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Case No. 9425-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GARY LIVINGSTON, derivatively on behalf of CABLEVISION SYSTEMS CORPORATION, Plaintiff, v. CHARLES F. DOLAN, JAMES L. DOLAN, KATHLEEN M. DOLAN, DEBORAH DOLAN-SWEENEY, MARIANNE DOLAN WEBER, THOMAS V. REIFENHEISER, JOHN R. RYAN, and VINCENT TESE, Defendants, -and- CABLEVISION SYSTEMS CORPORATION, a Delaware Corporation, Nominal Defendant.	C.A. No. 9425-VCN

COMPENSATION COMMITTEE DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

CASES

Page(s)

Page(s)

STATUTES

Page(s)

OTHER AUTHORITIES

PRELIMINARY STATEMENT

In his 60-page opposition ("Opposition" or "Opp."), which is long on invective but ignores governing law, Plaintiff confirms that his claims against the members of Cablevision's independent Compensation Committee ("Compensation Committee Defendants") cannot survive a motion to dismiss. For decades, Delaware courts have applied the business judgment rule to cases challenging the approval of executive compensation by independent directors. (*See* cases cited *infra* at 6 to 10.) Because the business judgment rule conclusively requires dismissal of Plaintiff's challenge to the Compensation Committee Defendants' approval of compensation awarded to Charles and James Dolan, he urges this Court to impose a radical new rule for challenges to the compensation of controlling stockholders.

Specifically, Plaintiff asks that this Court apply the more stringent "entire fairness" standard (Opp. at 2) whenever an executive who also is a controlling stockholder receives compensation from the corporation, regardless of whether an independent board committee approved such compensation. This standard would impose upon independent directors who set compensation levels the very high burden of "demonstrat[ing] their utmost good faith and the most scrupulous inherent fairness of the bargain." *Valeant Pharms. Int'l* v. *Jerney*, 921 A.2d 732, 746 (Del. Ch. 2007) (citation omitted). This Court should reject

Plaintiff's request to rewrite Delaware law and dismiss his Complaint with prejudice.

First, Plaintiff cannot cite a single case supporting the application of the entire fairness standard to challenges to executive compensation awarded to controlling stockholders where such compensation was approved by independent board committees. Indeed, Plaintiff recognizes (Opp. at 29) that *In re Tyson Foods, Inc. Consolidated Shareholder Litigation*, 919 A.2d 563, 588 (Del. Ch. 2007), squarely endorsed application of the business judgment rule to stockholder challenges to compensation awarded to controlling stockholders. *Tyson* rightly reflects, as Delaware courts have long held, that board approval of executive compensation is "the essence of business judgment." *Brehm* v. *Eisner*, 746 A.2d 244, 263 (Del. 2000).

If Plaintiff were right, any time a stockholder were to question an independent board committee's approval of executive compensation to a controlling stockholder, that stockholder could file suit secure in the knowledge that he could survive a motion to dismiss under the entire fairness doctrine, and proceed to discovery and possibly trial. Such a rule of law would significantly hamper a company's ability to make effective compensation decisions, and would create the perverse incentive for companies with controlling stockholders to simply dispense with independent review of the compensation awarded to such executives.

Indeed, every case Plaintiff cites in urging application of the entire fairness doctrine has involved rare and company-transforming transactions such as a merger or securities transaction benefitting a controlling stockholder. (Opp. at 27-32.) The application of the entire fairness doctrine in such special cases is warranted only because they present "extraordinary potential for the exploitation by powerful insiders of their informational advantages and their voting clout" in those situations. *In re Cox Commc'ns, Inc. S'Holders Litig.,* 879 A.2d 604, 617 (Del. Ch. 2005). (*See infra* at 10-16.)

Second, the Opposition confirms that, under the business judgment rule, the claims against the Compensation Committee Defendants must be dismissed, because the Complaint does not adequately allege that these Defendants were not independent or otherwise acted in bad faith. The Complaint contains no facts to support Plaintiff's inference that Thomas Reifenheiser is reliant on his directorship income from Cablevision simply because he is now retired. (Compl. ¶ 91; Opp. at 45.) Likewise, Plaintiff's allegation that Vincent Tese is dependent on Charles and James Dolan because his brother is employed by MSG (another Dolan-controlled company) (Opp. at 48) runs straight into Delaware case law holding that such a claim is insufficient to show lack of independence. The longevity of Mr. Reifenheiser's and John Ryan's respective tenures on the Board is also irrelevant to the independence analysis under Delaware law (*see* CCD Br. at

20-21).[1] Finally, the fact that the controlling stockholders appointed the members of the Compensation Committee is simply without significance under Delaware law, where it is "well-settled that a director's appointment at the behest of a controlling shareholder does not suffice to establish a lack of independence." *Tyson*, 919 A.2d at 588. (*See infra* at 16-24.)

Plaintiff's contention that in the event he cannot successfully plead lack of independence he is still not required to plead that the Compensation Committee Defendants acted in bad faith is plainly wrong: the exculpatory clause in Cablevision's certification of incorporation protects the Compensation Committee Defendants from any breach of fiduciary duty claim without a showing of bad faith. *See In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 641 (Del. Ch. 2008). Plaintiff does not plead any indicia of bad faith, such as a *quid pro quo* arrangement or that the Compensation Committee lacked control over the approval of the challenged compensation. In fact, the Complaint pleads that the Committee "reviewed and compared the compensation paid to the CEOs at the Company Peer Group companies" and relied on a compensation consultant in setting James Dolan's compensation. (Compl. ¶ 95.) Although Plaintiff would have chosen a different list of peer companies, he does not allege that Charles and James Dolan's

[1] "CCD Br." refers to the Compensation Committee Defendants' Opening Brief in Support of Their Motion to Dismiss the Complaint, dated June 16, 2014.

compensation was "so beyond the bounds of reasonable judgment that it seems essentially inexplicable on any other grounds [other than a lack of good faith]." *Leung* v. *Schuler*, 2000 WL 1478538, at *6 (Del. Ch. Oct. 2, 2000) (citations omitted). (*See infra* at 24-29.)

Third, Plaintiff cannot meet Delaware's "extreme test" for pleading waste, as he does not contest that the challenged stock options awarded to Charles and James Dolan are worthless if they do not stay with Cablevision, or if the Company's share price does not increase above the grant price of the options. (Opp. at 21-22.) Plaintiff speculates that Charles and James Dolan have no intention of leaving Cablevision, and so these options provide no extra incentive for them to stay at Cablevision or to perform well. But Plaintiff offers no support for this conclusory assertion. (*See infra* at 29-32.)

Accordingly, this Court should dismiss with prejudice the claims against the Compensation Committee Defendants.

ARGUMENT

I. THIS COURT SHOULD REJECT PLAINTIFF'S REQUEST TO IMPOSE A NEW STANDARD FOR REVIEWING AN INDEPENDENT BOARD COMMITTEE'S APPROVAL OF THE EXECUTIVE COMPENSATION OF A CONTROLLING STOCKHOLDER.

Tacitly recognizing that his Complaint cannot survive a motion to dismiss under the business judgment rule, Plaintiff wrongly contends that Delaware law requires application of entire fairness review whenever a controlling stockholder receives executive compensation, even if, as here, an independent board committee approved the challenged compensation. (Opp. at 26-27.)

Entire fairness "is the highest standard of review in corporate law." *Kahn* v. *M & F Worldwide Corp*., 88 A.3d 635, 644 (Del. 2014) ("*MFW*"), and is used sparingly. Delaware courts sometimes apply the entire fairness standard "in the controlled merger context as a substitute for the dual statutory protections of disinterested board and stockholder approval," because, in the unique circumstances of a merger with a controlling stockholder, "both protections are potentially undermined by the influence of the controller." *MFW,* 88 A.3d at 644. But Plaintiff can cite to no authority applying the entire fairness standard to an independent board committee's approval of executive compensation, even if to controlling stockholders—nor to any jurisprudential rationale for doing so.

A. Plaintiff's Position Finds No Support in Delaware Law.

1. Delaware Courts Have Consistently Applied the Business Judgment Rule to Challenges to Executive Compensation.

It is black letter law that an independent board committee's award of executive compensation is subject to the business judgment rule, and not to entire fairness review. *See Brehm*, 746 A.2d at 263 (applying the business judgment rule to challenged executive compensation and noting that a board is inherently empowered to determine if "a particular individual warrant[s] large amounts of money . . . in the form of current salary") (citation and internal quotation marks omitted) (alteration in original); *Nomad Acquisition Corp*. v. *Damon Corp*., 1988 WL 383667, at *6 (Del. Ch. Sept. 20, 1988) ("The actions of the compensation committee, comprised of Damon's independent directors, are *prima facie* subject to the protections of the business judgment rule.") (citations omitted). In fact, in *Valeant*, a case cited by Plaintiff (Opp. at 35), the Court explicitly recognized that to avoid the "high level of judicial scrutiny" of entire fairness review, "an independent compensation committee can be employed to award salaries and bonuses to officers." 921 A.2d at 745-46 (citation omitted). Indeed, Delaware courts have applied the business judgment rule where, as here, the challenged compensation went to a company's controlling stockholder.

In *Tyson*, plaintiffs claimed that the board's award of a consulting contract to the controlling stockholder, a former Tyson executive, should be

reviewed for "entire fairness."[2] (Pls.' Opp. to Defs' Mot. to Dismiss, *Tyson*, 2006 DE Ch. Ct. Motions LEXIS 1111, at *71.) In rejecting this argument, Chancellor Chandler applied the business judgment rule, holding that "[a]s the consulting agreement does not fall outside the bounds of business judgment, Count I can only withstand a motion to dismiss by sufficiently alleging that a majority of those who approved the transaction were dominated by or otherwise conflicted with respect to the recipient." *Tyson*, 919 A.2d at 587-88. The Court found that the complaint failed to "allege that a majority of the entire board lacked independence." *Id.* at 588. "Given that 'a board's decision on executive compensation is entitled to great deference' and that plaintiffs ha[d] failed to rebut the presumption of business judgment," the Court dismissed that portion of the plaintiffs' challenge for "failure to state a claim." *Id.* (citing *Brehm* v. *Eisner*, 746 A.2d 244, 263 (Del. 2000)).

Unable to distinguish *Tyson* on its facts, Plaintiff criticizes Chancellor Chandler's application of the business judgment rule as mere "dictum" that "cites no authority" and "engages in no analysis." (Opp. at 29-30.) This characterization is incorrect. Plaintiff appears to conclude that the relevant portion of *Tyson* is

[2] The consulting contract for the controlling stockholder provided annual payments for ten years and the right to personal perquisites and benefits. *Tyson*, 919 A.2d at 575.

dictum because the Court refused to dismiss *some* of the claims. *Tyson*, 919 A.2d at 589. But Chancellor Chandler squarely addressed the challenge to the board's approval of the consulting contract for the controlling stockholder and dismissed that claim under the business judgment rule. *See id.* at 587-88. And the Chancellor supported his application of the business judgment rule with reference to controlling case law equally applicable here. *See id.* (citing *Aronson* v. *Lewis*, 473 A.2d 805, 812 (Del. 1984); *In re Walt Disney Co. Derivative Litig*., 731 A.2d 342, 356 (Del. Ch. 1998); and *Brehm*, 746 A.2d at 263).

Apart from *Tyson*, there is a line of Delaware cases that has consistently recognized that the business judgment rule applies to challenges to an independent board committee's approval of executive compensation to controlling stockholders. In *Ravenswood Inv. Co., L.P.* v. *Winmill*, 2011 WL 2176478, at *4 (Del. Ch. May 31, 2011), in considering a challenge to executive compensation paid to a controlling stockholder on a Rule 12(b)(6) motion, this Court stated that "where the individuals comprising the board and the company's management are the same, the board bears the burden of proving that the salary and bonuses they pay themselves as officers are entirely fair to the company *unless the board employs an independent compensation committee* or submits the compensation plan to shareholders for approval." (emphasis added) (citing *Valeant*, 921 A.2d at 745-46); *see also Julian* v. *E. States Constr. Serv., Inc.*, 2008 WL 2673300, at *18

(Del. Ch. July 8, 2008) ("Self-interested directorial compensation decisions *made without independent protections* . . . are subject to entire fairness review.") (emphasis added) (citation omitted).

In fact, Plaintiff recognizes that in *Zutrau* v. *Jansing* and *Seinfeld* v. *Slager*, the Court applied entire fairness only where the challenged compensation was *self-awarded* (*see* Opp. at 34-35), not where an independent committee determined the compensation awards. *Zutrau*, 2014 WL 3772859, at *22 (Del. Ch. July 31, 2014) ("[S]elf-interested compensation decisions *made without independent protections* are subject to the same entire fairness review as any other interested transaction.") (emphasis added) (citation omitted); *Seinfeld*, 2012 WL 2501105, at *12 (Del. Ch. June 29, 2012) (Defendant directors were "interested in the decision to award themselves a substantial bonus.").

2. None of Plaintiff's Cited Cases Supports Imposition of the Entire Fairness Standard Here.

Without any supporting authority in the executive compensation context, Plaintiff weakly points to a series of cases involving mergers or securities transactions benefitting a controlling stockholder, beginning with *Kahn* v. *Lynch Communication Systems., Inc.*, 638 A.2d 1110 (Del. 1994). (Opp. at 27-32.) But these cases have no application here.

First, nothing about *Lynch*'s reasoning extends to executive compensation. In *Cox*, the Court of Chancery recognized that *Lynch* was

"premised on a sincere concern that mergers with controlling stockholders"—which are obviously unique and company-transforming events—"involve an extraordinary potential for the exploitation by powerful insiders of their informational advantages and their voting clout." 879 A.2d at 617. There is no such "extraordinary potential for exploitation" or "informational advantages" when an independent compensation committee approves executive compensation for controlling stockholders, especially, as here, when all relevant information indisputably is disclosed to all stockholders (CCD Br. at 9-16) and later subjected to a full stockholder advisory vote (*id.* at 16-17).

Second, the Delaware Supreme Court has recognized that "an interested merger transaction . . . by its very nature, [does] not require a business purpose," and therefore it would be inconsistent to apply the business judgment rule in the interested merger context. *Lynch*, 638 A.2d at 1116.[3]

[3] Indeed, Delaware law specifically recognizes the unique nature of mergers by requiring that they be approved by the board of directors *and* the stockholders of each merging corporation. *See* 8 *Del. C.* § 251(b)-(c). Plaintiff's reliance on *MFW* for the proposition that compensation of controlling stockholders requires a binding stockholders vote to remove that compensation from entire fairness review (Opp. at 38-39) is misplaced, because *MFW* was a merger case and thus, under 8 *Del. C.* § 251(b)-(c), the merger required approval of an independent board committee *and* a vote of the stockholders. 88 A.3d at 644. These dual protections are not required for the award of executive compensation, which normally must be approved only by independent directors. *See, e.g.*, *Gagliardi* v. *TriFoods Int'l, Inc.*, 683 A.2d 1049, 1051 (Del. Ch. 1996).

By contrast, the Delaware Supreme Court has held that "[i]t is the essence of business judgment for a board to determine if a particular individual warrant[s] large amounts of money, whether in the form of current salary or severance provisions." *Brehm*, 746 A.2d at 263 (citation and internal quotation marks omitted) (alteration in original). Whereas courts routinely evaluate the fairness of the price involved in a merger and acquisition transaction by looking at factors like "assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock," *Weinberger* v. *UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983), Delaware courts have consistently held that they are not equipped to evaluate the fairness of an independent board's approval of executive compensation, *see, e.g.*, *In re INFOUSA, Inc. S'Holders Litig.*, 953 A.2d 963, 983 (Del. Ch. 2007) ("The acumen of the business executive, the competitive environment in the industry, and the recruitment and retention challenges faced by the hiring corporation all bear heavily on an appropriate level of compensation. 'How much is too much?' is a question far better suited to the boardroom than the courtroom."); *Brehm*, 746 A.2d at 263 ("[T]he size and structure of executive compensation are inherently matters of judgment.").

Third, when a controlling stockholder's executive compensation is determined by an independent committee, the controlling stockholder is not

exercising its powers to effect a self-interested transaction. *See, e.g.*, *Odyssey Partners, L.P.* v. *Fleming Cos., Inc.*, 735 A.2d 386, 412-13 (Del. Ch. 1999) (finding that entire fairness review is warranted only when "the controlling stockholder *has actually used* its power over the corporation to impair the normal and primary protection the law affords the corporation and its stockholders; the judgment of its independent board of directors" and when "a self-interested corporate fiduciary *has set the terms of a transaction and caused its effectuation*") (emphases added; internal citations and quotation marks omitted). Here, moreover, Plaintiff does not allege any facts showing that Charles and James Dolan used their powers in any way as controlling stockholders to direct the payment of challenged compensation to themselves. Plaintiff merely alleges that "the Compensation Committee allowed James to '*assist* the Compensation Committee and its compensation consultant in determining the Company's core peer group and the peer group comparisons.'" (Compl. ¶ 95, emphasis added.)[4] As for Charles

[4] In *Tyson*, the Court explicitly held that the fact that a compensation committee consults corporate officers—one of whom, in that case, was the son of the controlling stockholder—was irrelevant in determining whether the members of the compensation committee had breached their fiduciary duties. 919 A.2d at 591 ("That the Committee was required to consult with other corporate officers is irrelevant: the committee admittedly retained independent authority and discretion to approve or modify whatever it received as a recommendation."). (*See also* CCD Br. at 28.)

Dolan, Plaintiff does not allege any participation on his part in the compensation approval process.

The use of a controlling stockholder's power, by contrast, is central in mergers between corporations and their controlling stockholders or securities transactions benefitting a controlling stockholder, as illustrated by the cases cited by Plaintiff.[5]

Fourth, the financial and structural impact on a company and its minority stockholders of payment of executive compensation to controlling stockholders is small compared to the potential consequences of an irrevocable merger and acquisition transaction with a controlling stockholder that could extinguish the rights of minority stockholders in the corporation. *See Brehm*, 746 A.2d at 259, n.49 ("[E]xecutive compensation makes up such a small percentage of

[5] The cases cited by Plaintiff include a stockholder who controls three different companies causing the first company to buy from the second company shares in the third company, *Kahn* v. *Tremont Corp*., 694 A.2d 422 (Del. 1997); a controlling company entering into a cash-out merger transaction with a controlled company, *Lynch*, 638 A.2d 1110; *Weinberger*, 457 A.2d 701; and a controlling company, through a subsidiary company, causing a controlled company to acquire its interest in a third company, *Americas Mining Corp*. v. *Theriault*, 51 A.3d 1213 (Del. 2012). In *T. Rowe Price Recovery Fund, L.P.* v. *Rubin*, 770 A.2d 536 (Del. Ch. 2000), the controlling stockholder was actively involved in a proposed transaction and clearly exerted his control as controlling stockholder, as he actively attempted to negotiate a merger between two competing furniture stores that he controlled, and, when this attempt failed, the controlling stockholder pushed through management and shared services agreements between the two companies.

a firm's assets that even excessive pay packages will likely not cause a blip in a firm's stock value.") (internal citation omitted).[6]

B. This Court Should Reject the Application of the Entire Fairness Rule Here as Fundamentally at Odds with Good Corporate Governance.

In addition to lacking any supporting case law or legitimate legal rationale, Plaintiff's proposal to apply the entire fairness test here would create an untenable corporate governance problem. Delaware courts examining stockholder derivative claims consider the practical implications of their rules.[7] Given that a defendant generally cannot show entire fairness on a motion to dismiss, *see Cox*,

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[6] Here, Plaintiff challenges aspects of the total compensation packages for 2010 through 2012 for James Dolan ($41.18 million) and Charles Dolan ($40.27 million). (Compl. ¶ 6.) Even if the entirety of these compensation packages were being challenged—which they are not—they would represent approximately .42% of Cablevision's reported overall annual revenue of roughly $19,583,884,000 for the same three-year period. (Ex. 10 of the Affidavit of Susan M. Hannigan, Esq. in Further Support of the Compensation Committee Defendants' Motion to Dismiss, dated October 21, 2014 (Cablevision, Annual Report (Form 10-K) (filed Feb. 28, 2013)), at 36.)

[7] *See, e.g.*, *Brehm*, 746 A.2d at 267 ("Delaware has pleading rules and an extensive judicial gloss on those rules that must be met in order for a stockholder to pursue the derivative remedy. Sound policy supports these rules, as we have noted."); *Gagliardi*, 683 A.2d at 1054 ("Under the general notice pleading rules this conclusory addition to allegations that otherwise clearly fall within the ambit of the business judgment rule might perhaps be regarded as sufficient to proceed to discovery. But it is not clear that, where derivative claims are involved, good policy supports the same result.") (citation omitted); *Gotham Partners, L.P.* v. *Hallwood Realty Partners, L.P.*, 2000 WL 1597909, at *10 (Del. Ch. Oct. 20, 2000).

879 A.2d at 605, Plaintiff's proposed new rule would subject *every single* approval of executive compensation to a controlling stockholder to discovery and, potentially, trial. This would make the smooth functioning of corporate management untenable. Eliminating the protection of the business judgment rule to the approval of executive compensation to controlling stockholders would also eliminate the incentive of companies like Cablevision from implementing appropriate independent protections when awarding such compensation, thereby undermining the established Delaware law encouraging the use of such committees to address conflicts involving controlling stockholders. (*See supra* at 7-10.)

II. THE COMPLAINT CANNOT SURVIVE UNDER THE BUSINESS JUDGMENT RULE.[8]

A. Plaintiff Wrongly Seeks to Evade His Burden of Pleading Facts Demonstrating That the Compensation Committee Defendants Are Not Independent.

Delaware law is clear that "[t]o state a derivative claim for excessive compensation, a shareholder must either plead facts from which it may reasonably

[8] Plaintiff contends that the Compensation Committee Defendants have introduced in their motion to dismiss contested issues of fact (Opp. at 41-45). To the contrary, the motion to dismiss properly quotes passages from the very documents on which the Complaint clearly relies (*e.g.*, CCD Br. at 7-9). Moreover, some of the facts Plaintiff now claims are contested—such as the Compensation Committee's use of an executive compensation consultant and that the core peer group consisted of companies "in the same general industry or industries as the Company as well as companies of similar size and business"—come straight from the Complaint. (Compl. ¶¶ 56, 95). In any event, none of the arguments in the motion to dismiss turns on any of those facts.

be inferred that the board or the relevant committee that awarded the compensation lacked independence (*e.g.*, was dominated or controlled by the individual receiving the compensation) . . . or plead facts from which it may reasonably be inferred that the board, while independent, nevertheless lacked good faith." *Gagliardi*, 683 A.2d at 1051 (ruling on a 12(b)(6) motion); (*see also* CCD Br. at 26-27). It is only *after* a plaintiff has met either of these pleading burdens that the burden may shift to the defendants. *See id.* This rule applies equally even when a controlling stockholder is the recipient of the compensation. *See Tyson*, 919 A.2d at 587-88; *see also Loveman* v. *Lauder*, 484 F. Supp. 2d 259, 269 (S.D.N.Y. 2007) (applying Delaware law) ("[A]s *Aronson* makes clear, the fact that a director approves a transaction that benefits a controlling shareholder is not sufficient [to sufficiently allege lack of independence]. Rather, the plaintiff must allege specific facts showing that the director failed to bring 'his or her own informed business judgment to bear with specificity upon the corporate merits of the issues without regard for or succumbing to influences which convert an otherwise valid business decision into a faithless act.'") (citation omitted).

To avoid his burden to show that the Compensation Committee members lacked independence or acted in bad faith, Plaintiff first maintains that *Tyson* is inapplicable because Plaintiff believes *Tyson* was decided under the heightened pleading standard of Court of Chancery Rule 23.1. (Opp. at 47.)

Plaintiff is incorrect—he is misreading *Tyson*, which was decided under Rule 12(b)(6) and imposed this same pleading burden on the plaintiffs as other executive compensation cases. *Tyson*, 919 A.2d at 584 ("[P]laintiffs raise a reason to doubt the disinterestedness and independence of the board, justifying excusal of demand with regard to the entire consolidated complaint."); *see also Gagliardi*, 683 A.2d at 1051 ("Count I fails to state a claim upon which relief may be granted.").

The cases Plaintiff cites in an attempt to shift onto Defendants his burden to show that the Compensation Committee members lacked independence are plainly inapposite. For example, *In re New Valley Corp.* involved the application of the entire fairness standard in the context of a stock sale by the controlling stockholder to the corporation. 2001 WL 50212, at *1-3, *7 (Del. Ch. Jan. 11, 2011). *Krasner* v. *Moffett* concerned a merger transaction where an independent committee had recommended a transaction that was then put to a vote of the full board. 826 A.2d 277, 280 (Del. 2003). The Supreme Court held that the plaintiff had pleaded sufficient facts to show that the majority of the board was interested in the merger transaction at hand, and so the business judgment rule did

not apply. *Id.* at 284.[9] And *London* v. *Tyrrell*, 2010 WL 877528 (Del. Ch. Mar. 11, 2010), involved challenges to the independence of a special litigation committee, which is subject to a unique heightened standard. *See, e.g.*, *Beam* v. *Stewart*, 845 A.2d 1040, 1055 (Del. 2004) (a special litigation committee must show "its own independence").

B. The Opposition Confirms That Plaintiff Has Not Pled Particularized Facts Showing a Lack of Independence.

Plaintiff simply lumps together a hodgepodge of disparate facts in the hope that, taken together, they "create even further doubt about [the Committee's] effectiveness." (Opp. at 48.) As shown in Defendants' opening brief, none of Plaintiff's allegations—taken separately or together—meets his burden of pleading facts showing that the Compensation Committee Defendants lacked independence. (CCD Br. at 18-25.)

First, Plaintiff does not deny that the allegations regarding Messrs. Reifenheiser and Ryan—that they have served on the Cablevision Board for 12 years (Compl. ¶ 91), that Mr. Reifenheiser is 77 years old, and that

[9] If anything, *Krasner* undermines Plaintiff's arguments. Here, there is no allegation that the compensation levels for Charles and James Dolan were put to a vote of the full Cablevision board. Rather, Cablevision's independent Compensation Committee was tasked with determining their compensation. The *Krasner* Court made clear that the business judgment rule is rebutted when an *interested* majority of the board is the "ultimate decisionmaker"; only then is "the entire fairness rule . . . implicated and defendants bear the burden of proof." *Id.* at 287.

Mr. Reifenheiser is retired (*id.*)—are wholly insufficient under clear Delaware law to show lack of independence. (*See* CCD Br. at 20-23.)

Second, Plaintiff cannot meet his burden of showing Mr. Tese's lack of independence by alleging that Mr. Tese's brother works for MSG, another public company controlled by the Dolans. (CCD Br. at 23-24.) In trying to distinguish *In re J.P. Morgan Chase & Co. Shareholder Litigation*, 906 A.2d 808, 823 (Del. Ch. 2005), which rejected challenges to the independence of one of JPMorgan's directors because his son was employed by the bank, Plaintiff makes two meritless critiques. (Opp. at 48 n.10.) First, it was irrelevant to the analysis that *J.P. Morgan* was decided on a Rule 23.1 motion. The difference between a Rule 23.1 motion and a Rule 12(b)(6) motion is simply "in the level of detail demanded of the plaintiffs' allegations," *Tyson*, 919 A.2d at 582, which is not at issue here. Second, whether or not JPMorgan had a controlling stockholder was also irrelevant to the analysis—the question was whether the fact that the son's career could be harmed by company management compromised the director's independence as to decisions about such management. The Court held that it did not. *J.P. Morgan*, 906 A.2d at 823.

Plaintiff's reliance on *In re China Agritech, Inc. Shareholder Derivative Litigation* is also misplaced. In *China Agritech*, the Court found that certain directors could not validly consider a litigation demand, because they

"face[d] a substantial risk of liability for knowingly disregarding their duty of oversight." 2013 WL 2181514, at *20 (Del. Ch. May 21, 2013). On top of that, one of the directors had a serious conflict of interest insofar as his daughter served as head of the internal audit department, and, as such, "[any] meaningful investigation" regarding the subject matter of the lawsuit "would necessitate an investigation into [the director's] daughter." *Id.* Moreover, any decision that the director made tending to place the company's controlling stockholders at risk would also put his daughter's employment at risk. *Id.* None of those issues are present here.

Third, even if Plaintiff were permitted to amend his Complaint through his Opposition by contending that compensation from Cablevision is the "primary source of income" for Messrs. Reifenheiser and Tese (Opp. at 45), he provides no support for this statement, other than to say (without citation) that Messrs. Tese and Ryan have worked for nonprofit institutions, and "it is therefore reasonable to infer that they earned substantially less than what Cablevision paid them." (Opp. at 46.) But this conclusory assertion says nothing about whether Messrs. Reifenheiser and Tese have independent sources of wealth and, thus, are not reliant on any outside income. Plaintiff's brief even ignores, for example, his own allegation that Mr. Tese previously rose high in the ranks of Wall Street when he served on the board of Bear Stearns (Compl. ¶ 90), as well as the documents on

which Plaintiff relies showing that Messrs. Reifenheiser and Tese have had distinguished careers outside of Cablevision (*see* CCD Br. at 7-9). Moreover, Delaware courts have held that the fact that a director may not have significant outside compensation is not a basis for doubting independence. (*See* CCD Br. at 23.)

Fourth, Plaintiff contends that the Compensation Committee Defendants generally lack independence, because Cablevision's Class A stockholders withheld their votes for their re-nomination to Cablevision's Board, and the only reason they serve on the Board is because the Dolans, as majority stockholders, nominated and voted for them. (Opp. at 48.) But *Aronson* squarely rejected this same argument, stressing that "the usual way a person becomes a corporate director" is through the controlling stockholder, and "[i]t is the care, attention and sense of individual responsibility to the performance of one's duties, not the method of election, that generally touches on independence." 473 A.2d at 816;[10] *see also* (CCD Br. at 25); *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 38 (Del. Ch. 2013) ("The duty to act for the ultimate benefit of stockholders does not

[10] Plaintiff accuses the Defendants of omitting the "key point" of the *Aronson* quotation, which is that the Court must determine whether the directors are independent or controlled. (Opp. at 49.) But that begs the question here of whether Plaintiff has alleged sufficient facts to show a lack of independence, and *Aronson* clearly holds that simply being appointed to a board by a majority stockholder does not render a director not independent.

require that directors fulfill the wishes of a particular subset of the stockholder base."); *Paramount Commc'ns Inc.* v. *Time Inc.*, 1989 WL 79880, at *30 (Del. Ch. July 14, 1989) ("The corporation law does not operate on the theory that directors, in exercising their powers to manage the firm, are obligated to follow the wishes of a majority of shares. In fact, directors, not shareholders, are charged with the duty to manage the firm.").

Indeed, Plaintiff's reasoning with respect to the stockholder withhold votes is completely circular: he asserts that the Class A stockholders withheld their votes for the Compensation Committee members because they had grounds to believe the Committee members are not independent, and then relies solely on the vote itself as evidence that the Committee members are not independent.

Moreover, even the Complaint recognizes that in 2013, *after* the Compensation Committee had awarded the allegedly unfair compensation, two of the three Compensation Committee members (Ryan and Reifenheiser) received *majority* support from Cablevision's *Class A* stockholders. (Compl. ¶ 92.) And, Plaintiff does not contest that a majority of these same Class A stockholders, in

two "Say-on-Pay" votes, approved much of the very compensation that Plaintiff now challenges. (*See* CCD Br. at 16-17.)[11]

Accordingly, the Complaint fails to allege any facts, taken separately or together, meeting Plaintiff's burden of pleading that any of the Compensation Committee Defendants, let alone a majority of them, lacked independence in approving the challenged compensation to Charles and James Dolan.

C. Plaintiff Has Not Pled Bad Faith.

In a footnote, Plaintiff effectively concedes that, in light of the exculpatory clause in Cablevision's certificate of incorporation (CCD Br. at 27), if he cannot show that the Compensation Committee Defendants lacked independence, he must show bad faith in order to state a claim for the breach of

[11] Even if Plaintiff's allegations that Cablevision's Class A stockholders "withheld" their votes for the Compensation Committee members in 2010 and 2012 were relevant to this motion, those allegations do not support his claims. First, the 2010 Class A stockholder vote noted by Plaintiff came *before* any challenged compensation awards. (Compl. ¶ 92.) Second, Plaintiff is conspicuously silent about the 2011 Class A stockholder votes for the Compensation Committee members (which followed the challenged 2010 compensation awards). (Compl. ¶ 92.) Each of the Compensation Committee members received a substantial majority of "for" votes in 2011. (Ex. 5 of the Affidavit of Susan M. Hannigan in Support of the Compensation Committee Defendants' Motion to Dismiss, dated June 16, 2014 (Cablevision, Current Report (Form 8-K) (filed May 26, 2011)), at 2.) Thus, given three chances (in 2011, 2012 and 2013) to vote to withhold their votes for the Compensation Committee members following the challenged compensation awards, only once, in 2012, did the Class A Stockholders elect to "withhold" their votes for all of the Committee members. (Compl. ¶ 92.)

their duty of loyalty. (Opp. at 37 n.8.) The case cited by Plaintiff, *In re Limited., Inc.*, 2002 WL 537692, at *7 (Del. Ch. Mar. 27, 2002), is consistent with this standard, by applying the entire fairness standard only *after* determining that "challenged transactions were not approved by a majority of independent and disinterested directors." *Id.* Plaintiff cites *Limited* for the proposition that "to the extent that a duty of loyalty claim is implicated [an exculpatory provision] is inapplicable." (Opp. at 37 n.8 (citing 2002 WL 537692, at *7, *10 n.65).) But, in in *Limited*, the Court was simply saying that *if* a plaintiff has adequately pled a breach of loyalty claim, which Plaintiff has not done here, then the directors cannot rely on the exculpatory clause in moving to dismiss. *See also Malpiede* v. *Townson*, 780 A.2d 1075, 1094 (Del. 2001) ("A plaintiff must allege well-pleaded facts stating a claim on which relief may be granted. Had plaintiff alleged such well-pleaded facts supporting a breach of loyalty or bad faith claim, the [exculpatory clause] would have been unavailing as to such claims, and this case would have gone forward.").

Here, the Complaint contains no well-pleaded allegations of bad faith. Plaintiff does not allege any *quid pro quo* or other indicia that the Compensation Committee awarded the challenged compensation in bad faith. (CCD Br. at. 27-28.) Instead, Plaintiff points to the Compensation Committee's process and the challenged compensation awards themselves to infer that the committee was

"comporting with the wishes of the Dolans not the Company's public stockholders." (Opp. at 50 (citation and brackets omitted).) This reasoning fails for several reasons.

First, in complaining that James Dolan was permitted to "assist" the Compensation Committee in determining the peer group for comparison to Cablevision (Compl. ¶ 95; Opp. at 51-52), Plaintiff never contends that the Compensation Committee lacked ultimate control over which peer companies to use in evaluating the challenged compensation. (CCD Br. at 28-29.) Chancellor Chandler rejected a similar allegation in *Tyson*. 919 A.2d at 591 (irrelevant that the independent committee consulted with other corporate officers because "the committee admittedly retained independent authority and discretion to approve or modify whatever it received as a recommendation").[12]

[12] Plaintiff tries to distinguish the Compensation Committee Defendants' citation to *In re Goldman Sachs Group, Inc. Shareholder Litigation*, 2011 WL 4826104 (Del. Ch. Oct. 12, 2011), on the grounds that in *Goldman*, the compensation committee sought different types of information from senior management than those sought from James Dolan at Cablevision, and that Goldman Sachs Group, Inc. is not a controlled company. (Opp. at 51-52 n.11.) But Plaintiff misses the point. As here, the Goldman Sachs compensation committee worked with senior management to understand metrics relevant to the compensation, including an alleged "proper ratio" of compensation to net revenues. And, like in *Goldman*, at Cablevision, the very people providing that information stood to benefit from the compensation. (*See* CCD Br. at 28-29.)

Likewise, that Plaintiff would have chosen a different list of peer companies, and believes that Charles and James Dolan should have received less compensation based on that different list, cannot give rise to an inference that the Compensation Committee Defendants acted in bad faith. (CCD Br. at 29-30.) Indeed, Plaintiff wholly ignores Vice Chancellor Glasscock's opinion in *Seinfeld*, 2012 WL 2501105 at *14, in which he rejected claims based on a plaintiff's disagreement with the list of peer companies analyzed by the board to set certain compensation levels. (CCD Br. at 30.) And in any event, there is substantial overlap between the peer companies selected by the Compensation Committee and those that the Plaintiff would have used.[13] (Compl. ¶ 60.)

Second, the Complaint does not allege how the actual amount of compensation awarded to Charles and James Dolan "is so beyond the bounds of reasonable judgment that it seems essentially inexplicable on any other grounds [other than a lack of good faith]." *Leung*, 2000 WL 1478538, at *6 (footnote and internal quotation marks omitted). Plaintiff's conclusory statements that the compensation awards show that the Committee members "certainly have aimed to please," and that Committee members have "never said 'no'" (Opp. at 49), are pure

[13] Both lists include the following comparison companies: CenturyLink, DISH Network, Frontier Communications, Level 3 Communications, Scripps Network, and Charter Communications.

speculation premised on Plaintiff's disagreement with the challenged compensation. *See Aronson*, 473 A.2d at 815 ("Plaintiff also alleges that mere approval of the employment agreement illustrates Fink's domination and control of the board. . . . Such contentions do not support any claim under Delaware law that these directors lack independence.").

The Complaint also acknowledges that Charles and James Dolan devote time to their functions at Cablevision. (Compl. ¶¶ 12-13). Thus, any allegation that James and Charles Dolan did not work *enough* to justify the compensation they received (*id*. ¶¶ 52, 68-71) must fail on its face because Delaware courts have consistently refused to evaluate the adequacy of the consideration provided in exchange for executive compensation. *Brehm*, 746 A.2d at 263 ("Courts are ill-fitted to attempt to weigh the 'adequacy' of consideration under the waste standard.").

Third, in challenging James Dolan's severance package, the Complaint contains no allegations supporting an inference that approving a severance package to the CEO of a company rises to the level of bad faith: many business reasons can justify the approval of a severance package to the CEO in the context of a voluntary resignation—for example, to ensure that he "cooperate[s] in succession planning." *Zucker* v. *Andreessen*, 2012 WL 2366448, at *9 (Del. Ch. June 21, 2012).

Fourth, that certain stockholder services groups disagreed with the amount of the compensation shows only that different people can have different opinions about executive compensation, not that the Compensation Committee Defendants acted in bad faith. (CCD Br. at 30-31); *see also Lear*, 967 A.2d at 651, 655-56 ("[T]he incentives of a firm like ISS also give it reason to play coy. . . . the notion that directors might face a loyalty claim for failing to secure the approval of a proxy advisory firm, such as ISS, before adopting a merger agreement is not one consistent with the tradition of our law. Such firms have no ownership stake in the corporation's shares and owe no duties to it.").

Finally, it is worth noting that Plaintiff cannot deny that a majority of the Cablevision Class A Stockholders elected in two "Say-on-Pay" votes to endorse much of the challenged compensation here. (CCD Br. at 31.) Accordingly, Plaintiff cannot meet his burden of pleading bad faith by showing that "no person could possibly authorize such a transaction if he or she were attempting in *good faith* to meet their duty." *Tyson*, 919 A.2d at 589 (footnotes omitted).

III. THE COMPLAINT CANNOT OVERCOME DELAWARE'S STRINGENT STANDARD FOR PLEADING WASTE.

Plaintiff does not question the rule that demonstrating waste "is an extreme test, very rarely satisfied by a stockholder plaintiff, because if under the circumstances any reasonable person might conclude that the deal made sense,

then the judicial inquiry ends." *Zupnick* v. *Goizueta*, 698 A.2d 384, 387 (Del. Ch. 1997) (citation and internal quotation marks omitted). And Plaintiff has not pled facts tending in any way to show that "no business person of ordinary, sound judgment could conclude that [Cablevision] has received adequate consideration" for the stock grants. *Leung*, 2000 WL 1478538, at *4.

Instead, Plaintiff makes the utterly speculative allegation that "[n]either James nor Charles plan to ever leave Cablevision," as they "have represented that they have consolidated their control over the Company in order potentially to take it private." (Opp. at 56.) But even if that were true—and the Complaint itself notes that James Dolan has considered leaving Cablevision for other opportunities (Compl. ¶70)—there is nothing requiring the Dolans to remain as executives at Cablevision if they attempt to take Cablevision private.[14] Plaintiff does not dispute that all Cablevision employees above a certain pay grade, not just Charles and James Dolan, received the challenged stock grants, and that such options will have no value to them unless they remain at Cablevision and lead it to a higher share price. (CCD Br. at 13-15.)

[14] That the stock option grants were "special" and awarded to all Cablevision executives in acknowledgment of the fact that a prior executive compensation plan had not come to fruition because of Cablevision's heavy capital investments (Opp. at 51) does not change the fact that the terms of the options provided a clear incentive for those executives, including Charles and James Dolan, to remain at Cablevision and to improve the Company's share price.

In re National Auto Credit, Inc. Shareholders Litigation, 2003 WL 139768 (Del. Ch. Jan. 10, 2003), cited by Plaintiff, is not "analogous" to this case. (Opp. at 58.) Among other things, the board in *National Auto* approved "a large sum of money" to be paid to the CEO "to be the head of what essentially is a passive corporation," *i.e.*, "essentially to sit idle." 2003 WL 139768, at *14. This compensation was allegedly approved during a single board meeting during which a series of interlocking transactions were approved by the board. *Id.* at *1. These interlocking transactions benefitted various directors and were "each allegedly approved as a *quid pro quo*." *Id.* On these "exceptional facts," the Court of Chancery concluded that the plaintiffs had stated a claim for corporate waste. *Id.* at *14. Here, there is no allegation of any *quid pro quo*, and certainly no allegation that Cablevision is a passive company or that Charles and James Dolan are idle.

Plaintiff's citation of *In re Citigroup Inc. Shareholder Derivative Litigation* (Opp. at 59) is similarly off point. The departure package in *Citigroup* provided the departing CEO with $68 million, an office, an administrative assistant and a car and driver for five years or until he found a new job. 964 A.2d 106, 138 (Del. Ch. 2009). In exchange, the departing Citigroup CEO would sign non-compete, non-disparagement, and non-solicitation agreements. *Id.* But, even on these facts, the Court's decision to sustain the waste claim turned not on the amount of the compensation paid to the departing executive, but on the fact the

Court lacked sufficient information "regarding (1) how much additional compensation Prince actually received as a result of the letter agreement and (2) the real value, if any, of the various promises given by Prince." *Id.* Accordingly, the Court could not determine whether "the letter agreement awarded compensation that is beyond the 'outer limit' described by the Delaware Supreme Court." *Id.*

Here, by contrast, the terms of the stock option compensation to Charles and James Dolan are not challenged as vague, and there is no doubt that the Dolans will not realize any benefit if the company's stock price does not increase or if they leave Cablevision before it does. Indeed, although the challenged compensation for the Citigroup CEO was in relation to his departure from the company, the challenged compensation for Charles and James Dolan was to not only incentivize them to stay with Cablevision but to work more effectively for the company. (CCD Br. at 31-33, 35-36.)

CONCLUSION

For the foregoing reasons, the Court should dismiss Counts III and IV with prejudice.

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