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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.	)	C.A. No. 9425-VCN
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.	)	

PLAINTIFF'S CORRECTED ANSWERING BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE COMPLAINT

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Plaintiff Gary Livingston ("Plaintiff"), derivatively on behalf of Cablevision Systems Corporation ("Cablevision" or the "Company"), respectfully submits this answering brief in opposition to the opening brief ("Dolan Brief"), filed by Charles F. Dolan ("Charles"), James L. Dolan ("James"), Kathleen M. Dolan ("Kathleen"), Deborah Dolan-Sweeney ("Deborah") and Marianne Dolan Weber ("Marianne") (collectively, the "Dolan Defendants"), and the opening brief (the "Committee Brief"), filed by Thomas V. Reifenheiser ("Reifenheiser"), John R. Ryan ("Ryan") and Vincent Tese ("Tese") (collectively, the "Compensation Committee" and, together with the Dolan Defendants, "Defendants").

PRELIMINARY STATEMENT

Plaintiff brought this derivative action in order to seek redress on Cablevision's behalf for a series of unfair transactions between the Company and its controlling stockholder, the Dolan family. The way in which the Dolans have run Cablevision is an extreme manifestation of the inherent danger arising out of the separation between corporate ownership and control. The Dolan family owns less than a quarter of the Company's outstanding stock, but wields the vast majority of Cablevision's voting power through its sole ownership of a separate class of high-vote stock. The Dolan family has used that control to pack the Company's board of directors ("Board") with a strong majority of Dolan family members and to enrich themselves through classically-unfair transactions at the expense of Cablevision's minority stockholders.

Defendants concede that Plaintiff has met his burden under Rule 23.1 to demonstrate that a majority of the board is conflicted, and that Plaintiff has pleaded facts demonstrating the substantive unfairness of the interested transactions. However, Defendants urge the Court to dismiss this action on the grounds that the mere existence of a committee of directors that supposedly approved some of the interested transactions automatically insulates the Dolans from entire fairness review. But that is not the law. The mere existence of this committee does not change the fact that the challenged transactions are subject to entire fairness review and Plaintiff has alleged that the transactions were materially unfair to Cablevision's minority stockholders. Defendants have not carried their burden to rebut those allegations or otherwise show that other procedural protections exist that warrant dismissal of the action. Defendants' motions to dismiss should be denied.

NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff filed his complaint on March 7, 2014, which was answered by Nominal Defendant Cablevision on April 14, 2014. On April 21, 2014, Defendants moved to dismiss the Complaint pursuant to Delaware Court of Chancery Rule 12(b)(6).

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STATEMENT OF FACTS

Cablevision is a publicly-traded telecommunications and media company controlled by the Dolan family, which offers digital television, voice and high-speed Internet services to households and businesses in the New York metropolitan area. (¶¶ 2, 11.)[1] Cablevision was founded by Charles, who has served as its Executive Chairman since 1985. (¶¶ 2, 12.) Charles's son, James, is the Company's Chief Executive Officer ("CEO"), a role he has held since 1995. (¶ 13.) Plaintiff has been a Cablevision stockholder since February 2011. (¶ 10.)

A. The Dolans' Control of Cablevision

Cablevision has two classes of common stock, Class A and Class B. (¶ 21.) Class A stockholders are entitled to one vote per share on matters submitted to all stockholders for approval, and are further entitled to vote for the election of 25% of the Company's directors, *i.e.*, the Class A directors. (*Id.*) Class B stockholders are entitled to ten votes per share on matters submitted to stockholders, and vote as a separate class for 75% of the Company's directors, *i.e.*, the Class B directors. (*Id.*) As of March 28, 2013, the Dolan family owned all outstanding Class B common stock (with Charles holding approximately 60%) and 4.2% of the outstanding Class A common stock. (¶ 24.) All told, the Dolan family holds approximately 73% of the voting power of Cablevision. (¶ 24.)

[1] The Verified Stockholder Derivative Complaint ("Complaint") will be cited as "¶ __".

In 2004, the Dolan family entered into an agreement to cast their votes in a unanimous bloc on all matters put to a vote of Class B stockholders (the "Voting Agreement"). (¶ 23.) As explained in Cablevision's Form 10-K Annual Report, filed with the SEC on February 28, 2013 (the "2013 Annual Report"), the purpose of the Voting Agreement was to "consolidate Dolan family control of Cablevision." (*Id*.)

This unified voting power enables the Dolan family to "control stockholder decisions on matters in which holders of all classes of Cablevision common stock vote together as a single class," including "the amendment of some provisions of Cablevision's certificate of incorporation and the approval of fundamental corporate transactions." (¶ 25.) As the sole holder of Cablevision's Class B stock, the Dolan family controls the election of Class B directors, and can block any unwanted change-of-control transaction. (¶¶ 23-25.)

With the Voting Agreement in place, Cablevision designated itself as a "controlled company" under New York Stock Exchange ("NYSE") rules and opted out of standards imposed on non-controlled companies, including requirements that the Board (1) be comprised of a majority of independent directors, and (2) have an independent nominating and corporate governance committee. (¶¶ 26-27.) Instead of a nominating committee, the Class A directors are recommended to the Board by the incumbent Class A directors and the Class B directors are recommended to the Board by the incumbent Class B directors. (¶ 30.) This arrangement allows both the Class A and Class B directors to nominate themselves for another term each year.

Since 2010 the Board has been comprised of sixteen to seventeen members. (¶ 28.) With 100% ownership of Cablevision's Class B stock, the Dolans have the power to elect twelve directors or 75% of the Board. (¶¶ 29-30.) The Dolans have used this power to place ten Dolan family members on the Board, namely: Charles (since 1985); Charles's sons James (since 1991), Thomas C. Dolan ("Thomas," since 2007), and Patrick F. Dolan ("Patrick," since 1991); Charles's daughters Kathleen (since 2008), Deborah (since 2008) and Marianne (since 2005); James's wife, Kristin Dolan ("Kristin," since 2010); Deborah's husband, Brian G. Sweeney ("Sweeney," since 2005); and Charles's brother-in-law, Edward C. Atwood ("Atwood," since May 2011). (¶¶ 28-29.) With ten family members on the Board, the Dolans comprise a majority of Cablevision's sixteen-member Board. (¶ 102.) The remainder of the Board consists of Defendants Reifenheiser, Ryan and Tese, and non-defendants Rand V. Araskog ("Araskog"), Frank J. Biondi ("Biondi") and Dr. Leonard Tow ("Tow"). (*Id.*)

B. Kathleen, Deborah and Marianne's Service on the Board and the Compensation Paid to Them is Determined by the Dolan Family

Kathleen, Deborah and Marianne lack the necessary qualifications to serve on Cablevision's Board and have failed to meet their obligations as directors. SEC

Regulation S-K, Item 401(e) requires companies in their annual proxy statements to "briefly describe the business experience during the past five years" of each director, including their "principal occupations and employment during the past five years," as well as "briefly discuss the specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as a director ... in light of the company's business and structure." (¶ 41.) Cablevision's Schedule 14A Proxy Statement filed with the SEC on April 11, 2013 (the "2013 Proxy")[2] described Kathleen's work at a community art and music center she founded, and Marianne and Deborah's work at Dolan-founded charitable foundations. (¶ 42.) However, with respect to the experience, qualifications, attributes and skills that led to the Dolan daughters being chosen to serve on the Board of a $4 billion publicly-traded media and telecommunications company, the 2013 Proxy cites only Kathleen and Deborah's previous Board experience and, tellingly, each's "***experience as a member of Cablevision's founding family***." (*Id.* (emphasis added).) The 2013 Proxy identifies Marianne's qualifying experience as her Board service, ***membership in the Dolan family*** and her service at two Dolan-family charities. (Ex. A at 9.)

[2] The 2013 Proxy is attached to the Transmittal Affidavit of Benjamin Chapple as Exhibit A. Exhibits to the Chapple Affidavit will be cited as "Ex. __."

The entire Board is responsible for reviewing and approving the compensation packages of Cablevision's non-employee directors, including Kathleen, Deborah and Marianne, at least once every three years. (¶ 33.) In Fiscal Year ("FY") 2011 and 2012, the Board determined that compensation packages for non-employee directors would be comprised of (i) a base fee of $60,000 annually (increased from $50,000 on May 24, 2011), (ii) restricted stock valued at $110,000, (iii) payments of $2,000 per Board, committee and non-management director meeting attended in person, and $500 for each such meeting attended telephonically, and (iv) free television, data and voice service for directors living in areas serviced by Cablevision. (¶ 34.)

In FY 2011 and 2012 Kathleen, Deborah and Marianne received compensation valued at $340,544, $367,863 and $374,455, respectively. (¶¶ 32, 35.) Kathleen, Deborah and Marianne did not serve on any Board committees in either FY 2011 or 2012. (¶¶ 36-38.) In FY 2011, Deborah attended only six of the Board's nine meetings and Kathleen did not attend a single Board meeting in person.[3] In FY 2012, Kathleen again failed to attend a single Board meeting in

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[3] Plaintiff inadvertently miscalculated Deborah's 2011 attendance record in the Complaint. Deborah attended three meetings in person and three telephonically. (Dolan Br. at 10.) With respect to Kathleen's 2011 attendance record, the amount Kathleen was paid is consistent with what Plaintiff alleged (she attended one meeting in person and two telephonically), however Defendants claim it is "equally plausible (and in fact correct)" that she attended six meetings
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person and also failed to attend Cablevision's Annual Meeting of Stockholders that year. (¶¶ 4, 36.) Deborah and Marianne each attended only four of six Board meetings in 2012, and Deborah, like Kathleen, did not attend the 2012 Annual Meeting of Cablevision Stockholders. (¶ 36.)

As directors of the Company, Kathleen, Deborah and Marianne are subject to Cablevision's Corporate Governance Guidelines, which establish "specific expectations of directors" designed to "promote the discharge of [a director's] responsibility and the efficient conduct of the Board's business." (¶ 38.) One such expectation is that "[a]ll directors should make every effort to attend meetings of the Board and meetings of committees of which they are members." (*Id.*) Another is that directors "review the materials provided by management and advisors in advance of the meetings of the Board and its committees" and "arrive prepared to discuss the issues presented." (¶ 39.) The 2013 Proxy similarly states that the Company "encourage[s its] directors to attend annual meetings ... and believe[s] that attendance at annual meetings is just as important as attendance at Board and committee meetings." (¶ 36.) The Corporate Governance Guidelines counsel that individuals' "[a]bility and willingness to commit adequate time to Board and

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telephonically, which Plaintiff does not dispute for the purposes of this motion. (*Id.*)

committee matters" are to be considered by the Board when selecting nominees for election. (¶ 38.)

C. The Dolan Family Employs Themselves

Through their control of Cablevision, the Dolans have installed James as CEO, Charles as Executive Chairman, and caused the Company to employ numerous other members of the Dolan family. (¶ 44.) Deborah's husband, Sweeney, served as Cablevision's Senior Vice President – eMedia from January 2000 until January 2013, at which time he transitioned to Senior Executive Vice President, Strategy and Chief of Staff. (¶¶ 29, 45.) From FY 2010 through FY 2012, Sweeney was paid $2,070,006 in salary, $1,067,000 in bonuses and an undisclosed amount of long-term incentive awards. (¶ 45.)

Charles's son, Thomas, served in various positions at Cablevision from 1987 to April 2005, at which time he was forced into a leave of absence for violating Cablevision's data-retention policy and certain document-retention notices issued in connection with an SEC investigation. (¶ 46.) Thomas was nevertheless reinstated in September 2008 and made Executive Vice President, Strategy and Development – Office of the Chairman, reporting directly to his father, in which capacity Thomas collected $2,384,711 in salary and $1,438,000 in bonuses and long-term incentive awards—the amount of which was not disclosed in the Company's proxy statements—from FY 2010 through FY 2012. (¶¶ 29, 46.)

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Since February 2002, Charles's son, Patrick, has served as President of Cablevision's News 12 Networks, where he was paid $897,053 in salary, $538,000 in bonuses, and an undisclosed amount of long-term incentive awards from FY 2010 through FY 2012. (¶ 47.) Cablevision has employed James's wife, Kristin, as Senior Vice President from 2003 to 2011, Senior Executive Vice President of Product Management and Marketing from 2011 to 2013 and President – Optimum Services since 2013, for which she has been paid $1,235,476 in salary, $757,000 in bonuses, and an undisclosed amount of long-term incentive awards from FY 2010 through FY 2012. (¶ 48.) The Company has also employed Rosemary E. Aigner ("Aigner"), James's mother-in-law, as a "coordinator," in which capacity she was paid $356,168 from FY 2010 through FY 2012. (¶ 49.) Finally, Charles's brother-in-law, Atwood, has served as Vice President – Multimedia Services since 1998, for which he was paid $781,033 in salary, $231,000 in bonuses, and an undisclosed amount of long-term incentive awards from FY 2010 through FY 2012. (¶ 50.)

D. Cablevision's Entrenched Compensation Committee

The Compensation Committee is comprised of Reifenheiser, Ryan and Tese. (¶¶ 17-19.) Tese is seventy years old and has served on the Board alongside James and Charles since 1996. (¶ 90.) He has served on the Compensation Committee since at least 2004 and as its Chairman since at least 2009. (¶ 19.) Tese also serves on the board of directors of The Madison Square Garden Company

("MSG"), a company that was spun off from Cablevision and is controlled by the Dolans. (¶ 90.) Tese's brother is also employed by MSG. (*Id*.) Tese does not have a full-time job and has, in the past three years, received $1,205,349 for serving on the Board and the board of MSG. (*Id*.)

Ryan and Reifenheiser have served on the Board alongside James and Charles for approximately twelve years. (¶ 88.) Ryan has been a member of the Compensation Committee since 2005 and Reifenheiser since 2007. (¶¶ 17-18.) Reifenheiser is seventy-seven years old and does not have a full-time job. (¶ 91.)

Because of the Company's compensation program and overall corporate governance practices, the Compensation Committee has routinely been the subject of criticism by institutional-stockholder-advisory firms. (¶¶ 85-86.) Specifically, Institutional Shareholder Services ("ISS") has recommended that the Company's Class A stockholders withhold their votes for Reifenheiser, Ryan and Tese because "the company's compensation actions in fiscal year 2011 [did] not warrant shareholder support." (¶ 85.) ISS also identified a "pay-for-performance disconnect" because Cablevision's disclosures may not have been "robust enough for shareholders to assess [equity compensation] plan rigor" and the "performance-based equity awards only required the achievement of a 1 percent growth rate in any of the three fiscal years 2011, 2012, and 2013 which may [have] put in question the rigors of how these awards are earned." (*Id*.) In its 2013 report, ISS again recommended that Cablevision's Class A stockholders withhold their votes for Reifenheiser, Ryan and Tese, and criticized (i) the increase to James's compensation in 2012 relative to 2011 amidst Cablevision's poor performance, (ii) the March 2012 "special" grant of stock options, which rewarded James and Charles for poor performance, and (iii) the terms of James's February 2013 amended employment agreement, which substantially increased his compensation and benefits. (*Id*.)

The Comptroller of the City of New York (the "Comptroller") echoed many of these concerns, on behalf of New York City Pension Funds (the holder of 532,000 shares of Class A common stock), who filed a Notice of Exempt Solicitation with the SEC on April 24, 2013 (the "Comptroller's Letter"). The Comptroller's Letter complains of (i) Cablevision's "poor performance," (ii) "[e]xcessive executive compensation" paid to James and Charles, which "surged 49% ... in 2012" despite shareowner returns that dramatically lagged behind the company-selected peer group, (iii) that "pay was already high relative to peers in 2011," (iv) "[p]ervasive conflicts of interest," including "related-party transactions and other conflicts of interest involving the company and entities controlled by the Dolans," such as Charles's involvement with AMC Networks, Inc. ("AMC") and James's involvement with MSG, and (v) the presence of "numerous Dolan family members and in-laws" serving as directors or employees of the Company. (¶ 87.)

The Comptroller encouraged Class A stockholders to withhold their votes for all five Class A directors, including Tese, Ryan and Reifenheiser, at the Company's 2013 annual meeting of stockholders. (*Id.*)

A majority of Class A stockholders voted "withhold" with respect to the re-election of Tese, Ryan and Reifenheiser in 2010 and 2012. (¶ 92.) In 2013, a majority voted withhold for Tese, while nearly 40% voted withhold for Ryan and nearly half voted withhold for Reifenheiser. (*Id.*) However, in the absence of a nominating committee, Tese, Ryan and Reifenheiser have continued to nominate themselves, and neither the Company nor the Compensation Committee itself has explained to the Company's public stockholders why the committee members have not been replaced. (¶ 93.) As stated by the Comptroller, Tese, Ryan and Reifenheiser's remaining "on the board suggests that one of the few rights afforded Class A shareowners under Cablevision's dual class share structure – to elect at least 25 percent of the members of the board – is fictitious." (*Id.*) The Compensation Committee has not implemented any actions or measures to address these stockholder concerns, furthering the impression that "the company is run for the benefit of the Dolans," as observed in the Comptroller Letter. (¶ 94.)

In its May 8, 2013 report on Cablevision, Glass Lewis & Co. ("Glass Lewis"), another leading proxy advisory firm, stated: "In light of the board's failure to respond to the evident desire of shareholders that Messrs. Reifenheiser, Ryan, and Tese resign, we believe that the Class A directors, acting as a group, have failed to protect shareholder interests. We think shareholders should withhold support from these directors to express continued displeasure with their ineffective board representation." (¶ 86.)

E. The Excessive Compensation Paid to James and Charles

Charles has been employed as Cablevision's Executive Chairman for almost 30 years, and the Company has employed his son, James, as its CEO for nearly two decades. (¶¶ 12-13.) From FY 2010 through FY 2012, James and Charles received compensation packages comprised of a base salary, perquisites, annual cash bonuses, and long-term incentive awards, which include both restricted stock awards that vest based on service time and performance-based cash awards that become payable if the Company meets a three-year performance goal. (¶¶ 53-54.) James received compensation valued at $13.32 million in FY 2010, $11.24 million in FY 2011 and $16.62 million in FY 2012, for a total of more than $41.18 million. (¶ 54.) Charles received compensation valued at $13.49 million in FY 2010, $10.68 million in FY 2011 and $16.09 million in FY 2012, for a total of approximately $40.27 million. (*Id.*)

From FY 2010 through FY 2012, Cablevision also provided various perquisites to James and Charles, valued at $476,000 and $792,000, respectively, including: (i) a Company car and driver assigned to them on a full-time basis for both personal and business purposes; (ii) a security program for their protection; (iii) use of Cablevision's travel department to arrange for personal travel; and (iv) Company-owned tickets to entertainment and sporting events. (¶¶ 79-80.)

1. James and Charles Are Only Part-Time Employees

At the same time James and Charles were each being paid over $40 million at Cablevision, they both held executive officer positions at larger public companies. (¶ 68.) James has served as Executive Chairman of MSG, a $4.5 billion company that has also been controlled by the Dolan family since it was spun off from Cablevision in 2010. (*Id*.) As described in the 2013 Proxy, James "devotes a portion of his time" to this position, for which MSG has paid him more than $8.7 million during the last three fiscal years. (*Id*.)

During this period, James also worked a third job, as lead singer of his band, JD & the Straight Shot, which shortly before the Complaint was filed had played six shows in Inglewood, CA from January 15 through January 25, 2014. (¶ 69.) In 2013, JD & the Straight Shot opened for the Eagles, ZZ Top, Willie Nelson and Joe Walsh, and played forty shows in thirty-six cities throughout the United States and Canada. (*Id*.) James's band had also played shows in eleven different cities the previous year. (*Id*.) James has described the band as his "first love," which "he has pursued with the boundless zeal of a teenager, albeit one with spectacular resources at his disposal." (¶ 70.)

Charles has served as Executive Chairman of AMC, a $4.7 billion company, since it was spun off from Cablevision in June 2011. (¶ 71.) As described in the 2013 Proxy, Charles "devotes a portion of his business time" to this position, for which AMC paid him in excess of $1.75 million during FY 2012. (*Id.*) At that time, Charles's role at Cablevision was limited to "setting the strategic direction of the company," while James—when not touring with his band or working for MSG—was responsible for managing the day-to-day affairs of the Company. (*Id.*)

2. James's Role in Determining His Own Compensation

In approving the compensation packages for James and Charles over the past four years, the Compensation Committee allowed James to influence the selection of the Company Peer Group (defined below), which the Compensation Committee then used in connection with evaluating and determining James's compensation. (¶ 95.) Despite the fact that the use of a peer group in determining executive compensation is one of the most basic aspects of sound corporate governance practice, the Compensation Committee did not compare Charles's compensation packages to ***any peers***.[4] (¶ 96.) Instead, the Compensation Committee set Charles's compensation at a level "slightly below the target total direct

[4] For example, NYSE Listing Rule 303A.05 states that "in determining the long-term incentive component of CEO compensation, the [compensation] committee should consider ... the value of similar incentive awards to CEOs at comparable companies...." (¶ 96.)

compensation of the Chief Executive Officer of the Company" on account of Charles's "important role in setting the strategic direction of the Company." (*Id*.)

3. The Peer Group Analysis

In each of years 2010, 2011 and 2012, the Compensation Committee, under James's influence, selected fourteen publicly-traded companies (the "Company Peer Group") against which the compensation paid to Cablevision's executives would be measured and compared. (¶¶ 56-57.) ISS performed a peer-group analysis of Cablevision, based on industry and size criteria, for the 2010 through 2012 period (the "ISS Peer Group"). (¶ 58.) The ISS Peer Group, together with the Company Peer Group, constitute a twenty-six company sample (the "Combined Peer Group"). (¶ 59.)

With a market capitalization of $4.39 billion, Cablevision is the smallest company in the Company Peer Group, with three of the fourteen companies having market capitalizations between $4.7 million and $7.7 million, and the other eleven companies having market capitalizations greater than $11 billion. Half of the companies have market capitalizations greater than $30 billion, topped by Comcast at $274.59 billion. (¶ 60.)

Cablevision is the third smallest company in the Combined Peer Group. (*Id*.) Eighteen of the companies in the Combined Peer Group have market capitalizations of greater than $10 billion and nine of these companies have a market capitalization greater than $30 billion. (*Id.*) Cablevision's revenue is also less than the Combined Peer Group average, with the Company generating $19.58 billion from FY 2010 through FY 2012 relative to a Combined Peer Group average of $30.87 billion during that time. (*Id.*)

At the same time, Cablevision has substantially underperformed its peers. The Company included a graphic in the 2013 Annual Report showing that Cablevision's return on common-stock investment since December 31, 2007 was less than 20% of the average return enjoyed by the Dolans' handpicked peers. (¶ 62.) While the Company Peer Group average stockholder return increased 57% in 2012, Cablevision's increased only 9%. (¶ 61.) In terms of stockholder returns, for each of the one, three and five-year periods ending December 31, 2012, Cablevision ranked in the bottom quintile of its Bloomberg-selected peer group. (*Id.*)

4. James's and Charles's Pay Packages

a) Total Pay Relative to Peers

Despite this underperformance, Cablevision paid James and Charles compensation that was disproportionately larger than compensation paid to executives at Cablevision's much larger and better performing peers. (¶ 63.) As illustrated by the chart below, of the CEOs at the seventeen Peer Group companies with market capitalization of less than $30 billion, James's pay was greater than all

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but two of them and Charles, who is not even a CEO, was paid more than all but three. (¶¶ 64-65.)

Company	Total CEO Compensation (2010-2012)
Level 3 Communications	$58,368,802
Live Nation	$56,285,033
Cablevision (James/Charles)	$41,183,649/$40,274,027
Omnicom Group	$41,036,350
Charter Communications	$36,729,369
BorgWarner	$34,487,237
Interpublic Group	$32,770,288
Sirius	$31,622,200
CenturyLink	$30,161,396
Scripps Network	$26,362,857
McGraw-Hill	$25,389,536
Windstream	$24,042,269
Frontier Communications	$21,224,469
Virgin Media	$17,641,126
Gannett	$16,966,201
DISH Network	$11,550,541
Federal-Mogul	$9,820,908
The Washington Post	$1,238,480

(¶¶ 60, 64.) The compensation paid to James and Charles is even more misaligned when the size of these "peer companies" is considered:

- James and Charles received 257% and 249% more compensation, respectively, than the CEO of DISH Network, a peer company 5.8 times the size of Cablevision.

- James and Charles received 30.2% and 27.4% more compensation, respectively, than the CEO of Sirius, a peer company 5.1 times the size of Cablevision.

- James and Charles received 62.2% and 58.6% more compensation, respectively, than the CEO of McGraw-Hill, a peer company 4.7 times the size of Cablevision.

- James and Charles received 133.5% and 128.3% more compensation, respectively, than the CEO of Virgin Media, a peer company 3.14 times the size of Cablevision.

- James and Charles received 142.7% and 137.4% more compensation, respectively, than the CEO of Gannett, a peer company 1.47 times the size of Cablevision.

- James and Charles each received approximately the same compensation as the CEO of Omnicom Group, a company 4.37 times the size of Cablevision.

- James and Charles received 36.5% and 33.5% more compensation, respectively, than the CEO of CenturyLink, a peer company 4.1 times the size of Cablevision.

- James and Charles received 19.4% and 16.8% more compensation, respectively, than the CEO of BorgWarner, a peer company 2.9 times the size of Cablevision.

- James and Charles received 56.2% and 52.8% more compensation, respectively, than the CEO of Scripps Network, a peer company 2.5 times the size of Cablevision.

- James and Charles received 25.7% and 22.9% more compensation, respectively, than the CEO of Interpublic Group, a peer company almost double the size of Cablevision.

- James and Charles received 12.1% and 9.7% more compensation, respectively, than the CEO of Charter Communications, a peer company 3.2 times the size of Cablevision.

It gets worse when one compares companies roughly the same size as Cablevision:

- James and Charles received 3,225% and 3,151% more compensation, respectively, than the CEO of The Washington Post.
- James and Charles received 94% and 89.8% more compensation, respectively, than the CEO of Frontier Communications.
- James and Charles received 71.3% and 67.5% more compensation, respectively, than the CEO of Windstream.

(¶ 66.) James and Charles also received more pay than the CEOs of Liberty Global and Thomson Reuters, companies with market capitalizations of $103 billion and $30.69 billion, respectively, which paid their CEOs $39.93 million and $32 million in 2010-2012. (¶ 67.)

b) The "Special" Grant of Stock Options

In March 2012, James and Charles received a one-time grant of 1,687,800 and 1,747,600 stock options, respectively, valued at $6.85 million and $7.09 million. (¶ 73.) The 2013 Proxy described these as "special" awards made outside of the Company's executive compensation program. (¶ 73.) These awards were granted to James and Charles as a replacement of three-year performance awards granted in 2010 and 2011 that were expected to be worthless because James and Charles were unlikely to meet the underlying performance goals. (¶¶ 7, 74.) As described in the 2013 Proxy, this "special grant" was made to "further incentivize and retain" James and Charles, notwithstanding that the Dolan family has made it clear that they would not sell their stake in the business they have controlled since it was founded by Charles more than four decades ago and are, in their own words, only interested in taking the Company private. (¶ 76.)

c) 2013 Increase to James's Pay

On February 27, 2013, Cablevision amended its employment agreement with James (the "Letter Agreement"), with the result that his total pay was expected to exceed the $16.1 million package he received in 2012. (¶ 81.) Specifically, pursuant to the Letter Agreement, James's base salary increased $250,000 to a floor of $2,000,000 as of January 1, 2013, and the target value of his long-term incentive awards increased $4,500,000 to a floor of $12,000,000 *per annum*, equating to a base compensation of $14,000,000 in addition to perquisites and cash bonuses. (*Id*.)

James's employment agreement also contains a modified single-trigger provision that entitles him to severance if he chooses to leave the Company, ***for any reason, including his own voluntary resignation,*** within a certain time period following a change in control. (¶ 82 (emphasis added).) Such provisions involve illusory consideration because they "give the executive the ability to unilaterally decide whether or not to continue employment, and may put the compensation committee at a disadvantage in compensation negotiations," while providing no incentive for the executive "to stay with the company over the long-term given the prospect of an unconditional payment." (*Id.*) Additionally, because Cablevision is controlled by the Dolan family, the Dolans have the unilateral option to effectuate a change in control, whereupon James's employment agreement would allow him to walk away and still receive severance pay. (¶ 83.)

ARGUMENT

Defendants moved to dismiss under Rule 12(b)(6). Defendants concede that Rule 23.1 has been satisfied. *See Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief."), *aff'd*, 840 A.2d 641 (Del. 2003). Although Defendants repeatedly rely on cases imposing the admittedly inapplicable heightened Rule 23.1 pleading burden, "reasonable conceivability is the Rule 12(b)(6) pleading standard in Delaware." *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 813 n.12 (Del. 2013); *see also Solomon v. Pathe Comm'ns Corp.*, 672 A.2d 35, 39 (Del. 1996) (noting that while Chancery Rule 23.1 requires the pleading of facts with "particularity," the "standard used to review a Chancery Rule 12(b)(6) motion to dismiss ... requires that the complaint need 'only give general notice of the claim asserted...'"). The Court must "accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as 'well-pleaded' if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011).

Defendants also repeatedly rely on facts outside the pleadings, but "the complaint ordinarily defines the universe of facts from which the trial court may draw in ruling on a motion to dismiss." *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001). Documents extrinsic to the complaint may be considered on a motion to dismiss only "in some instances and for carefully limited purposes." *In re GM (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006). Specifically, a court may consider a document that is "*integral* to a plaintiff's claim and incorporated in the complaint"; however, such documents "are relevant not to prove the truth of their contents but *only* to determine what the documents stated." *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995) (emphasis in original)). In other words, "it is only the undisputed facts" in such documents "that are considered." *Orman v. Cullman*, 794 A.2d 5, 16 n.9 (Del. Ch. 2002). Courts disregard additional "facts" in the noticed documents that are not contained in the complaint "absent endorsement of their truthfulness by the [p]laintiff." *In re Gardner Denver, Inc. S'holders Litig.*, 2014 WL 715705, at *5-10 (Del. Ch. Feb. 21, 2014). For instance, "disclosures relating to the Board's subjective motivation or opinions" may not be taken as true on a defendant's motion to dismiss. *In re MONY Group Inc. S'holder Litig.*, 853 A.2d 661, 682 (Del. Ch. 2004). *See also In re New Valley Corp. Deriv. Litig.*, 2001 WL 50212, at *6 (Del. Ch. Jan. 11, 2001).

I. THE COMPLAINT STATES A CLAIM THAT THE CHALLENGED PAYMENTS WERE NOT ENTIRELY FAIR

The standard of review in this case is entire fairness, and Defendants bear the burden of demonstrating both fair price and fair process. Defendants ignore the applicable standard and, in any event, the Complaint contains ample facts to satisfy this minimal pleading burden.

A. The Dolan Family Controls Cablevision

There is no dispute that the Dolan family controls Cablevision. A stockholder is deemed to control a company if it (1) has "ownership of more than 50% of the voting power of a corporation" or (2) "exercises control over the business and affairs of the corporation." *In re Primedia Inc., Deriv. Litig.*, 910 A.2d 248, 257 (Del. Ch. 2006) (citing *Lynch*, 638 A.2d at 1113-14), *rev'd on other grounds, Kahn v. Kolberg Kravis Roberts & Co., L.P.*, 23 A.3d 831, 833 (Del. 2011)). "A group of stockholders, none of whom individually qualifies as a controlling stockholder, may collectively be considered a control group that is analogous, for standard of review purposes, to a controlling stockholder." *Frank v. Elgamal*, 2014 WL 957550, at *18 (Del. Ch. Mar. 10, 2014) (holding group is controller where members are "connected in some legally significant way – e.g., by contract, common ownership, agreement or other arrangement – to work together toward a shared goal") (internal quotation marks and citation omitted).

The Dolans concede that Cablevision "is a 'controlled company' under the NYSE listing standards and is 'controlled by the Dolan family.'" (Dolan Br. at 3.) As owners of 72.9% of the total voting power of outstanding Cablevision stock, the Dolan family has entered into an agreement pursuant to which all Dolan family voting power is cast in a single, unified bloc, the purpose of which was to "consolidate Dolan family control of Cablevision." (¶¶ 2, 23-25.) Accordingly, there is no dispute that the members of the Dolan family are controllers. *See Kosachuk v. Harper*, 2002 WL 1767542, at *4 n.29 (Del. Ch. July 25, 2002) (noting that stockholder "did not have explicit control" over a corporation, but that "[b]ased on his family connections" he could "exercise control over both the board of directors and the company itself" because he, his mother and his uncle combined together controlled a voting majority).

B. Entire Fairness Review Applies to the Challenged Payments

Entire fairness review applies to the challenged payments by the Company to the Dolan Defendants. Defendants' arguments are based on the incorrect premise that the business judgment rule applies.

Transactions between controllers and a controlled company are reviewed under entire fairness, regardless of whether the challenged transaction is approved by a committee or whether the challenged transaction is a merger or non-merger. As the Delaware Supreme Court has held on several occasions, "[o]rdinarily, in a challenged transaction involving self-dealing by a controlling shareholder the substantive legal standard is that of entire fairness, with the burden of persuasion [on proving the fairness of the transaction] resting upon the defendants." *Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (Del. 1997) (citing *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983)); *see also Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1239 (Del. 2012) ("When a transaction involving self-dealing by a controlling shareholder is challenged, the applicable standard of judicial review is entire fairness, with the defendants having the burden of persuasion."); A. Gilchrist Sparks, III & S. Mark Hurd, *Special Committees of Directors—When Does the Business Judgment Rule Apply and to What Extent are Committee Proceedings Confidential?*, 2 DEL. L. REV. 215, 216 (1999) ("[T]he mere creation and existence of a special negotiating committee ... is *in-sufficient* .... Rather, courts must scrutinize the special committee's 'real bargaining power before shifting the burden of proof on the issue of entire fairness.'").

The mere presence of independent committee approval does not change the standard of review. Even when an interested transaction with a controller "receives the informed approval of a majority of minority stockholders ***or*** an independent committee of disinterested directors, an entire fairness analysis is the only proper standard of judicial review." *Lynch*, 638 A.2d at 1113-14 (emphasis added). As Chancellor Allen stated in *Kahn v. Tremont Corp.*, 1996 WL 145452 (Del. Ch. Mar. 21, 1996), "while as an original matter one could, indeed I did, express the view that if the evidence of the integrity of the special committee was substantial enough, that process should result in the invocation of business judgment type judicial review, that position can no longer be advanced in this jurisdiction." *Id.* at *7, *rev'd on other grounds*, 694 A.2d at 428. *See also Cooke v. Oolie*, 2000 WL 710199, at *13 (Del. Ch. May 24, 2000) ("[T]his Court will apply the business judgment rule to the actions of an interested director, ***who is not the majority shareholder***, if the interested director fully discloses his interest and a majority of the disinterested directors ratify the interested transaction.") (emphasis added); *In re Western Nat'l Corp. S'holders Litig.*, 2000 WL 710192, at *26 (Del. Ch. May 22, 2000) (holding "business judgment rule should apply to an independent special committee's good faith and fully informed recommendation" in the "***absence of a controlling shareholder***") (emphasis added).

The Supreme Court explained that the rationale for the application of entire fairness, even where a committee approves an interested transaction with a controller, is that "the underlying factors which raise the specter of impropriety can never be completely eradicated and still require careful judicial scrutiny." *Tremont*, 694 A.2d at 428. The Supreme Court further stated:

> This policy reflects the reality that in a transaction such as the one considered in this appeal, the controlling shareholder will continue to dominate the company regardless of the outcome of the transaction. The risk is thus created that those who pass upon the propriety of the transaction might perceive that disapproval may result in retaliation by the controlling shareholder. Consequently, ***even when the transaction is negotiated by a special committee of independent directors no court could be certain whether the transaction fully approximated what truly independent parties would have achieved in an arm's length negotiation.*** Cognizant of this fact, we have chosen to apply the entire fairness standard to "interested transactions" in order to ensure that all parties to the transaction have fulfilled their fiduciary duties to the corporation and all its shareholders.

Id. at 428-29 (citations omitted; emphasis added). Thus, the "use of a well-functioning committee of independent directors" may shift the burden of proving the fairness of the transaction from defendants to plaintiff, but "regardless of where the burden lies, when a controlling shareholder stands on both sides of the transaction the conduct of the parties will be viewed under the more exacting standard of entire fairness as opposed to the more deferential business judgment standard." *Id*.

In response, Defendants heavily rely on *In re Tyson Foods, Inc. Consolidated Shareholder Litigation*, 919 A.2d 563 (Del. Ch. 2007) for the proposition that the existence of a special committee negates the application of the entire fairness standard *ab initio*. However, the Committee Brief relies almost entirely on dictum. (*See* Committee Br. at 18, 26, 31 (citing *Tyson*, 919 at 589 (denying dismissal because majority of board compromised).)[5] Indeed, the dictum on which Defendants rely is especially unpersuasive because the opinion cites no authority, engages in no analysis and is inconsistent with *Tremont*, 694 A.2d at 428;. *Lynch*, 638 A.2d at 1113-14; *Cooke*, 2000 WL 710199, at *13; and *Western Nat'l*, 2000 WL 710192, at *26.

The Delaware Supreme Court's repeated holding that entire fairness applies to interested transactions with controlling stockholders is not limited to the "merger" context, either. In *T. Rowe Price Recovery Fund, L.P. v. Rubin*, 770 A.2d 536 (Del. Ch. 2000), Vice Chancellor Lamb held that "both the Supreme Court and this court explicitly held that the entire fairness standard of review applies in the non-merger context to interested transactions involving controlling stockholders." *Id.* at 552 ("Defendants seek to limit *Lynch* to cases in which mergers give rise to the claim of unfairness, but offer no plausible rationale for a

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[5] "[O]ur Supreme Court treats as dictum statements in opinions that are unnecessary to the resolution of the case before the court." *MFW*, 67 A.3d at 502 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-67 (1996) (defining the binding holding of an opinion as "the result [and] also those portions of the opinion necessary to that result," and contrasting it with dictum), *aff'd*, *M & F Worldwide,* 88 A.3d 635; *Brown v. United Water Del., Inc.*, 3 A.3d 272, 276 & n. 17 (Del. 2010) (describing as dictum judicial statements that "would have no effect on the outcome of the case") (citation and internal quotation omitted); *Crown EMAK P'rs, LLC v. Kurz*, 992 A.2d 377, 398 (Del. 2010) (noting that a lower court ruling was "unnecessary ... to decide [the] issue," and thus dictum "without precedential effect").

distinction between mergers and other corporate transactions and in principle I perceive none.") (quoting *Tremont*, 1996 WL 145452, at *7). Many other cases establish that the entire fairness standard of review applies to controlling stockholder transactions not involving mergers. *See*, *e.g.*, *Tremont*, 694 A.2d at 428 (applying entire fairness in context of controlling stockholder that "structured the purchase of ... shares"); *In re China Agritech, Inc. S'holder Deriv. Litig.*, 2013 WL 2181514, at *25 (Del. Ch. May 21, 2013) (applying entire fairness in context of controlling stockholder that caused the company to purchase stock from a corporation the controller owned); *In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 437 (Del. Ch. 2002) ("[L]ater cases have extended the rule in *Lynch* to a broader array of transactions involving controlling shareholders."); *New Valley*, 2001 WL 50212, at *7 (applying entire fairness to a transaction involving a company's purchase of assets from its controlling stockholder); *Strassburger v. Earley*, 752 A.2d 557, 570 (Del. Ch. 2000) (applying entire fairness in context of corporation repurchasing stock from its controlling stockholder); *T. Rowe Price*, 770 A.2d at 552 (applying entire fairness in context of corporation controlled by majority stockholder attempting to implement "management and shared services agreements" between two companies also controlled by the majority stockholder); *In re Dairy Mart Convenience Stores, Inc., Deriv. Litig.*, 1999 WL 350473, at *17 (Del. Ch. May 24, 1999) (applying entire fairness in context of two controlling stockholders entering into an agreement "with the Company for their continuing controlling interests in the Company ... at no cost to the insiders"); *Harbor Fin. Partners, v. Sugarman*, 1997 WL 162175, at *2 (Del. Ch. Apr. 3, 1997) (applying entire fairness in context of controlling stockholder that "inflat[ed] the market price of Rally's Notes and then caus[ed] Rally's to pay the inflated price in the Repurchase"); *Hamilton v. Nozko*, 1994 WL 413299, at *6-7 (Del. Ch. July 27, 1994) (rejecting the application of the business judgment rule on a motion to dismiss in context of controlling stockholder that "caused the corporation's stock to be deregistered and delisted").

Here, Plaintiff alleges—and Defendants do not dispute—that the Dolan family controls Cablevision and that they are interested in the challenged transactions. Accordingly, the payments challenged in this suit are subject to review under the entire fairness standard, regardless of whether a committee approved some of the challenged transactions.

C. Plaintiff Has Met His Pleading Burden

Plaintiff has met his pleading burden. The Court's role at the 12(b)(6) stage is simply to evaluate whether plaintiff has sufficiently alleged facts that suggest the challenged transaction is unfair. *See In re Atlas Energy Res., LLC*, 2010 WL 4273122, at *11 (Del. Ch. Oct. 28, 2010) ("[T]he Court must determine whether Plaintiffs' allegations suggest that the merger was not entirely fair; that is, that the merger was not characterized by fair price and fair dealing."). It is only where a defendant "is able to show, conclusively, that the challenged transaction was entirely fair based solely on the allegations of the complaint and the documents integral to it" that a court can grant a motion to dismiss under Rule 12(b)(6). *See Hamilton Partners, L.P. v. Highland Capital Mgmt., L.P.*, 2014 WL 1813340, at *12 (Del. Ch. May 7, 2014).

A plaintiff "satisfies whatever initial burden plaintiffs ha[ve] of showing some basis for invoking the fairness obligation" when a plaintiff alleges "a self-dealing transaction in which the majority stockholder ... is receiving a special benefit and [plaintiff] is suffering an apparent detriment." *T. Rowe Price*, 770 A.2d at 552. Here, there can be no question that the transactions Plaintiff has challenged provide benefits to the Dolans that are not shared with Cablevision or its non-Dolan stockholders. And Plaintiff has alleged numerous facts evidencing the unfairness of the Dolans' self-dealing. (*See* Statement of Facts Parts B-E above.) *See Monroe County Employees' Retire. Sys. v. Carlson*, 2010 WL 2376890, at *2 (Del. Ch. Jun. 7, 2010) (dismissing complaint only after finding that there were "*no* factual allegations geared towards proving that the [transactions] were executed at an unfair price").[6]

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[6] *See also* Kobi Kastiel, *Executive Compensation in Controlled Companies*, 6, *available at* http://www.law.harvard.edu/programs/olin_center/Prizes/2014-2.pdf
continued on next page…

Plaintiff has made numerous "factual allegations about [the challenged payments to the controller] to put them into perspective," *id.* at *2, including detailed comparisons of comparable companies that showed Cablevision's compensation scheme is an extreme outlier. (*See* Statement of Facts Part E above.) Defendants do not even attempt to argue that the Complaint fails to suggest any unfairness.

Thus, the well-pleaded allegations of the Complaint, taken as true and given all reasonable inferences that flow therefrom, suggest that both the process through which James's and Charles's compensation was determined and the price of the compensation itself were unfair to the minority stockholders. *See Zutrau v. Jansing*, 2014 WL 3772859, at *22-26 (Del. Ch. July 31, 2014) (holding majority stockholder self-compensation was not entirely fair); *Seinfeld v. Slager*, 2012 WL 2501105, at *11, *16 (Del. Ch. June 29, 2012) (denying motion to dismiss where plaintiff alleged that defendant directors awarded themselves "annual

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(May. 2014) (forthcoming 90 IND. L. J. 2015) ("[P]aying excessive compensation to controllers who serve in managerial roles (controllers-CEOs) has long been viewed as another mechanism for transferring private benefits to controllers."); *id.* at 13 ("They can [also] employ family members at the company ...."); F. Hodge O'Neal, *Oppression of Minority Shareholders: Protecting Minority Rights*, 35 CLEV. ST. L. REV. 121,129 (1987) ("Another commonly used squeeze-out technique is for majority shareholders to siphon off corporate wealth by causing the corporation to pay its majority shareholders, and perhaps members of their families, excessively high compensation for services rendered as directors, officers or key employees.").

compensation [that] far exceed[ed] the compensation of directors by one of the Company's peers"); *Valeant Pharms. Int'l v. Jerney*, 921 A.2d 732, 740, 750 (Del. Ch. 2007) (evaluating compensation relative to peer-group and determining that compensation was not entirely fair).[7] Likewise, Plaintiff has sufficiently alleged that the compensation paid to Kathleen, Marianne and Deborah was also unfair.

II. DEFENDANTS HAVE NOT CARRIED THEIR BURDEN TO PROVE THAT THE COMPENSATION COMMITTEE WAS INDEPENDENT AND EFFECTIVE

Defendants have taken the incorrect position that the business judgment presumption applies *ab initio* on a motion to dismiss a complaint challenging a series of interested controlling stockholder transactions. Chancellor Chandler's decision in *New Valley*, 2001 WL 50212, at *6, is squarely on point. There, the defendants argued that a committee had approved a non-merger interested transaction with a controlling stockholder. *Id.* at *1-2. The Court held:

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[7] Defendants contend that "[n]o authority supports the illogical proposition that although an officer's compensation was determined by a process protected by the business judgment rule, receiving the compensation nevertheless constitutes a breach of the duty of loyalty." (Dolan Br. at 11-12.) Again, the business judgment rule does not apply and, in any event, Delaware courts have upheld claims for breach of fiduciary duty involving the receipt of improper compensation. *See, e.g., Halpert v. Zhang*, 996 F.Supp 2d. 406 (D. Del. 2013) (denying motion to dismiss fiduciary duty claim where officer received options in violation of compensation plan); *Pfeiffer v. Leedle*, 2013 WL 5988416, at *10 (Del. Ch. Nov. 8, 2013) (denying dismissal of fiduciary duty claim where defendant "knew or should have known that his receipt of more than 150,000 Stock Options in a year violated the Plan").

"[B]ecause the Court is evaluating the legal sufficiency of the complaint, it has no evidence from the defendants that would allow it to determine whether they have adequate proof that a truly independent committee with real bargaining power evaluated the transaction." *Id.* at *7 (denying motion to dismiss).

Even if it were the case that the Defendants could meet their burden, which they have not, the business judgment rule can be rebutted and the entire fairness test implicated, if Plaintiff alleges facts which support a reasonable inference that a majority of the directors that awarded the challenged compensation were not independent from those receiving it. The Complaint alleges that neither a majority of the Compensation Committee (which authorized payments to James and Charles) nor a majority of the full Board (which authorized payments to Kathleen, Deborah and Marianne) were independent of the Dolan family members whose compensation is being challenged in this case. Defendants have not rebutted these allegations and their motions to dismiss must therefore be denied.

Indeed, two of the cases on which Defendants themselves rely came to the same result. *See In re The Limited, Inc. S'holders Litig.*, 2002 WL 537692, at *7 (Del. Ch. Mar. 27, 2002) (denying motion to dismiss "because the challenged transactions ... appear unfair to the stockholders ... [and] were not approved by a majority of independent and disinterested directors"); *Orman*, 794 A.2d at 15, 31 (finding that business judgment rule presumption is rebutted and motion to dismiss "must be denied" where plaintiff alleged "facts from which it is reasonable to question the independence and disinterest" of majority of the board).[8]

And, even if the approval of a fully-empowered and otherwise pristine committee were sufficient to invoke the business judgment rule, whether "a truly independent committee with real bargaining power evaluated the transaction" is a question of fact that is inappropriate to resolve at the motion to dismiss stage where the court is merely "evaluating the legal sufficiency of the complaint." *New Valley*, 2001 WL 50212, at *6-7 (denying motion to dismiss under Rule 12(b)(6) where plaintiff "sufficiently alleged facts" suggesting that controlling stockholder transaction was unfair).

A. The Challenged Payments to Kathleen, Marianne, and Deborah Were Approved by a Dolan Dominated Board

The entire Board sets the compensation of Kathleen, Marianne and Deborah. (¶ 33.) This compensation package consists of a base fee and cash payments for meeting attendance, as well as an annual stock award, given to them for each's

8 Defendants argue that even if Plaintiff sufficiently alleges that a majority of the Compensation Committee lacked independence, it still must be established that the Compensation Committee acted in bad faith. (*See* Committee Br. at 3.) But as this Court has held, "to the extent that a duty of loyalty claim is implicated [an exculpatory provision] is inapplicable." *Limited*, 2002 WL 537692, at *7, *10 n.65 (holding that complaint stated a loyalty claim where transaction "appear[ed] unfair" and was "not approved by a majority of independent and disinterested directors").

"***experience as a member of Cablevision's founding family***." (¶¶ 34, 42, 97 (emphasis added).)

Ten members of the seventeen-person Board that approved the non-employee director compensation package were Dolans, and thus a majority of the Board that approved the compensation lacked independence from Kathleen, Marianne and Deborah. *See London v. Tyrrell*, 2010 WL 877528, at *14, n.60 (Del. Ch. Mar. 11, 2010) (explaining on a motion to dismiss "plaintiffs can often meet their burden of establishing a lack of independence with a simple allegation of a familial relationship"); *Huizenga*, 751 A.2d at 889 (explaining "[c]lose familial relationships between directors can create a reasonable doubt as to impartiality," which creates a "natural inference of mutual loyalty and affection")

Accordingly, the challenged payments to Kathleen, Marianne and Deborah are not entitled to the protection of the business judgment rule, and Plaintiff's claims regarding that compensation should not be dismissed. *Mizel v. Connelly*, 1999 WL 550369, at *1 (Del. Ch. July 22, 1999) (denying motion to dismiss where a familial relationship created a reasonable doubt as to the director's competence to consider challenged transaction).

B. Defendants Never Claim that Any Stockholder Vote Was a Procedural Protection

Defendants have never claimed that there was a majority-of-the-minority vote that could have the potential, in other contexts, to insulate the challenged transactions from entire fairness review. (*See, e.g.*, Committee Br. at 16-17, 25 (noting that majority of "votes cast" on a non-binding "advisory" vote took place, but conspicuously omitting any argument that such a vote is an effective majority-of-the-minority condition).) "[T]he court is aware that even impartial directors acting in good faith and with due care can sometimes come out with an outcome that minority investors themselves do not find favorable. Conditioning the going private transaction's consummation on a majority-of-the-minority vote deals with this problem …." *MFW*, 67 A.3d at 531 ("Because a special committee in this structure knows from the get-go that its work will be subject to disapproval by the minority stockholders, the special committee has a strong incentive to get a deal that will gain their approval.").

Defendants easily could condition any changes in their compensation on a binding vote by Cablevision's non-Dolan stockholders, but they have not done so. *Cf. M & F Worldwide*, 88 A.3d at 638 ("From the outset, M & F's proposal to take MFW private was made contingent upon ... approv[al] by a majority of stockholders unaffiliated with M & F."). Indeed, it is especially ironic that the Committee Brief touts the results of a non-binding, advisory vote, when members of the Committee have routinely received abysmal numbers of votes from non-Dolan stockholders. (*See* ¶¶ 92-93.)

C. It is Reasonably Conceivable that the Compensation Committee Was Not Effective

Plaintiff's allegations concerning the lack of independence and ineffectiveness of the Compensation Committee are sufficient to survive a Rule 12(b)(6) motion. *See M & F Worldwide*, 88 A.3d at 638 n.14. In other words, Defendants have the burden to demonstrate that the Compensation Committee was effective, which cannot be resolved on a motion to dismiss. *See In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 548-49 (Del. Ch. 2003) ("[T]he Supreme Court expressly held that defendants could not meet their burden to prove a valid special committee process at the pleading stage and that a full factual record had to be developed.") (citing *Krasner v. Moffett*, 826 A.2d 277, 279 (Del. 2003)).

In *Krasner*, the plaintiff challenged a merger transaction and alleged that the special committee that negotiated the merger was not independent based on those directors taking seats on the post-merger board. *Krasner*, 826 A.2d at 285 n.30. In analyzing plaintiff's allegations, the Delaware Supreme Court recognized that the "independence of the special committee involves a fact-intensive inquiry that varies from case to case" and concluded that the allegations were sufficient to withstand a Rule 12(b)(6) motion to dismiss since that standard requires that a complaint "***must*** survive a motion to dismiss ... if the plaintiff could ultimately prevail on the merits of their claims based on ***any*** reasonable set of facts alleged in the complaint." *Id.* at 286 (emphasis added). *See also Emerald Partners*, 726

A.2d at 1223-24; *Tremont*, 694 A.2d at 428; *Primedia*, 910 A.2d at 261 n.45 (recognizing that it "must apply the deferential Rule 12(b)(6) standard to the question of independence" and inferring a lack of independence from allegations of a relationship of a "personal nature" that must be "viewed in a light most favorable to the plaintiffs").

The same is true here. In response, Defendants improperly attempt to reverse the applicable burden, as indicated by the way in which they have argued their motions to dismiss.

1. The Compensation Committee Cannot Introduce Evidence Outside the Pleadings to Meet Their Burden

Defendants seek to establish that the Compensation Committee was independent and acted reasonably by inappropriately introducing multiple disputed "facts" from outside the pleadings. That is not allowed. *See, e.g., Santa Fe*, 669 A.2d at 70; *Gardner Denver*, 2014 WL 715705, at *7-9. Plaintiff has not endorsed the truthfulness of any of this extrinsic content, and it therefore cannot be considered on a motion to dismiss. *Gardner Denver*, 2014 WL 715705, at *4, *7.

For example, Defendants rely on Cablevision's 2011, 2012 and 2013 proxy statements to assert that "the Compensation Committee engaged an independent compensation consultant" on whose expertise they relied, and that the "consultant advises the Compensation Committee on the design of the executive compensation program and the reasonableness of individual compensation awards." (Committee Br. at 9-10).

First off, "the protections of § 141(e) would constitute an affirmative defense for which evidence may be brought at trial. It cannot affect the ruling on a motion to dismiss because, at this stage, the plaintiff's allegations must be taken as true, notwithstanding any defenses that may be raised in a trial on the merits." *Manzo v. Rite Aid Corp.*, 2002 WL 31926606, at *3 n.7 (Del. Ch. Dec. 19, 2002).

Moreover, even if the Court were to accept unsworn and untested factual claims self-servingly advanced by the Compensation Committee such as that it hired "independent" advisors, it should be taken into account that these supposed "independent" advisors work for other Dolan-affiliated entities. In 2010 the Compensation Committee allegedly received advice from ClearBridge Compensation Group (Committee Br. at 9) at the same time Clearbridge also advised MSG, another Dolan-controlled company. (Ex. C at 18 ("In February 2010 our Compensation Committee engaged ClearBridge Compensation Group (the 'compensation consultant') to serve as its independent compensation consultant.").) The Compensation Committee also allegedly relied on Pay Governance LLC in 2011 and 2012. (Committee Br. at 9 ("In 2011 and 2012, that consultant was Pay Governance LLC.").) But at the same time, another Dolan-affiliated company, AMC Networks, Inc., retained Pay Governance LLC to serve as “its independent compensation consultant.” (Ex. D at 22.)

The same goes for numerous other factual assertions that Defendants improperly ask this Court to credit on the pleadings, including:

- the directors’ experience and committee service, including that “each of the Compensation Committee Defendants has led a highly successful career and continues to hold significant positions outside of Cablevision and its affiliates,” none of which was pleaded in the Complaint;

- claims that, with respect to a Say-on-Pay vote, “an overwhelming majority of Cablevision common stock, including a majority of the votes cast by common stock not held by the Dolan family, voted to approve the Compensation Committee’s executive compensation decisions”;

- how they selected the Company Peer Group, stating that “[t]his core peer group consisted of 15 publicly traded companies ‘in the same general industry or industries as the Company as well as companies of similar size and business mix’ with whom Cablevision ‘compete[s] for executives’” and that the Compensation Committee considered “experience, skills, position, level of responsibility, historic and current compensation levels, internal relationship of compensation levels between executives, as well as attraction and retention of executive talent” (internal citations omitted);

- the Compensation Committee’s purported use of a “deliberative” process, thereby attempting to directly contradict the allegations set forth in the Complaint;

- justifying the failure to meet performance goals, claiming that “Cablevision did not implement a rate increase, and extended the term of certain promotional offers as a result of its focus on retention and acquisition of subscribers. Consequently, as the Company explained in its most recent annual filings, its revenue growth for the year ended December 31, 2012 was negatively impacted. Cablevision also undertook significant increases in capital and operating expenditures in 2012.” (internal citations and quotations omitted);

- claiming that James's new employment agreement was fair, because of his "significant focus on operational responsibilities in addition to his role as President and Chief Executive Officer of the Company" (internal citation omitted); and

- providing a *post-hoc* justification for the "special" stock option grants by claiming that Cablevision had modified its strategy from the time it had granted the performance awards that allegedly precluded the Company from achieving the performance goals.

(Dolan Br. at 4; Committee Br. at 2-5, 8-14.)

These are all assertions of disputed fact that purport to contradict the Complaint, and they are plainly inappropriate to consider on a motion to dismiss. *See, e.g., Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009) ("On a motion to dismiss, the Court of Chancery [is] not free to disregard [a] reasonable inference, or to discount it by weighing it against other, perhaps contrary, inferences that might also be drawn."); *New Valley*, 2001 WL 50212, at *6 (explaining that documents relevant for the truth of the matter asserted "on their face, do not reflect the complete picture that can only really be drawn after discovery"); *see also Krasner*, 826 A.2d at 285-86 (rejecting an argument that "portions of the joint proxy statement incorporated in the complaint… negate[d] plaintiffs' fiduciary duty claims as a matter of law" because the "the joint proxy statement does not directly portray a complete picture of the special committee process") (citation omitted).

Indeed, now that Defendants have raised these issues, the motion to dismiss could be converted into a motion for summary judgment, where Plaintiff would be entitled to take discovery. *See* Rule 12(b) ("[T]he motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.").

2. Defendants Have Not Demonstrated the Independence of the Committee

Even if Defendants could do so on a motion to dismiss, Defendants have not carried their burden to demonstrate the members of the Compensation Committee were independent.

a) The Committee Members Have Not Demonstrated the Immateriality of Their Own Compensation

Defendants have not demonstrated the immateriality of the compensation paid to Tese, Reifenheiser and Ryan. In 2012 and 2013, Tese, Reifenheiser and Ryan were paid $467,647, $441,708 and $496,042, respectively. (Ex. B at 19; Ex. A at 18.) Both Tese and Reifenheiser do not have full time jobs, which makes Cablevision their primary source of income. (¶ 91.) Compensation is material when it is a director's sole or principal source of income. *See Limited,* 2002 WL 537692, at *5 (recognizing that "as a general matter, compensation from one's principal employment is 'typically of great consequence'" to him); *Kahn v.*

Portnoy, 2008 WL 5197164, at *12 (Del. Ch. Dec. 11, 2008) (director was beholden where, among other things, the compensation she received as a director exceeded her salary as a court clerk); *see also Orman*, 794 A.2d at 29 (finding that "it is reasonable to infer that $75,000 would be material to [the director] and that he is beholden to the [controller] for continued receipt of such fees").

Defendants claim that this compensation was immaterial to Tese, Reifenheiser and Ryan by pointing to their respective backgrounds and business experience. (*See* Committee Br. at 8-9.)[9] Defendants' argument must fail on a Rule 12(b)(6) motion because they cannot essentially "seek a judicial finding as to director disinterest and independence" where there has been no discovery and court is obliged to "accept plaintiffs' characterization of all well-pleaded facts." *Western Nat'l.*, 2000 WL 710192, at *19. Both Tese and Ryan also worked for non-profit institutions, and it is therefore reasonable to infer that they earned substantially less than what Cablevision paid them. *See Limited*, 2002 WL 537692, at *6 (finding

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[9] Defendants' improper reliance on selective facts outside the pleadings about Reifenheiser and Ryan omits their service on a two-member special committee that recommended an inadequate Dolan-family squeeze-out offer in 2007. The non-Dolan stockholders resoundingly rejected the deal: "No other deal of this size has ever been rejected…. [S]ome investors are questioning whether the directors should have approved the transaction." Andrew Ross Sorkin, *Dolans' Bid to Take Cablevision Private Is Rejected by Shareholders*, N.Y. TIMES (Oct. 25, 2007) (calling into question "the reputation of the independent directors").

reasonable inference that $150,000 was material to director whose principal occupation was a senior university official).

b) Defendants Wrongly Rely on Cases Where the Defendant Did Not Have the Burden

Defendants also inappropriately rely on cases decided under the heightened pleading standard of Chancery Rule 23.1. *See, e.g.*, *Tyson*, 919 A.2d 563, 595 & n.82 (analyzing claims under "the standard *Aronson* analysis"). Because Defendants have the burden, Rule-23.1 motion to dismiss cases are inapplicable. Cases where defendants have the burden, such as cases involving *Zapata* committees, demonstrate that Defendants here have not met their burden. *See London*, 2010 WL 877528, at *14 ("In this case, however, the burden is on iGov to show that it has appointed SLC members whose independence cannot seriously be doubted. The Company, not plaintiffs, must do the explaining in the first instance if there are associations that cast a shadow on independence."). Indeed, it is in part because the burden is on Defendants that a determination of the Committee's independence and effectiveness is not appropriate at the motion to dismiss stage. *See In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917, 940 (Del. Ch. 2003) ("The SLC bears the burden of persuasion on this motion and must convince me that there is ***no material issue of fact*** calling into doubt its independence.") (emphasis added).

3. The Totality of the Facts Must Be Considered

There are also numerous other facts, which—when added to the other problems with the Committee—create even further doubt about its effectiveness. *See China Agritech*, 2013 WL 2181514, at *20 (holding independence factors cannot be considered in isolation and must be viewed as a whole). For instance, Tese's brother also works for MSG, another company controlled by the Dolans, which provides Tese with another reason to stay in the good graces of the Dolan family. (¶ 90.) In *China Agritech* this was the basis for a finding that a certain director was not independent: "Dai also cannot consider a demand that would place Chang or Teng at risk because his daughter's primary employment depends on the good wishes of the Company's controlling stockholders." *Id.* (citing *Cal. Pub. Emps. Ret. Sys. v. Coulter*, 2002 WL 31888343, at *9 (Del. Ch. Dec. 18, 2002); *Mizel*, 1999 WL 550369, at *4; *Harbor Fin.*, 751 A.2d at 889).[10]

Indeed, despite the fact that a majority of the Class A stockholders have voted against them at least twice since 2010, Tese, Reifenheiser and Ryan continue to serve as Class A directors because the Dolans effectively control all elections. (¶ 92.) The Board has no nominating committee, so it is the full Dolan-controlled

[10] Defendant's reliance on *In re J.P. Morgan Chase & Co. Shareholder Litigation*, 906 A.2d 808 (Del. Ch. 2005) is unavailing, because (i) it was a Rule 23.1 motion and the defendants did not have the burden to show independence, unlike here, and (ii) J.P. Morgan does not have a controlling stockholder.

Board that approves all Class A nominee directors based on the recommendation of the incumbent Class A Board members. (Ex. B at 15.) This arrangement ensures that Tese, Reifenheiser and Ryan know that their continued service on the Board is subject to the wishes of the Dolan family. (¶ 93.) The Compensation Committee Charter also provides that Tese, Reifenheiser and Ryan serve "at the pleasure of" the Dolans, and when it comes to deciding how the Dolans will be paid, Tese, Reifenheiser and Ryan certainly have aimed to please. (Ex. E.)

Defendants claim that Cablevision's minority stockholders' repeated "withhold" votes for Tese, Reifenheiser and Ryan "do not support the conclusion that the Compensation Committee lacks independence as 'it is not enough to charge that a director was nominated by or elected at the behest of those controlling the outcome of a corporate election.'" (Committee Br. at 25 (quoting *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984).) Defendants miss the point. They have omitted the key point of the *Aronson* quotation: it is important to consider whether the director "comport[s] with the wishes of the corporation (or persons) doing the controlling." 473 A.2d at 816 (quotations omitted). The Compensation Committee has never said "no," and Defendants cite to nothing that demonstrates that there was any real arm's-length bargaining.

Tese has served on the Board alongside James and Charles for the last twenty years, and Reifenheiser and Ryan have been on the Board for the last twelve years. (¶¶ 90-91.) Cablevision has opted not to have a majority of independent directors or a corporate governance and nominating committee. (¶ 27.) The Dolans could eliminate the Compensation Committee in the event that Tese, Reifenheiser and Ryan displeased the Dolan family. *See* NYSE Rules 303A.00, 303A.05 (stating that a controlled company is not required to have a compensation committee). Tese, Reifenheiser and Ryan have no ability to replace James or Charles, and there, again, is no nominating and corporate governance committee to which Tese, Reifenheiser and Ryan could recommend that James and Charles be replaced.

Indeed, despite receiving a majority of withheld votes on numerous occasions, Tese, Reifenheiser and Ryan have not even felt it necessary to explain to the Company's public stockholders why they were continuing to renominate themselves. Of course, the lack of public stockholder support for Tese, Reifenheiser and Ryan is based largely on their having paid James and Charles too much money (¶ 85), and yet their response was not to decrease that compensation or even step down from the Board, but to pay James and Charles even more (*see* ¶¶ 73-78 ("special" option grants), ¶¶ 81-84 (new employment agreement)), thereby leading to the reasonable inference that the Compensation Committee is "comport[ing]" with the wishes of the Dolans, not the Company's public stockholders. *Aronson*, 473 A.2d at 816.

James's and Charles's receipt of a "special" grant of stock options constitutes increased pay to the family that controls the Company because otherwise they would receive less than they were anticipating due to the fact that the Company did not perform well. (Committee Br. at 13.) The "special" grant to James and Charles thus illustrates that the Compensation Committee does not have "real bargaining power that it can exercise with the majority shareholder on an arm's-length basis." *Rabkin v. Olin Corp.*, 1990 WL 47648 (Del. Ch. Apr. 17, 1990), *reprinted in* 16 DEL. J. CORP. L. 851, 861-62 (1991)). *See also M & F Worldwide*, 88 A.3d at 638 n.14 ("[A]llegations about the sufficiency of the price call into question the adequacy of the Special Committee's negotiations, thereby necessitating discovery on all of the new prerequisites to the application of the business judgment rule.").

Nor is this a case where the controller has removed himself or herself from the bargaining table. To the contrary, James played an active role in influencing the Company Peer Group. (Committee Br. at 11-12.) The Company Peer Group selected by James and the Compensation Committee was comprised of companies much larger than Cablevision, which supports an inference that it was designed for the purpose of ensuring an oversized compensation package for James. (¶ 95.)[11]

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[11] In defense of the Compensation Committee's process, Defendants rely on *In re Goldman Sachs Group, Inc. Shareholders Litigation*, 2011 WL 4826104 (Del.
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While Defendants attempt to explain the fact that the Compensation Committee did not compare Charles's compensation to the Company Peer Group on the grounds that "the Compensation Committee Defendants determined that 'there was limited market information regarding the role and compensation of chairmen who are executive officers but not chief executive officers,'" this does not advance their cause. (Committee Br. at 12.) The critical fact is that the Compensation Committee decided to err on the side of paying Charles more compensation than all but three of the CEOs within the sample of Company Peer Group companies with a market capitalization of less than $30 billion. (¶ 64.) These allegations more than adequately plead that, in deciding James's and Charles's compensation, the Compensation Committee's process by no means "appropriately simulated an arm's-length transaction." *Tremont*, 694 A.2d at 429 (reversing trial court's determination that committee was independent and well-functioning).

Defendants urge the Court to view each of Plaintiff's many different allegations separately and in a vacuum. Defendants cite *In re BJ's Wholesale*

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Ch. Oct. 12, 2011) (*see* Committee Br. at 28); however, in that case, unlike here, in connection with making its compensation decisions, the board consulted senior management for company specific information, such as projections of net revenues, *not* which companies to include as peers. *Goldman Sachs*, 2011 WL 4826104, at *3. Moreover, unlike here, the senior management in *Goldman* did not control the company. *Id*. at *8 n.76.

Club, Inc., 2013 WL 396202 (Del. Ch. Jan. 31, 2013) for the proposition that tenure of board service is not a factor in determining independence, but that case merely found that plaintiff had only "cursorily" challenged the independence of the director by alleging just one fact – "nearly twenty years of Board service alongside" the chairman. *Id*. at *26 n.63. Moreover, the *BJ's* Court granted the motion to dismiss on the grounds that the complaint failed to allege a "reasonably conceivable set of circumstances" for a breach of the duty of loyalty claim where the board "actively solicited" other bids, relied in good faith on financial and legal advisors and drove up the price with the result that shareholders received a 38% premium. *Id*. at *53, *60. Similarly, Defendants cite *Orman* for the proposition that a "previous business relationship is not enough to overcome the presumption of a director's independence"; but in *Orman* the "only fact[]" alleged to challenge the applicable directors' independence was "the mere recitation" that the two directors had served on the Board for a long time. 794 A.2d at 26-27. The Court found that plaintiff's complaint "pled facts that make it reasonable to question the independence and/or disinterest of a majority of [the company's] board." *Id*. at 31. Indeed, the Court noted that it "may be possible to plead additional facts concerning the length, nature or extent of those previous relationships that would put in issue that director's ability to objectively consider the challenged transaction." *Id.* at 27 n.55.[12]

Rounding out their arsenal, Defendants cite *In re The Limited*, and *In re Walt Disney Co. Derivative Litigation*, 731 A.2d 342 (Del. Ch. 1998), tellingly, for the proposition that a director's receipt of compensation for his role on the board does not, "without more," establish a lack of independence. (Committee Br. at 22-23). Of course, Plaintiff does not rely on such allegations "without more."[13]

Defendants' approach to parsing Plaintiff's Complaint is contrary to law. As this Court stated in *Selectica, Inc. v. Versata Enterprises*, 2010 WL 703062 (Del. Ch. Feb. 26, 2010), in determining whether a director is independent, the Court "tak[es] into account all circumstances" and "allows [the] independence determination to be 'tailored to the precise situation at issue." *Id.* at *13. *See also Orman*, 794 A.2d at 23 (stating that the Court "reach[es] conclusions as to the sufficiency of allegations regarding interest and independence only after considering *all* the facts alleged" in the Complaint) (emphasis added).

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[12] Similarly, in *Freedman v. Redstone*, 753 F.3d 416 (3d Cir. 2014), a Rule 23.1 case cited by Defendants, the court found allegations that "a long-time close personal friend and an advisor to" an interested director did not destroy that director's independence, but like *Orman*, that was the only fact alleged by plaintiff. *Id*. at 424.

[13] Both *The Limited* and *Disney* were also decided under the more stringent Rule 23.1 requirements.

III. THE COMPLAINT PLEADS A CLAIM FOR WASTE

In setting forth a series of transactions that are "so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration," Plaintiff's Complaint adequately pleads a claim for waste. *Glazer v. Zapata Corp*., 658 A.2d 176, 183 (Del. Ch. 1993).

On March 6, 2012, the Compensation Committee awarded James and Charles stock options to purchase 1,687,800 and 1,747,600 shares of Cablevision common stock, respectively, which were valued at $6.85 million and $7.09 million, respectively. (¶ 73.) In exchange for the options, the Company received in return no consideration whatsoever. The stock options were *not* part of the Company's regular executive compensation program that compensated James and Charles for their role as executive officers. (*Id*.) Rather, as the Defendants themselves have disclosed, the stock options were a "special" grant awarded to various employees in order to replace prior three-year cash-performance awards made in 2010 and 2011 that were not anticipated to pay out because James and Charles were not expected to achieve the performance goals underlying the awards. (¶ 74.) In other words, James and Charles were awarded a special grant valued at almost $14 million in the aggregate as a "special" reward for their own poor performance. (¶ 76.)

Defendants spend much time arguing a proposition that Plaintiff does not dispute: that a recipient's retention can serve as adequate consideration for a grant of stock options. (Committee Br. at 32-33, 36).[14] Here, however, the reason Defendants have advanced for the grant—the retention of James and Charles—is contradicted by the Dolans' own actions and by statements in the Company's SEC filings. Neither James nor Charles plan to ever leave Cablevision. The Dolans have represented that they have consolidated their control over the Company in order potentially to take it private. (¶ 76.) Thus, while the special grant may have served some retentive purpose for other employees, the rationale does not apply to James and Charles in the slightest. *See Sample v. Morgan*, 914 A.2d 647, 670 (Del. Ch. 2007) (denying motion to dismiss waste claim where plaintiff alleged that board granted additional compensation to three executives and "[i]n exchange, the company got the three executives to stay without any indication that the three had offers to go elsewhere").

[14] Defendants cite both *Official Comm. of Unsecured Creditors of Integrated Health Servs., Inc. v. Elkins*, 2004 WL 1949290 (Del. Ch. Aug. 24, 2004) and *Coulter* for the proposition that the retention of employees can serve as a benefit to the corporation, but neither case suggests that a plaintiff is somehow prevented from alleging facts that a specific grant lacked a retentive purpose, something that Plaintiff has done here. (¶ 77.) Indeed, the *Coulter* court recognized that a plaintiff is able to challenge a grant's retentive purpose but found that the plaintiff in that case had "insufficient factual allegations to support [the] conclusion" that the retentive purpose was a sham. *Coulter*, 2002 WL 31888343, at *11.

Defendants also argue that stock options are insulated from waste claims because "under Delaware law, [the] built-in incentive for the recipients of options" to increase the stock price motivates the recipient to perform valuable services, and that the recipients of the options will only "realize value" if the Company's stock price increases thus provides "ample consideration for the options grant." (Dolan Br. at 13-15.) But as Defendants' cited authority itself states, the standard for whether an option grant constitutes waste is the same standard for waste generally, which is whether "a person of ordinary, sound business judgment would be unable to find that the consideration received by the corporation was a fair exchange for the options granted." *Zupnick*, 698 A.2d at 389.[15] Indeed, on numerous occasions courts have found that a grant of stock options constituted waste notwithstanding the option's built-in incentive for the recipient to work to increase the company's stock price. *See, e.g.*, *In re Nat'l Auto Credit S'holders Litig.*, 2003 WL 139768, at *14 (Del. Ch. Jan. 10, 2003) (finding that plaintiff adequately pleaded that the stock option grant constituted waste); *Weiss v. Swanson*, 948 A.2d 433, 450 (Del. Ch. 2008) (same); *Halpert*, 966 F. Supp. 2d at 416 (same).

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[15] The award in *Zupnick* was a bonus to reward an executive for "extraordinary services that substantially benefited the corporation." 698 A.2d at 386. Here, the special grant of stock options were granted to James and Charles for the exact opposite reason.

Plaintiff has alleged facts indicating that any "incentive" provided by the special option grant to James and Charles was negligible at best. Indeed, when looking at the circumstances surrounding the special stock option grant, the grant creates a *disincentive*, not an incentive, for James and Charles to work hard. It is one thing to determine that low-level employees (who are not directly responsible for the Company's overall performance) should be granted an award as a replacement for past awards that failed to pay out through no fault of their own. But it is a completely different matter to determine that James and Charles, the two people most responsible for the 2010 and 2011 performance, should be rewarded for such failure through a new special grant of stock options.[16] A "performance" award that is essentially guaranteed is not a performance award at all.

The present case is analogous to *National Auto Credit*, where the plaintiff alleged that the stock option grants, as well as other director payments, were not granted as part of their regular fees but rather were made to induce them to approve another transaction. 2003 WL 139768, at *13-14 (Del. Ch. Jan. 10, 2003). This Court found that plaintiff's waste claim survived a motion to dismiss under Rule

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16 It does not help Defendants' case that the performance goals attached to the option awards were hardly strenuous. Following the filing of Plaintiff's Complaint, Defendants filed their 2014 Proxy, which revealed that the performance goals attached to the option awards consisted of achieving "at least 90% of the Company's budgeted net revenue for 2012." (Ex. B at 33.) In other words, the options would vest if James and Charles accomplished 90% of what the Company was already expected to accomplish.

12(b)(6) because the payments were not made in exchange for the directors' services and thus the Court could not "say with reasonable certainty that the approval of the unusual and not customary Directors' Fees does not constitute corporate waste." *Id.* at *13. Similarly, here, Plaintiff likewise alleges that the special option grants to James and Charles were not made in exchange for services, but rather outside of the Company's executive compensation program as a replacement award for their prior poor performance. (¶¶ 73-76.)

This case is also analogous to *In re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106 (Del. Ch. 2009). There, the Court denied a motion to dismiss a waste claim where $68 million was awarded to a departing CEO "whose failures as CEO were allegedly responsible, in part, for billions of dollars of losses." *Id.* at 138. Although the CEO signed a non-compete agreement, a non-disparagement agreement, a non-solicitation agreement, and a release of claims against the company, the Court noted that it was "left with very little information regarding ... the real value, if any, of the various promises given" by the CEO and held that the waste claim survived the motion to dismiss. *Id.* Here, James and Charles received excessive compensation despite their sizeable time commitments to other pursuits and executive positions at other companies. (¶¶ 68-71.) Taken together with the specious justification for the options and the *increase* in James's compensation concomitant with both a rise in the time he dedicated to other jobs and a precipitous decline in Cablevision's performance, Plaintiff has stated a claim for waste.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendants' motions to dismiss in their entirety. In the alternative, Plaintiff respectfully requests leave to amend the Complaint to clarify and supplement the relevant allegations therein.

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