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Case No. Multi-case

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SHELDON DUBROFF and MERVYN KLEIN on behalf of themselves and all others similarly situated,	:	
Plaintiffs,	:	
v.	:	**C.A. No. 3940-VCN**
WREN HOLDINGS, LLC, JAVVA PARTNERS, LLC, CAMERON FAMILY PARTNERSHIP, L.P., CATALYST INVESTORS, L.P., CHRISTOPHER SHIPMAN, ANDREW T. DWYER, DORT A. CAMERON, III, HOWARD KATZ, TROY SNYDER; and NINE SYSTEMS CORPORATION,	:	
Defendants.	:	

MORRIS FUCHS, TRUST FBO CHAIM ABIKHZER, TRUST FBO MOISHE ABIKHZER, TRUST FBO NAFTALI ABIKHZER, SUSAN ABIKHZR, SUSAN RAUSMAN ABIKHZER TRUST, J. PAUL AMADEN, JAMES P. AMADEN, BERNARD FUCHS, THE GOLDEN FAMILY FUND, THE GREENBERG FAMILY FUND DBA ASR VENTURES LLC, CINDY HASSAN, CINDY RAUSMAN HASSAN TRUST, ELIE HASSAN, CH TRUST FOR NATHAN HASSAN, CH TRUST FOR RACHEL HASSAN, DAVID HOROWITZ, HOWARD HOROWITZ, STEVEN HOROWITZ, EDDY HSU, CARRIE KEATING, JOHN KEATING, GREGORY LOPRETE, MICHAEL LOPRETE, TRUST FBO BARRY RAUSMAN, TRUST FBO CHAYA ETTA RAUSMAN,	:

EMIL & JOAN RAUSMAN IREV. TRUST, HERBERT RAUSMAN, TRUST FBO JACOB J. RAUSMAN, TRUST FBO PEARL RAUSMAN, RAUSMAN 1977 LIFE INSURANCE TRUST, RIVKAH RAUSMAN, TRUST FBO 7 GRANDCHILDREN, CAROLINE RECKLER, GILLIAN RECKLER, JON RECKLER, STEPHANIE RECKLER, SHLOMO SCHON, EDWARD STRAFACI, LINDA STRAFACI, JOANNE S. VISOVSKY, MICHAEL B. VISOVSKY, and BARRY WIEN,	:	
Plaintiffs,	:	
v.	:	**C.A. No. 6017-VCN**
WREN HOLDINGS, LLC, JAVVA PARTNERS, LLC, CAMERON FAMILY PARTNERSHIP, L.P., CATALYST INVESTORS, L.P., CHRISTOPHER SHIPMAN, ANDREW T. DWYER, DORT A. CAMERON, III, HOWARD KATZ, and TROY SNYDER,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: July 12, 2011
Date Decided: October 28, 2011

Seth D. Rigrodsky, Esquire and Brian D. Long, Esquire of Rigrodsky & Long, P.A., Wilmington, Delaware, and Laurence Rosen, Esquire, Phillip Kim, Esquire, and Timothy Brown, Esquire of The Rosen Law Firm, P.A., Attorneys for Plaintiffs Sheldon Dubroff and Mervyn Klein.

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Richard D. Heins, Esquire and Andrew D. Cordo, Esquire of Ashby & Geddes, Wilmington, Delaware, Attorneys for Defendants, and Richard G. Haddad, Esquire and Stanley L. Lane, Jr., Esquire of Otterbourg, Steindler, Houston & Rosen, P.C., New York, New York, Co-Attorneys for Defendants Wren Holdings, LLC, Cameron Family Partnership, L.P., Dort A. Cameron, III, Howard Katz, and Troy Snyder.

NOBLE, Vice Chancellor

I. INTRODUCTION

These actions involve two sets of plaintiffs who are former minority shareholders of Nine Systems Corporation ("NSC" or the "Company"). One set of plaintiffs, Sheldon Dubroff and Mervyn Klein (the "Dubroff Plaintiffs"), brought a purported class action on behalf of NSC's former shareholders alleging that some of NSC's former directors and its purported former control group breached their fiduciary duties. The Court dismissed most of the Dubroff Plaintiffs' claims in *Dubroff v. Wren Holdings, LLC*, allowing only a claim that the NSC board breached its fiduciary duties regarding disclosure, and a claim that some of the members of NSC's purported former control group aided and abetted that breach, to proceed.[1] The Court later refused to certify the Dubroff Plaintiffs' purported class action, leaving the Dubroff Plaintiffs to pursue their disclosure and aiding and abetting claims individually.[2] Thereafter, Morris Fuchs and forty-two other former NSC shareholders (collectively, the "Fuchs Plaintiffs")[3] filed a

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[1] 2009 WL 1478697, at *6 n.44 (Del. Ch. May 22, 2009) ("*Dubroff I*").
[2] *Dubroff v. Wren Holdings, LLC*, 2010 WL 3294219 (Del. Ch. Aug. 20, 2010).
[3] In addition to Morris Fuchs, the Fuchs Plaintiffs are Trust FBO Chaim Abikhzer, Trust FBO Moishe Abikhzer, Trust FBO Naftali Abikhzer, Susan Abikhzer, Susan Rausman Abikhzer Trust, J. Paul Amaden, James P. Amaden, Bernard Fuchs, The Golden Family Fund, The Greenberg Family Fund dba ASR Ventures LLC, Cindy Hassan, Cindy Rausman Hassan Trust, Elie Hassan, CH Trust for Nathan Hassan, CH Trust for Rachel Hassan, David Horowitz, Howard Horowitz, Steven Horowitz, Eddy Hsu, Carrie Keating, John Keating, Gregory Loprete, Michael Loprete, Trust FBO Barry Rausman, Trust FBO Chaya Etta Rausman, Emil & Joan Rusman Irev. Trust, Herbert Rausman, Trust FBO

complaint (the "Complaint" or "Compl."), similar to the one filed by the Dubroff Plaintiffs, alleging claims against NSC's purported former control group ("NSC's Control Group"), four of NSC's former directors (the "Director Defendants"), Cameron Family Partnership, L.P. ("CFP"), and Andrew T. Dwyer (collectively, with NSC's Control Group, the Director Defendants, and CFP, the "Defendants").

The Fuchs Plaintiffs have moved to intervene in, and consolidate their action with, the Dubroff Plaintiffs' action. The Dubroff Plaintiffs have not taken a position on that motion. The Defendants oppose the Fuchs Plaintiffs' motion to intervene, but do not oppose consolidation. The Defendants also moved to dismiss the claims in the Complaint and requested that the Court stay discovery, pending the Court's decision on that motion. At oral argument, the Court granted the Defendants' request for a stay.[4] This is the Court's decision on the Defendants' motion to dismiss and the Fuchs Plaintiffs' motion for intervention and consolidation.

Jacob J. Rausman, Trust FBO Pearl Rausman, Rausman 1977 Life Insurance Trust, Rivkah Rausman, Trust FBO 7 Grandchildren, Caroline Reckler, Gillian Reckler, Jon Reckler, Stephanie Reckler, Shlomo Schon, Edward Strafaci, Linda Strafaci, Joanne S. Visovsky, Michael B. Visovsky, and Barry Wien.

[4] The Defendants only requested a stay pending this decision. Thus, the stay is no longer in effect.

II. BACKGROUND[5]

A. *The Parties*

The Fuchs Plaintiffs are individuals and entities who invested in NSC during 1999-2002 and continuously held common shares and/or Series A Preferred Shares of NSC until Akamai Technologies, Inc. ("Akamai") acquired the Company in December 2006.

Defendants Wren Holdings, LLC ("Wren Holdings"), a Delaware limited liability company, Javva Partners, LLC ("Javva Partners"), a New York limited liability company, and Catalyst Investors, L.P. ("Catalyst Investors"), a Delaware limited partnership, collectively comprised NSC's Control Group.

The Director Defendants, Dort A. Cameron, III, Howard Katz, Christopher Shipman, and Troy Snyder, were, at all relevant times, four of NSC's five directors. NSC's fifth director during the relevant times, Abraham Biderman, was not named as a defendant. In addition to having been NSC directors, Cameron, Katz, and Shipman each had, during the relevant times, and continues to have, a relationship to one of the entities that comprised NSC's Control Group. Cameron is the ostensible managing member and an approximately 50% owner of Wren Holdings; Katz is the

[5] Except in two noted instances, the factual background is based on the allegations in the Complaint.

managing partner and principal of Javva Partners; and Shipman is the managing partner of Catalyst Investors.

CFP is a Delaware limited partnership. Dwyer, a resident of New York, was at all relevant times a member or affiliate and approximately 50% equity owner of Wren Holdings.

B. *Factual Background and Procedural History*

NSC was incorporated in Delaware in August 1999. Its primary purpose was to capitalize on the growth of internet broadband availability by offering streaming media services for broadband users. Between 1999 and 2002, the Fuchs Plaintiffs invested several million dollars in NSC, acquiring at least 20-25% of NSC's equity value.

Prior to any of the following events, NSC's Control Group had acquired approximately 56% of NSC's equity value. During 2001 and/or early 2002, NSC's Control Group loaned an unknown amount of money, believed to have been less than $5 million, to NSC. On January 10, 2002, NSC's board of directors (the "Board") approved a resolution to borrow $2.5 million from Javva Partners and Wren Holdings.

About a week later, during a January 17 Board meeting, Cameron, who was then Chairman of the Board, recommended that the Board review a recapitalization plan (the "Recapitalization"). Dwyer, in conjunction with

NSC's management, set out the Recapitalization, which called for the creation of two new series of preferred stock, Preferred A and Preferred B, which would be ranked equally. Under the Recapitalization, all of NSC's senior debt would be exchanged for Preferred A, and persons making new investments in NSC would receive Preferred B.

During a Board meeting on February 25, 2002, the terms of the Recapitalization were further discussed. Dwyer presided over the meeting and suggested that once the Recapitalization was completed: NSC's existing common stockholders would hold 6.6% of NSC's equity value; NSC's senior debt would be exchanged into Preferred A worth, on an as-converted basis, 16.5% of NSC's equity value; and Wren Holdings and Javva Partners, in exchange for $2.5 million, would receive Preferred B worth, on an as-converted basis, approximately 47% of NSC's equity value. The Complaint alleges that Dwyer was instrumental in developing the Recapitalization: "Dwyer personally and directly determined substantial and significant aspects of [NSC's] funding and business and the terms and timing of the [Recapitalization], with the full endorsement and support of the other Defendants."[6] Moreover, the Complaint alleges that NSC's Control Group

[6] Compl. ¶ 61.

acted as a single unit in developing, and subsequently causing the Board to carry out, the Recapitalization.[7]

In August 2002, the Recapitalization was achieved through a series of reverse stock splits and amendments to NSC's certificate of incorporation. The members of NSC's Control Group, as the holders of a majority of NSC's stock, approved the Recapitalization by written consent.

As part of the Recapitalization, the members of NSC's Control Group, fourteen of the Fuchs Plaintiffs, 2M Investments, L.P., and Trust FBO Eli Hassan executed a stockholders agreement (the "Stockholders Agreement").[8] The Stockholders Agreement recited that its signatories were

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[7] "From approximately the latter half of 2001 forward, the Defendants formed a single bloc that acted together for the purpose of engineering [the Recapitalization]." *Id.* at ¶ 42. "Wren Holdings, Javva Partners, and Catalyst Investors, dominating the business and affairs of [NSC] and acting as a single group in agreement among themselves and with Snyder, planned and caused [NSC] to engage in a series of transactions in late 2001 and 2002 that had the purpose and effect of enriching Wren Holdings, Javva Partners, and Catalyst Investors at the expense of the minority shareholders of [NSC]." *Id.* at ¶ 45. "By agreement among themselves and acting on behalf of [NSC's Control Group] and themselves, Cameron, Katz, Shipman, and Snyder completely controlled the Board . . . before and throughout the . . . [execution of the Recapitalization]. Along with Dwyer, who exerted considerable influence on them, they planned the transactions in advance, set the Board's agenda to pursue their interests, dominated the Board's meetings, and acted in coordination at all relevant times." *Id.* at ¶ 54. "Throughout a series of meetings leading up to the execution of the [Recapitalization] in or around August 2002, the Defendants worked together to prepare agendas for the meetings, to establish the framework, terms, and timing of the [Recapitalization], and to keep [the Fuchs] Plaintiffs and other minority shareholders from obtaining material information about the [Recapitalization]. The meetings included several in each month between January and September." *Id.* at ¶ 55.

[8] Opening Br. in Supp. of Defs.' Mot. to Dismiss ("Defs.' Opening Br."), Ex. A, Stockholders Agreement at 15-18. The fourteen Fuchs Plaintiffs who executed the Stockholders Agreement were: Herbert Rausman, Rivkah Rausman, Trust FBO Barry

record and beneficial owners of more than 75% of the issued and outstanding shares of NSC's common stock and were about to become the owners of the issued and outstanding shares of NSC's convertible preferred stock. The Stockholders Agreement also provided, immediately before the signature pages, that:

> [e]ach of the parties hereto represents and agrees that such party fully understands its rights, and has had the opportunity, to discuss all aspects of this Agreement with its attorney, and that to the extent, if any, that it desired, it availed itself of such right and opportunity. Each party further represents that it has carefully read and fully understands all of the provisions of this Agreement, and the meaning, intent and consequences thereof, that it is competent to execute this Agreement, that its execution and delivery of this Agreement has not been obtained by any duress and that it freely and voluntarily enters into this Agreement.[9]

The Fuchs Plaintiffs who signed the Stockholders Agreement received approximately 8% of the Preferred A, Wren Holdings obtained approximately 45%, Catalyst Investors approximately 36%, and Javva partners approximately 11%. Moreover, through the Recapitalization, Wren Holdings and Javva Partners, in exchange for $2.5 million, received

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Rausman, Susan Rausman Abikhzer, Cindy Hassan, Cindy Hassan as custodian for Nathan Hassan, Cindy Hassan as custodian for Rachel Hassan, Trust FBO Naftali Abikhzer, Trust FBO Moishe Abikhzer, Trust FBO Jacob J. Rausman, Trust FBO Chaim Abikhzer, Emil & Joan Rusman Irev. Trust, Eddy Hsu, and Barry Wien. The Complaint states that fifteen of the Fuchs Plaintiffs executed the Stockholders Agreement, *see* Compl. ¶ 75, but neither 2M Investments, L.P. nor Trust FBO Eli Hassan is a Fuchs Plaintiff. Elie Hassan, however, is one of the Fuchs Plaintiffs.

[9] Stockholders Agreement at 14.

Preferred B constituting, on an as-converted basis, approximately 47% of NSC's equity value. Also, as part of the Recapitalization, the Defendants caused stock options to be issued to Snyder and other Defendants, which, on an as-exercised basis, constituted approximately 10% of NSC's equity value. In the end, as a result of the Recapitalization, NSC's Control Group moved from holding approximately 56% of NSC's equity value to holding approximately 90%.

In the fall of 2002, NSC shareholders (including the Fuchs Plaintiffs) received an update notice (the "Update"), which stated that "[i]n early August [2002] in order to simplify and strengthen its capital structure, debt holders converted debt to equity and [the Company] declared a one for twenty reverse stock split."[10] The Update, however, did not disclose who benefited from the Recapitalization or what benefits they received.

From the time the Update was issued in 2002 until 2006, NSC had no communication of any kind with its minority shareholders. On November 25, 2006, NSC sent proxy materials to its shareholders seeking their approval of Akamai's proposed acquisition of the Company for $175 million. The Complaint alleges that "[t]he proxy materials allowed [the Fuchs] Plaintiffs to learn for the first time that they and the other minority

[10] Compl. ¶ 91.

shareholders held approximately or even less than 6% of [NSC's] fully-diluted securities, whereas [NSC's Control Group] then held approximately 90% of [NSC's] equity securities."[11] In December 2006, Akamai purchased all of NSC's then-outstanding shares for $175 million.

The Dubroff Plaintiffs originally filed a complaint on August 1, 2008, alleging that NSC, the Director Defendants, and NSC's Control Group, breached their fiduciary duties. On August 20, 2010, the Court refused to certify the Dubroff Plaintiffs' purported class action. The Fuchs Plaintiffs initially filed a complaint on November 24, 2010.

III. CONTENTIONS

The Complaint consists of four counts. Count I alleges that the Director Defendants breached their fiduciary duties to NSC and its shareholders in connection with the negotiation, approval, and subsequent disclosure of the Recapitalization. Count II alleges that NSC's Control Group, as NSC's controlling shareholder, owed duties to NSC's minority shareholders, which it breached by causing NSC to undertake the Recapitalization. Count III alleges that Dwyer, as well as NSC's Control Group, aided and abetted the Director Defendants' breach of their duties. Count IV alleges that all of the Defendants were unjustly enriched through

[11] *Id.* at ¶ 101.

the Recapitalization. The Fuchs Plaintiffs seek: (1) rescission of the Recapitalization or rescissory damages; (2) recovery for the damages they sustained as a result of the Defendants' breaches of fiduciary duty; (3) disgorgement of the full profits the Defendants received as a result of the sale of NSC; and (4) reasonable attorneys' fees and costs.

All of the Defendants have moved, pursuant to Court of Chancery Rules 12(b)(6) and 23.1, to dismiss the Complaint. The Defendants argue that the claims in the Complaint are derivative and, thus, that the Fuchs Plaintiffs must satisfy the continuous ownership rule to be able to assert their claims. The Fuchs Plaintiffs cannot satisfy that rule, the Defendants continue, because none of the Fuchs Plaintiffs has owned NSC stock since Akamai acquired NSC in 2006.

The Defendants admit that, under *Gentile v. Rossette*,[12] certain equity dilution claims may be pled both directly and derivatively, but the Defendants argue that *Gentile* is inapplicable here because the Fuchs Plaintiffs have not adequately pled that NSC had a controlling shareholder. According to the Defendants, the Fuchs Plaintiffs have not adequately pled that the members of NSC's Control Group were connected in a legally significant way. Moreover, the Defendants argue that *Gentile* is only

[12] 906 A.2d 91 (Del. 2006).

applicable to transactions in which a controlling shareholder receives an exclusive benefit that corresponds perfectly with a decrease in the value of the minority's shares. As part of the Recapitalization, some of the Fuchs Plaintiffs received preferred stock and, thus, the Defendants contend, *Gentile's* requirement of an exclusive benefit has not been met.

With regard to the claim that the Director Defendants breached their fiduciary duties in connection with the disclosure of the Recapitalization, the Defendants argue that the Fuchs Plaintiffs were required, but failed, to plead individualized reliance, causation, and damages flowing from the nondisclosure. Moreover, the Defendants argue that the disclosure claim is actually just the equity dilution claim in disguise, and that, under Delaware law, the Fuchs Plaintiffs cannot recover for any harm caused by the Recapitalization by pleading a disclosure claim. Any recovery for that harm, the argument continues, should have been sought through a derivative equity dilution claim, which, as a result of the Akamai merger, the Fuchs Plaintiffs may no longer assert.

With regard to Count III, the Defendants argue that since the Director Defendants did not breach their duties, there was nothing for Dwyer or the members of NSC's Control Group to aid or abet. Even assuming the Director Defendants did breach their duties, the Defendants contend that the

Complaint does not allege any non-conclusory facts from which it could be inferred that either Dwyer or the members of NSC's Control Group participated in that breach. As to Count IV, the Defendants argue that the Fuchs Plaintiffs' unjust enrichment claim is an impermissible attempt to bootstrap a derivative claim into a direct claim. Furthermore, the Defendants argue that, with regard to CFP, Count IV fails for the additional and independently adequate reason that the Complaint does not plead facts suggesting that CFP benefited from the Recapitalization.

The Defendants also contend that all of the Fuchs Plaintiffs' claims are barred by laches. The Defendants point out that twenty of the Fuchs Plaintiffs either signed the Stockholders Agreement or are directly related to or controlled by a person who did. With regard to those twenty Fuchs Plaintiffs, the Defendants argue that all of their claims are barred because the Stockholders Agreement, of which they were aware at least since August 12, 2002, disclosed the Recapitalization. The Defendants also argue that the claims of all of the Fuchs Plaintiffs are barred because the Update gave them notice of the Recapitalization. Moreover, even if the Stockholders Agreement and the Update provided insufficient notice, the Defendants argue that: (1) the proxy materials sent to the Fuchs Plaintiffs in connection with the Akamai merger provided the Fuchs Plaintiffs with sufficient notice

of the facts underlying their claims in November 2006; and (2) the time period presumptively applicable to the Fuchs Plaintiffs' claims should not be found to have been tolled while the Dubroff Plaintiffs' purported class action was pending. Finally, in addition to moving for dismissal under Rules 12(b)(6) and 23.1, Javva Partners and Dwyer have moved to dismiss the claims brought against them on personal jurisdiction grounds under Rule 12(b)(2).

The Fuchs Plaintiffs, in opposing the Defendants' motion to dismiss, argue that, under *Gentile*, they have adequately pled direct equity dilution claims against both the Director Defendants and NSC's Control Group. The Complaint, they contend, properly sets forth facts from which the Court can infer that NSC's Control Group amounted to NSC's controlling shareholder. Moreover, the Fuchs Plaintiffs assert that the fact that some of them executed the Stockholders Agreement does not affect the viability of their direct equity dilution claims because the Stockholders Agreement was deceptive and failed to reveal certain material terms of the Recapitalization.

With regard to their disclosure claim, the Fuchs Plaintiffs argue that it should not be dismissed because their claim is based on the same facts as the disclosure claim pled in *Dubroff I*, which survived a motion to dismiss. The Fuchs Plaintiffs explain that, contrary to the Defendants' suggestion, their

disclosure claim is distinct from their equity dilution claims. Moreover, the Fuchs Plaintiffs contend that they have adequately pled reliance, causation, and damages flowing from the Director Defendants' nondisclosure.

Moving to their aiding and abetting claim, the Fuchs Plaintiffs argue, as they did in support of their disclosure claim, that it should not be dismissed because their claim is based on the same facts as the claim pled in *Dubroff I*, which survived a motion to dismiss. In any event, the Fuchs Plaintiffs claim that the Complaint alleges adequate facts from which the Court can infer that Dwyer aided and abetted the Director Defendants' breach of their disclosure duties.

As for their unjust enrichment claim, the Fuchs Plaintiffs contend that it is an adequately pled direct claim. According to the Fuchs Plaintiffs, as a result of the Recapitalization, the Defendants were unjustly enriched because they received larger profits from the Akamai merger than they would have had the Director Defendants and NSC's Control Group not breached their fiduciary duties.

The Fuchs Plaintiffs also contend that none of their claims is barred by laches. Finally, the Fuchs Plaintiffs argue that this Court has personal jurisdiction over Dwyer and Javva Partners under the conspiracy theory of jurisdiction.

In addition to resisting the Defendants' motion to dismiss, the Fuchs Plaintiffs have filed a motion of their own, seeking to intervene in, and consolidate their action with, the action brought by the Dubroff Plaintiffs. The Fuchs Plaintiffs argue that, pursuant to Court of Chancery Rule 24(a), they are entitled, as of right, to intervene in the Dubroff Plaintiffs' action. In the alternative, they argue that, pursuant to Court of Chancery Rule 24(b), the Court should grant them permission to intervene. The Fuchs Plaintiffs also move this Court, pursuant to Court of Chancery Rule 42(a), to consolidate their action with the Dubroff Plaintiffs' action. They contend that, because they and the Dubroff Plaintiffs are bringing claims against many of the same defendants for the same conduct, consolidation would expedite the proceedings and avoid unnecessary costs and delays. The Fuchs Plaintiffs state that consolidation would be appropriate even if the Court were to deny their motion to intervene.

The Dubroff Plaintiffs take no position on the Fuchs Plaintiffs' motion for intervention and consolidation. The Defendants, however, oppose the Fuchs Plaintiffs' motion for intervention. They argue that the Fuchs Plaintiffs are not entitled, as of right, to intervene in the Dubroff Plaintiffs' action because the Fuchs Plaintiffs have no interest at stake in that action. The Defendants further argue that the Court should not grant the Fuchs

Plaintiffs' motion for permissive intervention because the Fuchs Plaintiffs have filed their own action, in which they can adequately assert their claims. The Defendants do not oppose the Fuchs Plaintiffs' motion for consolidation, but they do object to any consolidation order that does not explicitly provide for consolidated pleadings and discovery.

IV. ANALYSIS

The Court will first address the Defendants' motion to dismiss under Rules 12(b)(6) and 23.1; then, the Court will consider the Defendants' argument that the Complaint is barred by laches; thereafter, the Court will address Javva Partners and Dwyer's motion to dismiss for lack of personal jurisdiction; and finally, the Court will consider the Fuchs Plaintiffs' motion for intervention and consolidation.

A. *The Defendants' Motion to Dismiss Under Rules 12(b)(6) and 23.1*

The Defendants have moved to dismiss the claims brought against them on the basis that the Fuchs Plaintiffs have failed to state a claim. Under Rule 12(b)(6), a motion to dismiss for failure to state a claim will only be granted if the plaintiff would be unable to recover under "any reasonably conceivable set of circumstances susceptible of proof."[13] In considering a motion under Rule 12(b)(6), the Court must accept as true all

[13] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (citation and internal quotations omitted).

of the complaint's well-pled facts and draw all reasonable inferences in the plaintiff's favor.[14] "The Court gives no credence, however, to conclusory allegations and need not accept 'every strained interpretation of the allegations proposed by the plaintiff.'"[15] The Court, however, must "accept even vague allegations as 'well pleaded' if they give the opposing party notice of the claim."[16]

Under Rule 23.1(a), a plaintiff must plead that she was a shareholder at the time of the challenged transaction and that demand was made upon the board or the reasons for the futility of such demand. "[These] pleadings must comply with [the] stringent requirements of factual particularity," and notice pleading will not suffice.[17] The pleader is not required to plead evidence, but she must set forth "particularized factual statements that are essential to the claim."[18]

1. The Direct Equity Dilution Claims in Counts I and II

The Fuchs Plaintiffs argue that Counts I and II of the Complaint state direct claims for equity dilution against the Director Defendants and NSC's Control Group, respectively, and may not be dismissed under Rule 12(b)(6)

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[14] *Desimone v. Barrows*, 924 A.2d 908, 928 (Del. Ch. 2007) (citation omitted).
[15] *Fisk Ventures, LLC v. Segal*, 2008 WL 1961156, at *1 (Del. Ch. May 7, 2008) (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001)) (other citation omitted).
[16] *Central Mtg. Co. v. Morgan Stanley Mtg. Capital Holdings, LLC*, 27 A.3d 531, 535 (Del. 2011).
[17] *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000).
[18] *Id.*

or Rule 23.1. "Equity dilution claims are typically viewed as derivative under Delaware law."[19] In *Gentile*, however, the Delaware Supreme Court explained that some equity dilution claims may be both direct and derivative:

> There is, however, at least one transactional paradigm—a species of corporate overpayment claim—that Delaware case law recognizes as being both derivative and direct in character. A breach of fiduciary duty claim having this dual character arises where: (1) a stockholder having majority or effective control causes the corporation to issue "excessive" shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders.[20]

In *Gentile*, the Supreme Court also relied upon *In re Tri-Star Pictures, Inc., Litigation ("Tri-Star")*[21] for the principle that when a fiduciary duty claim has that dual character, the minority shareholders suffer "an injury that [i]s unique to them individually and that [may] be remedied in a direct claim against the controlling stockholder and any other fiduciary responsible for the harm."[22] Thus, the Fuchs Plaintiffs may plead direct equity dilution claims against both NSC's Control Group and the Director Defendants if the Fuchs Plaintiffs allege facts suggesting that: (1) NSC's Control Group was

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[19] *Feldman v. Cutaia*, 956 A.2d 644, 655 (Del. Ch. 2007).
[20] 906 A.2d at 99-100 (citations omitted).
[21] 634 A.2d 319 (Del. 1993).
[22] *Gentile*, 906 A.2d at 101 (citing *Tri-Star*, 634 A.2d at 332-33).

NSC's controlling stockholder; (2) NSC's Control Group and the Director Defendants were jointly responsible for causing NSC to issue excessive shares to NSC's Control Group; and (3) the excessive issuance caused the percentage of shares owned by NSC's Control Group and the minority stockholders to correspondingly increase and decrease, respectively.

a. *Whether NSC's Control Group was a controlling stockholder*

A controlling stockholder is often a single person or entity. This Court, however:

> has recognized that a number of shareholders, each of whom individually cannot exert control over the corporation (either through majority ownership or significant voting power coupled with formidable managerial power), can collectively form a control group where those shareholders are connected in some legally significant way—e.g., by contract, common ownership, agreement, or other arrangement—to work together toward a shared goal.[23]

If such a control group exists, it is accorded controlling shareholder status, and its members owe fiduciary duties to the minority shareholders of the corporation.[24] Even a control group, however, "is entitled to vote its shares as it chooses, including to further its own financial interest."[25] "Accordingly, if all a complaint alleges is that a group of shareholders have

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[23] *Dubroff I*, 2009 WL 1478697, at *3 (citing *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *10 (Del. Ch. Aug. 18, 2006)).
[24] *Id.*
[25] *Emerson Radio Corp. v. Int'l Jensen Inc.*, 1996 WL 483086, at *17 (Del. Ch. Aug. 20, 1996).

'parallel interests,' such allegations are insufficient as a matter of law to support the inference that the shareholders were part of a control group."[26]

Although the Dubroff Plaintiffs' complaint "contain[ed] no facts from which the Court [could] infer that [Wren Holdings, Javva Partners, and Catalyst Investors] formed a control group,"[27] the Complaint, filed by the Fuchs Plaintiffs, does contain such facts. At paragraph 45, the Complaint states that "Wren Holdings, Javva Partners, and Catalyst Investors . . . acting as a single group . . . planned and caused [NSC] to engage in a series of transactions in late 2001 and 2002 that had the purpose and effect of enriching Wren Holdings, Javva Partners, and Catalyst Investors at the expense of the minority shareholders of [NSC]." Later, it provides that throughout a series of ensuing meetings—several in each month between January and September 2002—the Defendants worked together to establish the exact terms and timing of the Recapitalization.[28] Thus, the Fuchs Plaintiffs have pled facts suggesting that NSC's Control Group was NSC's controlling stockholder.

[26] *Dubroff I*, 2009 WL 1478697, at *3 (citation omitted).
[27] *Id.* at *4.
[28] Compl. ¶ 55.

b. *Who was responsible for the Recapitalization*

The Fuchs Plaintiffs have also pled facts suggesting that NSC's Control Group and the Director Defendants were jointly responsible for causing NSC to undertake the Recapitalization, which allegedly involved NSC's issuance of excessive shares of its stock to NSC's Control Group. At paragraph 54, the Complaint provides:

> "By agreement among themselves and acting on behalf of [NSC's Control Group] and themselves, Cameron, Katz, Shipman, and Snyder completely controlled the Board . . . before and throughout the . . . [execution of the Recapitalization]. Along with Defendant Dwyer, who exerted considerable influence on them, they planned the transactions in advance, set the Board's agenda to pursue their interests, dominated the Board's meetings, and acted in coordination at all relevant times."

Moreover, as stated above, the Complaint provides that all of the Defendants worked together to establish the exact terms and timing of the Recapitalization.[29] Thus, the Fuchs Plaintiffs have pled facts suggesting that NSC's Control Group and the Director Defendants were jointly responsible for causing NSC to undertake the Recapitalization.

c. *Whether the Recapitalization caused the percentage of NSC owned by NSC's Control Group to increase and the minority shareholders' interest in NSC to correspondingly decrease*

The final issue regarding the direct equity dilution claims is whether the Fuchs Plaintiffs have pled facts suggesting that the excessive issuance of

[29] *Id.*

shares to NSC's Control Group caused that group's percentage ownership of NSC to increase in an amount corresponding to a decrease in the minority shareholders' ownership. The Defendants contend that *Gentile* requires an exact match between the controlling shareholder's increase in ownership, and the minority's decrease. Therefore, they argue that, because fourteen of the Fuchs Plaintiffs benefited from the Recapitalization,[30] *Gentile* is inapplicable to that transaction. Although some Delaware courts have used the word "exclusive," or its equivalent, in discussing direct equity dilution claims,[31] the syllogism—if anyone other than the controller benefits from the transaction, then the minority may not assert a direct equity dilution claim—is much too simplistic.[32] A corporation's minority shareholders should not be denied a direct equity dilution claim where a controller expropriates, from

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[30] The Complaint also alleges that CFP, which is not alleged to have been a member of NSC's Control Group, received preferred stock in the Recapitalization, and that, as part of the Recapitalization, Snyder and "other Defendants" received stock options. Compl. ¶¶ 20 & 82.

[31] *See Gentile*, 906 A.2d at 100 ("As a consequence, the public shareholders are harmed, uniquely and individually, to the extent that the controlling stockholder is (correspondingly) benefited.") (parenthetical in original); *Feldman*, 956 A.2d at 658 ("Count V also fails to allege that the Telx directors exclusively benefited from the Dilutive Transactions."); *see also St. Clair Shores Gen. Employees Ret. Sys. v. Eibeler*, 745 F. Supp. 2d 303, 313 n.10 (S.D.N.Y. 2010) (applying Delaware law and stating "[a] further defect in the Amended Complaint is that there is no allegation that the Defendants were the *sole* beneficiary of the options grants") (emphasis in original).

[32] Moreover, the term used by the Supreme Court in *Gentile*, "correspondingly" is defined as "in a corresponding manner." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged) 512 (1993). "Corresponding," in turn, is defined as "agreeing in kind, degree, position, function, or other respects." *Id.* Thus, even "correspondingly" would not appear to mean exclusive, but rather related; "agreeing in kind [or] degree . . . ."

them, a large percentage of the corporation's equity, keeps most of that expropriated equity for itself, and gives a small amount to other people. Moreover, in *Gatz v. Ponsoldt*,[33] our Supreme Court approvingly cited *Tri-Star* as holding that:

> because . . . [a corporation's] largest stockholder, did not suffer a dilution of cash value, or of voting power, or of ownership percentage to the same extent and in the same proportion as the minority stockholders, the plaintiffs had suffered an injury that was unique to them individually, and that could be remedied by bringing a direct claim against the controlling stockholder and any other fiduciary responsible for the harm.[34]

Thus, *Gatz* suggests that minority shareholders may have a direct equity dilution claim when their holdings are diluted, and those of the corporation's controller are not. In other words, as long as the controller's holdings are not decreased, and the holdings of the minority shareholders are, the latter may have a direct equity dilution claim.

Even if minority shareholders cannot plead direct equity dilution claims in as many instances as *Gatz* seems to suggest, the Fuchs Plaintiffs have pled one here. The Complaint alleges that, through the Recapitalization, NSC's Control Group went from holding 56% of NSC's equity to 90%.[35] The implication is that the rest of NSC's shareholders went

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[33] 925 A.2d 1265 (Del. 2007).
[34] *Id.* at 1277.
[35] Compl. ¶ 81.

from holding 44% of NSC's equity to 10%. The Fuchs Plaintiffs, for example, went from holding 20-25% of NSC's equity to less than 5%. Although, in the Recapitalization, a few of NSC's other shareholders appear to have received a small amount of preferred stock,[36] the alleged primary effect of the Recapitalization was "an extraction from [NSC's] public shareholders, and a redistribution to [NSC's Control Group], of a [substantial] portion of the economic value and voting power embodied in the minority interest."[37] Thus, the Fuchs Plaintiffs have adequately pled direct equity dilution claims against NSC's Control Group and the Director Defendants, and the Defendants' motion to dismiss those claims is denied.[38]

2. The Disclosure Claim in Count II

NSC's Control Group, as the holder of a majority of NSC's stock, approved the Recapitalization by written consent. Under 8 *Del.* C. § 228(e), "[p]rompt notice of the taking of the corporate action without a meeting by less than unanimous written consent shall be given to those stockholders . . . who have not consented in writing. . . ." The Stockholders Agreement gave the Fuchs Plaintiffs who signed it notice of the Recapitalization,[39] and the

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[36] *Id.* at ¶¶ 20, 57 & 82.
[37] *Gentile*, 906 A.2d at 100.
[38] Because the Fuchs Plaintiffs have adequately pled direct equity dilution claims, Rule 23.1 does not apply to those claims.
[39] Stockholders Agreement at 1-2 ("[T]he Company is in the process of adjusting its capital structure by, among other things, reducing the number of issued and outstanding

Update gave the Fuchs Plaintiffs who did not sign the Stockholders Agreement notice of the Recapitalization.[40] Neither document, however, disclosed who benefited from the Recapitalization or what benefits they received,[41] and the Fuchs Plaintiffs argue that, as a result of those missing disclosures, they were denied the ability to bring an action seeking rescission of the Recapitalization.[42]

As this Court explained in *Dubroff I*:

> The notice provided to the Plaintiffs following the Recapitalization accurately described the precise action accomplished through the written consent, but, as the Plaintiffs contend, material facts—who benefited from the Recapitalization and what benefits did they achieve—were omitted. And such a failure to disclose material facts necessitates the conclusion that the Plaintiffs have stated a claim that the NSC board breached its fiduciary duties regarding disclosure of material information.[43]

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shares of Common Stock by means of a 1 for 20 reverse stock split and exchanging Preferred Stock for certain of its outstanding indebtedness . . . ."). Although on a motion to dismiss, "[t]he complaint generally defines the universe of facts that the trial court may consider . . . ," *Gen. Motors (Hughes)*, 897 A.2d at 168, the Court "may rely upon exhibits attached to a motion to dismiss if the plaintiff's claims are based upon them." *Great-West Investors LP v. Thomas H. Lee Partners, L.P.*, 2011 WL 284992, at *6 (Del. Ch. Jan. 14, 2011) (citation omitted). In the Complaint, the Fuchs Plaintiffs rely on the Stockholders Agreement as an example of how the members of NSC's Control Group acted together, exercising control over NSC. Thus, the Court may look to the Stockholders Agreement.

[40] Compl. ¶ 91. (The Update stated that "[i]n early August [2002] in order to simplify and strengthen its capital structure, debt holders converted debt to equity and [the Company] declared a one for twenty reverse stock split.").

[41] *Id.* at ¶ 92.

[42] *Id.* at ¶ 93.

[43] 2009 WL 1478697, at *6.

Although, as the Court noted in *Dubroff I*, the precise parameters of the disclosure required by § 228(e) have not yet been delineated, whatever those parameters are, the Fuchs Plaintiffs have stated a claim that the Director Defendants did not meet them and, thus, that those defendants breached their fiduciary duties regarding disclosure.[44]

Moreover, although "[f]or a disclosure claim to be viable, it must demonstrate damages that flow from the failure to adequately *disclose* information, not that the information disclosed concerned matters for which damages are appropriate,"[45] the Fuchs Plaintiffs have alleged specific damages flowing from the inadequate disclosures. Namely, as a result of inadequate disclosures the Fuchs Plaintiffs were not able to "bring a legal action for rescission or rescissory damages with respect to the [Recapitalization]."[46] The amount that the Fuchs Plaintiffs were damaged by their inability to bring an action for rescission may pale in comparison to

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[44] *Id.* ("[I]t is immaterial whether § 228 requires full fiduciary duty disclosure of all material information as in the context of a request for shareholder action. If it does, the Complaint asserts well-plead facts sufficient for the Court to infer reasonably that the board materially misled shareholders about the Recapitalization. If it does not, there are well-plead facts in the Complaint sufficient for the Court to infer reasonably that the board deliberately omitted material information with the goal of misleading the Plaintiffs and other shareholders about the Defendants' material financial interest in, and benefit conferred by, the Recapitalization not shared with other shareholders.") (citing *Shamrock Holdings of Cal., Inc. v. Iger*, 2005 WL 1377490, at *5 (Del. Ch. June 6, 2005)).

[45] *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 597 (Del. Ch. 2007) (citing *Brown v. Perrette*, 1999 WL 342340, at *6 (Del. Ch. May 14, 1999)); *see also In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 773-74 (Del. 2006).

[46] Compl. at ¶ 93.

the amount that they were damaged by the actual Recapitalization,[47] but the two are nonetheless distinct, and the Fuchs Plaintiffs have alleged that they were separately damaged by each. Therefore, the Fuchs Plaintiffs have adequately pled a disclosure claim against the Director Defendants, and the Defendants' motion to dismiss that claim is denied.[48]

3. Count III

Count III alleges that Dwyer, as well as NSC's Control Group, aided and abetted the Director Defendants' breach of their fiduciary duties. "There are four elements of a claim for aiding and abetting a breach of fiduciary duty: 1) the existence of a fiduciary relationship; 2) a breach of an associated fiduciary duty; 3) knowing participati[on] in the breach by a defendant who is not a fiduciary; and 4) damages proximately caused by the breach."[49] As discussed immediately above, in Subsection A.1, the Fuchs Plaintiffs have adequately pled that the Director Defendants were in a

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[47] *See Tyson Foods, Inc.*, 919 A.2d at 602 ("In a direct suit based upon a disclosure claim, the Supreme Court has been very clear: damages to plaintiff shareholders are limited only to those that arise logically and directly from the lack of disclosure, and nominal damages are appropriate only where the shareholder's economic or voting rights have been injured.") (citing *J.P. Morgan Case & Co.*, 906 A.2d at 773-74).

[48] The Fuchs Plaintiffs' disclosure claim is direct. *See Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998) ("Whenever directors communicate publicly or directly with shareholders about the corporation's affairs, with or without a request for shareholder action, directors have a fiduciary duty to shareholders to exercise due care, good faith and loyalty. It follows *a fortiori* that when directors communicate publicly or directly with shareholders about corporate matters the *sine qua non* of directors' fiduciary duty to shareholders is honesty.") (citation omitted). Thus, Rule 23.1 does not apply to that claim.

[49] *Carlson v. Hallinan*, 925 A.2d 506, 542 (Del Ch. 2006) (citing *Malpiede*, 780 A.2d at 1096).

fiduciary relationship, which they breached, proximately causing the Fuchs Plaintiffs' damages. Thus, the Fuchs Plaintiffs have successfully pled the first, second, and fourth elements of a claim for aiding and abetting a breach of fiduciary duty.

As for the third element, "[k]nowing participation in a . . . fiduciary breach requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach."[50] The Complaint alleges facts suggesting that Dwyer and NSC's Control Group acted with the knowledge that the conduct they assisted constituted a breach. With regard to Dwyer, the Complaint states that the Director Defendants "[a]long with Defendant Dwyer, who exerted considerable influence on them, . . . planned the transactions in advance, set the Board's agenda to pursue their interests, dominated the Board's meetings, and acted in coordination at all relevant times."[51] With regard to NSC's Control Group, the Complaint states that:

> Wren Holdings, Javva Partners, and Catalyst Investors, dominating the business and affairs of [NSC] and acting as a single group in agreement among themselves and with Snyder, planned and caused [NSC] to engage in a series of transactions in late 2001 and 2002 that had the purpose and effect of enriching Wren Holdings, Javva Partners, and Catalyst Investors at the expense of the minority shareholders of [NSC].[52]

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[50] *Gatz*, 925 A.2d at 1276 (quoting *Malpiede*, 780 A.2d at 1097).
[51] Compl. ¶ 54.
[52] *Id.* at ¶ 45.

Moreover, the Complaint provides that:

> Throughout a series of meetings leading up to the execution of the [Recapitalization] in or around August 2002, the Defendants worked together to prepare agendas for the meetings, to establish the framework, terms, and timing of the [Recapitalization], and to keep [the Fuchs] Plaintiffs and other minority shareholders from obtaining material information about the [Recapitalization].[53]

Therefore, "the allegations of the Complaint with respect to aiding and abetting the conduct . . . , however marginal, do, nonetheless, survive under the standards of Court of Chancery Rule 12(b)(6)."[54]

4. Count IV

Count IV alleges that all of the Defendants were unjustly enriched through the Recapitalization. "[U]njust enrichment requires '(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law.'"[55]

a. *The unjust enrichment claim against NSC's Control Group*

As explained above, in Subsection A.1, the Complaint alleges that the Recapitalization involved NSC's Control Group increasing its equity stake in NSC (an enrichment) by expropriating equity from NSC's minority

[53] *Id.* at ¶ 55.
[54] *Dubroff I*, 2009 WL 1478697, at *6 n.44. A claim for aiding and abetting a direct breach of fiduciary duty is a direct claim. *See Kelly v. Blum*, 2010 WL 629850, at *15 (Del. Ch. Feb. 24, 2010). Thus, Rule 23.1 is inapplicable to Count III.
[55] *Latesco, L.P. v. Wayport, Inc.*, 2009 WL 2246793, at *9 n.33 (Del. Ch. July 24, 2009) (quoting *Addy v. Piedmonte*, 2009 WL 707641, at *22 (Del. Ch. Mar. 18, 2009)).

shareholders (an impoverishment related to the enrichment), and that NSC's Control Group violated its fiduciary duties by causing NSC to undertake the Recapitalization (done without justification and sounding in equity).[56] Thus, the Fuchs Plaintiffs' claims against NSC's Control Group for direct equity dilution and unjust enrichment appear to be duplicative, and both parties appear to recognize this fact.[57] Nonetheless, Delaware law does not appear to bar bringing both claims.[58] Of course, the Fuchs Plaintiffs will, at most, receive one recovery.[59] The Fuchs Plaintiffs have adequately pled a claim

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[56] *See, e.g.*, *Rizzo v. Joseph Rizzo and Sons Constr. Co., Inc.*, 2007 WL 1114079, at *1 (Del. Ch. Apr. 10, 2007) ("Generally speaking, this court's non-statutory jurisdiction arises in two types of cases: (1) when a plaintiff seeks to press an equitable claim such as a claim for breach of fiduciary duty; and (2) when a plaintiff seeks an equitable remedy or otherwise lacks an adequate remedy at law.") (citations omitted).

[57] *See* Pl.'s Br. in Opp. to Defs.' Mot. to Dismiss at 41 ("All of [the Fuchs] Plaintiffs' claims arise out of the same breach of fiduciary duty and series of self-dealing transactions as the claims in *Dubroff* [*I*]."); Defs.' Opening Br. at 21 ("[The Fuchs] Plaintiffs attempt to bootstrap their . . . breach of fiduciary duty claims attacking the Recapitalization into a separate claim of unjust enrichment premised upon the proceeds that the Defendants received in the Akamai [m]erger.").

[58] *See MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at *25 n.147 (Del. Ch. May 5, 2010) ("In this case, then, for all practical purposes, the claims for breach of fiduciary duty and unjust enrichment are redundant. One can imagine, however, factual circumstances in which the proofs for a breach of fiduciary duty claim and an unjust enrichment claim are not identical, so there is no bar to bringing both claims against a director."). Although this Court has dismissed an equitable claim on the basis that it was duplicative of a legal claim that could provide an adequate remedy, *see, e.g.*, *Grunstein v. Silva*, 2009 WL 4698541, at *7 (Del. Ch. Dec. 8, 2009), it is not at all clear that the Court, on a motion to dismiss, should reject an equitable claim on the basis that it is duplicative of another equitable claim.

[59] *See MCG Capital Corp.*, 2010 WL 1782271, at *25 n.147. ("If MCG is able to prove Maginn breached his duty of loyalty in Count Five then it will also be successful in proving unjust enrichment in Count Six. Both claims hinge on whether Maginn was disloyal to Jenzabar by the manner in which he procured the 2002 Bonus. Of course, in the event MCG makes its case on both claims, Jenzabar will only be entitled to one recovery; return of the 2002 Bonus plus interest.").

against NSC's Control Group for unjust enrichment and, therefore, the Defendants' motion to dismiss that claim is denied.[60]

b. *The unjust enrichment claim again CFP*

The one factual allegation asserted against CFP in the Complaint is that "[a]s a direct and intended beneficiary of the [Recapitalization], CFP received preferred stock in the [Company] at a below-market price, without offering the same terms to the minority shareholders and without informed consent by the minority shareholders."[61] Although this claim is not much to go on, it nonetheless survives under the standards of Rule 12(b)(6). The Fuchs Plaintiffs have alleged that the Recapitalization involved NSC's Control Group and the Director Defendants causing NSC to undertake the Recapitalization, a transaction that allegedly involved an expropriation from NSC's minority shareholders. The Complaint further alleges that CFP benefited from the Recapitalization. Thus, the Fuchs Plaintiffs have pled facts suggesting that CFP was enriched to the detriment of NSC's minority shareholders (including the Fuchs Plaintiffs). Moreover, the Fuchs Plaintiffs do not appear to have a legal remedy against CFP, and the issuance of preferred stock "below-market price" to CFP as part of the Recapitalization,

[60] The Fuchs Plaintiffs have pled a direct unjust enrichment claim against NSC's Control Group and, therefore, Rule 23.1 is inapplicable to that claim.
[61] Compl. ¶ 20.

an alleged self-dealing transaction, does suggest that the issuance of that stock was done without justification. Therefore, the Fuchs Plaintiffs have adequately pled a claim against CFP for unjust enrichment, and the Defendants' motion to dismiss that claim is denied.[62]

c. *The unjust enrichment claim against Dwyer and the Director Defendants*

The Complaint fails to allege that either Dwyer or the Director Defendants were enriched in the Recapitalization. As stated above, the first element of an unjust enrichment claim is an enrichment. There is no allegation in the Complaint that Dwyer or the Director Defendants received anything in the Recapitalization. Therefore, the Fuchs Plaintiffs have not pled facts suggesting that either Dwyer or the Director Defendants were enriched and, thus, the Defendants' motion to dismiss those claims under Rule 12(b)(6) is granted.[63]

B. *Laches*

In addition to moving to dismiss for failure to state a claim, the Defendants have also moved to dismiss the Fuchs Plaintiffs' claims on the basis of laches. A claim is barred by laches if plaintiffs wait an

[62] The Fuchs Plaintiffs have pled a direct unjust enrichment claim against CFP and, therefore, Rule 23.1 is inapplicable to that claim.

[63] The Complaint's vague reference to the issuance of options as part of Recapitalization fails to plead an enrichment claim with any substance. *See supra* note 30.

unreasonable length of time before asserting their claims and that delay unfairly prejudices the defendants.[64] "While statutes of limitations are not automatically controlling in actions in equity, '[a]bsent a tolling of the limitations period, a party's failure to file within the analogous period of limitations will be given great weight in deciding whether the claims are barred by laches.'"[65] Under Delaware law, claims for breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, and unjust enrichment (in other words, the Fuchs Plaintiffs' claims) are generally addressed with reference to a three-year statute of limitations.[66]

Fourteen of the Fuchs Plaintiffs signed the Stockholders Agreement,[67] and the Stockholders Agreement was entered into as part of the Recapitalization. The Stockholders Agreement discussed (1) the issuance of two new series of preferred stock, Preferred A and Preferred B,[68] (2) that NSC's debt was going to be converted into preferred stock, and (3) that NSC was undertaking a one-for-twenty reverse stock split.[69] It further provided that each of the parties to the agreement "had the opportunity . . . to discuss

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[64] *K & K Screw Prods., L.L.C. v. Emerick Capital Invs., Inc.*, 2011 WL 3505354, at *14 (Del. Ch. Aug. 9, 2011).
[65] *Id.* (quoting *Whittington v. Dragon Group, L.L.C.*, 991 A.2d 1, 9 (Del. 2009)).
[66] *Shandler v. DLJ Merch. Banking, Inc.*, 2010 WL 2929654, at *9, n.88 (Del. Ch. July 26, 2010); *see* 10 *Del. C.* § 8106.
[67] The Court may consider the Stockholders Agreement. *See supra* note 37.
[68] Stockholders Agreement at 1.
[69] *Id.* at 1-2.

all aspects of th[e] Agreement with its attorney,"[70] and each party represented "that it ha[d] carefully read and fully underst[ood] all of the provisions of th[e] Agreement, and the meaning, intent and consequences thereof. . . ."[71] The Stockholders Agreement, however, does not contain much beyond what the later Update provided, and this Court has already determined that "the . . . Update did not put NSC stockholders 'on inquiry notice of an alleged self-dealing transaction.'"[72]

The Stockholders Agreement was not intended as a disclosure document. It discussed one aspect of the Recapitalization, but it did not state what the effects of that aspect would be. The Stockholders Agreement did not describe which shareholders were getting which types of preferred stock or how much of that preferred stock they were getting. Thus, under the plaintiff-friendly standards of Rule 12(b)(6), the Court cannot say that the

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[70] *Id.* at 14.

[71] *Id.* Because the Fuchs Plaintiffs who signed the Stockholders Agreement attested that they understood "all aspects" of the Stockholders Agreement there is an argument, not without some force, that the Fuchs Plaintiffs who signed the Stockholders Agreement ratified the Recapitalization. *See Genger v. TR Investors, LLC*, 2011 WL 2802832, at *10 (Del. July 18, 2011) ("Ratification may . . . be found where a party 'receives and retains the benefit of [th[e] transaction] without objection, [ ] thereby ratify[ing] the unauthorized act and estop[ping] itself from repudiating it. . . .'") (quoting *Hannigan v. Italo Petroleum Corp. of Am.*, 47 A.2d 169, 172-73 (Del. 1945)) (other citations omitted). Given the standard on a motion to dismiss, however, the Court is unwilling to bar, at this procedural stage, the claims of the Fuchs Plaintiffs who signed the Stockholders Agreement on the basis of ratification.

[72] *Dubroff I*, 2009 WL 1478697, at *6.

Stockholders Agreement put the Fuchs Plaintiffs who signed it on notice of all of the terms of the Recapitalization.[73]

The Defendants also argue that the claims of the Fuchs Plaintiffs are barred by laches because the Update provided the Fuchs Plaintiffs with notice of the Recapitalization. The Defendants, however, acknowledge the Court's holding in *Dubroff I*.[74]

Although the Update did not provide the Fuchs Plaintiffs with notice of the Recapitalization, the proxy materials sent out on November 25, 2006, seeking approval of the merger with Akamai, did give the Fuchs Plaintiffs notice of the facts underlying their claims.[75] But the time period presumptively applicable to those claims was further tolled while the Dubroff Plaintiffs' putative class action was pending. The United States Supreme Court has interpreted Rule 23 of the Federal Rules of Civil Procedure to mean that class members' individual claims are tolled while a putative class action is pending. "Once the statute of limitations has been

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[73] The Defendants contend that the claims of six other Fuchs Plaintiffs should also be dismissed because those plaintiffs are "directly related to, or controlled by, signatories to the Stockholders Agreement." Defs.' Opening Br. at 5 n.5. Because the Court has determined that the Stockholders Agreement did not adequately inform its signatories of all of the terms of the Recapitalization, the Stockholders Agreement also did not adequately inform any entity that those signatories may control or be affiliated with. Of course, at this time, the Court takes no view on whether any Fuchs Plaintiff is affiliated with or controlled by any other Fuchs Plaintiff.

[74] *See Dubroff I*, 2009 WL 1478697, at *6 ("the . . . Update did not put NSC stockholders 'on inquiry notice of an alleged self-dealing transaction.'").

[75] Compl. ¶¶ 101-03.

tolled, it remains tolled for all members of the putative class until class certification is denied."[76] "Judicial interpretation of the Federal Rules respecting class actions . . . [is] persuasive authority for the interpretation of Court of Chancery Rule 23."[77] Moreover, "[t]he wide majority of states with class action rules similar to Fed. R. Civ. P. 23 have followed *American Pipe* and endorsed a class action tolling rule."[78]

A class action tolling rule makes sense. Without one, "all class members would be forced to intervene to preserve their claims, and one of the major goals of class action litigation—to simplify litigation involving a large number of class members with similar claims—would be defeated."[79] Thus, the Court acknowledges a class action tolling rule.

The Defendants concede that:

> [a] number of federal courts, as well as state courts interpreting procedural rules analogous to Federal Rule of Civil Procedure 23, have followed a concurring opinion by Justice

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[76] *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 354 (1983); *see also Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 551 (1974).

[77] *In re Countrywide Corp. S'holders Litig.*, 2009 WL 846019, at *12 n.84 (Del. Ch. Mar. 31, 2009) (citing *Nottingham Partners v. Dana*, 564 A.2d 1089, 1094 (Del. 1989)) (other citation omitted). Although the Delaware Supreme Court has suggested that Court of Chancery Rule 12(b)(6) might not be precisely the same as the United States Supreme Court has interpreted the comparable Federal Rule of Civil Procedure, *see Central Mtg. Co.*, 27 A.3d at 537, the Defendants have not suggested that the Court should not look to judicial interpretation of Rule 23 Federal Rules of Civil Procedure as persuasive authority for the interpretation of the Court of Chancery Rule at issue.

[78] *Philip Morris USA, Inc. v. Christensen*, 905 A.2d 340, 354 (Md. 2006) (citing eleven cases).

[79] *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002).

> Powell that posited that *American Pipe* tolling extends beyond causes of action that were actually asserted in the putative class action to include claims closely related to such causes of action.[80]

The claims pled in the Complaint are all analogous or closely related to the claims pled in the Dubroff Plaintiffs' complaint.[81] Therefore, those claims were tolled while the Dubroff Plaintiffs' putative class action was pending.[82]

The Fuchs Plaintiffs filed this action approximately three months after the Court refused to certify the Dubroff Plaintiffs' purported class action. The Fuchs Plaintiffs quickly sought to vindicate their rights once the Dubroff Plaintiffs were no longer supposedly responsible for protecting their interests. Thus, the claims of the Fuchs Plaintiffs are not barred by laches.

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[80] Reply Br. in Further Supp. of Defs.' Mot. to Dismiss at 23 (citing *Crown, Cork & Seal*, 462 U.S. at 355 (Powell, J., concurring); *Philip Morris*, 905 A.2d at 354, 355 n.8).

[81] The Defendants cite a line of cases holding that a class action tolling rule is inapplicable if the purported class representative lacked standing to assert the claims. The issue in *Dubroff I*, however, was not whether the Dubroff Plaintiffs had standing, but whether they had adequately pled facts. *See Dubroff I*, 2009 WL 1478697, at *4 ("Unfortunately for the Plaintiffs, those facts are absent from the Complaint; the Complaint is devoid of any facts demonstrating an agreement or that the Defendants were tied together in some legally significant way. In fact, at the hearing on this motion to dismiss, the Plaintiffs conceded that there were no facts in the Complaint from which the Court could infer that an agreement existed.").

[82] Although there is an argument that the limitations period should run between the time when a claim of a purported class representative is dismissed and when class certification is decided, the Defendants have not taken that position. Moreover, the federal rule, which the Court views as persuasive, is that "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." *Crown, Cork & Seal Co.*, 462 U.S. at 354.

C. *Javva Partners and Dwyer's Motion to Dismiss for Lack of Personal Jurisdiction*

In addition to moving for dismissal under Court of Chancery Rules 12(b)(6) and 23.1, and arguing that the Complaint is barred by laches, Javva Partners and Dwyer have moved, pursuant to Court of Chancery Rule 12(b)(2), to dismiss the claims brought against them for lack of personal jurisdiction. "Once a defendant moves to dismiss under Rule 12(b)(2), the burden rests on the plaintiff to demonstrate the two bedrock requirements for personal jurisdiction: (1) a statutory basis for service of process; and (2) the requisite 'minimum contacts' with the forum to satisfy constitutional due process."[83]

The Fuchs Plaintiffs contend that the conspiracy theory of jurisdiction provides the Court with a basis to exercise jurisdiction over Javva Partners and Dwyer. In order to establish personal jurisdiction over Javva Partners and Dwyer under the conspiracy theory, the Fuchs Plaintiffs must make a factual showing that:

> (1) a conspiracy to defraud existed; (2) [Javva Partners and Dwyer] w[ere] member[s] of that conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state; (4) [Javva Partners and Dwyer] knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and (5) the act in, or effect on, the forum state was a

[83] *Fisk Venture*, 2008 WL 1961156, at *6 (citations omitted).

> direct and foreseeable result of the conduct in furtherance of the conspiracy (the "*Istituto Bancario* factors").[84]

If the Fuchs Plaintiffs offer facts satisfying the *Istituto Bancario* factors, "jurisdiction [over Javva Partners and Dwyer] under [Delaware's] Long-Arm Statute may be proper. . . ."[85]

"Sufficiently pleading a claim for aiding and abetting a breach of fiduciary duty satisfies the first and second . . . *Istituto Bancario* [factors]."[86] As discussed in Subsection A.3 above, the Fuchs Plaintiffs have adequately pled a claim for aiding and abetting against Dwyer and NSC's Control Group, of which Javva Partners is a member. Thus, the Fuchs Plaintiffs have satisfied the first and second *Istituto Bancario* factors.

"The formation of a Delaware entity or the filing of a corporate instrument in Delaware to facilitate the challenged transaction satisfies [the third *Istituto Bancario* factor]."[87] The Complaint alleges that the Recapitalization involved amendments to NSC's certificate of

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[84] *Istituto Bancario Italiano SpA v. Hunter Eng'g Co., Inc.*, 449 A.2d 210, 225 (Del. 1982).
[85] *Reid v. Siniscalchi*, 2011 WL 378795, at *5 (Del. Ch. Jan. 31, 2011). Delaware's long-arm statute, 10 *Del. C.* § 3104, is referred to as the "Long-Arm Statute."
[86] *Hamilton Partners, L.P. v. Englard*, 11 A.3d 1180, 1198 (Del. Ch. 2010) (citing *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 2005 WL 583828, at *7 (Del. Ch. Feb. 4, 2005); *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 977 (Del Ch. 2000)).
[87] *Id.* (citing *Benihana of Tokyo*, 2005 WL 583828, at *8; *Gibralt Capital Corp. v. Smith*, 2001 WL 647837, at *6 (Del. Ch. May 9, 2001); *Crescent/Mach I*, 846 A.2d at 977).

incorporation.[88] Therefore, the Fuchs Plaintiffs have satisfied the third *Istituto Bancario* factor.

The fourth and fifth *Istituto Bancario* factors are that "[Javva Partners and Dwyer] knew or had reason to know of the act in the forum state," and "the act in . . . the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy."[89] The Complaint alleges that Javva Partners provided its written consent to the amendments to NSC's certificate of incorporation,[90] and that "Dwyer personally and directly determined substantial and significant aspects of . . . [NSC's] funding and business and the terms and timing of the . . . [Recapitalization] . . . ."[91] Thus, the Fuchs Plaintiffs have satisfied the fourth and fifth *Istituto Bancario* factors, and jurisdiction over Javva Partners and Dwyer under the Long-Arm Statute is proper.

Moreover, this exercise of personal jurisdiction comports with due process. In order to satisfy the requirements of due process, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State,

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[88] Compl. ¶¶ 67, 68 & 70.
[89] *Istituto Bancario*, 449 A.2d at 225.
[90] Compl. ¶¶ 67, 68 & 70.
[91] *Id.* at ¶ 61.

thus invoking the benefits and protections of its laws."[92] In *Istituto Bancario*, the Delaware Supreme Court explained that when the *Istituto Bancario* factors are met "a defendant . . . has so voluntarily participated in a conspiracy with knowledge of [his] acts in . . . the forum state [that he] can be said to have purposefully availed himself of the privilege of conducting activities in the forum state, thereby fairly invoking the benefits and burdens of its laws."[93] Thus, the Court may properly exercise personal jurisdiction over Javva Partners and Dwyer, and their motion to dismiss the claims against them under Rule 12(b)(2) is denied.

D. *The Fuchs Plaintiffs' Motion for Intervention and Consolidation*

Having dealt with the Defendants' motion to dismiss, the Court now addresses the Fuchs Plaintiffs' motion for intervention and consolidation. With regard to intervention as of right, Court of Chancery Rule 24(a) provides, in relevant part:

> [u]pon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

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[92] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).
[93] 449 A.2d at 225.

The Fuchs Plaintiffs clearly have an interest relating to the Recapitalization, but they fail to explain how that interest will be impaired by the disposition of the Dubroff Plaintiffs' action. Admittedly, the Fuchs Plaintiffs state in a conclusory fashion that they "have numerous, obvious interests to protect in this action," and that their claims "could be affected by the discovery and rulings in [the Dubroff Plaintiffs' action] . . . ."[94] But that simply overstates any potential risk. Once the Court refused to certify the Dubroff Plaintiffs' class action, anything that occurred in that action would not have a preclusive effect on the Fuchs Plaintiffs. Moreover, if the Dubroff Plaintiffs recover first, that fact would not seriously affect the Fuchs Plaintiffs' ability to recover. All the Dubroff Plaintiffs have left are a disclosure claim and an aiding and abetting claim. The disposition of the Dubroff Plaintiffs' action would not impair or impede the Fuchs Plaintiffs and, thus, the Fuchs Plaintiffs are not entitled, as of right, to intervene in the Dubroff Plaintiffs' action.

Turning to permissive intervention, Court of Chancery Rule 24(b) provides, in relevant part:

> [u]pon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the Court shall consider whether the

[94] Pl.'s Reply Br. in Further Supp. of Mot. for Intervention and Consolidation at 3.

> intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The Fuchs Plaintiffs' disclosure and aiding and abetting claims have numerous issues of fact and law in common with the remaining claims of the Dubroff Plaintiffs. The underlying basis for all of those claims is the Recapitalization. There has also not been any suggestion that intervention would unduly delay the Dubroff Plaintiffs or the Defendants. The Dubroff Plaintiffs took no position on the Fuchs Plaintiffs' motion to intervene, and the Defendants want to combine the two actions. Thus, it would be within the Court's discretion to permit the Fuchs Plaintiffs to intervene in the Dubroff Plaintiffs' action.

At this procedural juncture, however, consolidation would be the more appropriate mechanism for combining these two actions. Although, on occasion, this Court has allowed an intervenor to add claims to the matter he is joining,[95] several courts have suggested that an intervenor takes a matter as he finds it.[96] Going forward, the Fuchs Plaintiffs would presumably seek

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[95] *See, e.g.*, *Sanders v. Wang*, 1998 WL 842281, at *3 (Del. Ch. Nov. 19, 1998).

[96] *See Chao v. Chi. Reg'l Council of Carpenters*, 2006 WL 2849701, at *2 (N.D. Ill. Sept. 29, 2006) ("Intervenors may not inject into the case issues that are not raised in the [original plaintiff's] complaint.") (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 537 (1972)); *U.S. v. Sch. Dist. Of Omaha, State of Neb.*, 367 F. Supp. 198, 201 (D. Neb. 1973) (allowing intervention but stating that "[i]ntervenors may not reopen any questions that have previously been decided by the Court"); *Moore v. Tangipahoa Parish Sch. Bd.*, 298 F. Supp. 288, 293 (E.D. La. 1969) (same); *Fireman's Fund Ins. Co. v. Gerlach*, 128 Cal. Rptr. 396, 398 (Cal. Ct. App. 1976) ("The issues of the action may not be enlarged

to rely on their Complaint, as opposed to the Dubroff Plaintiffs' complaint. Thus, the Court is faced with two sets of plaintiffs, each of which is going to rely on a different complaint. If the Court combines those two sets of plaintiffs, then what it is doing is "consolidating" two actions brought by different plaintiffs. It is not allowing one set of plaintiffs to "intervene" in the action brought by the other set of plaintiffs. Thus, consolidation rather than intervention is the appropriate procedural mechanism for bringing these two sets of plaintiffs together. Moreover, although the Defendants oppose intervention, no one opposes consolidation. The Fuchs Plaintiffs and the Defendants want to consolidate the Fuchs Plaintiffs' action with the Dubroff Plaintiffs' action, and the Dubroff Plaintiffs take no position on that issue.

The Fuchs Plaintiffs and the Defendants each requested the opportunity to work together to draft a mutually acceptable consolidation order. The Court grants that request.

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by the proposed intervention.") (citations omitted); *Dankman v. D.C. Bd. of Elections and Ethics*, 443 A.2d 507, 516 (D.C. 1981) ("We conclude that the . . . intervenors may not broaden the scope of contested issues . . . ."); *Casebere v. Clark County Civil Serv. Comm'n Sheriff's Office*, 584 P.2d 416, 419 (Wash. Ct. App. 1978) ("[I]ntervenors must accept the pleadings as they find them.") (citations omitted). *But see Genentech, Inc. v. Bowen*, 676 F. Supp. 301, 308 n.20 (D.D.C. 1987) ("[T]here is no basis for [the] argument that the intervenors may not raise claims not raised by [the original plaintiff]. Indeed, providing an opportunity to litigate claims not adequately raised by the parties is one of the purposes of intervention.") (citations omitted).

V. CONCLUSION

For the foregoing reasons, the Defendants' motion to dismiss the Complaint is granted in part and denied in part, the Fuchs Plaintiffs' motion for permissive intervention and consolidation is granted in part and denied in part, and the discovery stay granted at oral argument is hereby lifted. An implementing order will be entered.