IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MARTHA S. SUTHERLAND, as Trustee of the Martha S. Sutherland Revocable Trust dated August 18, 1976,	:	
Plaintiff	:	
v.	:	**C.A. No. 2399-VCN**
PERRY H. SUTHERLAND, TODD L. SUTHERLAND, and MARK B. SUTHERLAND,	:	
Defendants.	:	
and	:	
DARDANELLE TIMBER CO., INC., and SUTHERLAND LUMBER SOUTHWEST, INC.,	:	
Nominal Defendants.	:	

MEMORANDUM OPINION

Date Submitted: December 2, 2009
Date Decided: May 3, 2010

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NOBLE, Vice Chancellor

I. INTRODUCTION

This stockholder derivative and double-derivative action involves a nuanced take on self-dealing and a look into the appropriateness of a spirited, but unsuccessful, § 220 defense. The matter may fairly be characterized as a family feud, and as this Court has previously recognized, stems in some part from personal animosity and resentment. Early on, there was little doubt, however, that there was conduct worth investigating—that there might be claims to pursue. The more egregious examples of corporate mismanagement have already been rectified or are protected from judicial review by the passage of time; the plaintiff has also abandoned several claims following discovery. Essentially three claims remain, and the defendants now contest them in their pending motion for summary judgment.

II. BACKGROUND

A. *The Parties*

The Nominal Defendants, Dardanelle Timber Co. ("Dardanelle") and Sutherland Lumber-Southwest, Inc. ("Southwest") (collectively, the "Companies"), are closely-held Delaware corporations engaged in the operation of retail lumber yards and home improvement centers. Southwest is a wholly-owned subsidiary of Dardanelle.

The plaintiff is Martha Sutherland ("Martha"), suing as trustee of the Martha B. Sutherland Revocable Trust dated August 18, 1976.[1] She was a director of Southwest from 1976 to 2004. Her trust owns 17% of Dardanelle's common stock, while a trust established for her children owns an additional 8%.

Defendant, Perry Sutherland ("Perry"), is the President and Chief Executive Officer, as well as a director, of both Dardanelle and Southwest. Together, he and his children own 25% of Dardanelle's common stock. Perry's twin brother, Defendant Todd Sutherland ("Todd"), is also an officer and director of Dardanelle and Southwest; collectively, he and his children own 25% of Dardanelle's common stock. Perry, Todd and Martha are siblings. The final individual defendant, Mark Sutherland ("Mark"), is Perry, Todd, and Martha's cousin, and a director of both Dardanelle and Southwest.[2]

Another Sutherland sibling, Dwight Sutherland, Jr. ("Dwight, Jr."), is not a party to this lawsuit, but supports Martha. He and his children own the remaining 25% of Dardanelle's common stock.

[1] For sake of convenience, and because they all share the same last name, the individual defendants and plaintiff will be referred to by first name.

[2] Collectively, the individual defendants—Perry, Todd, and Mark—will be referred to as the "Defendants."

B. *Factual Background*

This dispute began with the death of the Sutherlands' father, Dwight Sutherland, Sr. ("Dwight, Sr."), in 2003, although a rift among the siblings had been brewing in the years leading up to that event. Until his death, Dwight, Sr. had served as Dardanelle's president.[3] Approximately three decades before his death, Dwight, Sr. gave 25% of Dardanelle's common stock to each of his children: Dwight, Jr., Martha, Perry, and Todd. Dwight, Sr., and his wife, Norma Sutherland ("Norma"), retained Dardanelle's preferred stock by joint ownership—this allowed Dwight, Sr. to retain his authority over the Companies. The preferred shares were transferred to a trust for Norma's benefit following Dwight, Sr.'s death.

Perry was named trustee of Norma's trust, which has given him power to vote the preferred shares. As long as Perry has the support of one of his three siblings, he is able to control the Companies. Perry in fact controls both Companies with cooperation from Todd. Perry and Todd also constitute a majority of Dardanelle and Southwest's respective boards, and serve as the Companies' principal officers.

[3] Although founded by Dwight, Sr., Dardanelle is part of a larger, but divided, commercial structure comprised of businesses owned by members of the extended Sutherland family.

Although Martha held a 25% stake in Dardanelle and served as a director of Southwest from 1976 to 2004, she had never participated materially in the management of either company; indeed, the sum of Martha's participation in the Companies' management until October 2003 consisted almost entirely of signing unanimous consents. Dwight, Jr. was, however, more active in company affairs; in fact, he had voiced disagreement with Perry's management of the Companies even before Dwight, Sr.'s death. Indeed, Dwight, Jr. was concerned that the establishment of Norma's trust with Perry as trustee would give Perry control over the Companies (which, of course, it ultimately did).[4] This led Dwight, Jr. to resign in protest from his post as a Southwest director in June 2002.

As stated above, tension among the siblings worsened after Dwight, Sr.'s death in October 2003. It appears as though Dwight, Jr. and Martha were upset with the disposition of Dwight, Sr.'s estate. They suggested to Norma that she retain independent legal counsel to assist in her estate planning. This seemed to anger Perry and exacerbate the distrust and, perhaps, dislike that existed among the Sutherland siblings.

After Dwight, Sr.'s death, employees of the Companies forwarded to Martha unexecuted consents to authorize Perry's appointment as Southwest's president. Martha took no action and the consents were sent again on January 2, 2004.

[4] Dwight, Sr. always intended for Perry to succeed him as operational head of Dardanelle and Southwest.

Believing that Perry and Todd were committing some wrongdoing through their control of the business, Martha refused to approve the follow-up requests and communicated her decision to the Defendants. On February 2, 2004, Perry directed a Southwest employee to draw up documents for Martha's removal from the Southwest board. Perry and Todd then held a secret meeting on February 20, 2004, at which time they removed Martha as a Southwest director and replaced her with Mark. At this same meeting, the Defendants caused Perry to be appointed Southwest's president, and caused Todd to be appointed Southwest's vice-president and secretary. The Defendants also approved employment agreements for Perry and Todd. These agreements heightened Martha's original suspicions of wrongdoing and were at the heart of her original complaint in this Court.

Approximately one month after Martha's removal, she requested certain records and information related to the Companies from 1990 to the then-present, including corporate records, bylaws, articles of incorporation, financial results, and tax returns. The Companies, at the direction of the Defendants, provided only some of the requested financial information, but it was enough to make Martha aware of her removal and of the employment agreements. Due to apparent inconsistencies between the information sent by the Defendants and financial material she had earlier received from the Companies, Martha also suspected that

Perry and Todd's formal employment agreements did not account for the entirety of their compensation from Southwest and Dardanelle.

C. *Procedural History*

Because Martha was dissatisfied with the Defendants' response to her informal request for documents, she made a formal books and records demand under 8 *Del. C.* § 220 on July 13, 2004. The Defendants, however, refused to allow her access to the books and records; they responded by letter, dated July 21, 2004, and asserted that Martha's demand was for personal and vexatious reasons, and not for any legitimate purpose related to her status as a Dardanelle stockholder. After a second demand by Martha and a second refusal by the Defendants, Martha filed an action under § 220 (the "§ 220 Action") to inspect the Companies' books and records.[5]

In the § 220 Action, the parties vigorously debated whether Martha had a proper purpose to request inspection. The Court ultimately granted Martha's demand. It was troubled by Martha's secret removal from Southwest's board and the Defendants' secret approval of Perry and Todd's employment agreements, which contained "lavish perquisites," and which the Court had reason to believe represented only a "part of Perry and Todd's actual compensation."[6] The Court

[5] *See Sutherland v. Dardanelle Timber Co.*, 2006 WL 1451531 (Del. Ch. May 16, 2006) (the "§ 220 Opinion").
[6] *Id.* at *8.

found credible evidence of possible management entrenchment, "possible waste and other breaches of fiduciary duty," and thus a "sufficient basis" to grant Martha's books and records request.

Relying upon the documentation received in the § 220 Action, Martha filed her original complaint on September 6, 2006.[7] In response to the original complaint, the Defendants amended the Companies' bylaws to increase their respective boards from three members to four; they then appointed Bryan Jeffrey to each board, and designated him as a one-person special litigation committee (the "SLC"). Jeffrey investigated the merits of Martha's complaint and concluded that the Companies should not pursue her claims.[8] He set forth his conclusions into a report that he then submitted to the Court, and the Defendants moved to dismiss Martha's claims on the basis of the SLC's findings. The Court, however, denied the Defendants' motion to dismiss, holding that it lacked confidence in the reasonableness and good faith of the SLC's investigation; it also found that the SLC had failed to investigate adequately all of Martha's claims.[9] The parties then conducted discovery, and the Defendants filed their motion for summary judgment, which is now before the Court.

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[7] Martha filed an amended complaint (the "Amended Complaint") on September 15, 2008.

[8] He did, however, recommend amendment of Perry and Todd's employment agreements to diminish their more generous provisions. Those agreements were amended to incorporate his recommendations.

[9] *Sutherland v. Sutherland*, 958 A.2d 235, 242-45 (Del. Ch. 2008) (the "SLC Opinion").

III. CONTENTIONS

Martha presented a number of allegations in her complaint, but only three require much substantive analysis, although others will be touched upon. She first argues that the Defendants breached their fiduciary duty of loyalty by allowing Dardanelle to pay for certain accounting expenses incurred in relation to an audit performed on one of Perry's affiliates. This decision, according to Martha, provided Perry a benefit not shared by the other shareholders generally. Next, Martha challenges the Defendants' purchase and continued ownership of a company aircraft. She rests this particular challenge on several grounds: (1) that the Defendants purchased and continued to own the aircraft for their own personal use, thereby violating their fiduciary duty of loyalty; (2) that they made these decisions regarding the aircraft on such an uninformed basis as to breach the fiduciary duty of care; and (3) that the purchase and ownership of the aircraft was irrational. Martha's third main allegation relates to the Defendants' vigorous, and expensive, efforts to defend against the successful § 220 Action. Martha maintains that the Defendants engaged in self-dealing, acted in bad faith, and committed waste by using Dardanelle and Southwest funds to resist her books and records demand.

As for Martha's less expansive claims, she argues that the Defendants should be held liable for amending the Companies' corporate charters after she

filed the § 220 Action. The charters were amended to include § 102(b)(7) provisions and to eliminate cumulative voting. Martha contends that the charter amendments constituted self-dealing. She also requests attorney's fees for her successful efforts to reform the Defendants' employment agreements.[10] Lastly, she demands that the Defendants undertake a comprehensive accounting of Dardanelle and Southwest's expenses. She argues that the Defendants should be required to demonstrate affirmatively that the Companies' funds have not been used to finance any of Perry, Mark, or Todd's personal expenses.

The Defendants have moved for summary judgment on all of Martha's claims.

IV. ANALYSIS

A. *Standard of Review*

Summary judgment may be granted pursuant to Court of Chancery Rule 56 if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. When the evidence shows no genuine issues of material fact in dispute, the nonmoving party has the burden of demonstrating that there are genuine issues of material fact that require resolution at trial.[11]

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[10] *See supra* note 8.
[11] *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009).

B. *The Choctaw Audit*

The first of Martha's more substantial claims involves work performed by Cimarron Lumber & Supply Co. ("Cimarron") for the Choctaw Racing Stable ("Choctaw"), an independent business venture now belonging to Perry, but that was once owned almost entirely by Dwight, Sr. Cimarron, which provides tax and accounting services to members of the Sutherland family and their affiliated businesses, is a partnership made up of the branches of the Sutherland extended family business network; Dardanelle is one of Cimarron's four 25% partners. Before 1982, Cimarron did not charge for its services; its partners bore its expenses pro rata. After 1982, Cimarron employees began designating their time to one of the Sutherland family groups—the resulting charges were then paid by the applicable family group's designated company. Dardanelle paid for all accounting work done by Cimarron on behalf of Dwight, Sr. and his personal business interests and on behalf of his children and their interests.[12]

In late 2000, John Sutherland ("John", who is Dwight, Sr.'s brother) and David Dotson, the manager of Cimarron's tax department, determined that it would be appropriate to charge "individual family members and businesses" a fee for Cimarron's tax and accounting services. John Sutherland and Dotson set fees for

[12] Besides Choctaw, Dwight, Sr. held some two dozen or more sole proprietorships or closely-held business investments, including a sizeable cattle operation in Kansas and Missouri, and a second horseracing venture called DDS Racehorses. Suppl. Aff. of Brian Maxwell ("Suppl. Maxwell Aff.") ¶¶ 3-5.

each member of Dwight, Sr.'s family, as well as for each of their affiliated businesses, including Choctaw. These flat fees were supposedly set "in good faith as an attempt to make a fair and accurate estimate of the likely amount of work that would be necessary for Cimarron to perform for particular taxpayers."[13]

Under the flat-fee arrangement, Dwight, Sr. paid a $4,000 annual fee, his children, including Perry and Martha, paid $3,000 annually, and Choctaw paid a $7,500 annual fee—the highest amount charged to any of Dwight, Sr.'s businesses. Of critical importance here, all work performed by Cimarron for any members of Dwight, Sr.'s family or his affiliated entities was still charged to Dardanelle; the flat fees collected would then be credited to Dardanelle's account. Moreover, the Cimarron employees, when recording their time, documented the work performed for each of the family branches on an aggregate basis; in other words, they did not specify for which particular family member or business entity they were working, but instead charged all of their time to Dardanelle or one of its counterparts.[14]

The billing structure, at least as it pertained to Dardanelle, was revised once again in March 2004. Following Dwight, Sr.'s death, Perry and Dotson decided that Cimarron would begin billing several entities affiliated with Dwight, Sr.'s family for actual time charged instead of estimates.[15] This change was made

[13] Aff. of David Dotson ("Dotson Aff.") at ¶ 8.
[14] Aff. of Brian Maxwell ("Maxwell Aff."), Ex. B.
[15] *Id.* at ¶ 11.

retroactive to November 1, 2003—the first day of Cimarron's second quarter, and importantly, the "first day of a new fiscal quarter following Dwight, Sr.'s death."[16] These affiliated entities included Choctaw.

Martha's claim focuses on an IRS audit (the "Choctaw Audit"), which spanned four years (2001-2004), of Dwight, Sr.'s personal tax returns. The IRS was concerned with whether Choctaw was a hobby instead of a business and thus questioned Dwight, Sr.'s deduction of losses from the horse racing venture. Dwight, Sr. hired outside accountants and attorneys to assist in the audit;[17] however, at least some work was provided by Cimarron.[18] Martha argues that the work performed by, and billed from, Cimarron in response to the Choctaw Audit exceeded the flat fees paid by Choctaw during that time period, and consequently Dardanelle paid for any and all overages. Martha claims that, by permitting Cimarron to work on the Choctaw Audit and allowing Dardanelle to pay the overages, which she maintains were substantial, the Defendants engaged in self-dealing and thereby breached their duty of loyalty to Dardanelle.[19] Her contention

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[16] *Id.*

[17] Aff. of Perry Sutherland ("Perry Aff.") ¶ 9

[18] Transmittal Aff. of Matthew Davis ("Davis Aff."), Ex. 6 at 13-15, Ex. 7 at 9-11; Ex. 12 at Responses to Requests 9-11, 30.

[19] The Court turns to the Defendants' contention that Martha's allegations regarding the Choctaw Audit are barred by the statute of limitations. All claims in this matter that accrued before August 31, 2001 are time-barred. *See infra* note 57 & accompanying text. The Defendants contend that the statute of limitations for this claim began to run in January 2001 upon implementation of the fixed-fee billing system. Martha, however, correctly points out that the statute of limitations would not begin to run until a Choctaw overage was charged to

rests upon the premise that a director may be held liable for receiving some benefit from a decision or transaction that is not shared by the other stockholders generally.[20]

Dardanelle's account. It would then accrue upon, and for, each payment. *See Teachers' Retirement Sys. of La. v. Aidinoff*, 900 A.2d 654, 665-66 (Del. Ch. 2006). In *Aidinoff*, the Court found that the plaintiff had challenged the defendants' discretionary decision to continue doing business under contracts that the plaintiff considered grossly unfair. Although the contracts were entered into many years before the plaintiff filed its complaint, the Court did not consider the plaintiff's claims to be time-barred. This was because the contracts could be freely terminated by the defendants at any time, and the complaint alleged that the defendants breached their fiduciary duties not by entering into the allegedly unfair contracts, but by deciding to continue under them even though they had the opportunity to stop. *Id.* Likewise, here Martha has not sued on the implementation of the fixed-fee billing system, but instead on the Defendants' allowance of Dardanelle funds to be paid out under the system for personal reasons. Am. Compl. ¶¶ 100-04. There is no evidence that the Defendants had to comply with the fixed-fee billing system as it pertained to family members or were unable to agree upon a different system that limited the accounting services to Dardanelle and Southwest. The payments here were made quarterly throughout the four-year Choctaw Audit, which places at least some of them within the statute of limitations. *See, e.g.*, Davis Aff., Ex. 37.

The Defendants also contend that, even if the statute of limitations began to run after August 31, 2001, Martha was on notice of the alleged wrongdoing during the pendency of the § 220 Action and thus that action did not toll her claims. Indeed, although August 31, 2001 has been established as a cut-off date for determining timely-filed claims, the Court left open the possibility that claims accruing before September 6, 2003, would also be time-barred if Martha was, or should have been, aware of such claims during the pendency of the § 220 Action. *See Sutherland v. Sutherland*, 2009 WL 1177047, at *1 (Del. Ch. Apr. 22, 2009). The Defendants base their argument on a January 2001 letter from Dotson to the various Sutherland family members informing them that they would be charged an annual fee for tax and accounting work performed by Cimarron. Dotson Aff., Ex. C. The Dotson letter, however, did not explain how overages would be handled, and the Court cannot now determine when Martha learned that they would be absorbed by Dardanelle. Indeed, Martha claims that she first learned that Dardanelle had been paying for Cimarron overages when she received a letter in March 2004 from Dotson explaining Cimarron's decision to bill Choctaw and other entities for actual time charged. Davis Aff., Ex. 31. Moreover, the Court cannot yet determine when Martha learned of the Choctaw Audit and the possibility that substantial work could be performed by Cimarron because of it. Martha contends that neither she nor Dwight, Jr. learned of the Choctaw Audit until November 2003. *Id.*, Ex. 26 at 181-82, Ex. 1 at 132. Thus it is unclear at this point whether the statute of limitations was tolled during the § 220 Action, and if so, which payments from Dardanelle to Cimarron survive.

[20] *See, e.g.*, *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 364 (Del. Ch. 2008).

As a threshold matter, Martha argues that the burden falls on the Defendants to prove that payments made by Dardanelle to Cimarron in connection with the Choctaw Audit were not substantial or otherwise were entirely fair. She contends that the Defendants "irrevocably conceded their conflict of interest" regarding all of Martha's claims in the original complaint by appointing a special litigation committee ("SLC") and proceeding under the procedure established in *Zapata Corp. v. Maldonado*.[21] She cites to *Abbey v. Computer & Communications Technology Corp.*, in which the Court held that the special *Zapata* procedure is available "only in a situation where, because of some alleged self-interest, the board of directors is disqualified from acting itself."[22] Likewise, she cites to an earlier letter opinion in which this Court noted that the Defendants "conceded their own disability to consider a demand or investigate or take action with respect to the Complaint."[23] This concession, according to Martha, puts the onus on the Defendants to demonstrate the fairness of their conduct.

Martha's argument is overly broad. By appointing a special litigation committee, the Defendants conceded that self-dealing was adequately alleged in the original complaint; they did not, however, concede self-dealing as a substantive

[21] 430 A.2d 779, 786 (Del. 1981) (affirming authority of board of directors to delegate to committee the power to consider, and possibly dismiss, "derivative litigation that is believed to be detrimental to the corporation's best interest").
[22] 457 A.2d 368, 373 (Del. Ch. 1983).
[23] *Sutherland v. Sutherland*, 2008 WL 3021024, at *1 n.1 (Del. Ch. Aug. 5, 2008).

matter. Indeed, the Court in *Abbey* further explained that "the incumbent board of directors, in effect, conceded that the circumstances alleged in the complaint justified the initiation of the suit by the plaintiff."[24] Martha may no longer rely on presumptions applicable at the pleading stage.[25] If the Defendants sponsor record evidence in support of a denial of any self-dealing, the responsibility would then fall on Martha to present evidence of self-dealing by the Defendants.[26]

In this instance, Martha argues that there is a genuine issue of material fact about whether the Defendants knowingly caused the Companies to pay to Cimarron substantial sums for personal tax and accounting work undertaken in response to the Choctaw Audit. Over the years 2001, 2002, and 2003, Dardanelle paid Cimarron approximately $690,000 for tax and accounting work, which averages roughly $230,000 per year.[27] Over 2004, 2005, and 2006, however, Dardanelle paid almost $466,000, or about $155,000 per year.[28] This, of course, was after Choctaw began paying Cimarron for actual hours charged. Martha argues that the $75,000 in additional annual costs for Cimarron work "reasonably

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[24] 457 A.2d at 373.
[25] *See Ryan v. Gifford*, 918 A.2d 341, 358 n.49 (Del. Ch. 2007) (explaining that, once the case "reaches the trial stage," the plaintiff may no longer "rely on liberal pleading assumptions," but instead must present evidence "to demonstrate by a preponderance of the evidence" that the self-dealing allegations stated in the complaint rebut the "protections of the business judgment rule").
[26] *See Krasner v. Moffett*, 826 A.2d 277, 279 (Del. 2003) (reversing Court of Chancery's application of the business judgment rule at the pleading stage, but holding that a "factual record must be developed to determine what standard of review ultimately applies.").
[27] Davis Aff., Ex. 37.
[28] *Id.*, Ex. 38.

can be inferred to have been incurred" by Dardanelle's paying for the Choctaw Audit.[29]

The Defendants maintain that there is ample evidence in the record demonstrating that such an inference cannot be made; they go further and claim that there is also no genuine issue of material fact that substantial Dardanelle funds were not expended for Choctaw's benefit.[30] They point out that Dardanelle had ceased paying *all* tax, accounting, and estate services for Dwight, Sr. after he died. Brian Maxwell, a tax manager at Cimarron, stated in an affidavit that preparation of Dwight, Sr. and Norma's joint return required the review and assembly of "significant volumes" of data, a task he described as "formidable."[31] Further, Maxwell characterized the work performed by Cimarron staff in regard to the Choctaw Audit from 2001-2003 as "small and insignificant relative" to the work

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[29] Pl.'s Answering Br. at 16.

[30] The Defendants also argue that since they did not institute the flat-rate scheme or set the rates, they cannot be held liable for any overages. This argument overlooks the Defendants' ability, as Dardanelle directors, to refuse to commit company funds for certain family member expenses or otherwise negotiate a more limited billing plan with Cimarron. *See supra* note 19. The Defendants additionally claim that they could not possibly have expected that the sums expended by Dardanelle in relation to the Choctaw Audit would substantially exceed Choctaw's flat-rate. They argue that, since they did know of a substantial overage, they cannot be held liable for its cost to the Companies. It is difficult to accept that the Defendants would be unaware of the Choctaw Audit's total cost and the possibility that Cimarron personnel would be spending a considerable amount of time assisting in the audit. The Defendants could have made inquiry into the expenses paid by Dardanelle on Choctaw's behalf and stopped such payments if they were substantially exceeding Choctaw's flat-rate. The Court therefore cannot conclude on summary judgment that the Defendants were sufficiently (and reasonably) unaware of the Choctaw Audit's cost to Dardanelle to escape liability on Martha's claim. That said, since Mark did not become involved in the Company's management until 2004, he cannot be held liable for Martha's Choctaw claim.

[31] Suppl. Maxwell Aff. ¶ 5.

done for Dwight, Sr. personally and his family's other investments.[32] Indeed, Choctaw was not the only one of Dwight, Sr.'s businesses that began paying for actual time charged following his death.[33] Latigo Cattle, Dwight, Sr.'s ranching business, incurred $23,348 in charges in the nine months after Dwight, Sr.'s death.[34] This figure, which amounts to $31,131 annualized, far exceeds the $7,500 flat fee that Latigo Cattle, like Choctaw, had been charged each year by Cimarron.

The Defendants' response also rests on the argument that much of the Choctaw Audit was performed by the outside accountants and attorneys retained by Choctaw. In fact, Cimarron employees testified that most of the work they did in relation to the Choctaw Audit involved collecting data and preparing reports for the IRS agents or the outside professionals.[35]

Moreover, there is evidence that other shareholders, Martha included, also received some benefit in the fixed-fee billing scheme. For instance, Martha's art business, which was historically charged a $500 annual fee for Cimarron tax and accounting services, incurred $1,836 in accounting expenses in the nine months after Dwight, Sr.'s death after it had become responsible for actual time charged.[36]

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[32] *Id.* at ¶ 8.
[33] Suppl. Transmittal Aff. of Nicole DiSalvo ("DiSalvo Suppl. Aff."), Ex. Y.
[34] *Id.*, Ex. X.
[35] Davis Aff., Ex. 6 at 13, 63-64; Ex. 7 at 41. While Martha claimed that bills from Choctaw's outside attorneys describe "numerous" conferences with Cimarron personnel, these bills show only seven conferences with Cimarron personnel that account for perhaps eleven hours of time. *Id.*, Ex. 36.
[36] DiSalvo Suppl. Aff., Ex. X . This amounts to $2,448 annualized.

Despite this evidence, which is persuasive, the Court cannot conclude on a motion for summary judgment that the Defendants received no material benefit from the former Cimarron billing scheme not shared by the other stockholders generally.[37] The record is simply unclear as to how much time Cimarron spent on the Choctaw Audit, and thus how much time, if any, it billed to Dardanelle in that effort.[38] There is evidence that the time spent and billed by Cimarron for Choctaw during 2001-2004 exceeded the $7,500 flat rate. For example, Choctaw paid actual

[37] The Defendants contend that, even if Perry received a benefit from the fixed-fee billing scheme, it would be immaterial because he owned only 1% of Choctaw while the audit was performed under the fixed-fee system. The Court does not concur. Although Perry owned only 1% of Choctaw during much of the audit, the IRS audited and proposed adjustments to Perry and his wife's joint tax returns as well as Dwight Sr. and Norma's filings. The audit resolved an issue that became even more beneficial to Perry once he inherited Choctaw—whether the stable was a hobby or a business for tax deductibility purposes. On inheriting his father's interest in Choctaw in late 2003, Perry received the full benefit of Cimarron's work on the Choctaw Audit.

The Defendants argue that there is no evidence that Perry knew his father would pass away when he did and leave Choctaw's horses to Perry. Again, the Court disagrees. Dwight Sr. was in failing health before his death. *Sutherland*, 2006 WL 1451531, at *2. Moreover, he executed his Last Will and Testament on May 13, 1996, in which he left to Perry all of his interests in his race horses as well as any joint venture or partnership involving his race horses. He made specific mention of the Choctaw stables. Davis Aff., Ex. 46. Given Dwight Sr. and Perry's close relationship, there is a genuine issue of material fact as to whether Perry knew of this bequest. This issue is amplified by Perry's involvement, and minority stake, in Choctaw and his shared horse racing interests with his father.

[38] In fact, the Defendants concede that while Cimarron produced time records dating back to January 2002, "there is no evidence of how much time was spent on Choctaw matters, and therefore no evidence of what Cimarron would have billed Choctaw if it had charged by the hour." Defs.' Opening Br. at 14. The Defendants claim that, "[i]n the end, Martha is left to complain that individual defendants were somehow obligated to ensure that Cimarron employees kept detailed time records assigning their work to individual taxpayers . . . just so that Martha would have an evidentiary record for any claim that she might decide to assert five years later." *Id.* at 14-15. If this is Martha's claim, it is not so far off the mark. An inference has been raised that Dardanelle funds were used to pay Perry's expenses in an amount disproportionate to similar payments made for the benefit of other Dardanelle shareholders. On their motion for summary judgment, that the Defendants cannot account for these funds is their problem, not Martha's.

time charges of $6,073 to Cimarron for the first nine months after the end of fixed-fee billing—when the audit was still ongoing.[39] This amounts to about $8,100 annualized, which represents a $600 premium over the $7,500 fixed fee. Although this is a relatively small premium, the Court reiterates that it was incurred at the end of the audit, and the Court cannot eliminate the possible inference that higher amounts were paid in prior years. Further, there is reason to believe that John Sutherland and Dotson did not consider the potential cost of the Choctaw Audit when they set the $7,500 Choctaw flat rate, which again was based on estimates of the amount of "time that was generally required."[40] The time "generally required" likely did not include assistance for what could be considered an extraordinary accounting event, like the Choctaw Audit. For these reasons, the Court denies the Defendants' motion for summary judgment as to Martha's accounting claims—this is a question that cannot be resolved until after trial.[41]

C. *The CJ1*

The parties also vigorously dispute Southwest's purchase and continued ownership of a half-interest in the company airplane. Dwight, Sr.'s family

[39] DiSalvo Suppl. Aff., Ex. X.
[40] Dotson Aff. ¶ 6.
[41] Pending before the Court is Martha's motion for an adverse evidentiary inference. Without restating her argument in full, the substance of the motion is that the Defendants destroyed (or caused destruction of) evidence material to Martha's Choctaw claim. A finding in Martha's favor might shift the burden to the Defendants to prove, by a preponderance of the evidence, that the accounting overages incurred during the life of the Choctaw audit were not all spent on that particular effort.

business has owned either an aircraft or a half-interest in an aircraft since 1976.[42] A former affiliate of Southwest purchased the Companies' first plane, a Cessna Citation; Dwight, Sr. traded in the Citation approximately one year later and acquired a Lear Jet in its place.[43] Southwest eventually sold the Lear Jet, probably at some point in 2000.[44] Southwest, upon inquiry by Dwight, Sr.'s nephew, and Perry's cousin, Chris Sutherland ("Chris"), agreed with Sutherland Lumber & Home Center ("Home Center") to split ownership in a Cessna CJ1 (the "CJ1").[45] Home Center is owned by Dwight, Sr.'s brother, John, and John's family; it is managed by Chris, who is John's son and Mark's brother.[46]

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[42] Aff. of Steven Scott ("Scott Aff.") ¶ 4. Steven Scott is Cimarron and Sutherland Bookkeeping's Controller and Chief Financial Officer. Sutherland Bookkeeping, along with Cimarron, maintains accounting and organizational records for Dardanelle and Southwest. *Id.* at ¶ 1.

[43] Southwest acquired title to the Lear Jet in 1983 when it merged with the affiliate mentioned above. *Id.* at ¶ 4.

[44] There is some inconsistency in the record as to when the Lear Jet was sold. Scott stated that it was sold in November 2000 for approximately $1.3 million. *Id.* at ¶ 5. Perry, however, could only say that the thought the plane was sold in 1999 or 2000. Transmittal Aff. of Nicole DiSalvo, Ex. O (Dep. of Perry Sutherland ("Perry Dep.")) at 68. Chris Sutherland, whose role is set forth in note 46, *infra*, stated that he and Dwight, Sr. had started discussing the joint purchase of a CJ1 in 1998 or 1999—a time frame that he admitted was an approximation. According to Chris, Dwight, Sr. had sold the Lear Jet before they agreed to purchase the CJ1, which, as will be seen later, was sometime before July 2000. DiSalvo Aff., Ex. I (Dep. of Chris Sutherland ("Chris Dep.")) at 6-7.

[45] The agreement was made orally, and the Defendants have attempted to establish the contract through affidavits, deposition testimony, and, as will be seen shortly, documentary evidence in the form of deposit checks. Martha has challenged the admissibility of some of this evidence, and the Court addresses those challenges in the following sub-section.

[46] Chris Dep. at 5-6. Specifically, Chris serves as Home Center's President and Chief Executive Officer. *Id.* at 5. The agreement to split ownership of the CJ1 was negotiated by Chris for Home Center and Dwight, Sr. (and perhaps Perry) for Southwest. Perry Dep. at 67.

Chris signed a contract with Cessna for the CJ1 on July 27, 2000.[47] Two weeks earlier, Dwight, Sr. had written a Southwest check to Home Center for $37,500, which the Defendants claim served as Southwest's half of the first deposit on the CJ1.[48] Dwight, Sr. then wrote another check to Home Center on February 5, 2001, for $100,000, purportedly as its half of the second deposit.[49] The Cessna Contract was amended on September 25, 2001, at which time Home Center assigned, with Cessna's consent, its interest in the Cessna to both itself and Southwest as tenants-in-common.[50] The plane was delivered at around the time this amendment was executed, at which point Southwest paid half of the remaining amounts due under the contract.

Martha challenges the Defendants' decisions both to purchase and to continue to own the CJ1. She claims that neither Perry nor Todd considered whether purchase of the CJ1 was necessary, reasonable, or appropriate, given Southwest and Dardanelle's size and financial condition.[51] She also argues that each of the individual defendants received a personal benefit from Southwest's ownership of the CJ1 not shared by the remaining stockholders.[52] She claims that

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[47] Scott Aff. ¶ 6, Ex. C (the "Cessna Contract"). The sales price was approximately $3.8 million; Southwest would thus pay roughly $1.9 million for its share. When first signed, only Home Center and Cessna were parties to the Cessna Contract.
[48] Scott Aff. ¶ 5, Ex. B.
[49] *Id.* at ¶ 7, Ex. D.
[50] Cessna Contract, Amendment No. 4.
[51] Am. Compl. ¶ 83.
[52] *Id.* at ¶¶ 92-96.

Perry and Todd have used the aircraft for many personal trips, and, although their personal use was governed by their employment agreements (which have since been challenged and amended with the challenges then dropped), she contends that the very purchase and ownership of the CJ1 with the intent that it would be used substantially for personal reasons constitutes a breach of the duty of loyalty. She also argues that Mark receives a material personal benefit through Southwest's ownership of the CJ1 because, according to Martha, Southwest has historically subsidized Home Center's use of the aircraft.[53]

Martha further alleges that the purchase and ownership of the CJ1, even for business flights, is "irrational, unreasonable and not in the best interests of the Companies."[54] She contends that the flight cost to the Companies "substantially exceeds by multiples" the cost of "normal" commercial travel.[55] She further

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[53] *Id.* at ¶ 91. Home Center and Southwest entered into a time-sharing agreement around the time the CJ1 was delivered (the "Time Sharing Agreement") whereby each company would account for its respective use of the CJ1. Davis Aff., Ex. 55. The cost of a CJ1 flight, however, has historically exceeded the payments by either Southwest or Home Center under the Time Sharing Agreement. Southwest and Home Center have split 50/50 any remaining expenses. Because Home Center and its affiliates apparently used the plane more frequently than Southwest and its affiliates, including Perry and Todd, Martha argues that the Defendants have caused Southwest to subsidize Home Center's costs of using the CJ1. *Id.*, Ex. 15 (the "de Decker Report") at 14. According to the de Decker Report, Southwest flew only 25.9% of the total hours, but was billed for 29.9% of the costs. Had total billings reflected actual use of the airplane, Southwest would have paid about $95,000 less in operational costs. These funds were essentially paid for Home Center's benefit. Martha therefore claims that Mark has breached his duty of loyalty to Dardanelle by permitting Southwest's ownership of a plane that personally benefits him and his family as Home Center shareholders.

[54] Am. Compl. ¶ 98.

[55] *See* de Decker Report at 17 (finding that the use of commercial airlines to accomplish the required travel to the Companies' stores from 2001 through 2008 would have cost between

argues that the Defendants cannot justify these costs on "any reasoned basis," especially given the Companies' alleged weak financial condition and "net borrowing position."[56]

The Defendants have raised time-bar, consent and acquiescence, and merits-based defenses to Martha's claims. For the reasons stated below, the Court concludes that Martha's challenge to the purchase of the CJ1 is time-barred, but that, in any event, all of her claims ultimately fail to rebut the presumptions of the business judgment rule.

1. The Statute of Limitations

This Court, in an earlier letter opinion, held as time-barred any and all claims that accrued before August 31, 2001.[57] A claim for breach of fiduciary duty accrues at the time of the wrongful act.[58] When the wrongful act involves a

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$36,000 and $53,000 and comparing this figure to the "actual out-of-pocket cost for the use of the jet of $787,827 and total cost of $2.45 million for the same period.").

[56] Am. Compl. ¶ 98.

[57] *Sutherland v. Sutherland*, 2009 WL 857468, at *5 (Del. Ch. Mar. 23, 2009). The Court looked to the three-year time bar that is almost universally applied in shareholder derivative suits that seek the recovery of damages. Although reference is made to the statute of limitations, the proper time-bar standard for fiduciary duty claims is governed by the doctrine of laches. *See id.* ("[s]trictly speaking, statutes of limitations do not bind courts of equity with respect to purely equitable claims."). Equity, however, routinely borrows the appropriate statute of limitations to guide its application of a laches defense. The Court does not understand the parties to dispute that, in these circumstances, the Court should look to Delaware's three-year statute of limitations, 10 *Del. C.* § 8106.

[58] *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004).

contractual obligation, the claim accrues at the time when "enforceable legal rights [are] created."[59]

The Defendants contend that the relevant contract for statute of limitations purposes was entered into in July 2000, when Home Center and Southwest agreed to purchase an aircraft as co-owners.[60] If true, this would mean that the decision to purchase a one-half interest in the aircraft accrued before the cut-off date set by the Court for timely-filed claims: August 31, 2001. The contract between Southwest and Home Center was made orally, and the Defendants have had to prove its existence by affidavit, deposition testimony, and documents such as the checks described above. The Defendants rely upon deposition testimony by Chris and Perry, as well as an affidavit by Perry, in which they claim that Southwest agreed with Home Center to purchase the CJ1 sometime in 2000.[61] The Defendants further rely upon an affidavit by Cimarron employee, Brian Maxwell, in which he claimed that Southwest was unable to take bonus depreciation on the aircraft

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[59] *Kahn v. Seaboard Corp.*, 625 A.2d 269, 271 (Del. Ch. 1993).

[60] There is some uncertainty as to the exact date that Home Center and Southwest agreed to purchase the CJ1 together. Chris testified that the agreement was made before he began negotiating with Cessna, which would, of course, have been before July 27, 2000, when Home Center signed the Cessna Contract. Chris's deposition, coupled with Southwest's check to Home Center signed earlier in July 2000 for $37,500—which represented exactly half of the first, $75,000, deposit on the CJ1 as required in the Cessna Contract—is evidence that Home Center and Southwest reached agreement some time in, or before, July 2000.

[61] Chris Dep. at 7-8 & *supra* note 44; Perry Dep. at 67; Perry Aff. ¶ 13 ("On July 27, 2000, with my father's approval and my father's agreement that Southwest would split the cost of purchase and ownership, Chris Sutherland signed the contract with Cessna to purchase the CJ1.").

because it had been subject to a binding contract prior to September 11, 2001.[62] There are also the two checks issued by Southwest to Home Center, one dated July 14, 2000, the other, February 5, 2001.[63] According to Steven Scott, these payments were for deposits made on the aircraft.[64] Scott further explained that Southwest and Home Center purchased and received the CJ1 in 2001, but that Southwest had made a commitment to Home Center to enter into the agreement with Cessna in 2000.[65]

Martha presents no evidence of her own to dispute the Defendants' showing of a year 2000 agreement between Southwest and Home Center which she refers to as a "phantom oral contract." She has moved to strike certain of the evidence described above, but otherwise presents no challenge, either substantive or evidentiary, to the deposition testimony of Chris, Perry, and Scott.[66] Since Martha

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[62] Maxwell Aff. ¶ 5.
[63] Scott Aff. ¶¶ 5, 7, Exs. B, D.
[64] *Id.*, Exs. B, D. Indeed the Cessna Contract called for one deposit of $75,000 and another of $200,000. The checks were made out in amounts that totaled one-half of each deposit: $37,500 and $100,000.
[65] DiSalvo Aff., Ex. G (Dep. of Steven Scott ("Scott Dep.")) at 184.
[66] In her motion to strike, Martha argues that Perry's statements given in his affidavit constitute inadmissible hearsay. Pl.'s Mot. to Strike ¶ 8 (citing Perry Aff. ¶ 13); *see supra* note 61. Likewise, she claims that Scott's affidavit testimony regarding the deposit checks is also hearsay. Pl.'s Mot. to Strike ¶ 10. She challenges Maxwell's statements given in his affidavit for lack of foundation. *Id.* at ¶ 19. Finally, she contends that both the Cessna Contract and one of the checks written to Home Center were wrongfully withheld from her during discovery. *Id.* at ¶ 22.

The Court rejects Martha's arguments. Perry's affidavit testimony regarding Dwight, Sr.'s agreement to purchase the plane and split the cost is not inadmissible on hearsay grounds. Dwight's, Sr.'s agreement to purchase the plane was a verbal act giving rise to a legal obligation, and, in any event, was not offered to prove the truth of the matter asserted. *See* D.R.E. 801(c);

has offered no facts in rebuttal to any of the evidence, at least some of which is admissible, there is no genuine issue of material fact that Southwest agreed to purchase a one-half interest in an aircraft during the year 2000.[67]

Martha, however, contends that Southwest's contract with Home Center is independent from the Cessna Contract that Southwest entered into on September 25, 2001. It follows, according to Martha, that the running of the statute of limitations on her CJ1 claim could not have started until after Southwest had become a party to the Cessna Contract. When a contract is claimed to have resulted from fiduciary misconduct, the statute of limitations begins to run upon formation of the contract or the genesis of legal obligations.[68] Here there exist two separate contracts, but since Southwest was contractually obligated to Home

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see also Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co., Inc., 866 A.2d 1, 21 (Del. 2005) ("A statement is not hearsay if offered only to prove that the statement was made, rather than for the truth of the matter asserted."). Regarding Scott's affidavit testimony, this may or may not be admissible depending upon the circumstances and when Scott was informed that the checks were to be used for deposits on the CJ1. Nevertheless, his testimony is unnecessary because the Court may draw no reasonable inference that the checks were used for anything other than deposits on the CJ1 given their amount and the time of their execution. *See supra* notes 60, 64. As for Maxwell's affidavit, the Court is hard pressed to find that an accountant's statements lack foundation when he is explaining why a company for which he works has failed to qualify for bonus depreciation. And, regarding the late production of the Southwest check and Cessna Contract, the Court fails to see the prejudice caused by their production in light of the other evidence, especially Chris's testimony, which also places the agreement between Southwest and Home Center some time in 2000.

[67] *See* Ct. Ch. R. 56(e) ("[A]n adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."); *see also In re Speedway Motorsports, Inc. Deriv. Litig.*, 2003 WL 22400758, at *2 (Del. Ch. Oct. 14, 2003) (holding that merely denying the existence of an agreement is inadequate to create a factual dispute for summary judgment purposes).

[68] *See Kahn v. Seaboard Corp.*, 625 A.2d 269, 277 (Del. Ch. 1993).

Center to enter into the Cessna Contract, Southwest's inclusion in that agreement by way of assignment was nothing more than the performance of its obligation to Home Center under their prior agreement.[69] For this reason, Martha's cause of action for her claims related to the purchase of the CJ1 accrued in 2000, when Southwest became legally obligated to purchase a one-half interest in the aircraft.

2. Application of the Business Judgment Rule

Even without the obstacles of the time bar defenses, Martha's claims regarding the purchase and continued ownership of the CJ1 ultimately fail to defeat the business judgment rule.[70] The business judgment rule is a presumption that, when making a business decision, the directors have "acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company."[71] Of course, a party challenging the directors' conduct may rebut the presumption upon a showing that the board breached either or both its fiduciary duty of care or its fiduciary duty of loyalty.[72] However, if the business judgment

[69] In fact, the argument could be made that Southwest's obligations to Home Center neutralize Martha's claims regarding not just the aircraft's purchase, but its continued ownership as well. If Southwest is obligated to Home Center to share the CJ1, how then can the Defendants be liable for keeping the airplane? The Court need not explore this claim further because it rules in favor of the Defendants on the merits of both the aircraft's purchase and its ownership.

[70] Martha once again argues that the Defendants have conceded self-dealing by appointing the SLC. For the reasons stated in text accompanying notes 24-26, *supra*, the Court finds Martha's argument unpersuasive.

[71] *In re Trados, Inc. S'holder Litig*., 2009 WL 2225958, at *6 (Del. Ch. July 24, 2009).

[72] *Ryan v. Gifford*, 918 A.2d 341, 357 (Del. Ch. 2007).

rule's presumptions are applicable, "the board's decision will be upheld unless it cannot be attributed to any rational business purpose."[73]

(a) *Did the Defendants Make an Informed Decision*?

Martha first argues that the Defendants failed to make an informed business judgment. She rests her argument upon the fact that the Defendants never reviewed a written analysis to determine whether purchasing the CJ1 was in the Companies' best interests. This included a failure to compile or analyze written information regarding the CJ1's projected use and operational costs, both "business and otherwise."[74] The Defendants, moreover, apparently performed no formal or written analysis as to whether the Companies should continue owning the CJ1—Martha claims this "analysis" would include cost-benefit comparisons between maintaining a private jet and flying commercially as well as comparisons between the costs of operating the plane for personal and business purposes.

Indeed, if the Defendants failed to act on an informed basis, this conduct would rebut the business judgment rule.[75] To be informed, the board need not know every fact, but is instead responsible only for "considering material facts that are reasonably available."[76] Material facts are those that are "relevant and of a

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[73] *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 74 (Del. 2006) (citation omitted).
[74] Pl.'s Answering Br. at 38.
[75] *Cede & Co. v. Technicolor, Inc*, 634 A.2d 345, 367 (Del. 1993) ("The duty of the directors of a company to act on an informed basis . . . forms the duty of care element of the business judgment rule.").
[76] *Brehm v. Eisner*, 746 A.2d 244, 260 n.49 (Del. 2000).

magnitude to be important to directors in carrying out their fiduciary duty of care in decisionmaking."[77] Moreover, the standard for determining whether the board's decision was "informed" is one of gross negligence.[78] This standard presents a high hurdle for Martha to overcome: gross negligence in the duty of care context must amount to "conduct that constitutes reckless indifference or actions that are without the bounds of reason."[79]

Martha here has been unable to identify any material fact of which the Defendants were uninformed; her argument instead hinges on the Defendants' failure to provide or study a written analysis of the costs associated with the acquired aircraft. There is, however, no "prescribed procedure,"[80] or a "special method that must be followed to satisfy the duty of due care."[81] While Perry conceded at deposition that neither he nor Dwight, Sr. prepared a "formal written analysis," he explained that, because Southwest had owned a corporate jet since 1975, he and his father "were familiar with what the costs were."[82] Moreover, he stated that Southwest had adopted a strategy of expansion into markets "far-flung and far away from commercial airports," and thus management "thought [it]

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[77] *Id.*
[78] *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 66 (Del. 1989) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985)).
[79] *McPadden v. Sidhu*, 964 A.2d 1262, 1274 (Del. 2008).
[80] *Levine v. Smith*, 591 A.2d 194, 214 (Del. 1991).
[81] *In re KDI Corp. S'Holders Litig.*, 1990 WL 201385, at *3 (Del. Ch. Dec. 13, 1990).
[82] DiSalvo Supp. Aff., Ex. V (Suppl. Dep. of Perry Sutherland ("Suppl. Perry Dep.")) at 80-81.

needed an airplane."[83] Perry also explained that he and his father thought it would be a better idea to own half of an airplane and to purchase a newer plane that would be more fuel efficient.[84] He also expressed his awareness that the CJ1 costs more to fly than traveling commercially.[85] Lastly, Perry considered the tax benefits of asset depreciation that would be derived from ownership of the aircraft.[86]

The record demonstrates that the Defendants purchased, and continued to own the CJ1, with requisite knowledge to maintain the protection of the business judgment rule. The Court views the Defendants' prior experience with corporate jet transportation particularly relevant.[87] Given this experience, Perry's historic operational control over the Companies and his understanding of the business, the Court cannot draw any reasonable inference to the effect that the Defendants' decision to purchase and own the CJ1 was recklessly uninformed or the product of gross negligence.

(b) *Did the Defendants Act Disloyally*?

Martha also contends that, by authorizing the purchase and ownership of the CJ1, the Defendants received a benefit not shared generally by the other

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[83] *Id.* at 81.
[84] *Id.* at 81-82.
[85] *Id.* at 107-08.
[86] *Id.* at 229-30.
[87] *See Blackmore Partners L.P. v. Link Energy LLC*, 2005 WL 2709639, at *8 (Del. Ch. Oct. 14, 2005) (explaining that the duty of care "does not require any particular actions or roadmap," and that the "nature and importance of the considered transaction" shape the required procedures).

stockholders.[88] She argues that the Defendants purchased and maintained the aircraft so they could use it for personal reasons.[89] Indeed, Perry and Todd's personal use of the aircraft was expressly provided for in their employment agreements.[90] These agreements, however, have since been challenged and reformed, and Martha has voluntarily dismissed her claims against them.[91]

It seems more appropriate for Martha to challenge (or continue to challenge) the actual personal use of the airplane, including the employment agreements

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[88] *See supra* note 20.

[89] Pl.'s Answering Br. at 39-40 ("Perry and Todd fully intended to use the Private Jet substantially for personal reasons, just as they had done with the Old Jet.").

[90] Perry had the right to unlimited personal use of the CJ1. Expenses were recorded as income to him on his W2. Maxwell Aff., Ex. L. According to Martha, Perry received additional compensation to offset the tax liability on his CJ1-related benefit. Am. Compl. ¶ 61. Todd had (and still has) the right to use the CJ1 for personal flights at a rate charged in accordance with the Time Sharing Agreement between Southwest and Home Center. Maxwell Aff., Ex. N. Perry's employment agreement was amended in 2005 so that he too must now pay the charter rate, although that revision was apparently made in response to a change in the tax code. Am. Compl. at ¶ 71. The employment agreements were further amended after Martha filed suit, and after a determination by the SLC that several of their provisions were unreasonable. These later revisions, however, did not affect the provisions governing Perry and Todd's use of the aircraft. Davis Aff., Exs. 72-74.

[91] Martha at one point specifically challenged the Defendants' personal use of the airplane, as governed by their employment agreements. Am. Compl. ¶ 150. She contested the provision in Perry's employment agreement that gave him unlimited use of the CJ1 entirely at the Companies' expense. She claimed that this provision allowed Perry to use the airplane for personal trips at great expense to the Companies. *Id.* at ¶ 61. She also challenged the provision in Todd's employment agreement that gave him unlimited use of the CJ1 at the prevailing charter rate. She argued, and continues to argue, that the charter rate is below cost to the Companies; she also maintained that Todd had used the aircraft for free anyway simply by flying as Perry's guest. *Id.* at ¶ 68. Martha, however, no longer pursues any claim against the use of the CJ1, both historically and as provided by the current employment agreements. In any event, there appears to be nothing wrong with the Defendants' personal use of the aircraft under the revised agreements given the Defendants' payment of the charter rate. And again, insofar as the employment agreements provide, or ever provided, the Defendants with an inappropriate benefit at the Company's expense, any challenge to the agreements specifically has been dropped.

governing the personal use, instead of suing on Southwest's purchase and continued ownership of the aircraft, which clearly has some rational business purpose—namely, as a mode of transportation to some of the Companies' more remote locations.[92] The purchase and ownership of the asset itself is therefore protected by the business judgment rule since it was not otherwise the product of self-dealing.[93] This holding is in keeping with the business judgment rule as it allows the Court to refrain from passing judgment on the wisdom of purchasing and owning an asset but leaves open the option of scrutinizing benefits bestowed upon the directors through their improper use of that asset.[94] By arguing that the Defendants should be liable for the CJ1's purchase and continued operation,

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[92] *See* de Decker Report at 12. According to the de Decker Report, the CJ1 has been used for 101 trips to Southwest and Dardanelle stores, and 30 times for other purposes, ostensibly personal trips. The use for other purposes plummeted in 2004 and after—other purposes had been the reason for almost half of the flights taken between 2001 and 2003. *Id.* at 18. Martha contends the Defendants stopped using the CJ1 for personal reasons in response to her lawsuit; the Defendants suggest it was due to the death of Dwight, Sr., who was the primary beneficiary of the personal flights. Whatever the reason, the aircraft has certainly been used often enough for business trips to demonstrate that there was some legitimate reason for its purchase and continued ownership. Indeed, given the Companies' centralized management structure, their business strategy to serve markets in more remote locations than those served by competitors such as Loews and Home Depot, and the consequential distance between the Companies' stores, the Court concludes that the CJ1's purchase and continued ownership was certainly rational. Whether or not Southwest's ownership of the CJ1 is or ever was a good idea given its cost, however, is beyond the scope of the Court's judgment and firmly protected by the business judgment rule. This conclusion also resolves Martha's claim that the Defendants are unable to justify the CJ1's cost on any reasonable basis.

[93] Moreover, had the plane been purchased *only* to benefit the fiduciaries, and for no apparently rational business purpose, that might represent corporate waste. *See infra*, notes 121-22 & accompanying text. But, as explained in the preceding footnote, that is not the case here.

[94] Likewise, insofar as Martha claims that Mark also engaged in self-dealing as a result of the alleged benefits accrued to Home Center by virtue of the Time Sharing Agreement, these claims should also be directed specifically to creation of that particular agreement, and not to Southwest's mere ownership of the CJ1.

Martha puts the Court in the position of determining which part of the transaction was for a valid business purposes and which part was intended to benefit the Defendants. Her position, if adopted, would open the door to a host of challenges to the purchase of corporate assets used by company executives that were otherwise the product of a legitimate business decision.

Martha has failed to rebut the presumptions of the business judgment rule. The CJ1 was purchased with adequate information; its purchase was not irrational; and as an asset of the business, its purchase and ownership was not, standing alone, a self-interested transaction. The Court will therefore not otherwise judge the prudence, or imprudence, of owning the CJ1. For this reason, Martha's challenge regarding the aircraft is dismissed.

D. *The § 220 Action*

Martha also challenges the Defendants' vigorous defense undertaken in the § 220 Action, which cost Dardanelle approximately $750,000.[95] She claims that, by defending the § 220 Action and refusing her access to books and records, the Defendants acted out of self-interest and breached their duty of loyalty. She contends that the Defendants therefore have the burden of showing that incurring the costs of defense was entirely fair or, otherwise, face liability for those

[95] Davis Aff., Ex. 30.

expenses.[96] In addition, Martha claims that the Defendants failed to inform themselves about the potential costs of the § 220 Action, and thus breached their fiduciary duty of care. She further argues that the Defendants' conduct was in bad faith because they acted "intentionally with a purpose to protect themselves rather than advancing the best interests of the Companies."[97] Lastly, she claims that the Defendants' decision to contest the § 220 Action cannot be attributed to any rational business purpose, and thus constituted corporate waste.

1. Self-Dealing and Bad Faith

Under Delaware law, a stockholder has the right to inspect, "for any proper purpose," the corporation's books and records.[98] A proper purpose is defined as a "purpose reasonably related to such person's interest as a stockholder."[99] If the corporation refuses the stockholder's demand, the stockholder may then apply to the Court of Chancery for an order compelling inspection. This Court is vested "with exclusive jurisdiction to determine whether or not the person seeking inspection is entitled to the inspection sought."[100]

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[96] Martha again claims that the Defendants have the burden of proving the entire fairness of their conduct of the § 220 Action due to the appointment of a special litigation committee. This argument was discussed in text accompanying notes 24-26, *supra*.
[97] Pl.'s Answering Br. at 46.
[98] 8 *Del. C.* § 220(b).
[99] *Id.*
[100] 8 *Del. C.* § 220(c).

Martha argues that the Defendants were motivated to fight her books and records demand by substantial concerns about personal liability. She claims that they therefore had a personal interest in the § 220 Action; this, according to Martha, negates the business judgment rule and requires the Defendants to prove the entire fairness of their defense.[101] In supporting her claim, Martha analogizes this situation to one in which a plaintiff successfully pleads demand futility under Court of Chancery Rule 23.1. In that context, boards have been held to lack the requisite disinterestedness or independence to consider a pre-suit demand if they faced a substantial likelihood of liability arising from the potential lawsuit.[102]

It is a huge leap, however, from being disabled to consider a pre-suit demand and being exposed to personal liability for taking an action that is impliedly authorized by statute. Under 8 *Del. C.* § 220, the Board may reject a demand for books and records that does not satisfy the statutory standards. Requiring board members to show the entire fairness of their refusal to grant a books and records request simply because they face a risk of substantial liability would create an unjustifiably burdensome rule. Indeed, this Court has recognized that, "in most" § 220 proceedings involving a closely-held corporation, "the corporation

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[101] Pl.'s Answering Br. at 45.

[102] *In re infoUSA, Inc. S'holders Litig.*, 953 A.2d 963, 990 (Del. Ch. 2007) (recognizing that "[a]lthough the mere threat of personal liability is insufficient to render a director interested in a transaction, plaintiffs are entitled to a reasonable inference of interestedness where a complaint indicates a 'substantial likelihood' of liability will be found") (quoting *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993)).

customarily pays the legal costs of opposing the § 220 or § 225 claim, even though the opposition often serves the interests (or the position being taken) by the incumbent management, yet in such cases that fact is often not viewed as controversial."[103] This is because there is usually an independent corporate interest at play in defending the suit, and thus a good faith dispute on the merits.[104]

The appropriate question therefore, and one that has been anticipated before in other cases, is whether the Defendants acted in bad faith by refusing Martha's request for books and records inspection and by contesting the § 220 Action.[105] Martha cites to *Technicorp* and *Carlson* as examples in which the Court held the defendants liable for the costs of defending a § 220 action in bad faith.[106] However, given the *Technicorp* language cited above, the fact pattern in that case, as acknowledged by the Court, did not fit within the "typical" or "ordinary" § 220 paradigm.[107] In fact, after trial in *Technicorp*, it became "abundantly manifest" that the defendants had engaged in a historic pattern of fraud and embezzlement

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[103] *Technicorp Int'l II, Inc. v. Johnston*, 2000 WL 713750, at *43 (Del. Ch. May 31, 2000).
[104] *Id.*
[105] Bad faith may be shown when a director "intentionally acts with a purpose other than that of advancing the best interests of the corporation." *Ryan v. Gifford*, 918 A.2d 341, 357 (Del. Ch. 2007) (quoting *Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006)).
[106] *See Technicorp*, 2000 WL 713750, at *43; *Carlson v. Hallinan*, 925 A.2d 506, 545-46 (Del. Ch. 2006).
[107] *Technicorp*, 2000 WL 713750, at *43.

and they therefore "knew" they had no defense to their wrongful conduct.[108] Due to the Defendants' obvious and egregious wrongdoing, the Court could say with confidence that their bad faith motive "permeated and drove their defense of the § 220 Action. . . ."[109] And in *Carlson*, the defendants "[did] not dispute" that the plaintiff director had a proper purpose, and thus a "clear right," to inspect the books and records but they resisted demand anyway.[110] The Court found that the plaintiffs had "made the requisite showing" that the defendants acted in bad faith by refusing the inspection demand, and were therefore liable for attorney's fees under the American Rule.[111]

There is no genuine issue of material fact as to whether the Defendants acted in bad faith in resisting the § 220 Action. Although the Court previously found that Martha had a proper purpose to request books and records, it emphasized the

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[108] *Id.* at *44. ("Indeed, it is now abundantly manifest that ever since Statek was acquired in 1984, the defendants have engaged in a pattern of massive fraudulent diversion of Statek's (and TCI II's) assets, and concealments of the same.").
[109] *Id.*
[110] 925 A.2d 506, 545-46. The Court in *Carlson* found it particularly relevant that the plaintiff was a director when he made his request for books and records. In reaching its decision, the Court stressed that the right to inspect books and records, once supported by a proper purpose, will not be defeated by improper secondary purposes, and that this "proposition applies with even greater force in the context of a director seeking books and records" due to his management responsibilities. *Id.* at 545-46 & n.267.
[111] The Court notes that *Carlson* dealt with a plaintiff's request for an award of its own attorney's fees to prosecute a § 220 action, and not, as here, a derivative claim brought on behalf of a company or companies to recover sums spent defending a § 220 action. The distinction may not be particularly significant.

very personal and acrimonious nature of the dispute.[112] The Court recognized the existence of several improper purposes that possibly motivated Martha's efforts to access the Companies' information, specifically Martha and Dwight, Jr.'s evident disappointment over their father's disposition of his estate.[113] Moreover, the Defendants, after discussing the matter with their attorneys, developed a good faith belief in the validity of their defenses to the § 220 demand.[114] Perry and Todd's employment agreements were somewhat generous but have since been amended, and Martha's claim regarding the Choctaw Audit remains unresolved, but there is no evidence that the Defendants fought Martha's demand with the knowledge that it was for a proper purpose or that they did so to cover up pervasive wrongdoing. This case is therefore sufficiently distinguishable from *Technicorp* and *Carlson*. The Defendants' § 220 defense was not made in bad faith.

2. Gross Negligence

Martha also argues that the Defendants failed to inform themselves adequately about the potential costs of the § 220 Action.[115] She claims that the

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[112] *Sutherland*, 2006 WL 1451531, at *9 (Del. Ch. May 16, 2006) (stating that Martha's proper purpose for bringing suit is not her sole purpose as "many motivations have precipitated this long and expensive litigation . . . it is evident to the court that an undercurrent of family animosity has contributed to the parties' actions in this case, including the defendants' extremely vigorous defense").

[113] *Id.* at *2 ("[T]he evidence adduced at trial suggests that Martha and Dwight, Jr. were, to some extent, unhappy with the disposition of their father's estate.").

[114] Indeed, the Defendants succeeded in limiting the scope of Martha's demand from seven years to one year. *Id.* at *11.

[115] Pl.'s Answering Br. at 45-46.

Defendants "acted blindly and without regard to cost," and defended the books and records action with no analysis, budget, or spending limit.

Once again, to hold the Defendants liable for allegedly acting on an uninformed basis, Martha must show they acted with gross negligence, or recklessness, in failing to acquire the data they needed to make an informed business decision.[116] The record lacks the necessary undisputed facts for drawing an inference that the Defendants acted recklessly in availing—or failing to avail—themselves of the information they needed to defend the § 220 Action. Although Defendants admitted that they did not establish a budget, set a limit on the amount of dollars that could be spent on defending the § 220 Action, or perform a written analysis of its potential costs, they also knew the litigation would be costly, but believed a vigorous defense was worth pursuing if it could avoid the greater cost of litigating a derivative action.[117] In addition, lead counsel for the Defendants stated

[116] *See supra* notes 78-79 & accompanying text.

[117] Suppl. Perry Dep. at 455 ("I knew it was going to be expensive, it was going to cost a lot of money to defend this thing, but I also knew it would be even more expensive to go through the derivative lawsuit that we had hoped to prevent by prevailing on the books and records."); Suppl. DiSalvo Aff., Ex. W (Suppl. Dep. of Todd Sutherland) at 106 (explaining that while the Defendants did not perform a detailed analysis, they "considered the costs to go forward . . . the costs to comply . . . the costs of the derivative action . . . the standards that we felt like we would prevail on . . . the likelihood of success . . . a lot of factors"); *Id.*, Ex. OO (Suppl. Dep. of Mark Sutherland) at 145 ("[W]e made the decision at the time that money spent on—the books and records case, if we could successfully put a stop to her litigation, would be far less expensive than ongoing litigation").

during deposition that he had frequent discussions with the Defendants "throughout the litigation" about the cost of the defending the § 220 Action.[118]

There is simply no evidence that the Defendants were recklessly uninformed when they decided to defend the § 220 Action. They knew that the cost of litigating the action would be sizeable, what the company could bear, and the potential savings that could be achieved by preventing derivative litigation further down the road. As stated with the CJ1, this is a closely-held business and the Defendants, particularly Perry, exercise tight control over its operations.

3. Waste

For many of the same reasons stated above, there is also no genuine issue of material fact as to whether the Defendants committed waste by fighting Martha's books and records demand. Martha's argument rests on her success in the § 220 Action; indeed, the Court previously recognized that Martha "unquestionably possessed a proper purpose" and described the defense as a "futile, yet extremely expensive, campaign of attrition."[119] Martha also cites the apparent ease with which the Defendants could have produced the relevant books and records. She claims that this last fact is amplified by the Companies' weak financial position.

[118] *Id.*, Ex. PP (Suppl. Dep. of Robert Saunders ("Saunders Suppl. Dep.") at 11-13.
[119] *Sutherland v. Sutherland*, 2007 WL 1954444, at *1 (Del. Ch. July 2, 2007).

Lastly, she argues that waste claims are often inappropriate for disposition by summary judgment.[120]

Directors may only be held liable for waste in extreme cases in which they "squander or give away corporate assets."[121] The test is whether the "board's decision was so egregious or irrational that it could not have been based on a valid assessment of the corporation's best interests."[122] Under this standard, Martha's claim for waste is unavailing. As stated above, the Defendants believed that Dardanelle could prevail in the § 220 Action and, if it did, could save a substantial amount of money in the long run. The Defendants formed the belief upon advice from competent, experienced counsel.[123] That is sufficient here to defeat a claim of waste on a motion for summary judgment.

E. *Charter Amendments*

Martha next challenges the Defendants' adoption of voting and personal monetary liability amendments to Dardanelle's certificate of incorporation. The Defendants amended Dardanelle's certificate of incorporation to eliminate

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[120] Pl.'s Answering Br. at 47 (citing *Michelson v. Duncan*, 407 A.2d 211, 223 (Del. 1979)).
[121] *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 74 (Del. 2006).
[122] *White v. Panic*, 783 A.2d 543, 554 (Del. 2001).
[123] Saunders Suppl. Dep. at 96-97 ("I think that was a fairly common topic of discussion when we discussed the options that were available to us, that the directors expected that Martha would filed a derivative case if she could, and because generally they believed that she would try to create as much litigation as she could, and that if we were able in the defense of the 220 case to have the court conclude that Martha did not even have a reasonable basis to suspect wrongdoing, that it would be more difficult for her to file or pursue a derivative action.").

cumulative voting shortly after Martha filed the § 220 Action.[124] The Defendants amended Dardanelle's certificate of incorporation once again, on October 5, 2004, this time to provide immunity from personal monetary liability for breach of their fiduciary duty of care by adding a § 102(b)(7) provision.[125]

Martha alleges that the Defendants engaged in self-dealing by adopting the charter amendments.[126] She claims that they stood on both sides of this decision and against "the wishes of owners of 50% of Dardanelle's common stock."[127] She further contends that the Defendants acted in bad faith when they adopted these amendments, which they used to insulate themselves from liability and entrench their positions within the Companies.[128] The voting amendment precluded Martha and Dwight, Jr. from electing a Dardanelle director at its next annual meeting, which would have given Martha a near presumptive right to access the Companies' books and records.[129] Indeed, given the pending § 220 Action with its allegations of corporate wrongdoing, the Defendants most likely adopted the § 102(b)(7) amendment out of concern for a growing risk of personal liability.

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[124] Davis Aff., Ex. 82 (the "Voting Amendment"). The Voting Amendment was adopted on September 5, 2004. Martha filed the § 220 Action on August 31, 2004.
[125] *Id.*, Exs. 76, 77.
[126] Am. Compl. ¶ 152.
[127] *Id.*
[128] *Id.* at ¶ 153.
[129] *See supra* note 110.

Even if the Defendants, however, recognized the potential personal benefit of adopting these charter amendments, making the amendments was not wrongful. Regarding Martha's challenge to the § 102(b)(7) provision, similar arguments have been offered before. In both *Caruana v. Saligman* and *Decker v. Clausen*, the plaintiff alleged that the board members' adoption of a charter amendment limiting their liability demonstrated their interest in a challenged transaction sufficient to excuse demand. The Court in both cases held that the plaintiffs' argument represented nothing more than variations on the "directors suing themselves and participating in the wrongs refrain."[130] The Court, in each instance, concluded that such allegations failed to create a reasonable doubt that the directors were disinterested or not independent.[131]

The precise issue raised here was also addressed in *Orloff v. Shulman*: whether a board breaches its fiduciary duties by approving the addition of a § 102(b)(7) provision to the corporate charter.[132] As is the case here, the defendants in *Orloff* adopted the § 102(b)(7) provision after the plaintiffs had filed a § 220 books and records action.[133] Thus, the plaintiffs alleged that the defendants approved the provision "under the threat of imminent litigation, and breached their

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[130] *Caruana v. Saligman*, 1990 WL 212304, at *4 (Del. Ch. Dec. 21, 1990) (quoting *Decker v. Clausen*, 1989 WL 133617, at *2 (Del. Ch. Nov. 6, 1989)).
[131] *Id.*
[132] 2005 WL 3272355, at *6 (Del. Ch. Nov. 23, 2005).
[133] *Id.*

fiduciary duties by self-interestedly protecting themselves against litigation that they knew would soon name them as defendants."[134] The Court, citing *Caruana* and *Decker*, saw no reason to depart from settled precedent.[135] This Court will follow the *Caruana* and *Decker* line of cases as well—Martha's claims regarding adoption of the § 102(b)(7) provision are dismissed.[136]

The Court also rejects Martha's claim regarding the elimination of cumulative voting. This issue was considered many years ago in *Maddock v. Vorclone Corp*.[137] In *Maddock*, the board of directors amended the corporate charter to eliminate cumulative voting, admittedly to prevent the plaintiffs from electing a representative to the board.[138] The Court held that the issue was "one purely of the statute's application," and that the "right to vote cumulatively may be supplanted by a scheme of simple straight voting if the statute which is written into the contract authorizes it and its directions are followed."[139] Likewise, in this case, the Defendants validly recommended the charter amendment eliminating

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[134] *Id.*
[135] *Id.* at *13.
[136] Ruling against the directors would also infringe upon their right to propose, and the stockholders' right to ratify, amendments to the corporate charter. Martha does not contest that the Defendants, acting unanimously and as the entire Dardanelle board, proposed an amendment to the corporate charter that was approved by a majority of Dardanelle's shareholder voting power.
[137] 147 A. 255 (Del. Ch. 1929).
[138] *Id.* at 256.
[139] *Id.* at 256-57.

cumulative voting, and the shareholders approved the recommendation by majority vote.

F. *The Personal Living Expenses*

In her Amended Complaint, Martha claimed that Perry and Todd caused Dardanelle and Southwest to pay for "a variety of 'expenses' that were for the personal benefit of Perry and Todd with no legitimate or reasonable business need or purpose."[140] She also alleged that Perry, "in particular," used the Companies' funds and assets as a means of supporting "lavish and expensive lifestyles" to which he and his family had grown accustomed.[141] Martha later claimed, in response to the Defendants' interrogatories, that Perry and Todd were causing the Companies to pay personal living expenses "including telephone bills, hotel bills and limousines."[142]

The Defendants argue that no facts exist to support these allegations, and Martha identifies none in response. Instead, she argues that the Defendants, as corporate fiduciaries, have the burden of showing that they dealt fairly with the Companies' funds, "particularly since Defendants have absolute control over the

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[140] Am. Compl. ¶ 9.
[141] *Id.* at ¶ 8.
[142] DiSalvo Aff., Ex. A. (Defs.' 1st Set of Interrogs. at Interrog. No. 5). In her original complaint, Martha laid out several examples of improper personal expenses, including "such things as rental cars, expensive hotels, limousines, club memberships, chartered private railroad cars for extended personal trips, private parties, and personal living expenses, among many others." Compl. ¶¶ 64, 66. Martha eliminated these allegations following the limited discovery performed by the special litigation committee, but seemed to have revived several of these claims in her responses to Defendants' interrogatories.

companies and are intimate with both their Companies' disbursement practices and, more fundamentally, which of their personal expenses were paid for as part of that practice."[143] She cites both *Technicorp* and *Carlson* in support of this proposition.

Technicorp and *Carlson* do not advance Martha's claim. In *Technicorp*, the plaintiffs "made a *prima facie* showing" that the two individual defendants had diverted almost $12 million from one of the plaintiff companies over a twelve-year period while the company was in the defendants' exclusive control.[144] The Court placed the burden upon the defendants to account for the funds; in other words, the "defendants had a duty to create and maintain accurate records to substantiate the expenses" they claim the company paid, and the burden to "*produce those records when called to account for those expenses*."[145] Likewise, in *Carlson*, the Plaintiffs demonstrated "definite instances" where the defendants did not properly "allocate" or "keep track" of expenses.[146] In light of these unaccounted-for dispositions, the Court ordered an accounting to determine the extent of any wrongdoing.

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[143] Martha also claims that Jeffrey admitted at deposition that there was a "pattern and practice" of the Companies' paying the Defendants' personal expenses. Jeffrey in fact stated that it was "the usual and customary practice for the company to pay bills on certain peoples' behalf and then to receive a reimbursement or to put these things in a loan account temporarily that got paid back." Davis Aff., Ex. 5 (Dep. of Bryan Jeffrey ("Jeffrey Dep.")) at 129. The Court does not view Jeffrey's statements as an admission that the Companies were paying for Perry and Todd's personal expenses.

[144] 2000 WL 713750, at *15.

[145] *Id.* at *18 (emphasis added).

[146] 925 A.2d at 537.

In this case, by contrast, the Defendants have no burden to account for the Companies' expenses because Martha has not alleged there to be an unaccounted-for disposition of corporate funds.[147] Martha would have the Court impose an affirmative duty on fiduciaries to come forward and explain the allocation of company funds at the behest of any inquiring shareholder. This cannot be what the law requires. Absent some reason to suspect improper and unaccounted-for payment of company funds, the Court will not mandate an accounting from fiduciaries. Here, Martha has identified no funds that were improperly paid-out for the Defendants' personal expenses nor has she given any other reason to suspect that company resources are missing or unaccounted-for.[148] For this reason, the Court grants the Defendants' summary judgment as to Martha's claims regarding the Companies' payment of the Defendants' personal expenses.

G. *The Employment Agreements*

Martha next argues that she has already prevailed on her claims regarding the employment agreements and requests attorneys' fees and costs. Parties are usually responsible for paying their own attorney's fees unless required otherwise

[147] There, of course, remains the possibility of requiring the Defendants to account for the funds allocated to the Choctaw Audit.

[148] Martha claims that she cannot be faulted for "not spending money on a forensic accountant to decipher the Companies' general ledgers and all related invoices regarding improperly paid personal expenses." Pl.'s Answering Br. at 10. While that may be so, the Court will not require an equitable accounting without some evidence of missing funds.

by statute or contract.[149] There are exceptions to this rule, one of which involves creation of a common fund or recognition of calculable monetary benefit, and another one of which involves efforts by the plaintiff's counsel that result in a non-monetary benefit to the corporation.[150] The exception may apply when defendants take some action in response to litigation that moots a derivative or class claim before it had been finally adjudicated. In this circumstance, fees may be awarded to plaintiffs' counsel if the plaintiff is able to show that 1) the litigation was meritorious when filed; 2) the action rendering the litigation moot produced the same benefit sought after in the litigation; and 3) there was some causal connection between the litigation and the action taken that produced the benefit.[151]

Martha alleged that Perry and Todd's employment agreements bestowed on them "an array of lavish compensation and perquisites that served no legitimate purpose and were harmful to Dardanelle and its shareholders."[152] Specifically, Martha challenged the size of Perry's $200,000 per year salary. And as stated previously, she also challenged clauses in the employment agreements that

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[149] *See, e.g.*, *La. State Employees' Ret. Sys. v. Citrix Sys., Inc.*, 2001 WL 1131364, at *4 (Del. Ch. Sept. 19, 2001).

[150] *Id.* The principle underlying the exception for non-monetary benefits, which is sometimes called the therapeutic or corporate benefit doctrine, is that shareholders who share in the benefit of litigation should also share in its costs. *Id.* (citing *United Vanguard Fund, Inc. v. Takecare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997)).

[151] *Id.*

[152] Am. Compl. ¶¶ 57, 150, 163.

provided for Perry and Todd's personal use of the CJ1.[153] Martha further questioned provisions giving Perry and Todd the right to unlimited personal tax and accounting services from Cimarron, and unlimited use of the Maysville Training Center—the Companies' training facility and Sutherland family farm.[154] Lastly, she objected to language that gave Perry and Todd the unrestrained right to compete against the Companies and a severance provision that would give them two years of continued compensation payments if their employment was terminated for any reason.[155]

These agreements were amended in July 2007. They now contain non-competition provisions prohibiting Perry and Todd from competing within 25 miles of any store owned by the Companies. The severance provisions were also revised and no longer provide compensation to Perry or Todd if they are terminated for cause. Lastly, the amended agreements contain limits on the extent to which Perry and Todd may use the Maysville facility at the Companies' expense and they cap the amount of money paid by the Companies for Cimarron accounting

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[153] *See supra* note 91.
[154] Am. Compl. at ¶¶ 62-63.
[155] *Id.* at ¶ 64; *see also* Maxwell Aff., Ex. L. Todd's employment agreement provided for a $14,760 annual salary and use of the CJ1 at the charter rate provided in the Time Sharing Agreement; Todd also received perquisites regarding Cimarron accounting and use of the Maysville facility, as well as competition and severance provisions that were identical to those contained in Perry's agreement. *Id.* at ¶¶ 65-69; *see also* Maxwell Aff., Ex. N.

services.[156] As noted previously, these amendments were adopted at the recommendation of the special litigation committee.[157]

Martha contends that her claim as to the employment agreements was meritorious when filed and that the July 2007 amendments "rendered the claim moot as they achieved the material benefit Martha was seeking in this litigation."[158] She claims that she is entitled to attorney's fees and cost for her success in achieving the amendments.

Some, but not necessarily all, of Martha's attorney's fees should be shifted to the Defendants. The amendments were made, at least in part, in response to this litigation. Martha correctly points out that several of her earlier claims are now moot. Not all of Martha's requests, however, were successful. While she challenged the amount of Todd and Perry's salary as excessive; Perry and Todd's salaries actually have been increased under the amended employment

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[156] Davis Aff., Exs. 72-74.

[157] In its report the SLC stated that:

> [G]ood corporate governance suggests that modification to the employment agreement including clarification that the Companies' payments for tax and accounting work to be performed by Cimarron for Perry and Todd shall be limited to the preparation of individual tax returns for them and their immediate families, elimination of the right to compete with the Companies, and the adoption of an appropriate "for cause" carve-out to the severance benefits, should be negotiated between the Companies and Perry and Todd.

SLC Report (D.I. #41). Jeffrey also admitted at deposition, although reluctantly and with some qualification, that the former severance and permissive competition provisions were unreasonable. Davis Aff., Ex. 5 at 199-200.

[158] Pl.'s Answering Br. at 42.

agreements.[159] The employment agreements also still provide for Perry and Todd's personal use of the CJ1.[160] Because only some of her original demands have been achieved, Martha may not necessarily be awarded all of her attorney's fees and court costs. Determination of the appropriate amount must await further proceedings.

H. *Martha's Conceded Claims*

As a final matter, Martha claimed in the Amended Complaint that Dardanelle wrongfully paid almost $100,000 for personal work to build Perry's home.[161] These funds were paid in January 2001, although the work was performed some time earlier.[162] This Court has already determined that all claims arising before August 31, 2001—three years before the § 220 action was initiated—are time barred. Accordingly Martha's claims regarding the work performed on Perry's home is barred by the statute of limitations; Martha has conceded this point in her answering brief.[163]

Martha also claimed that the Defendants wrongfully caused the Companies to borrow money. In her answering brief, Martha informed the Court that she no longer intends to pursue this claim and "instead will withdraw these allegations."[164]

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[159] Davis Aff., Exs. 72-74.
[160] *Id.*
[161] Am. Compl. ¶ 107.
[162] Maxwell Aff. ¶ 3; Davis Aff., Ex. 33.
[163] Pl.'s Answering Br. at 11-12.
[164] *Id.* at 41.

The Court considers Martha's claim withdrawn and awards the Defendants summary judgment on this matter.

V. CONCLUSION

For the foregoing reasons, the Defendants' motion for summary judgment is granted in part and denied in part. Counsel are requested to confer and to submit an implementing form of order.