National Association of Corporate Directors

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The Delaware Court of Chancery Weighs In on Option Backdating, Spring-Loading and Bullet-Dodging

Focus on Directors' Fiduciary Duties in the Grant Process

Director Summary >

Last month the Delaware Court of Chancery sent a warning signal to boards by allowing two lawsuits to proceed against directors allegedly involved in options backdating. In denying motions to dismiss complaints in Ryan v. Gifford *and* In Re Tysons Food, Inc.*, the court refused to apply a statute of limitations or the business judgment rule as hoped by the defendants. Here is a summary and analysis prepared for clients and friends of the firm by Robert L. Messineo, a board member of NACD's New York Chapter, and a partner of Weil, Gotshal & Manges LLP.*
– The DMX Editors

The Delaware Court of Chancery, addressing the subject for the first time, has recently denied motions to dismiss, allowing breach of fiduciary duty claims against directors to proceed toward trial in two separate cases alleging intentional improper board action regarding the timing of option grants. These cases, *Ryan v. Gifford*[1] and *In re Tyson Foods, Inc.*[2], decided by Chancellor Chandler the same day, underscore the type of claims alleging breach of fiduciary duty by directors related to option backdating, "spring-loading" and "bullet-dodging" that will be litigated in the Delaware courts and elsewhere. These are claims that the court characterized as involving "fundamental issues," "of great import to the law of corporations."[3] In both cases the court held that option timing decisions by a board that circumvent option plan provisions requiring all option grants to have "at-the-market" exercise prices cannot be presumed, at least for purposes of a motion to dismiss, to be entitled to the protections of the business judgment rule because

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such actions, as alleged, could not be considered to be taken in good faith.

In *Ryan*, a stockholder derivative action, the plaintiff alleged, among other things, that directors of Maxim Integrated Products breached their fiduciary duty by granting backdated options from 1998 to 2002 to the company's founder, Chair and Chief Executive. The options had been issued under shareholder-approved stock option plans that, as described by the court, Maxim had "contracted and represented" to its shareholders required that the exercise price of all options would be no less than the fair market value of the company's common stock, measured by its publicly traded closing price on the date of grant.[4] The court ruled:

> [T]he intentional violation of a shareholder approved stock option plan, coupled with fraudulent disclosures regarding the director's purported compliance with that plan, constitute conduct that is disloyal to the corporation and is therefore an act in bad faith.[5]

Tyson Foods, also a derivative action, presented claims involving numerous alleged improper related party transactions approved by directors of Tyson Foods, Inc., one of which concerned option grants between 1999 to 2003 to corporate insiders made "[d]ays before *Tyson* would issue press releases that were very likely to drive stock-prices higher…"—"spring-loaded" options.[6] With reasoning similar to *Ryan*, the Court held that the intentional grant of spring-loaded options by directors having inside information in contravention of a shareholder-approved stock option plan could support a claim for a breach of fiduciary duty:

> [A] director who intentionally uses inside knowledge … to enrich employees while avoiding shareholder imposed requirements cannot…be said to be acting loyally and in good faith as a fiduciary.
>
> This conclusion… rests upon at least two premises, each of which should be… alleged… to show that a spring-loaded option issued by a disinterested and independent board is nevertheless beyond the bounds of business judgment. First, a plaintiff must allege that the options were issued according to a shareholder-approved employee compensation plan. Second, a plaintiff must allege that the directors that approved the spring-loaded… options (a) possessed material non-public information soon to be released that would impact the company's share price, and (b) issued those options with the intent to circumvent otherwise valid shareholder-approved restrictions upon the exercise price of the options.
>
> Such allegations would satisfy a plaintiff's requirement to show adequately at the pleading stage that a director acted disloyally and in bad faith is therefore unable to claim the protection of the business judgment rule.[7]

While not alleged in the case before it, the *Tyson Foods* decision noted that the same considerations would apply to so-called "bullet-dodging" in the granting of options. The court referred to this practice in general terms as "granting options to employees after the release of materially damaging information,"[8] apparently having in mind intentionally postponing the recorded grant date until after negative information drove the trading price of the related stock downwards and thereby achieving a more favorable exercise price than would have been the case at the originally intended grant date. This decision will undoubtedly receive significant attention in the already wide-ranging debate over what is acceptable practice in pricing options at times when a company has material undisclosed information, given that the Securities and Exchange Commission has not yet taken any enforcement action concerning spring-loading or bullet dodging[9]—and an SEC Commissioner has stated publicly that spring-loading may not constitute a violation of the federal securities laws, at least where there was a business reason for using the practice.[10]

Important Aspects of the Decisions

The decisions will likely have significant impact on the many cases concerning option grants pending in the Delaware and other state and federal courts. The views expressed in the decisions, particularly regarding spring-loading and bullet-dodging, should also be considered by board committees that are currently conducting reviews of past option grant practices as they make determinations about these practices and the proper remedies for any misconduct found. Companies that have already reviewed their past option grant practices should consider whether, taking into account the decisions, any additional review and reconsideration of such matters is warranted.

Demand Was Excused

The court in both cases held that demand on the respective boards of directors was excused. The demand requirement reflects the universally recognized "basic principle of corporate governance that the decision of a corporation—including the decision to initiate litigation—should be made by the board of directors or the majority of shareholders."[11] As the Delaware Supreme Court has observed in numerous cases, "'[t]he directors of a corporation and not its shareholders manage the business and affairs of the corporation'… and accordingly, the directors are responsible for deciding whether to engage in derivative litigation."[12]

Where a decision made by a board of directors is challenged, the question whether demand is excused is governed by the test first stated in *Aronson v. Lewis*, pursuant to which "particularized facts" must be alleged that, if true, would create "a reasonable doubt" that "(1) 'the directors are disinterested and independent'" or "'(2) the challenged transaction was otherwise the product of a valid exercise of business judgment.'"[13] Where board action is not at issue, a different test, first stated in *Rales v. Blasband,*[14] applies because no business judgment has been made and thus the second prong of the *Aronson* test is inapplicable. The court only "must determine whether or not… particularized factual allegations… create a reasonable doubt that… the board of directors could have properly exercised its independent and disinterested business judgment in responding to the demand."[15] Under *Rales,* a diasabling interest also may be found where the potential for outside director liability "is not 'a mere threat' but may instead may rise to 'a substantial likelihood.'"[16] A "substantial likelihood" of director liability exists only in "rare cases" where the challenged director conduct is "egregious on its face."[17]

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- In *Ryan*, the plaintiff had alleged that the board members violated their fiduciary duties by having "actively allowed" the backdating of nine option grants to the company's CEO over a five year period, causing the company to receive lower payments upon exercise of the options, to overstate its profits and to incur adverse tax effects, while unjustly enriching the CEO.[18] Plaintiff supported its backdating claim with statistical data published by Merrill Lynch, indicating that the recorded date of each option grant was the date of the lowest market price of the month or year in which the grant was made—timing the court characterized as being "too fortuitous to be mere coincidence."[19] Plaintiff further argued that the grants were contrary to the provisions of company's shareholder-approved option plans that required that the exercise price of the options not be less than the fair market value of the stock subject to the option on the date the option was granted. Pointing out that the alleged option grants were made "not at set or designated times, but by a sporadic method," the court found the factual allegations raised a reasonable doubt "that the challenged transactions resulted from a valid exercise of business judgment."[20] It explained:

  > Plaintiff supports his breach of fiduciary duty claim and his assertion that demand is futile by pointing to the board's decision to ignore limitations set out in the… plans. The plans do not grant the board discretion to alter the exercise price by falsifying the date on which options were granted.
  >
  > Plaintiff here points to specific grants, specific language in option plans, specific public disclosures [that options were issued "at the market"], and supporting empirical analysis to allege knowing and purposeful violations of shareholder plans and intentionally fraudulent public disclosures. Such facts… provide sufficient particularity in the pleading to survive a motion to dismiss for failure to make demand…[21]

- The court in *Ryan* also concluded that under the circumstances a majority of the board could not be considered disinterested with respect to the backdating claim. It pointed to the plaintiff's allegations that all three of the compensation committee members who approved the challenged grants were still on the board at the time the complaint was filed; thus, out of the six-member board, the plaintiff "alleges that three… *approved* backdated options, and another… [the CEO] accepted them."[22] It characterized the situation as "one of those 'rare cases [in which] a transaction may be so egregious on its face that board approval cannot meet the test of business judgment, and a substantial likelihood of director liability therefore exist,'" thereby rendering the directors incapable of making a disinterested decision about the lawsuit. The court pointed out that "a director who approves the backdating of options faces at the very *least* a substantial likelihood of liability, if only because it is difficult to conceive of

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a context in which a director may simultaneously lie to his shareholders… and yet satisfy his duty of loyalty." The court added in a footnote that the defendant directors' interest not only arose because of their duty of loyalty but because: "Were the board to pursue a derivative suit, it might unearth facts that would subject the directors to further civil and criminal liability."[23]

- In *Tyson Foods*, the court excused demand based on the combination of related party transactions involved in the case, including alleged *quid pro quo* arrangements that rendered all directors interested or lacking in independence with respect to all the transactions. The court did not refer specifically to the challenged options in this portion of its decision.[24]

The Business Judgment Rule Did Not Prevent the Lawsuits From Going Forward

In both cases, the court also rejected the defendants' argument that, even if pre-suit demand were excused, the lawsuits should be dismissed because the plaintiffs had not properly alleged by particularized facts that the option grant was not a valid exercise of business judgment. The court relied in each case on duty of loyalty and good faith considerations similar to those considered in *Ryan* to excuse demand.

- In *Ryan*, the court held that "the intentional violation of a shareholder-approved option plan, coupled with fraudulent disclosures regarding the directors' purported compliance with that plan, constitute conduct that is disloyal to the corporation and is therefore an act in bad faith." The court commented that it was "unable to fathom a situation where the deliberate violation of a shareholder-approved option plan and false disclosures, obviously intended to mislead shareholders into thinking that the directors complied honestly with the… plan, is anything but an act of bad faith. It certainly cannot be said to amount to faithful and devoted conduct of a loyal fiduciary." As an act of bad faith, the award could not be a valid exercise of business judgment.[25]
- In *Tyson Foods*, the plaintiffs alleged four instances in which the compensation committee of the board granted options to executives shortly before the corporation disclosed highly favorable business developments that led to substantial increases in the trading price of its shares. Again, the options were issued under a shareholder-approved plan that, the plaintiffs alleged, required the exercise price to be equal to the fair market value of the shares subject to the options. Although concluding that the plaintiffs had failed to allege particular facts to support a lack of independence on the part of the compensation committee members,[26] the court found that the plaintiffs had sufficiently alleged that the committee members had not acted in good faith. It explained:

> Granting spring-loaded options, without explicit authorization from shareholders, clearly involves an indirect deception. A director's duty of loyalty includes the duty to deal fairly and honestly with the shareholders for whom he is a fiduciary. It is inconsistent with such a duty for a board of directors to ask for shareholder approval of an… option plan and then later distribute shares to managers in such a way as to undermine the very objectives approved by shareholders. This remains true even if the board complies with the strict letter of a shareholder-approved plan as it relates to strike prices or issue dates.[27]

Claims Arising Years Before the Statute of Limitations Period Were Allowed

In both lawsuits, the applicability of the statute of limitations was at issue, given that many of the alleged acts of backdating or spring-loading had occurred several years before the lawsuits were commenced. The court held that the three year statute of limitations normally applicable to breach of fiduciary duty claims did not bar the lawsuits based on the equitable tolling and/or fraudulent concealment doctrine. As it did in finding demand excused, the court premised its findings on the inconsistency between the option plans' market-value-options-only provisions and the alleged intentional conduct of directors in departing from that standard, stating in *Tyson Foods* for example:

> Plaintiffs allege that defendants knowingly spring-loaded options to key executives and directors while maintaining in public disclosures that such options were issued at market rates. Such partial, selective disclosure—if not itself a lie, certainly exceptional parsimony with the truth—constitutes an act of 'actual artifice' that satisfies the requirements of the doctrine of fraudulent concealment.

> Even were this not the case, defendants' roles as fiduciaries would justify tolling the statute of limitations through the doctrine of equitable tolling. Plaintiffs were entitled to rely upon the competence and *good faith* of those protecting their interests. It is difficult to conceive of an instance, consistent with the concept of loyalty and good faith in which a fiduciary may declare that an option is granted at 'market rate' and simultaneously withhold that both the fiduciary and recipient *knew* at the time that those options would quickly be worth more.[28]

Unjust Enrichment Claims Were Permitted

In both cases, the plaintiffs asserted claims of unjust enrichment against some option recipients, and in both cases the court determined that such claims could not be dismissed despite defendants' arguments that they were duplicative of the breach of fiduciary duty claims. The court held that such claims, if proven, permit a recovery by the corporation inasmuch as the defendant in respect of such a claim "may be liable 'even when the defendant retaining the benefit is not a wrongdoer' and 'even though he may have received [the benefit] honestly in the first instance.'"[29] In addition, in *Tyson Foods*, where the alleged spring-loading was part of a series of allegedly improper transactions between the corporation and various directors, the court suggested that in some circumstances such a claim might be maintained against a director who received an improperly granted option even if he or she did not violate his or her fiduciary duty in connection with the grant of the option:

> Although neither party develops the concept in their brief, the structure of the complaint suggests that were certain of the directors to be found liable for breaches of fiduciary duty under other theories, [the unjust enrichment claim in the complaint] would allow the Court to force other directors to disgorge, for example, improperly spring-loaded options or profits from related-party transactions without having to show a breach of fiduciary duty on the part of a particular director.[30]

Implications for Companies That Have Experienced Option Granting Problems

While, generally speaking, the decisions may make it more difficult for Delaware companies and their directors to achieve the dismissal of cases alleging intentional backdating and spring-loading without a trial in some circumstances, because both decisions concerned motions to dismiss, for purposes of which the court was required to assume the truth of the factual allegations and make all reasonable factual inferences in the plaintiffs' favor, the decisions do not address, or address only peripherally, several factors that will usually be key in considering options backdating and spring-loading situations.

- First, the decisions do not address the knowledge the directors actually had, or should have had in exercising their duty of care, regarding the company's option granting practices. Instead, they assume that the director defendants knowingly and intentionally approved backdating and spring-loading of options and misled shareholders regarding the company's option granting policies, based only on the court's finding of the sufficiency at the pleading stage of the particularized allegations referred to above.[31]

  Many companies upon reviewing their option grant practices have encountered, in contrast, circumstances that involve unintentional backdating, spring-loading or bullet-dodging. One example is where as a result of administrative errors the wrong date was recorded as the grant date for financial reporting purposes and accounting charges should have been taken. Another is where a compensation committee, formally or in practice, delegated to management the authority to award options, or to finalize the timing of awards, and the directors intended and had an honest belief that only "at-the-market" options were being granted.[32] While duty of care claims might be asserted where there were deficiencies in delegation practices or in director oversight of management's conduct of the option granting process, precedent treats such claims very differently from claims of bad faith and director disloyalty. Duty of care claims are subject to a gross negligence standard and personal liability of directors on such claims may be exculpated by commonplace certificate of incorporation provisions.[33] Moreover, claims of director liability for failure to establish or oversee compliance practices must satisfy a higher standard than where director self-interest is shown in more traditional duty of loyalty cases.[34] In addition, spring-loading or bullet-dodging may occur where, although not done accidentally, it was done without any knowledge that the practice was wrongful and without a subjective intent to mislead directors or shareholders about the timing or pricing of option grants.

- Second, the decisions emphasize that the relevant option plans permitted (or were assumed to permit) the issuance of "at-the-market" options only. While this restriction is not uncommon, especially in plans adopted in recent years, many of the plans now being scrutinized permitted or permit "in-the-money" options, and this may be a distinguishing factor. On

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the other hand, the thrust of the court's discussion about good faith seems to be the potential for shareholders to be misled where options are backdated, spring-loaded or bullet-dodged, as these practices depart from shareholders' expectations that options are to be issued "at-the-market" and few, if any, companies have indicated in any of their management compensation disclosures that they have departed, or expect to depart, from the practice of issuing "at-the-market" options. (This may change as companies write their first compensation disclosures and analyses under the SEC's new executive compensation rules.)

In *Tyson Foods* the court commented: "Of course, it is conceivable that a director might show the shareholders have expressly empowered the board of directors (or relevant committee) to use backdating, spring-loading, or bullet-dodging as part of employee compensation, and that such actions would not otherwise violate applicable law. But defendants make no such assertion here."[35] The court made this comment in the context of considering the application of the business judgment rule to a motion to dismiss for failure to state a claim; a company's disclosures regarding its option granting practices may have a different significance where, instead, the court is applying the business judgment rule to a grant decision made by directors. Where directors do not have reason to think otherwise, they should be entitled to rely on management and others involved in the preparation of disclosure materials to have determined the pertinent facts about the company's grants and to have disclosed them properly. As discussed above, consideration of the directors' actual knowledge regarding grant practices and their role in the disclosures made about them will be pertinent.

- Third, in both decisions the demand requirement was overcome on the ground that a majority of the directors in office at the time the complaint was filed were not sufficiently independent and disinterested in respect of the backdating or spring-loading claims asserted. In many circumstances, this may not be the case, inasmuch as the composition of the board may have changed materially from the time challenged grants were made or the number of directors involved in the granting and receipt of challenged options may constitute less than a majority of the board, particularly where option granting decisions had been delegated to the compensation committee. In such circumstances other directors may be in a position to consider the allegations made in a stockholder complaint and determine if it is in the company's interest to pursue the claims asserted.

  In addition, even in instances where the board at the time a derivative complaint is filed is not composed of a majority of directors of sufficient disinterestedness and independence such that demand is excused, it is well established under Delaware law that a board of directors may establish a "special litigation committee" composed of directors who are independent and disinterested and empower that committee to act on behalf of the company with regard to the claims made in a stockholder derivative lawsuit. Such a committee likely would seek to stay the stockholder derivative litigation pending its conduct of an investigation of the claims, or completion of any further investigation into the claims that is warranted, and a decision as to whether it should take over the pursuit of any or all the claims.[36] It should be recognized, however, that a greater level of judicial scrutiny may be applied in reviewing the independence of such committees and the grounds for their decisions than are normally applied under the business judgment rule.[37]

- Fourth, companies that have determined that backdating, spring-loading or bullet-dodging problems existed in their option granting practices should reconsider, in light of the discussion in the decisions regarding unjust enrichment claims, whether the actions they have taken to deal with such problems provide a suitable remedy. The decisions consider unjust enrichment claims only generally in the context of motions to dismiss alleged claims against directors or senior executives who received backdated or spring-loaded options or actively and intentionally participated in the process whereby such options were granted, and do not address the situation of recipients of backdated, spring-loaded or bullet-dodged options (such as "rank-and-file employees") who had no participation in the option grant process and no reason to believe there was any irregularity with respect to the options they received. While case law has not yet addressed how companies should deal with such option recipients, there is nothing in the decisions to suggest that, where a business judgment with respect to such matters has been made by adequately informed, independent and disinterested directors, such a decision should not be respected.

- Fifth, many D & O insurance policies contain exclusions that permit the carrier to deny coverage in circumstances where directors or management have been found to have engaged in criminal or fraudulent acts or to have received a profit or benefit to which they were not entitled. Companies may wish to be proactive in distinguishing for carriers their circumstances from those that may be arguably be subject to such policy exclusions.

Implications for Option Granting Best Practices

Finally, companies should consider the decisions, particularly the discussion of spring-loading and bullet-dodging in *Tyson Foods*, in establishing their policies and procedures regarding equity grants to directors, officers and employees. We recommend that every company review their practices in this area.

For more guidance on compensation, see *Weil Briefing: Corporate Governance—Options and Other Equity Grant Practices,* February 23, 2007, available at "Resources" at www.weil.com.

ENDNOTES

1 Slip. op., Del. Ch. Ct., C.A. No 2213-N, Feb. 6, 2007, *available at* 2007 Del. Ch. LEXIS 22.

2 Slip. op., Del. Ch. Ct., Consolidated C.A. No. 1106-N, Feb. 6, 2007, *available at* 2007 Del. Ch. LEXIS 19.

3 *Ryan*, slip op. at 12. Chancellor Chandler has also indicated in a separate context the significance of option backdating litigation. In issuing recently a temporary restraining order in shareholder litigation regarding a challenge to the approval by the board of directors of Caremark Rx, Inc. of a merger with CVS, Inc., in preference to a rival bid by Express Scripts, Inc., Chancellor Chandler noted that the pendency of derivative shareholder litigation against Caremark's directors alleging backdating was information "'a reasonable shareholder would find relevant in deciding how to vote' in that [it] would 'significantly alter[]' the 'total mix' of information made available." The Chancellor concluded that, because of the materiality of the option backdating litigation, as well as certain other information, the Caremark shareholders' meeting to vote on the merger should be deferred to permit shareholders a further opportunity to consider the information, as the backdating litigation was only disclosed in a proxy statement supplement issued to the shareholders three days before the meeting date, stating that "a reasonable shareholder's view on a merger might be significantly altered by the discovery that, were any merger to be consummated, other plaintiffs engaged in derivative litigation against defendant [Caremark] directors based on backdated option grants might lose standing to assert claims." Letter and order, dated February 13, 2007, in *Louisiana Municipal Police Employees' Retirement Sys. v. Crawford,* Del. Ch. Ct. Civil Action No. 2635-N (citations omitted and emphasis in original). In subsequent proceedings seeking a preliminarily injunction to prevent the shareholders meeting from going forward at the postponed date, the court considered further whether the disclosure that had been made regarding the option backdating litigation was sufficient, particularly with respect to the provisions of the merger agreement under which CVS agreed to honor the options that had been issued and to indemnify the Caremark directors against claims raised against them in the litigation to the fullest extent permitted by law. The court concluded that the disclosure that had been made on those matters was sufficient but, based on other concerns, ordered the meeting further postponed pending other disclosures being made. *Louisiana Municipal Police Employees' Retirement Sys. v. Crawford,* Del. Ch. Ct. Civil Action No. 2635-N, Feb. 23, 2007, slip op. at 28-30, 38-39.

4 *Ryan*, slip op. at 2 & 3.

5 *Ryan*, slip op. at 30.

6 *Tyson*, slip op. at 14. The complaint also included a class action claim to the effect that the company's 2004 proxy statement materially misrepresented facts such that the election of directors that year should be held invalid.

7 *Tyson Foods*, slip op. at 54-55.

8 *Tyson Foods*, slip op. at 14 n. 16 and at 55.

9 *See*, however, the Form 10-K Annual Report of Analog Devices, Inc. for the year ended October 28, 2006, Item 3 (discussing an informal SEC investigation and a tentative settlement with the SEC of Rule 10b-5 violation claims involving spring-loading, a settlement apparently not yet approved by the Commission).

10 *See* Paul S. Atkins, Remarks before the International Corporate Governance Network 11th Annual Conference, July 6, 2006, *available at* www.sec.gov/news/speech/2006/spch070606psa.htm.

11 *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 101 (1991), *quoting Daily Income Fund, Inc. v. Fox,* 464 U.S. 523, 530 (1984).

12 *White v. Panic,* 783 A.2d 543, 550 n. 18 (Del. 2001), *quoting Levine v. Smith,* 591 A.2d 194, 200 (Del. 1991).

13 *White v. Panic,* 783 A.2d at 551; *Brehm v. Eisner,* 746 A.2d 244, 253 & n. 13 (both citing *Aronson v. Lewis,* 473 A.2d 805, 814 (Del. Sup. 1984).
14 634 A.2d 927, 933 (Del. 1993).
15 *Id.* at 934.
16 *Id.* at 936, *quoting Aronson,* 473 A.2d at 815.
17 *Aronson v. Lewis,* 473 A2d at 815.
18 *Ryan,* slip op. at 7.
19 *Ryan,* slip op. at 3-5, 23.
20 *Ryan,* slip op. at 23. In this respect the court applied the second of the *Aronson v. Lewis* tests.
21 *Ryan,* slip op. at 24.
22 *Ryan,* slip op. at 19-20, 25-26. In a footnote the court stated that, even though the decision to award the allegedly backdated options have been that of the compensation committee, given that the members of that committee constituted half of the independent directors, there was no reason to view the situation differently for purposes of the demand requirement: "Where half or more of the board has already approved a corporate action, even acting through a committee, there is no need for a shareholder to give the entire board a second bite at the apple." *Id.* at 20-21, n. 29.
23 *Ryan,* slip op. at 25-26 (emphasis in original).
24 *Tyson Foods,* slip op. at 31-34.
25 *Ryan,* slip op. at 30-31.
26 T*yson Foods*, slip op. at 51.
27 *Tyson Foods,* slip op. at 53 (footnote deleted).
28 *Tyson Foods,* slip op. at 48-49 (emphasis in original and footnotes deleted).
29 *Ryan,* slip op. at 37, quoting *Schock v. Nash,* 732 A.2d 217 at 232-33 (Del. 1999).
30 *Tyson Foods,* slip op at 75-76.
31 In *Ryan,* the court emphasized for example: "This opinion addresses a motion to dismiss. Thus, neither party has had the benefit of discovery. At this stage, plaintiffs are afforded certain presumptions of truth. Because of these presumptions, plaintiffs may survive a motion to dismiss where the complaint relies on empirical data to support claims of : 1) specific instances of backdating; 2) violations of shareholder-approved plans or some other legal obligation; and 3) fraudulent disclosures regarding compliance with that plan. If, however, this case reaches the trial stage, plaintiff may no longer rely on liberal pleading assumptions. Instead, plaintiff must then rely on evidence presented at trial to demonstrate by a preponderance of the evidence that the defendants in fact backdated options, and thus are not afforded the protections of the business judgment rule." *Ryan,* slip op. at 31 n. 49.
32 In *Ryan*, the court did note that the option grant decisions had been delegated by the board to the compensation committee and that this could be an important distinction in respect of claim against directors who were not members of the compensation committee in some instances. However, as in that case the compensation committee members and the CEO who received allegedly backdated options constituted a majority of the board, the court concluded that the acts of the compensation committee could be imputed to the full board for purposes of the motions to dismiss before it did not need to consider the issue further. *Ryan,* slip op. at 19-21.
33 *See,* e.g., *In re Walt Disney Co. Derivative Litigation,* 907 A.2d 693 (Del. Ch. 2005), *aff'd,* 906 A.2d 27 (Del. Sup. 2006); *Stone v Ritter,* 911 A.2d 362 (Del. Sup. 2006).
34 *See, e.g., Stone v Ritter,* 911 A.2d 362 (Del. Sup. 2006), *esp.* at 370: ("We hold that … the necessary conditions predicate for director oversight liability [are]: (a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention. In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations. Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith [footnotes omitted].")
35 *Tyson Foods,* slip op. at 55. Regarding special litigation committees, *see Kaplan v. Wyatt,* 484 A.2d 501 (Del. Ch. 1984), *aff'd,* 499 A.2d 1184 (Del. Sup. 1985). 37 *See, e.g., In re Oracle Corp. Derivative Litigation,* 824 A.2d 917 (Del. Ch. 2003).

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