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' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

John D. Donovan, Jr.
Bonnie Schroeder McGuire
ROPES & GRAY LLP
One International Place
Boston, Massachusetts 02110
(617) 951-7000

Counsel for Defendants
Timothy A. Barrows,
Paul W. Chisholm, Paul J. Ferri
and John W. Gerdelman

Anthony W. Clark (#2051)
Robert A. Weber (#4013)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Rodney Square
P.O. Box 636
Wilmington, Delaware 19899
(302) 651-3000

Of counsel:
James R. Carroll
Michael S. Hines
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Beacon Street
Boston, Massachusetts 02108
(617) 573-4800

Counsel for Nominal Defendant
Sycamore Networks, Inc. and
Defendants Gururaj Deshpande,
Daniel E. Smith, Anita Brearton,
Kurt Trampedach, Jeffry A. Kiel
and Kevin J. Oye

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PRELIMINARY STATEMENT[1]

Plaintiff stakes his entire case upon allegations asserted by a disgruntled former Sycamore Networks employee ("Landry") in hopes of demonstrating that the required pre-suit demand on the Board would have been futile.[2] On January 24, 2007, however, Judge Gants of the Massachusetts Superior Court dismissed Landry's complaint with prejudice, holding that Landry's claims were "plainly meritless as a matter of law." Landry v. Sycamore Networks, Inc., Civ. A. No. 06-4242-BLS2 (Mass. Super. Ct. Jan. 24, 2007) (emphasis added) (Compendium of Unreported Opinions Cited In Defendants' Reply Brief In Support Of Their Motion To Dismiss (cited as "Comp.") Tab C).

Entirely absent from the now-adjudicated meritless Landry allegations (and, consequently, the Amended Complaint in this case) is even one specific allegation of fact demonstrating that any Director Defendant participated in, knew or should have known of any alleged misconduct. That alone is sufficient grounds for dismissal.

The Answering Brief also argues that all four of the Board's outside directors are "interested" and therefore incapable of considering a demand because "substantial doubt exists" in connection with stock options they received in 2001 and 2003. (Ans. Br. at 26.) Plaintiff concedes that those director grants were automatically granted and scheduled long in advance and, thus, were not -- and could not have been --

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1 Capitalized terms herein shall have the same meaning as in Defendants' Memorandum Of Law In Support Of Their Motion To Dismiss (the "Opening Brief") (cited as "Opening Br. at __"), filed December 4, 2006.

2 Plaintiff's Answering Brief In Opposition To All Defendants' Motions To Dismiss (the "Answering Brief") (cited as "Ans. Br. at __"), filed January 16, 2007.

"backdated." (Ans. Br. at 7, 26.) Nevertheless, Plaintiff argues that those option grants are suspicious because they "came closely on the heels of negative news to the market." (Id. at 26.) According to Plaintiff, that timing suggests that the Director Defendants controlled the release of negative news to coincide with those option grants. Plaintiff completely fails, however, to support that conclusion with particularized facts (indeed, there are no allegations at all concerning any Director Defendant's role in preparing financial information and releasing it to the market). Moreover, a very recent "backdating" case rejected Plaintiff's argument as insufficient to excuse demand as a matter of Delaware law. See In re Linear Tech. Corp. Derivative Litig., C-06-3290 MMC, 2006 WL 3533024, at *3 (N.D. Cal. Dec. 7, 2006) (Comp. Tab D).

Plaintiff's arguments that demand is excused because all of the Director Defendants face a substantial likelihood of personal liability for a failure of directorial oversight fare no better. The Amended Complaint does not allege a sustained or systematic failure of oversight as required to state such a claim. Indeed, Plaintiff's arguments boil down to an impermissible assertion that, because misconduct allegedly occurred, all Director Defendants are liable for not implementing controls to prevent that misconduct. Much more is required under the Delaware Supreme Court's recent ruling in Stone v. Ritter, 911 A.2d 362 (Del. 2006) -- Plaintiff must plead, at a minimum, particularized facts showing that the Director Defendants knew they were not satisfying their fiduciary obligations. The Amended Complaint does not meet that standard.

The Opening Brief also sought dismissal because Plaintiff does not satisfy the contemporaneous ownership rule. Plaintiff does not dispute that he was not a stockholder at the relevant time, and instead relies upon the "continuing wrong" exception. However, under long-standing Delaware law, any right of action in respect of stock options is triggered by the grant of such options, not the exercise thereof, and the continuing wrong exception thus cannot apply.

In addition, the Amended Complaint fails to state a claim. Indeed, the Answering Brief confirms that the Amended Complaint lacks allegations of fact to support any claim against any Defendant.

The Answering Brief also fails to overcome the applicable three-year limitations period. The Amended Complaint simply does not contain any particularized facts sufficient to demonstrate that the limitations period was tolled.

ARGUMENT

I. PLAINTIFF DOES NOT SATISFY THE HEIGHTENED PLEADING REQUIREMENTS DELAWARE COURTS APPLY TO CLAIMS OF "DEMAND FUTILITY."

To adequately plead demand futility, Plaintiff must allege particularized facts sufficient to demonstrate that at least three of the six Director Defendants (four of whom are outside directors) are either (i) interested in the underlying conduct and, if so, whether any of the other Board members are unable to act independently of the interested director(s) or (ii) face a substantial likelihood of personal liability for any of the conduct alleged in the complaint. Guttman v. Huang, 823 A.2d 492, 501-03 (Del. Ch. 2003). As the Answering Brief confirms, the Amended Complaint does neither.

A. The "Plainly Meritless" Landry Allegations Are Insufficient To Excuse Demand.

Plaintiff relies almost exclusively on the Landry allegations in purported support of his otherwise conclusory demand futility allegations. (Am. Compl. ¶¶ 36-39, 68(g), 68(h), 68(j), 68(n); Ans. Br. at 8-9, 12-14, 20-23.) Indeed, the Answering Brief argues that Landry's allegations "clearly" demonstrate, among other things, that (i) Mr. Smith "approved, ratified, failed to halt and even enforced the manipulation of stock options" and (ii) "the Compensation Committee was completely and utterly ineffective." (Ans. Br. at 10.) Tellingly, however, Plaintiff does not -- nor could he -- cite to a single specific Landry allegation to support those non-particularized conclusions.

There is no support whatsoever in the Landry allegations for Plaintiff's (reckless) assertion that Mr. Smith "approved, ratified, failed to halt and even enforced the manipulation of stock options." (Id.) The only allegation Landry asserts in

connection with the granting of stock options as to Mr. Smith is a non-particular "and/or" allegation that Mr. Smith may have approved certain grants: "stock option grants were approved for all of the above individuals by Fran Jewels and/or Daniel Smith." (Landry Complaint ¶ 26 (emphasis added).) But missing from the Landry Complaint (and Plaintiff's Amended Complaint) are necessary particulars such as when did Mr. Smith approve those stock option grants, when did he allegedly "know" of any option "backdating" and what stock option grants did he "approve[ ], ratif[y], fail[ ] to halt and even enforce[ ]." (Ans. Br. at 10.) Absent those types of specific allegations, Landry's (and Plaintiff's) conclusions as to Mr. Smith's purported knowledge or participation in any alleged wrongdoing are of no avail.

Similarly deficient is Plaintiff's conclusion that the Landry allegations "clearly" demonstrate that the "Compensation Committee was completely and utterly ineffective." (Id.) At most, Landry's allegations (including the Landry Memo) suggest that a few individuals (none of whom were ever directors) took steps to actively conceal misconduct from the Board. (See Landry Complaint ¶ 27 (alleging that two former Company employees drafted and exchanged the Landry Memo).) See also Am. Compl. ¶ 68(j) (alleging that unidentified non-director employees "took steps to circumvent the audit procedures.") (emphasis added).) Plaintiff attempts to sidestep those allegations by *arguing* that those former employees exploited "obvious, well-known, holes in the Company's audit control system," "management and other employees knew this and exploited these deficiencies," and those purportedly defective controls were "well known" and an "open secret." (Ans. Br. at 1, 9, 23.) Yet again, those arguments are

conclusions, not particularized factual allegations and, as discussed more fully below, nothing more than an impermissible attempt to, "[w]ith the benefit of hindsight, . . . equate a bad outcome with bad faith." Stone, 911 A.2d at 373. Those sorts of hindsight criticisms are inadequate to excuse demand.

Further, Judge Gants of the Massachusetts Superior Court recently dismissed Landry's Complaint with prejudice, holding that Landry's claims were "plainly meritless as a matter of law." Landry v. Sycamore Networks, Inc., Civ. A. No. 06-4242-BLS2, slip op. at 1 (Mass. Super. Ct. Jan. 24, 2007) (emphasis added). It is ironic that Plaintiff -- who is ostensibly acting in the best interests of the Company -- would identify as a purported whistleblower a former Company employee who attempted to extort more than $10 million from Sycamore Networks. (Ans. Br. at 12, 21-22.)

B. Plaintiff's Conjecture That The Director Defendants "Control" The Release Of Public Information Is Insufficient To Demonstrate Director "Interest."

The first prong of the Rales/Guttman demand futility analysis instructs a court to determine whether a complaint contains particularized facts sufficient to demonstrate that a director is "interested." Guttman, 823 A.2d at 502; Rales v. Blasband, 634 A.2d 927, 934 (Del. 1993).

In the Opening Brief, Defendants demonstrated that Plaintiff's allegations lack the requisite particularity to demonstrate that any Director Defendant was "interested" (i.e., involved in a transaction with Sycamore Networks that would render him incapable of considering a demand). (Opening Br. at 9-12.) Defendants also showed that Plaintiff's allegations that Messrs. Barrows, Chisholm, Ferri and Gerdelman received

backdated stock options are not only conclusory, but also are contradicted by the public record. Consequently, they fail as a matter of law to demonstrate director interest. (Id.)

The Answering Brief now concedes that those option grants were automatic and therefore could not have been "backdated." (Ans. Br. at 7, 26.) Instead, Plaintiff speculates that "substantial doubt exists regarding the propriety of those grants" because they "came closely on the heels of negative news to the market." (Id. at 26.) According to Plaintiff, the Director Defendants, "by virtue of their control over the public flow of information," *might have* timed that negative news to coincide with their option grants. (Id.) Such conjecture is not enough.

A very recent option "backdating" case held a nearly identical allegation inadequate as a matter of law to plead director interest. In re Linear, 2006 WL 3533024, at *3 (applying Delaware law and dismissing derivative complaint for failure to plead demand futility with requisite particularity). In Linear, plaintiffs brought a shareholder derivative action alleging that the individual officer and director defendants breached fiduciary duties by improperly backdating stock options and filing false financial statements that improperly accounted for the stock option grants. Id. at *1. As in this case, plaintiffs in Linear alleged that demand was excused because certain directors received allegedly backdated stock options. Id. In support of this allegation, plaintiffs alleged that those directors received stock options "just after a sharp drop" and "just before a substantial rise" in stock price. Id. at *3.

The Court analyzed those allegations and concluded that plaintiffs provided "no facts as to how often and at what times the [directors] have granted stock options in the past," and, therefore, "failed to plead with the particularity required . . . that a reasonable doubt exists as to whether any of the four [directors] is disinterested or independent." Id. Accordingly, the Court granted the motion to dismiss the complaint.

As in Linear, Plaintiff's allegations of director receipt of purportedly backdated stock options do not excuse demand. Absent from the Amended Complaint are any particularized facts that any director intentionally manipulated the grant date of any stock option or, as Plaintiff now speculates, "control[s] . . . the public flow of information." (Ans. Br. at 26.) Indeed, there are no facts concerning, for example, any Director Defendant's role in the preparation and release of financial information. Rather, Plaintiff merely identifies two stock option grant dates and concludes that those stock option grants must have been "backdated" or "modified" because those grants "immediately preced[ed] a . . . climb in the Company's stock within twenty days of the date of the grant[s] and located close to the quarterly low." (Am. Compl. ¶ 47, 48.) That type of non-specific allegation is insufficient as a matter of law to demonstrate director interest. In re Linear, 2006 WL 3533024, at *3.

Also inadequate is Plaintiff's unsubstantiated assertion that "it is simply inexplicable that, in connection with the internal investigation, the Audit Committee did not scrutinize and correct grants made to its own members that were likely the product, even if only indirectly, of the Company's illegal practices." (Ans. Br. at 26.) As discussed in more detail below, neither the Amended Complaint nor the Answering Brief

identifies any facts regarding what the Audit Committee did or did not scrutinize, what is still being evaluated, and what conclusions were reached. Indeed, outside of empty rhetoric, there are no facts whatsoever concerning the particulars of the Audit Committee's investigation.

C. The Answering Brief Does Not Rectify Plaintiff's Failure To Adequately Allege That At Least Three Director Defendants Face A Substantial Likelihood Of Liability.

The second prong of the Rales/Guttman demand futility analysis instructs a court to evaluate whether a complaint pleads particularized facts sufficient to demonstrate that at last 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 (emphasis added); Rales, 634 A.2d at 936.

The Answering Brief principally argues that all of the Director Defendants face a substantial likelihood of personal liability for a failure of directorial oversight -- a "Caremark" claim. (Ans. Br. at 18-25.) The Answering Brief also argues that all of the Director Defendants face a substantial likelihood of personal liability for purportedly failing to institute litigation against the alleged wrongdoers. (Id. at 25-26.)

Neither of those theories, however, are supported with the particularized facts required by Rule 23.1 as strictly applied by Delaware precedent.

1. Plaintiff fails to demonstrate that any Director Defendant faces a substantial likelihood of liability for a lack of oversight.

The Delaware Supreme Court recently held that in order to adequately plead directorial oversight liability, a plaintiff must put forth particularized facts demonstrating either that the board (i) utterly failed in implementing a reporting or

information system or (ii) consciously failed to monitor or oversee those operations, and that in so doing, the directors knew they were not fulfilling their fiduciary duties. Stone, 911 A.2d at 369-70. Indeed, the Court held that those particularized allegations must demonstrate a "sustained or systematic" failure of oversight. Id. at 369. As confirmed by the Answering Brief, the Amended Complaint in this case fails to do that.

The Answering Brief *argues* that the Amended Complaint "specifically alleged" that (i) the Company's internal controls "were woefully inadequate and deficient," (ii) the Audit Committee "had every reason to know" about the alleged misconduct, (iii) the Board "without question, knew about the illegal practices after Landry came forward with the Memo," and (iv) the Board "failed utterly in its initial internal investigation." (Ans. Br. at 20.) Those *arguments*, however, are not supported by particularized factual *allegations*. Indeed, the Answering Brief does not cite to any paragraph of the Amended Complaint to support those conclusions. (See id.)

Moreover, Plaintiff's effort to distinguish the dispositive authorities cited in the Opening Brief is nothing more than an assertion that those cases are inapposite because demand futility was not adequately pled in any of those situations. (Ans. Br. at 19-20.) That is no argument at all. As demonstrated below, the Amended Complaint in this case fails to plead that any Director Defendant faces a substantial likelihood of personal liability for the identical reasons that the complaints in Guttman, Stone and the scores of other cases applying Delaware law were found to be deficient and, consequently, dismissed.

a. The "management" directors do not face a substantial likelihood of liability by virtue of their membership on the Board.

The Answering Brief impermissibly argues that the two management directors -- Messrs. Deshpande and Smith -- are disqualified from considering a demand because they were "member[s] of the Board, and as such [are] responsible for the failure of the Board to institute and maintain audit controls sufficient to prevent the underlying wrongdoing." (Ans. Br. at 21 (emphasis added).)

Plaintiff, however, does not substantiate those "position-based" conclusions with a single specific factual allegation that purports to establish that either Mr. Deshpande or Mr. Smith participated in the alleged misconduct, or that information was available that would have alerted them to it.[3] (Id.) Indeed, the Answering Brief does not cite to any allegations at all. The mere fact that Messrs. Deshpande and Smith are directors -- without any particularized factual allegations as to their knowledge or participation in alleged wrongdoing -- is insufficient as a matter of law to establish a substantial likelihood of personal liability. Rattner v. Bidzos, Civ. A. No. 19700, 2003 WL 22284323, at *10 n.53 (Del. Ch. Oct. 7, 2003) (noting that conclusory allegations of directors' knowledge of wrongdoing based on their status as directors are insufficiently particular).

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[3] As to Mr. Smith, the Answering Brief mentions the Landry allegations (Ans. Br. at 21) but, as discussed above, those allegations are insufficiently particular and fail to demonstrate that Mr. Smith either participated in any alleged misconduct or knew of any wrongdoing. (See supra Part I.A.)

b. Mere membership on Board committees does not demonstrate a substantial likelihood of liability.

Plaintiff also impermissibly argues that the four outside directors -- Messrs. Barrows, Chisholm, Ferri and Gerdelman -- face a substantial likelihood of personal liability by the mere fact of their positions on the Compensation and/or Audit Committees. (Ans. Br. at 22-24.) This argument fails for at least three reasons:

First, conclusory allegations of liability based upon membership of a Board committee will not suffice to excuse demand. See, e.g., Kenney v. Koenig, 426 F. Supp. 2d 1175, 1183 (D. Colo. 2006) ("All that plaintiffs' Amended Complaint and Response ostensibly demonstrates is that Carrier had an audit committee and the four independent outside director defendants were members of this committee during the period where the accounting improprieties occurred. That is not enough."); Egelhof v. Szulik, Civ. A. No. 04-CVS-11746, 2006 WL 663410, at *9 (N.C. Super. Ct. Mar. 13, 2006) (holding that allegations of committee membership insufficient to excuse demand because "the demand requirement would be rendered void in all cases where a company opts to restate earnings. Such a ruling would be inconsistent with the public policy that corporations act diligently to correct reported earnings when mistakes or inconsistencies are discovered or where current accounting practices dictate a change in reporting practices.") (Comp. Tab B).

Second, there are no allegations whatsoever concerning what any outside director knew about the Company's internal controls or when they knew it. Indeed, absent from the Amended Complaint are necessary particulars such as "how often and how long [the Compensation and Audit Committees] met, who advised the Committee[s],

and whether the Committee[s] discussed and approved of the allegedly improper [ ] practices." Guttman, 823 A.2d at 498. See also Rattner, 2003 WL 22284323, at *12 ("conspicuously absent from any of the Amended Complaint's allegations are particularized facts regarding the Company's internal financial controls . . . . [or] the Board's involvement in the preparation of the financial statements and the release of financial information to the market.").

Third, although Plaintiff *argues* that the "most obvious of red flags was waved in front" of the Board, the Answering Brief does not identify what those purported "red flags" were or when they were presented to the Board. (Ans. Br. at 22). See Stone, 911 A.2d at 373 ("In the absence of red flags, good faith in the context of oversight must be measured by the directors' actions 'to assure a reasonable information and reporting system exists' and not by second-guessing after the occurrence of employee conduct that results in an unintended adverse outcome." (citation omitted)). To the extent the Answering Brief is referring to the Landry allegations and/or Landry Memo as a "red flag," those too are insufficient. All that those allegations do is, at most, suggest that there was a conscious effort to conceal any alleged misconduct from the Board. (See supra Part I.A.) That, of course, is the exact opposite of "red flags [ ] waved in front of them." (Ans. Br. at 22.)

c. The Audit Committee Directors do not face a substantial likelihood of liability for an allegedly inadequate investigation.

The Answering Brief further argues that Messrs. Chisholm, Ferri and Gerdelman (the current Audit Committee members) face a substantial likelihood of personal liability because they conducted a limited investigation after receipt of the Landry Memo. (Ans. Br. at 23.) According to Plaintiff, the Audit Committee "apparently limited its investigation to focus on the [Landry] Memo to the exclusion of a broader investigation." (Id.)

Yet again, those *arguments* are not supported by particularized factual *allegations*. For example, entirely absent from the Amended Complaint are any facts as to what the Audit Committee investigated, what the Audit Committee did, what information was available and when, who advised the Audit Committee, when the Audit Committee met, what was discussed, and what conclusions were reached and why. Guttman, 823 A.2d at 498.

Sufficiently pleading demand futility under Delaware law requires more than "precious little investigation beyond perusal of the morning newspapers." Beam v. Stewart, 833 A.2d 961, 882 (Del. Ch. 2003). Indeed, Delaware courts acknowledge that pleading with particularity is a difficult standard to meet because plaintiffs have certain "tools at hand" to conduct an investigation, and are encouraged to avail themselves of those facts prior to filing suit. See Rales, 634 A.2d at 935 n.10 ("Although derivative plaintiffs may believe it is difficult to meet the particularization requirement of Aronson . . . they have many avenues available to them to obtain information bearing on

the subject of their claims"). Indeed, had Plaintiff done a proper investigation of his claims before filing this lawsuit, he may have discovered the particulars of the Audit Committee's investigation.

d. Plaintiff's "imputation of knowledge" argument is contrary to Delaware law.

Unable to plead knowledge with the requisite particularity, Plaintiff argues that "[w]here one or more members of a board know of or should know of internal company violations, that knowledge should be imputed to the full board." (Ans. Br. at 24.) Plaintiff's "imputation" argument fails, however, because it is contrary to Delaware law, and also because Plaintiff has not alleged with particularity facts demonstrating that any Director Defendant had knowledge of any alleged misconduct.

First, Plaintiff's blanket assertion is as erroneous as it is contrary to the long-established principle of Delaware law that a plaintiff must plead particularized facts, specific to each director, sufficient to demonstrate that at least half of the directors could not have exercised their presumed disinterested and independent judgment in responding to a demand, had one been made. Beam v. Stewart, 845 A.2d 1040, 1049-50 (Del. 2004) (affirming dismissal on demand futility grounds because the complaint failed to allege individually particularized facts that a majority of the board was not independent). Indeed, Plaintiff's imputation argument is just a variation of the impermissible theme of charging directors with knowledge of wrongdoing by virtue of their positions on the board. Rattner, 2003 WL 22284323, at *10 n.53 (rejecting allegation of director knowledge based on "access to internal corporate documents . . . conversations and

connections with other corporate officers and employees, attendance at management and Board of Directors['] meetings and committees thereof") (bracket in original).

Second, Plaintiff's reliance on Saito v. McCall, Civ. A. No. 17132-NC, 2004 WL 3029876 (Del. Ch. Dec. 20, 2004) is misplaced. (Ans. Br. at 24.) Saito represents a rare occasion where if a plaintiff adequately pleads that certain members of the boards of two merging companies had prior knowledge of accounting issues, that knowledge can be imputed to the new board of the merged entity. Saito, 2004 WL 3029876, at *7 n.68 In that case, shareholder plaintiffs derivatively sued McKesson HBOC, Inc., the newly formed entity resulting from the merger of McKesson Corporation and HBO & Company, based on allegations stemming from the approval of the merger despite prior knowledge of an allegedly fraudulent accounting scheme at HBO & Company. Id. at *1. Vice Chancellor Chandler dismissed the majority of plaintiffs' claims on the grounds of standing pursuant to 8 Del. C. § 327, failure to state a claim under Rule 12(b)(6) and failure to adequately plead demand futility pursuant to Rule 23.1. Id. at *11.

The Court held, however, that one of plaintiffs' remaining claims, which "appears -- barely -- to state a claim under Caremark," was sufficient to excuse demand because "the well-pled facts [are] sufficient to infer that separately, both the HBOC and McKesson boards were aware (or should have been) of accounting irregularities at HBOC." Id. at *7 (emphasis added). Because plaintiff adequately alleged that "[t]he HBOC audit committee knew that the 1997 audit was 'high risk[,]' . . . discussed the accounting risks . . . in general and specifically discussed the risks arising from HBOC's

sales practices [and] the McKesson board came to know that certain HBOC accounting practices were a problem," the Court imputed the knowledge of the HBOC's audit committee to the combined McKesson HBOC board. Id. at *7, *7 n.68 (emphasis added). As the Court explained:

> Here . . . the allegations of knowledge stem beyond articles in trade magazines and newspapers. Plaintiffs have alleged well-pled facts that indicated at least four members knew of HBOC accounting problems -- the three members of the audit committee and McCall [HBO & Company CEO]. A reasonable inference, which the Court is entitled to draw at this procedural stage, is that that information was communicated to the other HBOC board members who later served on McKesson HBOC's board.

Id. at *7 n.68 (emphasis added).

In this case, by contrast, Plaintiff does not allege particularized facts sufficient to establish that Mr. Smith or any other Director Defendant knew of any misconduct or knew that any internal controls were deficient or otherwise inadequate. Indeed, unlike in Saito, there are no particularized facts that any Director Defendant "specifically discussed" alleged problems with any other Director Defendant. Saito, 2004 WL 3029876, at *7. Put simply, there is nothing to impute.[4]

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[4] Plaintiff's argument that purported "knowledge" of Ms. Jewels -- a non-director -- should be imputed to the Board because she was allegedly "required to attend all Board meetings" is also inadequate to charge any Director Defendant with knowledge of Ms. Jewels' alleged wrongdoing. (Ans. Br. at 24-25.)

2. Plaintiff fails to demonstrate that any Director Defendant faces a substantial likelihood of liability for not yet initiating litigation.

The Answering Brief also argues that the Director Defendants face a substantial likelihood of personal liability for failing to initiate litigation against the alleged wrongdoers. (Ans. Br. at 25-26.) That argument fails to excuse demand for at least three independently sufficient reasons:

First, Plaintiff's argument is, at best, premature; the Audit Committee's investigation has not yet concluded, and the Board may still initiate litigation once that investigation is complete. Plaintiff's own authority makes plain that absent particularized allegations that the Board made a decision regarding whether to initiate litigation, arguments of a failure to rectify wrongs are insufficient to excuse demand. See Saito, 2004 WL 3029876, at *5 (dismissing fiduciary duty claim for failing to pursue claims against third parties for monetary redress as "deficient on the grounds of ripeness because plaintiffs fail to allege that the [director defendants] have made a definitive decision to sue any of the Third Parties"). Indeed, there are no allegations at all -- nor could there be -- concerning what the Board decided or decided not to do. That alone is dispositive. Lewis v. Graves, 701 F.2d 245, 249 (2d Cir. 1983) ("bald charges of mere failure to take corrective action are similarly inadequate to demonstrate futility").

Second, also inadequate are Plaintiff's arguments that the Director Defendants made a decision to "not assert claims on behalf of the Company . . . [because] to do so would have negatively impacted their self-interest," and that those whom they sued "would undoubtedly have brought to light the acts and omissions of the Director

Defendants." (Ans. Br. at 25.) Not only does Plaintiff fail to support that *argument* with particularized *allegations*, that argument is also an impermissible attempt to allege demand futility based on the uniformly rejected mantra of a reluctance of directors to sue themselves. 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").

Third, even if Plaintiff had adequately alleged that the Board decided not to initiate litigation -- and he has not -- the decision about whether to pursue such litigation is protected by the presumption of good faith inherent in the business judgment rule. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) ("It is the presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company."). Plaintiff's argument (and the conclusory allegations in the Amended Complaint) are wholly insufficient to overcome that presumption.

3. The Answering Brief does not overcome the applicability of Sycamore Networks' exculpatory clause.

In hopes of avoiding the immunizing effect of the exculpatory clause in Sycamore Networks' Certificate of Incorporation, the Answering Brief asserts that the exculpatory provision under § 102(b)(7) is only an affirmative defense and "do[es] not protect against 'duty of loyalty violations, good faith violations and certain other conduct." (Ans. Br. at 27 (citing Emerald Partners v. Berlin, 787 A.2d 85, 90 (Del. 2001)).) Plaintiff is wrong in two respects:

First, for the purposes of Rule 23.1, it is irrelevant whether the exculpation clause should only be raised as an affirmative defense. It is Plaintiff's burden to demonstrate with particularity a substantial likelihood of personal liability. See Beam, 845 A.2d at 1048. Where -- as here -- an exculpatory provision negates any liability, Plaintiff fails to carry that burden.

Second, as Plaintiff's own authority demonstrates (see Ans. Br. at 27), an exculpation clause can be raised pre-trial -- as it has been in other demand futility cases. See Emerald Partners v. Berlin, 787 A.2d 85, 91 n.35 (Del. 1995) ("[t]he Section 102(b)(7) bar may be raised on a Rule 12(b)(6) motion to dismiss") (quoting Malpiede v. Townson, 780 A.2d 1075, 1093 (Del. 2001)).[5] As discussed in detail above, the well-pled facts of the Amended Complaint are insufficient to demonstrate a breach of the duty of loyalty or bad faith conduct on the part of any Director Defendant. Accordingly, Defendants are entitled to "dismissal because the [Amended Complaint] fails to properly plead a claim . . . premised on behavior not immunized by the exculpatory charter provision." McMillian v. Intercargo Corp., 768 A.2d 492, 501-02 (Del. Ch. 2000).

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[5] Plaintiff's reliance on Desert Equities, Inc. v. Morgan Stanley Leverage Equity Fund, 624 A.2d 1199 (Del. 1993) is misplaced, as that case involved a direct cause of action for breach of fiduciary duty, which fell under the general notice pleading standard. Plaintiff, here, however, must satisfy the heightened pleading standard under Rule 23.1, and his claims can be dismissed at the pleading stage for failure to plead demand futility with particularity. See Del. Ch. Ct. R. 23.1; Brehm v. Eisner, 746 A.2d 244, 254 (Del. 2000); Desert Equities, Inc., 624 A.2d at 1207 n.10 (distinguishing the notice pleading standard in that case, which did not require pleading with particularity, and the particularized pleading standard required by Rule 23.1).

II. THE ANSWERING BRIEF DOES NOT OVERCOME PLAINTIFF'S LACK OF STANDING TO CHALLENGE ANY ALLEGED MISCONDUCT THAT OCCURRED DURING 1999 TO 2001.

According to the Amended Complaint, the "underlying wrongful stock option grants alleged herein occurred during the period of 1999-2001." (Am. Compl. ¶ 69). The Amended Complaint also alleges that Plaintiff did not purchase Sycamore Networks stock until February 4, 2002 -- a year after the alleged misconduct occurred. (Id. at ¶ 13). Accordingly, pursuant to Rule 23.1 and 8 Del. C. § 327, because Plaintiff was not a Sycamore Networks shareholder in 1999 to 2001, he cannot bring claims based on misconduct during that time period. (Opening Br. at 23-24.)

Plaintiff attempts to sidestep the contemporaneous ownership requirement by arguing that he "held stock during the period of continuing wrongs, including the Restatements, the cover up of the wrongs, the limited scope of the internal investigation conducted by the Audit Committee, the failure to require disgorgement or any penalty including discharge of wrongdoers and the ongoing investigations by the U.S. Attorney and SEC." (Ans. Br. at 46.) That "continuing wrong" argument, however, fails because "the wrong or injury of which plaintiff complains is the granting of the options, not the exercise thereof. The action is therefore not a continuing one." Elster v. Am. Airlines, 100 A.2d 219, 224 (Del. Ch. 1953) (granting summary dismissal for lack of standing on claims related to the validity of stock option grants) (citation and internal quotation omitted) (emphasis added).

Further, the cases cited by Plaintiff actually contradict his contention that he has met the standing requirements based on a "continuing wrongs" theory:

- Newirk v. W.J. Rainey Inc., 76 A.2d 121, 123 (Del. Ch. 1950) (granting motion to dismiss for lack of standing since the transaction occurred before shareholder's ownership). "Although a conspiracy . . . is alleged, . . . the fact is that plaintiffs complain of and seek relief with respect to three specific transactions . . . [that] are the wrongful acts which plaintiffs want remedied and which are susceptible of being remedied in a legal tribunal. The allegation of a conspiracy cannot obscure the hard fact that the stock purchases are the wrongs which plaintiffs want rectified." Id. at 123 (emphasis added).

- Chirlin v. Crosby, Civ. A. No. 6632, 1982 WL 17872, at **2-3 (Del. Ch. Dec. 7, 1982) (granting motion to dismiss for lack of standing because alleged wrong was not "continuing" wrong). "The allegations of a continuing wrong in the complaint merely attempt to obscure the fact that the plaintiffs are actually complaining about the alleged diversion which took place in 1966 [twelve years before plaintiff obtained stock]." Id. at *2.

- Saito v. McKesson HBOC, Inc., 806 A.2d 113, 117 (Del. 2002). The Delaware Supreme Court addressed the possibility of continuing wrong in relation to a Section 220 books and records request, not in relation to satisfying the contemporaneous ownership requirement of Rule 23.1.

III. PLAINTIFF FAILS TO SUFFICIENTLY PLEAD ANY OF HIS CLAIMS.

Separate and apart from Plaintiff's failure to adequately plead demand futility, the complete lack of supporting factual allegations also warrants dismissal pursuant to Rule 12(b)(6). (Opening Br. at 24-28.) Rule 12(b)(6) "requires that when evaluating a motion to dismiss for failure to state a claim, the truthfulness of all well-pleaded allegations in the complaint is to be assumed." Solomon v. Pathe Commc'ns Corp., 672 A.2d 35, 38 (Del. 1996) (citing Grobow v. Perot, 539 A.2d 180, 187 n.6 (Del. 1998) (emphasis added).) However, "[c]onclusions . . . will not be accepted as true without specific allegations to support them." Id. (citation omitted) (emphasis added).

The Amended Complaint does not state a claim because Plaintiff fails to provide any specific factual allegations to support any of the claims against any Defendant. (See Opening Br. at 24-26.) The Answering Brief's "count-by-count" recitation does not cure the Amended Complaint's insufficiency to meet the minimal notice requirements of Rule 12(b)(6). (See Ans. Br. at 29-38.) The Answering Brief merely repeats the conclusory allegations asserted in the Amended Complaint, but offers nothing to substantiate those conclusions. (Id.)

Count I (Breach of Fiduciary Duty)

Plaintiff asserts Count I against all Defendants but nowhere pleads any facts as to any Defendant concerning what they knew and when they knew it. Indeed, Plaintiff does not even allege that the Landry Memo was drafted by any Defendant or shown to any Defendant until the commencement of the Board's investigation. Further, there are no allegations at all (whether particularized or conclusory) that Ms. Brearton or Messrs. Trampedach, Kiel and Oye breached any fiduciary duties.

Count II (Aiding and Abetting Breach Of Fiduciary Duty)

For substantially the same reasons as Count I, Count II should be dismissed because conclusory allegations such as those here fail to satisfy the stringent pleading requirement for an aiding and abetting claim. Saito, 2004 WL 3029876, at *9 (dismissing aiding and abetting claim for failure to plead such a claim with specific facts) (citing Malpiede, 780 A.2d at 1097-98).

Moreover, Plaintiff purports to assert an aiding and abetting claim against fiduciaries. (Am. Compl. ¶ 79.) Under Delaware law, however, an aiding and abetting

claim can only be asserted against non-fiduciaries. See Nebenzahl v. Miller, Civ. A. No. 13206, 1996 WL 494913, at *7 (Del. Ch. Aug. 29, 1996) (observing that to succeed on an aiding and abetting claim, plaintiff must prove that "a defendant, who is not a fiduciary, knowingly participated in a breach") (emphasis added) (Comp. Tab E).

Count III (Unjust Enrichment)

Plaintiff's unjust enrichment claim should be dismissed because Plaintiff has not adequately alleged that any of the stock option grants identified in the Amended Complaint that are alleged to have been received by any Defendant were backdated or modified. (Am. Compl. ¶¶ 43, 47, 48, 49.) Indeed, Plaintiff's only allegation in this regard is that those option grants must have been backdated because they "immediately preced[ed] a . . . climb in the Company's stock within twenty days of the date of the grant[s] and located close to the quarterly low." (See, e.g., Am. Compl. ¶¶ 42, 43, 45, 47, 48.) That sort of allegation, however is insufficient as a matter of law. In re Linear, 2006 WL 3533024, at *3.

Count IV (Gross, Reckless and Intentional Mismanagement)

Count IV fails to state a claim because Plaintiff offers no more than conclusory allegations that any Defendant engaged in misconduct or knew of any misconduct. Further, and similar to Count I, there are no allegations at all concerning the purported mismanagement of Ms. Brearton or Messrs. Trampedach, Kiel or Oye.

Count V (Waste)

Similarly, Count V fails to state a claim because Plaintiff's allegations are insufficient to demonstrate option backdating. In re Linear, 2006 WL 3533024, at *3. Further, Plaintiff's wholly conclusory allegations fall far short of meeting the high standard for a waste claim that is "very rarely satisfied by a shareholder plaintiff." Criden v. Steinberg, Civ. A. No. 17082, 2000 WL 354390, at *3 (Del. Ch. Mar. 23, 2000) (rejecting similarly conclusive assertions and dismissing shareholder plaintiff's waste claim for director-approved re-priced option grants) (Comp. Tab A).

Count VI (Breach of Contract)

Plaintiff's breach of contract claim is predicated upon certain Defendants' receipt of allegedly backdated stock options. (Ans. Br. at 38.) This claim, however, fails for the same reason as Count III: that is, Plaintiff does not sufficiently allege that any of those stock option grants were backdated or otherwise modified. In re Linear, 2006 WL 3533024, at *3.

In sum, all of Plaintiff's counts fail to state a claim, and should therefore be dismissed. See Solomon, 672 A.2d at 40.

IV. THE ANSWERING BRIEF CONFIRMS PLAINTIFF CANNOT MEET *HIS* BURDEN OF DEMONSTRATING THAT THE STATUTE OF LIMITATIONS WAS TOLLED.

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.) Therefore, at the latest, with the exception of the 2003 director grants, Plaintiff's claims accrued in 2002, and the three year statute of limitations period for

those claims expired in 2005 -- before Plaintiff filed this case. See In re Dean Witter P'ship Litig., Civ. A. No. 14816, 1998 WL 442456, at *4 (Del. Ch. July 17, 1998) ("the cause of action accrues, at the time of the alleged wrongful act, even if plaintiff is ignorant of the cause of action").

Plaintiff does not challenge Defendants' argument that he did not bring his claims within three years of the alleged wrongdoing. (Ans. Br. at 42-46.) Instead, Plaintiff argues that the applicable three-year statute of limitations period was tolled. (Id.) Plaintiff fails, however, to satisfy his burden of "pleading specific facts" to demonstrate any such tolling. In re Dean Witter P'ship Litig., 1998 WL 442456, at *6.

Plaintiff's single paragraph in the Amended Complaint conclusorily asserting tolling exceptions (Am. Compl. ¶ 69) is insufficient to satisfy his pleading burden. (See Opening Br. at 30-32.) In the Answering Brief, Plaintiff again contends the limitations period has been tolled "due to a pattern of affirmative acts of concealment and misrepresentations by Defendants in public filings." (Ans. Br. at 43.) That argument is insufficient; Plaintiff does not plead with the requisite particularity any affirmative acts of concealment preventing discovery of any purported misrepresentation, never mind a "pattern" of affirmative acts. See In re Dean Witter P'ship Litig., 1998 WL 442456, at *5 (requiring plaintiff to plead "an actual artifice" intended to place plaintiff off path of inquiry); Halpern v. Barran, 313 A.2d 139, 143 (Del. Ch. 1973) (plaintiff alleging fraudulent concealment must plead with particularity).

Recognizing that he can not satisfy that burden, Plaintiff instead attempts to improperly shift the burden to Defendants by asserting that he "has pled specific facts

of wrongdoing and affirmative acts of concealment that will prevent the Defendants from raising the affirmative defense of laches." (Ans. Br. at 45.) Plaintiff (again) fails to cite a single Amended Complaint paragraph to support that argument. (Id.) That failure is not surprising: the Amended Complaint does not contain those "specific facts," but instead "alleges facts that show that the complaint [was] filed too late," and should therefore be dismissed. Kahn v. Seaboard Corp., 625 A.2d 269, 277 (Del. Ch. 1993).

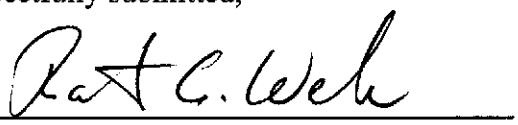
Even if the statute of limitations were tolled, however, Plaintiff was placed on inquiry notice more than three years before the filing of the Amended Complaint, as Sycamore Networks' SEC filings (such as proxy statements) are sufficient to place Plaintiff on inquiry notice. (Opening Br. at 32). Plaintiff's argument that "defendants cannot point to a single public document that would have put Plaintiff on inquiry notice that certain Defendants manipulated option exercise prices" is wrong. (Ans. Br. at 44.) Plaintiff's allegations of "backdating" merely consist of Plaintiff inserting charts of stock option grant dates and plotting Sycamore Networks' stock price in the weeks preceding and following those grants. (Am. Compl. ¶¶ 42-49.) That same information was available to Plaintiff long ago, and well within the limitations period. Accordingly, Plaintiff's claims are time-barred.

CONCLUSION

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

Dated: February 6, 2007
Wilmington, Delaware

Respectfully submitted,



Anthony W. Clark (#2051)
Robert A. Weber (#4013)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Rodney Square
P.O. Box 636
Wilmington, Delaware 19899
(302) 651-3000

Counsel for Nominal Defendant
Sycamore Networks, Inc. and Defendants
Gururaj Deshpande, Daniel E. Smith,
Anita Brearton, Kurt Trampedach,
Jeffry A. Kiel and Kevin J. Oye

-and-

John D. Donovan, Jr.
Bonnie Schroeder McGuire
ROPES & GRAY LLP
One International Place
Boston, Massachusetts 02110
(617) 951-7000

Counsel for Defendants
Timothy A. Barrows, Paul W. Chisholm,
Paul J. Ferri and John W. Gerdelman

Of counsel:

James R. Carroll
Michael S. Hines
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Beacon Street
Boston, Massachusetts 02108
(617) 573-4800