] In addition to this case, there are also five related shareholder derivative actions pending in other jurisdictions -- four in the United States District Court for the District of Massachusetts captioned Vanpraet v. Deshpande, Civ. A. No. 06-11130-RCL; Patel v. Deshpande, Civ. A. No. 06-11207-RCL; Ariel v. Barrows, Civ. A. No. 06-12118-RWZ; Weisler v. Barrows, Civ. A. No. 06-12149-RGS and one case pending in the Massachusetts Superior Court captioned McMahon v. Smith, Civ. A. No. 06-3338.

STATEMENT OF FACTS

Plaintiff alleges that he has been a Sycamore Networks stockholder since February 4, 2002. (Am. Compl. ¶ 13.) Nominal defendant Sycamore Networks, a Delaware corporation headquartered in Massachusetts, is a provider of optical networking products for telecommunications service providers. (Id. ¶ 15.) On June 7, 2005, Sycamore Networks announced that it was conducting an internal investigation (at the direction of the Audit Committee of the Board) into the accounting for certain stock options granted during 1999 to 2001 (the "Investigation") and, accordingly, it would delay the filing of its Form 10-Q for the quarterly period ended on April 30, 2005. (Id. ¶ 30.) On August 26, 2005, Sycamore Networks announced that the Audit Committee had completed the Investigation. (Id. ¶ 31.) The Company further announced that the Investigation identified certain stock options granted during 1999 to 2001 that were incorrectly accounted for and, as a result, the Board recommended that the Company's financial statements be restated for fiscal years 2000 through 2004. (Id.)

On September 12, 2005, Sycamore Networks filed with the Securities and Exchange Commission (the "SEC") an amended annual report on Form 10-K/A for the fiscal year ended July 31, 2004, restating the Company's consolidated financial statements for fiscal years ended July 31, 2000 through July 31, 2004 (the "Restatement"). (Id. ¶¶ 32, 33.) The Restatement publicly announced, among other things, that the Investigation identified certain stock options granted during 1999 to 2001 that were erroneously accounted for under Generally Accepted Accounting Principles ("GAAP"). (Id. ¶ 32.)

Plaintiff alleges that the Board initiated the Investigation in response to allegations by a former Sycamore Networks employee ("Landry") that the Company may have improperly modified six employees' start dates in order to grant those employees stock options with a more favorable exercise price.[3] (Id. ¶ 39.) Further, Plaintiff alleges that a memorandum purportedly drafted by a former Sycamore Networks employee evidences backdating of stock options. (Id. ¶¶ 37-38.) That memorandum -- which was attached to the Landry Complaint -- is attached to the Amended Complaint as Exhibit B (the "Landry Memo").

[3] Landry filed a complaint against Sycamore Networks in Massachusetts Superior Court alleging, among other things, breach of contract, fraud and wrongful termination (the "Landry Complaint"). Plaintiff incorporates Landry's allegations into the Amended Complaint and, indeed, attaches a copy of the Landry Complaint as Exhibit A to the Amended Complaint.

ARGUMENT

I. PLAINTIFF DID NOT MAKE PRE-SUIT DEMAND AND DOES NOT ALLEGE WITH PARTICULARITY FACTS SUFFICIENT TO DEMONSTRATE DEMAND FUTILITY.

A "cardinal precept" of Delaware corporate law is that "directors, rather than stockholders, manage the business and affairs of the corporation." Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984), overruled on other grounds sub nom. Brehm v. Eisner, 746 A.2d 244, 253 (Del. 2000). See also Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 91, 101 (1991) ("[t]he demand requirement implements 'the basic principle of corporate governance that the decisions of a corporation -- including the decision to initiate litigation -- should be made by the board of directors . . . .'") (citation omitted). As a result, a derivative suit to enforce corporate rights may not be brought unless the shareholder-plaintiff demonstrates that (i) the board wrongfully refused to bring suit or (ii) a demand on the board would have been futile and is therefore excused. White v. Panic, 783 A.2d 543, 550 (Del. 2001) (dismissing derivative complaint with prejudice where plaintiff failed to allege with particularity why demand was futile).

Where, as here, the shareholder fails to make demand on the board, he must "allege with particularity . . . the reasons . . . for not making the effort" (i.e., why demand would have been futile). Del. Ch. Ct. R. 23.1 (emphasis added).[4] To establish

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[4] The pleading requirements of Rule 23.1 are "an exception to the general notice pleading standard" and "more onerous than that required to withstand a Rule 12(b)(6) motion to dismiss." Levine v. Smith, 591 A.2d 194, 207, 210 (Del. 1991) (affirming dismissal of derivative action pursuant to Rule 23.1 due to plaintiff's failure to plead demand futility with sufficient particularity), overruled on other grounds sub nom. Brehm, 746 A.2d 244. Indeed, "Rule 23.1 is not satisfied by conclusory statements or mere

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demand futility in a case such as this, where the Amended Complaint challenges a course of conduct rather than a specific decision of the Board, a plaintiff must plead "particularized factual allegations . . . [that] create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand." Rales v. Blasband, 634 A.2d 927, 934 (Del. 1993).[5]

As this Court recently explained in Guttman v. Huang, the demand futility test described in Rales involves a two-prong framework, which requires the Court to analyze whether Plaintiff plead particularized facts sufficient to demonstrate that either (i) the underlying conduct renders any board member "interested" and, if so, whether any of the other board members are unable to act independently of that interested director(s) or (ii) at least half of the board faces a "substantial likelihood of personal liability" as to any of the conduct alleged in the complaint. 823 A.2d 492, 501-03 (Del. Ch. 2003).

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notice pleading . . . . What the pleader must set forth are particularized factual statements that are essential to the claim." Brehm, 746 A.2d at 254. While the Court should draw all reasonable inferences from the well pleaded facts in plaintiff's favor, "[c]onclusory allegations are not considered as expressly pleaded facts or factual inferences." Beam v. Stewart, 845 A.2d 1040, 1048 (Del. 2004) (quotation omitted) (affirming dismissal of derivative action on grounds that plaintiff failed to demonstrate that majority of board was not independent).

[5] Pursuant to Delaware law, "directors are entitled to a presumption that they were faithful to their fiduciary duties." Beam, 845 A.2d at 1048. "In the context of presuit demand, the burden is upon the plaintiff . . . to overcome that presumption." Id. at 1048-49. To overcome this presumption, Plaintiff must plead particularized facts, specific to each director, to demonstrate that at least three of the six-member Board could not have independently responded to a demand, had one been made. Id. at 1049-50.

In this case, in order for demand to be excused, Plaintiff must allege particularized facts demonstrating that at least three of the six Board members (four of whom are outside directors) are either (i) interested (or beholden to an interested director) or (ii) face a *substantial likelihood* of personal liability. The Amended Complaint does not satisfy either prong and, accordingly, should be dismissed.

A. Demand Is Not Excused Because Plaintiff Fails To Allege With Particularity Facts Demonstrating That *Any* Member Of The Board Is "Interested."

To establish "interest," Plaintiff's well-pleaded facts must demonstrate that a Board member was, in essence, involved in a transaction with Sycamore Networks that would render him incapable of considering a demand. Guttman, 823 A.2d at 502. In this case, Plaintiff claims that all four of the non-management Director Defendants -- Messrs. Ferri, Barrows, Chisholm and Gerdelman -- are interested because they purportedly "are recipients of illegal stock option grants."[6] (Am. Compl. ¶ 68(c).) The Amended Complaint, however, does not contain any particularized facts supporting that conclusion and, indeed, Sycamore Networks' public filings conclusorily rebut it. Accordingly, as a matter of law, Plaintiff fails to satisfy the "interest" prong of the Rales framework.

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[6] While Plaintiff also conclusorily alleges that defendants Jewels, Brearton, Trampedach, Kiel and Oye received backdated options (Am. Compl. ¶¶ 43, 49), that "has little bearing on the demand excusal analysis for an obvious reason: they are not on the board." Guttman, 823 A.2d at 503 n.22.

1. Plaintiff's allegation that December 2001 director stock option grants were backdated is conclusory, and also contradicted by the public record.

Plaintiff alleges that Messrs. Gerdelman, Ferri and Barrows each received 30,000 stock options on December 13, 2001, and further contends that those options must have been modified or backdated because those grants "immediately preced[ed] a thirteen percent climb in the Company's stock within twenty days of the grant[s] and located close to the quarterly low." (Am. Compl. ¶ 47.) Conspicuously absent from the Amended Complaint, however, are necessary particulars such as what was Sycamore Networks' practice in granting director stock options and when was the decision made to grant those options. See Guttman, 823 A.2d at 498 (holding that assertions of insider trading are insufficient without particularized allegations of relationship of trades with trading window protocols and actual trading of director defendants).

Pursuant to Sycamore Networks' 1999 Non-Employee Director Stock Option Plan, grants to outside directors are automatic, and granted each year on the date of the annual shareholder meeting.[7] Further, Sycamore Networks' proxy statement dated November 12, 2002 (excerpt attached hereto as Exhibit B),[8] confirms the requirement of

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[7] 1999 Non-Employee Director Stock Option Plan at ¶ 4(b) (providing that stock options to non-management directors "shall be automatically granted on each such annual meeting date") (attached hereto as Exhibit A). That plan is incorporated into the Amended Complaint by reference (Am. Compl. ¶ 56).

[8] The Amended Complaint incorporates by reference "the yearly proxy statements promulgated in connection with the Company's annual meetings." (Am. Compl. ¶ 63.) Moreover, the Court may take judicial notice of SEC filings when considering a motion to dismiss. See Del. Unif. R. Evid. 201(f) ("Judicial Notice may be taken at any stage of the proceeding"); In re Gen. Motors (Hughes) S'holder Litig., 897 A.2d 162, 170 (Del.

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the automatic option grants and, consistent with that requirement, states that the December 2001 grants were granted at that 2001 annual meeting:

> on an annual basis immediately following each annual meeting of stockholders, each non-employee director is granted an option to purchase 30,000 shares of Common Stock which vests in one year. . . . At the annual meeting of stockholders held on December 13, 2001, each of the following non-employee directors received an option to purchase 30,000 shares of Common Stock with an exercise price of $4.60 per share: Messrs. Barrows, Ferri and Gerdelman.

(Exhibit B at 5 (emphasis added).)[9]

2. Plaintiff's allegation that December 2003 director stock option grants were backdated is conclusory, and also contradicted by the public record.

For substantially the same reasons, Plaintiff's conclusory allegation that Messrs. Gerdelman, Ferri, Barrows and Chisholm received backdated options on December 18, 2003 fails as a matter of law to demonstrate director "interest." (Am. Compl. ¶ 48.)

First, just as in all prior and subsequent years, and as required by the 1999 Non-Employee Director Stock Option Plan, those options were granted "[a]t the annual meeting of stockholders held on December 18, 2003." (Exhibit D at 7.)

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2006) ("This Court has recognized that, in acting on a Rule 12(b)(6) motion to dismiss, trial courts may consider hearsay in SEC filings 'to ascertain facts appropriate for judicial notice under [Delaware Rule of Evidence] 201.'") (citing In re Santa Fe Pac. Corp. S'holder Litig., 669 A.2d 59, 70 n.9 (Del. 1995)).

[9] The non-management directors received 30,000 stock options every year on the date of the annual shareholders' meeting. See Proxy Statements dated November 12, 2003 at 6, November 17, 2004 at 7 and November 17, 2005 at 7 (excerpts attached hereto as Exhibits C, D and E, respectively).

Second, the Form 4s associated with those stock option grants were filed with the SEC on December 19, 2003, just one day after the issuance of those options. (See Form 4s attached hereto as Exhibit F.) Accordingly, the December 18, 2003 director grants could not have been backdated or otherwise modified as a matter of law.[10]

B. Demand Is Not Excused Because Plaintiff Fails To Allege With Particularity Facts Demonstrating That At Least Three Directors Face A *Substantial Likelihood* Of Personal Liability.

Where -- as here -- the complaint fails to adequately allege director interest, the Rales inquiry further requires that the Court evaluate whether a plaintiff plead particularized facts sufficient to demonstrate that at least half of the board members face a "substantial likelihood" of personal liability for the conduct alleged in the complaint. Guttman, 823 A.2d at 501; Rales, 634 A.2d at 936. The "mere threat" of personal liability is insufficient to excuse demand. Aronson, 473 A.2d at 815. If the complaint fails to allege a substantial likelihood of personal liability -- as is the case here -- then demand is not excused and the complaint must be dismissed.

In this case, the Amended Complaint's demand futility allegations consist of nothing more than variations of the same circular theme: the Director Defendants

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[10] The Sarbanes-Oxley Act expedited the disclosure requirements under Section 16 of the Securities Exchange Act of 1934. Prior to Sarbanes-Oxley, Form 4s were required to be filed "within 10 days after the close of the calendar month" in which the transaction occurred. 15 U.S.C. § 78p(a) (2000) amended by 15 U.S.C. § 78p(a)(2) (2002). Sarbanes-Oxley, which became effective August 29, 2002, requires that those disclosures be made "before the end of the second business day" following the transaction. 15 U.S.C. § 78p(a)(2) (2006). Accordingly, the Form 4s associated with the December 18, 2003 stock option grants were filed December 19, 2003 (Exhibit F), while the Form 4s associated with the December 13, 2001 stock option grants were filed January 7, 2002.

could not have independently considered a demand because they engaged in the alleged misconduct. (See Am. Compl. ¶¶ 68(a)-(n)). Apart from conclusory assertions however, there is not a single particularized allegation to substantiate that any of the Director Defendants -- let alone the requisite three -- participated in, or knew of, any wrongdoing and consequently face a "substantial likelihood" of personal liability for any of the six Counts asserted in the Amended Complaint.[11]

To the contrary, Plaintiff's allegations demonstrate just the opposite. For example, Plaintiff heavily relies on the Landry allegations (which Plaintiff attaches and incorporates into the Amended Complaint), but those allegations make plain that a majority of the Board did not participate in any purported wrongdoing.[12] Moreover, Landry further alleges that to the extent any intentional misconduct occurred at all, it was actively hidden from the Board. (Id. ¶ 68 (j).) In short, this is exactly the sort of case that requires demand be made and, accordingly, the Amended Complaint should be dismissed with prejudice.

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[11] In addition to the utter lack of particularized facts, demand is not excused for Count VI (Breach of Contract) because none of the Director Defendants have "employment agreements" with Sycamore Networks and, therefore, do not face any threat of personal liability as to that claim.

[12] At most, Landry alleges that only one Board member (Mr. Smith) *may have* participated in purported misconduct, but that allegation is so conclusory and non-specific it too fails as a matter of law and should be rejected. (Landry Complaint ¶ 26 ("Stock Option grants were approved for all of the above individuals by Fran Jewels and/or Daniel Smith.").)

1. Conclusory allegations that the Director Defendants engaged in the misconduct are inadequate to excuse demand.

Most of the Amended Complaint's demand futility allegations conclusorily contend that demand is excused because the Director Defendants "approved," "authorized," "ratified," or "facilitated" purportedly "unlawful" and "illegal" conduct during the period between 1999 and 2001. (Am. Compl. ¶¶ 68 (f), (i)-(l).) Because that kind of conclusory contention, if accepted, would virtually disable every Delaware board of directors from ever considering whether a lawsuit of this type is in the best interests of the corporation, such allegations are insufficient to excuse demand as a matter of law. Instead, to meet his burden Plaintiff must allege particularized facts that demonstrate a "substantial likelihood" that the Director Defendants face personal liability that will prevent them from considering a demand.

Plaintiff does not -- and cannot -- satisfy that burden. Plaintiff offers only a series of conclusory allegations, none of which (individually or collectively) suggest that even one Director Defendant participated in, knew of, or should have known of the alleged misconduct. In conclusory fashion, the Amended Complaint alleges that:

- "the Director Defendants participated in, approved and/or permitted the wrongs alleged herein, concealed or disguised those wrongs or recklessly and/or negligently disregarded them;" (Am. Compl. ¶ 68(f));
- "All of the Director Defendants authorized, approved, ratified or have failed to rectify . . . and are named as defendants herein" (id. ¶ 68(i)); and
- "The back-dating and manipulation of options as alleged herein was unlawful and not within Director Defendants' business judgment to authorize, ratify or facilitate." (id. ¶ 68(j)).

Other than those conclusory assertions, Plaintiff does not identify even one single, specific fact that establishes that any Board member participated in the alleged conduct, or that information was available that would have alerted the Board to the alleged misconduct. The Amended Complaint lacks particularized allegations regarding any of the Director Defendants' involvement in the granting of stock options, what any Director Defendant knew during 1999 to 2001 or how they came to learn such information. In short, Plaintiff's conclusory assertions of Board participation in unlawful activity, without any supporting particularized factual allegations, are insufficient as a matter of law to excuse demand. Guttman, 823 A.2d at 498 (complaint failed to allege demand futility because it was "entirely devoid of particularized allegations of fact demonstrating that the outside directors had actual or constructive notice of the accounting improprieties"); Haber v. Bell, 465 A.2d 353, 359 (Del. Ch. 1983) (holding that allegations that all directors named in suit "participated in, expressly approved and/or acquiesced in, and are personally liable for, the wrongs complained herein" insufficient to excuse demand).

Similarly inadequate are Plaintiff's allegations that the Director Defendants would not sue themselves because it would expose them to suits for securities fraud. (Am. Compl. ¶¶ 68(k), (l).) As an initial matter, with the exception of related shareholder derivative litigation pending in the federal court of Massachusetts, there are no securities fraud suits, and such allegations are purely speculative. Moreover, those allegations do not even come close to establishing that the Director Defendants face a "substantial likelihood" of personal liability from such hypothetical suits. Indeed, those

allegations are nothing more than Plaintiff naming each member of the Board as a defendant and alleging that because he has sued all of them they are conflicted and interested, and therefore demand is futile. That, of course, is insufficient. Pogostin v. Rice, 480 A.2d 619, 625 (Del. 1984) ("bootstrap allegations of futility, based on claims of directorial participation in and liability for the wrongs alleged, coupled with a reluctance by directors to sue themselves, were laid to rest in Aronson").

2. Conclusory claims of inadequate oversight are insufficient to excuse demand.

As an apparent alternative theory to his allegations that the Board participated in the alleged misconduct, Plaintiff also alleges that demand would have been futile because the Director Defendants are liable for breaching their fiduciary duties by failing to adequately monitor or establish internal controls to detect the purported misconduct.[13] (Am. Compl. ¶¶ 68 (b), (d), (g)-(h), (m)-(n).) Yet again, those conclusory allegations are insufficient to demonstrate that any of the Director Defendants face a substantial likelihood of personal liability and, accordingly, fail as a matter of law to excuse demand. See In re Caremark Int'l, Inc. Derivative Litig., 698 A.2d 959, 967 (Del.

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[13] Had Plaintiff sought to investigate his allegations before filing this lawsuit -- such as making a proper books and records request -- perhaps the alternative (and conflicting) theories of direct participation or inadequate oversight could have been avoided. Guttman, 823 A.2d at 493 ("Having failed to heed the numerous admonitions by our judiciary for derivative plaintiffs to obtain books and records before filing a complaint, the plaintiffs have unsurprisingly submitted an amended complaint that lacks particularized facts comprising the impartiality of the [company's] board that would have acted on a demand); Beam, 845 A.2d at 1056 ("failure to plead sufficient facts to support [their] claim of demand futility may be due in part to [their] failure to exhaust all reasonably available means of gathering facts . . . the point is that it was within [Plaintiffs'] power to explore these matters and [they] elected not to make the effort").

Ch. 1996) (holding that for "good policy reasons," a failure of oversight claim is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.").

The Amended Complaint conclusorily (and impermissibly) asserts that the Director Defendants "fail[ed] to adequately monitor Sycamore's financial reporting" (Am. Compl. ¶ 68(b)) and "Sycamore's internal controls were woefully deficient" (id. ¶ 68 (h)). Those conclusory allegations fall far short of demonstrating a substantial likelihood of personal liability for a lack of directorial oversight. To the contrary, the only theory Plaintiff's allegations support is that to the extent any misconduct occurred at all, it is not alleged to have been done by any director and, indeed, the purported misconduct is alleged to have been concealed from the Board. Plaintiff's inadequate supervision arguments are analogous to those recently considered -- and rejected -- by the Delaware Supreme Court in Stone v. Ritter, __ A.2d __, Civ. A. No. 93-2006, 2006 WL 3169168 (Del. Nov. 6, 2006) (Compendium Of Unreported Authorities Cited In Defendants' Memorandum Of Law In Support Of Their Motion To Dismiss (cited as "Comp.") Tab G).

In Stone, plaintiffs brought a derivative action alleging that demand was futile because the board faced a substantial likelihood of personal liability for their "'utter failure'" to implement and/or monitor internal controls sufficient to reveal the misconduct. Id. at **1, 7. In affirming dismissal of the complaint for failure to plead demand futility with the requisite particularity, the Court held that a claim predicated upon a failure to act

appropriately is not stated absent particularized allegations of fact that, if true, would demonstrate a "sustained or systematic failure" of the board to exercise oversight:

> We hold that *Caremark* articulates the necessary conditions predicate for director oversight liability: (a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention. In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations.

Id. at *6 (underlining added).

Plaintiff here does not even attempt to satisfy this high standard. The Amended Complaint does not contain a single particularized allegation that there was a sustained or systematic failure by any of the Director Defendants to exercise oversight. For example, the Amended Complaint lacks any allegations whatsoever concerning the policies and procedures for granting stock options, let alone any Director Defendant's role in that process. See Guttman, 823 A.2d at 507 (rejecting argument that claims of lack of internal controls excused demand where complaint did not contain "well-pled factual allegations -- as opposed to wholly conclusory statements -- that the [] independent directors committed any culpable failure of oversight").

Also absent from the Amended Complaint are any particularized allegations that any director knew that any internal controls concerning stock options

were inadequate.[14] Indeed, Plaintiff does not allege that any "red flags" were presented to the Board putting them on notice of inadequate internal controls, and that the Board nevertheless chose to do nothing about it. Stone, 2006 WL 3169168, at *7. To the contrary, Plaintiff alleges that the Landry Memo demonstrates that unidentified "management and other employees . . . took steps to circumvent the audit procedures." (Am. Compl. ¶ 68 (j); see also Landry Complaint ¶ 27 (alleging that certain former employees (none of whom were ever Board members) drafted and exchanged the Landry Memo).) Further, Plaintiff concedes -- as he must -- that when presented with evidence of potential stock option irregularities, the Board initiated an investigation into the accounting for certain stock options granted during 1999 to 2001. (Am. Compl. ¶ 30.) In short, when presented with evidence of potential wrongdoing, the Board did exactly what it is supposed to do.[15] Not only is demand not excused, but this is precisely the sort of case that requires that demand be made.

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[14] In an apparent effort to establish "knowledge," Plaintiff alleges that the Director Defendants *must have known* of alleged misconduct because they had "access to and review of internal corporate documents; conversations and connections with other corporate officers, employees and directors; and attendance at management and Board meetings." (Am. Compl. ¶ 68 (d).) Those types of conclusory, non-specific assertions are insufficient. Rattner v. Bidzos, Civ. A. No. 19700, 2003 WL 22284323, at *10, n.53 (rejecting identical allegations for failure to allege with particularity what information directors knew and how they acquired such knowledge) (Comp. Tab F).

[15] Based solely on an allegation in the Landry complaint asserted upon "information and belief," (Landry Complaint ¶ 54), Plaintiff claims that the Board inappropriately limited its investigation to the issues raised in the Landry Memo. (Am. Compl. ¶ 39.) Not only is that allegation insufficiently particular, but it is also contradicted by the Restatement. The Restatement publicly announced, among other things, that "options granted under the April 14, 2000 broad based stock option grant program . . . likely [were] *(cont'd)*

3. Conclusory allegations of a failure to rectify the alleged wrongs are insufficient to excuse demand.

Plaintiff's assertions that the Board failed to "rectify" the alleged misconduct also miss the mark and do not excuse demand. (Id. ¶¶ 68 (a), (e), (h)-(i), (m), (n).) If that type of allegation was sufficient -- and it is not -- demand would always be excused. See Lewis v. Graves, 701 F.2d 245, 249 (2d Cir. 1983) (affirming dismissal of shareholder derivative action for failure to allege demand futility and holding that "[j]ust as it does not suffice simply to name all of the directors as defendants and charge them with having approved the alleged wrongdoings, bald charges of mere failure to take corrective action are similarly inadequate to demonstrate futility") (emphasis added).

Notably, Plaintiff does not -- and could not -- allege that the Board considered, and rejected, taking any remedial action against any individual for the alleged wrongdoing. First, the Board's investigation has not concluded. Second, there are simply no particularized allegations that the Board has even determined that it will not initiate legal proceedings against any individual once its investigation is concluded, let alone that such a decision (had it been made) was not the "product of a valid exercise of business judgment." Aronson, 473 A.2d at 814.

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not ultimately determined until April 26, 2000." (Restatement at 51, excerpt attached hereto as Exhibit G (emphasis added).)

4. Allegations that the Director Defendants have "professional and personal entanglements" are insufficient to excuse demand.

Plaintiff's allegation that demand is excused because the Board members "cannot be expected to prosecute claims against themselves, and persons with whom they have extensive inter-related business, professional and personal entanglements" (Am. Compl. ¶ 68 (e)) have been uniformly rejected under Delaware law as insufficient to excuse demand. See Kohls v. Duthie, 765 A.2d 1274, 1284-85 (Del. Ch. 2000) ("the law is clear that evidence of personal and/or business relationships does not raise an inference of self interest") (quotation omitted); Green v. Phillips, Civ. A. No. 14436, 1996 WL 342093, at *5 (Del. Ch. June 19, 1996) (allegations that directors had "long-standing personal and business ties . . . are insufficient to overcome directors' presumption of independence") (Comp. Tab D).

5. Sycamore Networks' Certificate Of Incorporation exculpates directors from liability for breaches of fiduciary duty.

In addition to the absence of any particularized allegations demonstrating that the Director Defendants breached any fiduciary duty, Sycamore Networks' Certificate Of Incorporation expressly exculpates the directors under these circumstances from any liability for such breaches of the duty of care, thereby eliminating a "substantial likelihood" of personal liability for the Board.[16] See In re Baxter Int'l, Inc. S'holders

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[16] See Amended And Restated Certificate of Incorporation, restated October 27, 1999 and amended January 26, 2000 and December 14, 2000 (attached hereto as Exhibit H). The exculpatory provision is permitted under 8 Del. C. § 102(b)(7). The Court may take judicial notice of Sycamore Networks' Certificate of Incorporation. Malpiede v. Townson, 780 A.2d 1075, 1090 (Del. 2001) (dismissing shareholder suit for breach of *(cont'd)*

Litig., 654 A.2d 1268, 1270 (Del. Ch. 1995) (dismissing derivative action for failure to plead demand futility with requisite particularity and holding that "[w]hen the certificate of incorporation exempts directors from liability, the risk of liability does not disable them from considering a demand fairly unless particularized pleading permits the court to conclude that there is a substantial likelihood that their conduct falls outside the exemption").

Sycamore Networks' exculpatory provision states, in part:

> Except to the extent that the General Corporation Law of Delaware prohibits the elimination or limitation of liability of directors for breaches of fiduciary duty, no director of the Corporation shall be personal liable to the Corporation or its stockholders for monetary damages for any breach of fiduciary duty as a director, notwithstanding any provision of law imposing such liability.

(Exhibit H, Art. Seventh.)

Delaware law expressly recognizes that such an exculpatory provision shields directors from claims for monetary damages except for claims of breach of their duty of loyalty, or involving intentional misconduct, a knowing violation of law, or an improper personal benefit. See 8 Del. Code § 102(b)(7). As described in more detail above, the Amended Complaint contains no well-pleaded factual allegations that would support a non-exculpated claim. Outside of hopeless conclusory allegations, Plaintiff does not plead that the Director Defendants engaged in intentional misconduct or knowingly violated any law. Plaintiff also fails to adequately plead that the Director

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duty of care where corporate charter expressly limited director defendants' personal liability).

Defendants violated a duty of loyalty for a sustained or systemic failure of oversight. See Stone, 2006 WL 3169168, at *6. Accordingly, because a substantial likelihood of personal liability as to any Director Defendant is plead with particularity, demand is not excused, and the Amended Complaint should be dismissed.

II. PLAINTIFF DOES NOT HAVE STANDING TO CHALLENGE ALLEGED MISCONDUCT OCCURRING BETWEEN 1999 AND 2001 BECAUSE HE WAS NOT A SHAREHOLDER AT THAT TIME.

In addition to the requirement of pleading demand futility with particularity, before a shareholder-plaintiff may institute a suit on behalf of a corporation, Rule 23.1 requires that "the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law." Del. Ch. Ct. R. 23.1. See also 8 Del. Code, § 327 ("In any derivative suit instituted by a stockholder of a corporation, it shall be averred in the complaint that the plaintiff was a stockholder at the time of the transaction of which he complains . . . .").

The policy behind this requirement is to "prevent the purchasing of stock to be used for the purpose of filing a derivative action attacking transactions occurring prior to such purchase." Schreiber v. R.G. Bryan, 396 A.2d 512, 516 (Del. Ch. 1978) (granting summary dismissal of derivative claims on the grounds that plaintiff was not a shareholder at the time of the occurrence of the underlying transaction). In making this determination, the Court should decide "when the specific acts of alleged wrongdoing occur[red], and not when their effect [was] felt." Id.

The Amended Complaint alleges that the "underlying wrongful stock option grants alleged herein occurred during the period of 1999-2001." (Am. Compl. ¶ 69.) Nevertheless, Plaintiff also alleges that he did not purchase Sycamore Networks securities until February 4, 2002 -- a year after the alleged misconduct occurred. (Id. ¶ 13.) Accordingly, to the extent Plaintiff seeks to bring suit on behalf of Sycamore Networks to recover damages from any defendant for misconduct that allegedly occurred in 1999 to 2001, Plaintiff lacks standing to pursue those claims because he was not a Sycamore Networks shareholder at that time.[17] (Id.)

III. THE AMENDED COMPLAINT SHOULD BE DISMISSED BECAUSE ALL COUNTS FAIL TO STATE A CLAIM.

Pursuant to Rule 12(b)(6) of the Delaware Chancery Rules, the Amended Complaint also should be dismissed for failure to state a claim.[18] The Amended Complaint contains six counts, three counts against all Director Defendants for alleged breaches of fiduciary duty (Count I), gross mismanagement (Count IV) and corporate waste (Count V), two counts against the Officer Defendants and certain Director Defendants for unjust enrichment (Count III) and breach of contract (Count VI), and one count against the Officer Defendants for allegedly aiding and abetting breaches of fiduciary duties (Count II).

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[17] The only claims that Plaintiff is not barred from pursuing due to the contemporaneous ownership requirement of Rule 23.1 are those allegations that purport to assert a claims against certain of the individually named defendants for stock options granted after February 4, 2002. (See Am. Compl. ¶¶ 48-49.)

[18] The Court may dismiss a complaint for failure to state a claim upon which relief can be granted under the general notice pleading standard under Del. Ch. R. 8(a).

(cont'd)

A. Plaintiff's Conclusory Allegations Are Insufficient To State A Claim.

Plaintiff provides no factual allegations to even remotely support any of the claims asserted in the Amended Complaint. Instead, Plaintiff makes only unsubstantiated, conclusory allegations that are insufficient, and consequently, fail as a matter of law. As the chart below demonstrates, Plaintiff's conclusory assertions provide no factual allegations that even colorably support any claim against any Defendant:

Conclusory Assertion In Amended Complaint	**Why That Assertion Is Wholly Without Merit**
Director Defendants "authorized, or by abdication of duty, permitted the dates of stock options granted to the Executive Officer Defendants to be improperly modified . . ." (Am. Compl. ¶ 73.)	How did the Director Defendants "authorize[] or by abdication of duty, permit[]the dates of stock options granted to the Executive Officer Defendants to be improperly modified?" What did the Director Defendants do or not do that provides a basis for this claim?
Officer Defendants "knowingly aided and abetted the breaches of fiduciary duty committed by the Director Defendants. . . . Indeed, the modification of stock option grant dates could not have taken place without the active participation of the Executive Officer Defendants." (Id. ¶ 79.)	How did the Officer Defendants "knowingly aid[] and abet[] the breaches of fiduciary duty?" What type of active participation did the Officers contribute?

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Solomon v. Pathe Commc'ns Corp., 672 A.2d 35, 38 (Del. 1996) (affirming Chancery Court's dismissal where complaint supported by conclusory allegations, noting "[t]he complaint itself, need 'only give general notice of the claims asserted, ...' However, conclusions . . . will not be accepted as true without specific allegations of fact to support them.'").

Conclusory Assertion In Amended Complaint	**Why That Assertion Is Wholly Without Merit**
Director and Officer Defendants "by their actions . . . abandoned and abdicated their responsibilities and fiduciary duties with regard to prudently managing the assets and business of the Company." (Id. ¶ 92)	Which Director and Officer Defendants "abandoned and abdicated their responsibilities?" By what "actions" and when?
Director and Officer Defendants "caused the Company to waste valuable corporate assets solely for the financial gain of the Executive Officer Defendants" (Id. ¶ 96)	Which Director and Officer Defendants "caused the Company to waste valuable corporate assets?" How and when did the Individual Defendants "waste valuable corporate assets?"
"As a result of the improperly manipulation [sic] options granted to them, the Executive Officer Defendants and certain Director Defendants have breached their employment agreements with the Company and violated the stock option plan . . . " (Id. ¶ 99.)	How did the Officer Defendants "breach[] their employment agreements with the Company and violate[] the stock option plan?" What did the Officer Defendants do or not do that violated the terms of the employment agreement or stock option plan? What employment agreement did the non-employee Defendant Directors breach?

Unsupported, conclusory allegations like those here are insufficient to state a claim. In re Gen. Motors (Hughes) S'holder Litig., 897 A.2d 162, 168 (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). Accordingly, the Amended Complaint should be dismissed in its entirety.

B. The Exculpatory Provision Of Sycamore Networks' Certificate Of Incorporation Bars Counts I, III, IV And V Against The Director Defendants.

Counts I, III, IV and V fail to state a claim against the Director Defendants for the independent reason that they are barred by the exculpatory provision of Sycamore Networks' Certificate Of Incorporation. Where, as here, the alleged misconduct is covered by an exculpatory provision, and the "facts alleged in the complaint do not state a cognizable claim that the directors acted in their own personal interests rather than in the best interests of the stockholders," the claim should be dismissed. Malpiede, 780 A.2d at 1085 (dismissing suit for breach of duty of care where charter expressly limited director defendants' personal liability).[19] See also McMillan v. Intercargo Corp., 768 A.2d 492, 507 (Del. Ch. 2000) (action failed to state claim for breach of duty of loyalty where allegations of bad faith or intentional misconduct were conclusory and corporation had exculpatory charter provision).

Under this standard, Sycamore Network's exculpatory provision bars Counts I, III, IV and V as to the Director Defendants. The Amended Complaint contains only conclusory allegations that the Director Defendants' "actions were not a good faith exercise of prudent business judgment." (Am. Compl. ¶ 73). Plaintiff does not allege that any of the Director Defendants stood to benefit personally from the alleged

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[19] See also In re BHC Commc'ns, Inc. S'holder Litig., 789 A.2d 1, 10-11 (Del. Ch. 2001) (dismissing claims, based on exculpatory charter provision, where board allegedly failed to maximize stockholder value but "[t]here [were] no facts alleged from which [the Court] could infer that such 'failure' resulted from anything other than a breach of the duty of care");

misconduct. In the absence of any factual allegations allowing a reasonable inference of bad faith -- and there are none -- Counts I, III, IV and V fail to state a claim and should be dismissed as a matter of law.

IV. THE AMENDED COMPLAINT SHOULD BE DISMISSED FOR THE INDEPENDENT REASON THAT ALL CLAIMS ARE TIME BARRED.

Nearly all six Counts of the Amended Complaint are barred by the applicable three-year statute of limitations.[20]

While "generally, . . . the bar of limitations is an affirmative defense, . . . it is equally well settled that where the complaint itself alleges facts that show that the complaint is filed too late, the matter may be raised by defendants' motion to dismiss . . . ." Kahn v. Seaboard Corp., 625 A.2d 269, 277 (Del. Ch. 1993). The statute of limitations begins to run "at the time of the alleged wrongful act, even if the plaintiff is ignorant of the cause of action." In re Dean Witter P'ship Litig., Civ. A. No. 14816, 1998 WL 442456, at *4 (Del. Ch. July 17, 1998) (emphasis added) (Comp. Tab C). In short, a complaint should be dismissed where -- as here -- it alleges facts that demonstrate that the claims are time barred as a matter of law. See id. at *4 (dismissing complaint as time barred); Kahn, 625 A.2d at 277 (dismissing shareholder derivative action on statute of limitations grounds).

When evaluating a statute of limitations argument, the court first ascertains the date Plaintiff's claim accrued (i.e., when the alleged misconduct occurred),

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[20] The only claims that would not specifically be time-barred are those allegations concerning stock option grants in December 2003. (See Am. Comp. ¶ 48.)

then determines whether the statute of limitations was in fact tolled. CertainTeed Corp. v. Celotex Corp., Civ. A. No. 471, 2005 WL 217032, at *7 (Del. Ch. Jan. 24, 2005) (Comp. Tab B). If the limitations period was tolled, the Court must next determine when the plaintiff received inquiry notice of any alleged injury, thereby resuming the running of the limitations period. Id.

1. Plaintiff's claims are barred because they were not brought within three years of the alleged misconduct.

The statute of limitations for claims of breach of fiduciary duty, aiding and abetting breach of fiduciary duty, gross mismanagement, corporate waste, unjust enrichment and breach of contract is three years. Del. Code Ann. Tit. 10, § 8106 ("no action . . . arising out of contractual or fiduciary relations . . . shall be brought after the expiration of 3 years from the accruing of the cause of such action"); see also Halpern v. Barran, 313 A.2d 139, 141 (Del. Ch. 1973) ("It is by now firmly established that the three-year statute of limitations, 10 Del. C. s 8106, applies to shareholder derivative actions which seek recovery of damages or other essentially legal relief.").

In this case, the Amended Complaint alleges that during 1999 to 2001, Defendants "authorized, modified, or failed to halt the modification of stock option grants." (Am. Compl. ¶ 4.) Accordingly, the limitations period began to run -- at the latest -- in 2001, even if Plaintiff was not actually aware of the conduct. In re Dean Witter P'ship Litig., 1998 WL 442456, at *4 ("the cause of action accrues, at the time of the alleged wrongful act, even if the plaintiff is ignorant of the cause of action"). The Amended Complaint makes plain that the alleged misconduct occurred no later than 2002 -- four years prior to bringing this action. (Am. Compl. ¶¶ 42, 43, 45, 47, 49.) For

stock grants that occurred in 2000 through 2002 (id.), the three-year statute of limitations period for those claims has long expired.

2. Plaintiff's conclusory allegations do not -- because they cannot -- demonstrate that the statute of limitations was, in fact, tolled.

Plaintiff attempts to argue that the applicable three-year statute of limitations was tolled, but he "bear[s] the burden of pleading specific facts to demonstrate that the statute of limitations was, in fact, tolled." In re Dean Witter P'ship Litig., 1998 WL 442456, at *6 (emphasis added). Where -- as here -- a plaintiff fails to meet that burden, the court "must dismiss the complaint if filed after expiration of the limitations period." CertainTeed Corp., 2005 WL 217032, at *6 (partially dismissing plaintiff's claims because plaintiff was on inquiry notice but failed to file within three-year statute of limitations).

Plaintiff conclusorily asserts that certain tolling exceptions would be applicable here, (see Am. Compl. ¶ 69), but utterly fails to satisfy his burden of pleading particularized facts sufficient to demonstrate that the statute of limitations was in fact tolled. In re Dean Witter P'ship Litig., 1998 WL 442456, at *6.

In addition, Plaintiff conclusorily asserts that "concealment [of stock option pricing packages] could not have been discovered through reasonable diligence by the typical shareholder, prior to publication of the May 19, 2006, Wall Street Journal article." (Am. Compl. ¶ 63.) In order to toll the statute of limitations by allegations of fraudulent concealment, Plaintiff must plead "an affirmative act of concealment by defendant -- an 'actual artifice'" that prevents plaintiff from discovering the

misrepresentation intended to place the plaintiff off the path of inquiry. In re Dean Witter P'ship Litig., 1998 WL 442456, at *5. Further, a plaintiff alleging fraudulent concealment must plead fraud with particularity, "and mere use of the word 'fraud' or its equivalent is not a sufficiently particular statement. . . ." Halpern, 313 A.2d at 143 (citations omitted) (holding fiduciary duty claims time barred because plaintiff failed to assert fraudulent concealment with sufficient particularity to toll the statute of limitations). See also Boeing Co. v. Shrontz, Civ. A. No. 11273, 1992 WL 81228, at *3 (Del. Ch. April 20, 1992) (finding fiduciary duty claims time barred because not disclosing illegal activity in SEC filings does not suggest the existence of scheme to conceal facts from plaintiffs) (Comp. Tab A).

Where -- as here -- a plaintiff fails to satisfy his burden to allege with particularity an affirmative act of concealment beyond "mere generalizations, anchored to no specific acts of concealment by defendants," the doctrine of fraudulent concealment will not toll the statute of limitations. Halpern, 313 A.2d at 144. Plaintiff's single conclusory allegation that unidentified SEC filings misrepresented that stock grants were priced at fair market value falls far short of pleading fraud with the requisite particularity. Boeing Co., 1992 WL 81228, at *3 (rejecting plaintiffs' claim that defendants' failing to disclose existence of illegal activity in SEC filings as insufficiently particular to toll the statute of limitations under doctrine of fraudulent concealment). Plaintiff fails to allege any particularized facts about the allegedly misrepresented SEC filings such as which filings contained purported misrepresentations, how those statements were allegedly false or when those filings were actually filed with the SEC. (See Am. Compl. ¶ 42.) The

complete lack of specificity regarding Plaintiff's claim of fraudulent concealment renders that tolling exception inapplicable as a matter of law.

Because Plaintiff is unable to meet his burden of pleading particularized facts, the tolling exceptions are inapplicable and the Amended Complaint should be dismissed, as it was filed long after the expiration of three-year statute of limitations. CertainTeed Corp., 2005 WL 217032, at *6.

3. Even if the statute of limitations was tolled, Plaintiff was placed on inquiry notice more than three years prior to filing the Amended Complaint.

Even if the statute of limitations is tolled, the tolling only lasts until plaintiff is placed on inquiry notice, at which point the running of the statute of limitations resumes. CertainTeed Corp., 2005 WL 217032, at *6. "Inquiry notice does not require actual discovery of the reason for injury. Rather it exists when the plaintiff becomes aware of 'facts sufficient to put a person of ordinary intelligence and prudence on inquiry, which, if pursued, would lead to the discovery [of injury.]'" Id. Filings with the SEC, such as proxy statements, are sufficient to place a plaintiff on inquiry notice. See Official Comm. of Unsecured Creditors of Integrated Health Servs. v. Elkins, Civ. A. No. 20228, 2004 WL 1949290, at *8 (Del. Ch. Aug. 24, 2004) (dismissing claims as time barred because filing of proxy statements was "enough to alert stockholders reasonably to a possible infringement of their rights") (Comp. Tab E); In re Dean Witter P'ship Litig., 1998 WL 442456, at *7 (holding plaintiff placed on inquiry notice "when the information underlying plaintiff's claim is readily available" in proxy statements and other SEC filings); Teachers' Ret. Sys. of Louisiana v. Aidinoff, 900 A.2d. 654, 667 (Del. Ch. 2006)

(partially dismissing claims because defendants' public filings were sufficient to put plaintiffs on inquiry notice).

In In re Dean Witter P'ship Litig., plaintiffs claimed defendants breached their fiduciary duties in the marketing, sale, management and oversight of certain partnerships. 1998 WL 442456, at *4. Defendants moved to dismiss the complaint on several grounds, including that the claims were time barred by the applicable three-year statute of limitations. Id. at *3. Plaintiffs argued that the claims were timely because the statute of limitations was tolled until a *Wall Street Journal* article put them on notice of their potential claims. Id. at *5. The Court rejected that argument because "the article simply did not disclose any information about [defendants'] sales practices, nor did it identify any limited partnerships by name." Id. at *6. The Court then dismissed plaintiff's claims as time-barred because plaintiffs -- as a matter of law -- were placed on inquiry notice by defendants' public filings more than three years before the claims were filed and well before the *Wall Street Journal* article was published:

> the trusting plaintiff still must be reasonably attentive to his interests. "[B]eneficiaries should not put on blinders to such obvious signals as publicly filed documents, annual quarterly reports, proxy statements, and SEC filings." Thus, even where a defendant is a fiduciary, a plaintiff is on inquiry notice when the information underlying plaintiff's claim is readily available.

Id. at *8 (emphasis in original) (citations omitted).

The result should be the same here. Plaintiff was on inquiry notice of his claims well prior to three years before filing this action -- and no later than 2003. Indeed, the allegations in the Amended Complaint are based entirely on information in public filings that have been readily available to Plaintiff since 2001 and 2002. (See Am.

Compl. ¶¶ 42, 43, 45, 47 (detailing the challenged transactions and stock price during 2000 and 2001).) See In re Dean Witter P'ship Litig., 1998 WL 442456, at *7; Teachers Ret. Sys. of Louisiana, 900 A.2d. at 667. For example, Plaintiff claims the option grants were made at the stock's yearly low point or immediately before a large increase in the stock's trading price, information which was publicly available long ago. (See Am. Compl. ¶¶ 42, 43, 45, 47.) Moreover, Plaintiff's allegations concerning the grant of options to the Individual Defendants accrued when Sycamore Networks filed its proxy statements disclosing those grants, placing Plaintiff on inquiry notice within a year of the events in April 2000 and 2001. (See id.) Having been placed on inquiry notice, Plaintiff could have (and should have) employed reasonable diligence at that time, and reviewed the publicly available information in order to file this complaint. See CertainTeed Corp., 2005 WL 217032, at *7 ("the statute of limitations runs from the point at which the plaintiff, by exercising reasonable diligence, should have discovered her injury.").

Plaintiff's conclusory assertion that the alleged backdating "could not have been discovered through reasonable diligence by the typical shareholder, prior to the publication of the May 19, 2006 *Wall Street Journal* article" is also insufficient. (Am. Compl. ¶ 63.) The *Wall Street Journal* article does not identify or disclose any information relating to Sycamore Networks specifically.[21] The article simply

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[21] The Court may consider the information contained in the *Wall Street Journal* article when considering a motion to dismiss because Plaintiff has incorporated the article by reference in the Amended Complaint. (See Am. Compl. ¶¶ 6, 41, 63). In re Dean Witter P'ship Litig., 1998 WL 442456, at *6 n.46. That article is attached hereto as Exhibit I.

summarizes data that had previously been disclosed regarding companies other than Sycamore Networks, and therefore is an insufficient justification for tolling the statute of limitations. In re Dean Witter P'ship Litig., 1998 WL 442456, at *6. As evidenced by the facts alleged in the Amended Complaint itself, and because Plaintiff was on inquiry notice in 2001 and 2002, the three-year statute of limitations period for Plaintiff's claims has long expired.

CONCLUSION

For all the foregoing reasons, Defendants' motion to dismiss should be granted in its entirety, and the Amended Complaint dismissed with prejudice.

Dated: December 4, 2006
Wilmington, Delaware

Respectfully submitted,

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