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Case No. 3940-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE NINE SYSTEMS CORPORATION SHAREHOLDERS LITIGATION	))))	Consol. C.A. No. 3940-VCN

MEMORANDUM OPINION

Date Submitted: April 3, 2013
Date Decided: July 31, 2013

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NOBLE, Vice Chancellor

Six plaintiffs (the "Kim Plaintiffs") have joined this action to challenge certain transactions (the "Transactions") preceding the acquisition of Nine Systems Corporation (the "Corporation" or "NSC") by Akamai Technologies, Inc. ("Akamai") in 2006 (the "Acquisition"). In 2008, two plaintiffs (the "Dubroff Plaintiffs") filed a putative class action challenging the Transactions (the "Class Action Complaint"). Although the Court denied class certification, it acknowledged that purported class members might be able to bring claims on an individual basis.[1] In 2010, a group of former minority shareholders in the Corporation (the "Fuchs Plaintiffs") individually brought suit (the "Fuchs Complaint"). The Court consolidated the Fuchs Plaintiffs and the Dubroff Plaintiffs' actions (the "Consolidated Action").[2] Some of their claims challenging the Transactions survived summary judgment.[3] The Kim Plaintiffs filed an initial complaint on October 22, 2012, and an amended complaint on December 17, 2012 (the "Kim Complaint," or "Am. Compl."), raising claims similar to those brought by the Fuchs Plaintiffs.

The main difference between the Kim Complaint and the Fuchs Complaint is how the Kim Plaintiffs were situated with respect to the Corporation. There are three distinct sets of Kim Plaintiffs: (i) shareholders who owned NSC common

[1] *Dubroff v. Wren Hldgs., LLC*, 2010 WL 3294219, at *4, 5, 9 (Del. Ch. Aug. 20, 2010).
[2] *Dubroff v. Wren Hldgs., LLC*, 2011 WL 5137175, at *15-16 (Del. Ch. Oct. 28, 2011).
[3] *In re Nine Sys. Corp. S'holders Litig.*, 2013 WL 771897 (Del. Ch. Feb. 28, 2013).

shares from before the Transactions until the Acquisition (the "Shareholder Plaintiffs"); (ii) a shareholder who owned NSC common shares before the Transactions and was purportedly induced to sell before the Acquisition (the "Stock Sale"); and (iii) individuals who owned options to purchase NSC common stock that were extinguished by the Transactions before the Acquisition (the "Pre-2002 Options"). The Defendants have moved to dismiss the Kim Complaint.[4] The Kim Plaintiffs responded with a Motion to Strike certain elements relied upon by the Defendants in their Motion to Dismiss.[5]

I. BACKGROUND[6]

Before the Transactions, NSC's three largest shareholders—Defendants Wren Holdings, LLC ("Wren"), Javva Partners, LLC ("Javva"), and Catalyst Investors, L.P. ("Catalyst") (the "Entity Defendants")—collectively owned approximately 56% of the Corporation. The Transactions increased the Entity

[4] Initially, the Defendants sought, in the alternative, summary judgment on the Kim Complaint for the same reasons as those they articulated in seeking summary judgment on the Fuchs Complaint. Defs.' Opening Br. in Supp. of Mot. to Dismiss 3-4. 49-50 ("Opening Br."). In light of the Fuchs Complaint's survival of summary judgment, the Defendants have withdrawn their alternative motion for partial summary judgment. Defs.' Reply Br. in Further Supp. of Mot. to Dismiss 1 n.2 ("Reply Br."); *In re Nine Sys. Corp. S'holders Litig.*, C.A. No. 3940, at 1-2 (Del. Ch. Apr. 3, 2013) (TRANSCRIPT) ("Tr.").

[5] The three items sought to be struck by the Kim Plaintiffs relate to the Shareholder Plaintiffs and the Stock Sale. Kim Pls.' Mot. to Strike ("Mot. to Strike"); Kim Pls.' Br. in Opp'n to Defs.' Mot. to Dismiss the Am. Compl. & Br. in Supp. of Kim Pls.' Mot. to Strike 18-21 ("Kim Br."). As discussed below, the items ultimately do not affect the Court's disposition of the claims to which they relate.

[6] The facts are drawn from well-pleaded allegations in the Kim Complaint. In considering the Defendants' Motion to Dismiss, they are presumed to be true. *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001).

Defendants' ownership of NSC to approximately 90%, and decreased the Kim Plaintiffs' ownership from approximately 15% to approximately 1%.[7]

The Kim Plaintiffs, like the Fuchs Plaintiffs, complain about the dilution of their equity interest in the Corporation, especially as it occurred before the Acquisition.[8] They similarly allege claims of breach of fiduciary duty,[9] aiding and abetting,[10] and unjust enrichment[11] against the Defendants due to this dilution.[12] Earlier, on the Fuchs Complaint, the Court largely denied the Defendants' motion for summary judgment on these claims on the grounds that the Court could not decide as a matter of undisputed fact whether the Entity Defendants constituted a control group which collectively decided to carry out the Transactions.[13]

A. *The Shareholder Plaintiffs*

Plaintiffs Rick Murphy, Thomas Murphy, Rounsevelle W. Schaum ("Schaum"), and Newport Capital Partners, Inc. ("Newport") were either founders

[7] Am. Compl. ¶ 99, 158.
[8] Am. Compl. ¶ 157.
[9] Am. Compl. ¶¶ 159-70.
[10] Am. Compl. ¶¶ 171-73.
[11] Am. Compl. ¶¶ 174-77.
[12] The Defendants acknowledge that the claims raised in the Kim and Fuchs Complaints are substantially the same. Opening Br. 1-2 ("[T]he Kim Complaint alleges the same claims as asserted by the Fuchs Plaintiffs in the Consolidated Action. That is, it asserts claims . . . challenging the [Transactions] under theories of breach of fiduciary duty, unjust enrichment, and aiding and abetting.").
[13] *In re Nine Sys. Corp. S'holders Litig.*, 2013 WL 771897, at *6 (Del. Ch. Feb. 28, 2013). Claims against the other Defendants Cameron Family Partnership, L.P. ("CFP"), Dort A. Cameron, III ("Cameron"), Andrew T. Dwyer ("Dwyer"), Howard Katz ("Katz"), Christopher Shipman ("Shipman"), and Troy Snyder ("Snyder"), also survived summary judgment. The Kim and Fuchs Complaints share the same Defendants.

of, or original investors in, the Corporation, a privately-held company incorporated in Delaware in 1999.[14] Rick Murphy was the Chairman of the Board and Chief Executive Officer of the Corporation at the time. He acquired NSC common shares in 1999 and 2000 and held them until the Acquisition.[15] Thomas Murphy, the father of Rick Murphy, was the first investor in the Corporation. He acquired NSC common shares in 1999 and 2000, and held a portion of them until the Acquisition.[16] Schaum was a founding director of the Corporation, and its then-Chief Financial Officer.[17] Schaum, or Newport (of which Schaum is the sole shareholder),[18] obtained NSC common shares in 1999-2000 and held them until the Acquisition.[19] Rick Murphy, Thomas Murphy, Schaum, and Newport collectively owned common shares representing about 15% of the Corporation's equity before the Transactions.[20]

B. *The Stock Sale*

Thomas Murphy acquired 45,000 NSC common shares in 1999 and 2000, and sold 44,000 shares back to NSC for $1 per share on June 6, 2006, before the

[14] Am. Compl. ¶ 57.
[15] Am. Compl. ¶ 35.
[16] Am. Compl. ¶ 36.
[17] Am. Compl. ¶ 37.
[18] The parties dispute whether Schaum owned stock during the relevant period. Am. Compl. ¶ 37; Opening Br. 49; Kim Br. 21, 49; Reply Br. 24-25; Tr. 11. This is addressed *infra*.
[19] Am. Compl. ¶ 37.
[20] Am. Compl. ¶ 58.

Acquisition.[21] Thomas Murphy claims that he decided to sell shares at that price based on conversations with Snyder, Dwyer, and then-CFO John Walpuck on May 30, 2006.[22] During these conversations, Thomas Murphy specifically asked Snyder and Dwyer for an update on the Corporation's activities and business prospects.[23] In their responses, Snyder and Dwyer did not mention that NSC was at the time in discussions with third parties, including Akamai, about a potential merger.[24] Snyder and Dwyer had participated in these discussions, and knew the terms of potential deals.[25] They suggested to Thomas Murphy the $1 per share purchase price and assured him it was fair under the circumstances, and he relied on their representations.[26]

According to the Kim Plaintiffs, NSC had begun discussions regarding a potential sale, acquisition, or combination with parties including Akamai months before the Stock Sale.[27] In connection with these negotiations, the Corporation suggested to Akamai a purchase price of $200 million, or approximately $15 per share of NSC common stock. Thomas Murphy alleges that had he known about the talks involving the sale of NSC at the time of the Stock Sale, he would not have

[21] Am. Compl. ¶ 135.
[22] Am. Compl. ¶¶ 36, 136.
[23] Am. Compl. ¶ 136.
[24] Am. Compl. ¶¶ 135-36.
[25] Am. Compl. ¶¶ 136-37.
[26] Am. Compl. ¶¶ 32, 140.
[27] Am. Compl. ¶ 133.

resold his NSC common shares and would have received approximately $13 per share from the Acquisition six months later.[28]

C. *The Pre-2002 Options*

Peter Mountanos ("Mountanos") joined the Corporation as Vice President during its first months in business and then became its Chief Technology Officer.[29] Mountanos claims that he was issued options to purchase 140,000 shares of NSC common stock in 2000, amounting to approximately 3% of the Corporation's total equity.[30] Mountanos was married to Jenny Kim ("Kim") during most of the period that he worked for the Corporation. After they divorced, Kim acquired a portion of Mountanos's options.[31]

In 2002, as part of the Transactions, the Defendants cancelled the Pre-2002 Options.[32] A shareholder list from before the Transactions, dated March 28, 2001, lists Mountanos as owner,[33] but the capitalization table from immediately after the Transactions does not.[34] Mountanos and Kim claim that the Pre-2002 Options were cancelled by the Defendants to ensure that options could be issued to Snyder

[28] Am. Compl. ¶¶ 141-42.
[29] Am. Compl. ¶¶ 38, 111.
[30] Am. Compl. ¶¶ 59, 111. Mountanos alleges that he acquired an option to purchase 90,000 shares of NSC common stock when he was hired as the Corporation's Vice President on March 15, 2000, and a further option to purchase 50,000 more shares when he was named the Corporation's Chief Technology Officer on December 15, 2000. Am. Compl. ¶ 111. The Defendants dispute the latter figure. Tr. 24-27.
[31] Am. Compl. ¶ 39.
[32] Am. Compl. ¶¶ 111, 113-14, 126.
[33] Am. Compl. ¶ 122.
[34] Am. Compl. ¶ 114.

in 2002 and that there would be sufficient issuable common stock remaining to carry out the Transactions.[35]

Beginning in mid-2002, and over the course of the next several years, Mountanos and Kim requested information about the Pre-2002 Options, including: capitalization tables, stock option agreements, and other option-related documents. The Defendants did not provide them with this information.[36] On or about January 4, 2005, Mountanos called Snyder to inquire about the Pre-2002 Options.[37] Part of the conversation involved Mountanos' stating to Snyder that "[t]here was no notification made to me as an employee of changes to my option status or numbers nor did I sign any type of release with respect to those previous grants."[38] Snyder told Mountanos that the Pre-2002 Options were not properly authorized by the Board and that Dwyer and the Board had reached this conclusion.[39]

According to the Kim Plaintiffs, but for the Defendants' misrepresentations and active concealment, Mountanos and Kim would have sought to exercise the Pre-2002 Options and would have discovered (and thus been able to challenge) their cancellation.[40] By cancelling the Pre-2002 Options in 2002 and subsequently concealing the cancellation from Mountanos and Kim in 2005, the Defendants

[35] Am. Compl. ¶ 113.
[36] Am. Compl. ¶ 116.
[37] Am. Compl. ¶ 119.
[38] Am. Compl. ¶ 117.
[39] Am. Compl. ¶ 119.
[40] Am. Compl. ¶¶ 125-26.

allegedly deprived them of the right to exercise the Pre-2002 Options, as well as to be compensated for any options that remained unexercised at the time of the Acquisition.[41]

II. ANALYSIS

A. *Motion to Dismiss Standard*

In considering a motion to dismiss, Court of Chancery Rule 12(b)(6) prescribes "reasonable conceivability."[42] The Court should:

> accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as "well-pleaded" if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[43]

Although the Court does not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party,"[44] a motion to dismiss will be denied if there is a reasonable possibility the plaintiff can recover.[45]

B. *The Shareholder Plaintiffs*

The Defendants have moved to dismiss the Shareholder Plaintiffs' claims on the grounds that they are time-barred. The Shareholder Plaintiffs acknowledge that

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[41] Am. Compl. ¶¶ 24, 125.
[42] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 (Del. 2011).
[43] *Id.* at 536 (citation omitted).
[44] *Price v. E.I. DuPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011)).
[45] *In re Alloy, Inc. S'holder Litig*, 2011 WL 4863716, at *6 (Del. Ch. Oct. 13, 2011).

they received inquiry notice of the Transactions as of November 25, 2006, when the Corporation sent proxy materials to shareholders seeking approval of the acquisition of the Corporation by Akamai (the "Merger Proxy").[46] The Shareholder Plaintiffs first raised their claims on October 22, 2012. The Defendants assert that, because of their six years delay, the Shareholder Plaintiffs waited too long.

"A statute of limitations period at law does not automatically bar an action in equity because actions in equity are time-barred only by the equitable doctrine of laches."[47] "Dismissal of a complaint on the grounds of laches requires the establishment of a) knowledge of the claim by the plaintiff; b) unreasonable delay in bringing the claim; and c) resulting prejudice to the defendant."[48] "Where the plaintiff seeks equitable relief, however, the Court of Chancery generally applies the statute of limitations by analogy."[49] "Absent 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."[50] Under Delaware law, claims for breach of fiduciary duty, aiding and abetting a breach of

[46] Am. Compl. ¶¶ 143-44.
[47] *Eluv Hldgs. (BVI) Ltd. v. Dotomi, LLC*, 2013 WL 1200273, at *5 (Del. Ch. Mar. 26, 2013) (citing *Whittington v. Dragon Gp., L.L.C*, 991 A.2d 1, 9 (Del. 2009)).
[48] *Gallagher v. Long*, 65 A.3d 616, 2013 WL 1857552, at *2 (Del. Apr. 30, 2013) (TABLE); *see also Eluv Hldgs.*, 2013 WL 1200273, at *4.
[49] *Eluv Hldgs.*, 2013 WL 1200273, at *5 (citing *Weiss v. Swanson*, 948 A.2d 433, 451 (Del. Ch. 2008)).
[50] *Whittington*, 991 A.2d at 9; *see also Eluv Hldgs.*, 2013 WL 1200273, at *5.

fiduciary duty, and unjust enrichment—those pled by the Shareholder Plaintiffs[51]—have a three-year analogous period of limitations.[52]

The Kim Plaintiffs argue that because the Shareholder Plaintiffs were part of the putative class defined in the Class Action Complaint (the "Proposed Class"), their claims were tolled between when the class action was filed on August 1, 2008 and when class certification was denied on August 20, 2010 (the "Tolling Period").[53] The Court has acknowledged the federal class action tolling rule in *American Pipe* as persuasive,[54] and 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."[55] The Court applied that reasoning to the Fuchs Plaintiffs, allowing them to avoid dismissal due to laches because they were intended members of the Proposed Class.[56]

The Defendants assert that the Shareholder Plaintiffs may not similarly invoke the tolling doctrine because they were not members of the Proposed

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[51] Compl. ¶¶ 159-77.
[52] *Shandler v. DLJ Merch. Banking, Inc.*, 2010 WL 2929654, at *9 n.88 (Del. Ch. July 26, 2010); *see* 10 *Del. C.* § 8106.
[53] Kim Br. 21-26.
[54] *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974); *see Dow Chem. Corp. v. Blanco*, 67 A.3d 392, 395 (Del. 2013).
[55] *Dubroff v. Wren Hldgs.*, 2011 WL 5137175, at *13 n.82 (citing *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 354 (1983)). "Judicial interpretation of the Federal Rules respecting class actions . . . [is] persuasive authority for the interpretation of Court of Chancery Rule 23." *In re Countrywide Corp. S'holders Litig.*, 2009 WL 846019, at *12 n.84 (Del. Ch. Mar. 31, 2009) (citing *Nottingham P'rs*, v. *Dana*, 564 A.2d 1089, 1094 (Del. 1989)).
[56] *Dubroff v. Wren Hldgs.*, 2011 WL 5137175, at *13.

Class.[57] The Class Action Complaint, dated August 1, 2008, provides the following definition of the Proposed Class:

> Plaintiffs bring this action as a class action pursuant to Court of Chancery Rule 23, on behalf of themselves and all persons who owned the common stock and Series A preferred stock of the [Corporation] as of the date of the initiation of the [Transactions], which is believed to be August 1, 2002 (the "Class").[58]
>
> Excluded from the Class are the Defendants, and any senior officers, directors, and control persons of any Defendant, members of the immediate family of each of the individual Defendants, any subsidiary or affiliate of a Defendant or any entity in which any excluded person has a controlling interest, as well as the legal representatives, heirs, successors, and assigns of any excluded person.[59]

The Shareholder Plaintiffs argue that they were part of the Proposed Class because (i) they owned common stock of the Corporation "as of the date of the initiation of the [Transactions]," and (ii) they were not "Defendants," "senior officers, directors and control persons of any Defendant," or "any subsidiary or affiliate of a Defendant" at that time.[60] The Class Action Complaint initially included NSC as a Defendant, but the Shareholder Plaintiffs were not senior officers, directors or control persons of the Corporation at its filing. Rick Murphy and Schaum were no

[57] Opening Br. 31-33.
[58] Class Action Compl. ¶ 40.
[59] Class Action Compl. ¶ 41.
[60] Am. Compl. ¶¶ 2, 4, 35-37. The Kim Plaintiffs do not plead that Mountanos or Kim owned NSC stock during the relevant period.

longer senior officers, directors or control persons of NSC as of 2001 prior to the Transactions.[61] NSC was dismissed as a defendant in 2009.[62]

The Defendants challenge whether the Shareholder Plaintiffs meet the second part of the definition of the Proposed Class in the Class Action Complaint by quoting from the Court's opinion on class certification, which stated that: "Excluded from the Class are the Defendants, the current and former officers of [the Corporation], their affiliates, and related individuals and entities."[63] Significantly, this language differs from the definition of the Proposed Class set out in the Class Action Complaint by purporting also to exclude "former" officers of the Corporation and their affiliates or related individuals and entities from the Proposed Class.[64] However, by *American Pipe*, the initial definition of a proposed class in a complaint initiating a putative class action is what governs for the

[61] *See, e.g.* Am. Compl. ¶¶ 15, 16, 35, 37, 63. Thomas Murphy and Newport were never senior officers, directors, or control persons of NSC.
[62] *Dubroff v. Wren Hldgs.*, 2009 WL 1478697, at *6 n.44.
[63] Opening Br. 8 (citing *Dubroff v. Wren Hldgs.*, 2010 WL 3294219, at *2).
[64] As the Kim Plaintiffs note, this formulation may have come from one of the briefs filed by the Dubroff Plaintiffs. Kim Br. 24 n.16. The opening brief in support of class certification may have introduced the "former" language by erroneously paraphrasing the Class Action Complaint:

> Excluded from the Class are defendants, the current and former officers and directors of Nine Systems, members of their immediate families, their affiliates, and their legal representatives, heirs, successors or assigns and any entity in which defendants have or had a controlling interest.

Dubroff Pls.' Opening Br. 5, Feb. 8, 2010.

purposes of class action tolling.[65] Since the Shareholder Plaintiffs were not senior officers, directors or control persons of any Defendants at the time of the filing of the Class Action Complaint, they were part of the Proposed Class.[66]

Being part of the Proposed Class, however, only allows for claims to be tolled until class certification is denied.[67] Once tolling has ceased, there remains the question of how to calculate "the amount of time available to file suit after tolling has ended."[68] Possible methods of calculation include suspension, extension, and renewal.[69] Suspension requires that the plaintiff file suit "within the

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[65] *Am. Pipe*, 414 U.S. at 554 ("[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action"); *see also Crown, Cork & Seal Co.*, 462 U.S. at 350 ("The filing of a class action tolls the statute of limitations 'as to all asserted members of the class.'").

[66] In addition, the Court has held that it "does not exclude potential class members . . . including shareholders who were merely employees of Nine Systems, or were Nine Systems Founders or Founder Consultants or purchasers from those Founders or Founder Consultants." *Dubroff*, 2010 WL 3294219, at *4 n.13.

[67] *Dubroff*, 2011 WL 5137175, at *13 n.82 ("[T]he 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." (citing *Crown, Cork & Seal Co.*, 462 U.S. at 354)).

[68] *Chardon v. Fumero Soto*, 462 U.S. 650, 650 n.1 (1983). Although the Kim Plaintiffs assert that the Defendants have waived any other basis for invoking laches other than those relating to the definition of the Proposed Class, Kim Br. 23 n.15, the Defendants could potentially again raise laches as an affirmative defense at later procedural stages. *See, e.g.*, *Bean v. Fursa Capital P'rs, L.P.*, 2013 WL 755792, at *10 n.73 (Del. Ch. Feb. 28, 2013) ("Although Defendants did not succeed on their motion to dismiss based on laches . . . Defendants have raised several facts in their defense to Plaintiffs' motion for summary judgment that could leave to a finding of laches on Plaintiffs' claims."). Moreover, as the Kim Plaintiffs have anticipated such arguments and responded to them in their answering brief, Kim Br. 23 n.15, they are not necessarily prejudiced by the Court's addressing them here. *But see Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at *5 (Del. Ch. Oct. 19, 2006) ("Plaintiffs were not afforded an adequate opportunity to assess the pertinent information before filing their answering brief.").

[69] Kathleen L. Cerveny, Note, *Limitation Tolling When Class Status Denied: Chardon v. Fumero Soto and Alice in Wonderland*, 60 *Notre Dame L. Rev.* 686, 689 (1985).

amount of time left in the limitation period on the day tolling took place."[70] Extension, often in the form of a "savings statute," "establishes fixed periods during which the plaintiff may file suit without regard to the length of the original limitation period or the amount of time left when the tolling began."[71] Renewal provides the plaintiff with an entirely fresh time period after class certification is denied.[72]

American Pipe itself does not answer the question of whether, in a case where "the filing of a class action has tolled the statute of limitations until class certification is denied, the tolling effect is suspension instead of renewal or extension of the period."[73] The United States Supreme Court has rejected the argument that "*American Pipe* establishes a uniform federal rule of decision that mandates suspension rather than renewal whenever a federal class action tolls a statute of limitations."[74] Similarly, this Court has not strictly endorsed either suspension or renewal as a rule for class action tolling.

As the Delaware Supreme Court discussed in *Reid*,[75] although "both laches and statutes of limitations operate to time-bar suits, the limitations of actions

[70] *Id.* at 689.
[71] *Id.* at 689-90.
[72] *Id.* at 690.
[73] *Chardon*, 462 U.S. at 661.
[74] *Chardon*, 462 U.S. at 662.
[75] *Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2009).

applicable in a court of law are not controlling in equity."[76] The Court "moves upon considerations of conscience, good faith, and reasonable diligence,"[77] and "although a statute of limitations defense is premised solely on the passage of time, the lapse of time between the challenged conduct and the filing of a suit to prevent or correct the wrong is not, in itself, determinative of laches."[78] The "laches inquiry is principally whether it is inequitable to permit a claim to be enforced,"[79] and "if unusual conditions or extraordinary circumstances make it inequitable . . . to forbid its maintenance after a longer period than that fixed by the statute, the Court will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it."[80]

The Class Action Complaint was filed on August 1, 2008, a little over a year and eight months after the Shareholder Plaintiffs received inquiry notice through the Merger Proxy on November 25, 2006. Class certification was denied on August 20, 2010. Under suspension, the Shareholder Plaintiffs would still have had close to a year and four months remaining to file their Complaint.[81] The Fuchs

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[76] *Reid*, 970 A.2d at 183 (citing *Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982)); *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 645 (Del. Ch. 2013).
[77] *Reid*, 970 A.2d at 183 (citations omitted); *Stevanov v. O'Connor*, 2009 WL 1059640, at *7 (Del. Ch. Apr. 21, 2009).
[78] *Id.* (citations omitted).
[79] *Id.* (citations omitted); *see also Whittington v. Dragon Gp., L.L.C.*, 991 A.2d 1, 8 (Del. 2009).
[80] *Id.* (citing *Wright v. Scotton*, 121 A. 69, 73 (Del. Ch. 1923)).
[81] While a suspension rule could potentially result in hardship to plaintiffs in situations where only a short time remains in the limitations period after tolling is restarted, the Shareholder Plaintiffs do not suffer this hardship here. *See* Cerveny, *supra* note 69, at 689 n.24 ("If only a

Plaintiffs were able to file their Complaint well within this period, on November 24, 2010. The Shareholder Plaintiffs, however, chose to wait until October 22, 2012 to file, more than two years and two months after class certification was denied and exceeded an aggregate period of three years from before and after the pendency of the class action. No reason justifying this delay in filing after the denial of class certification has been offered. Applying an equitable time bar—related to the statute of limitations but not exercised in blind obeisance to it—is not merely a matter of counting days. If only a few weeks, or even a few months, had been left in the analogous limitation period when class certification was denied, equity would provide a reasonable amount of time to allow the assertion of individual claims. The potential unfairness if the remaining time was paltry does not lurk here. The more than fifteen months available to the Shareholder Plaintiffs following denial of classification was sufficient for any diligent plaintiff to present her claims. Dismissal of the Shareholder Plaintiffs' claims because of their dilatory conduct should trigger no equitable handwringing.

The defense of laches, however, has another component: how long it took the Shareholder Plaintiffs to file their complaint and whether Defendants suffered any prejudice from the passage of time. It is straightforward to suggest that the passage of time—in particular because this action was progressing, albeit slowly—

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short time remained on the limitation period when tolling occurred, a hardship may be imposed on the plaintiff.").

satisfies the prejudice portion of the laches test. That, ultimately, is a question with factual considerations. Separating out prejudice caused by delay during the tolling period from any prejudice that may have occurred when there was no tolling is not readily done in the context of a motion to dismiss. It has been observed that resolving affirmative defenses is sometimes difficult to do with the limited factual record available on a motion to dismiss.[82] That observation is accurate in this instance as well. It is likely that the passage of more than three years and ten months, without the protection of tolling, coupled with the probably inevitable adverse consequences for the Defendants caused by the passage of time, would meet the laches standard. Resolving this factual question and exercising the discretion called for by the doctrine of laches preclude a definitive resolution of the Defendants' laches defense at this stage of the proceedings. Thus, the motion to dismiss the Shareholder Plaintiffs' claims as time-barred must be denied.[83]

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[82] *Reid*, 970 A.2d at 183-84.

[83] The Kim Plaintiffs have urged the Court to treat the motion to dismiss as one deserving consideration under summary judgment standards after an opportunity for discovery has been afforded. Kim Br. 13. The practical effect of the Court's conclusion here does not drift far from that suggestion.

On the issue of whether Schaum held shares for the relevant period, the Kim Plaintiffs assert that there are conflicting capitalization tables which show shares owned both in Schaum's name and in Newport's name. Am. Compl. ¶¶ 4, 37; Kim Br. 21; Tr. 72. The Defendants argue in response that "it does not appear that Schaum ever purchased or owned any shares of [NSC] in his own name" by referencing a stockholder list that does not include Schaum. Opening Br. 6, 6 n.4, 49. The Kim Plaintiffs have sought to strike the stockholder list referenced by the Defendants as extrinsic to the Complaint. Kim Br. 21; Mot. to Strike. Regardless of whether the particular stockholder list cited by the Defendants is considered by the Court, the Kim Plaintiffs have alleged other stockholder lists which do include Schaum. Am. Compl. ¶¶ 4, 37; Kim Br. 21; Tr. 72. On a motion to dismiss, the Court "is required to assume as true the well-pleaded

C. *The Stock Sale*

Thomas Murphy sold 44,000 shares of NSC common stock to the Corporation for $1 per share in June 2006, several months before the Acquisition.[84] He alleges that Snyder and Dwyer made false, misleading, and incomplete statements at the time of the Stock Sale upon which he justifiably relied[85] (i) stating that the Corporation was surviving, but was by no means prospering,[86] (ii) suggesting that the $1 per share purchase price was fair,[87] and (iii) failing to inform him in response to his questions that the Corporation was then involved in negotiations regarding a potential sale, merger, or acquisition with several companies including Akamai.[88]

Thomas Murphy claims that if he had known about the discussions involving the sale of NSC, he would not have sold his shares and would have received approximately $13 per share from the merger with Akamai less than six

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allegations in the complaint." *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001). The Kim Plaintiffs do not seek double recovery, as Schaum is the sole owner and beneficiary of Newport. Tr. 72. They merely seek additional discovery on records kept by the Corporation to determine whether the Newport/Schaum shares were in Schaum's or Newport's name, Tr. 73, to which their claims can then be properly attributed.

Following oral argument on the pending motion, counsel wrote to the Court regarding the treatment of "Founders" and "Founder Consultants" in a prior *Dubroff* memorandum opinion. 2010 WL 3294219, at *4 n.13. The foregoing resolves that debate.

[84] Am. Compl. ¶ 36.
[85] Am. Compl. ¶ 183.
[86] Am. Compl. ¶ 179.
[87] Am. Compl. ¶ 179.
[88] Am. Compl. ¶ 180.

months later.[89] As a result of the Stock Sale, he was financially harmed in an amount of more than $500,000 because of his reliance on the alleged material misstatements of Dwyer and Snyder.[90] Thomas Murphy brings three claims: (i) Snyder breached his fiduciary duties by making such false or misleading disclosures;[91] (ii) Dwyer aided and abetted that breach;[92] and (iii) Snyder and Dwyer's statements constituted fraud.[93]

1. Tolling

The Stock Sale occurred in June 2006. Thomas Murphy first brought his claims regarding the Stock Sale on October 22, 2012. The Defendants argue that any claims relating to the Stock Sale are time-barred,[94] first, because the Class Action Complaint did not toll such claims, and second, because the Merger Proxy provided Thomas Murphy with inquiry notice in November 2006.[95] The Kim Plaintiffs respond, however, that because the Merger Proxy falsely stated that discussions regarding the Acquisition only started in August 2006 (after the Stock Sale) when they instead began in May 2006 (before the Stock Sale),[96] the Merger

[89] Am. Compl. ¶¶ 141-42.
[90] Am. Compl. ¶ 184.
[91] Am. Compl. ¶ 164.
[92] Am. Compl. ¶ 173.
[93] Am. Compl. ¶ 179.
[94] Claims of breach of fiduciary duty and fraud are generally addressed by reference to a three-year statute of limitations. *See Smith v. McGee*, 2006 WL 3000363, at *3 (Del. Ch. Oct. 16, 2006); 10 *Del. C.* § 8106.
[95] Opening Br. 34, 38.
[96] Am. Compl. ¶ 146.

Proxy did not provide Thomas Murphy with inquiry notice as to his Stock Sale claims.[97]

The statute of limitations is "tolled if a defendant engaged in fraudulent concealment of the facts necessary to put a plaintiff on notice of the truth."[98] "Fraudulent concealment requires an affirmative act of concealment or 'actual artifice' by a defendant that prevents a plaintiff from gaining knowledge of the facts."[99] It includes "misrepresentations intended to put the plaintiff off the trail of inquiry."[100] According to Thomas Murphy, he was only able to discover that he had been financially harmed as a result of Snyder's allegedly false, misleading, and incomplete statements through non-confidential discovery in the Consolidated Action in 2012.[101] The Defendants respond by asserting that the deposition testimony of Dwyer and Snyder "contradicts such allegations, and shows that in fact no merger negotiations were underway" when Thomas Murphy agreed to the Stock Sale.[102]

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[97] Kim Br. 32.

[98] *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5 (Del. Ch. July 17, 1998), *aff'd*, 725 A.2d 441 (Del. 1999) (TABLE).

[99] *Weiss v. Swanson*, 948 A.2d 433, 451 (Del. Ch. 2008).

[100] *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *8 (Del. Ch. Jan. 24, 2005) (citations omitted).

[101] Am. Compl. ¶ 146. Because Thomas Murphy argues that he was not provided with inquiry notice regarding his Stock Sale claims through the Merger Proxy in 2006, and did not receive such inquiry notice until discovery in the Consolidated Action in 2012, the Court does not reach the parties' arguments as to whether the Class Action Complaint provided tolling.

[102] Opening Br. 47; Ex. E (Snyder Dep.) at 309; Ex. F (Dwyer Dep.) at 648. The dispute as to whether discussions regarding a sale or merger of NSC had in fact begun prior to the Stock Sale cannot be resolved at this stage.

The Kim Plaintiffs have alleged two instances of fraudulent concealment, that: (i) "[i]n response to direct questions from Thomas Murphy in late May 2006 . . . Dwyer and Snyder failed to tell him that the Corporation was discussing a potential merger, including with Akamai,"[103] and (ii) "[i]n the merger proxy, Defendants continued their concealment by stating falsely that discussions with Akamai began in August 2006."[104] According to the Kim Plaintiffs, these misrepresentations were intended to, and did, prevent Thomas Murphy from discovering Snyder and Dwyer's wrongdoing.[105]

Snyder and Dwyer's alleged failure to advise, in response to Thomas Murphy's questions prior to the Stock Sale, that negotiations to sell or merge NSC were underway, coupled with the Merger Proxy's statement that such discussions did not begin until after the Stock Sale, are sufficient to rise to the level of fraudulent concealment at the motion to dismiss stage.[106] Thomas Murphy therefore did not receive inquiry notice until 2012, when he allegedly learned that

[103] Kim Br. 30 (citing Am. Compl. ¶¶ 136, 140).
[104] Kim Br. 30 (citing Am. Compl. ¶¶ 138-41).
[105] Kim Br. 30.
[106] The Defendants assert that the financial statements of NSC attached to the Merger Proxy gave Thomas Murphy inquiry notice as to "any discrepancy between what he claims to have been told about [NSC]'s financial condition and what [NSC]'s actual financial condition was" and as to "his claim that the sale price he negotiated with SMC was too low." Opening Br. 28. While the Kim Plaintiffs have moved to strike the financial statements as extrinsic to their complaint, Mot. to Strike, the Defendants' assertions are inapposite. Thomas Murphy's claim, as the Court understands it, is that he was fraudulently induced to part with NSC common shares by fiduciaries who deliberately failed to inform him that merger discussions were taking place before and at the time of the Stock Sale. The financial statements do nothing to establish inquiry notice as to this claim.

negotiations to sell NSC had begun prior to the Stock Sale, and not after the Stock Sale as he had been led to believe.[107]

2. Fraud

To plead fraud, a plaintiff must allege "(i) a misrepresentation, which can take the form of a statement, omission, or active concealment of the truth; (ii) the defendant's knowledge that the representation was false; (iii) intent to induce the plaintiff to act or refrain from acting; (iv) justified reliance on the misrepresentation; and (v) damage as a result of such reliance."[108] Court of Chancery Rule 9(b) requires fraud to be pled "with particularity," which "obligates plaintiffs to allege the circumstances of the fraud 'with detail sufficient to apprise the defendant of the basis for that claim.'"[109] The Kim Complaint pleads with particularity two separate grounds of fraud relating to the Stock Sale, that Dwyer and Snyder remained silent when they had a duty to speak,[110] and that they made false statements to and/or actively concealed the truth (that negotiations relating to

[107] As Thomas Murphy's allegations of fraudulent concealment are sufficient to toll his claims relating to the Stock Sale, the Court has no occasion to reach his arguments regarding equitable tolling or inherently unknowable injury.
[108] *Great-West Investors LP v. Thomas H. Lee P'rs, LP*, 2011 WL 284992, at *12 (Del. Ch. Jan. 14, 2011).
[109] *Narrowstep, Inc. v. Onstream Media Corp.*, 2010 WL 5422405, at *12 (Del. Ch. Dec. 22, 2010) (quoting *Grunstein v. Silva*, 2009 WL 4698541, at *14 (Del. Ch. Dec. 8, 2009)).
[110] Am. Compl. ¶ 180

the Acquisition were taking place before and at the time of the Stock Sale) from Thomas Murphy.[111]

3. The Stock Purchase Agreement

The Defendants respond to Thomas Murphy's fraud claims by asserting that Thomas Murphy had made representations—in the stock purchase agreement he signed in connection with the Stock Sale (the "SPA")—that he did not rely on any of the statements alleged in the Kim Complaint.[112] The Kim Plaintiffs seek to strike the SPA as extrinsic to the Complaint and argue that even if the SPA were considered by the Court "it should not be enforced on a motion to dismiss, where all reasonable inferences are drawn in Plaintiffs' favor."[113] Whether the anti-reliance language in the SPA is enforceable against Thomas Murphy's claims of fraud and breach of fiduciary duty depends on whether Thomas Murphy was a sophisticated party who negotiated that language.[114] Factual considerations include, *inter alia*, whether Thomas Murphy was advised by legal counsel, whether the anti-reliance language was negotiated between the parties, and whether Thomas

[111] Am. Compl. ¶ 179.
[112] Opening Br. 45.
[113] Kim Br. 38; Tr. 53-55.
[114] *See Great Lakes Chem. Corp. v. Pharmacia Corp.*, 788 A.2d 544, 555 (Del. Ch. 2001).

Murphy possessed relevant experience and knowledge.[115] The Court cannot make these factual determinations at this stage of the proceedings.[116]

Thus, the motion to dismiss Thomas Murphy's claims regarding the Stock Sale is denied.

D. *The Pre-2002 Options*

Mountanos and Kim allege that the Defendants cancelled their Pre-2002 Options as part of the Transactions in 2002,[117] and then fraudulently concealed that fact from them in 2005.[118] Specifically, in 2002, the Defendants are alleged to have committed conversion by cancelling the Pre-2002 Options; Wren, Javva, Catalyst, and CFP are said to have been unjustly enriched by the "seizure of equity reserved for Kim and Mountanos."[119] Then, in 2005, Snyder allegedly defrauded Mountanos and Kim by making false and misleading statements about the status of the Pre-2002 Options that prevented their exercise,[120] and Dwyer and the Board allegedly committed fraud by approving of Snyder's statements.[121] The

[115] *See id.*; *Homan v. Turoczy*, 2005 WL 2000756 at *17, *17 n.53 (Del. Ch. Aug. 12, 2005).
[116] Similarly, the Court cannot yet conduct the factual inquiry as to whether the language in the SPA precluded Thomas Murphy from raising a claim of fraud by silence.
[117] Am. Compl. ¶¶ 111, 113-14, 126.
[118] Am. Compl. ¶¶ 124-26.
[119] Am. Compl. ¶¶ 175, 195.
[120] Am. Compl. ¶¶ 186-90.
[121] Am. Compl. ¶¶ 186-87.

Defendants respond by asserting that any claims relating to the Pre-2002 Options are time-barred.[122]

As discussed above, the question of whether a claim is time-barred is determined under laches through reference to the relevant analogous statute of limitations.[123] "The statute of limitations begins to run at the time that the cause of action accrues, which is generally when there has been a harmful act by a defendant. This is true even if the plaintiff is unaware of the cause of action or the harm."[124] Mountanos and Kim's claims of conversion and unjust enrichment accrued in 2002 when the Pre-2002 Options were allegedly cancelled,[125] and their claim of fraud arose in 2005 when Snyder allegedly made the fraudulent statements at issue.[126] In order to bring their claims in 2012, Mountanos and Kim have the burden of pleading facts that demonstrate grounds for tolling,[127] which operates to suspend the running of the statute of limitations only in "very limited circumstances."[128]

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[122] Opening Br. 25-28.
[123] *Eluv Hldgs.*, 2013 WL 1200273, at *5 ("[A]ctions in equity are time-barred only by the equitable doctrine of laches. . . . Absent a tolling of the limitations period, a party's failure to file within an analogous statute of limitations, if any, is typically presumptive evidence of laches.").
[124] *In re Tyson Foods, Inc.*, 919 A.2d 563, 584 (Del. Ch. 2007) (citing *Isaacson, Stolper & Co. v. Artisan's Sav. Bank*, 330 A.2d 130, 132 (Del. 1974); *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5.).
[125] Am. Compl. ¶ 113.
[126] Am. Compl. ¶¶ 117-20.
[127] *Smith v. Mattia*, 2010 WL 412030, at *3 (Del. Ch. Feb. 1, 2010).
[128] *Merck & Co., Inc. v. SmithKline Beecham Pharms. Co.*, 1999 WL 669354, at *42 (Del. Ch. Aug. 5, 1999).

To that end, the Kim Plaintiffs argue against laches on the grounds of fraudulent concealment. "Under the doctrine of fraudulent concealment, the statute of limitations may be tolled if there was an affirmative act of concealment or some misrepresentation that was intended to 'put a plaintiff off the trial of inquiry' until such time as the plaintiff is put on inquiry notice."[129] According to the Kim Plaintiffs, Snyder falsely told Mountanos on January 4, 2005, that the Pre-2002 Options never existed and that the Board never authorized them,[130] when, in fact, the Corporation's internal shareholder list before the Transactions listed the Pre-2002 Options as outstanding and issued to Mountanos.[131] Snyder denied Mountanos' requests to see a capitalization table and other information relating to the Pre-2002 Options, allegedly because he knew Mountanos "would not be happy" if he showed him.[132] The Defendants blocked Mountanos and Kim's requests and inquiries on several other occasions,[133] and forbade Snyder from sharing such information with Mountanos.[134] According to Mountanos, these actions constituted "fraudulent concealment" as they "prevented the plaintiff[s] from gaining knowledge of material facts or led the plaintiff[s] away from the

[129] *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *15 (Del. Ch. Dec. 23, 2008).
[130] Am. Compl. ¶ 119.
[131] Am. Compl. ¶ 122.
[132] Am. Compl. ¶ 120.
[133] Am. Compl. ¶¶ 19, 116.
[134] Am. Compl. ¶ 120.

truth."[135] Mountanos and Kim contend that as a result of these actions, they did not discover their claims until discovery in the Consolidated Action in 2012,[136] and could not have done so any earlier.[137]

The Defendants correctly note that Snyder's statements in 2005 placed Mountanos and Kim on inquiry notice of any wrongdoing relating to the Pre-2002 Options that may have occurred between 2002 and 2005.[138] According to Mountanos, at the time of Snyder's statements in 2005 Mountanos believed that he owned the Pre-2002 Options as a result of his original hiring as the Corporation's Vice President and his subsequent naming as the Corporation's Chief Technology Officer.[139] Snyder's statements on January 4, 2005 that the Pre-2002 Options did not exist were incompatible with Mountanos' beliefs and his rights under his employment agreements, and should have placed Mountanos on inquiry notice of any wrongdoing relating to the Pre-2002 Options. As the Court held in *Sunrise Ventures*:

> Inquiry notice does not require a plaintiff to have actual knowledge of a wrong, but simply an objective awareness of the facts giving rise to the wrong-that is, a plaintiff is put on inquiry notice when he gains

[135] Kim Br. 34; *Smith v. Mattia*, 2010 WL 412030, at *5 (Del. Ch. Feb. 01, 2010) (quoting *In re Tyson Foods, Inc.*, 919 A.2d at 585).
[136] Am. Compl. ¶ 126.
[137] Am. Compl. ¶¶ 191-92, 198-99.
[138] Opening Br. 25.
[139] Am. Compl. ¶¶ 15, 111.

> "possession of facts sufficient to make him suspicious, or that ought to make him suspicious."[140]

The Kim Plaintiffs argue that Snyder's statements only provided inquiry notice that the Corporation may have violated Mountanos' employment agreements and did not "provide inquiry notice that, in fact, the options were validly issued, that Defendants subsequently seized them, and that Defendants were lying to Mountanos to cover their tracks."[141] They assert that these harms "are distinct from the Corporation's alleged failure to issue options, and they give rise to entirely separate claims."[142]

Inquiry notice, however, "does not require actual discovery of the reason for the injury. Nor does it require plaintiffs' awareness of all of the aspects of the alleged wrongful conduct."[143] "[T]he information necessary to put a plaintiff on inquiry notice is not necessarily the exact same information necessary to state a claim."[144] The statute of limitations "begins to run when plaintiffs should have discovered the general fraudulent scheme," but is tolled until "such time that persons of ordinary intelligence and prudence would have facts sufficient to put

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[140] *Sunrise Ventures, LLC v. Rehoboth Canal Ventures*, LLC, 2010 WL 363845, at *7 (Del. Ch. Jan. 27, 2010) *aff'd*, 7 A.3d 485 (Del. 2010) (quoting *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *7 n.49).
[141] Kim Br. 35.
[142] *Id.*
[143] *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *7.
[144] *Van de Walle v. Salomon Bros. Inc.*, 733 A.2d 312, 315 (Del. Ch. 1998).

them on inquiry which, if pursued, would lead to the discovery of the injury."[145] Had Mountanos further investigated Snyder's statements to him in 2005 that the Pre-2002 Options were never issued, he would have discovered their cancellation and have been able to take appropriate action. Therefore, Mountanos and Kim's claims regarding the Pre-2002 Options are time-barred.[146]

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[145] *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *7.

[146] Because Snyder's 2005 statements were sufficient to establish inquiry notice, the Court does not reach the parties' arguments as to whether the proxy materials relating to the Acquisition constituted inquiry notice. *See, e.g.*, Opening Br. 25-28. The Class Action Complaint did not toll the Pre-2002 Options claims (between August 1, 2008 and August 20, 2010) because the Class Action Complaint was filed o behalf of Shareholders, not on behalf of holders of options. The Kim Plaintiffs' arguments based on the doctrine of inherently unknowable injury and "blameless ignorance" are without merit. Mountanos knew of Snyder's statements as of 2005, and they were in direct conflict with Mountanos' belief that he owned Pre-2002 Options. In 2005, Snyder directly stated to Mountanos that the Pre-2002 Options, to which Mountanos thought he was entitled, did not exist. Mountanos' decision not to further investigate at that point, while curious, can hardly be attributed to the injury being inherently unknowable or to his blameless ignorance. Further, as the claims relating to the Pre-2002 Options are time-barred, the Court does not reach the Defendants' arguments that the Kim Complaint fails to state a claim for fraud, conversion, or unjust enrichment relating to the Pre-2002 Options.

The limitations period was never tolled as to the claims of Mountanos and Kim. They delayed more than four years beyond when they should have filed their action. To the extent that their claims are equitable, they are barred by laches because there can be no doubt that such an extraordinary delay did cause adverse consequences for Defendants.

The Kim Plaintiffs argue that "equity requires" that Mountanos and Kim's claims likewise be tolled during the pendency of the . . . class action." Kim Br. 28. Mountanos and Kim were not members of the proposed class. They held options—not common stock. Their interests are materially different from those of the Plaintiffs who held stock. There is no apparent rationale, in this instance, behind the mantra that "equity requires." In this context, the mere invocation of equitable notions does not prevail.

III. CONCLUSION

For the foregoing reasons, the Defendants' Motion to Dismiss is granted as to the claims of Mountanos and Kim; otherwise, it is denied. Because the Court did not rely upon the exhibits which the Kim Plaintiffs sought to keep from the Court's consideration, their Motion to Strike is denied as moot.

An implementing order will be entered.