IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE COCA-COLA ENTERPRISES, INC. SHAREHOLDERS LITIGATION	)))))	CONSOLIDATED C.A. NO. 1927-CC

MEMORANDUM OPINION

Date Submitted: August 6, 2007
Date Decided: October 17, 2007

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CHANDLER, Chancellor

While there may never be a decisive victory in the Great American Cola Wars,[1] the plaintiffs in this action seem to think they got the wrong stock, baby—uh huh.[2] Plaintiffs, who are shareholders in Coca-Cola Enterprises, Inc. ("CCE"), the primary bottler and distributor of Coca-Cola products, conclude their fifty-page complaint with a lengthy and unfavorable comparison between the stock price performance of their company, CCE, with Pepsi Bottlers Group, its counterpart in the world of Pepsi. Dismayed that the Pepsi Bottlers Group has outperformed CCE despite the fact that the Coca-Cola Company ("Coke") has outperformed PepsiCo, plaintiffs have authored a tale of abuse spanning two decades, in which defendant Coke has, "[s]ince CCE's creation,"[3] somehow high jacked the CCE board and forced its members to operate CCE solely to benefit Coke. Stripped of its histrionics, however, the amended complaint essentially alleges claims that challenge the fundamental nature of the relationship between Coke and CCE—a relationship that plaintiffs acknowledge was established over twenty years ago in a perpetual Master Bottle Contract. Sobered from their rhetorical high by defendants' motions to dismiss, plaintiffs have attempted to save their case by showing equitable tolling, but their attempt has not satisfied their burden.

[1] *See Pepsico, Inc. v. The Coca-Cola Co.*, 114 F. Supp. 2d 243, 245 (S.D.N.Y. 2000) (noting the fabled marketing battle between Coke and Pepsi).
[2] *Cf.* The Pepsi Legacy 1990, http://www.pepsi.com/ads_and_history/legacy/1990/1990.php (last visited Oct. 17, 2007) (recalling the Diet Pepsi Commercial featuring Ray Charles and the "Uh Huh Girls" singing "You've Got the Right One, Baby").
[3] Am. Compl. ¶ 1.

Consequently, for the reasons described later, plaintiffs' amended complaint is dismissed as time-barred.

I. BACKGROUND

A. Procedural History

On February 7, 2006, the International Brotherhood of Teamsters filed a derivative action in this Court on behalf of CCE against Coke and current and former members of the CCE board of directors alleging breaches of fiduciary duty. In March and April of the same year, two substantially similar complaints were filed here by Robert Lang and Natalie Gordon. Lang and Gordon moved to consolidate, and the Teamsters filed a competing consolidation motion. After a brief dispute between the plaintiffs, the three filed an amended, consolidated complaint on September 29, 2006. On October 16, 2006, defendants filed their motions to dismiss. Following briefing and oral argument, this is my decision on the motions.

B. Facts

Nominal defendant CCE is the largest bottler and distributor of Coke beverage products in the world. Initially formed as a wholly owned subsidiary of Coke, CCE was spun off in 1986 as an independent, public company. Its relationship with former parent Coke, of course, continued pursuant to a series of

contracts and licensing agreements, the most important of which is the 1986 Master Bottle Contract ("MBC").

The MBC defines the contours of the relationship between CCE and Coke that persists today.[4] In addition to establishing that CCE may buy Coke's syrup and concentrate, bottle, and sell the soda, the MBC grants Coke certain rights and saddles CCE with certain responsibilities. For example, CCE must allow Coke representatives access to CCE facilities to conduct inspections to assure Coke that CCE is "complying with instructions" and other standards.[5] The MBC also provides that: (1) Coke has the right to pull the final product if it is not satisfied and can force CCE to recall the product after shipment;[6] (2) Coke has the right to set and revise prices of its concentrates and syrups;[7] (3) CCE must "develop and stimulate and satisfy fully the demand" for Coke beverages;"[8] (4) CCE must "cooperate in and vigorously promote" all joint marketing programs with Coke;[9] (5) CCE must present for approval to Coke its "plans for the ensuing year" and the

[4] The Court may properly consider the contract in deciding this motion to dismiss because plaintiffs expressly refer to and rely on the contract in their amended complaint. *In re Dean Witter P'ship Litig.*, C.A. No. 14816, 1998 WL 442456, at *6 n.46 (Del. Ch. July 17, 1998), *aff'd*, 725 A.2d 441 (Del. 1999); *see also Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320 (Del. 2004) ("On a motion to dismiss, the Court may consider documents that are 'integral' to the complaint"). The amended complaint references the MBC and its terms repeatedly. *See* Am. Compl. ¶¶ 6, 46, 55, 56, 66, 94–97.
[5] MBC art. IV, ¶ 11.
[6] *Id.* at ¶ 13.
[7] *Id.* at art. V., ¶ 14.
[8] *Id.* at art. VI, ¶ 17.
[9] *Id.* at ¶ 18.

plans must be approved by Coke;[10] (6) CCE must report on its progress to Coke at least quarterly if not more frequently;[11] (7) Coke may give to CCE technology it has or develops;[12] and (8) CCE must furnish financial or other records to Coke upon request.[13]

Plaintiffs allege that Coke and the directors of CCE have worked together to abuse the relationship between the two companies. At the heart of the amended complaint is the contention that by maximizing sales volume, CCE has maximized Coke's profits at the expense of CCE's. CCE's decisions to push for increased volume can only be explained, plaintiffs contend, by Coke and the individual defendants' desire to aid Coke's financial future. Connected to this core theme are arterial sections flowing with vitriol about Coke's domination, channel stuffing, and harmful experimentation in various warehouse delivery systems.

1. Coke's Alleged Domination and Abuse

Despite conceding that Coke has directly named just three of CCE's thirteen directors and that Coke owns just a thirty-six percent share of CCE, plaintiffs maintain that Coke controls and dominates CCE. Plaintiffs trace the history of this domination to CCE's origins in the mid-1980s.

[10] *Id.* at ¶ 20(a).
[11] *Id.* at ¶ 20(b).
[12] *Id.* at art. XII, ¶ 36.
[13] *Id.* at ¶ 40(c).

Plaintiffs stuff much of the amended complaint with conclusory allegations of control and abuse.[14] An allegation is conclusory when it merely states a generalized conclusion with no supporting facts. For example, the bald assertion that "Coke ultimately controls virtually every aspect of CCE's operations and profitability in a manner designed to maximize Coke's own financial condition" is conclusory.[15] That allegation does not explain *how* Coke controls CCE; it perfunctorily concludes that Coke exerts control without offering any support. Plaintiffs' amended complaint is riddled with similar, conclusory statements.[16]

There are, however, several substantive allegations of control and abuse. First, the MBC provides "Coke with the ability to manipulate its own financial condition from sales to CCE through, among other things, price changes, sales volume changes, financing terms, and other terms of payment and conditions."[17] Second, Coke forces "CCE to pay a higher price for beverage base and concentrate than CCE otherwise would have paid" if the MBC were negotiated at arm's length.[18] Third, a 2002 Sales Growth Initiative Agreement between Coke and CCE incentivized increased sales volume at the expense of profit by providing

[14] On a motion to dismiss, this Court assumes that the well-pleaded allegations in a complaint are true, but does not accept the truthfulness of conclusory allegations. *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).
[15] Am. Compl. ¶ 54.
[16] *See, e.g.*, Am. Compl. ¶ 50 ("For all practical purposes, Coke controls CCE.").
[17] Am. Compl. ¶ 55.
[18] *Id.* at ¶ 56.

CCE with payments from Coke if it hit certain sales volume thresholds.[19] Fourth, "Coke is directly involved in CCE's annual business planning process" and can manipulate this process by withholding its approval.[20]

2. Channel Stuffing

The plaintiffs define "channel stuffing" as "last minute forced sales increases,"[21] and argue that Coke pushed this practice on CCE. Plaintiffs allege that Coke caused CCE to engage in channel stuffing by giving advance warning of future price increases, giving discounts in price for increased orders in volume or other incentives for ordering more, and over-delivery of product. Plaintiffs cite as an example the fact that CCE allegedly parked numerous trailers filled with product in the parking lots of various accounts in the early 1990s. Plaintiffs contend that this practice persisted (albeit to a lesser extent) in 2004 in the Kansas City area and that CCE would count this parked product as having been sold.

3. Wal-Mart Delivery

Finally, plaintiffs assert that the individual defendants and Coke forced CCE to change the way it delivers products to the Wal-Mart account. Previously, CCE and the other Coke bottlers utilized a direct store delivery distribution method whereby the bottlers could negotiate for the pricing and marketing of the beverages

[19] *Id.* at ¶¶ 59–64.
[20] *Id.* at ¶¶ 66–67.
[21] *Id.* at ¶ 85.

at each individual retail location. For large, national accounts (like Wal-Mart), CCE negotiated on behalf of all Coke's major bottlers. The amended complaint alleges that in 2004 Coke somehow "forced" CCE to test a new warehouse delivery system for the Wal-Mart account. In 2005, plaintiffs say, "Coke directed that CCE propose [to the other bottlers] the switch to the Warehouse Delivery system"[22] for delivery of the Powerade energy drink for all Wal-Mart stores. Plaintiffs stress that CCE did so without following the proper notice procedures outlined in its agreement with the other bottlers and that this switch is detrimental to "the long-term best interests of CCE."[23]

C. Defendants' Motions to Dismiss

Defendants have moved to dismiss the complaint pursuant to Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted and Rule 23.1 for failure to adequately plead demand futility. Defendants offer a litany of reasons to dismiss this action. First, defendants argue that the amended complaint is barred by the statute of limitations or the doctrine of laches, because plaintiffs' claims arise out of contractual agreements formed in the mid-1980s. Second, defendants assert that the amended complaint's allegations are factually insufficient to state a claim as a matter of law, because the allegations are conclusory and speculative. Third, defendants say that the CCE board of directors

[22] Pls.' Answering Br. 9.
[23] Am. Compl. ¶ 112.

is comprised of a majority of independent directors and that the decisions challenged in the amended complaint were well informed and made in the exercise of sound business judgment.

D. Plaintiffs' Response

Plaintiffs obviously disagree. They challenge whether a statute of limitations / laches defense can appropriately be raised at this stage in the litigation and argue that, even if such a defense is properly presented now, it is inapplicable in this case. Further, plaintiffs stress that their allegations are legally sufficient and that demand would have been futile.

II. ANALYSIS

A. Standard of Review and Pleading Requirements

Court of Chancery Rule 8(a) requires that pleadings give notice of the claim being asserted through a "short and plain statement" that shows "the pleader is entitled to relief."[24] When a complaint fails to do so, it must be dismissed under Rule 12(b)(6). In reviewing a motion to dismiss, this Court must, as noted above, take as true all well-pleaded factual allegations and make every reasonable inference in favor of the plaintiff. The Court will not, however, give any credence to conclusory allegations or wildly speculative and unreasonable conjecture.[25]

[24] Ct. Ch. R. 8(a).
[25] *See Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).

Plaintiffs' amended complaint purports to state a cause of action for breach of the duty of loyalty against Coke[26] and the individual defendants. To establish a breach of the fiduciary duty of loyalty, plaintiffs must show that the defendants either (1) "stood on both sides of the transaction and dictated its terms in a self-dealing way," or (2) "received in the transaction a personal benefit that was not enjoyed by the shareholders generally."[27]

Immediately, the Court may dispose of the claim related to the distribution of beverages to Wal-Mart because the amended complaint manifestly fails to allege facts showing that a breach of the duty of loyalty occurred in connection with that transaction. The switch to a warehouse distribution arrangement with Wal-Mart was effected by an agreement between CCE (on behalf of the consortium of bottlers) and Wal-Mart. Plaintiffs have not alleged that either Coke or any of the individual defendants are somehow on Wal-Mart's side, nor are there any facts that show any of the defendants will derive a personal benefit from the transaction. Plaintiffs have included a conclusory assertion that this distribution arrangement will harm the long-term interests of CCE and will help Coke, but this amorphous

[26] Coke strenuously denies that it is a controlling shareholder of CCE and, therefore, denies that it owes any fiduciary duties. Because I have decided to dismiss the complaint on other grounds, I need not address this issue.

[27] *Chaffin v. GNI Group, Inc.*, C.A. No. 16211-NC, 1999 WL 721569, at *5 (Del. Ch. Sept. 3, 1999); *see also Joyce v. Cuccia*, C.A. No. 14953, 1997 WL 257448, at *5 (Del. Ch. May 14, 1997) ("To state a legally sufficient claim for breach of the duty of loyalty, plaintiffs must allege facts showing that a self-interested transaction occurred, and that the transaction was unfair to the plaintiffs.").

allegation is insufficient.[28] By failing to allege facts showing the elements of a breach of the fiduciary duty of loyalty with respect to the Wal-Mart distribution arrangement, plaintiffs have failed to state a claim upon which relief can be granted.

Plaintiffs' other claims are supported by more robust factual allegations, but they are ultimately no more successful. Because plaintiffs' other claims are really complaints about the painful effects of the terms of the 1986 MBC, the claims accrued in 1986 and are time-barred.

B. Statute of Limitations and Doctrine of Laches

Courts of Equity came into being because universally applicable legal rules are bound to work injustice in certain individual cases.[29] As such, it would be antithetical for a court of equity to blindly apply a statute of limitations to bar equitable claims.[30] Nevertheless, because "equity follows the law,"[31] it is firmly

[28] If a complaint were held sufficient simply because it restates the legal elements of a particular cause of action, Rule 8(a) would be rendered meaningless. Plaintiffs need not offer prolix tales of abuse belabored by needless details, but plaintiffs must allege *facts* sufficient to show that the legal elements of a claim have been satisfied.

[29] H. Jefferson Powell, *"Cardozo's Foot": The Chancellor's Conscience and Constructive Trusts*, 56 LAW & CONTEMP. PROBS. 7, 7–8 (1993).

[30] A statute of limitations sets a strict time period after which a claim, if not made, is barred. The doctrine of laches, on the other hand, bars a particular plaintiff from bringing a claim about which he had knowledge where the plaintiff's unreasonable delay prejudiced a defendant. Laches is an intensely factual analysis. *See Fed. United Corp. v. Havender*, 11 A.2d 331, 345–346 (Del. 1940) (noting that delays of even as short as two months have been held to constitute laches under Delaware law).

[31] *E.g.*, *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 584 (Del. Ch. 2007).

established that this Court can and will apply a statute of limitations by analogy.[32] In fact, the Supreme Court has held that "[a]bsent unusual circumstances, a court of equity will deny a plaintiff relief when suit is brought after the analogous statutory period."[33] Where, as here, a plaintiff seeks money damages for breach of fiduciary duties, the claim will "be subject to the three-year limitations period of 10 *Del. C.* § 8106" and this Court need not "engage in traditional laches analysis."[34]

Defendants argue that the claims in the amended complaint all arise from the 1986 MBC. As such, defendants contend, those claims are time-barred under section 8106. Plaintiffs have three responses. First, plaintiffs argue that defendants may not use the statute of limitations or the doctrine of laches as a defense in a motion to dismiss. Second, plaintiffs say their claims are based on discrete actions that occurred within the past three years rather than on the 1986 contract. Third, plaintiffs contend that if the statute of limitations applies, it has been equitably tolled. For the reasons stated below, none of these responses is persuasive and the claims in the amended complaint are barred under section 8106.

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[32] *Acierno v. Goldstein*, C.A. No. 20056, 2004 WL 1488673, at *2 (Del. Ch. June 29, 2004) ("The time fixed by the analogous statute of limitations is deemed to create a time period beyond which delay is presumptively unreasonable for purposes of laches."); *Fike v. Ruger*, 754 A.2d 254, 260 (Del. Ch. 1999), *aff'd*, 752 A.2d 112 (Del. 2000); *In re MAXXAM, Inc.*, 659 A.2d 760, 769 (Del. Ch. 1995); *Bovay v. H.M. Bylesby & Co.*, 29 A.2d 801, 803 (1943); *see also* 27A AM. JUR. 2D *Equity* § 198 (West 2007).

[33] *U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996).

[34] *Atlantis Plastics Corp. v. Sammons*, 558 A.2d 1062, 1064 (Del. Ch. 1989).

1. This Court May Properly Consider the Statute of Limitations and the Doctrine of Laches when Reviewing a Motion to Dismiss.

Plaintiffs devote considerable energy attempting to persuade this Court that a motion to dismiss is an improper mechanism by which one might determine whether claims are time barred. In so doing, plaintiffs (at best) misunderstand or (at worst) disregard well settled Delaware law. As this Court has stated time and time again, when the allegations of a complaint show the action was commenced too late, a defendant may properly seek dismissal under the statute of limitations or the doctrine of laches.[35] Plaintiffs have in fact correctly conceded that the statute of limitations is used as a presumptive guide for this Court,[36] but plaintiffs have failed to overcome that presumption. The allegations of the amended complaint itself affirmatively establish the plaintiffs' claims are based on the 1986 MBC.

2. The Wrath of *Kahn*: Claims Accrue at the Moment of Initial Wrongdoing—Not when their Effects Are Felt.

In *Kahn v. Seaboard Corp.*, Chancellor Allen dismissed a complaint that alleged a breach of fiduciary duty claim against directors who "structure[ed the contract] so as to obtain better terms for Flour than would have been the case had the transactions been negotiated on an arm's length basis."[37] Specifically, he

[35] *E.g.*, *Tyson Foods*, 919 A.2d at 585; *Kahn v. Seaboard*, 625 A.2d 269, 277 (Del. Ch. 1993); *Boeing Co. v. Shrontz*, C.A. No. 11273, 1992 WL 81228, at *2 (Del. Ch. Apr. 20, 1992); *see also* 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 13.8 (3d ed., supp. 2006).
[36] Pls.' Answering Br. at 17.
[37] 625 A.2d 269, 270 (Del. Ch. 1993) (quoting complaint).

found that "[t]he wrong attempted to be alleged is the use of control over Seaboard to require it to enter into a contract that was detrimental to it and beneficial, indirectly, to the defendants. Any such wrong occurred at the time that enforceable legal rights against Seaboard were created."[38] Ultimately, it is that principle that dooms plaintiffs' amended complaint.

Under Delaware law, a plaintiff's cause of action accrues at the moment of the wrongful act—not when the harmful effects of the act are felt—even if the plaintiff is unaware of the wrong.[39] Defendants contend plaintiffs' claims of abuse by Coke and so-called "channel stuffing" are really challenges to the 1986 MBC. Plaintiffs, of course, resist this characterization. Instead, plaintiffs counter, their complaint challenges certain transactions that occurred within the last three years. Specifically, they challenge: (1) a 2002 Sales Growth Initiative Agreement that

[38] *Id.* at 271.

[39] *Wal-Mart Stores, Inc. v. AIG life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004) ("This Court has repeatedly held that a cause of action 'accrues' under Section 8106 at the time of the wrongful act, even if the plaintiff is ignorant of the cause of action."); *Albert v. Alex Brown Mgmt. Servs., Inc.*, C.A. No. 762-N, 2005 WL 1594085, at *18 (Del. Ch. June 29, 2005) ("The court reiterates that a claim accrues at the time of the alleged wrongdoing, and not when the plaintiff suffered a loss."); *Fike v. Ruger*, 754 A.2d. 254, 260 (Del. Ch. 1999) ("A cause of action accrues at the moment of the wrongful act, even if the plaintiff is ignorant of the wrong."), *aff'd*, 752 A.2d 112 (Del. 2000); *In re Dean Witter P'ship Litig.*, C.A. No. 14816, 1998 WL 442456, at *4 (Del. Ch. July 17, 1998) ("The general law in Delaware is that the Statute of Limitations begins to run, *i.e.*, the cause of action accrues, at the time of the alleged wrongful act, even if the plaintiff is ignorant of the cause of action."), *aff'd*, 725 A.2d 441 (Del. 1999); *cf. Schreiber v. R.G. Bryan*, 396 A.2d 512, 516 (Del. Ch. 1978) ("[W]hat must be decided is when the specific acts of alleged wrongdoing occur, and not when their effect is felt."); 2 EDWARD P. WELCH, ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 327.3.2 (2007-1 supp.) ("Generally, the determinative issue is when the specific acts of alleged wrongdoing occurred, and not when their effect is felt.").

incentivized increased volume in sales; (2) the revisions to the 2004 Rocky Mountain Division business plan; (3) the use of databases by Coke to track daily CCE sales; and (4) channel-stuffing practices.

The claim challenging the 2002 Sales Growth Initiative is clearly time-barred under the three-year statute of limitations. The amended complaint quotes from the agreement itself and challenges actual provisions and terms of the contract. Plaintiffs appear to have conceded as much by abandoning this argument in their answering brief.

The claim challenging the revisions to the 2004 Rocky Mountain Division Business Plan is also time barred. Plaintiffs argue that in 2004 Coke forced CCE to revise the plan to push for an increase in sales volume at the expense of CCE's profits. Under the 1986 MBC, however, CCE is *obligated* to submit its annual plans to Coke and those plans must be approved by Coke.[40] The revised plan did not call for a waste of CCE's assets or resources; rather, it called for a 5.5% gross profit gain combined with an increase in projected sales volumes instead of the 7.3% gain combined with a decrease in projected sales called for in the original plan. This was clearly permitted and expected under the terms of the 1986 MBC. If plaintiffs have a valid claim on this point, they had it in 1986.

[40] MBC art. VI, ¶ 20(a).

The claim challenging the use of databases by Coke to track sales of CCE also appears to have been abandoned by plaintiffs. Even if it were not, the use of databases provided by Coke to CCE is clearly permitted by and contemplated in the 1986 MBC.[41] Again, if there is a valid claim, it is a claim that existed in 1986.

Finally, the crux of the claim challenging the alleged channel stuffing is that "Coke routinely has forced CCE to purchase additional beverage base or concentrate beyond CCE's immediate needs, and/or has raised prices on such materials, without adequate notice, all in order to improve Coke's own financial condition and meet Coke's earnings guidance and sales volume projections."[42] Coke has every right, however, under the 1986 MBC to "revise at any time, in its sole discretion, the price of any of the Concentrates or Syrups, the terms of payment, and other terms and conditions of supply, any such revision to be effective immediately upon notice to the Bottler."[43] Plaintiffs have alleged only that Coke exercised its rights under the contract.

Each one of these claims is, therefore, time-barred because each "hinges upon the allegations that the terms and conditions established by a contract are unfair to the plaintiff[s]."[44] Plaintiffs attempt to avoid dismissal by claiming that

[41] *See id.* at art. XII, ¶ 36.
[42] Am. Compl. ¶ 85.
[43] MBC art. V, ¶ 14(a).
[44] *In re Marvel Entm't Group, Inc.*, 273 B.R. 58, 74 (D. Del. 2002) (interpreting Delaware law).

they are challenging the actions taken in the last three years,[45] but concede that the contract "may have provided the means by which the Defendants effectuated their breaches of fiduciary duty."[46] Plaintiffs took a similar position (and made a similar concession) at oral argument.[47] This is precisely the argument considered and rejected by Chancellor Allen in *Kahn*[48] and by the Federal District Court in *Marvel*.[49] I likewise reject it. The actions challenged in the amended complaint represent the manifestation of the bargain struck in 1986 between Coke and CCE.[50] Absent tolling, therefore, these claims are barred by section 8106.[51]

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[45] Plaintiffs' reliance on *Teachers' Ret. Sys. of La. v. Aidinoff* is misplaced. There, the Court found a claim based on actions taken under a contract was not time-barred because the contract had a provision that granted an annual right of termination. 900 A.2d 654, 666 (Del. Ch. 2006). The Court found that the complaint was actually challenging the decision of the defendants to continue to honor the harmful contract when they could have opted out each year. *Id.* Here, the plaintiffs admit that the MBC is perpetual. Am. Compl. ¶ 95; MBC art. VIII, ¶ 24.

[46] Pls.' Answering Br. at 21.

[47] Transcript of Oral Argument at 53.

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

[49] *Marvel*, 273 B.R. at 74.

[50] *Compare Kahn*, 625 A.2d at 270 (quoting complaint: "defendants have violated their duty of loyalty by structuring such transaction so as to obtain better terms for Flour than would have been the case had the transaction been negotiated on an arm's-length basis"), *with* Am. Compl. ¶ 56 ("Coke also requires CCE to pay a higher price for beverage base and concentrate than CCE otherwise would have paid to Coke if CCE's beverage base agreements with Coke had been negotiated at arms' length").

[51] Plaintiffs' claims may also be barred under 8 *Del. C.* § 327, which requires ownership of stock contemporaneously with the wrongs challenged in a derivative suit. Plaintiffs have only alleged that they owned CCE stock from October 15, 2003, to the present, but the wrong actually complained of is the 1986 MBC. *See 7547 Partners v. Beck*, 682 A.2d 160 (Del. 1996) (strictly applying section 327 to bar a derivative suit).

3. Plaintiffs Have Not Met their Burden of Establishing that the Statute has Been Equitably Tolled.

When a complaint asserts a claim that is, as here, on its face barred by the statute of limitations, plaintiffs bear the burden of pleading specific facts demonstrating that the statute was tolled.[52] Equitable tolling will toll the statute of limitations "for claims of wrongful self-dealing, even in the absence of actual fraudulent concealment, where a plaintiff reasonably relies on the competence and good faith of a fiduciary."[53] Nevertheless, neither equitable tolling nor any other theory can toll the statute of limitations beyond the point at which the plaintiff had actual knowledge or should have been aware of the facts giving rise to the wrong.[54]

Plaintiffs summarily state that they "did not know or have reason to know of Defendants' self-interested wrongdoing prior to 2004."[55] The amended complaint itself, however, belies that assertion by relying on and quoting from documents publicly filed with the SEC prior to 2004.[56] Moreover, plaintiffs undercut their own argument with the affected rhetoric of the complaint's allegations. In the amended complaint, plaintiffs conjure images of the long-suffering whipping boy

[52] *In re Dean Witter P'ship Litig.*, C.A. No. 14816, 1998 WL 442456, at *6 (Del. Ch. July 17, 1998), *aff'd*, 725 A.2d 441 (Del. 1999); *Yaw v. Talley*, C.A. No. 12882, at *6 (Del. Ch. Mar. 2, 1994).
[53] *Dean Witter*, 1998 WL 443456, at *6; *see also Kahn*, 625 A.2d at 275.
[54] *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 585 (Del. Ch. 2007) ("Even where a defendant uses every fraudulent device at its disposal to mislead a victim or obfuscate the truth, no sanctuary from the statute will be offered to the dilatory plaintiff who was not or should not have been fooled.").
[55] Pls.' Answering Br. at 20.
[56] *See, e.g.*, Am. Compl. ¶¶ 62–64.

CCE, mistreated "[s]ince [its] creation"[57] by Coke, whose abuses are recounted by CCE's former employees with "unanimity."[58] With respect to the channel stuffing allegations, the amended complaint details practices from the "early 1990s,"[59] and it chronicles Coke's alleged domination from the 1980s to the present.[60] Finally, Coke and CCE have publicly disclosed their agreements with one another and their individual finances in filings under the Federal securities laws. The plaintiffs have railed against particular actions that have occurred in the last three years, but those actions were the foreseeable results of a contract formed in 1986. Intermittently, plaintiffs seem to acknowledge as much.[61] As in *Tyson*, "[i]f plaintiffs believed that these contracts were unfair, they could reasonably have been aware of their injuries in [1986]."[62] Consequently, plaintiffs have failed to meet their burden of establishing that the statute of limitations has been tolled.

III. CONCLUSION

CCE's relationship with Coke may not be optimal, but it is guided by a contract formed in 1986. If the plaintiffs in this action or if CCE's shareholders in general believe it is time CCE took a more aggressive, competitive stance vis-à-vis

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[57] *Id.* at ¶ 1.
[58] *Id.* at ¶¶ 68–73.
[59] *Id.* at ¶ 91.
[60] *Id.* at ¶¶ 46–49.
[61] *See* Pls.' Answering Br. at 21 (admitting that the MBC "may have provided the means by which the Defendants effectuated their breaches of fiduciary duty"); Transcript of Oral Argument at 53 ("[W]e believe that the control arises as a result of the contractual relationships and the actions taken pursuant to those contractual relations . . . .").
[62] *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 586 (Del. Ch. 2007).

Coke, they ought to put pressure on management; they cannot seek to do so by dressing up their frustration in the guise of fiduciary duty claims. Because the amended complaint objects to so-called wrongs that all rationally flow from Coke and CCE's 1986 agreement, plaintiffs' claims accrued in 1986. Because plaintiffs have alleged facts that show they either were or should have been aware of these claims for far more than three years before filing this action, the amended complaint is dismissed as time-barred.

IT IS SO ORDERED.