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

NATALIE GORDON, Derivatively on Behalf of NAVIGANT CONSULTING, INC.,	**Case Number: 12-cv-00369**
Plaintiff,	Honorable Amy J. St. Eve
v.	
WILLIAM M. GOODYEAR, JULIE M. HOWARD, THOMAS A. NARDI, MONICA M. WEED, THOMAS A. GILDEHAUS, CYNTHIA A. GLASSMAN, STEPHEN A. JAMES, PETER B. POND, SAMUEL K. SKINNER, JAMES R. THOMPSON, and MICHAEL L. TIPSORD,	
Defendants,	
and	
NAVIGANT CONSULTING, INC.,	
Nominal Defendant	

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS
THE VERIFIED SHAREHOLDER'S DERIVATIVE COMPLAINT

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Plaintiff Natalie Gordon ("Plaintiff") respectfully submits this Memorandum of Law in Opposition to the Defendants[1] Motion to Dismiss.

I. INTRODUCTION

This shareholder derivative action arises out of Individual Defendants' failure to act in the best interests of Navigant and its shareholders and their attempts to mislead shareholders about the nature of and motivations behind their executive compensation decisions. On April 25, 2011, pursuant to a "say-on pay" vote mandated by the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), §951; 15 U.S.C. §78n-1, over 55% of Navigant's voting shareholders voted against the 2010 executive compensation packages approved by the Navigant Board of Directors (the "Board"). Navigant became one of only 43 out of the more than 2,982 company shareholder say-on-pay votes held in 2011 to have its shareholders reject management's compensation proposals. This rare and substantial no vote reflects the shareholder's considered belief that the Board's decision to increase executive pay and give substantial cash awards to defendants Goodyear, Howard, Nardi and Weed, was not a rational exercise of independent business judgment. The shareholders also correctly saw the Board's decision as one completely contrary to the Company's clearly stated requirement that executive pay be linked to performance.

The Board rewarded its executives with generous compensation and increased cash awards despite the fact that the Company posted a **negative 38.1% shareholder return in 2010 and a negative 12.4% return over the past three years.** ¶36.[2] Over a broader stretch of time,

[1] The "Defendants" are comprised of the Individual Defendants, William M. Goodyear ("Goodyear"), Julie M. Howard ("Howard"), Thomas A. Nardi ("Nardi"), Monica M. Weed ("Weed"), Thomas A. Gildehaus ("Gildehaus"), Cynthia A. Glassman ("Glassman"), Stephen A. James ("James"), Peter B. Pond ("Pond"), Samuel K. Skinner ("Skinner"), James R. Thompson ("Thompson") and Michael L. Tipsord ("Tipsord"), as well as Nominal Defendant Navigant Consulting, Inc. ("Navigant" or the "Company").

[2] References to the Complaint or "¶" or "¶¶" refers to Plaintiff's Verified Shareholder's Derivative Complaint.

Navigant has performed even worse. From 2006-2010, Navigant's share price fell by more than 55 percent for over $21 to $9.20, its earnings per share dropped by 50 percent, and its net income dropped from $53 million to $24 million. ¶38. During the same time period, Navigant significantly underperformed both the S&P 500 Total Returns Index as well as the "Business Services" industry in general. ¶37. Thus, from a factual perspective, the Complaint sufficiently rebuts the presumption that the Navigant Board's 2010 executive compensation was a valid business judgment and sufficiently pleads both demand futility and an actionable breach of the duty of loyalty claim.

In moving to dismiss the Complaint, the Defendants rely on the business judgment rule. Normally, the business judgment rule protects the compensation decisions of a company's directors. Under Delaware law however, the business judgment rule is a rebuttable presumption that does not apply in the face of factual evidence that board members acted disloyally to enhance the selfish interests of themselves and/or fellow directors and did not act in good faith or in the best interests of the company and its shareholders. *See eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 36-37 (Del. Ch. 2010); *see also NECA-IBEW Pension Fund v. Cox*, No. 1:11-cv-451, 2011 U.S. Dist. LEXIS 106161, at *2 (S.D. Ohio Sept.20, 2011) ("*Cincinnati Bell*") ("[T]he business judgment rule is a presumption that may be rebutted by a plaintiff with factual evidence that board members acted disloyally, *i.e.*, not in the best interests of the company or its shareholders.").

Such is the case here. By approving executive pay hikes despite the Company's dismal performance and by attempting to pass off these pay awards as consistent with Navigant's compensation policy of linking pay to performance, the Board breached its fiduciary duty of loyalty and the protection of the business judgment rule no longer applies.

Unfortunately, Defendants' response to its shareholders appears to be to disparage the clear message sent by the shareholders and dismiss the say on-pay vote as "non-binding" and immaterial to any determination as to whether the Board breached its fiduciary duty of loyalty. The Defendants' position is wrong. Although non-binding, the April 25, 2011 shareholder vote clearly constitutes **some** probative evidence that the Board's actions were not in the best interests of the Company and its shareholders and thus serves to rebuts the presumption that the Board acted in good faith. Moreover, the Board's compensation awards clearly violate the Company's own stated policy of carefully linking executive pay to company performance and return to shareholders. The Navigant Board urged shareholders to approve the 2010 compensation package knowing full well that it violated the Company's stated compensation policies. Taken together, this evidence is more than sufficient to rebut the business judgment rule.

The advisory nature of Navigant's say-on-pay vote does not mean the results are meaningless or can be casually disregarded as Defendants suggest. There is nothing in Delaware law that suggests that the results of a shareholder vote are meaningless and it is clear beyond any dispute that Congress passed the say-on-pay provisions of the Dodd-Frank Act in order to give shareholders a stronger voice regarding executive compensation.[3]

The Complaint's particularized factual allegations also excuse a pre-suit demand upon the Board which not only approved the rejected 2010 executive compensation awards, but also unanimously recommended shareholders' approval of that compensation. A pre-suit demand is not required where, as here, the entire Board, faces a substantial likelihood of liability for breaching its duty of loyalty by paying excessive executive compensation to Navigant's

[3] *See* H.R. Rep. No. 111-517, at 872 (2010) (Conf. Rep.) (indicating that the say-on-pay provisions were "designed to address shareholder rights and executive compensation"); S. Rep. No. 111-176, at 35-36 (2010) (explaining that say-on-pay provisions address concerns that "investors need more protection; shareholders need a greater voice in corporate governance"); *id.* at 133 ("shareholders, as the owners of the corporation, have a right to express their opinion collectively on the appropriateness of executive pay").

corporate managers in violation of the Board's publically stated pay-for-performance compensation policy. The Complaint's facts rebut the presumption that the Navigant Board's decision to award excessive 2010 compensation was the type of disinterested, objective determination that warrants the protection of the business judgment rule. Accordingly, the motion to dismiss should be denied.

II. STATEMENT OF FACTS

The factual allegations of the Complaint are straightforward and largely undisputed. In 2010, Navigant posted a negative 38.1% shareholder return which capped a three year shareholder return of negative 12.4 percent. ¶¶3, 36. Navigant also vastly underperformed its peers from 2006 through 2010. ¶37. During that time period, Navigant's share price fell by more than 55 percent, its earnings per share dropped by 50 percent and its net income dropped from $53 million to $24 million. ¶38. The Board itself referred to these results as "disappointing." ¶36.

Despite these awful results, the Board decided to reward its under-performing executives with generous pay packages including cash awards and salary raises as well as continued equity awards. The four main Navigant executives at issue are defendants William M. Goodyear (Navigant's Chairman of the Board and Chief Executive Officer ("CEO")), Thomas A. Nardi (Navigant's Executive Vice President and Chief Financial Officer ("CFO"), Julie M. Howard (Navigant's President and Chief Operating Officer ("COO") and Monica M. Weed (Navigant's Vice President, General Counsel and Corporate Secretary). Unfazed by their poor record of achievement, the Board decided to award defendants Goodyear, Howard, Nardi and Weed a combined $4.85 million dollars in total compensation for 2010, up from the $4.77 million they received in 2009. The 2010 compensation included combined pay raises to defendants Nardi and Weed totaling more than $370,000, and annual cash bonuses to defendants Goodyear, Howard,

Nardi and Weed totaling $725,000. ¶¶3, 12, 14-15. Goodyear was paid nearly $1.9 million, which included a $275,000 annual cash bonus award, as part of his 2010 compensation. ¶12. Howard was paid more than $1.3 million, including a $200,000 annual cash bonus award as part of her 2010 compensation. ¶13. Nardi received a pay increase of more than $222,000 in 2010, including a $150,000 cash bonus award, totaling more than $900,000 in compensation for the year, and Weed received a pay increase of more than $148,000 in 2010, including a $100,000 cash bonus award, totaling more than $755,000 in compensation for the year. ¶¶14-15. *See also* Navigant's March 16, 2011 Proxy Statement (the "Proxy") at 23, attached as Exhibit B to Defendants' Motion to Dismiss.[4]

The fact that $725,000 of the total 2010 compensation paid to defendants Goodyear, Howard, Nardi and Weed consisted of cash bonus awards is particularly egregious given the decline in value suffered by Navigant's shareholders and the Compensation Committee's claim that Navigant's "financial and strategic performance during 2010 was the primary factor used by the committee in determining the cash bonuses earned by our NEOs in 2010." *See* Proxy at 12. In addition, it further disincentives the executives by further reducing the already greatly frayed link between performance and compensation since the executives now have less of an equity stake in the Company. Given that the Board has acknowledged that the Company's financial

[4] Defendants' claims that they substantially decreased total compensation awarded for performance in 2010 from the compensation awarded in 2009 and that the Complaint distorts or misrepresents the total compensation received, fall flat and seem to be further attempts to mislead or confuse shareholders. *See* Navigant's Memorandum of Law in support of Defendants' Motion to Dismiss ("Navigant Mem.") p. 3-4, n.5. Regardless of whether the compensation awards granted in 2010 (and voted on in 2011) were meant to "reward" performance achieved in 2010 or 2009, they are equally misguided and subject to attack for the same lack of compliance with the Company's pay for performance compensation guidelines and philosophy. Additionally, Defendants appear to ignore the fact that in 2010, the percentage and total amount of compensation in the form of cash awards to the executive defendants increased substantially. Given the Company's rapidly declining share price and earnings per share, awarding additional cash-based compensation is an undeserved benefit that further demonstrates the Individual Defendants' disloyalty and desire to protect the interests of executives at the expense of shareholders. The fact that the Individual Defendants inserted two charts into the proxy to disguise the fact that more compensation was awarded in 2010 than 2009 is further evidence of their knowledge that the 2010 compensation package was not a reasonable exercise of business judgment and their desire to bypass any meaningful say by shareholders.

results in 2010 were "disappointing," it is unconscionable, and directly contradicts Navigant's stated compensation policy, that defendants Goodyear, Howard, Nardi and Weed would be rewarded with $750,000 in cash bonuses for their role in Navigant's "disappointing" results. ¶43. The absurdity of granting 2010 annual cash bonuses is best described by the following facts: Between 2008 and 2009, Navigant's share price fell by around $1 per share and the Board awarded no annual cash bonuses in 2009. Between 2009 and 2010, Navigant's share price fell by more than $5 per share – or over 35 percent -- and the Board awarded defendants Goodyear, Howard, Nardi and Weed a combined $750,000 in annual cash bonuses as part of their salaries. ¶44.

The Proxy specifically stated and reaffirmed Navigant's pay-for-performance compensation policy while at the same time asking shareholder approval to violate the policy. According to the Proxy, the guiding principal of the Company's executive compensation policy was pay-for-performance which it defined as "meaning ***that the most significant percentage of our NEOs' targeted total direct compensation is performance-based compensation —short-term (in the form of an annual cash bonus) and long-term (in the form of equity-based incentive awards), both of which are determined primarily based on the company's financial and strategic performance.***" Proxy at 14-15; ¶31 (emphasis added). The Company also stated that "***We also believe that an effective compensation program is one that seeks to align our NEO's interests with those of our shareholders, with the ultimate objective of increasing long-term shareholder value.***" *Id.* Individual Defendants actions in increasing the amount of cash bonuses awarded to its failing executives ensured that the executives' compensation would no longer align with the fortunes of Navigant's shareholders. When specifically discussing the annual cash bonuses awarded in 2010, the Board further stated:

> Annual cash bonuses paid to our NEO's are primarily based upon the company's financial and strategic performance during the year. The committee does not apply a strict formula in determining annual bonus funding or bonus payouts. Instead, ***the committee assesses the company's overall performance for the fiscal year relative to budgeted amounts and, based upon that assessment and other considerations, including individual performance, determines the level of bonus payouts, if any.***

Proxy at 16; ¶32.

Thus, the Board admitted to its shareholders that the cash bonus awards that defendants Goodyear, Howard, Nardi and Weed were awarded as part of their 2010 compensation were not in line with their stated function of evaluating individual annual performance, an annual performance that resulted in a negative 38.1 percent return for Navigant's shareholders. The Board maintained it performed qualitative assessments of each of its executives and that the ultimate objective of its executive compensation program was to reward performance and increase long-term shareholder value. ¶¶34-35. The Navigant Board said it would follow these policies but did not. The result was that a majority of Navigant's shareholders, using their reasonable business judgment, sought to hold the Individual Defendants accountable for their diversion from the Company's stated compensation policies.

Defendants would have this Court completely ignore the views of Navigant's shareholders regarding whether the Board's executive compensation decisions served the shareholders' best interests. However, the reaction of shareholders to the Board's executive compensation decisions, combined with their clear and unmistakable understanding that the Board had not lived up to its stated obligations and duties, constitutes substantial evidence that the Board did not act in the best interests of Navigant or its shareholders.

III. ARGUMENT

A. Derivative Actions Play an Important Role In Protecting Shareholders

While it is true that the overall management of a corporation is properly reserved to the board of directors, derivative actions serve a very important role, placing "in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of 'faithless directors and managers.'" *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95 (1991) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 (1949). Without the tool of the derivative action, a stockholder would be "powerless to challenge director action which results in harm to the corporation." *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984), *overruled in part on other grounds sub nom., Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

Thus, derivative actions play an important role in corporate governance as the primary – and often only – means for enforcing a standard of conduct on the part of corporate officials: a role that simply cannot be filled by the directors. As explained by the Supreme Court:

> This remedy, born of stockholder helplessness, was long the chief regulator of corporate management and has afforded no small incentive to avoid at least grosser forms of betrayal of stockholders' interests. It is argued, and not without reason, that without it there would be little practical check on such abuses.

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. at 548.[5]

Consistent with these principles, this shareholder derivative action on behalf of Navigant is the only means to curtail the corporate misconduct detailed in Plaintiff's Complaint by holding all the Individual Defendants accountable for their breaches of fiduciary duties.

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[5] In addition, academic articles extol the role of shareholder derivative lawsuits as a vital tool of corporate governance. Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class and Derivative Litigation*, 58 U. Chi. L.R. 1 (1991) ("The classic case is the action for breach of fiduciary duty against corporate directors. Obviously the directors cannot be trusted to cause the corporation to sue themselves.").

B. The Applicable Legal Standards

Under the Federal Rules of Civil procedure, a complaint need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8 (a)(2). The complaint must "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). In ruling on a Rule 12(b)(6) motion to dismiss, the court "construe[s] the ... [c]omplaint in the light most favorable to Plaintiff, accepting as true all well-pleaded facts and drawing all possible inferences in [her] favor." *Cole v. Milwaukee Area Tech. Coll. Dist.*, 634 F.3d 901, 903 (7th Cir. 2011).

Under Delaware law which governs this action, a derivative action seeking to enforce a right on behalf of a corporation that has failed to assert that right must allege, with particularity, any efforts by the plaintiff to obtain the desired action from the directors or the reasons for not doing so. *See also* Fed. R.Civ.P.23.1.[6] However, a pre-suit demand is unnecessary when the particularized factual allegations in complaint create a reason to doubt that the board would consider the demand in a disinterested, impartial manner. *See Carmody v. Toll Bros., Inc.*, 723 A.2d 1180, 1189 (Del. Ch. 1998); *Aronson,* 473 A.2d at 814-15; *Cincinnati Bell*, 2011 U.S. Dist. LEXIS 106161, at *14-15. A director is considered subject to a disqualifying or disabling interest when he or she faces a substantial likelihood of liability because there is reason to doubt that the challenged decision is the product of a valid exercise of business judgment. *Ryan v. Gifford*, 918 A.2d 341, 355-56 (Del. Ch. 2007).

Under Delaware law, failure to make a demand may be excused if a plaintiff can raise a reasonable doubt that (1) a majority of the board is disinterested or independent, or (2) the

[6] Since Navigant is incorporated in Delaware, Delaware law governs its internal affairs and the issue of demand futility. *Kamen,* 500 U.S. at 96.

challenged act was a product of the board's valid exercise of business judgment. *Aronson*, 473 A.2d at 814. A plaintiff need only satisfy either part of the test for demand to be excused. *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

To qualify for business judgment protection, directors must, at all times, act loyally by putting the best interests of shareholders ahead of their own interests and the interests of third parties, including corporate executives. *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993) ("In exercising [business judgment], directors are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders."). The duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director or an officer. *Id.* at 361; *In re Tyson Foods, Inc. Consol. S'holder Litig.*, No. 1106-CC, 2007 Del. Ch. LEXIS 120, at *10-11 (Del. Ch. Aug. 15, 2007) ("Loyalty. Good faith. Independence. Candor. These are words pregnant with obligation. The Supreme Court did not adorn them with half-hearted adjectives. Directors should not take a seat at the board table prepared to offer only conditional loyalty, tolerable good faith, reasonable disinterest or formalistic candor.") The duty of loyalty requires a balance between granting deference to boards exercising their authority to direct and oversee the business and affairs of the corporation with an "assiduous **protection of the stockholders' right to ... meaningful enforcement of fiduciary duties, with particular emphasis on the duty of loyalty**." *Pfeiffer v. Toll,* 989 A.2d 683, 707 (Del. Ch. 2010) (emphasis added).

C. The Complaint Rebuts the Presumption that the Navigant Board's 2010 Executive Compensation Awards Were Valid Exercises of Business Judgment and, Therefore, States a Claim for Breach of Loyalty.

Plaintiff has rebutted the presumption of the business judgment rule by pleading with particularity that (1) the Board awarded excessive executive compensation in a time of severely declining company performance and in violation of its own expressed pay for performance

policies; (2) the Board misled shareholders as to the rationale behind its executive compensation awards as well as the fact that Goodyear, Nardi, Weed and Howard's total compensation actually increased in 2010; and (3) Navigant shareholders overwhelmingly rejected the compensation awarded to the executives and Navigant's defense of the compensation, a clear indication that they were not in the best interests of Navigant or its shareholders.

In 2010, the Navigant Board promised to pay executive compensation on a pay-for performance basis, expressing a desire to further align Navigant's executives' interests with those of shareholders and stating that its compensation decisions were made "with the ultimate objective of increasing long-term shareholder value." ¶¶28-35 (citing the Proxy). However, in 2010, Navigant's business accelerated its decline and posted a negative 38.1% shareholder return for the year. ¶¶36-37. Nevertheless, despite the absence of any meaningful positive returns for shareholders for over three years, the Board increased the total compensation awarded in calendar year 2010 to defendants Goodyear, Howard, Nardi and Weed and vastly compounded their breach and disloyalty by greatly increasing the amount of compensation given in cash. ¶¶42-44. Taken as a whole, the Complaint's well-pled allegations (which must be taken as true) provide direct and probative evidence that the Individual Defendants failed to act in good faith and in furtherance of the Company and its shareholders' best interests.

Contrary to the arguments put forth by the Defendants in their Memorandum of Law, the adverse say-on-pay vote also provides direct evidence that rebuts the presumption that the Board's actions were a valid exercise of business judgment. As the court in *Cincinnati Bell* explained:

> These factual allegations raise a plausible claim that the multi-million dollar bonuses approved by the directors in a time of the company's declining financial performance violated Cincinnati Bell's pay-for performance compensation policy

> and were not in the best interests of Cincinnati Bell's shareholders and therefore constituted and abuse of discretion and/or bad faith.

Cincinnati Bell, 2011 U.S. Dist. LEXIS 106161, at *8-9.

The purpose of enacting the advisory say-on-pay provision under the Dodd-Frank Act was to ensure that shareholders had an efficient and mandated mechanism for expressing their views on whether the corporation's executive compensation is in the best interests of shareholders. Dodd-Frank Act, §951; 15 U.S.C. §78n-1. Congress clearly intended that the provisions allow shareholders to have a meaningful voice on whether the executive compensation paid out by boards of directors was in the best interests of shareholders.[7] The Dodd-Frank Act clearly contemplated that the result of a say-on-pay vote would be more than just a futile gesture but would constitute a non-binding but direct referendum on whether the amount and nature of executive compensation paid by the board of directors of a publically traded company was actually in the best interests of shareholders. *See* S. Rep. No. 111-176, at 134 (2010) ("Non-binding shareowner votes on pay [were meant to] serve as a direct referendum on the decisions of the compensation committee and . . . offer a more targeted way to signal shareholder discontent than withholding votes from committee members.").

The say on pay negative vote is clearly a factor in determining whether the Individual Defendants breached their fiduciary duties. It does not alter the fiduciary duties of directors, but it does provide evidence that the Individual Defendants acted in a manner not in the best interests of its shareholders. *See Cincinnati Bell*, 2011 U.S. Dist. LEXIS 106161, at *8-9.[8]

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[7] *See* H. R. Rep. No. 111-517, Subtitle E-Accountability and Executive Compensation, at 1423 (2010) (conf. rep.); *see also* S. Rep. No. 111-176, at 6 (2010) (declaring that say on pay provisions answer concerns that "investors need more protection; shareholders need a greater voice in corporate governance"); *id.* at 133 (say on pay provision adopted in response to the fact that during the recent economic crises, corporate executives received very high compensation despite very poor performance by executives.).

[8] *See also* Danielle Myles, "Experts disagree on validity of say-on-pay lawsuits," *Int' Fin. L. Rev.* (Aug. 2011), (quoting Professor Frank Partnoy, "a negative say-on-pay vote gives the court evidence that there's been a breach of

The *Cincinnati Bell* court held that a negative say-on-pay vote by shareholders "gives the court evidence that there's been a breach of duty" and is "probative evidence that directors have violated their duties to act in the best interest of their companies' stockholders." *Id.* at *3-4 n.1. Defendants misrepresent the nature of the Plaintiff's claims when they argue that the Complaint relies **solely** on the negative shareholder say-on-pay vote as evidence of the Board's breach of fiduciary duty. The other evidence that supports the claim for breach of fiduciary duty is Navigant's own detailed compensation policies and the stark irrefutable fact that the Individual Defendants both approved the 2010 compensation awards and recommended that shareholders approve them, despite the Board knowing that they were completely out of compliance with the Company's stated guidelines and philosophy concerning compensation awards. These facts, which have not and cannot be rebutted by the Defendants, combined with the negative shareholder vote, are more than sufficient to establish a claim for breach of fiduciary duty of loyalty at this juncture.

Much of the authority cited by the Defendants is not to the contrary and in fact supports the Plaintiff's arguments. For example, *Laborers' Local v. Intersil*, No: 5:11-CV-04093 EJD, 2012 U.S. Dist. LEXIS 30289 (N.D. Cal. Mar. 7, 2012) (attached as Exhibit N to Defendant's Motion to Dismiss), is an executive compensation say-on-pay case brought in California federal court and decided under Delaware law. In granting the motion to dismiss the derivative complaint, the Court in *Intersil* noted that no court in California or Delaware has yet decided whether a negative shareholder vote under Dodd-Frank can be used as evidence to rebut the business judgment rule presumption under Delaware law. *Intersil*, 2012 U.S. Dist. LEXIS

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fiduciary duty."; Daniel J. Morrissey, "Courts should curb executive pay," *Nat'l L.J.* (Aug. 15, 2011 (negative shareholder resolutions are "probative evidence that directors have violated their duties to act in the best interest of their companies' stockholders").

30289, at *23-25. The Court concluded that Congress must have intended the shareholder vote to have some weight if, as discussed above, the goals of the say-on-pay provision to empower shareholders and hold boards accountable were to be met. The court opined that "if the shareholder vote approving executive compensation is meant to have no effect whatsoever, it seems unlikely that Congress would have included a specific provision requiring such a vote." *Id.* at *25. Stating that it was looking at precedent from other courts that have interpreted the shareholder vote provision of Dodd-Frank, the Court concluded that the shareholder vote on executive compensation has "substantial evidentiary weight and could be used as evidence by a court in determining whether the second prong of the *Aronson* test has been met." *Id.* at *26-27. The Court found that while the shareholder vote by itself was not enough to rebut the presumption of the business judgment rule, it could be used in combination with additional facts to raise a reasonable doubt that the decision was not a valid exercise of business judgment. *Id.* It therefore dismissed the complaint but granted leave to replead.

Here by contrast, the plaintiff has already plead additional facts with particularity and can utilize the shareholder vote as further substantial evidence of the defendants' breach of fiduciary duty.[9] Denying the motion to dismiss and recognizing the Individual Defendants' breach of the duty of loyalty is hardly the radical result the Defendants claim and would represent an affirmance of a well settled principle under Delaware law and elsewhere that directors do not have *carte blanche* to make irrational and disloyal executive compensation decisions that are not

[9] The same analysis was used in other cases the defendants have cited to including *Teamsters Local 237 Add'l Sec. benefit Fund v. McCarthy* ("*Beazer*"), No. 2011-cv-197841, slip op. (Ga. Super. Ct. Sept. 16, 2011) (attached as Exhibit U to Defendants' Motion to Dismiss); *Assad v. Hart*, No: 11cv2269 WQH (BGS), 2012 U.S. Dist. LEXIS 2366, (S.D. Cal. Jan. 6, 2012) (attached as Exhibit F to Defendants' Motion To Dismiss) and *Dennis v. Hart*, No: 11cv2271 WQH (WVG), 2012 U.S. Dist. LEXIS 1893, (S.D. Cal. Jan.6, 2012) (attached as Exhibit H to Defendant's Motion to Dismiss). For example, the *Beazer* court, applying Delaware law, found that while an adverse say on pay vote *alone* could not suffice to rebut the presumption of business judgment protection applicable to directors' compensation decisions; it did not follow that such a vote could not be used along with other facts to rebut the business judgment protection. *Beazer* at *12.

in the best interests of shareholders. See *also In re Citigroup, Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 138-139 (Del. Ch. 2009) ("'there is an outer limit' to the board's discretion to set executive compensation, 'at which point a decision of the directors on executive compensation is so disproportionally large as to be unconscionable and constitute waste.'"); *In re Tyson*, 2007 Del. Ch. LEXIS 120, at *10-11; *In re Viacom Inc. S'holder Deriv. Litig.*, No: 602527/05, 2006 N.Y. Misc. LEXIS 2891, at *21-22 (N.Y. Sup. Ct. June 26, 2006) (same).

D. The Complaint's Particularized Facts Excuse a Pre-Suit Demand on the Navigant Board

The particularized facts plead in the Complaint not only render the Navigant's directors not disinterested, but establish that demand is excused because plaintiff has sufficiently rebutted the presumption of the business judgment rule. Under Delaware law, directors who cannot qualify for business judgment protection face a substantial likelihood of liability for breach of fiduciary duty. *Ryan,* 918 A.2d at 357 (excusing demand because directors who grant backdated executive stock options face a substantial likelihood of liability and are not entitled to business judgment protection). Under such circumstances, plaintiffs need not make a pre-suit demand. *Aronson*, 473 A.2d at 815; *London v. Tyrrell*, No. 3321-CC, 2008 Del. Ch. LEXIS 75, at *17 (Del. Ch. June 24, 2008) (excusing demand where the directors' breached their duty of loyalty and were not entitled to business judgment protection). The court in *Cincinnati Bell* concluded the same: "at the dismissal stage, that plaintiff's allegations create a reasonable doubt that the challenged transaction is the result of a valid business judgment, and, accordingly, the directors possess a disqualifying interest sufficient to render pre-suit demand futile and hence unnecessary." *Cincinnati Bell,* 2011 U.S. Dist. LEXIS 106161, at *14-15. The affirmative defense of the business judgment rule must wait for trial – "it is not fodder for dismissal." *Id.* at *11.

Here the specific facts pleaded give serious doubt that the Board could make unbiased, independent business judgments about whether to sue on behalf of the Company. It 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. Nowhere is this more evident than the Board's decision to increase the cash component of the executive officers' compensation, breaking the compensation's link to Navigant's shareholders and rewarding the executives for their poor performance without any requirement that they improve the Company's performance in order to benefit from their bonuses. Moreover, the Board did not merely approve the 2010 executive compensation but also unanimously recommended that shareholders vote in favor of it. The Board that formulated, approved, and recommended Navigant's excessive 2010 executive compensation to shareholders is the same Board that received the negative shareholder vote regarding the 2010 executive compensation. Taken as true, together these facts are sufficient to excuse a pre-suit demand upon the Board. *Cincinnati Bell*, 2011 U.S. Dist. LEXIS 106161, at *11-15.

In *Cincinnati Bell,* based on virtually identical facts the Court held:

> Given that the director defendants devised the challenged compensation, approved the compensation, recommended shareholder approval of the compensation, and suffered a negative shareholder vote on the compensation, plaintiff has demonstrated sufficient facts to show that there is reason to doubt these same directors could exercise their independent business judgment over whether to bring suit....

Id. at *14-15. Therefore, because a majority of the membership of the Navigant Board faces a substantial likelihood of personal liability based on their decision to award increased executive

compensation and cash awards that were undeserved and flew in the face of the Company's declining financial performance, the Complaint sufficiently alleges demand futility.[10]

IV. CONCLUSION

For the foregoing reasons, the Motion to Dismiss should be denied in all respects.

Dated: May 4, 2012

By: /s/ Marvin A. Miller

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[10] In the event the Court dismisses the Complaint, Plaintiff requests leave to replead.