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Case No. 2399-VCN

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: February 6, 2013
Date Decided: May 30, 2013

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NOBLE, Vice Chancellor

I. INTRODUCTION

The final claim in this long-standing stockholder derivative and double-derivative action between family members involves allegations of self-dealing in a closely-held corporation relating to corporate expenditures on tax and accounting services.[1] All other claims in this action have been resolved.[2] What remains is the allegation that, from August 31, 2001 until November 1, 2003 and beyond, certain corporate funds were expended on tax and accounting services benefiting the controlling directors at the expense of other stockholders.[3]

II. BACKGROUND

Some of the facts in this case have been set forth on several prior occasions.[4] Others required trial.[5] Those relevant to the resolution of the remaining claim involving self-dealing are set out below.

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[1] The Amended Joint Pretrial Stipulation and Order (the "Stipulation") sets forth certain facts that are no longer in dispute.

[2] Stipulation § I, ¶ 4 n.1.

[3] The Court has held that any claims are limited to events occurring after August 31, 2001. *Sutherland v. Sutherland*, 2009 WL 857468, at *5 (Del. Ch. Mar. 23, 2009) (the "Statute of Limitations Opinion").

[4] *See, e.g.*, *Sutherland v. Sutherland*, 2010 WL 1838968 (Del. Ch. May 3, 2010) (the "Summary Judgment Opinion"); *Sutherland v. Sutherland*, 958 A.2d 235 (Del. Ch. May 5, 2008) (the "SLC Opinion"); *Sutherland v. Sutherland*, 2007 WL 1954444 (Del. Ch. July 2, 2007); *Sutherland v. Dardanelle Timber Co.*, 2006 WL 1451531 (Del. Ch. May 16, 2006) (the "Section 220 Opinion").

[5] The trial transcript is referred to as "Trial Tr.".

A. *The Parties*

The Nominal Defendants, Dardanelle Timber Co., Inc. ("Dardanelle") and Sutherland Lumber Southwest, Inc. ("Southwest") (collectively, the "Companies"), have been Delaware corporations at all relevant times, and their principal place of business is in Kansas City, Missouri. Dardanelle is the sole stockholder of Southwest. The Companies are in the retail lumber business and operate yards and home improvement stores.

Plaintiff Martha S. Sutherland ("Martha")[6] and trusts established for her children own 25 percent of Dardanelle's common stock. Defendant Perry H. Sutherland ("Perry") is a director, as well as the President and Chief Executive Officer, of both Dardanelle and Southwest. Perry and trusts for his children own 25 percent of Dardanelle's common stock. Defendant Todd L. Sutherland ("Todd") is an officer and director of Dardanelle and Southwest. Todd and trusts for his children own 25 percent of Dardanelle's common stock.[7]

The third defendant, Mark B. Sutherland ("Mark"), became a director of Southwest on February 20, 2004, after the events relating to Martha's remaining claim; and has been dismissed from this remaining claim.[8] Dwight Sutherland, Jr.

[6] Because the individual defendants and the plaintiff share the same last name; they are referred to by first name.
[7] Collectively, Perry and Todd are referred to as the "Defendants."
[8] Stipulation § 1, ¶ 2.

("Dwight Jr."), who is not a party to this lawsuit, and trusts for his children own the remaining 25 percent of Dardanelle's common stock.

B. *Factual Background*

Approximately thirty years ago, Dwight Sutherland Sr. ("Dwight Sr.") gave 25 percent of Dardanelle's common stock to each of his children: Dwight Jr., Martha, Perry, and Todd. At the time, Dwight Sr. and his wife, Norma Sutherland ("Norma"), retained ownership of Dardanelle's preferred stock. From 1986 through when Perry received the titles of President and Chief Executive Officer of Dardanelle and Southwest, Perry was actively engaged in the management of both Companies as director and vice president.

As of 2001, the board of directors of Dardanelle consisted of Dwight Sr., Dwight Jr., Perry and Todd,[9] and the board of directors of Southwest consisted of Dwight Sr., Norma, Dwight Jr., Martha, Perry, and Todd.[10] On June 14, 2002, Dwight Jr. resigned from the board of Southwest. Martha was removed as a director of Southwest on February 20, 2004 by unanimous consent actions of the Companies, executed by Perry, Todd, and Mark.[11]

In 2002, Dwight Sr. placed all of the preferred shares of Dardanelle into a Voting Trust, with himself as controlling trustee and Perry as successor trustee in

[9] Stipulation § II, ¶ 8.
[10] Stipulation § II, ¶ 9.
[11] Stipulation § II, ¶ 9.

the event of Dwight Sr.'s death or incapacity.[12] Dwight Sr. died in late October 2003, and as a result, Perry became the trustee of the Voting Trust and acquired the power to vote those preferred shares.[13] Because Perry controls the voting preferred and because Perry and Todd together have 50 percent of the common stock, the Defendants control both Companies.[14]

Martha initiated this action on September 6, 2006, by filing her original derivative complaint (the "2006 Complaint").

1. Cimarron

Cimarron Lumber & Supply Co. ("Cimarron") provides tax and accounting services to the Companies, and to individual members of the extended Sutherland family and their affiliated businesses.[15] Dardanelle is one of four equal partners in Cimarron. In early 2001, retroactive to the fiscal year starting August 1, 2000, Cimarron began to charge individual Sutherland family members and their affiliated businesses a flat annual fee, to be paid quarterly, for tax and accounting services (the "flat-fee system"). Previously, all tax and accounting services provided to members of Dwight Sr.'s family and their affiliated businesses were fully paid for by Dardanelle.

[12] Stipulation § II, ¶ 11.
[13] Stipulation § II, ¶ 13.
[14] *See* Section 220 Opinion, at *1.
[15] Stipulation § II, ¶ 16.

Cimarron charged individual family members an annual fee depending on their generation: $4,000 for Dwight Sr., $3,000 for Dwight Jr., Martha, Perry and Todd, and $1,000 for their children.[16] Their affiliated businesses were charged varying amounts: Choctaw Racing Stables ("Choctaw"), for instance, was charged $7,500, which it paid in full.[17] The work performed by Cimarron for members of Dwight Sr.'s family and their affiliated entities was still fully charged to Dardanelle; the flat fees would then be credited to Dardanelle's account. Any difference between the flat fees charged by Cimarron and the cost of actual work performed would either be absorbed as overages, or inure to the benefit of Dardanelle.

On January 19, 2001, David Dotson ("Dotson"), the manager of Cimarron's tax department at the time, sent a letter to family members regarding the implementation of the flat-fee system.[18] Perry was consulted before the creation of the flat-fee system, and knew that it was in use thereafter.[19]

Cimarron employees each had hourly rates that were periodically adjusted.[20] They recorded their time worked in a spreadsheet on Cimarron's computer system.[21] The spreadsheet specifically listed each of the four branches of the

[16] Stipulation § II, ¶ 19.
[17] Stipulation § II, ¶ 19.
[18] Stipulation § II, ¶ 17; Defs.' Exhibit ("DX") 20.
[19] Stipulation § II, ¶¶ 20-21.
[20] Stipulation § II, ¶ 27.
[21] Stipulation § II, ¶ 23.

extended Sutherland family, which each owned similar companies. Each day, Cimarron employees would record lump-sum entries denoting the time they had spent on a particular Sutherland company or individual.

The Dwight Sr. branch of the Sutherland family had four possible spreadsheet entries: Dardanelle, Southwest, Lawrence Financial Ltd. Partnership ("Lawrence"), and a catch-all category "All DDS Family Yards."[22] Any time spent by Cimarron employees on members of Dwight Sr.'s family, and on any of their affiliated companies (excluding Dardanelle, Southwest, or Lawrence) was recorded under the general "All DDS Family Yards" category.[23] Time recorded under the "All DDS Family Yards" category was not itemized or recorded separately for each individual or company, and the spreadsheet did not include information from which those time entries could be broken down.[24]

Martha's current claim includes only "those companies in which the Defendants had an interest not shared equally with Dardanelle's other stockholders."[25] While these are not limited to Choctaw, Martha has acknowledged that "she does not have a separate claim for any specific expenses paid to Cimarron for audit services other that those relating to Choctaw matters."[26]

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[22] Stipulation § II, ¶ 25.
[23] Stipulation § II, ¶ 27.
[24] Stipulation § II, ¶ 27.
[25] *Sutherland v. Sutherland*, C.A. No. 2399-VCN, at 42-43 (Del. Ch. Dec. 14, 2011) (TRANSCRIPT) (the "December Tr.").
[26] *See Sutherland v. Sutherland*, 2011 WL 4445648, at *2 (Del. Ch. Sept. 21, 2011).

Despite this, Martha contends that the companies affiliated with Perry and Todd benefiting from the flat-fee system include at least "Choctaw, Latigo Cattle,[27] Deep Water Farms,[28] DDS Family Investment Co.,[29] Finney Kearney County Gas Venture,[30] Indian Creek Land & Investment Co.,[31] PHS Family Interests, LP, and Space Savers LLC" (the "Other Companies").[32]

In the spring of 2004, Cimarron began charging actual time worked for certain individuals and companies that used to be billed to the "All DDS Family Yards" billing code, retroactively to November 1, 2003.[33] On March 17, 2004, Dotson announced the change in billing by Cimarron from the "flat-fee" system to a partial "actual time" system to Martha, Dwight Jr., and others by letter.[34] During the three years in which the flat-fee system was in place (2001-2003), Dardanelle

[27] Latigo Cattle was wholly owned by Dwight Sr. before his death. It is now owned by a trust for the benefit of Norma, for which Perry is a paid trustee. Trial Tr. 200.
[28] From 2001 through 2003, Perry and Todd each had a 17 percent partnership interest in Deep Water Farms. Martha had no partnership interest in the company at the time. Trial Tr. 198.
[29] From 2001 through 2003, Perry and Todd both had ownership interests in DDS Family Investment Co., and Perry had a general partnership interest. Trial Tr. 199. Martha did not have a general partnership interest in the company at the time. *Id.*
[30] Since 1979, Perry and Todd have maintained a 12.5 percent partnership interest in Finney-Kearny. Trial Tr. 194. Martha has had no partnership interest in Finney-Kearny. Trial Tr. 198.
[31] From 2001 through 2003, Perry was a general partner of Indian Creek Land Investment Co., and Martha had no such interest. Trial Tr. 199.
[32] Stipulation § I, ¶ 4 n.1.
[33] Stipulation § II, ¶ 34.
[34] Pl.'s Exhibit ("PX") 98. Although Cimarron began to charge fees for actual time for certain entities after this date, the parties dispute the full extent in which Cimarron transitioned away from the flat-fee system. Martha alleges that certain of the Other Companies were still charged a flat fee after this date. Pl.'s Reply Post Trial Brief ("PTRB") 10 n.7.

paid Cimarron a total of $688,602.76 for its tax and accounting services.[35] For the three-year period immediately after, Dardanelle paid Cimarron a total of $465,909.15 for its tax and accounting services.[36]

2. Choctaw

Choctaw was a personal horseracing venture jointly owned by Perry and Dwight Sr. prior to his death in late October 2003.[37] During Dwight Sr.'s lifetime, he owned more than 99 percent of Choctaw, and Perry owned less than one percent.[38] Perry is now currently the sole owner of Choctaw.[39] From at least 2000 through the present, neither of the Companies ever held an ownership interest in Choctaw.[40] Choctaw was charged and paid the amount it was billed by Cimarron, which was $7,500 annually, or $1,875 each quarter.[41] Part of the work done by Cimarron for Choctaw involved the Internal Revenue Service's ("IRS") audit of Choctaw and its owners (the "Choctaw Audit"), which began in December 2000.[42] While Martha alleges that the work done for Choctaw "was substantially and factually intense, both in general and also for the work on the Choctaw Audit,"[43]

[35] PX 54-56.
[36] PX 57-59.
[37] Trial Tr. 193.
[38] Trial Tr. 301; DX 18, 19, 48, 49, 53, 77, 90, 99.
[39] Trial Tr. 17-20.
[40] Stipulation § II, ¶ 15.
[41] Stipulation § II, ¶ 19.
[42] Stipulation § II, ¶ 30; Trial Tr. 241, 301-02; DX 16.
[43] Pl.'s Opening Post-Trial Br. ("PTOB") 2-3.

the Defendants instead contend that the Cimarron's role was minor[44] and that its "primary work in connection with the Choctaw Audit was simply to provide source data in response to IRS requests."[45]

C. *Procedural History*

In March 2004, one month after Martha was removed from the Southwest board of directors, she informally requested books and records from the Companies to investigate concerns she had about potential wrongdoing by the Defendants.[46] Later, Martha made a formal written demand for certain categories of books and records for both Companies under 8 *Del. C.* § 220. Following the rejection of her demand, Martha filed a Section 220 action for inspection of certain categories of the Companies' books and records (the "220 action"),[47] which was generally successful.[48]

After receiving documents from the 220 action, Martha filed the 2006 Complaint.[49] In response, the boards of directors of both Companies amended their by-laws by unanimous written consent.[50] Bryan Jeffrey ("Jeffrey") was appointed as a member of each board, and a special litigation committee ("SLC") consisting solely of Jeffrey was formed. The SLC hired independent counsel, and

[44] Defs.' Post-Trial Answering Br. ("PTAB") 20.
[45] Trial Tr. 302.
[46] PX 113-116.
[47] Section 220 Opinion, at *5.
[48] *See* Section 220 Opinion, at *8-9.
[49] PX 121; Stipulation § II, ¶ 11.
[50] SLC Opinion 238.

was given final and binding authority with regard to the claims asserted by Martha in the 2006 Complaint. The Court then stayed the action while Jeffrey conducted his investigation. In March 2007, Jeffrey filed his report which concluded that the Companies should not pursue any of the claims alleged in the 2006 Complaint.[51] The Companies, relying on the report, moved to dismiss. The Court denied the Companies' motion because significant errors or shortcomings in the SLC's report undermined the Court's confidence in the SLC's entire investigation and because the SLC's selective investigation did not adequately address all of Martha's claims.[52]

Martha then amended her complaint in September 2008 (the "2008 Complaint").[53] The Defendants moved to dismiss, but the Court denied that motion except for the determination that Martha's claims were "time-barred as to any transactions occurring more than three years prior to the date the 220 action was instituted, *i.e.* prior to August 31, 2001."[54] The Defendants' next motion was for summary judgment. The Court denied the motion as to Martha's claims relating to the flat-fee system, and kept open the possibility that some of Martha's attorneys' fees and court costs might be shifted to the Defendants due to the

[51] SLC Opinion 238.
[52] SLC Opinion 242-45.
[53] Statute of Limitations Opinion, at *2.
[54] Statute of Limitations Opinion, at *5.

amendments made to Perry and Todd's employment agreements in response to this litigation, but granted the Defendants' motion as to Martha's other claims.[55]

The Court later clarified that trial on the flat-fee system was not limited to sums paid by the Companies to Cimarron for Choctaw matters,[56] but was limited "to those companies in which the Defendants had an interest not shared equally with Dardanelle's other stockholders."[57] Trial was held in November 2012.

III. CONTENTIONS

Martha claims that Perry and Todd violated their fiduciary duties as directors of Dardanelle by benefiting from the flat-fee system at the expense of other Dardanelle stockholders, including Martha. Martha seeks damages relating to any overages incurred by Dardanelle as a result of the flat-fee system, and fee-shifting for her costs of litigating this claim. Martha also seeks attorneys' fees and court costs for her success on certain other claims she has pursued in this action.

In response, Perry and Todd argue that Martha's claim fails because (i) it is barred by the doctrine of laches and the analogous statute of limitations;[58] (ii) Martha conceded that Dwight Sr. did not breach any fiduciary duties relating to the flat-fee system, and Dwight Sr. was at the very least similarly situated to Perry and Todd as a director of Dardanelle until his death in late October 2003;

[55] Summary Judgment Opinion, at *7, *17.
[56] *Sutherland v. Sutherland*, 2011 WL 4445648, at *1 (Del. Ch. Sept. 21, 2011).
[57] December Tr., at 42-43.
[58] PTAB 45-50.

(iii) Perry and Todd did not breach their duty of loyalty relating to the flat-fee system because they did not receive a material benefit, or alternatively if they did receive a material benefit it was one generally available to all Dardanelle stockholders; and (iv) Perry and Todd did not breach their duty of care, because they did not act "without the bounds of reason" in failing to stop the implementation of the flat-fee system by Dotson and John Sutherland (a brother of Dwight Sr.).

Martha, in rejoinder, contends that (i) Martha's flat-fee system claim should be tolled through the books and records action, during which Martha sought to obtain information related to all of the claims set forth in the 2006 Complaint; (ii) Dwight Sr. had relinquished control of Dardanelle and Southwest in favor of Perry after 1998; (iii) Perry and Todd have the burden of demonstrating the entire fairness of the flat-fee system,[59] and (iv) Perry and Todd breached their duty of care because they failed to inform themselves adequately about the ramifications of the flat-fee system.

IV. ANALYSIS

A. *Laches*

The Defendants argue that Martha's claims are barred by laches "because all the payments to Cimarron she complains about took place more than three years

[59] PTRB 13.

before she filed suit."[60] In evaluating a laches defense, the Court generally applies the analogous legal statute of limitations.[61] The analogous statute of limitations period for derivative claims for breach of fiduciary duty seeking money damages is three years.[62] Because Martha filed the 2006 Complaint on September 6, 2006, all claims accruing before September 6, 2003 are time-barred unless Martha can establish grounds for tolling. Although the Court earlier dismissed Martha's claims as to all events occurring before August 31, 2001 (the date three years before Martha filed her 220 action),[63] it reserved the question (pending further discovery) as to whether the 220 action would toll the statute of limitations as to any events occurring between August 31, 2001 and September 6, 2003.[64]

At the summary judgment stage, the Court addressed the Defendants' argument that the statute of limitations for the flat-fee system claim began to run upon its implementation in January 2001. The Court held that the statute of limitations would not begin to run until an actual overage of tax and accounting fees was charged to Dardanelle. The statute of limitations would then accrue upon,

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[60] PTAB 45.
[61] *In re Mobilactive Media, LLC*, 2013 WL 297950, at *10 (Del. Ch. Jan. 25, 2013).
[62] *U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996).
[63] Statute of Limitations Opinion, at *5.
[64] *Sutherland v. Sutherland*, 2009 WL 1177047, at *1 (Del. Ch. Apr. 22, 2009) (holding that "there is no hard and fast rule tolling the running of the state of limitations during the pendency of books and records litigation" and that "the relationship between [a books and records action] and the claims eventually filed, may in some circumstances operate to toll the limitations period," but that at this stage there were "material issues of fact regarding the state of the plaintiff's knowledge before the books and records litigation began" that remained).

and for, each quarterly payment made to Cimarron for these overages. The Court also rejected the Defendants' argument that Martha was on notice of the alleged wrongdoing as of Dotson's January 2001 letter informing Martha of the implementation of the flat-fee system because Dotson's letter did not explain how overages would be handled, and because the letter itself was not dispositive of when Martha learned that these overages would be absorbed by Dardanelle. Finally, the Court held that it could not determine on the summary judgment record when Martha learned of the Choctaw Audit and the possibility that substantial work had been performed by Cimarron because of it.[65]

Under Delaware law, "the statute of limitations is tolled for claims of wrongful self-dealing . . . until an investor knew or had reason to know of the facts constituting the wrong."[66] At trial, the Defendants sought to establish that Martha had knowledge of overages relating to the flat-fee system before filing her 220 action on August 31, 2004. The Defendants proffered three pieces of information: (i) Dotson's November 2003 statement to Martha that he and other Cimarron personnel had been working on the IRS audit of Choctaw,[67] (ii) Dotson's March 17, 2004 letter regarding payment for work performed by Cimarron

[65] Summary Judgment Opinion, at *5 n.19.
[66] *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *6 (Del. Ch. July 17, 1998), *aff'd*, 725 A.2d 441 (Del. 1999) (TABLE).
[67] Trial Tr. 96; DX 126.

personnel for Choctaw,[68] and (iii) Dotson's April 2, 2004 letter regarding the same.[69]

Even without reaching the parties' arguments regarding whether the 220 action would toll the statute of limitations[70]—if the Court takes the earliest November 2003 date cited by the Defendants as the date upon which Martha had inquiry notice of any potential wrongful self-dealing regarding Cimarron,[71] Martha had until sometime in November 2006 before the statute of limitations would bar her claims. Because Martha filed her original complaint on September 6, 2006,

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[68] Trial Tr. 100; DX 93.

[69] Trial Tr. 100; DX 99.

[70] The Defendants argue that Martha's 220 action should not toll the statute of limitations because Martha "knew all of the purported facts on which she later based her derivative claim before she even commenced her books and records case" and because Martha "did not learn through the books and records case a single fact" that supports her claim. PTAB 48. In her 220 action, Martha specifically requested "[a]ll documents relating to expenditures of [the Companies] pertaining to the Choctaw Racing Stables, whether such expenditures were made directly by [the Companies] or indirectly by [the Companies] through [Cimarron] for the last 7 years." Compl., Ex. A, Aug. 31, 2004. That request was granted by the Court. Section 220 Opinion, at *11. "It is settled Delaware law that the institution of other litigation to ascertain the facts involved in the later suit will toll the statute while that litigation proceeds." *Technicorp Int'l II, Inc. v. Johnston*, 2000 WL 713750, at *9 (Del. Ch. May 31, 2000). The Delaware Supreme Court has "expressly encouraged potential derivative plaintiffs to utilize the 'tools at hand' to obtain information bearing on the subject of their claims." *Technicorp*, 2000 WL 713750, at *9 n.26 (citing *Rales v. Blasband*, 634 A.2d 927, 932-35, 934 n.10 (Del. 1993)). A 220 action has also been "regarded as 'strong evidence that plaintiff was aggressively asserting its claims at that time.'" *Id.* (citing *Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 714 A.2d 96, 105 (Del. Ch. 1998)). As Martha sought to develop her claims relating to Choctaw and Cimarron through her 220 action, tolling pending her books and records action is appropriate.

[71] Notably, the Defendants raise these dates. Trial Tr. 96-101. The Defendants have not challenged their significance, nor have they suggested any earlier occasions on which Martha may have acquired inquiry notice as to Dardanelle's absorption of overages or the Choctaw Audit.

within three years of November 2003, her claim with regard to the flat-fee system is not barred by the statute of limitations.

In the alternative, the Defendants argue that dismissal based on laches nonetheless ought to be granted due to "an intervening change in conditions prejudicial to the party raising the defense."[72] The Defendants suggest that Martha's claim ought to be barred due to her "delay in waiting until Dwight Sr.'s death to bring her claims substantially prejudiced Perry and Todd by rendering them unable to offer Dwight Sr.'s testimony."[73] This argument mischaracterizes the timeframe of Martha's claims, and the cases cited by the Defendants in support are inapposite.

Dwight Sr. died suddenly and unexpectedly in late October 2003.[74] Before 2004, there was never an actual meeting of Dardanelle stockholders, and as a Southwest director, Martha never received any financial reports or any information regarding major decisions.[75] Dwight Sr.'s death sparked Martha's inquiries, whether informally or formally through her 220 action, and it was on the basis of

[72] *Skouras v. Admiralty Enters., Inc.*, 386 A.2d 674, 682 (Del. Ch. 1978) ("Laches, however, unlike the statute of limitations at law, is not predicated upon the mere passage of time but rather calls for a showing that if the claim sought to be tardily enforced will result in an inequity because of an intervening change in conditions prejudicial to the party raising the defense, then it should be barred.").
[73] PTAB 50.
[74] Stipulation § II, ¶ 12.
[75] Trial Tr. 11.

these inquiries that Martha filed this action. *Fike v. Ruger*[76] and *Cooch v. Grier*[77] can therefore be distinguished, because those cases involved situations where a party, knowledgeable of his claim, sat on such claim (for more than a decade) until after the death of key witnesses[78] or other interested parties.[79] Martha can therefore bring her claim free of laches.

B. *Duty of Loyalty*

1. Dwight Sr.

The Defendants argue that because Martha stated at trial that she did not believe Dwight Sr. ever breached his fiduciary duties to the Companies,[80] and because Dwight Sr., like Perry and Todd, was a director and officer of Dardanelle at the time the flat-fee system was put in place, Perry and Todd could not have violated their fiduciary duties.[81] The decision about whether a director violated his fiduciary duties is for the Court;[82] it is not one for Martha to make. Moreover, a

[76] 752 A.2d 112 (Del. 2000).
[77] 59 A.2d 282 (Del. Ch. 1948).
[78] *Fike v. Ruger*, 752 A.2d 112, 114 (Del. 2000) (affirming summary judgment partially on the grounds that the defendants would be prejudiced by the plaintiffs' unreasonable delay of over a decade in bringing claims, due to the death of two witnesses that would have been key in refuting the plaintiffs' claims).
[79] *Cooch v. Grier*, A.2d 282, 288 (Del. Ch. 1948) (holding a 15-year delay bars the plaintiff's claims due to laches, as "death has removed the alleged fraudulent grantee from the scene and when the grantee could have defended the action had the real estate transfer been attacked with reasonable promptness.").
[80] Trial Tr. 105.
[81] PTAB 33-35.
[82] *In re Walt Disney Co. Deriv. Litig.*, 2004 WL 550750, at *1; *see also United Rentals, Inc. v. ARM Hldgs., Inc.*, 2007 WL 4465520, at *1 (Del. Ch. Dec. 13, 2007).

daughter may assess her father's conduct in different ways and for different reasons. It is understandable that a daughter might seek to avoid accusing her (deceased) father of wrongdoing, and that human impulse may impair her capacity to draw proper conclusions about his conduct. In any event, Martha's apparent concessions about her father's actions—admittedly not all different from those of Perry and Todd—does not bar her fiduciary duty claims asserted at trial.

2. Perry and Todd

The business judgment rule "is a presumption that in making a business decision the directors of a corporation 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."[83] A board's decision will not be overturned by the Court unless it cannot be "attributed to any rational business purpose."[84] In attempting to rebut this presumption, the plaintiff bears the burden of proof.[85] She must allege "facts sufficient to overcome one of the elements of the rule."[86] That requires her to "introduc[e] evidence either of director self-interest, if not self-dealing, or that the

[83] *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).
[84] *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971); *see also Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985).
[85] *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64 (Del. 1989) (citing *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)); *see also Solomon v. Armstrong*, 747 A.2d 1098, 1111-12 (Del. Ch. 1999) ("Under the business judgment rule, the burden of pleading and proof is on the party challenging the decision. . . ." (footnote omitted)), *aff'd*, 746 A.2d 277 (Del. 2000) (TABLE)).
[86] *Carsanaro v. Bloodhound Techs., Inc.*, 2013 WL 1104901 (Del. Ch. Mar. 15, 2013) (citation omitted).

directors either lacked good faith or failed to exercise due care."[87] If the plaintiff "fails to meet her burden of establishing facts rebutting the presumption, the business judgment rule, as a substantive rule of law, will attach to protect the directors and the decisions they make."[88] Only if the business judgment rule is rebutted will the burden shift to the defendants to demonstrate the "entire fairness" of the challenged transaction.[89]

Martha claims that Perry and Todd were self-interested directors because they benefited from the flat-fee system at the expense of other Dardanelle stockholders.[90] However, a director is not self-interested merely because she receives a benefit from a transaction; self-dealing requires that such benefit not be generally available to other stockholders.[91] Further, "the mere fact that a director received some benefit that was not shared generally by all shareholders is insufficient; the benefit must be material."[92] For allegations of self-interest to rebut the business judgment rule, a "stockholder must show that the directors' self-interest materially affected their independence."[93] Materiality requires that the benefit be significant enough "in the context of the director's economic

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[87] *Citron*, 569 A.2d at 64.
[88] *Id.*
[89] *Nixon v. Blackwell*, 626 A.2d 1366, 1376 (Del. 1993); *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1989); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (1983).
[90] PTOB 1.
[91] *Aronson*, 473 A.2d at 812.
[92] *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 364 (Del. Ch. 2008) (citations omitted).
[93] *McGowan v. Ferro*, 859 A.2d 1012, 1029 (Del. Ch. 2004) *aff'd*, 873 A.2d 1099 (Del. 2005) (TABLE) (citing *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 363 (Del. 1993)).

circumstances, as to have made it improbable that the director could perform her fiduciary duties to the . . . shareholders without being influenced by her overriding personal interest."[94] "'To be disqualifying, the nature of the director interest must be 'substantial,' not merely 'incidental.'"[95]

The Defendants argue that because the flat-fee system was available to all of Dwight Sr.'s children, as well as their affiliated entities, any benefits received by Perry and Todd under the flat-fee system were generally available to all Dardanelle stockholders, including Martha.[96] Martha received benefits from the flat-fee system, but it is possible that the sheer number of entities solely affiliated with Perry and Todd and able to benefit from the flat-fee system, as compared to the much smaller number associated with Martha, would nonetheless rise to the level of a significant benefit received by Perry and Todd and not available to Martha. The Defendants assert that many of the fees charged to Dardanelle by Cimarron during the three-year flat-fee system period were for entities in which Perry, Todd

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[94] *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 617 (Del. Ch. 1999).

[95] *Id.* (citing *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1169 (Del. 1995)); *Perlegos v. Atmel Corp.*, 2007 WL 4754533, at *17 (Del. Ch. Feb. 8, 2007) ("[T]o declare a director to have a disabling, disqualifying conflict of interest requires a finding that the nature of the director interest is 'substantial' or 'material,' but not 'merely incidental.'"). *See also President & Fellows of Harvard Coll. v. Glancy*, 2003 WL 21026784, at *21 (Del. Ch. Mar. 21, 2003) ("[I]t is not enough to establish the interest of a director by alleging that he received any benefit not equally shared by the stockholders. Such benefit must be alleged to be material to that director. Materiality means that the alleged benefit was significant enough 'in the context of the director's economic circumstances, as to have made it improbable that the director could perform [his]. . . duties. . . .'").

[96] PTAB 39-41.

and Martha had the same interest. The difficulty, of course, results from Cimarron's timekeeping system which, at the time, did not include separate entries by company, making it impossible to break down the amount of time spent on any of the Other Companies.[97]

Central to Martha's claim is the difference between the fees charged by Cimarron to Dardanelle during the three-year flat-fee system period ($688,602.76)[98] and the three years immediately after ($465,909.15),[99] a difference of $222,693.61, which averages to an annual difference of around $74,231.20. Because more detailed records were not kept by either Cimarron or Dardanelle, these are the only figures available to the Court. Martha argues that the additional annual sums paid to Cimarron can be reasonably inferred to have been incurred by Dardanelle's paying for the Choctaw Audit.

The Defendants challenge the inference that Martha would have the Court draw to the effect that the discrepancy in annual fees paid to Cimarron was primarily attributable to the Choctaw Audit. The most important piece of evidence provided by Martha supporting this inference was the tangential testimony from a Cimarron bookkeeper about the work done by Cimarron for Choctaw during a time

[97] Stipulation § II, ¶ 27.
[98] PX 54-56.
[99] PX 57-59.

period before the Choctaw Audit.[100] The Defendants, however, note that Cimarron's primary work in connection with the Choctaw Audit was to provide source data in response to IRS requests,[101] and that Cimarron was not required to do substantial work on the Choctaw Audit because Choctaw hired and paid outside professionals to handle the protest and later appeal.[102] Barbara Courtney, a bookkeeper for Cimarron, testified that during the period of the Choctaw Audit the bookkeeper for Choctaw, Connie Campfield, "did not require any assistance" from other bookkeepers, and "completed all of her regular work on time."[103] Therefore, according to Courtney, the Choctaw Audit "was really not a significant draw on [Cimarron's] bookkeeping resources at that time at all."[104]

Much of the work on the Choctaw Audit occurred either before August 31, 2001 (which would be time-barred), or after November 1, 2003, when the flat-fee system was discontinued as to Choctaw.[105] The Defendants cite testimony that by August 31, 2001, Cimarron had already received and responded to seven of the IRS's nine inquiries.[106] Only the follow-up questions to two inquiries were worked

[100] PTOB 10.
[101] Trial Tr. 302.
[102] Trial Tr. 202-03, 240, 302-03.
[103] Trial Tr. 415.
[104] Trial Tr. 415-16.
[105] PTAB 21-23; DX 93. Even if the flat-fee system remained in effect until early 2004, that would not significantly affect the analysis.
[106] Trial Tr. 309, 312-13.

on after August 31, 2001.[107] After the IRS responded in January 2002, Choctaw hired a certified public accountant and a tax attorney. From that point, Cimarron only participated in a "couple of telephone conferences" with those professionals, and pulled documents for them.[108] The professionals prepared the protest document,[109] and the tax lawyer's bills show only infrequent conferences with Cimarron.[110]

The Defendants also offer alternative explanations for the difference in annual fees charged by Cimarron during and after the flat-fee system.[111] According to Brian Maxwell, a tax manager at Cimarron from 2000 onwards,[112] during the flat-fee period, work for Dwight Sr. and Norma "by far" took up the most of Cimarron's resources, and that Dwight Sr. was "easily the largest user" of Cimarron prior to his death.[113] After Dwight Sr.'s death in October 2003, all of that work was no longer billed to Dardanelle, but to Dwight Sr.'s estate and Norma's trust.[114] Courtney testified that Martha was the second largest user of Cimarron's services,[115] until Martha transferred her work away from Cimarron in

[107] Trial Tr. 313.
[108] Trial Tr. 315-17.
[109] Trial Tr. 315-16.
[110] PX 39, 40; DX 50.
[111] PTAB 27-30.
[112] Trial Tr. 298.
[113] Trial Tr. 320, 334.
[114] DX 93.
[115] Trial Tr. 385-86.

the summer of 2004.[116] Maxwell also explained that developments in tax law and regulations resulted in more work for Cimarron in 2001-03 compared to the later period.[117]

On balance, Martha has not established by a preponderance of the evidence that the average annual difference between the three-year flat-fee system period and the three years after can be inferred to be attributable to the Choctaw Audit.

More importantly, because the Choctaw Audit does not explain a significant proportion of the difference in Cimarron's fees, Martha has not established by a preponderance of the evidence that the expectation of a material benefit from the flat-fee system affected Perry and Todd's judgment in allowing its implementation.[118] It is worth noting that the shift to a flat-fee system, from the previous arrangement under which Dardanelle would pay for all of Cimarron's services in full,[119] was at least a marginal, if not significant, improvement from the standpoint of Dardanelle's stockholders. Martha has not rebutted the business judgment rule presumption with regard to the flat-fee system, and Perry and Todd cannot be found by a preponderance of the evidence to have violated their

[116] Trial Tr. 11-12.
[117] Trial Tr. 334-35.
[118] As discussed above, Martha does not have a separate claim for any specific expenses paid to Cimarron by Dardanelle other that those relating to Choctaw matters.
[119] Trial Tr. 227, 370-71.

fiduciary duty of loyalty or to bear the burden of justifying their actions under the entire fairness standard.[120]

Because Martha has not made the evidentiary showing necessary to impose upon Perry and Todd the burden of demonstrating the entire fairness of the flat-fee system, her claim is subject to the presumptions of the business judgment rule. With that benefit, Perry and Todd's actions are presumed not to have been disloyal to the Companies or to their shareholders.

Perry and Todd did not directly attempt to prove the entire fairness of the flat-fee system. But, under the circumstances, a brief review of the evidence related to an entire fairness analysis may be helpful to an understanding of why the outcome here is not the product of a technical application of doctrine. The course of this proceeding has been complicated by the nature of a family business, the animosity within the family, and the actions of a father whom Martha was and is unwilling to challenge directly.

Although Martha's unwillingness to pursue comparable breach of fiduciary duty allegations against her father does not preclude her action against two of her brothers, her choices cannot be ignored in assessing the context in which the events occurred. Perry and Todd could exercise the authority of the board, but the better

[120] Even if Martha were able to attribute the billing differences to the Choctaw Audit, she has not shown that those amounts were material to Perry and Todd. Indeed, it is unclear how they could have been material to Todd in light of the simple fact that he has no ownership interest in Choctaw.

inference is that Dwight Sr., during the approximately thirty years after he gave control of Dardanelle's common stock to his children, still had *de facto* authority over the Companies' actions about which he cared.[121] While alive, he received the most benefit from the flat-fee system. The flat-fee system did not survive for long after his death.

The flat-fees were set by Dotson and John Sutherland, the uncle of the individuals involved in these proceedings and a member of one of the other Sutherland family branches involved in the lumber business and holding an interest in Cimarron. Dotson, as the head of Cimarron's tax department, could reasonably be expected to have (and most likely did have) the best knowledge of the annual needs of each of the entities (and individuals) for which Cimarron provided accounting and bookkeeping services. As a threshold matter, it was reasonable for Perry and Todd to rely upon the fee assessments made by John Sutherland and Dotson.[122]

[121] Even though he had given his Dardanelle common stock away, Dwight Sr. remained President and Chief Executive Officer of Dardanelle and Southwest. Perry was responsible for managing the lumber business, but Dwight Sr. controlled major decisions in financial matters. Trial Tr. 213-14, 221. *See also* DX 93 (Dotson's Mar. 2004 Letter recounting how Dwight Sr. "called the shots" over Cimarron's billing of his family's entities). Dwight Sr.'s ongoing control of important aspects of Dardanelle's corporate governance is not at odds with Perry's affidavit to the effect that Dwight Sr. spent limited time on Dardanelle matters and that he, Perry, was responsible for ongoing operations. PTRB 9; PX 24-26.

[122] Dwight Sr. was the member of his branch of the family who managed Cimarron (along with brothers, John Sutherland and Herman Sutherland) up until his death.

The absence of Cimarron time records during the flat-fee period makes impossible a precise calculation of whether that system conferred benefits unjustly on Perry and Todd, or the entities they owned disproportionately. Martha points out that they accepted and benefited from the flat-fee system and now seek to benefit from the lack of documentation of the work performed by Cimarron. Martha is correct that those who breach their fiduciary duties should not be able to avoid liability by also failing to maintain (or require the maintaining of) reasonable records.

Although Martha challenges the use of flat-fees for allocating costs to other entities controlled by Perry or Todd, her focus is on Choctaw. Choctaw, 99 percent owned by her father (and one percent by her brother) until his death and thereafter 100 percent by Perry, was the target of an IRS audit. Choctaw's "tax work" on the audit was largely done by a certified public accountant and a tax lawyer paid for by Choctaw—not Cimarron. Cimarron's tasks were primarily reproducing and compiling financial information—largely a bookkeeping function. Also, the bulk of the work associated with the audit was completed by the time of Dwight Sr.'s death.

There seems to be nothing (and Martha has not identified anything) that is inherently wrongful about a flat-fee billing system. The potential shortcoming is that the fees will be inaccurately assessed or, perhaps to capture Martha's

objections more accurately, understated. Why Perry or Todd should be expected to have known that John Sutherland's and Dotson's allocation of costs understated the burdens of serving Choctaw is not clear. A flat-fee should be subject to regular re-evaluation to accommodate fluctuations in accounting and bookkeeping needs, and the Cimarron fee system was materially altered shortly after Dwight Sr.'s death. On these facts, the conduct of Perry and Todd did not constitute a breach of either the duty of loyalty or the duty of care. The process of fee allocation by John Sutherland and Dotson was reasonable and the persistent and foreseeable deviation, if any, from actual cost was, at most, minimal.[123] As for the other entities for which Cimarron provided services, the setting of the fees by John Sutherland and Dotson was reasonable, and no credible basis for discounting their efforts has been presented.[124]

Perhaps Cimarron's fees were unfair to Martha and, given Perry and Todd's attitudes toward her, one can understand why she holds such a view, but, on the record before the Court, a preponderance of the evidence supports Perry and

[123] The annual fees ($7,500) charged to Choctaw were at the highest level of fees charged by Cimarron. Also, although not dispositive, it should be noted that because the father held 99 percent ownership in Choctaw until his death, most of the benefits of any inaccurate fee assessment accrued to him, but Martha—for understandable reasons—did not choose to pursue such a claim against her father or his estate.

[124] This takes on added significance if the flat-fee system continued as to some of these entities beyond March 2004. DX 93.

Todd's roles with respect to Cimarron's fees and the benefits that might have flowed from those flat-fees.[125]

C. *Duty of Care*

Martha also raises a duty of care claim; she argues that Perry and Todd "failed to inform themselves about the bills and fees generated by using the flat-fee system and the alternative of converting to a straight actual time charges system for all of the companies in the Dwight Sr. branch of the family."[126]

A failure to act on an informed basis rebuts the business judgment rule.[127] For a board to be informed, it need not know every single fact relating to a transaction. A board only needs to consider "material facts that are reasonably available," those that are "relevant and of a magnitude to be important to directors in carrying out their fiduciary duty of care in decisionmaking."[128] There is no "prescribed procedure"[129] or any "special method that must be followed to satisfy

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[125] Cimarron's services were not just allocated in one direction. Martha, during her divorce proceedings, received substantial assistance from Cimarron. Cimarron routinely arranged for the payment of her bills and prepared her tax returns; Cimarron performed accounting services for her fine arts business from its inception in 1999 until mid-2004. Trial Tr. 140-41. The fee structure imposed upon her was generally consistent with the methodology used to determine the fees for Perry and Todd and the entities in which they held disproportionate interests (except for a few entities which were billed on a time basis).

[126] PTRB 22.

[127] *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.").

[128] *Brehm v. Eisner*, 746 A.2d 244, 260 n.49 (Del. 2000).

[129] *Levine v. Smith*, 591 A.2d 194, 214 (Del. 1991).

the duty of due care."[130] The standard to determine whether a board's decision is "informed" is gross negligence.[131] In the duty of care context, gross negligence is "conduct that constitutes reckless indifference or actions that are without the bounds of reason."[132]

Martha does not cite any material fact of which Perry and Todd were uninformed; her duty of care claim instead rests on the Defendants' alleged failure to "investigate the proposed flat-fee billing system, the potential impacts upon transactions between Cimarron and Dardanelle, or the advisability of following that system rather than going to actual time charges."[133] According to Martha, the Defendants did not investigate "the propriety of the fees assessed to the companies under the flat-fee system" or the "amounts ultimately charged to Dardanelle to determine whether participation in the flat-fee system harmed Dardanelle."[134] Martha also asserts that there was "absolutely no involvement by the Defendants in any deliberative process through which this flat-fee system, which materially impacted Dardanelle, was implemented."[135]

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[130] In *re KDI Corp. S'holders Litig.*, 1990 WL 201385, at *3 (Del. Ch. Dec. 13, 1990).
[131] *Citron*, 569 A.2d at 66.
[132] *McPadden v. Sidhu*, 964 A.2d 1262, 1274 (Del. 2008).
[133] PTOB 36.
[134] PTRB 23.
[135] PTRB 24.

Dotson and John Sutherland decided that Cimarron would begin to implement the flat-fee system.[136] Perry and Todd had no role in the actual implementation of the flat-fee system, nor in determining the amount of fees to be charged to each individual or entity.[137] The Court has acknowledged "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."[138] Nonetheless, in the duty of care context, 8 *Del. C.* § 141(e) protects "directors who rely in good faith upon information presented to them from various sources, including 'any other person as to matters the member reasonably believes are within such person's professional or expert competence and who has been selected with reasonable care by and on behalf of the corporation.'"[139]

Dotson was a tax professional who managed Cimarron's tax department. The fees under the flat-fee system were set by Dotson and John Sutherland, who compared the amount of work required for Sutherland family members and affiliated businesses and came up with flat fees which they thought were fair and

[136] Stipulation § II, ¶ 17; PX 96 (John Sutherland's approval of Dotson's draft letters announcing the flat-fee system).
[137] Trial Tr. 229, 267. Perry was consulted about the flat-fee system before its implementation. Stipulation § II, ¶ 20.
[138] Summary Judgment Opinion, at *6 n.30 .
[139] *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 59-60 (Del. 2006).

reasonable.[140] In an April 2, 2004 letter to Dwight Jr., Dotson wrote that "the flat fee amounts are, in fact, estimates and one year an estimate for a particular individual or entity might be high and in another year it might be low."[141] In other letters to Sutherland family members, Dotson further explained that he would review the fees annually and make any appropriate changes,[142] a review he and John Sutherland did every year.[143] At trial, Perry explained that he relied on Dotson and John Sutherland to set the flat fees fairly, because they knew how much work was involved in each set of books.[144] Todd also explained that he trusted them because of their experience to know better than he what the fees should be.[145] Because Perry and Todd reasonably believed that the flat-fee system was within Dotson's "professional or expert competence," and that Dotson's setting and annual review of the flat fees to be charged was "not so deficient that. . . the Board would have reason to question it,"[146] Section 141(e) protects the Defendants against any claim that they may have violated their duty of care.

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[140] Trial Tr. 229, 371-72, 438-40.
[141] DX 99.
[142] Trial Tr. 230; DX 20.
[143] Trial Tr. 372, 422-23.
[144] Trial Tr. 423 ("[Dotson] was the manager of our whole department, the director of the tax department. And he knew how much work was involved in each set of books."); Trial Tr. 183-84 ("I had professionals working for me that I depended on to do that, Dave Dotson being primarily one of them.").
[145] Trial Tr. 287.
[146] *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d at 59.

D. *Fees and Costs*

Martha also seeks to recover her attorneys' fees "for her success on certain claims she has pursued in this action."[147] Those claims generally involve amendments made to Perry and Todd's employment agreements.[148] The Court retains jurisdiction to address this application.

V. CONCLUSION

For the foregoing reasons, judgment will be entered in favor of the Defendants on Martha's remaining substantive claim: her fiduciary duty claim based on the flat-fee system. The Court will retain jurisdiction to consider Martha's application for attorneys' fees and expenses.

Counsel are requested to confer and to submit a form of implementing order.

[147] PTOB 4.
[148] Summary Judgment Opinion, at *17.