

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

PRESIDENT AND FELLOWS OF
HARVARD COLLEGE, UNIVERSITY
OF CHICAGO, and ETI PROPERTIES,
LLC,

Plaintiffs,

v.

ALFRED R. GLANCY, III, DALE R.
SPERLING, DAVID G. JOHANSEN,
HERBERT A. TOBIN, NORMAN
DUBIN, DAVID CORTELYOU,
HENRY A. ASHFORTH, JR.,
CHRISTABEL GOUGH, DONALD J.
COVEY, and UNICO INVESTMENT
COMPANY,

Defendants.

C.A. No. 18790

MEMORANDUM OPINION AND ORDER

Submitted: January 2, 2003

Decided: March 21, 2003

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Defendants.

LAMB, Vice Chancellor,

I.

This action involves a dispute about the governance of a closely held corporation. A vast majority of the stock in the corporation is held in a voting trust, which is controlled by voting trustees. The parties to the voting trust are most of the several family groups that were the corporation's original stockholders. One of the original stockholders of the corporation died, and his interest in the corporation passed to the plaintiffs. By virtue of this transfer, the plaintiffs became parties to the voting trust agreement owning approximately 10% of the interest in the voting trust. The plaintiffs then sought but were denied representation on the corporation's board as well as on the board of the voting trustees.

Some, but not all, of the family groups represented by the voting trust and the voting trustees and directors then secretly executed another agreement that purportedly bound the voting trustees and directors to act in a manner so as to preclude the plaintiffs from obtaining board and trustee representation. This agreement was later changed so that the trustees and directors were no longer bound by it. The corporation's board and a majority of the stockholders also approved a stock option plan (subsequently revised), and certain charter amendments to implement such a plan, over the plaintiffs' objection.

The plaintiffs filed a lengthy 16-count complaint alleging a variety of fiduciary duty and contractual violations. These include breaches of fiduciary duties by both the corporation's board of directors and the voting trustees. The contractual claims allege violations of the original voting trust agreement as well as subsequent informal agreements relating to board and trustee representation.

The contractual claims all must fail. The plaintiffs claim that a second agreement among some, but not all, of the parties to the voting trust constituted an unlawful amendment to the original voting trust agreement. However, the later change in that agreement eliminated any of its potentially offensive parts. The plaintiffs also claim that the voting trust agreement permitted each family group to select a director to the corporation's board. But this claim finds no support in a plain reading of the voting trust agreement. Finally, the plaintiffs claim that an informal agreement existed among the parties to the voting trust regarding board representation. Even if such an informal agreement existed, it would be unenforceable because it would constitute an illegal amendment to the original voting trust agreement.

The fiduciary duty claims against the directors must fail as well. These allegations relate to the stock option plan. Under that plan, as originally adopted non-employee directors were entitled to receive options, although none were ever awarded. The plan was later amended to exclude these non-employee directors

from the group of potential recipients. As a result of this amendment, the plaintiffs are unable to demonstrate any disqualifying interest on the part of the directors in the adoption of the revised plan or the related charter amendments. Further, the claims relating to the amended stock option plan do not rise to the level of waste and, therefore, any duty of care claim against the directors cannot survive.

Some of the fiduciary duty allegations against the voting trustees are sufficient to state a claim. By executing certain agreements with some of the family groups, and not others, which purportedly bound the voting trustees to vote and act in a particular manner, the voting trustees' actions could amount to a breach of their duty not to discriminate among beneficiaries of a trust. The plaintiffs have also stated a claim against the voting trustees for failure to disclose to the plaintiffs essential facts about the trust. In particular the voting trustees never disclosed to the plaintiffs the existence of a subsequent agreement that affected the basic terms of the voting trust agreement. As a possible remedy for these violations, the court has discretion to remove one or all of the voting trustees of the voting trust.

II.

A. The Parties

The plaintiffs, the President and Fellows of Harvard College (“Harvard”), University of Chicago (“Chicago”), and ETI Properties, LLC. (“ETI”), are beneficial owners of Unico Investment Company (“Unico”) common stock bequeathed to them by William J. Friedman and others.¹ At the time of Friedman’s death, a trust bearing his name (of which he and others were beneficiaries) held Voting Trust Certificates representing 133 1/3 Unico shares, amounting to approximately 13 % of the Unico shares outstanding. The plaintiffs in this case allege they acquired the beneficial ownership of approximately 106 of those shares from Friedman and other beneficiaries of that trust.

Defendant Unico is a Delaware corporation engaged in the business of real estate investment, management and development.

Defendant Dale R. Sperling is a Unico stockholder, member of the Unico board, and Unico’s President and CEO.

Defendant David G. Johansen is a Unico stockholder, a board member, and is or was a Successor Trustee of the Voting Trust at issue in this litigation.

¹ For purposes of this motion only, the facts are taken from the plaintiffs well-pleaded complaint.

Defendant David Cortelyou was a member of the Unico board at all relevant times, is or was an officer of Unico, and is a Successor Trustee of the Voting Trust.

Defendants Herbert **Tobin** and Alfred R. **Glancy**, III are members of the Unico board, Voting Trustees of the Voting Trust, and stockholders of Unico.

Defendant Norman **Dubin** is a member of the Unico board and is a Voting Trustee of the Voting Trust

Defendants Christabel Gough and Donald Covey are Voting Trustees of the Voting Trust.

Defendant H. Darrell Harvey is a member of the Unico board and is a Successor Trustee of the Voting Trust.

B. Incorporation Of Unico And Formation Of The Voting Trust

Unico is a privately held Delaware corporation engaged in the business of real estate investment, management, and development in the Pacific Northwest. Unico is the successor to University Properties, Inc. (“UPI”). Six investors founded UP1 in 1953 to acquire a lease with the Board of Regents of the University of Washington (the “UW Lease”). The UW Lease provided for the long-term tenancy and management of the area of downtown Seattle known as the Metropolitan Tract.

By the early 1970s, the stockholders of UP1 decided to pursue real estate opportunities beyond the Metropolitan Tract. Because UP1 was formed for the specific purpose of acquiring and maintaining the rights available pursuant to the UW Lease, the stockholders of UPI decided that these additional opportunities should be pursued through a separate investment vehicle.

In 1975, the stockholders of UP1 agreed to form Unico as a holding company for UPI and other entities formed to pursue real estate investment opportunities beyond the UW Lease. By that time, the original investment group of 6 investors had grown to 15 persons or entities, consisting of 7 family groups descended from the original investors who had formed UP1 (the "Founding Stockholders"). On April 24, 1975, Unico was incorporated in Delaware. Unico was authorized to issue 1,000 shares of stock and all 1,000 shares were issued to the Founding Stockholders.

The Founding Stockholders entered into and created a Voting Trust by unanimous agreement dated June 13, 1975 (the "Voting Trust Agreement"). The Founding Stockholders were divided into 7 shareholder groups that corresponded to the families of the original 6 investors of UPI. The shares of Unico held of record by each of the Shareholder Groups were transferred to the Voting Trust. The Shareholder Groups received interests in the Voting Trust proportionate to their interests in Unico.

The relevant terms of the Voting Trust were as follows:

- Unico's stockholders agreed to deposit all of their shares of Unico common stock in the Voting Trust;
- In exchange for the deposited common stock, each stockholder received a Voting Trust Certificate representing the same number of Voting Trust shares as the number of shares of Unico common stock deposited by the stockholder;
- Voting Trust Certificates are transferable to the same extent as a negotiable instrument. Every transferee of a Voting Trust Certificate became a party to the Voting Trust;
- The Unico common stock was registered on the books of Unico in the name of the Voting Trustees of the Voting Trust;
- The Voting Trust initially provided for 7 Voting Trustees (2 of whom subsequently were consolidated into one position). Each Voting Trustee is assigned a "position" that corresponds to a specific group of shares deposited in the Trust (a "Shareholder Group"). Each Voting Trustee, as Voting Trustee, has a number of votes assigned to that particular position equal to the number of shares of Unico in the corresponding Shareholder Group;
- Whenever any proposal is submitted to the stockholders of Unico for their vote, all of the Unico stock in the Voting Trust is to be voted by the Voting Trustees as a unit in the same manner;
- The manner in which the Unico shares in the Voting Trust are voted is determined by a majority vote of the Voting Trustees, except for certain extraordinary corporate actions that require a super-majority vote of the Voting Trustees.
- The Voting Trust contains a provision to the effect that: "If any Trustee has any interest in any transaction with or effecting [Unico], and said transaction is submitted to a vote of the Stockholders of [Unico], the interested Trustee shall disqualify himself from any consideration in the

[matter], and the person hereinafter designated as successor to the interested Trustee, shall act in his place in voting [on] the transaction.”

- The original term of the Voting Trust was 10 years, subject to being extended (and the Trust was extended twice and is due to expire on June 12, 2005); and
- The Trust cannot be extended, terminated, amended or otherwise modified without the consent of the Board of Regents of the University of Washington.

At the time the Voting Trust was created, the 7 “positions” of the Voting Trustees were as follows:

1. Hem-y Adams Ashforth, Voting Trustee Position One, with 100 votes as Voting Trustee corresponding to the 100 Unico shares initially deposited into the Voting Trust by **Ashforth Properties, Inc.** Henry A. Ashforth, Jr. held Voting Trustee Position One until his death on September 21, 2001. Henry A. Ashforth, III succeeded his father as Voting Trustee for Position One.
2. William J. Friedman, Voting Trustee Position Two, with 100 votes as Voting Trustee corresponding to the 100 Unico shares initially deposited into the Voting Trust by William J. Friedman, as trustee of the William J. Friedman Revocable Trust II (“Friedman Trust”). Norman **Dubin**, who served as Friedman’s accountant before Friedman’s death, currently holds Voting Trustee Position Two.
3. Alfred R. Glancy, III, Voting Trustee Position Three, with 150 $\frac{1}{5}$ votes as Voting Trustee corresponding to the 150 $\frac{1}{5}$ Unico shares initially deposited into the Voting Trust by the Estate of Alfred R. Glancy, Jr., as well as other members or trusts of the Glancy family. Alfred R. Glancy , III still holds Voting Trustee Position Three.
4. Herbert M. Rosenberg, Voting Trustee Position Four, with 100 votes as Voting Trustee corresponding to the 100 Unico shares initially deposited into the Voting Trust by the trust and estates of Nathan and Beatrice Schulman, for which Rosenberg was a trustee and executor. Donald J.

Covey, who is a member of or advisor to the descendants' of Nathan and Beatrice Schulman, currently holds Voting Trustee Position Four.

5. Roger L. Stevens, Voting Trustee Position Five, with 399 4/5 votes as Voting Trustee corresponding to the 399 4/5 Unico shares initially deposited into the Voting Trust by himself and others. Christabel Gough, who is the daughter of Roger L. Stevens, currently holds Voting Trustee Position Five.
6. Ben Tobin, Voting Trustee Position Six, with 75 votes as Voting Trustee corresponding to the 75 Unico shares initially deposited into the Voting Trust by himself.
7. Ben Tobin, Voting Trustee Position Seven, with 75 votes as Voting Trustee corresponding to the 75 Unico shares initially deposited into the Voting Trust by trusts for Herbert Allen Tobin and Steven Arnold Tobin. Voting Trustee Positions Six and Seven were subsequently consolidated and Herbert A. Tobin, the son of Ben Tobin currently holds this consolidated position.

The initial stockholders and Voting Trustees appointed persons as “Successor Trustees” to act temporarily in the Voting Trustee’s absence or upon the death, resignation or permanent disability of the Voting Trustee. The initial stockholders appointed either other family members or trusted family advisors as their Successor Trustee.

There were occasions when the number of Unico shares held by a particular Shareholder Group changed. In that case, the Voting Trust was amended to change the number of votes held by the designated Voting Trustee who corresponded to that Shareholder Group.

During the subsequent operation of the Voting Trust, each Shareholder Group was permitted to select the Voting Trustee or Successor Trustee for the “Position” that corresponded to that Shareholder Group. For example, in November 1992, William J. Friedman changed his Successor Trustee to Norman Dubin, who was his accountant at the time.

C. Friedman’s Death And The Defendants’ Efforts To Acquire The Friedman Shares

William J. Friedman died on December 5, 1994. After Friedman’s death, Norman Dubin succeeded Friedman as the Voting Trustee for the position that corresponded to the Friedman Shares. At the time of Friedman’s death, the Unico Voting Trust Certificates were held in the Friedman Trust. At his death, the First National Bank of Chicago (“First Chicago”) was named as the Successor Trustee under the Friedman Trust. During April 1995, the Voting Trustees made Dubin a director of Unico, but did so without consulting First Chicago or any of the beneficiaries (including the plaintiffs) of the Friedman Trust. Dubin has continuously been reelected a director of Unico by the Voting Trustees.

Although the Voting Trust Certificates are freely transferable, Friedman and the other Voting Trust Certificate holders entered into a standstill agreement (the “Standstill Agreement”). The Standstill Agreement restricted the ability to

transfer the Voting Trust Certificates and provided Unico and each of the Shareholder Groups with certain rights of first refusal with respect to the Unico shares and Voting Trust Certificates. The Agreement also required the Voting Trustees to vote for the reelection of the then current slate of directors. The Standstill Agreement expired by its own terms on November 30, 1997.

From Friedman's death until November 30, 1997, the Voting Trustees and Unico's directors attempted to acquire the Voting Trust Certificates (and the Unico shares represented by those Certificates) held in the Friedman Trust. First Chicago, the trustee of the Friedman Trust, did not accept the offers made by the Voting Trustees because First Chicago believed the offers were too low.

During the spring of 1996, Unico negotiated with Dale Sperling, John Bliss and Quinton Kuhran (together, "DJ and Q") about possible employment opportunities at Unico. In May 1996, DJ and Q each entered into a Stock Sale/Loan Agreement and Pledge ("DJ and Q Stock Agreements") in connection with their employment at Unico. The DJ and Q Stock Agreements provided a number of benefits to DJ and Q. These benefits included the opportunity for DJ and Q to exercise Unico's right of first refusal to purchase Unico shares that might become available for sale (i.e., the Friedman Shares), and loans from Unico to finance such purchases. The Unico board, including **Dubin**, approved the DJ and Q Stock Agreements.

Between May 1996 and November 1996, **Dubin** organized informal discussions between DJ and Q and certain beneficiaries of the Friedman Trust. DJ and Q offered to purchase the shares in the Friedman Trust for approximately \$10,000 per share. They allegedly knew this price was substantially less than the market value of the shares. The beneficiaries rejected the offer. DJ and Q continued through May 1, 1997 to make unsuccessful attempts to acquire the Friedman Shares.

D. The Shareholder Agreement

By the autumn of 1997, it became clear that neither Unico nor DJ and Q would be able to acquire the Friedman Shares at the prices they were offering. As a result, the Voting Trustees and the Unico directors decided to enter into an agreement allegedly to preserve their positions as Unico directors and their control of Unico (the “Shareholder Agreement”). This Shareholder Agreement was concealed from the plaintiffs until it was finally disclosed in the course of this litigation.

On September 12, 1997, Unico entered into the Shareholder Agreement with certain Voting Trustees and directors of Unico, in their capacities as Voting Trustees and directors, and with 4 of the 6 Shareholder Groups represented in the Voting Trust. The Shareholder Agreement provided as follows:

- The Voting Trustees agreed to “exercise voting rights as Voting Trustees ... to cause ... a designee of each Shareholder Group . . . to be a director of UNICO and each of its subsidiaries.”
- The Voting Trustees agreed to “exercise voting rights as Voting Trustees ... to cause ... the designee directors of the Shareholder Groups to constitute a majority of the directors of UNICO and each of its subsidiaries. ”
- The Voting Trustees agreed to “exercise voting rights as Voting Trustees ... to cause ... the number of directors of ‘UNICO and each of its subsidiaries to be 6 directors, unless otherwise approved by each Shareholder Group. ”
- The Agreement terminated “(a) on the written agreement of all Shareholders, or (b) on the dissolution of UNICO or its adjudication as a bankrupt. ”

In addition, each of the then-directors of Unico who was also a Voting Trustee obligated himself in the Shareholder Agreement “to . . . vote as Directors ... to perform every act and execute every document necessary to enforce the rights and obligations provided in this Agreement.” The Shareholder Agreement also provided for a right of first refusal by Unico and the other parties to the Agreement if any of the shares subject to the Agreement were offered for sale.

The Shareholder Groups that were parties to the Shareholder Agreement included: (1) the **Ashforth** Shareholder Group, (2) the **Glancy** Shareholder Group, (3) the Stevens Shareholder Group, and (4) the **Tobin** Shareholder Group. The Friedman Shareholder Group and the Rosenberg Shareholder Group were not parties to the Shareholder Agreement.

The Voting Trustees, Successor Trustees and/or directors who signed the Shareholder Agreement were Henry A. Ashforth, Jr. ; Henry A. Ashforth, III; H. Darrell Harvey; Alfred R. Glancy, III; Ruth A. Glancy; Alfred R. Glancy , IV; John C. Glancy; Roger L. Stevens; Christine Stevens; Christabel Gough; David Johansen; Herbert A. **Tobin**; and Vincent E. **Damian**, Jr.

On or about December 4, 1997, all of the Voting Trustees, including **Dubin**, amended the Voting Trust by designating two Successor Trustees to **Dubin**. These designations were made by **Dubin** and the other Voting Trustees without conferring with or informing First Chicago or any of the beneficiaries of the Friedman Trust. The persons designated as Successor Trustees are complete strangers to the plaintiffs.

E. Harvard Attempts To Obtain Board And Trust Representation

During 1998, ETI, Harvard and Chicago obtained record title to approximately 80% of the Voting Trust Certificates that had previously been held in the Voting Trust on behalf of the Friedman Trust. They then sought to select a person to serve as the Voting Trustee for the Voting Trustee Position previously held by Friedman. This person would also serve as a director of Unico, as Friedman had served.

During September 1999, a representative of Harvard met with **Dubin**, who was unknown to Harvard or **ETI** and did not have any beneficial interest in the

Friedman Shares or any other Unico shares. Harvard told **Dubin** that it and ETI, as successors to approximately 80% of the Friedman Shares, wanted a Harvard representative to serve as Voting Trustee for the Friedman Position and as a Unico director. **Dubin** said that he would discuss Harvard's request with the other Voting Trustees and directors.

At a meeting of the Voting Trustees and Unico directors held on September 15 and 16, 1999, **Dubin** told the other Voting Trustees and Unico directors about Harvard's request to replace him. At that meeting the other Voting Trustees and directors told **Dubin** that they did not want Harvard or the other beneficial owners of the Friedman shares to select a Voting Trustee for the Friedman Position.

On September 22, 1999, **Dubin** met with representatives of Harvard and ETI. **Dubin** told them that the other Voting Trustees and directors did not want him to resign, and that he would not be quitting. **Dubin** did not disclose the existence of the Shareholder Agreement, which provided rights to board representation to the 4 Shareholder Groups subject to that Agreement.

On September 27, 1999, Henry A. Ashforth, Jr., then chairman of the Voting Trustees, wrote to Harvard. Addressing Harvard's request for representation on the Unico board, **Ashforth** wrote that the intent and purpose of the Voting Trust was "continuity of control, management and business policy of

[Unico]” and that this purpose would not be served “by changing voting trustees or directors whenever beneficial interests in shares are transferred.” **Ashforth** did not reveal the existence of the Shareholder Agreement or its terms.

On October 12, 1999, Gary Snerson, on behalf of Harvard, responded to **Ashforth’s** letter. Snerson argued that allowing a representative of Harvard to participate as a Voting Trustee and/or director would not impair “continuity” because the Voting Trust would remain in place. He explained that Harvard’s desire for a representative to serve on the Unico board was to be fully informed about Harvard’s investment and to contribute to board deliberations. On December 17, 1999, **Ashforth** wrote to Snerson indicating that the Unico directors had again discussed Harvard’s request to replace **Dubin** and stated, “The directors unanimously confirmed their prior decision not to request [**Dubin**] to resign as a voting trustee or director. ”

During the autumn of 1999, the plaintiffs learned that **Ashforth** was developing a proposal to merge Unico with his own real estate entity, **Ashforth Pacific**. Upon learning of this possible self-dealing transaction, Harvard notified **Ashforth** that Vomado Realty Trust (“Vomado”), a public real estate company traded on the New York Stock Exchange, was interested in discussing a possible transaction with Unico. **Ashforth** and the other Voting Trustees and directors

refused to meet with Vomado. Ultimately, no transactions were completed with either **Ashforth** Pacific or Vomado.

In late January 2000, Harvard and **ETI** received notice of a joint meeting of the Unico shareholders and Voting Trustees to be held on February 11, 2000. The notice stated that the meeting had two purposes: to elect the directors of Unico for the ensuing year and to have the Voting Trustees vote the shares in the Voting Trust to ratify “all actions of the officers and directors of [Unico] taken since the last annual meeting. ” The notice did not disclose that the election of the directors by the Voting Trustees was, in part, controlled by the undisclosed Shareholder Agreement.

Harvard and **ETI** determined to renew their request that **Dubin** be replaced as Voting Trustee. They also wanted a representative of Harvard be elected as a Unico director, either to replace **Dubin** as a director or to fill a vacancy on an expanded board. Harvard and **ETI** also requested an inspection of Unico’s books and records to identify the actions that would be ratified.

Representatives of Harvard and **ETI** attended the February 11, 2000 joint meeting of Unico stockholders and the Voting Trustees. At the meeting, Unico informed Harvard and **ETI** that it refused to provide the requested books and records because Harvard and **ETI** were not stockholders of record since their shares were held in the Voting Trust. In addition, Unico advised Harvard and

ETI that it had determined that the previously proposed ratification vote at the meeting “is not required” and the ratification proposal was withdrawn.

At the same meeting, **ETI** asked that a representative of Harvard be nominated to serve as a director. The Unico secretary ruled **ETI** out of order, contending that only a stockholder of record or a Voting Trustee could make a nomination. **ETI** then requested that one of the Voting Trustees, such as **Dubin**, make a motion. **Dubin** and the other Voting Trustees refused to do so. The Voting Trustees and directors proceeded to elect directors in accordance with the terms of the Shareholder Agreement. Each of the 4 Shareholder Groups elected a director that was designated by each Group, and those 4 directors constituted a majority of the Unico board. **Dubin** and the other directors then exercised their power as Voting Trustees to reelect **Dubin** as a director of Unico.

F. The Stock Option Plan

On January 26, 2001, Unico sent to the plaintiffs and other stockholders notice of the annual meeting of its stockholders to be held on February 15, 2001. That notice indicated that the following items were on the agenda:

- Approval of the minutes of the stockholder meeting held on February 11, 2000.
- Election of the Unico directors.

- Approval of an amendment to Unico's Certificate of Incorporation to (a) effect a 1,000-for-1 stock split (the "Stock Split Amendment"), (b) reduce the par value of each share, and (c) increase the authorized capital stock of Unico to cover the proposed stock split and increase the authorized capital stock by an additional 100,000 shares to cover the options under a newly created stock option plan (the "Stock Option Plan").'
- Approval of the newly created Stock Option Plan.
- Approval of an amendment to Unico's Certificate of Incorporation to limit director liability.
- Ratification of an amendment to Unico's Bylaws authorizing stockholder action by less than unanimous written consent.

The Stock Option Plan permitted defendants to award options constituting nearly 11% of Unico's equity. As originally proposed and approved, the Stock Option Plan provided that the defendants could issue options to themselves or persons with whom they have family or business relationships. Also, the Stock Option Plan did not put any limit on the number of authorized options that the defendants could issue to themselves, as opposed to other eligible persons.

Unico furnished an Information Statement to its stockholders in anticipation of the upcoming annual meeting. The Information Statement stated that "[t]he Board of Directors has made no decision, to date, about whether, when, to whom, or on what terms to grant stock options under the Plan if it is

² The numbers of shares reported in this opinion do not reflect the adoption of the Stock Split Amendment since it is being challenged in this lawsuit.

approved. ” The Information Statement also contained a discussion of the value of an existing Unico share, before the stock split and before the authorization of additional shares. The Information Statement provided that, “the Board of Directors believes that the value of a share is currently a multiple of \$10,000 (that is, a figure between \$10,000 and \$99,900). ” The complaint alleges, however, that additional valuation information was known to the defendants but not disclosed. In 1999, for example, Unico was appraised. That appraisal reported that Unico had an enterprise value of \$154,000 per share and the Unico shares had a discounted value (reflecting marketability and lack of control) of \$77,000 per share. An even more recent appraisal valued Unico on an enterprise basis at \$179,700 per share, or \$89,950 per share on a discounted basis.

As of January 22, 2001, when the Stock Option Plan was authorized by the Unico board of directors, there were 984,559 shares of Unico stock issued and outstanding and only 15,441 authorized, but unissued, shares of Unico available for issuance under the Stock Option Plan. In connection with its approval of the Plan, the board of directors authorized an amendment to Unico’s Certificate of Incorporation to increase the amount of shares authorized, but unissued, to 10.5% of the total authorized stock (the “Increased Stock Amendment”). The amended complaint alleges that the value of the increased shares authorized was between \$17 million and \$25 million.

Unico convened its annual joint stockholders' meeting and meeting of Voting Trustees on February 15, 2001. At the annual meeting, the Unico board submitted to a stockholder vote the Stock Option Plan, the Stock Split Amendment and the Stock Increase Amendment.

Harvard and **ETI** had earlier written to the defendants protesting the Stock Option Plan because the Plan permitted the defendants to issue to themselves additional equity in Unico. Harvard and **ETI** representatives also attended the annual meeting and protested against the implementation of the Stock Option Plan. Nonetheless, the defendants refused to modify the Plan, and the only statement made to the Harvard and **ETI** representatives was that defendants had no "present intention" to issue options to themselves. The Voting Trustees thereafter unanimously voted the entirety of the Voting Trust's shares in favor of the Stock Option Plan, the Stock Split Amendment and the Stock Increase Amendment.

On February 16, 2001, the defendants filed with the Secretary of State of Delaware a Certificate of Amendment to Unico's Certificate of Incorporation. The Certificate of Amendment implemented the Stock Split Amendment and Stock Increase Amendment. Also, on February 16, 2001, the Unico board "provisionally" approved the grant of non-qualified stock options to 10 named

officers or employees of Unico without determining the exercise price or the terms and conditions of the options.

The Unico board met again on May 1, 2001. At that meeting, the board rescinded the previously “provisionally” granted options. It also discontinued the original Stock Option Plan. It then approved a new stock option plan (the “Revised Stock Option Plan”) that does not allow issuance of options to non-employee directors. The board then granted non-qualified stock options under the Revised Stock Option Plan on a total of 81,000 shares of stock to 10 named officers and employees of Unico or its subsidiaries.³

Also on May 1, 2001, the Voting Trustees, on behalf of all of the shares in the Voting Trust, approved and ratified the Revised Stock Option Plan, the granting of stock options and “the prior action of the stockholders.”

G. The Amendment To The Shareholder Agreement

On November 16, 2001, the defendants amended the Shareholder Agreement (the “November 2001 Amendment”). The signatories to the November 2001 Amendment included all the existing Voting Trustees who represent the 4 Shareholder Groups and all of the directors of Unico except **Dubin** and **Johansen**. The November 2001 Amendment eliminates from the

³ This grant represented 81 shares of Unico stock on a pre-split basis.

Shareholder Agreement the provision obligating the Voting Trustees to elect certain directors for the 4 Shareholder Groups and to limit the size of the board, and eliminates the provision obligating the directors of Unico to do whatever was necessary “to enforce the rights and obligations provided” in the Shareholder Agreement.

On February 1, 2002, the directors unanimously recommended that the existing 6 Unico directors be reelected. These 6 directors include representatives designated by the 4 Shareholder Groups subject to the Shareholder Agreement.

III.

The original complaint in this action was filed on April 3, 2001, by Harvard, Chicago, and ETI, holders of Voting Trust Certificates. The defendants are Unico, directors of Unico, and the Voting Trustees of Unico. The complaint challenged the validity of the original Stock Option Plan on several theories.

The defendants then submitted the affidavit of Alfred R. Glancy, III, setting forth the actions of the directors and Voting Trustees in discontinuing the Stock Option Plan and implementing the Revised Stock Option Plan, and moved to dismiss the complaint as moot.

On February 19, 2002, the plaintiffs filed a **90-page** Amended and Supplemental Complaint (the "Complaint") alleging 16 separate counts. The defendants have moved to dismiss the Complaint in its entirety.

- Count I alleges the Shareholder Agreement violated the Voting Trust Agreement because it amended the Voting Trust without first obtaining required approvals. The plaintiffs argue the Shareholder Agreement amended the Voting Trust because the Agreement obligated Voting Trustees to act in a manner inconsistent with the Voting Trust and because it imposed additional obligations on the Voting Trustees with respect to the operation of the Voting Trust.
- Count II alleges the Voting Trust Agreement itself creates a right on the part of the plaintiffs to designate their own director.
- Count III alleges the Voting Trustees violated 8 *Del. C.* § 218(a) by not filing the Shareholder Agreement with Unico's registered agent in the State of Delaware. The plaintiffs allege that compliance with Section 218 was required because the Shareholder Agreement is an amendment to the Voting Trust.
- Count IV alleges the Shareholder Agreement violates 8 *Del. C.* §141(b) and Unico's Charter and Bylaws. The plaintiffs allege these violations result from the former provision of the Shareholder Agreement requiring Unico directors to maintain the number of directors at 6 unless otherwise approved by each of the 4 Shareholder Groups. This allegedly had the effect of setting the number of directors in a manner not contained in Unico's Charter or its Bylaws.
- Count V alleges Unico's directors were illegally elected from 1997 to 2001 because the elections violated the terms of the Voting Trust, Unico's Certificate of Incorporation and Bylaws, and 8 *Del. C.* §§141(b) and 218. The plaintiffs allege

the illegal elections are void, and that actions taken by the allegedly illegally elected directors are either void or voidable.

- Count VI alleges that, despite the November 2001 Amendment to the Shareholder Agreement, the Voting Trustees and directors have continued to act in accordance with its discriminatory provisions and intend to continue to do so.
- Count VII alleges Unico directors and Voting Trustees breached their fiduciary duties by entering into and concealing the Shareholder Agreement. The plaintiffs argue that the Shareholder Groups subject to the Shareholder Agreement obtained more favorable governance rights than other stockholders. The directors and Voting Trustees allegedly obligated themselves to exercise their powers as fiduciaries to implement and honor these favored rights. In so doing, the directors and Voting Trustees allegedly violated their duties to the disfavored shareholders and the disfavored beneficiaries of the Trust.
- Count VIII alleges a breach of an unwritten agreement that each Shareholder Group is permitted to select a Voting Trustee and a director whose position is tied to the common stock beneficially owned by that Group. Although there is no express written agreement to memorialize this understanding, plaintiffs allege that an enforceable contract can be implied through the course of dealing and course of performance of the parties involved.
- Count IX alleges the Voting Trustees and directors have breached their fiduciary duties to the plaintiffs by electing Voting Trustees and directors from each Shareholder Group except for the plaintiffs' Group. With this representation, each Group, other than the plaintiffs, has access to information about Unico and each Group is consulted and participates in decision-making. The plaintiffs allege this conduct violates the duties of the Voting Trustees and directors not to discriminate among their beneficiaries, and it violates their duty of loyalty with respect to certain self-

dealing transactions the directors and Voting Trustees allegedly engaged in.

- Count X alleges a breach of the duty of loyalty by certain defendants due to the adoption of the Stock Option Plan and the Revised Stock Option Plan. The plaintiffs assert that the entire fairness standard applies to the adoption of these plans because certain directors and Voting Trustees had a financial interest in the Stock Option Plan when they voted for its adoption. The plaintiffs further allege the terms of the Stock Option Plan were not entirely fair to Unico when it was adopted. Count X also alleges that the adoption of the Revised Stock Option Plan is subject to the entire fairness standard because the terms of the Revised Stock Option Plan are “identical to the terms which were created when the Voting Trustees and directors were interested in those terms. ” Finally, the plaintiffs allege the Voting Trustees and directors must establish the entire fairness of the Stock Increase Amendment and the Stock Split Amendment because they were necessary for the adoption of Stock Option Plan and the Revised Stock Option Plan.
- Count XI alleges a breach of the duty of care by the Voting Trustees and directors because they were “grossly negligent in approving the Revised Stock Option Plan and/or granting options under the Revised Stock Option Plan.” The alleged gross negligence results from the defendants’ failure to obtain advice regarding whether the Revised Stock Option Plan was appropriate compensation for the employees who would benefit. The plaintiffs also allege the options issued were unduly generous to the holders of the options.
- Count XII alleges that certain Voting Trustees voted for the Stock Option Plan, the Stock Split Amendment and the Stock Increase Amendment when they were personally interested in the transactions. The plaintiffs allege this action violated the Voting Trust Agreement and the Voting Trustees were therefore disqualified from voting. The plaintiffs claim they

“have suffered damages and incurred legal expenses to correct the violation. ”

- Count XIII alleges the Stock Split Amendment and Stock Increase Amendment are null and void because “the vote of the Trustees approving those amendments was invalid under the terms of the Voting Trust.” This allegation is based on a provision in the Voting Trust Agreement requiring a Voting Trustee to disqualify himself if he has any interest in any transaction affecting Unico. The plaintiffs further allege that because the Stock Split and Stock Increase Amendments are void, there were no shares available for the Revised Stock Option Plan. The options granted under the Plan, therefore, are allegedly void.
- Count XIV alleges a breach of fiduciary duty by the Voting Trustees because the adoption of the Revised Stock Option Plan, Stock Increase Amendment and Stock Split Amendment have the “effect of disrupting the balance of ownership and control of Unico” in contravention of the duties imposed by the Voting Trust Agreement.
- Count XV alleges that **Dubin** should be removed as a Voting Trustee because he has acted in a manner “that discriminates against the plaintiffs, who are beneficiaries of the Voting Trust, and in favor of the other Shareholder Groups.”
- Count XVI alleges that, “[i]f the existing Shareholder Groups are not entitled to select Trustees and directors, the existing Trustees should be removed from office, and disinterested Trustees [should be] appointed by the Court.”

N .

When considering a motion to dismiss a complaint under Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted, the court is to assume the truthfulness of all well-pleaded allegations of

fact in the complaint.⁴ Although “all facts of the pleadings and reasonable inferences to be drawn therefrom are accepted as true . . . neither inferences nor conclusions of fact unsupported by allegations of specific facts . . . are accepted as true.”⁵ That is, “[a] trial court need not blindly accept as true all allegations, nor must it draw all inferences from them in the plaintiffs’ favor unless they are reasonable inferences.”⁶ Additionally, the court may consider, for certain limited purposes, the content of documents that are integral to or are incorporated by reference into the complaint.’ For example, the court will take judicial notice of the Voting Trust Agreement and the Shareholder Agreement in assessing the merits of the claims asserted against the defendants. Under Rule 12(b)(6), a complaint may, despite allegations to the contrary, be dismissed where the unambiguous language of documents upon which the claims are based contradict the complaint’s allegations .⁸

⁴ *Grobow v. Perot*, 539 A.2d 180, 187 & n.6 (Del. 1988).

⁵ *Id.*

⁶ *Id.*

⁷ *See In re Santa Fe Pac. Corp. S’holders Litig.*, 669 A.2d 59, 69-70 (Del. 1995).

⁸ *See In re Wheelabrator Tech’s, Inc. S’holders Litig.*, 1992 WL 212595, at *3 (Del. Ch. Sept. 1, 1992) (“the Court is hardly bound to accept as true a demonstrable mischaracterization and the erroneous allegations that flow from it”); *See also Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001) (“a claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law”).

V.

A. Counts I - IV And Count VI: The Shareholder Agreement And The November 2001 Amendment

1. Counts I And III

The court begins by addressing the legality of the Shareholder Agreement and the effect of the November 2001 Amendment to the Shareholder Agreement. Counts I and III claim that the Shareholder Agreement was an illegal amendment to the Voting Trust Agreement because, when the Shareholder Agreement was adopted, the defendants failed to comply with either the contractual or statutory provisions governing amendments to the Voting Trust Agreement. Count I points to express language of the Voting Trust Agreement requiring that any amendment thereto be unanimously approved by all shareholders whose shares are deposited in the Voting Trust. The Voting Trust Agreement further requires that any amendments be approved by the University of Washington. When the Shareholder Agreement was created, neither unanimous consent of the shareholders nor consent of the University of Washington was obtained.

Count III alleges a violation of 8 **Del.** C. § 218, the purpose of which is “to avoid secret, uncontrolled combinations of stockholders formed to acquire voting control of the corporation to the possible detriment of nonparticipating

stockholders. ”⁹ Section 218(a) requires that a copy of a written voting trust agreement be filed with the registered office of the corporation in the State of Delaware and be open for inspection by any stockholder of the corporation and by any beneficiary of the voting trust. Section 218(b) requires that any amendment to a voting trust must be made by written agreement, a copy of which must be filed in the registered office of the corporation in the State of Delaware. It must also be open for inspection by any stockholder of the corporation and by any beneficiary of the voting trust. The Voting Trust Agreement was adopted in conformity with Section 218, but Unico never filed a copy of the Shareholder Agreement at its registered office in Delaware.

As a threshold matter for deciding Count I and Count III, the court must consider whether the Complaint adequately alleges that the Shareholder Agreement served as an “amendment” to the Voting Trust Agreement. An amendment of a trust is defined as “an addition which alters the original terms of a trust.”¹⁰ The Complaint alleges that the Shareholder Agreement was an addition to the Voting Trust Agreement and it altered the original terms of the Voting Trust Agreement in several ways. For example, the Shareholder

⁹ *Lehman v. Cohen*, 222 A.2d 800, 807 (Del. 1966).

¹⁰ **BLACK’S LAW DICTIONARY** 81 (6th ed. 1990).

Agreement amended the Voting Trust Agreement by obligating the Voting Trustees to vote their shares in a specific manner that would guarantee that the 4 Shareholder Groups subject to the Shareholder Agreement: 1) had equal director representation on the Unico board; 2) had combined director representation that would constitute a majority of the Unico board; and 3) had a veto fixing the number of directors at 6, unless each of the 4 Shareholder Groups consented. The court agrees that these rights and obligations had the effect of altering the original terms of the Voting Trust, and therefore the Shareholder Agreement must be considered an amendment to the Voting Trust Agreement.

The defendants argue that, even if the Shareholder Agreement is considered an amendment, the only relief available to the plaintiffs is removal of the illegal provisions of the Shareholder Agreement. They then state that, since the November 2001 Amendment removed all of the offensive provisions in the Shareholder Agreement, the plaintiffs no longer have a cognizable claim. The plaintiffs respond that, despite the November 2001 Amendment, the Voting Trustees and directors have acted, and intend to continue to act, in conformity with the terms of the original Shareholder Agreement. To demonstrate this point, the plaintiffs offer the fact that, even after the November 2001 Amendment, the Voting Trustees proceeded to reelect the same previously designated directors.

The court is persuaded that the November 2001 Amendment eliminated the potentially offensive parts of the Shareholder Agreement. The fact that the same directors were elected after the November 2001 Amendment proves nothing since that result is entirely consistent with the original terms of the Voting Trust Agreement. The preamble of the Voting Trust Agreement sets forth the purpose of the trust:

WHEREAS, it is the desire of the Stockholders that there be a continuity of control, management and business policy of the Company [Unico] which shall continue uninterrupted and undisturbed for a period of years; and

WHEREAS, the Stockholders deem it to be in their best interest, and in the best interest of the Company, that the desired continuity of control, management and business policy be achieved by establishing a trusteeship of the capital stock of the Company

....¹¹

It is clear from the preamble that the guiding principle Voting Trustees are to follow when electing directors pursuant to the Voting Trust Agreement is to maintain continuity. The Voting Trustees have done exactly that. The board has remained consistently the same size, and, except for a death and a change in CEO, the same directors have been elected before and after the signing of the

¹¹ Sec. Glancy Aff., at Ex. A.

Shareholder Agreement.¹² Since the Voting Trustees are no longer bound as Voting Trustees under the Shareholder Agreement,¹³ and the Voting Trustees have acted consistent with the terms of the Voting Trust Agreement, Counts I and III will be dismissed for failure to state a claim upon which relief can be granted.

2. Count II

Count II must also fail. The plaintiffs assert that, “[u]nder the terms of the Voting Trust, each of the Shareholder Groups under the Voting Trust were intended to be able to designate a person to serve as a Director of Unico.” The plaintiffs, however, are unable to point to any provision of the Voting Trust Agreement that provides for this assurance. The language of the Voting Trust Agreement is unambiguous, and the intent of the parties subject to it must therefore be determined from its terms.”

¹² Glancy has been a director since 1975, Tobin since 1991, Johansen since 1993, and Dubin since 1995. Cortelyou was elected director and CEO in February 2000, and was succeeded by Sperling in February 2001. Harvey was elected to succeed Henry A. Ashforth, Jr. upon his death in September 2001.

¹³ The November 2001 Amendment removed the Voting Trustees and directors as signatories. The Amended Shareholder Agreement only binds parties in their capacity as stockholders.

¹⁴ See *Cincinnati SMSA, L. P. v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 993 n.19 (Del. 1998) (where contract language is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties); *Eagle Ind. v. DeVilbiss Health Care*, 702 A.2d 1228, 1232 (Del. 1997) (“If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity”); see also *Hilbert v. Hollywood Park, Inc.*, 457 A.2d 339, 343 (Del. 1983); *Cleveland Trust Co. v. Wilmington Trust Co.*, 258 A.2d 58, 65 (Del. 1969).

Although the Voting Trust Agreement provides for the number of Voting Trustees and sets forth the number of Voting Trustee votes corresponding to each Voting Trustee Position, no part of the Voting Trust Agreement directs the Voting Trustees to vote for any particular director. Also, the Voting Trust Agreement does not grant any Shareholder Group the right to designate a director. In fact, exactly the opposite is true. The Voting Trust Agreement gives Voting Trustees “sole discretion” in voting for directors. Therefore, the court will dismiss Count II for failure to state a claim upon which relief can be granted.

3. Count IV

In Count IV, the plaintiffs argue that the Shareholder Agreement, as originally stated, violated 8 *Del.* C. § 141 and Unico’s Certificate of Incorporation and Bylaws. Section 141(b) states that “[t]he number of directors shall be fixed by, or in a manner provided in, the bylaws, unless the certificate of incorporation fixes the number of directors, in which case a change in the number of directors shall be made only by amendment of the certificate.” Unico’s Certificate of Incorporation provides that the “number of directors of the corporation shall be such as from time to time shall be fixed by, or in the manner provided in the bylaws, but shall not be less than three.” Unico’s Bylaws provide that the “number of directors which shall constitute the whole board shall

be' 10, but such number may be increased or decreased, from time to time, by resolution of the Board of Directors. ”

By binding themselves to the Shareholder Agreement, the argument goes, the directors who executed it violated Section 141 of Unico's Articles of Incorporation and its Bylaws, because the signing of the Shareholder Agreement purported to obligate the Unico directors to maintain the number of directors at 6 unless the 4 Shareholder Groups subject to the Shareholder Agreement approved otherwise. This argument fails for several reasons.

First, the allegedly illegal portion of the Shareholder Agreement relating to setting the number of directors was deleted in the November 2001 Amendment. There has since been an annual meeting and an election of directors. Consequently, the current board has been properly elected under the terms of the Voting Trust Agreement without the constraints imposed in the original Shareholder Agreement.

Second, although the plaintiffs allege the Shareholder Agreement required that the number of directors be 6, the plaintiffs have not alleged that as a result of the Shareholder Agreement the size of the board is inconsistent with, or has ever been inconsistent with, the size of the board as set forth in the Certificate of Incorporation or Unico's Bylaws.

Moreover, the size and composition of the board, except for a death and change in CEO, has remained the same during, before, and after the creation of the Shareholder Agreement. The board was originally set at 6 directors and remains at 6 directors today. For all of these reasons, the court will dismiss Count IV for failure to state a claim upon which relief can be granted.

4. Count VI

Count VI of the Complaint contains a single sentence allegation that, “[d]espite the November 2001 Amendment, the Voting Trustees and directors have continued to act in accordance with [the Shareholder Agreement’s] discriminatory provisions and intend to continue to do so.” The plaintiffs, however, do not state any substantive theory upon which they seek relief for the allegations of Count VI. The plaintiffs do not plead what acts or future acts of the Voting Trustees or directors will be wrongful or why any such act would be wrongful in light of the November 2001 Amendment that released all Voting Trustees and directors from any responsibility under that contract? As discussed above, the court is not bound to accept as true inferences or

¹⁵ The plaintiffs allege that the same directors elected in 2001 were elected in 2002. The Complaint, however, also shows that these same directors, but for a death and change in CEO, were elected prior to the adoption of the Shareholder Agreement. See note 12, *supra*.

conclusions of fact unsupported by non-conclusory allegations? The court refuses to do so here. Therefore, the court will dismiss Count VI for failure to state a claim upon which relief can be granted.

B. Count V: The Validity Of Director Elections And Actions Taken Between The Signing Of The Shareholder Agreement And The November 2001 Amendment

Count V has two elements. First, the plaintiffs argue that the election of directors from 1997-2001 was illegal. Second, the plaintiffs argue that as a result of illegal elections, the director actions are therefore void or voidable. These arguments fail for several reasons.

First, the directors were validly elected. The Voting Trustees were granted “sole discretion” in voting for directors. The only limiting instruction placed on the Voting Trustees was to “maintain continuity.” The Voting Trustees have done exactly that. Except for a death and change in CEO, the same directors have been consistently reelected since before the creation of the Shareholder Agreement. The plaintiffs further allege the elections were illegal because there was an agreement among the Shareholder Groups that each Shareholder Group would be able to elect its own director. However, this argument fails to address the illegality of the elections as a whole. If, as the

¹⁶ See Part IV, *supra*.

plaintiffs allege, each Shareholder Group was entitled to elect its own choice for director, then at most, only one of the 6 directorships was illegally procured. Since at least 5 out of 6 directors were properly elected, there is no basis for arguing that the election of all directors was illegal.

Second, the plaintiffs are barred by laches or acquiescence from claiming Unico directors were illegally elected.¹⁷ In order to prove laches, the defendants must show that the plaintiffs had knowledge that the director elections were faulty, that the plaintiffs unreasonably delayed in challenging the election and that the defendants or third parties were injured by the delay.¹⁸

If, as the plaintiffs allege, each Shareholder Group was entitled to elect its own director, then the plaintiffs were on notice of the faulty elections from the moment they became the beneficial owners of the Friedman Shares. The plaintiffs allege there was an agreement in existence since the creation of Unico allowing each Shareholder Group to elect its own director. Since Friedman died

¹⁷ See *Frank v. Wilson & Co.*, 32 A.2d 277, 283 (Del. 1943) (noting that these equitable defenses share common elements and are “oftentimes loosely used”).

¹⁸ See *Stengel v. Rotmun*, 2001 WL 221512, at *6-7 (Del. Ch. Feb. 26, 2001), *aff’d*, 783 A.2d 124 (Del. 2001) (TABLE); see *also* Donald J. Wolfe, Jr. & Michael A. Pittenger, **CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 11-5(b)**, at 785 (citing *Wacht v. Continental Hosts, Ltd.*, 1993 WL 315461, at *2 (Del. Ch. Aug. 5, 1993)).

in 1994, the plaintiffs had ample opportunity to protest any of the elections from 1997 on.

Although the plaintiffs protested at some of the actual board meetings, they failed to bring any legal action until April 2001. Beginning no later than 1997, the plaintiffs could have utilized an expedited summary proceeding under 8 *Del. C.* § 225 challenging the director elections, but failed to do so.¹⁹ This constitutes unreasonable **delay**.²⁰

Finally, the plaintiffs' delay has prejudiced both the defendants and third parties. The Complaint alleges that "actions taken by the illegally elected Directors of Unico are void, voidable and not entirely fair." By waiting for over 4 years to bring their first complaint, the plaintiffs have allowed to pass unchallenged many significant decisions by the directors. These include major management hiring decisions, such as the choice of a new CEO and the consideration of investment opportunities involving third parties. For these reasons, the plaintiffs are barred by **laches** from challenging the director elections between 1997 and 2001.

¹⁹ See *Cavender v. Curtiss-Wright Corp.*, 60 A.2d 102 (Del. Ch. 1948) (holding that to preserve an expedited remedy a proceeding brought pursuant to Section 225 is a summary proceeding, limited to narrow issues).

²⁰ See *Stengel v. Rotman*, 2001 WL 221512, at *7 (holding that the plaintiff was barred by **laches** or acquiescence from challenging the election of directors where the plaintiff with knowledge waited one and one-half months after the election to raise an objection).

Even assuming Unico's directors were illegally elected between 1997 and 2001, and assuming the plaintiffs are not barred by **laches** from bringing their claim, the plaintiffs still fail to allege how the challenged actions of the board are void or voidable. The illegally elected Unico directors would still be considered **de facto** directors, and **de facto** directors have the authority to take valid corporate action when third parties are **affected**.²¹

C. Count VII And IX: Fiduciary Duties Of Voting Trustees

The plaintiffs argue that even if the Shareholder Agreement was valid, the execution of that Agreement by the Voting Trustees and directors, as well as other actions taken by the Voting Trustees and directors, violated their fiduciary duties to the disfavored **beneficiaries**.²² These duties include: the duty not to discriminate against a **beneficiary**;²³ the duty of trustees not to self-deal **unfairly**;²⁴

²¹ **See Dillon v. Scotten, Dillon Co.**, 335 F. Supp. 566, 569 (D. Del. 1971); **See also 2 FLETCHER, CYCLOPEDIA OF CORPORATIONS** §383 (Per-m. Ed. 1998) ("A corporation may act by means of an officer de facto as fully and effectually, as regards the public and third persons, as by an officer de jure, in all matters within the scope of the corporate business"); 1 **FOLK, ON THE DELAWARE CORPORATION LAW** §141.5.3 (1996) ("The de facto directors' doctrine will ordinarily validate acts of a de facto director in dealing with third parties").

²² Although these allegations include directors and Voting Trustees, all of the cases cited by the plaintiffs to support these allegations relate to fiduciary duties of trustees only. Therefore, the court will dismiss the claims inasmuch as they allege breach of duties by Unico directors.

²³ **See, e.g., McNeil v. McNeil**, 798 A.2d 503, 509-10 (Del. 2002).

²⁴ **See Noerr v. Greenwood**, 1997 WL 419633, at *10 (Del. Ch. July 16, 1997).

and the duty of trustees not to mislead their beneficiaries.²⁵ The court will address each of these alleged duties in turn. Before doing so, however, it is necessary to make a distinction between contractual rights of the plaintiffs under the Voting Trust Agreement and more generalized obligations of fiduciary duties that the Voting Trustees owe to the plaintiffs.

In support of their motion to dismiss Counts VII and IX, the defendants make two arguments that have repeatedly been rejected by this court. First, the defendants contend that, under the terms of the Voting Trust Agreement, Voting Trustees have the power to elect directors and the plaintiffs have no contractual right to board representation. This conclusion does not address the fiduciary duty issues, and, if a violation of fiduciary duty is found to have occurred, the court, using its equitable powers, could determine that a proper remedy for such a breach is that a Harvard representative should be placed on the board. As this court and the Delaware Supreme Court have held, the fact that fiduciaries have the power to act does not eliminate scrutiny of whether they have exercised that power in accordance with their fiduciary duties.²⁶ It is precisely because they

²⁵ See *Malone v. Brincat*, 722 A.2d 5, 10 n.17 (Del. 1998).

²⁶ See *McNeil v. McNeil*, 798 A.2d at 509 (rejecting the contention that a trust provision granting “wide discretion to distribute income or principal to any, all or none of the beneficiaries” relieved the trustees of a duty not to discriminate among beneficiaries); see also *McNeil v. Bennett*, 792 A.2d at 210 & 213 (“The law is clear that the fact that the trust instrument provides discretion to trustees does not vest in the trustees unfettered authority to

have the power to manage the property of others, in this case to vote the shares in the Trust, that fiduciary duties are imposed upon trustees in the first place.

Second, the defendants contend that these breaches of fiduciary duty have not harmed the plaintiffs. Once a breach of fiduciary duty has been alleged, however, the Complaint need not allege specific harm.²⁷ Therefore, the court will not dismiss Count VII and IX based on an argument that no damages have been alleged.**

act in any manner they *see fit The fact that the . . . Trustees might have properly decided to choose the same course of action had they engaged in an unbiased and adequately informed process does not excuse how they went about reaching this course of action*) (emphasis original).

²⁷ *See Cede & Co. v. Technicolor*, 634 A.2d 345, 371 (holding that a plaintiff does not have to establish damages to state a valid claim for a breach of fiduciary duty), *modified on reh 'g in part, reh 'g denied in part*, 636 A.2d 956 (Del. 1994); *Leslie v. Telephonics Office Tech., Inc.*, 1993 WL 547188, at *11 (Del. Ch. Dec. 30, 1993) (holding that “a well pleaded claim for breach of fiduciary duty will survive a motion to dismiss, even in the absence of any allegation of damages flowing from the breach”); *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 333-34 (Del. 1993) (breach of duty of disclosure creates a virtual *per se* rule of damages).

²⁸ The plaintiffs have alleged some damages. The plaintiffs claim they were damaged because they were denied the same minority representation afforded to parties to the Shareholder Agreement and the access to information that such representation provides. The plaintiffs cite a case granting a preliminary injunction based on the loss of minority representation in the management of a limited liability company. *See Solar Cells, Inc. v. True N. Partner, LLC*, 2002 WL 749163 (Del. Ch. Apr. 25, 2002). In that case, however, minority participation in management was explicitly contracted for. In the present case, very few facts, if any, have been alleged supporting an inference of an explicit agreement for the plaintiffs’ management participation rights.

1. The Duty Not To Discriminate Among Beneficiaries

The plaintiffs claim that by entering into the Shareholder Agreement the Voting Trustees bound themselves to discriminate against the plaintiffs by providing to each Shareholder Group, other than the plaintiffs, representation among the Voting Trustees and on the Unico board.

It is settled law in the area of trusts “that where there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them.”²⁹ It is evident from the terms of the Shareholder Agreement and from the plaintiffs’ well-pleaded Complaint that the Voting Trustee-defendants who were party to the original Shareholder Agreement (i.e., before the November 2001 Amendment) bound themselves to act in a discriminatory manner against the plaintiffs.³⁰ Each party to the Shareholder Agreement was guaranteed board representation by the Voting Trustee signatories. The plaintiffs were guaranteed, and received, nothing in terms of board representation. The Voting Trustees,

²⁹ *Dupont v. Delaware Trust Co.*, 320 A.2d 694, 699 (Del. 1974); see also *McNeil v. Bennett*, 792 A.2d 190, 212 (Del. Ch. 2001) (holding that the trustees “breached their fiduciary duties by failing to give impartial consideration to [one particular beneficiary’s] interests”), *aff’d and modified*, 798 A.2d 503 (Del. 2002); *Cannon v. Denver Tramway Corp.*, 373 A.2d 580, 583 (Del. 1977) (holding that a “trustee must deal impartially with the several beneficiaries of a trust” (citing *Cahall v. Lofland*, 107 A. 769 (Del. Ch. 1919))).

³⁰ The Voting Trustee-defendants that were party to the original Shareholder Agreement were Henry A. **Ashforth** III (as Successor Trustee), Christabel Gough, H. Darrell Harvey (as Second Successor Trustee), David **Johansen** (as Second Successor Trustee), Alfred R. Glancy III, and Herbert A. **Tobin**. See Sec. Glancy Aff., at Ex. B.

however, owed a duty to all beneficiaries, not the parties to the Shareholder Agreement only.

The most critical power of the Voting Trustees is determining how the Unico shares held in the Trust will be voted. One of the most important votes a Voting Trustee can cast is the vote for election of directors. The Voting Trustees bound themselves to vote for certain directors without any consideration of the plaintiffs' interests. Therefore, the court cannot dismiss the claims in Count VII and Count IX that the Voting Trustee-defendants breached their duty to not discriminate among beneficiaries.

2. Duty Of Loyalty And The Defendants' Attempts To Acquire The Friedman Shares

The plaintiffs claim that the defendants attempted to acquire the Friedman Shares in violation of their duty of loyalty. This supposedly occurred from the time of Friedman's death until November 30, 1997. The plaintiffs point to the DJ & Q Stock Agreements to support their argument. After attempts to acquire the Friedman Shares failed, the defendants supposedly entered into the Shareholder Agreement in an attempt to motivate the plaintiffs to sell their shares. The alleged facts, however, fail to support an inference of wrongdoing.

The plaintiffs allege that the DJ & Q Stock Agreements wrongfully provided incentives to 3 Unico officers to acquire Friedman Shares at a price the

defendants “knew was grossly unfair to the Friedman Trust [and its beneficiaries].”³¹ The DJ & Q Stock Agreements simply provided an opportunity for DJ & Q to purchase shares from the Friedman Trust that might be offered for sale to Unico. Unico could buy all the Friedman Shares at any price, and DJ & Q had the right, but not the obligation, to buy up some of them from Unico. . This is not a “coercive” structure or even self-dealing by the Unico directors.³² The Friedman Trust was not compelled to sell shares at any price, and it did not sell shares. Essentially, the plaintiffs’ real complaint is that neither Unico nor DJ & Q would buy the Friedman Shares at the desired price.

The plaintiffs next complain that the Shareholder Agreement, and the appointment of two unfamiliar Successor Trustees for the Friedman Position, were further attempts to motivate the plaintiffs to sell the Friedman Shares. First, it bears repeating that the plaintiffs did not sell any of the Friedman Shares. Second, the plaintiffs have not alleged any facts other than the existence of the Agreement itself to support this claim. There is no evidence from which the court could conclude that the mere existence of the Shareholder Agreement or the

³¹ Pl. Br. at 63.

³² There is no law supporting the proposition that directors of a company cannot approve efforts to repurchase shares for the benefit of the company. Also there are no allegations that the repurchase pursued by Unico directors would not have benefited Unico.

refusal to elect a Harvard representative to the board of directors has caused any cognizable harm to any of the plaintiffs. Certainly, these facts do not support an inference that the defendants have acted disloyally. Thus, Counts VII and IX will be dismissed to the extent they allege a breach of duty of loyalty.

3. Duty To Disclose Information To Trust Beneficiaries

The plaintiffs allege a breach of duty on the part of the Voting Trustee-defendants for failure to provide information related to the Shareholder Agreement. Specifically, the Voting Trustees never disclosed that the Shareholder Agreement obligated the Voting Trustees to vote for directors designated by the Shareholder Groups.

A trustee has a duty to furnish requested information to the beneficiaries of a trust about basic trust **terms**.³³ Moreover, a trustee may not give one beneficiary “materially greater access to information and influence over the trust decisions” than another **beneficiary**.³⁴ Additionally, “even in the absence of a

³³ See **RESTATEMENT (SECOND) OF TRUSTS § 173 (1959)** (“**The** Trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust”).

³⁴ *McNeil v. Bennett*, 792 **A.2d** at 2 11.

request for information, a trustee must communicate essential facts, such as the existence of the basic terms of the trust. ”³⁵

Here the plaintiffs’ Complaint supports an inference that the Voting Trustee-defendants failed to provide to the plaintiffs material information about the basic terms of the Voting Trust. As discussed in Part V:A above, the Shareholder Agreement must be considered an amendment to the Voting Trust Agreement. The defendants who signed the Shareholder Agreement as Voting Trustees bound themselves to vote in a manner not explicitly stated in the Voting Trust Agreement. This essentially added terms to the Voting Trust Agreement. A decision about whom to elect as a director has to be considered an essential term of any Voting Trust Agreement. This term was never disclosed to the plaintiffs, and, as such, the plaintiffs have pleaded facts that give rise to an inference that the Voting Trustee-defendants failed to disclose required information about the basic terms’ of the Voting Trust Agreement.³⁶ Therefore, the court cannot grant the defendants’ motion to dismiss Counts VII and IX with respect to the plaintiffs’ duty of disclosure claim.

³⁵ *McNeil v. McNeil*, 798 A.2d at 510.

³⁶ The defendants argue that the plaintiffs were provided with an Information Statement about the election of directors. That statement, however, never mentioned the existence of the Shareholder Agreement or the fact that the Voting Trustees and directors had obligated themselves to vote and exercise their powers in a manner consistent with the Shareholder Agreement.

D. Count VIII: What Effect Does An Agreement That Each Shareholder Group Is Permitted To Select A Successor Trustee And A Director Have?

The plaintiffs argue in Count VIII that the Voting Trust Agreement and “subsequent agreements, ” created a right to designate a Successor Trustee corresponding to the Friedman Shareholder Group and to designate a person to serve as a Unico director. This argument cannot succeed based in large part on the plaintiffs’ own allegations as well as language in the Voting Trust Agreement itself.

In Counts I and II, the plaintiffs allege that the Shareholder Agreement was an illegal amendment to the Voting Trust Agreement because there was no unanimous approval of the shareholders who deposited their shares in the Trust or approval by the University of Washington. As discussed above, the Shareholder Agreement was in fact an amendment to the Voting Trust Agreement .³⁷ But for the November 2001 Amendment, it was a violation to not obtain the necessary approvals for an amendment. The same is true here.

Any agreement, oral or otherwise, that purportedly bound Shareholder Groups or Voting Trustees to act in a manner distinct from the Voting Trust Agreement necessarily must be considered an amendment. Although it is alleged

³⁷ See Part IV:A, *supra*.

that all of the shareholders who originally placed their shares in the Voting Trust agreed to this amendment, nothing has been alleged with respect to the University of Washington's acceptance. The Voting Trust Agreement explicitly required the University of Washington's approval of any amendments. Since the University of Washington was never consulted about this amendment, the agreement must be deemed illegal. As such, its provisions cannot be legally enforced.

Additionally, in Count III the plaintiffs allege the Shareholder Agreement violated 8 **Del. C.** § 218 because it contained "terms and conditions applicable to the voting of the shares in the Voting Trust," and it was not filed in written form with Unico's registered office in Delaware. The same is true for any unwritten agreements granting Shareholder Groups the right to designate Successor Trustees and directors. To remain in compliance with Section 218, an amendment of this type "shall be made by written agreement, a copy of which shall be filed in the registered office of the corporation in this State." No such acts have been undertaken.

These facts lead to one of two conclusions, which both warrant dismissal. Either there never was an agreement granting Shareholder Groups the right to Trust and board representation, or there was an unenforceable illegal amendment to the Voting Trust Agreement creating such rights.

E. Count X: Did The Creation Of The Stock Option Plan Breach The Directors' And The Voting Trustees' Duty Of Loyalty?

Count X of the Complaint asserts that the entire fairness standard applies to adoption by the directors and approval by the Voting Trustees of the Stock Option Plan, the Revised Stock Option Plan and the Charter Amendments. The plaintiffs claim certain of the directors and Voting Trustees had a financial interest in the Stock Option Plan when they voted for its adoption and approval. They further claim that the terms of the Revised Stock Option Plan were identical to the Stock Option Plan. Also, since the Charter Amendments were necessary to create the Stock Option Plan, those Amendments should also be subject to an entire fairness standard. The court does not accept these arguments.

At the time the Stock Option Plan was adopted, all of the Unico directors were eligible to receive options under the Plan. In that circumstance, the adoption of the Plan would constitute a self-dealing transaction, which the defendants would show was entirely fair.³⁸ The original Stock Option Plan,

³⁸ See *Gottlieb v. Heyden Chem. Corp.*, 91 A.2d 57, 58 (Del. 1952); *Lewis v. Vogelstein*, 699 A.2d 327, 333 (Del. Ch. 1997) (“As the [directors’ stock option] Plan contemplates grants to the directors that approved the Plan and who recommended it to shareholders, we start by observing that it constitutes self-dealing that would ordinarily require that the directors prove the grants involved were, in the circumstances, entirely fair to the corporation”).

however, was rescinded before any options were granted under it.³⁹ Therefore, there is no claim concerning the Stock Option Plan for which there is a remedy.⁴⁰ Thus, the relevant conduct at issue is the adoption of the Revised Stock Option Plan and the Charter Amendments. Whether the business judgment rule or the entire fairness doctrine is applicable to that conduct turns on whether the defendants had a financial interest sufficient to render them incapable of exercising objective business judgment .⁴¹

1. The Directors

As explained in *Oman v. Culman*:

it 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 . . .*”⁴²

³⁹ Some options were “provisionally” granted, but these options were subsequently rescinded.

⁴⁰ Although the plaintiffs allege that the Stock Option Plan was submitted for stockholder approval through an Information Statement that was materially false and misleading, the Complaint does not seek relief for a disclosure violation in connection with that stockholder approval.

⁴¹ See *Orman v. Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002) (explaining that “the business judgment rule presumption that a board acted loyally can be rebutted by alleging facts which, if accepted as true, establish that the board was either interested in the outcome of the transaction or lacked the independence to consider objectively whether the transaction was in the best interest of its company and all of its shareholders”).

⁴² Id. at 23 (citation omitted) (emphasis original).

Since they could not be participants in the Revised Stock Option Plan, the non-employee directors (a majority of the board) had no disqualifying financial interest in voting on the Revised Stock Option Plan or the Charter Amendments adopted in connection with it.⁴³ It is immaterial whether some of the terms of the Stock Option Plan were the same or different from those in the Revised Stock Option Plan. The only relevant inquiry is whether the directors who approved the Revised Stock Option Plan were financially interested in the transaction. Since they could not participate in the Revised Stock Option Plan, the court must conclude that the directors did not have a direct financial interest resulting from the creation of such Plan.

The plaintiffs next speculate that the Voting Trustees and directors expected that shares issued pursuant to the Revised Stock Option Plan “will be available to be repurchased by the [S]hareholder [G]roups having representation among the Trustees and Directors of Unico, ” and further speculate that these Shareholder Groups will be able to repurchase the shares at a favorable price. These allegations do not suffice to create a disqualifying interest. To invoke the entire fairness standard of review, a complaint must “allege facts as to the

⁴³ Only defendant Sperling was eligible under the Revised Stock Option Plan as he was President and CEO of Unico. That a single director was interested (Sperling abstained from voting) does not render the business judgment rule inapplicable. *Id.* at 22 & n.38.

interest and lack of independence of the *individual members* of [the] board.”

The plaintiffs do not allege that there is any contractual obligation on the part of any employee who received options to sell shares to any individual director or any individual director’s family, let alone at a bargain price.

2. The Voting Trustees

For the same reasons, the Complaint also fails to state a claim that the Voting Trustees who approved the Revised Stock Option Plan and the Charter Amendment were financially interested in those transactions. The claims of disqualifying interests alleged are entirely speculative and conclusory .

F. Count XI: Did The Defendants Breach Their Duty Of Care By Approving The Revised Stock Option Plan?

The plaintiffs allege a breach of duty of care on the part of the directors and Voting Trustees with respect to the approval of the Revised Stock Option Plan and the options granted thereunder. The plaintiffs do not seek monetary damages from Unico directors for their alleged gross negligence. Rather, they seek to void the Revised Stock Option Plan and the options granted **thereunder**.⁴⁵

⁴⁴ Id. at 22 (emphasis in original).

⁴⁵ The defendants argue that 8 Del. C. § 102(b)(7) and Unico’s Charter implementing that Section bar the plaintiffs’ claim. This argument is without merit because the plaintiffs are seeking rescission of the Revised Stock Option Plan, not monetary damages.

There is some confusion about the appropriate standard of care that must be demonstrated to state a claim. The plaintiffs allege that gross negligence must be shown, whereas the defendants argue that waste must be demonstrated because the stockholders ratified the Plan. The court concludes that waste is the appropriate standard that must be satisfied and that the Complaint fails to state a claim for waste.

The directors (except one) and Voting Trustees had no financial interest in the Revised Stock Option Plan.⁴⁶ Because the Revised Stock Option Plan was ratified by the disinterested Voting Trustees whose families hold the beneficial interest in over 80% of the issued and outstanding Unico stock, and because the plaintiffs do not challenge the Revised Stock Option Plan as *ultra vires*, illegal, or fraudulent, the only basis on which the Plan may be challenged successfully is waste.⁴⁷

⁴⁶ The plaintiffs incorrectly argue that the director and Voting Trustee votes were self-interested. The plaintiffs, however, are attempting to invalidate the Revised Stock Option Plan (not the original Stock Option Plan), in which only one director and no Voting Trustees were entitled to receive options.

⁴⁷ See *Steiner v. Meyer-son*, 1995 WL 441999, at *4-5 (Del. Ch. July 19, 1995) (explaining that when stockholders approved an option plan where directors were eligible recipients and the plaintiffs did not challenge the plan as *ultra vires*, illegal, or fraudulent, the plan could only be challenged as waste).

The waste standard has been described as “high and the test is . . . ‘very rarely satisfied by a shareholder plaintiff.’”⁴⁸ Accordingly, to state a claim for waste, the plaintiffs must demonstrate that the Unico directors “authorize[d] an exchange that was so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration.”⁴⁹ In other words, the transaction “must serve no corporate purpose or be so completely bereft of consideration that ‘such transfer is in effect a gift.’”⁵⁰ Thus, the alleged facts must “establish a complete failure of consideration.”⁵¹ For the reasons stated below, the plaintiffs have not alleged facts that would indicate a complete failure of consideration in the grant of options or that no business person of sound judgment could conclude that Unico received adequate consideration.

The plaintiffs complain that the terms of the options were established without any independent **advice**,⁵² that the percentage of equity available and the

⁴⁸ *In re 3Com Corp. S’holders Litig.*, 1999 WL 1009210, at *4 (Del. Ch. Oct. 25, 1999) (citation omitted).

⁴⁹ *Glazer v. Zapata Corp.*, 658 A.2d 176, 183 (Del. Ch. 1993).

⁵⁰ *In re 3Com Corp. S’holders Litig.*, 1999 WL 1009210 at *4 (citation omitted).

⁵¹ *Id.*

⁵² This allegation is incorrect. Minutes of the May 1, 2001 meeting of the board produced for the plaintiffs prior to their filing of the Amended Complaint show that the Unico board of directors did seek independent advice.

number of shares for which options were granted was excessive, that the exercise price substantially undervalued the shares, that the terms were excessively generous, that a valuation of Unico by the Sedway Group was not performed for the purpose of setting the exercise price for nonqualified options, and that the exercise price established in the Sedway report was for values as of December 31, 2000, not May 2001. The plaintiffs also disagree with certain valuations given in the Sedway report.

The plaintiffs also make other arguments that the Revised Stock Option Plan was imprudently designed: the option holders would obtain consideration in any change of control transaction in excess of twice the exercise price; the options issued were nonqualified options without any discussion of the reasons or consequences of using nonqualified options; the exercise price could be paid with a promissory note for the shares; the optionee has the right to require Unico to repurchase as much as 50% of the option shares in certain circumstances; and finally, that 20% of the granted options vested upon grant.

All of these matters fall within the broad scope of the business judgment rule and do not constitute waste based on the standard articulated above. Essentially, the plaintiffs' allegations amount to nothing more than a disagreement over what the market value of a share of Unico stock is and how much incentive management should have. These allegations relate to matters as

to which properly functioning boards of directors and dissenting stockholders could have honest disagreements about the best course to pursue. They do not rise to the level of waste. Therefore, **the court** will grant the defendants' motion to dismiss Count XI for failure to state a claim upon which relief can be granted.

F. Counts XII And XIII: Did A Majority Of The Voting Trustees Violate The Voting Trust Agreement In Approving The Stock Option Plan And The Charter Amendments?

Counts XII and XIII focus on the actions of the Voting Trustees in approving the Stock Option Plan and the Charter Amendments. The Voting Trust Agreement requires Voting Trustees not to vote on an action when the Voting Trustee has “any interest” in the **transaction**.⁵³ The plaintiffs allege a majority of the Voting Trustees were “interested” when they approved the Charter Amendments. The plaintiffs then argue that because those Voting Trustees were interested their votes were void. The plaintiffs allege, therefore, that the Charter Amendments were not validly approved, and that there are no shares available to be issued under the Revised Stock Option Plan.

⁵³ The relevant language of the Voting Trust Agreement is as follows:

If any Trustee has any interest in any transaction with or affecting [Unico], and said transaction is submitted to a vote of the Stockholders of [Unico], the interested Trustee shall disqualify himself from any consideration in the [matter], and the person hereinafter designated as successor to the interested Trustee, shall act in his place in voting [on] the transaction.

Sec. **Glancy** Aff., Ex. A.

The Voting Trustees voted on the Charter Amendments separately from the vote on the Stock Option Plan. The only effect flowing from their decision to approve the Charter Amendments is that Unico has a greater number of shares outstanding and a larger number and percentage of authorized but unissued shares. These changes affected the Voting Trustees the same as all other stockholders. Thus, in voting on the Charter Amendments (even initially) the Voting Trustees did not have a disabling interest.

Even if this were not true, the later ratification of the Charter Amendments would have been an effective cure. At the time of the second vote by the Voting Trustees, the “interest” that the plaintiffs assert with respect to the first vote no longer existed. Only Unico employees were entitled to receive compensation under the new Plan. Thus, the Voting Trustees could not be “interested” in a vote that was necessary merely to implement such a Plan. Therefore, the Charter Amendments, which had the sole purpose of increasing authorized shares and splitting the shares 1,000 to 1 are valid and effective. The court will dismiss Counts XII and XIII for failure to state a claim.

G. Count XIV: Impairment Of Trust Purpose

In Count XIV, the plaintiffs attempt to invalidate the Revised Stock Option Plan and the Charter Amendments by claiming that those transactions disrupt the balance of ownership and control that is established by the Voting Trust. The

corporate action challenged increased the outstanding shares of Unico by a maximum of 11%. Those shares, if issued, would go to management, not to existing shareholders. So long as the Voting Trust is in effect, these additional shares, even if voted as a block, could not change a stockholder vote because the huge percentage of Unico stock held in the Voting Trust is voted as a single block. As a result, the additional shares that may be granted under the Revised Stock Option Plan do not affect the balance of control established by the Voting Trust Agreement. Therefore, the stated purpose of the Voting Trust Agreement-to maintain continuity-is not upset by the Revised Stock Option Plan. Thus, the court will dismiss Count XIV for failure to state a claim upon which relief can be granted.

H. Counts XV and XVI: Removal Of **Dubin** And All Voting Trustees As Voting Trustees

Count XV seeks to remove **Dubin** as a Voting Trustee. Count XVI seeks to remove all Voting Trustees as Voting Trustees.⁵⁴ The plaintiffs allege that **Dubin** should be removed as a director because he has acted in a **manner** that discriminates against the plaintiffs and has breached his fiduciary duties by:

⁵⁴ The plaintiffs have argued that **Dubin** is supposed to represent their interests, but as discussed in Part V:D the shareholders either did not or could not agree to have particular Voting Trustees represent their own interest. The plaintiffs' criticisms of **Dubin** are for the most part applicable to all the Voting Trustees. Therefore, the court will discuss Counts XV and XVI together.

- approving stock agreements that created an incentive to Unico officers to acquire the Friedman Shares at a price that was unfairly low;
- concealing the existence of the Shareholder Agreement;
- voting in accordance with the Shareholder Agreement;
- voting to elect himself as a director of Unico;
- refusing to expand the board to provide for a Harvard representative:
- voting to deny the plaintiffs access to Unico's books and records;
- supporting the decision to refuse to meet with Vomado;
- approving the Stock Option Plan;
- approving a misleading Information Statement issued in connection with the Stock Option Plan;
- violating the Voting Trust Agreement by approving the Stock Option Plan;
- approving the Revised Stock Option Plan without conferring with the plaintiffs; and
- refusing to provide the plaintiffs with information regarding his conduct as a director and a Voting Trustee.

Based on the relevant legal standards and the plaintiffs' well-pleaded complaint, these allegations are sufficient to withstand the defendants' motion to dismiss.

As part of its duty to see that a trust is administered properly, this court has the power to remove a trustee? Further, under recently adopted legislation, this Court has the authority to remove a trustee for reasons other than a breach of trust? That discretion, however, should be exercised sparingly.⁵⁷

A comparison of the allegations in the Complaint with the facts in *McNeil v. Bennett*⁵⁸ demonstrates that removal of one, or even more than one, of the Voting Trustees might be within the discretion of the court in this circumstance. In *McNeil v. Bennett*, the court found the trustees concealed certain information to one of the grantor's children but not to the other children.⁵⁹ In this case, the

⁵⁵ See *McNeil v. McNeil*, 798 A.2d at 513-14.

⁵⁶ The statute provides as follows:

- d. A trustee may be removed by the Court of Chancery on its own initiative or on petition of a trustee, co-trustee, or beneficiary if:
- (1) The trustee has committed a breach of trust; or
 - (2) A lack of cooperation among co-trustees substantially impairs the administration of the trust; or
 - (3) The court, having due regard for the expressed intention of the **trustor** and the best interest of the beneficiaries determines that notwithstanding the absence of a breach of trust, there exists:
 - a. A substantial change in circumstances;
 - b. Unfitness, unwillingness or inability of the trustee to administer the trust properly; or
 - c. Hostility between the trustee and beneficiaries that threatens the efficient administration of the trust.

12 Del. C. § 3407 (effective June 30, 2000).

⁵⁷ See *McNeil v. McNeil*, 798 A.2d at 513-14.

⁵⁸ 792 A.2d 190 (Del. Ch. 2001), *aff'd and modified*, 798 A.2d 503 (Del. 2002).

⁵⁹ *Id.* at 200.

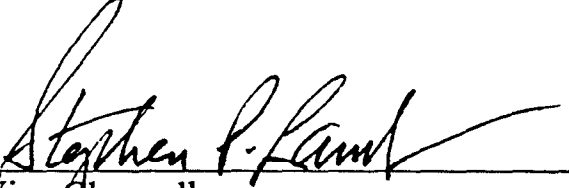
Voting Trustees concealed from the plaintiffs the existence of the Shareholder Agreement that provided additional governance benefits to the favored Shareholder Groups. In *McNeil v. Bennett*, the court found the trustees conferred with certain of the beneficiaries about the management of the trust, but not with the disfavored beneficiary.⁶⁰ The same has allegedly occurred here. In *McNeil v. Bennett*, the court found that, although the trustees had extremely broad discretion in the management of the trust, they had given preferential consideration to the interests of certain beneficiaries without considering the interest of the disfavored beneficiary? The same has allegedly occurred here. These alleged facts give rise to an inference that **Dubin** and the other Voting Trustees have acted in such a manner as to have negligently discharged their duties, which can be grounds for removing a Voting Trustee.⁶² Therefore, the court denies the defendants' motion to dismiss with respect to Counts XV and XVI.

⁶⁰ *Id.* at 199-200.

⁶¹ *Id.* at 213.

⁶² 12 *Del. C.* § 3407 (2001) provides a trustee may be removed for a breach of trust. A breach of trust is defined as a "violation by the trustee of a duty the trustee owes to a beneficiary." 12 *Del. C.* § 3581(a) (2001). The duties of a trustee include the duty to "act with the care, skill, prudence and diligence . . . that a prudent person . . . would use" 12 *Del. C.* § 3302 (2001). Therefore, the statutory power of removal includes removal for negligence.

For all the foregoing reasons, the motion to dismiss is **GRANTED** with respect to Counts I, II, III, IV, V, VI, VIII, X, XI, XII, XIII, and XIV, DENIED with respect to Counts XV and XVI, and GRANTED in part and DENIED in part with respect to Counts VII and IX. IT IS SO ORDERED.


Vice Chancellor