IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATALIE GORDON, Derivatively on Behalf of NAVIGANT CONSULTING, INC.,	)	
Plaintiff,	)	Case No. 12-cv-00369
v.	)	Honorable Amy J. St. Eve
WILLIAM M. GOODYEAR, JULIE M. HOWARD, THOMAS A. NARDI, MONICA M. WEED, THOMAS A. GILDEHAUS, CYNTHIA A. GLASSMAN, STEPHAN A. JAMES, PETER B. POND, SAMUEL K. SKINNER, JAMES R. THOMPSON and MICHAEL L. TIPSORD,	)	
Defendants,	)	
and	)	
NAVIGANT CONSULTING, INC.,	)	
Nominal Defendant.	)	

DEFENDANTS' REPLY MEMORANDUM
IN SUPPORT OF THEIR MOTION TO DISMISS

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As Plaintiff admits, "the overall management of a corporation is properly reserved to the board of directors" (Pl. Mem., Dkt. #41, at 8), including the decision whether litigation should be initiated on the corporation's behalf. Accordingly, when an individual shareholder purports to anoint herself to make such decisions in lieu of the board, she is required under Delaware law[1] to allege facts, with particularity, that demonstrate that a majority of the board is incapacitated from acting on the matter, thereby excusing demand. And when, as here, the theory of incapacitation is that a majority of the directors themselves face liability, those particularized facts must show "a substantial likelihood of liability," as Plaintiff concedes. (Pl. Mem. at 9; Def. Mem. at 9-12.) The Complaint does not come close to making such a showing. Instead, Plaintiff attempts a mere second-guessing of the board's decisions that, although dressed up with rhetorical flourishes, is not remotely sufficient to constitute a particularized factual showing of the intentional malfeasance necessary under Delaware law to establish "bad faith"—the fundamental legal prerequisite to the duty of loyalty claim here. This Court should follow *all* of the other courts who have addressed say-on-pay cases under Delaware law and dismiss this case.[2]

I. THE DEMAND REQUIREMENT.

Plaintiff concedes that, for her suit to proceed, she must—as a substantive requirement of Delaware law (Def. Mem. at 7)—set forth particularized factual allegations that show that a pre-suit demand was excused. (Pl. Mem. at 9.) Plaintiff also concedes the *Aronson* test provides the legal standards for determining whether the Complaint adequately pleads that a demand upon the Board is excused. (*Id.* at 9-10.) That test directs the Court to determine "whether, under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested

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[1] Plaintiff does not contest that Navigant is a Delaware corporation, not an Illinois corporation (as incorrectly alleged), or that Delaware law applies. (Def. Mem., Dkt. #34, at 2 n.3, 7 n.7.)

[2] Even without considering the insufficiency of the Complaint under Rule 23.1, Count I should be dismissed as to the NEOs because Plaintiff does not allege that they participated in the decisions regarding their 2010 compensation. (*See* Def. Mem at 10 n.9.) Plaintiff does not dispute this point.

and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." *Aronson v. Lewi*s, 473 A.2d 805, 814 (Del. 1984). Plaintiff here has not alleged facts with particularity that satisfy either prong of the *Aronson* test.

II. PLAINTIFF FAILS TO ALLEGE PARTICULARIZED FACTS THAT CREATE A REASONABLE DOUBT THAT THE DIRECTORS ARE NOT INDEPENDENT OR DISINTERESTED.

Plaintiff can show that demand is excused under the first prong of *Aronson* in three ways: by showing that a majority of the directors (1) were self-interested in (*i.e.*, derived a personal benefit from) a decision of theirs which is being challenged; (2) were controlled by one or more persons who themselves were self-interested in the challenged decision; or (3) face a "substantial likelihood" of liability for their earlier decision. In each instance, Plaintiff bears the burden of pleading particularized facts. (Def. Mem. at 8-9 (citing cases).)

Plaintiff makes no attempt to establish demand futility under the first two alternatives. Although Plaintiff's memorandum notes, in the abstract, that "factual evidence that board members acted disloyally to enhance the selfish interests of themselves and/or fellow directors" can suffice to show demand futility (Pl. Mem. at 2), the Complaint does not identify any such evidence here of the Board members acting to enhance *their own* "selfish interests." In that regard, the Complaint does not contain even a conclusory assertion that the majority of directors received any personal benefit whatsoever from the compensation decisions. Nor does Plaintiff contest that she has not alleged that a majority of directors stood on both sides of the transaction.[3] And Plaintiff does not contest that she has not alleged that any of the outside Directors (seven of the eight members of the Board) were controlled by the NEOs or anyone

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[3] The Complaint alleges that Mr. Goodyear received a personal benefit from the Board's compensation decisions (*i.e*., his 2010 compensation as CEO), but the Complaint does not allege that he participated in the decisionmaking related to his own compensation. In any event, as noted in Defendants' opening brief, allegations concerning Mr. Goodyear do not raise any legitimate questions about the rest of the board. (Def. Mem. at 9 n.8.) Plaintiff does not contest the point in her brief.

else. There is, accordingly, no "independence" issue here, either.

Plaintiff thus is left with a single argument under the first prong of *Aronson*: that a majority of the directors (purportedly) face a substantial likelihood of liability for breach of a fiduciary duty of loyalty in connection with their executive compensation decisions. (*See* Pl. Mem. at 15-16.) But establishing demand futility by showing a substantial likelihood of liability is a particularly difficult feat under Delaware law. (*See* Def. Mem. at 10-11; *In re Citigroup Inc. S'holder Deriv. Litig*., 964 A.2d 106, 121 (Del. Ch. 2009) (quoting *Aronson*, 473 A.2d at 815) (it is a "rare case" in which a plaintiff has alleged particularized facts demonstrating "director conduct that is 'so egregious on its face that board approval cannot meet the test of business judgment, and a substantial likelihood of director liability therefore exists'")).) And that is especially so when, as here, only violations of the duty of loyalty are alleged.

For such a case to be permitted to proceed, the plaintiff must allege particularized facts demonstrating a failure of the directors to "act[] in the good faith belief that [their] actions are in the corporation's best interest." *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).[4] This standard requires *subjective* wrongdoing. Thus, the plaintiff must establish that the directors "*intentionally* act[ed] with a purpose other than that of advancing the best interests of the corporation." *Id*. at 369 (emphasis added). Bad faith requires "conduct motivated to do harm" or "intentional dereliction of duty, a conscious disregard for one's responsibilities." *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 64-68 (Del. 2006).[5]

[4] As noted in Defendants' opening brief, and not contested by Plaintiff, the Company's charter insulates directors from liability for alleged failures to exercise due care. (*See* Def. Mem. at 11 n.10.) A claim of lack of due care thus would not suffice to excuse demand. *See, e.g., Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008). It is no accident that the only breach of fiduciary duty alleged is a loyalty breach.

[5] Plaintiff's cited cases are not to the contrary. *Cede* explained that the duty of loyalty may be violated if a majority of the board acted with self-interest, such as "appearing on both sides of a transaction or a director receiving a personal benefit from a transaction not received by shareholders generally," or engaging in "entrenchment, fraud upon the corporation or the board, abdication of directorial duty, or the

Plaintiff attempts to fudge this "bad faith" standard throughout her brief. Although she repeatedly asserts that Defendants failed to act "in the best interests" of the Company (*e.g.*, Pl. Mem. at 1, 2, 3), this phrase attempts to mask the difference between an intentional (*i.e.*, *subjective*) dereliction of duty and an *objective* criticism that the wrong decisions were made. Only the former suffices to demonstrate "bad faith." The latter criticism amounts only to the very type of second-guessing of a board of directors' disinterested decisions that the demand requirement is designed to prevent.

Indeed, the Complaint does not allege even a single fact suggesting that the board engaged in "bad faith" conduct *intended* to harm the Company. And Plaintiff's memorandum is conspicuously silent as to why the directors plausibly would want to damage the Company, a query posed in Defendant's memorandum. (Def. Mem. at 12.) There simply is no particularized, factual support at all for such a conclusion, and the Complaint itself does not even contain a conclusory allegation to this effect.

Plaintiff's memorandum does attempt to assert, in passing, that "[i]t is uncontested that the Individual Defendants formulated and awarded executive compensation in 2010 that they knew were not in compliance with the Company's compensation guidelines and were not in the best interests of the Company." (Pl. Mem. at 16.) Yet far from being "uncontested," this is an unsupported, naked assertion. There are simply *no* facts alleged which indicate that any director *knew* or *believed* that the compensation decisions at issue violated Company policy (a matter discussed further *infra* at 14-15) or were not in the best interests of the Company. Absent such particularized allegations, there can be no claim for "bad faith," and therefore no "substantial

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sale of one's vote." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362-63 (Del. 1993). The *Tyson* directors were alleged to have engaged in deceptive conduct. *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 2007 Del. Ch. LEXIS 120, at *10-11 (Del. Ch. Aug. 15, 2007). The *Pfeiffer* directors were defendants in a suit alleging insider trading that had satisfied "the rigorous standards for pleading securities fraud." *Pfeiffer v. Toll*, 989 A.2d 683, 690 (Del. Ch. 2010). There are no such allegations here.

likelihood of liability" for breach of fiduciary duty.[6]

III. PLAINTIFF FAILS TO ALLEGE PARTICULARIZED FACTS SUFFICIENT TO CREATE A REASONABLE DOUBT THAT THE COMPENSATION DECISIONS ARE PROTECTED BY THE BUSINESS JUDGMENT RULE.

Plaintiff also argues that the Complaint has sufficiently rebutted the presumption of the business judgment rule under *Aronson*'s second prong. As Plaintiff concedes, the business judgment rule is a presumption that, among other things, the directors of a corporation acted "in good faith and in the honest belief that the action taken was in the best interests of the company."[7] (Def. Mem. at 13 (quoting *Spiegel v. Buntrock*, 571 A.2d 767, 774 (Del. 1990)); Pl. Mem. at 2.) Plaintiff attempts to rebut the business judgment rule—again, for the purpose of attempting to establish a "substantial likelihood" of the directors' liability—by once again arguing that the compensation decisions were not actually in the Company's best interests. But under Delaware law, the business judgment presumption is not rebutted so easily. Instead, a plaintiff can rebut the business judgment rule presumption under the second prong of *Aronson* only in "extreme cases in which despite the appearance of independence and disinterest a decision is so extreme or curious as to itself raise a legitimate ground to justify further inquiry and judicial review"—*i.e.*, the decision is so obviously lacking in any conceivable justification that by itself it creates an inference of wrongdoing. (Def. Mem. at 13 (quoting *Highland Legacy Ltd. v. Singer*, 2006 WL 741939, at *7 (Del. Ch. Mar. 17, 2006)).) Here, as discussed above, the inference facially created must be one of intentional "bad faith" in order to support Plaintiff's

[6] In her memorandum, Plaintiff suggests that the fact that the board "increase[d] the cash component" of executive compensation is relevant to this inquiry, but never alleges that doing so was itself somehow prohibited by the policy, much less that the directors *knew* it or *believed* it to be so. Similarly, Plaintiff's reliance on the fact that the directors "unanimously recommended that shareholders vote in favor" of the Board's compensation decisions is misguided. If anything, such a unanimous recommendation is more consistent with the directors having the subjective belief that the compensation decisions *were* appropriate and *not* in violation of company policy. (*See* Pl. Mem. at 16.)

[7] As previously noted, the business judgment rule also creates a presumption that directors acted "on an informed basis," which Plaintiff does not challenge here. (*See* Def. Mem. at 13 n.11.)

theory of a "substantial likelihood" of Board liability for an alleged breach of the duty of loyalty.

Yet the shareholder vote that apparently prompted this lawsuit affirmatively demonstrates the absurdity of the claim that the Board's compensation decisions were so facially egregious as to suggest that they were the product of bad faith. Shareholders holding more than 41% of the shares present voted *in favor* of the say-on-pay resolution. (*See* Compl. ¶ 55; Navigant 4/26/11 Form 8-K, Dkt. #34-5 at 2.) There is no more reason to believe that the Board members intentionally sought to damage Navigant by their compensation decisions than there is to believe that 41% of the shareholders sought to do so by their say-on-pay votes. Defendants made this basic point in their opening memorandum (Def. Mem. at 6, 12), but Plaintiff does not address it.

Instead, Plaintiff puts forth three arguments in an attempt to rebut the presumption that the compensation decisions are protected by the business judgment rule: (1) that the negative say-on-pay vote is evidence that the compensation decisions were not in the best interests of shareholders; (2) that the executive compensation was excessive in light of declines in the Company's stock price; and (3) that the board "violated" the Company's executive compensation policy. (*See* Pl. Mem. at 2, 10-11.) None of these arguments comes close to establishing the bad faith necessary to rebut the business judgment rule.

A. The Say-on-Pay Vote Does Not Rebut the Business Judgment Rule.

As Defendants demonstrated, the explicit language of Dodd-Frank and the decisions of a number of courts across the country applying Delaware law make clear that a negative say-on-pay vote does not rebut the presumption of the business judgment rule. (*See* Def. Mem. at 5-6, 17-20.) Defendants also demonstrated that this rule is consistent with more general principles of Delaware law, which makes clear that the directors, not shareholders, manage the corporation and may take actions with which a majority of shareholders disagree. (*Id.* at 16-17.) Plaintiff appears not to take issue with these propositions. She does not contest (or acknowledge) that

Delaware law protects directors even if they act contrary to shareholder wishes, or cite any contrary authority. And Plaintiff's memorandum does not claim that a negative "say-on-pay" vote alone is enough to rebut the business judgment rule (which of course it is not).

Instead, Plaintiff relies on legislative history to argue that an after-the-fact negative say-on-pay vote is not "meaningless." (Pl. Mem. at 3, 12.) But Defendants never argued that a negative say-on-pay vote is "meaningless," and that is not what is at issue here. The question here does not relate to whether shareholders have or should have a "voice," or even whether it is desirable for a board of directors to consider that "voice."[8] Instead, the question presented is whether the "meaning" of a say-on-pay vote is to alter the traditional legal standards that apply to lawsuits alleging that directors breached their fiduciary duties by awarding excessive executive compensation. This question is easily answered: the statute itself provides that a say-on-pay vote "may not be construed . . . to create or imply *any* change to the fiduciary duties of [the company] or board of directors" or "to create or imply *any* additional fiduciary duties for [the company] or its board of directors." 15 U.S.C. § 78n-1(c)(2), (3) (emphases added); *see also* Def. Mem. at 5-6. Indeed, Plaintiff herself acknowledges that the say-on-pay vote is "advisory" and "does not alter the fiduciary duty of directors." (Pl. Mem. at 3, 12.)

With respect to the say-on-pay caselaw, Plaintiff relies almost exclusively on the *Cincinnati Bell* case. (*See id.* at 11-13, 15-17 (citing *NECA-IBEW Pension Fund ex rel. Cincinnati Bell, Inc. v. Co*x, 2011 WL 4383368 (S.D. Ohio Sept. 20, 2011)).) But *Cincinnati Bell* was decided under Ohio law, under which the business judgment rule is treated as an affirmative defense, and *not* analyzed on a motion to dismiss. *See Marsalis v. Wilson*, 778 N.E.2d 612, 616 (Ohio Ct. App. 2002) (holding that plaintiffs are not "obligated to plead

[8] Indeed, as Defendants previously noted, after the negative say-on-pay vote, the Compensation Committee modified some aspects of 2010 executive compensation to add performance-based vesting conditions to portions of the restricted stock awards. (*See* Def. Mem. at 6 n.6.)

operative facts in their complaint that would rebut the presumption" of the business judgment rule). By contrast, under Delaware law (which Plaintiff now concedes applies here), a shareholder seeking to bring a derivative suit must plead particularized facts to rebut the business judgment rule at the motion to dismiss stage. *See Cede*, 634 A.2d at 360-61 (explaining that, under Delaware law, "a shareholder plaintiff challenging a board decision has the burden at the outset to rebut the rule's presumption"); *Aronson*, 473 A.2d at 812. This is the key takeaway from the *Cincinnati Bell* case, as Defendants pointed out and several other courts have noted. (*See* Def. Mem. at 20 (citing cases).) Yet Plaintiff fails to acknowledge this fact.

Plaintiff also asserts that "[m]uch of the authority cited by the Defendants is not to the contrary and in fact supports the Plaintiff's arguments." (Pl. Mem. at 13.) This is simply wrong. Defendants cited a number of cases, applying Delaware law, that reached the *same* conclusion: negative say-on-pay votes are insufficient to allow a breach of fiduciary duty claim to survive a motion to dismiss. (*See* Def. Mem. at 17-20 (citing *Plumbers Local No. 137 Pension Fund v. Davis*, 2012 WL 104776, at *5 (D. Or. Jan. 11, 2012), *adopted as the district court's opinion*, 2012 WL 602391 (D. Or. Feb. 23, 2012); *Assad v. Hart*, 2012 WL 33220, at *4 (S.D. Cal. Jan. 6, 2012); *Teamsters Local 237 Add'l Sec. Benefit Fund v. McCarthy*, No. 2011-cv-197841, slip op. at 14-16 (Ga. Super. Ct. Sept. 16, 2011)).)[9] Plaintiff simply ignores most of these cases.

Plaintiff attempts to distort this overwhelming precedent by relying entirely on dicta from *one* of the several say-on-pay cases cited by Defendants to suggest that a court may deny a motion to dismiss by relying on the say-on-pay vote as "evidence" *plus* some other factual allegation that independently gives rise to a substantial likelihood of liability. (*See* Pl. Mem. at

[9] *See also Weinberg ex rel. BioMed Realty Trust, Inc. v. Gold*, 2012 WL 812348, at *6 (D. Md. Mar. 12, 2012) (Maryland law); *In re Jacobs Engineering Group, Inc. Consolidated S'holder Deriv. Litig.*, No. BC454543, slip op. at 13-14 (Cal. Super. Ct. Mar. 6, 2012) (California law); *In re Jacobs Engineering Group, Inc. Consolidated S'holder Deriv. Litig.*, No. BC454543, slip op. at 2-3 (Cal. Super. Ct. Nov. 10, 2011) (same).

13-14 (citing *Laborers' Local v. Intersil*, 2012 WL 762319, at *8 (N.D. Cal. Mar. 7, 2012)).) If anything, the *Intersil* case confirms why Plaintiff's case should be dismissed. Plaintiff concedes that the court in *Intersil* rejected the idea that a negative say-on-pay vote alone rebuts the presumption of the business judgment rule. (*Id*.) But the *Intersil* court *also* rejected the sufficiency of allegations that executive compensation was excessive given declines in revenue and net income, and claims that it therefore did not comply with the company's pay-for-performance policy. *Intersil*, 2012 WL 762319, at *5. These are the same arguments made here by Plaintiff. After being presented with the very same combination of factors alleged here, the *Intersil* court held that plaintiff "ha[d] not pled sufficient facts to raise a reasonable doubt that the challenged act was a product of the board's valid exercise of business judgment"—and thereby declined to excuse demand. *Id*. at *8. The same result should obtain here.

B. The Compensation Provided Was Not So Disproportionate in Amount or Nature to Establish a Claim of Bad Faith.

By effectively conceding that a negative say-on-pay vote alone is not enough to suggest that a Board's compensation decisions were made in bad faith, Plaintiff's claim amounts to nothing more than a classic case of a shareholder attempting to second-guess the decisions of a disinterested and independent Board on executive compensation. Specifically, Plaintiff makes two arguments against the compensation decisions themselves: (1) that the amount of compensation was so excessive in light of the Company's performance so as to give rise to an inference of bad faith and corporate waste; and (2) that the proportion of compensation awarded in the form of cash bonuses also was too high.

1. Plaintiff Does Not Demonstrate that the Amount of Compensation Was So Disproportionately Large as to Constitute Bad Faith.

As Defendants demonstrated, long-established Delaware law treats a Board's executive compensation decisions as "entitled to great deference" because it is "the essence of business judgment for a board to determine if a particular individual warrants large amounts of money." (Def. Mem. at 14-15 (quoting *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000)).) Defendants cited five cases in support of this proposition: *Brehm*, *Pirelli*, *Lewis*, *Haber*, and *Goldman Sachs*. Plaintiff addresses *none* of them.

There are numerous reasons consonant with the good faith judgment of a board of directors that executive compensation could go up, stay static, or go down in a given year—even when the stock price declines. For example, a board may put primacy on executive retention, on an executive's qualitative performance, or on metrics that recognize success in minimizing the extent of anticipated decline. Indeed, even beyond Navigant's explicit policy statements, *see infra* at 14, it is clear that the NEOs were not being judged *solely* by the absolute performance of Navigant's stock price, as they each received different compensation and each had a different change in compensation from the prior year. The inherently judgmental nature of executive compensation decisions is the very reason why particular deference is given to those decisions.

Plaintiff cites the *Citigroup* case. (Pl. Mem. at 15 (citing *Citigroup*, 964 A.2d at 138-39).) But that case focused on whether the consideration *received* by the company was "so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade." *Id*. at 138. That issue arose because Citigroup had entered into an agreement to pay its former CEO $68 million, as well as to provide other additional ongoing perquisites, in return for receiving *no ongoing services at all*. Instead, Citigroup obtained a "non-compete agreement, a non-disparagement agreement, a non-solicitation agreement, and a release of claims," which were of questionable "real value." *Id*. The Court held that this agreement may be "so one-sided" as to be beyond "the outer limit" of the board's discretion. *Id*.

The facts are entirely different here. Unlike *Citigroup*, the compensation here was awarded in exchange for the NEO's full-time work as Company officers. And it is precisely because valuations of the "worth" of such executive services are so inherently imprecise and discretionary that Delaware courts have repeatedly refused to allow challenges to claims of "excessive" compensation for such services to proceed. (Def. Mem. at 14-15 & n.12.)[10]

Moreover, not only does Delaware law not permit the second-guessing that Plaintiff attempts here regarding executive compensation for services rendered, we are not aware of any case in which compensation amounts remotely approximating those at issue here sufficed either for a facial inference of "bad faith" or to allow a waste claim to proceed. Plaintiff makes much of what she (inaccurately) alleges to be an *increase* in compensation—but that aggregate increase, by her own calculation, is only $80,000 spread over the four named executive officers. (Pl. Mem. at 4 ("…the Board decided to award…a combined $4.85 million dollars in total compensation for 2010, up from the $4.77 million they received in 2009").)[11] Plaintiff does not cite a single case in which a court held that such modest increases in compensation gave rise to a cognizable claim, much less to any inference of intentional misconduct.[12]

[10] Plaintiff cites two other cases for the proposition that some compensation decisions may be so disproportionately large as to state a claim for breach of fiduciary duty. (Pl. Mem. at 15.) But neither of these cases was decided on that theory. *Tyson* involved the award of allegedly "spring-loaded" stock options, which the court held were awarded in violation of a shareholder-approved stock incentive plan and were misleadingly disclosed to investors. *In re Tyson*, 2007 Del. Ch. LEXIS 120, at *13-15. The court held that demand was excused on the board of directors not because of the size of the compensation awarded but because of an alleged "purposeful subterfuge." *Id*. at *18-19. Moreover, the *Tyson* court *rejected* the very kind of corporate waste/outsized compensation theory alleged here, dismissing claims that certain multimillion dollar, long-term contracts with ex-officers for consulting services were excessive. *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 587-88 (Del. Ch. 2007). In *Viacom*, plaintiffs challenged the award of $160 million of compensation to three officers in a single year, during which the Company suffered nearly $17.5 billion in net losses. *In re Viacom Inc. S'holder Deriv. Litig*., 2006 N.Y. Misc LEXIS 2891, at *3, *6 (N.Y. Sup. Ct. June 26, 2006). The court did not reach the question of whether the compensation decision satisfied the business judgment rule under the second prong of *Aronson*, *id*. at *15, because half of the directors were either admittedly self-interested or lacked independence, *id*. at *3, *11-12.

[11] Although Plaintiff never alleges what compensation each of the directors is alleged to have received, Plaintiff appears to concede that the compensation of Mr. Goodyear and Ms. Howard declined in 2010. (Pl. Mem. at 4-5 (alleging a total "pay hike" of $80,000, and that Mr. Nardi and Ms. Weed received pay raises totaling $370,000, implying that Mr. Goodyear and Ms. Howard pay declined by $290,000).)

[12] Indeed, these alleged increases in compensation were significantly smaller than increases upheld by

In any event, contrary to Plaintiff's allegation that executive compensation increased by a small amount, total executive compensation for 2010 performance actually *declined* as compared to total executive compensation for 2009 performance. (*See* Def. Mem. at 3-4 & n.5; Proxy, Dkt. #34-3 at 17-20; Supplemental Proxy, Dkt. #34-4 at 1.) Notably, in her opposition memorandum, Plaintiff *never* actually challenges the calculations demonstrating this fact, which are entirely consistent with the relevant language from the Proxy quoted in her own Complaint. (Compl. ¶ 50 ("These decisions resulted in a decrease, both individually and in the aggregate, in the total direct compensation to our NEOs for 2010 as compared to 2009.").)

Instead, Plaintiff attempts to dodge the facts regarding whether there was or was not a compensation "increase" by rhetorically asserting that the compensation awarded was excessive "regardless" of the year for which it was meant to reward performance. (Pl. Mem. at 5 n.4, 11.) Plaintiff also nakedly asserts that the charts contained in the Proxy showing a year-to-year decrease in executive compensation constituted a "disguise." (*Id*.) But there is no allegation in the Complaint that the proxy statements were misleading in any respect, and, once again, Plaintiff identifies nothing at all inaccurate about the compensation charts.

At bottom, however, it makes no legal difference whether a minuscule aggregate increase in executive compensation occurred for 2010 performance compared to 2009 performance, or whether there was an aggregate decrease. In either event, nothing about the amounts awarded here is so far beyond the pale as to give rise to an inference of "bad faith" and deliberate waste.

2. The Cash Bonus Awards Do Not Establish Bad Faith.

Unable to make a meaningful challenge about *total* executive compensation, Plaintiff points to the fact that two of the NEOs were awarded a larger *proportion* of their compensation

other courts rejecting derivative lawsuits based on negative say-on-pay votes. (*See* Def. Mem. at 20.) Plaintiff does not address this point either.

in cash (compared to the prior year) rather than equity. (Pl. Mem. at 5-7, 15-16.) (Mr. Nardi was awarded the same cash bonus amount and Ms. Weed a reduced one.)[13] Plaintiff argues that awarding proportionately less compensation in the form of equity for some NEOs reduced the alignment between these officers' incentives and the shareholders' interests. The relevant question, however, is whether these decisions regarding one component of total compensation are, on their face, so unreasonable as to be suggestive of intentional bad faith.

Plaintiff cannot cite a single case for this proposition, for there is none. To the contrary, Delaware law is clear that this transparent attempt to second-guess a decision squarely within the discretion of the Board is insufficient to state a claim. (Def. Mem. at 15 (citing In re *Goldman Sachs Group, Inc. S'holder Litig.*, 2011 WL 4826104, at *14 (Del Ch. Oct. 12, 2011) (dismissing allegations that compensation did not align officer and shareholder interests)).)[14] Moreover, an assertion that the award of certain cash bonuses here bespeaks intentional bad faith is particularly absurd where the *decrease* in the amount of equity awards for these very same officers far exceeded the *increase* in their cash bonuses.[15]

[13] Plaintiff's memorandum misstates the facts with respect to the amount of the cash bonuses. It inexplicably asserts that the NEOs received $725,000 (or $750,000) in cash bonuses for 2010 (Pl. Mem. at 5, 6), as compared to "no annual cash bonuses in 2009" (*id.* at 6). But as disclosed in the Proxy, Navigant actually paid $275,000 in cash bonuses in 2009. (Proxy at 23.)

[14] In addition to *Cincinnati Bell*, Plaintiff points to three cases in connection with her discussion of the types of compensation at issue. Each case involved inappropriate provision of stock options where the alleged wrongful conduct itself altered the appropriate valuation of those options—*e.g.*, because they were "springloaded" or "backdated"—or involved self-deaing. *See Tyson*, 2007 Del. Ch. LEXIS 120, at *4-7 (allowing suit to proceed where directors allegedly granted spring-loaded options in contravention of shareholder-approved stock incentive plan and approved deceptive disclosures thereof); *Ryan v. Gifford*, 918 A.2d 341, 358 (Del Ch. 2007) (allowing suit to proceed where directors allegedly awarded back-dated stock options in contravention of shareholder-approved stock incentive plan and approved fraudulent disclosures related to the option awards); *London v. Tyrell*, 2008 Del. Ch. LEXIS 75, at *15-17 (Del. Ch. June 24, 2008) (allowing suit to proceed where directors allegedly stood on both sides of a transaction and awarded themselves under-priced stock options in contravention of shareholder-approved stock incentive plan).

[15] Nor can Plaintiff demonstrate that the allocation of compensation between cash and equity awards was contrary to Company policy. The Proxy itself discloses that "we have no pre-established policy or formula for the allocation between cash and equity-based incentive compensation." (Proxy at 16.)

C. Plaintiff's Insufficient Allegations of "Violations" of Company Policy Do Not Establish Bad Faith.

Plaintiff's sole remaining argument is that the directors must have acted in bad faith because the 2010 executive compensation decisions allegedly did not comply with the Company's "stated guidelines and philosophy concerning compensation awards," because pay allegedly was not commensurate with performance. (Pl. Mem. at 13; *see also id*. at 5-7.) But the Complaint does not adequately allege any such violations of policy, much less that Defendants did so in a way that is indicative of intentional misconduct.

Plaintiff cites the Proxy as the source of the alleged compensation policy (*id*. at 6-7), yet she selectively ignores the Proxy's disclosures regarding the factors determining compensation awards. Plaintiff alleges that "the guiding principal [sic] of the Company's executive compensation policy was pay-for-performance" (*id*. at 6) and contends that the policy was violated because pay allegedly increased while "performance" allegedly decreased. But Plaintiff focuses only on a single measure of performance: the Company's stock price. This ignores the many other aspects of performance explicitly described in the Proxy as considered by the Compensation Committee in reaching its compensation recommendations, including financial performance measures such as "net income and earnings per share" (Proxy at 16)[16]; strategic performance measures such as "strategic investment in core growth practice areas; senior level recruitment; and management's timely and effective response to changes in the competitive landscape" (*id*. at 16-17); and individual performance measures such as each NEO's "individual performance in the area of the company over which he or she has direct responsibility" and "his or her individual contributions to the company's financial and strategic performance for the year in question" (*id*. at 15-16). It also ignores the relationship of the Company's compensation to

[16] Net income and earnings per share each in fact increased from 2009 to 2010. (*See* Navigant Form 10-K for the year ended December 31, 2010 at 18, attached as Exhibit A.)

that of its industry peers. (*See* Def. Mem. at 15-16 & n.14.) Moreover, as Plaintiff acknowledges, part of the assessment was "qualitative," *i.e.*, not tied to numbers at all (Pl. Mem. at 7), yet Plaintiff makes no effort to suggest that the NEOs fell short of such measures.

Moreover, by cherry-picking sections of the Proxy, Plaintiff ignores that the Proxy itself makes clear that the NEOs' compensation in fact *was* negatively impacted by the Company's stock performance: "In aggregate, the committee concluded that the company's financial, strategic and stock price performance warranted cash bonus payments at levels significantly below target." (*Id*. at 17.) Indeed, the Proxy disclosed that the NEOs in the aggregate received cash bonuses that were only 37% of their pre-established target amounts. (*Id*.)

In short, the "policy' the Plaintiff claims was violated is of her own invention, and her tendentious attempt to selectively define "performance" does not correspond to any actual "policy" requirement, much less demonstrate that the directors intentionally sought to harm the Company. In that regard, Plaintiff's argument here is identical to arguments rejected by other courts in recent say-on-pay cases. *See, e.g.*, *Intersil*, 2012 WL 762319, at *6. Notably, in *Intersil*, certain of the company's performance metrics increased from one year to the next (*e.g.*, revenue and operating income), and some declined (*e.g.*, net income and earnings per share)—and the court concluded that no adequate showing had been made of a violation of a "pay-for-performance" policy. (*See also supra* at 9.) The same is true here.

CONCLUSION

For all of the reasons discussed above and in Defendants' Memorandum in Support of Their Motion to Dismiss, this action should be dismissed.

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Respectfully submitted,

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