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Bakerman v. Sidney Frank Importing Co., Inc.
 Del.Ch.,2006.

UNPUBLISHED OPINION. CHECK COURT
 RULES BEFORE CITING.

Court of Chancery of Delaware.
 Bruce M. BAKERMAN, Plaintiff,
 v.

SIDNEY FRANK IMPORTING CO., INC., Estate
 of Sidney E. Frank, Lee R. Einsidler, John R. Frank.
 Stuart W. Moselman, William F. Thompson, and
 Thomas Bruno, Defendants,
 and GREY GOOSE BOTTLING CO., L.L.C.,
 Nominal Defendant.
No. Civ.A. 1844-N.

Submitted Aug. 31, 2006.
 Decided Oct. 10, 2006.
 Revised Oct. 16, 2006.

Norman Monhait, of Rosenthal, Monhait &
 Goddess, P.A., Wilmington, Delaware, William T.
 Reid, IV, Lisa Tsai, and **EricD. Madden**, of
 Diamond Mccarthy Taylor Finley & Lee, LLP,
 Austin, Texas, and **EricD. Madden**, of Diamond
 Mccarthy Taylor Finley & Lee, LLP, Dallas, Texas,
 for Plaintiff, of counsel.

Stephen C. Norman, of Potter Anderson & Corroon
 LLP, Wilmington, Delaware, Jay W. Waks,
 Gregory J. Wallace, Christine A. Neagle, and
 William Poorten, of Kaye Scholer LLP, New York,
 New York, for Defendants, of counsel.

MEMORANDUM OPINION

CHANDLER, J.

*1 In 2000, a company's chief legal counsel was
 granted a membership interest in a non-wholly
 owned subsidiary. Four years later, the company
 negotiated a multi-billion dollar sale of it and its
 subsidiary's assets to a third party that required the
 unanimous consent of the subsidiary's members.
 After receipt of such consents, the transaction was

consummated. One month following the sale, the
 chief legal counsel to the parent was terminated. He
 has since brought this lawsuit, claiming among
 other things that the managers of the subsidiary
 breached their fiduciary duty by abdicating nearly
 all of the consideration paid by the third party
 acquiror to the subsidiary's parent. In addition, he
 alleges that his consent as a member of the
 subsidiary was coerced.

Before me is defendants' motion to dismiss the
 complaint. For the reasons set forth below, the
 motion is granted in part and denied in part. Part I
 of this Opinion sets out the factual background that
 gave rise to this lawsuit. Part II delineates plaintiff's
 claims, defendants' responses to those claims, and
 the standard to be applied at this stage of the
 proceedings. Part III examines and applies the legal
 principles governing each claim. This Part
 concludes that two claims, for tortious interference
 with contract and for unjust enrichment, must be
 dismissed. The remaining claims-direct and
 derivative claims related to fiduciary breaches and
 to contractual breaches-all survive the defendants'
 challenge at this stage. Finally, Part IV summarizes
 the conclusions.

I. FACTUAL BACKGROUND

As required, the facts are drawn from the complaint,
 the documents it incorporates, and facts not subject
 to reasonable dispute.^{FN1}

FN1. See *In re Gen. Motors (Hughes)
 S'holder Litig.*, 897 A.2d 162, 169
 (Del.2006) (on a motion to dismiss, trial
 court may properly take judicial notice of
 matters that are not subject to reasonable
 dispute).

A. The Makings of a Superpremium Vodka

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Sidney Frank began working in the liquor business for his in-laws in the 1940's and for thirty years sold Scotch all over the world. After a falling out with the family in 1972, Sidney Frank formed Sidney Frank Importing Co. ("SFIC"). SFIC purchased the U.S. rights to a brandy and a then little-known German sipping liqueur called Jägermeister and plodded on until the mid-1980's, when Frank discovered a bar in New Orleans that served shots of chilled Jägermeister. Promoting chilled shots of Jägermeister in college bars, and sending out teams of models to college barrooms to sell and dispense the shots and other merchandise, SFIC began enjoying a period of relative success and created a network of solid relationships with major liquor distributors throughout the country that would later prove very useful.

SFIC was not alone in creating sensations in the liquor market. In 1979, a Swedish distillery repackaged its vodka into a clear Swedish medicine bottle with crisp blue lettering. With the help of an original and hugely popular ad campaign, Absolut launched vodka from a well drink to a hip drink. Over fifteen years later, following on a more recent trend in the mid-1990's of superpremium vodkas offered in frosted bottles, Sidney Frank decided to launch his own superpremium vodka.

*2 In the late 1990's, however, SFIC was merely a liquor distribution company, which had built its fortune as the U.S. distributor of Jägermeister. SFIC enlisted the help of H. Mounier ("Mounier"), a company already engaged in liquor production in the Cognac region of France. Mounier concocted and developed the formulas and production processes for Grey Goose Vodka, using water that had been filtered through champagne limestone from the Gentè Springs of Cognac, France. SFIC developed a distinctive bottle that was frosted and taller than the rest, with a cutaway of geese in flight, and the French flag.

Mounier, as the exclusive manufacturer of Grey Goose Vodka, began full-scale production in 1997. SFIC, in turn, imported and distributed Grey Goose Vodka, primarily in the United States, the only major market at the time. During 1997, the first year of production, SFIC sold only about 45,000 cases of

Grey Goose Vodka. In 1998, Grey Goose Vodka received the number one vodka rating from the Beverage Testing Institute, a company that produces Consumer Reports-style rankings of alcoholic beverages. By 1999, sales were up to 190,000 cases. SFIC continued to market Grey Goose Vodka as one of the best vodkas in the world, and as a result of the ensuing success, Mounier began producing flavored versions of the vodka, including orange, citrus, and vanilla variations.

B. Problems with Mounier and the Creation of the LLC and SAS

Throughout this time period, SFIC and Mounier operated without any written contract between them. Mounier considered its relationship with SFIC to be a partnership, while SFIC claimed sole rights to the formulas and production processes for Grey Goose Vodka. In September 1999, Mounier's corporate parent filed for bankruptcy protection in France.

In November 1999, Sidney Frank hired Bakerman to serve as his special assistant at SFIC. Several months later, Sidney Frank promoted Bakerman, a licensed attorney, to the position of SFIC's Chief Legal Counsel. Shortly after joining SFIC, Bakerman developed a strategy that would protect and enhance SFIC's and Sidney Frank's interests in Grey Goose Vodka, while also minimizing their potential tax and other liability exposure.

On May 22, 2000, Bakerman, Sidney Frank and Lee Einsidler (collectively, the "Founding Members"), formed Grey Goose LLC (the "LLC"). The LLC served as the holding company for a second company formed in July 2000, Grey Goose Bottling France S.A.S. ("SAS"), which would acquire Mounier's interests in the formulas and production processes for Grey Goose Vodka. The Founding Members intended for the LLC and SAS to generate their own significant profits from the production and sale of vodka.

The SAS bylaws charged management to the individual managers of the LLC; any transfer,

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assignment or other action with respect to the intellectual property rights of SAS, however, required the approval of the LLC itself. On August 2, 2000, the Founding Members approved the issuance of membership units in the LLC as follows:

<i>Member</i>	<i>Units</i>	<i>Ownership %</i>
SFIC	100	50%
Sidney Frank	25	12.5%
Eugene Frank	15	7.5%
Bruce Bakerman	10	5%
Thomas Bruno	10	5%
Lee Einsidler	10	5%
John Frank Stuart	10	5%
Moselman William Thompson	10	5%
Total:	200 units	100%

*3 According to the LLC's Articles of Organization, the members received their ownership interests due to "their individual efforts and work in organizing the [LLC]," which represented "full and satisfactory consideration for their respective Membership Interests ."On more than one occasion, Bakerman communicated to Sidney Frank and Lee Einsidler that he had a potential conflict of interest in obtaining a membership interest in the LLC. Independent legal counsel, White & Case LLP, advised SFIC and the LLC throughout the formation of the LLC and did not object to Bakerman's membership in the LLC.

The LLC's Operating Agreement contained several important riders, the most important of which required the unanimous written consent by the members for, among other things, any sale of all or substantially all of the LLC's business or assets.

During the next few years, SAS operated as a

subsidiary of SFIC (controlled through the LLC). SAS obtained the trademark and trade dress of Grey Goose Vodka in approximately 40 countries. Finally resolving the dispute with Mounier in 2002, SAS secured complete control of the production process and rights in the formula for Grey Goose Vodka. SAS further received significant controls over Mounier's actual production of the vodka. With the dispute resolved, SAS entered into numerous distributorship agreements for Grey Goose Vodka in countries throughout the world, including Australia, China, Hong Kong, Greece, Italy, Russia, and the United Kingdom.

C. Exponential Growth and the Bacardi Sale

Sales of Grey Goose Vodka increased exponentially between 1999 and 2004. In 1999, SFIC sold approximately 190,000 cases of the vodka. In 2003 SAS sold more than 2.3 million cases of Grey Goose Vodka. SFIC estimated that SAS would sell

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nearly 3 million cases in 2004. SAS sold most of its production to SFIC for distribution in the United States. Plaintiff alleges that the transfer price (from SAS to SFIC) sorely undervalued the cases of vodka. SAS received only a few dollars per case from SFIC, but SFIC received as much as \$72 per case from its arm's-length sales of the vodka in various international markets. Nonetheless, even with these allegedly depressed transfer prices on the bulk of its sales, SAS had annualized net income of approximately \$2.5 million as of June 2004.

The success of Grey Goose Vodka and other superpremium vodkas did not go unnoticed by the larger spirits companies. After a period of confidential negotiations, SFIC signed a letter of intent on March 2, 2004, to sell the Grey Goose Vodka business to Bacardi, the world's largest privately held spirits company. The negotiations proceeded over the course of the next three months and were largely handled by SFIC executives and outside counsel, to the exclusion of Bakerman.

D. The Allocation and Bakerman's Consent

Only in early June was Bakerman informed of the imminent sale to Bacardi. On June 17, Bakerman asked William Presti, an SFIC officer and in-house counsel who had participated in the Bacardi negotiations, about the purchase price allocation. Presti responded that he believed that one-third of the proceeds would be allocated to each of the three entities. While such a symmetrical allocation may have been the earliest plan, a number of factors favored an allocation advantageous to SFIC.

*4 First, any portion of the purchase price allocated to SAS would be subject to a host of taxes under French law, including a French transfer tax, which would be higher than U.S. taxes and would reduce the overall proceeds obtained from the sale.

Second, Sidney Frank himself, the controlling shareholder of SFIC, which in turn controlled the LLC and SAS, would receive \$0.70 on the dollar for proceeds to SFIC but only \$0.475 on the dollar for proceeds to the LLC.

Third, two LLC members, Bakerman and Linda Rodman,^{FN2} held shares only in the LLC and did not hold any shares in SFIC. All the other members of the LLC either owned equity in SFIC previously, or had received equity in SFIC pursuant to SFIC's "Stock Warrant Plan for Key Employees" (the "Warrant Plan"). Therefore, while allocations to the LLC would have to be shared with these two LLC members, allocations to SFIC could exclude these two LLC members.

FN2. Linda Rodman is the daughter of the late Eugene Frank, and the sister of John Frank. Rodman acquired her 3.75% interest in the LLC from her father's estate. She never held an equity interest in SFIC, however. Am. Compl. ¶¶ 77-78.

On June 18, 2004, one day after Presti discussed the allocation with Bakerman, and shortly before the scheduled public announcement of the Bacardi sale, Lee Einsidler, on behalf of defendants, asked Bakerman, as a member of the LLC, to sign a unanimous written consent of the members. The consent would authorize the LLC to sell all of SAS's interests in the Grey Goose Vodka product line to Bacardi. After reviewing the consent, Bakerman repeatedly asked for, and eventually received, what was identified as the current draft of the Asset Purchase Agreement between SFIC, the LLC, SAS, and Bacardi (the "APA"). Under the draft APA, the cash portion of the purchase price would be allocated among the sellers as follows:

1. \$2.24 billion to SFIC for "[t]rademark for US, Canada and other markets and production know-how, recipes, formulas and any other production related intangible";
2. \$200,000 to SAS for "[t]rademark for France and some other countries";
3. \$5.5 million to SAS for the Production Facility in France;
4. \$5.4 million to SAS for machinery and other assets in France; and
5. undetermined amounts to SFIC and SAS for inventory.

In addition, under the draft APA, SAS was to receive only about \$11 million of the approximately

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\$2.25 billion cash purchase price-less than 0.49% of the purchase price.

Bakerman did not think that the allocation reflected the true value of the LLC and SAS. Bakerman proposed to Einsidler, John Frank, and Moselman that SAS's allocation should be greatly increased. When this proposal was roundly rejected, Bakerman responded that he would not sign the consent due to the apparent misallocation of the purchase price. Bakerman then attempted to contact Sidney Frank, who was out of the SFIC office that day. Einsidler, however, intervened and instructed him not to call Sidney Frank.

Einsidler brought Bakerman into an office for a meeting with several SFIC executives, including Moselman and John Frank. The executives repeatedly asserted that SAS had received its fair share of the purchase price allocation under the draft APA.

*5 Einsidler then convened a private meeting with the SFIC executives. After that meeting, Einsidler told Bakerman that "the lawyers" believed that: (a) Bakerman had a "major conflict of interest" based upon his dual role as SFIC's in-house legal counsel and as a member of the LLC; and (b) Einsidler could act on behalf of the LLC, with or without Bakerman's consent to the transaction. Einsidler then delivered an ultimatum to Bakerman. He stated that Bakerman had less than half an hour to make one of three choices:

- a. Bakerman could sign the consent, keep his employment at SFIC, and receive \$700,000 (similar to the bonuses that all SFIC employees would receive upon the closing of the sale with Bacardi);
- b. Bakerman could sign the consent, resign his employment at SFIC, and receive \$1,000,000 in severance from SFIC; or
- c. Bakerman could refuse to sign the consent, have his employment terminated by SFIC, and be sued by SFIC.

Einsidler added that if Bakerman failed to choose one of these three options within the allotted time, then the third option would be chosen for him.

Bakerman initially responded that he would sign the

consent with an express caveat related to his disagreement over the purchase price allocation. Einsidler promptly rejected that proposal, stating that the lawyers required the consent to be signed as drafted.

Bakerman returned to meet with Einsidler and the other SFIC executives, and told them that he needed to keep his job and, therefore, would sign the consent if they really wanted him to stay at SFIC. Bakerman and each of the defendants who were members of the LLC signed the consent. It is unclear whether Rodman ever signed the consent.

Two days later, on June 20, 2004, Bacardi announced the agreement to acquire Grey Goose Vodka. On June 25, 2004, SFIC, the LLC, SAS, and Bacardi signed the APA, pursuant to which Bacardi agreed to pay approximately \$2.25 billion in cash, plus up to \$300 million through an earn-out arrangement, to purchase the assets related to the Grey Goose Vodka line. The sale to Bacardi closed formally on August 3, 2004.

Three weeks later, on August 24, 2004, Einsidler informed Bakerman that he was being immediately terminated as an SFIC employee because he allegedly had been very unprofessional on the day that he signed the consent. Einsidler requested that Bakerman sign a comprehensive release in conjunction with his termination. Bakerman refused to sign such a release, and Einsidler asked a security officer to escort Bakerman from the SFIC offices.

Following the termination, Einsidler called Bakerman on two occasions to persuade Bakerman to sign the release. During the second call, Einsidler told Bakerman that his refusal to sign the release must mean that he was planning to sue defendants. Bakerman did nothing to disabuse him of that notion. Einsidler was, in fact, correct.

Approximately sixteen months after his termination, and eighteen months after the Bacardi transaction was announced, Bakerman filed a complaint in this Court against defendants on December 15, 2005. Bakerman asserted both direct claims on his own behalf and derivative claims on behalf of the LLC challenging the transfer pricing paid by SFIC to the

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LLC, the allocation of the Bacardi transaction proceeds, and the alleged coercion that resulted in Bakerman's signing the consent.

*6 On March 13, 2006, defendants moved to dismiss the complaint. Among the myriad defenses presented, defendants argued that Bakerman's original interest in the LLC was void due to a conflict of interest that was never correctly consented to by Sidney Frank and SFIC.

Bakerman exercised his right to amend the complaint,^{FN3} and filed his first amended complaint on April 27, 2006 (the "Amended Complaint"). Among certain additions and clarifications, the Amended Complaint addressed Bakerman's alleged acquisition of consent from Sidney Frank and SFIC. The Amended Complaint describes how "[o]n more than one occasion, Bakerman communicated to Sidney Frank and Lee Einsidler that he had a potential conflict of interest in obtaining a membership interest in [the LLC]." Defendant Sidney Frank, however, had passed away in early January 2006, after the original complaint had been filed, but months before the filing of the Amended Complaint.

FN3. Ct. Ch. R. 15(a).

II. CONTENTIONS

The Amended Complaint includes five claims: two derivative claims and three putative direct claims. The defendants move to dismiss on a number of grounds.

A. Derivative Claims

Count I alleges breaches of fiduciary duty against the defendants as members and managers of the LLC. Count V alleges that the defendants have been unjustly enriched at the LLC's expense.

B. Direct Claims

Count II alleges that defendants breached the LLC's

Operating Agreement by depriving Bakerman of the benefit of the LLC Operating Agreement's unanimous consent requirement, by failing to inform Bakerman's decision and by obtaining the consent through coercion and economic duress.

Count III alleges that defendants tortiously interfered with Bakerman's contractual relations, as established by the LLC's Operating Agreement. Specifically, defendants misallocated the purchase price, did not disclose the justification for the misallocation to Bakerman, did not disclose to Bakerman their conflicted interests, and deprived Bakerman of his contractual entitlement to give informed and volitional consent to the transaction through the use of coercion, threat of litigation, and economic duress.

Count IV alleges that defendants breached the implied covenant of good faith and fair dealing by engaging in the actions that formed the bases of Counts II and III, and by additionally executing the Bacardi transaction, despite having knowledge of the deceptive and coercive nature of the consent obtained.

C. Defendants' Contentions

In respect to each claim, defendants move under Rule 12(b)(6) to dismiss for failure to state a claim. In more general attacks, defendants argue the following: First, the complaint is barred by the doctrine of laches, and the amended complaint is barred by Bakerman's unreasonable delay in amending the complaint until after Sidney Frank's death. Second, the individual and direct claims are in fact derivative in nature. Third, Bakerman's demand futility allegations fail to meet a heightened burden of pleading. Fourth, Bakerman is not an adequate derivative representative.

D. Legal Standard

*7 The standards governing a motion to dismiss for failure to state a claim are well settled: (i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are "well-pleaded"

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if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and (iv) dismissal is inappropriate unless the “plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.”^{FN4}

FN4.*In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del.2006) (quoting *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-7 (Del.2002)).

III. ANALYSIS

A. Defendants' Rule 23.1 Motion: Was Demand on the Managers Excused?

Bakerman seeks to assert multiple derivative claims on behalf of the LLC. Bakerman concedes that demand was not made on the LLC's current managers, Einsidler and Thompson. The Court must therefore determine whether demand is excused.

Court of Chancery Rule 23.1 imposes on a plaintiff prosecuting a derivative action a pleading burden that is “more onerous” than the burden a plaintiff must satisfy when confronted with a motion to dismiss under Court of Chancery Rule 12(b)(6).^{FN5} Rule 23.1 requires a plaintiff to “allege with particularity ... the reasons ... for not making” a demand.^{FN6} In considering a motion to dismiss under Rule 23.1, the Court must accept the well-pled allegations of the amended complaint as true.^{FN7} Conclusory allegations, however, will not be accepted as true.^{FN8}

FN5. Ct. Ch. R. 23.1; *Levine v. Smith*, 591 A.2d 194, 207 (Del.1991), *overruled on other grounds*, *Brehm v. Eisner*, 746 A.2d 244, 254 (Del.2000).

FN6. Ct. Ch. R. 23.1.

FN7. *Grobow v. Perot*, 539 A.2d 180, 186 (Del.1988).

FN8.*Id.* at 187; *see also Rales v. Blasband*, 634 A.2d 927, 931 (Del.1993).

Inquiry into whether demand is excused proceeds in this circumstance under the familiar test set forth by the Supreme Court in *Aronson v. Lewis*.^{FN9} Under the two-pronged *Aronson* test, demand will be excused if the derivative complaint pleads particularized facts creating a reasonable doubt that “(1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment.”^{FN10}

FN9. 473 A.2d 805 (Del.1984).

FN10.*Id.* at 814-15.

Disinterested “means that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally.... Independence means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences.”^{FN11}

FN11.*In re J.P. Morgan Chase & Co.*, 2005 WL 1076069, at *8 (Del. Ch. Apr. 29, 2005) (quoting *Aronson*, 473 A.2d at 812, 816), *aff'd*, 2006 WL 585606 (Del. Mar. 8, 2006); *see also Rales*, 634 A.2d at 936.

1. Were Einsidler and Thompson Interested Managers?

Bakerman alleges that demand is excused because Einsidler and Thompson are interested in the allocation due to their holdings in SFIC, because they are beholden to SFIC and Sidney Frank, and because there is reasonable doubt that the transaction was the product of a valid exercise of business judgment.

Bakerman presents several particularized facts

