

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

NECA-IBEW PENSION FUND (THE)	No. 1:11-cv-00451-MRB-JGW
DECATUR PLAN), Derivatively on Behalf of)	
CINCINNATI BELL INC.)	
)	
Plaintiff,)	
)	
vs.)	
)	
PHILLIP R. COX, et al.,)	
)	
Defendants,)	
)	
- and -)	
)	
CINCINNATI BELL INC., an Ohio)	
corporation,)	
)	
Nominal Party.)	
)	

PLAINTIFF’S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Plaintiff NECA-IBEW Pension Fund (The Decatur Plan) (“plaintiff”) respectfully submits this reply in support of its Motion for Preliminary Injunction Freezing the 2010 Executive Pay Increases (“Motion,” Dkt. No. 8) and in response to the Memorandum in Opposition to Plaintiff’s Motion for Preliminary Injunction (“Defs’ Opp.,” Dkt. No. 22) submitted by defendants Phillip R. Cox, Bruce L. Byrnes, Jakki L. Haussler, Craig F. Maier, Alex Shumate, Lynn A. Wentworth, John M. Zrno, John F. Cassidy, Gary J. Wojtaszek and Christopher J. Wilson (“defendants”).

I. INTRODUCTION

Contrary to defendants’ illusory claim, the relief sought by plaintiff is clear: an order by the Court (1) placing a freeze upon the excessive 2010 executive compensation given to defendants Cassidy, Wojtaszek and Wilson for the duration of this litigation; and (2) placing the amount of increased compensation into a constructive, interest-bearing trust.¹ Plaintiff, on behalf of Cincinnati Bell in this derivative action, has demonstrated why this immediate equitable relief is necessary to avoid the extremely difficult, if not impossible, task of recovering these assets should the executives act to hide and/or dissipate the excessive compensation they received in violation of the law. Using the publicly-available and uncontroverted facts alleged in its Complaint, plaintiff has met its burden by showing that there is a substantial likelihood that the action will succeed on the merits and that the balance of hardships strongly favors granting injunctive relief. Defendants’ Opposition fails to appreciate the fact that defendants Cassidy, Wojtaszek and Wilson inappropriately received increases in their compensation in 2010 in violation of the Cincinnati Bell Board of Directors’ fiduciary duties, that they retain complete control over the increased compensation in dispute in this

¹ Defendants’ argument that plaintiff “does not provide ‘explicit notice’ of what conduct Plaintiff seeks to enjoin” is misguided. Defs’ Opp. at 26. The Motion provides sufficient specificity to provide defendants with notice of the injunctive relief plaintiff seeks for the duration of this litigation.

matter, and that there is no mechanism in place to prevent them from making that compensation unrecoverable in the likely event that plaintiff's claims succeed. For these reasons, plaintiff's Motion for Preliminary Injunction should be granted.

II. ARGUMENT

A. The Facts Alleged in the Complaint are Undisputed and Provide Clear Evidence Warranting a Preliminary Injunction

Defendants argue that "plaintiff must establish its entitlement to a preliminary injunction by clear and convincing evidence," but fail to dispute any of the facts alleged in the Complaint as the basis for the preliminary injunction. Defs' Opp. at 11. Indeed, these facts are publicly available and defendants cannot dispute them. First, the Cincinnati Bell Board (and its Compensation Committee) awarded defendants Cassidy, Wojtaszek and Wilson increases in their executive compensation in 2010. ¶¶ 2, 30²; Defs' Opp. at 8-9. Second, Cincinnati Bell held a say-on-pay vote in which 66% of voting shareholders voted against the 2010 executive compensation. ¶¶ 2, 35; SEC Report on Form 8-K, dated May 9, 2011, attached as Ex. D to Defs' Opp. Finally, defendants Cassidy, Wojtaszek and Wilson continue to retain their 2010 executive compensation, and the Cincinnati Bell Board has not rescinded (nor does it intend to) that compensation. ¶¶ 5, 38. Defendants do not make any claim to the contrary.

Although defendants may disagree with the legal significance of these facts, *i.e.*, that defendants breached their fiduciary duties of loyalty in awarding excessive and unwarranted executive compensation, their contrary position is not dispositive of the instant motion. For the Court to order this preliminary injunction, plaintiff is not required to prove its case in full. *Six Clinics Holding Corp., II v. Cafcomp Sys.*, 119 F.3d 393, 400 (6th Cir. 1997). What is dispositive is

² References to "¶" or "¶¶" herein are to plaintiff's Verified Shareholder Derivative Complaint filed July 5, 2011.

that defendants Cassidy, Wojtaszek and Wilson maintain control over the compensation in dispute, and thus, have the ability to prevent Cincinnati Bell from recovering that compensation at the close of this litigation. Upon these facts, plaintiff has demonstrated in its Motion that a preliminary injunction is warranted in this matter.

To the extent the Court believes that more evidence is required to meet plaintiff's burden, plaintiff respectfully requests leave to file a motion for expedited discovery pursuant to Federal Rule of Civil Procedure 26(d). Under Rule 26(d), courts apply a good cause standard that is "often found when there is a request for a preliminary injunction." *Russell v. Lumpkin*, No. 2:10-cv-00314, 2010 WL 1882139, at *2 (S.D. Ohio May 11, 2010); *Hydropartners, LLC v. Ecoenergy Energy Generation, Ltd.*, No. 1:08-CV-819, 2008 WL 1775411, at *2 (N.D. Ohio Apr. 16, 2008) ("such limited discovery in advance of [a preliminary] injunction hearing is supported by applicable law"); *Hausser Taylor LLC v. RSM McGladrey, Inc.*, No. 1:07-CV-2832, 2007 WL 2778659, at *3 (N.D. Ohio Sept. 21, 2007) (permitting expedited discovery to "allow Plaintiff the opportunity to present evidence warranting a preliminary injunction"). Accordingly, allowing plaintiff to propound limited and narrowly tailored discovery concerning Cincinnati Bell's 2010 executive compensation will assist the Court in its determination of plaintiff's Motion if needed.

B. There is a Substantial Likelihood that Plaintiff Will Succeed on the Merits

Defendants spend a third of their brief attacking the merits of plaintiff's claims against them. Defs' Opp. at 13-23. Their attack must fail. Plaintiff has sufficiently alleged claims against Cincinnati Bell's Board for breach of fiduciary duty of loyalty and against defendants Cassidy, Wojtaszek and Wilson for unjust enrichment. Having sufficiently alleged its claim of breach of loyalty against the Board, plaintiff has also demonstrated demand futility. For the sake of brevity and to avoid repetitious briefing, plaintiff incorporates the arguments set forth in its Opposition to Defendants' Motion to Dismiss, which address these issues more thoroughly. Dkt. No. 23.

C. Plaintiff Has Demonstrated Irreparable Harm

Contrary to defendants' arguments, plaintiff has demonstrated that immediate equitable relief is necessary to protect the interests of Cincinnati Bell in recovering the excessive compensation in dispute in this action. Defendants incorrectly raise the standard for a preliminary injunction to direct evidence that defendants Cassidy, Wojtaszek and Wilson will dissipate or have already dissipated the compensation they received in 2010. Defs' Opp. at 25. Instead, plaintiff is required to show, and has shown, that irreparable harm is likely without injunctive relief because defendants control the assets in question and could easily hide or dispose of those assets absent an injunction. *See USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 98 (6th Cir. 1982) (finding irreparable harm where party had the ability to "easily dispose" of assets). Indeed, courts have required far less of a showing.

For example, in *Concheck v. Barcroft*, No. 2:10-cv-456, 2010 WL 4117480 (S.D. Ohio Oct. 18, 2010), the court granted plaintiff's motion for a preliminary injunction and found irreparable harm on the sole basis that defendants retained the assets in question and refused to return these assets to the plaintiff. *Id.* at *3. It is undisputed that defendants Cassidy, Wojtaszek and Wilson retain their 2010 compensation and have not stated any intention of returning it given this litigation.

Similarly, in *Meridian Diagnostics, Inc. v. Yi*, No. C-1-00-540, 2001 WL 1842463 (S.D. Ohio Mar. 9, 2001), the court found irreparable harm without even a showing that the entity to be enjoined possessed any assets. *Id.* at *8 ("Apollo may not possess assets now or during the future life of this litigation."). Plaintiff has demonstrated far more here. *See* ¶¶2, 5, 30 and 38.

Defendants also erroneously argue that plaintiff cannot establish irreparable harm where monetary damages are available. Defs' Opp. at 23-25. This is not the state of the law. As the Supreme Court stated in *DeBeers Consol. Mines v. United States*, 325 U.S. 212, 220, 65 S. Ct. 1130, 1134, 89 L.Ed. 1566 (1945), "A preliminary injunction is always appropriate to grant intermediate

relief of the same character as that which may be granted finally.” By its Motion, plaintiff seeks intermediate relief of exactly the same character as that which may be granted at the resolution of this action. For example, plaintiff’s claim for unjust enrichment seeks the return of the 2010 executive compensation wrongfully awarded to defendants Cassidy, Wojtaszek and Wilson. ¶¶56-59. Despite the relief being monetary in nature, this claim sounds in equity, and thus, preliminary injunctive relief freezing assets subject to the unjust enrichment claim is proper. *See Concheck*, 2010 WL 4117480 at *2 (granting preliminary injunction freezing assets subject to an unjust enrichment claim).

Moreover, defendants fail to raise any argument that defendants Cassidy, Wojtaszek and Wilson will suffer any hardship as a result of the preliminary injunction requested by plaintiff. Nor do they argue that the public interest is disserved by a preliminary injunction here. Given the circumstances and the failure of defendants’ arguments, the balance of hardships strongly favors granting the preliminary injunction plaintiff seeks.

III. CONCLUSION

For the foregoing reasons, plaintiff respectfully requests the Court grant its Motion for Preliminary Injunction.

DATED: September 12, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2011, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 12, 2011.

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