

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

SHAMROCK HOLDINGS OF )  
CALIFORNIA, INC., ROY E. )  
DISNEY and STANLEY P. GOLD, )

Plaintiffs, )

v. )

Civil Action No. 1330-N

ROBERT A. IGER, MICHAEL D. )  
EISNER, JUDITH L. ESTRIN, JOHN )  
S. CHEN, AYLWIN B. LEWIS, )  
MONICA C. LOZANO, GEORGE J. )  
MITCHELL, LEO J. O'DONOVAN, )  
S.J., and THE WALT DISNEY )  
COMPANY, )

Defendants. )

**MEMORANDUM OPINION**

Submitted: June 1, 2005

Decided: June 6, 2005

A. Gilchrist Sparks, III, S. Mark Hurd and Samuel T. Hirzel, of MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware; OF COUNSEL: Stephen D. Alexander, of FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, Los Angeles, California and Debra M. Torres of FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, New York, New York, Attorneys for Plaintiffs.

Robert K. Payson, Donald J. Wolfe, Jr., Stephen C. Norman and Kevin R. Shannon, of POTTER ANDERSON & CORROON LLP, Wilmington, Delaware; OF COUNSEL: Theodore N. Mirvis, Paul K. Rowe and Robin M. Wall, of WACHTELL, LIPTON, ROSEN & KATZ, New York, New York, Attorneys for Defendants.

CHANDLER, Chancellor

In the face of a threatened proxy contest in an election of directors, what are the potential consequences of a board of directors not keeping dissident shareholders fully and accurately informed regarding the selection of the company's new CEO? Alleging breaches of the duty of disclosure and equitable fraud, plaintiffs seek to have this Court, among other things, void the result of the most recent election of directors, compel the company to make full and fair disclosure of the CEO selection process, and (following such disclosure) compel another election of directors. Because I cannot conclude that the complaint fails to state a claim upon which relief can be granted, I deny defendants' pending motion to dismiss the complaint.

## **I. INTRODUCTION<sup>1</sup>**

Plaintiff Roy E. Disney ("Disney") is the nephew of the late Walt Disney, founder of the company (The Walt Disney Company or "the Company") that bears his name. Disney is a former director of the Company and owns, together with his family, stock in the Company worth in excess of \$750 million. Plaintiff Stanley P. Gold is also a former director of the Company and President of plaintiff Shamrock Holdings of California, Inc., an investment vehicle for Disney and his family.

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<sup>1</sup> This explication of the relevant facts is drawn from the complaint, which I must accept as true at this time. I make no findings that the events discussed herein occurred as described, reserving that right for any future trial on the merits.

Defendants Judith L. Estrin, John S. Chen, Aylwin B. Lewis, Monica C. Lozano and Leo J. O'Donovan, S.J. are members of the Company's board of directors. Defendant George J. Mitchell is currently Chairman of the Board. Mitchell, together with Estrin, Chen, Lewis, Lozano and O'Donovan constitute a majority of the ten non-employee members of the board.<sup>2</sup> Defendants Michael D. Eisner, CEO of the Company, and Robert A. Iger, COO and President of the Company, are the remaining directors.

Understanding the immediate dispute before the Court requires a basic knowledge, at least since November 2003, of Disney and Gold's disputes with the Company's management. On November 30, 2003, Disney resigned as a director of the Company.<sup>3</sup> Gold resigned the next day.<sup>4</sup> From that time, they have "publicly challenged the corporate governance and business practices of the management and directors of the Company."<sup>5</sup>

The most widely reported of these challenges was a campaign in connection with the Company's 2004 Annual Stockholders Meeting to have shareholders demonstrate their lack of confidence in current management by

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<sup>2</sup> The following individuals were non-employee directors at the time of the filing of the complaint, but are not named as defendants in this action: John E. Bryson, Fred H. Langhammer, Robert W. Matschullat and Gary L. Wilson. *See* Ex. A to Defs.' Reply Br. In Supp. Of Their Mot. To Dismiss.

<sup>3</sup> Compl. ¶ 4; Ex. A to Compl.

<sup>4</sup> Compl. ¶ 4; Ex. B to Compl.

<sup>5</sup> Compl. ¶ 4.

voting “no” on the election of Eisner, Mitchell and Estrin as directors of the Company.<sup>6</sup> Despite the absence of a competing slate of candidates, 45.37% of the Company’s shareholders withheld their votes for Eisner, 25.69% for Mitchell and 24.37% for Estrin.<sup>7</sup>

On the heels of this campaign, plaintiffs announced on May 3, 2004, that they would evaluate nominating a competing slate of directors at the 2005 Annual Meeting.<sup>8</sup> Six months later, on September 9, 2004, Eisner announced that he would retire as CEO of the Company on September 30, 2006.<sup>9</sup>

Purportedly concerned that Eisner intended to simply hand over the reins of the company to Iger, Disney and Gold sent a letter to the non-employee directors of the Company on September 13, 2004, encouraging them to “reject Mr. Eisner’s brazen attempt to usurp your responsibilities as directors by stage-managing the appointment of his anointed successor and instead tangibly show your commitment to best corporate practices by

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<sup>6</sup> *Id.* at ¶ 5.

<sup>7</sup> *Id.* at ¶ 6. The complaint further indicates that if “broker non-votes (votes automatically cast in favor of management when the stockholders who actually own the shares do not respond to requests for direction from their brokers) are removed from the totals, the percentage of withhold votes actually would be: Eisner 54.4% [&] Mitchell 30.8%.” *Id.* at ¶ 7. Lack of confidence in management was even higher among Company employees. *See id.* at ¶ 8.

<sup>8</sup> *Id.* at ¶ 10.

<sup>9</sup> *Id.* at ¶ 11.

immediately initiating an expeditious and broad search for a world-class CEO.”<sup>10</sup> The letter also contained a clearly defined threat:

We intend to make it clear—to our fellow stockholders, to Disney Cast Members and to other Disney constituencies—that we will strongly support Directors who want to move Disney forward by requiring Mr. Eisner to leave as CEO and as a Director no later than the 2005 Annual Meeting and who are committed to the Board conducting an immediate search for a new CEO. By the same token, we will oppose with unrelenting vigor Directors who continue to support drift, delay, and decay. Should the Board not take the actions proposed above—immediately engaging an independent executive recruiting firm to conduct a worldwide search for a talented CEO and concurrently announcing that Michael Eisner will leave the Company at the conclusion of that search—we intend to take our case directly to our fellow stockholders and propose an alternate slate of directors committed to moving the Company forward aggressively.<sup>11</sup>

Following the September 20, 2004 board meeting, and presumably in response to Disney and Gold’s letter of roughly a week before, the Company’s board of directors released the following statement:

The Board will engage in a thorough, careful, and reasoned process to select as the next CEO the best person for the company, its shareholders, employees, customers, and for the many millions of others who care so much about The Walt Disney Company. The Board is keenly aware of the special place our company holds in the hearts of people all over the world and the importance of its responsibility in choosing a CEO.

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<sup>10</sup> Ex. C. to Compl. at 1.

<sup>11</sup> *Id.* at 3.

To achieve its objective, the Board will:

1. Engage an executive search firm to assist it in selecting a CEO who possesses the qualities and experience the Board believes are necessary for this important position.
2. Consider both internal and external candidates. Bob Iger is the one internal candidate. He is an outstanding executive and the Board regards him as highly qualified for the position. However, the Board believes that the process should include full consideration of external candidates.
3. Complete the process and announce a successor as soon as possible, with an expected date of completion of June 2005.
4. Michael Eisner and the Board will work to assure a smooth and effective transition. The Board regards its responsibility on succession as so significant that all members should participate actively and fully in the entire process; and each has committed to do so.<sup>12</sup>

Soon thereafter, the Company announced that Eisner would step down as CEO and as a member of the Board as soon as his successor was installed, as opposed to the September 30, 2006 date previously announced.<sup>13</sup> On September 28, 2004, Disney and Gold responded to the board's September 21, 2004 statement and the statement that Eisner would step down sooner than anticipated with one of their own, applauding the Board's display of

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<sup>12</sup> Compl. ¶ 13; Ex. B to Defs.' Reply Br. In Supp. Of Their Mot. To Dismiss contains the full text of the statement which addresses other matters not directly relevant in this case.

<sup>13</sup> Compl. ¶ 14. Certain responses in the press to these statements are quoted in the complaint. See Compl. ¶ 18.

“precisely the kind of leadership and independence which we and the vast number of shareholders who share our concerns had been requesting.”<sup>14</sup>

Forced by the Company’s bylaws to decide whether to run an alternate slate of directors for the 2005 Annual Stockholders Meeting by December 3, 2004,<sup>15</sup> Disney and Gold announced that they were “taking the Board at its word” that it would engage in a *bona fide* search for a CEO, giving full consideration to external candidates. As a result, they decided not to support and nominate an alternate slate of directors at the 2005 Annual Stockholders Meeting.<sup>16</sup>

At an analyst conference shortly before the Company’s 2005 Annual Stockholders Meeting, Mitchell spoke on behalf of the board, stating that:

We’re functioning well together as we act as the stewards of the long-term interests of the company and its shareholders. The Board is currently undertaking what could be its most important task—the selection of the next chief executive officer of The Walt Disney Company. The entire Board is fully and actively engaged in that process. We selected the executive search firm of Heidrick & Struggles and we are committed to announcing our decision no later than this June. While the process is public, the details must be private, in order to allow the Board to frankly go about the business of choosing wisely and well. And we shall. We approach this decision in good faith, with

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<sup>14</sup> See Compl. ¶ 15; Ex. I to Defs.’ Reply Br. In Supp. Of Their Mot. To Dismiss contains the full text of the statement, which unlike the letter of September 13, 2004, was not attached as an exhibit to the complaint and expressly integrated therein.

<sup>15</sup> See Ex. D to Defs.’ Reply Br. In Supp. Of Their Mot. To Dismiss.

<sup>16</sup> Compl. ¶ 16.

open minds. There has been no prior determination; there are no preconditions.<sup>17</sup>

At the 2005 Annual Stockholders Meeting, Mitchell expounded upon these statements when he commented that the board is “carefully considering an internal as well as external candidates, including interviews with each candidate. The board will make its decision when the process is completed, not before or during it,” and that the board regards selecting a new CEO “as our most important task,” pledging to “continue to devote our full effort and focus on the succession process.”<sup>18</sup>

After the 2005 Annual Stockholders Meeting, plaintiffs “heard from a credible source that external CEO candidates would be interviewed in the presence of Eisner.”<sup>19</sup> The noted author, James Stewart, also published the book *DisneyWar*, in which he asserted wrongdoing on the part of both Eisner and Iger in connection with the Company’s acquisition of the Fox Family Channel.<sup>20</sup>

On March 10, 2005, Disney and Gold again wrote to the Company’s board, expressing their concerns about these recent discoveries, urging the

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<sup>17</sup> Compl. ¶ 17; Ex. C to Defs.’ Reply Br. In Supp. Of Their Mot. To Dismiss is the Schedule 14A which contains the full text of Mitchell’s statement.

<sup>18</sup> Compl. ¶ 19.

<sup>19</sup> Compl. ¶ 20.

<sup>20</sup> *Id.*

board to prohibit Eisner from participating in interviews of external candidates and to investigate further the allegations in *DisneyWar* with respect to the Fox Family Channel.<sup>21</sup> Three days later the Company held a press conference where it was announced that Iger would succeed Eisner as CEO of the Company on September 30, 2005.<sup>22</sup> The decision to have Iger succeed Eisner was made at a special meeting of the board called by Eisner and Mitchell on twenty-four hours notice, such that further review of external candidates would not be possible.<sup>23</sup> At the March 13, 2005 press conference, Mitchell also reiterated the Board’s belief that it had conducted a fair selection process and had carefully considered several external candidates.<sup>24</sup>

Plaintiffs dispute this assertion, citing seven “troubling facts” in support of a conclusion that the CEO selection process was rigged *ab initio* such that Iger would be appointed as Eisner’s successor. They allege that: (1) Mitchell did not publicly reveal how many external candidates were considered, with plaintiffs noting that it is widely reported that the board interviewed only one external candidate; (2) Eisner was present at or

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<sup>21</sup> *Id.* at ¶ 21; Ex. D to Compl.

<sup>22</sup> Compl. ¶ 21.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at ¶ 22.

expected to be present at the interviews of external candidates in an effort to chill full consideration of qualified external candidates; (3) certain external candidates declined to be interviewed with Eisner present; (4) Meg Whitman, an external candidate requested a prompt decision following her interview, and when the Company failed to provide such a decision, she chose to withdraw her candidacy; (5) when Whitman informed Mitchell that she intended to withdraw her name from consideration, Mitchell did not attempt to dissuade her and confirmed that she was not a serious candidate; (6) Eisner and Iger mounted a public relations campaign with Company funds designed to promote Iger's candidacy for the CEO position; and (7) the board declined plaintiffs' invitation to investigate the Fox Family Channel acquisition.<sup>25</sup>

In addition to these “troubling facts,” plaintiffs allege that the Company's rejection of two demands pursuant to 8 *Del. C.* § 220, one relating to the CEO selection process, and the other relating to the Fox Family Acquisition, should give rise to an inference that the rejection of plaintiffs' demands is due to the fact that the board did not engage in a *bona fide* CEO search and selection process.<sup>26</sup> Plaintiffs also state that had they

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<sup>25</sup> *Id.* at ¶¶ 23, 26.

<sup>26</sup> *Id.* at ¶¶ 24-25.

known of these “troubling facts” and that the board did not intend to engage in a *bona fide* search for a new CEO, taking on the task with “open minds,” with no prior determinations and giving “full consideration” to external candidates, before December 3, 2004, that they would have run an alternate slate of directors at the 2005 Annual Stockholders Meeting.<sup>27</sup>

## II. STANDARD OF REVIEW

On a motion to dismiss under Rule 12(b)(6), I am required to assume the truthfulness of all well-pleaded allegations of the complaint. Although I am required to extend to plaintiffs the benefit of all reasonable inferences that can be drawn from the complaint, “conclusory statements without supporting factual averments will not be accepted as true for purposes of a motion to dismiss.”<sup>28</sup> Under this analysis, I cannot order dismissal unless it is reasonably certain that plaintiffs could not prevail under any set of facts that can be inferred from the complaint. Consistent with these requirements, I accept as true all of plaintiffs’ properly pled allegations and have made every reasonable inference in their favor.<sup>29</sup>

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<sup>27</sup> *Id.* at ¶ 27.

<sup>28</sup> *Grimes v. Donald*, 673 A.2d 1207, 1214 (Del. 1996).

<sup>29</sup> *Solomon v. Armstrong*, 747 A.2d 1098, 1110-11 (Del. Ch. 1999).

### III. ANALYSIS

#### A. *The Duty of Disclosure*

Count I of the complaint alleges that the defendants breached their fiduciary duties of care and/or loyalty by making false and/or misleading statements regarding the CEO selection process.<sup>30</sup> When boards of Delaware corporations communicate with shareholders, directors are under a duty to “disclose fully and fairly all material information within the board’s control when it seeks shareholder action.”<sup>31</sup> Even in instances where directors are not seeking shareholder action, they are still obligated to communicate honestly with shareholders. The *Malone* Court stated:

Whenever directors communicate publicly or directly with shareholders about the corporation’s affairs, with or without a request for shareholder action, directors have a fiduciary duty to shareholders to exercise due care, good faith and loyalty. It follows *a fortiori* that when directors communicate publicly or directly with shareholders about corporate matters the *sine qua non* of directors’ fiduciary duty to shareholders is honesty.

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When the directors are not seeking shareholder action, but are deliberately misinforming shareholders about the business of the corporation, either directly or by a public statement, there is a violation of fiduciary duty. That violation may ... be a basis for equitable relief to remedy the violation.<sup>32</sup>

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<sup>30</sup> The complaint purports to state a claim for breach of the “fiduciary duty of disclosure.” The duty to disclose is not an independent fiduciary duty, but instead stems from, and is an application of, the general fiduciary duties of care and loyalty. See *Malone v. Brincat*, 722 A.2d 5, 9-12 (Del. 1998).

<sup>31</sup> *Zirn v. VLI Corp.*, 681 A.2d 1050, 1056 (Del. 1996); *Malone*, 722 A.2d at 9.

<sup>32</sup> 722 A.2d at 10, 14.

At this stage, I conclude that it is immaterial whether statements made by the Company's board were made in the course of seeking shareholder action. If they were, I conclude the complaint asserts well-pled facts sufficient for me to reasonably infer that the board materially misled shareholders about the structure of the search for a new CEO. If the statements were not made in connection with seeking shareholder action, there are well-pled facts in the complaint sufficient for me to reasonably infer that the board deliberately misinformed plaintiffs and other shareholders about the process of the search for a new CEO, either by virtue of the statements having been false or misleading when made, or because subsequent events rendered those statements false or misleading when corrective disclosures were not made.

Under Delaware law, an omitted fact is material if it “would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information available.”<sup>33</sup> Even non-material facts can take on importance if partial disclosure on that subject has already been made.<sup>34</sup>

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<sup>33</sup> *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

<sup>34</sup> *Arnold v. Society for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994); *Zirn*, 681 A.2d at 1056 (citing *Arnold* for the proposition that “the disclosure of even a non-material fact can, in some instances, trigger an obligation to disclose additional,

Here, plaintiffs have alleged facts suggesting that the Company's board did not go about the process of searching for a new CEO with "open minds," without prior determinations and giving "full consideration" to external candidates. The complaint alleges that only one external candidate was interviewed, that Mitchell told that candidate "she was not a serious candidate,"<sup>35</sup> and that Eisner's presence at interviews of external candidates, "was intended to chill and did chill full consideration of qualified external candidates for the position of CEO."<sup>36</sup>

Should these allegations be proven, plaintiffs could be entitled to the relief they seek because the board's statements materially misled plaintiffs with respect to the board's intent to conduct a *bona fide* executive search process.<sup>37</sup> Given plaintiffs' undisputed prior statements of their intent to run an opposition slate of directors, had plaintiffs known the purported truth about the CEO search process, it is reasonable to infer that such information

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otherwise non-material facts in order to prevent the initial disclosure from materially misleading the stockholders").

<sup>35</sup> Compl. ¶ 23.

<sup>36</sup> *Id.* at ¶ 26.

<sup>37</sup> Voiding results of directoral elections and ordering a new election is an appropriate remedy when an election occurs using materially false and misleading proxy materials. *Millenco L.P. v. meVC Draper Fisher Jurvetson Fund I, Inc.*, 824 A.2d 11, 19 (Del. Ch. 2002). My recent holding in *The M&B Weiss Family Ltd. Partnership of 1996 v. Davie*, C.A. No. 20303 (Bench Ruling Del. Ch. Apr. 12, 2005) is not to the contrary because the disclosure claims in that case were moot since, unlike here, the directors who committed the alleged disclosure violations were no longer in office.

would have significantly altered the total mix of information available to them and assumed importance in their decision whether to propose an alternate slate of directors at the 2005 Annual Stockholders Meeting, making the board's September 21, 2004 written statement, and Mitchell's February 1, 2005 statements, materially misleading.

With respect to many of the "troubling facts" listed in the complaint, I cannot conclude that they of themselves, or together with any *reasonable* inferences drawn from those facts, demonstrate that the Company's board went about the process of searching for a new CEO in a manner inconsistent with the board's September 21, 2004 statement and Mitchell's February 1, 2005 statements. There is nothing about Mitchell's refusal to disclose how many candidates were interviewed that leads me to believe that anything less than full consideration was given to external candidates. Similarly, nothing about the Company's choice not to honor Ms. Whitman's request for a prompt decision, or Mitchell's doing little to dissuade her from withdrawing from consideration, indicates either closed-mindedness or prior determinations on the part of the board.<sup>38</sup> The allegation that Eisner and Iger expended Company resources promoting Iger's candidacy does not in any

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<sup>38</sup> That is, nothing except, as mentioned above, that he told Whitman that she was not a serious candidate.

way contradict the board's statements that *the board* would conduct a *bona fide* search process.<sup>39</sup>

By the same token, the board's decision not to further investigate the Fox Family Channel acquisition (which occurred several years earlier) based on the allegations in *DisneyWar* and in plaintiffs' March 10, 2005 letter does not lead me to draw any reasonable conclusions about the *bona fides* of the CEO selection process. In addition, I fail to understand how it would be reasonable for me to draw an inference of wrongdoing from the Company's refusal of plaintiffs' books and records demand pursuant to 8 *Del. C.* § 220 when there is nothing in the complaint to indicate that the refusals were wrongful in any way.

Just as the above described facts created a reasonable inference that the defendants made materially misleading statements relating to the search for a new CEO, those same facts also (barely) create a reasonable inference that the board deliberately misled shareholders because those statements were either false or misleading when made, or became false and misleading

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<sup>39</sup> The allegation in paragraph twenty-six of the complaint that the remaining defendants willingly permitted Iger and Eisner to expend Company resources in this way is conclusory and, therefore, entitled to no weight in my analysis.

when corrective disclosures were not made.<sup>40</sup> It is of no import, therefore, whether the statements were made in connection with a request for shareholder action.

Defendants' other arguments miss the mark. Had defendants made disclosures in accordance with a CEO selection process as plaintiffs plead it occurred, those disclosures would simply be facts—not “negative inferences or characterizations of misconduct or breach of fiduciary duty.”<sup>41</sup> Nor are plaintiffs taking defendants to task for failing to disclose “details of a corporation’s inner workings and its day-to-day functioning”—instead, plaintiffs take defendants to task for, once defendants undertook to disclose details of the CEO search, disclosing details that are not accurate, but are false and misleading.<sup>42</sup> Finally, as this case progresses, the issue will not turn on the distinction between “consideration” of external candidates and “full consideration” of them, but instead on the more objectively verifiable question of the distinction between “full,” “fair,” “serious” or “good faith”

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<sup>40</sup> See *Metro*, 854 A.2d at 153, 159 (stating that “it is only a small step [from *Malone*], and a justified one, to conclude that a fiduciary who learns that her earlier communications to her beneficiaries were false and nonetheless knowingly and in bad faith remains silent even as the beneficiaries continue to rely on those earlier statements also breaches her duty of loyalty”). See also *Metro*, 854 A.2d at 155 (concluding that fiduciaries committed actionable fraud by nondisclosure by failing to disclose all facts within their knowledge necessary to make previous communications not false or misleading).

<sup>41</sup> *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 143 (Del. 1997).

<sup>42</sup> *Id.* at 144.

(you supply the adjective—or even no adjective at all) consideration of external candidates, and sham consideration of those individuals. In conclusion, Count I states a claim upon which relief can be granted because I cannot conclude that it is reasonably certain that plaintiffs could not prevail under any set of facts that can be inferred from the complaint.

*B. Equitable Fraud*

Count II is for equitable fraud. To make out a *prima facie* case of equitable fraud, plaintiff must adequately allege: 1) a false representation, usually of fact, by defendant; 2) an intent to induce plaintiff to act or to refrain from acting; 3) that plaintiff's action or inaction was taken in justifiable reliance upon the representation; and 4) damage to plaintiff as a result of such reliance.<sup>43</sup> Fraud claims are subject to the heightened pleading standards of Court of Chancery Rule 9(b). This means that the pleading must identify the “time, place and contents of the false representations, the facts misrepresented, as well as the identity of the person making the misrepresentation and what he obtained thereby.”<sup>44</sup> The complaint adequately identifies these particular pieces of information.

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<sup>43</sup> *Zirn*, 681 A.2d at 1060-61; *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 472 (Del. 1992); *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del. 1983).

<sup>44</sup> *York Linings v. Roach*, 1999 WL 608850, at \*2 (Del. Ch. July 28, 1999) (internal quotations and citations omitted); *Metro*, 854 A.2d at 144.

Because plaintiffs allege that the statements were made in an effort to induce them not to run an alternate slate of directors at the 2005 Annual Stockholders Meeting,<sup>45</sup> and because the deadline for announcing such slate was December 3, 2004, only statements made on or before that date, such as the board's written statement of September 21, 2004, could give rise to equitable fraud. The September 21 statement said that the CEO search should involve full consideration of external candidates. For the reasons already stated above, I conclude that plaintiffs have pled facts sufficient to raise a reasonable inference that no serious consideration, much less full consideration, was given to external candidates, making that statement false when made and satisfying the first element of equitable fraud.

Again, for the same reasons that I concluded earlier that the disclosures could be materially misleading, I conclude that it is reasonable to infer that the September 21, 2004 statement was intended to induce plaintiffs to not pursue the proxy battle they threatened in their September 13, 2004 letter, and that plaintiffs reasonably relied on that statement (as shown by their willingness to take Mitchell "at his word" in their September 28, 2004 statement) in deciding not to run an alternate slate of directors, satisfying the second and third elements.

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<sup>45</sup> Compl. ¶ 36.

The final element—injury or damages as a result of reliance on the false statement—is also met. Plaintiffs were ostensibly defrauded into not running an alternate slate of directors. This Court has held that “the right of shareholders to participate in the voting process includes the right to nominate an opposing slate.”<sup>46</sup> Inequitable conduct by directors that infringes upon a stockholder’s right to participate in the voting process is a cognizable injury that equity can redress.<sup>47</sup> In conclusion, Count II also states a claim upon which relief can be granted.

#### IV. CONCLUSION

The complaint adequately states claims for disclosure violations and for equitable fraud. The motion to dismiss is denied. Counsel for plaintiffs shall submit a form of order implementing this decision. All counsel shall confer and agree upon a scheduling order to move this case forward in an expeditious fashion, with a trial to be held in August 2005, in order to avoid the concerns identified in *North Fork Bancorporation v. Toal*.<sup>48</sup>

IT IS SO ORDERED.

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<sup>46</sup> *Millenco*, 824 A.2d at 19.

<sup>47</sup> *Id.*

<sup>48</sup> 825 A.2d 860 (Del. Ch. 2000).