UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NECA-IBEW PENSION FUND (THE DECATUR PLAN), Derivatively on Behalf of Cincinnati Bell Inc.,	:	Case No. 1:11 CV 00451
	:	Judge Timothy S. Black
Plaintiff,	:	Magistrate Judge Wehrman
v.	:	
	:	**INDIVIDUAL DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**
PHILLIP R. COX, et al.,	:	
Defendants.	:	

Respectfully submitted,

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Defendants Phillip R. Cox, Bruce L. Byrnes, Jakki L. Haussler, Craig F. Maier, Alex Shumate, Lynn A. Wentworth, John M. Zrno ("Independent Directors") and John F. Cassidy, Gary J. Wojtaszek, and Christopher J. Wilson ("Officer Defendants") (hereinafter all defendants are collectively referred to as "Individual Defendants") submit the following Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction.

I. <u>INTRODUCTION</u>

As a preliminary matter, it is unclear to the Individual Defendants what relief Plaintiff seeks in its Motion for Preliminary Injunction ("Motion"). Plaintiff's Motion states that it seeks an injunction, placing a "freeze order" upon the "excessive 2010 executive compensation" for the duration of this litigation and placing the amount of "increased compensation" into a constructive trust. (Motion, pg. 7). Plaintiff does not explain what it considers to be the amount of "excessive" and "increased" compensation that is at issue. Nor does Plaintiff indicate whether it seeks an injunction ordering Nominal Defendant Cincinnati Bell Inc. ("Cincinnati Bell") to do something, or whether Plaintiff seeks an injunction ordering the Independent Directors to do

something, or whether Plaintiff seeks an injunction ordering the Officer Defendants to do something. The Individual Defendants (and presumably the Court) are thus left to try to divine what specific relief Plaintiff seeks. This lack of specificity dooms Plaintiff's Motion.

Plaintiff's Motion should be denied for other reasons. Plaintiff contends that immediate equitable relief is necessary because the Officer Defendants' compensation "will be extremely difficult—if not impossible—for Cincinnati Bell to recover **should** the executives act to hide and/or dissipate the excessive compensation they have received and continue to receive." (Motion, pg. 7)(emphasis added). Plaintiff has not alleged—much less provided any evidence—that the Officer Defendants have dissipated or intend to dissipate their assets during the pendency of this matter. Plaintiff simply asserts—without any factual or evidentiary support—that it believes that they **might** attempt to dissipate their assets. Plaintiff's failure to provide any support for its allegations is not surprising. The Officer Defendants are well-respected members of the Cincinnati business community who remain gainfully employed by Cincinnati Bell. Plaintiff has failed to demonstrate any irreparable harm sufficient to warrant a preliminary injunction.

Plaintiff's Motion should also be denied because Plaintiff has not demonstrated that it is substantially likely to succeed on the merits of its claims against the Individual Defendants. First, under well-settled Ohio law, the compensation decisions made by the independent Compensation Committee and the Board of Directors are entitled to the protection of the business judgment rule. Under the business judgment rule, directors are presumed to have acted in good faith and in the best interests of the corporation. Contrary to the assertion of the Plaintiff, the protection afforded by the business judgment rule is not "rebutted" by the purely advisory "say-on-pay" vote held by Cincinnati Bell's shareholders. Indeed, the statutory

provision authorizing such "say-on-pay" votes expressly states that such votes do not alter, amend, or modify a director's fiduciary duties.

Second, the Company's Compensation Committee and Board of Directors ("Board") followed Cincinnati Bell's expressed compensation guidelines in determining 2010 executive compensation. Cincinnati Bell's executive compensation policies rely on different performance metrics than those referenced by Plaintiff in its Complaint. Plaintiff has not asserted that Cincinnati Bell's policy of using EBITDA and revenue as the appropriate performance measuring sticks for executive performance is an irrational or impermissible exercise of the Board's discretion. Similarly, Plaintiff has not offered any evidence or pled any facts to support a claim that the Independent Directors acted in bad faith. Thus, Plaintiff has not and cannot prove that the Independent Directors breached their duty of loyalty to Cincinnati Bell.

Third, and finally, Plaintiff's claim for unjust enrichment against the Officer Defendants fails under Ohio law because the compensation paid to these defendants is governed by express employment contracts and because Plaintiff has failed to demonstrate, or even allege, that these defendants were unjustly enriched.

II. BACKGROUND

A. Plaintiff's Claims

Plaintiff's claims can fairly be summarized as follows: (1) in 2010, Cincinnati Bell saw a decline of $61.3 million in net income and a negative 18.8% annual shareholder return; (2) despite the Company's "severely impaired financial results," the Board approved the compensation of three executive officers which, Plaintiff alleges, included excessive pay hikes; (3) a majority of Cincinnati Bell shareholders voted against the executive compensation in a May 2011 non-binding advisory vote; (4) the non-binding advisory vote rebuts the presumption that the Board acted in the best interest of Cincinnati Bell shareholders in approving the executive

compensation; and (5) Cincinnati Bell has been "severely injured" by the "excessive" executive compensation. (Complaint, pars. 28, 31, 36, and 37).

B. Cincinnati Bell and its Board of Directors

Cincinnati Bell is a full-service regional provider of data and voice communications services over wireline and wireless networks and a full-service provider of data center operations, related managed services and equipment. (Cincinnati Bell 2011 Proxy Statement, dated March 21, 2011) (hereinafter "Proxy Statement")(copy attached as Exhibit A).

Plaintiff's complaint names eight members of the Cincinnati Bell Board of Directors (including Defendant Cassidy, who also serves as the Chief Executive Officer of Cincinnati Bell), and two additional officers, Defendant Wojtaszek and Defendant Wilson.[1]

All of the Board members, except Mr. Cassidy and Mr. Wojtaszek, are independent under the rules and listing standards of the New York Stock Exchange and the Company's Corporate Governance Guidelines. (Proxy Statement, pg. 7). Plaintiff has not alleged that any of the Independent Directors are not independent.

C. The Compensation Committee

The Board's Compensation Committee consists of five Board members (Messrs. Byrnes, Cox, Maier, Shumate, and Zrno), none of whom has at any time been an officer or employee of Cincinnati Bell. (Proxy Statement, pg. 15). The Compensation Committee, which held eight meetings in 2010, is responsible for, among other things, ensuring that directors and certain key executives are effectively and competitively compensated, both in base compensation and in short-and long-term incentive compensation and benefits. (Proxy Statement, pg. 8-9).

[1] The Board currently consists of 10 members. On May 3, 2011, Alan R. Schreiber was appointed by the Board to serve as a Director. (See Cincinnati Bell Form 8-K, dated May 5, 2011)(copy attached as Exhibit B). On July 29, 2011, Mr. Wojtaszek was appointed by the Board to serve as a Director. (See Cincinnati Bell Form 8-K, dated July 29, 2011) (copy attached as Exhibit C).

The Compensation Committee is primarily responsible for determining executive compensation. The Compensation Committee retained Mr. Charles Mazza, an independent compensation consultant, to assist the Committee in its deliberations regarding executive compensation. Mr. Mazza is retained solely by the Compensation Committee and performs no services for management. Mr. Mazza analyzes and comments on various compensation proposals made by the Company and on various topics specified by the Committee and opines and reports on these matters in open sessions of Compensation Committee meetings. In executive sessions of Compensation Committee meetings, Mr. Mazza addresses subjects of particular interest to the Compensation Committee, such as compensation of the CEO. In such instances, Mr. Mazza presents his analysis along with the pros and cons of certain compensation elements and his recommendations. (Proxy Statement, pg. 32-33).

Cincinnati Bell also retained Towers Watson, a compensation consulting firm, to assist it with various compensation-related projects during the course of the year. At the Company's request, Towers Watson conducts an annual study of marketplace compensation practices. The Compensation Committee annually benchmarks each executive's compensation to ensure that it is in a competitive range and that an appropriate portion of it is "at risk", i.e., subject to payment only if the Company obtains certain quantitative results and the individual achieves certain qualitative results. (Proxy Statement, pg. 32-33).

Towers Watson obtains, compiles and supplies to the Company and the Compensation Committee competitive compensation information. The information covers two peer groups: (1) the first peer group consists of 18 telecommunications companies (e.g., AT&T; Comcast Corp.; Frontier Communications Corp.; Time Warner; and Verizon); and (2) the second peer group is comprised of 120 companies, in various industries, with annual revenues between $1 billion and

$3 billion (e.g., Bob Evans Farms; Burger King; E.W. Scripps; Convergys; Martin Marietta Materials; New York Times; Revlon; and Virgin Mobile USA). (Proxy Statement, pg. 33-34).

D. Cincinnati Bell's 2010 Executive Compensation

There are three elements to Cincinnati Bell's executive compensation program: (1) fixed yearly compensation in the form of a base salary; (2) "at-risk" annual incentive compensation generally paid in cash; and (3) "at-risk" long-term compensation generally delivered in the form of stock options, stock appreciation rights, and performance units that vest over time and upon achievement of certain performance objectives. (Proxy Statement, pg. 32).

Cincinnati Bell executives' base salary is determined based on an assessment of the executive's performance as compared to his or her individual job responsibilities, his or her effectiveness in identifying and developing future management talent, such other factors as the CEO or the Compensation Committee deems relevant for such executive, and the predicted market 50th percentile base salary data for such position. (Proxy Statement, pg. 35).

Cincinnati Bell executives' annual (short-term) incentive payments are tied to (1) the Company's level of achievement of (a) earnings before interest, taxes, depreciation and amortization (EBITDA) and (b) revenues; and (2) the executive's individual performance. The Company has selected the EBITDA and revenue measures because it believes that investors use them to evaluate the financial performance of the Company. The Company also believes that those measures indicate the level of success of the Company's strategy to sustain operating cash flows and profitability—to drive transformative growth—through its data center strategy (to become a premier data center collocation provider to the Fortune 1000 companies). EBITDA is a common measure of profitability employed in the telecommunications and other capital-intensive industries. (Proxy Statement, pg. 36). The annual incentive plan (short-term plan)

identifies the permissible performance measures that may be used in connection with an annual incentive award, and the annual incentive plan has been voted on and approved by shareholders.

Cincinnati Bell executives' long-term incentives are intended to encourage Cincinnati Bell's executives to focus on and achieve the Company's long-term goals. (Proxy Statement, pg. 38). Long-term incentive awards also aid the development and retention of top management through share ownership and recognition of future performance. (Proxy Statement, pg. 38). Although other forms of awards are possible, Cincinnati Bell's long-term incentives consist principally of stock options, stock appreciation rights, and performance-based awards granted under the Cincinnati Bell, Inc. 2007 Long Term Incentive Plan. (Proxy Statement, pg. 38). The long-term incentive plan identifies the permissible performance measures that may be used in connection with a long-term incentive award, and the long-term incentive plan is voted on and approved by shareholders.

For 2010, the Compensation Committee generally allocated the annual (short-term) incentive targets as follows: (1) 60% for attainment of the EBITDA goal; (2) 20% for attainment of the revenue goal; and (3) 20% for individual performance. (Proxy Statement, pg. 36). Cincinnati Bell succeeded in attaining its EBITDA and revenue goals for 2010. Indeed, for 2010, actual EBITDA was $474.0 million, which was 103% of the target goal of $460 million, and actual revenue was $1,332.0 million, which was 100% of the target goal of $1,332.0 million. (Proxy Statement, pg. 37).

After determining the amount an executive has earned pursuant to the objective EBITDA and revenue criteria, the Compensation Committee then considers that executive's individual performance. For executives other than the CEO, the CEO (Mr. Cassidy) provides the Compensation Committee with his assessment of each executive officer's individual

performance, which includes a review of the performance of the executive's department, the quality of the executive's advice and counsel on matters within the executive's purview, qualitative feedback, and the effectiveness of the executive's communication with the organization and with the CEO on matters of topical concern. These factors are evaluated subjectively and are not assigned specific individual weight. (Proxy Statement, pg. 37).

Based on the criteria established for annual incentive payments, Mr. Wilson was awarded a total annual incentive award of $282,762 and Mr. Wojtaszek was awarded a total annual incentive award of $531,300. (Proxy Statement, pg. 37). The Committee also approved a special additional bonus of $238,700 for Mr. Wojtaszek to recognize his instrumental role in the successful acquisition of CyrusOne Networks, LLC ("CyrusOne") and the initial implementation of the Company's data center strategy. (Proxy Statement, pg. 37). Additionally, based on the criteria established for long-term incentive awards, Mr. Wojtaszek was awarded long-term incentives in the amount of $552,174, and Mr. Wilson was granted long-term incentives in the amount of $538,486. (Proxy Statement, pg. 46).

The Compensation Committee meets in executive session to consider the CEO's individual performance. Factors considered include: operational and financial performance, succession planning, development of the Company's leadership team, development of business opportunities, and community involvement/relationships. The Compensation Committee recommended to the full Board that Mr. Cassidy be awarded a bonus for 2010 of $1,335,840 to reflect the Company's meeting the revenue goals and exceeding the EBITDA goals, and the Compensation Committee's and full Board's assessment of the CEO's individual performance. Further, the Committee also recommended a special additional bonus of $600,160 for Mr. Cassidy to recognize his role in the successful acquisition of CyrusOne and the initial

implementation of the data center strategy. Both bonus awards were presented to the full Board and were approved. (Proxy Statement, pg. 37).

To recognize Mr. Cassidy's contributions to the Company over the years, particularly his leadership as CEO, and to ensure his retention during the next few years of transformative growth in the Technology Solutions/Data Center segment, the Compensation Committee recommended and the Board approved a retention bonus payment of $2,100,000 in January 2010. If Mr. Cassidy retires, resigns, or is terminated for "cause" prior to December 31, 2012, he will be required to repay a portion of his retention bonus. (Proxy Statement, pg. 37-38).

The Company and the Compensation Committee both believe that the central objective of effective compensation practice is to provide an appropriate and competitive mixture of base pay (the "fixed cost" of the program) and incentive compensation programs that promote achievement of current-year goals and longer-term business strategy in a way that is closely aligned with shareholder interests. (Proxy Statement, pg. 40). The Company and the Compensation Committee believe the long term incentive plans encourage good business decisions by the executives that consider the longer term strategy and needs of the Company balanced against the demands of current year performance. The Company believes that its compensation program, taken as a whole, has been effective in attracting and retaining key executive talent, driving attainment of its annual revenue and EBITDA goals, delivering sustained cash flow performance over multiple years during a period of great economic disruption and industry competition, and aligning executive rewards with the interests of shareholders. (Proxy Statement, pg. 41).

E. The Advisory Say-On-Pay Vote

Plaintiff alleges that Cincinnati Bell held an advisory say-on-pay vote on May 3, 2011 and that 66% of voting Cincinnati Bell shareholders voted against the 2010 executive

compensation. (Compl., par. 35).[2] Plaintiff alleges that the result of the say-on-pay vote is direct and probative evidence that the 2010 executive compensation was not in the best interests of Cincinnati Bell shareholders, and correspondingly that the Cincinnati Bell Board did not act in the best interests of Cincinnati Bell shareholders when approving it. (Compl., par. 36). Plaintiff alleges that the Board members breached their duty of loyalty to Cincinnati Bell and its shareholders by approving the 2010 executive "pay hikes." (Compl., par. 47). Plaintiff alleges that the decision to increase executive pay in 2010 was not in the best interests of Cincinnati Bell's shareholders, as evidenced by the May 3, 2011 adverse advisory say-on-pay vote. (Compl., par. 47).

F. Plaintiff's Requested Injunction

Plaintiff's Motion for Preliminary Injunction seeks "an order (1) placing a freeze order upon the excessive 2010 executive compensation for the duration of this litigation; and (2) placing the amount of increased compensation into a constructive, interest-bearing trust." (Motion for Preliminary Injunction, pg. 7) (hereinafter "Motion"). Plaintiff's sole basis for requiring this extraordinary relief is set forth in one sentence of its Motion: "Immediate equitable relief is necessary to protect Cincinnati Bell shareholders because the executives' excessive compensation will be extremely difficult—if not impossible—for Cincinnati Bell to recover **should** the executives act to hide and/or dissipate the excessive compensation they have received and continue to receive." (Motion, pg. 7)(emphasis added). Plaintiff submits absolutely no evidence to support this assertion.

[2] On the same day, shareholders (1) overwhelmingly voted to elect the proposed Board of Directors—the 8 directors named as the Individual Defendants in this case; (2) approved the Cincinnati Bell 2011 Short-Term Incentive Plan; and (3) voted—in an advisory vote—in favor of conducting an advisory say-on-pay vote on executive compensation every year. (See SEC Report on Form 8-K, dated May 9, 2011, cited by Plaintiff at paragraph 35 of the Complaint) (copy attached as Exhibit D). In light of the voting results, the Board decided that the Company will hold the advisory vote on executive compensation every year until the next required advisory vote on the frequency of holding advisory votes on executive compensation. (Id.).

III. ARGUMENT

A. Plaintiff Sets Forth The Wrong Standard For Obtaining an Injunction

Plaintiff asserts that the allegations in its Complaint must be taken as true for the purposes of its Motion for Preliminary Injunction. (Motion for Preliminary Injunction, pg. 6) ("Taken as true, as they must at this stage of the pleadings, plaintiffs have presented facts that demonstrate they have a strong likelihood of success on the merits."). That assertion is incorrect.

In Mazurek v. Armstrong, 520 U.S. 968, 117 S.Ct. 1865 (1997), the court stated: "It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." (citing 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, pp. 129-130 (2d ed.1995) (emphasis in original). In other words, a plaintiff must establish its entitlement to a preliminary injunction by clear and convincing evidence. Convergys Corp. v. Wellman, No. 1:07-cv-509, 2007 WL 4248202, *6 (S.D. Ohio Nov. 30, 2007); Davis v. Strickland, No. 2:09-cv-00015, 2009 WL 1862519, *3 (S.D. Ohio June 23, 2009); Israfil v. Woods, No. 1:09-cv-468, 2010 WL 5692075, *8 (S.D. Ohio Sept. 9, 2010).

The Sixth Circuit has held that proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion, because a preliminary injunction is an "extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied 'only in [the] limited circumstances' which clearly demand it." Leary v. Daeschner, 228 F.3d 729, 739 (6th Cir. 2000); Shopping Center Venture Ltd. Partnership v. CDC Mortgage Capital, Inc., 274 F.3d 1085, 1097 (6th Cir. 2001) ("[T]he proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion.").

When requesting a preliminary injunction, a plaintiff must present evidence to support his request for injunctive relief. As the court in Davis v. Strickland, 2009 WL 1862519 (S.D. Ohio June 23, 2009) stated:

> The party seeking the injunction must establish his right to that extraordinary relief by clear and convincing **evidence**. To meet this burden, the plaintiff's **evidence** must more than outweigh the evidence opposed to it. The plaintiff's **evidence** must persuade the court that [his] claims are highly probable… or create a firm belief or conviction in the facts plaintiff seeks to establish. (internal citations omitted) (emphasis added).

The information presented by plaintiff must be sufficient to allow the court "to make fact findings to determine whether or not the four factors weigh in favor of granting equitable relief." See Cabot Corp. v. King, 790 F.Supp. 153, 156 (N.D. Ohio 1992) ("plaintiff's burden is greater at the preliminary injunction stage because the plaintiff bears the burden of demonstrating the probability of success on a claim by a 'strong' or 'substantial' likelihood of success on the merits.").

Finally, Plaintiff seems to devote much attention to preserving the *status quo*. A focus on preserving the *status quo* can be problematic, as articulated in Stenberg v. Cheker Oil Co., 573 F.2d 921, 925 (6th Cir. 1978), a case cited by Plaintiff, where the court stated:

> Too much concern with the status quo may lead a court into error. The proper consideration to be given the status quo question was stated in Canal Authority of Florida v. Callaway, 489 F.2d 567, 576 (5th Cir. 1974), as follows:
>
> First and foremost, we reemphasize the importance of the general requirements for a preliminary injunction. It is an extraordinary remedy, not available unless the plaintiff carries his burden of persuasion as to all of the four prerequisites. The primary justification for granting a preliminary injunction is to preserve the court's ability to render a meaningful decision after a trial on the merits.

B. Plaintiff Has Not Demonstrated a Substantial Likelihood of Success on the Merits.

(1) *The Board's Compensation Decisions are Protected by the Business Judgment Rule*

In Ohio, directors owe two separate duties to the corporation: the duty of loyalty and the duty of care. Radol v. Thomas, 772 F.2d 244, 256 (6th Cir. 1985). Plaintiff alleges that the Independent Directors breached their duty of loyalty to Cincinnati Bell. (Compl., Count I, par. 46-50). The Ohio formulation of these duties was codified in 1984 in O.R.C. § 1701.59(B), and under the duty of loyalty, a "director shall perform his duties as a director … in good faith, in a manner he reasonably believes to be in or not opposed to the best interests of the corporation…" O.R.C. §1701.59(B); Radol, 772 F.2d at 256.

Ohio courts adhere to the business judgment rule and will not inquire into the wisdom of actions taken by the directors, in the absence of fraud, bad faith, or an abuse of discretion. Radol, 772 F.2d at 256; Koos v. Central Ohio Cellular, Inc., 94 Ohio App.3d 579, 590, 641 N.E.2d 265 (Cuyahoga App. 1994). The business judgment rule "is a rebuttable presumption that directors are better equipped than the courts to make business judgments and that the directors acted without self-dealing or personal interest and exercised reasonable diligence and acted in good faith." Gries Sports Ent.,Inc. v. Cleveland Browns Football Co., 26 Ohio St.3d 15, 20, 496 N.E.2d 959 (1986); NCS Healthcare, Inc. v. Candlewood Partners, LLC, 160 Ohio App.3d 421, 428, 827 N.E.2d 797, 802. Ohio's business judgment rule is codified in O.R.C. §1701.59(C), which provides that a director shall not be found to have violated his duty of loyalty unless it is proved by clear and convincing evidence that the director has not acted in good faith or in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation. O.R.C. §1701.59(C)(1). Ohio law further provides that a director shall be liable in damages for any action that the director takes or fails to take as a director **only**

if it is proved by clear and convincing evidence that the director's action or failure to act involved an act or omission undertaken with **deliberate intent to cause injury to the corporation** or undertaken with **reckless disregard for the best interests of the corporation**. O.R.C. §1701.59(D).

It is without dispute that the business judgment rule applies to directors' decisions regarding executive compensation. See, generally, Worth v. Huntington Bancshares, Inc., 43 Ohio St.3d 192, 197, 540 N.E.2d 249 (1989) (in determining executive compensation, "it is certainly not for this court to second-guess the business judgment of corporate executives."); Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust v. Raines, 534 F.3d 779, 791 (D.C. Cir. 2008) ("courts rarely second-guess directors' compensation and severance decisions because the size and structure of executive compensation are inherently matters of judgment.")(applying Delaware law); Jannett v. Gilmartin, 2006 WL 2195819 (N.J. Sper. L. July 21, 2006) (Courts "have long recognized that the business judgment rule's presumption of good faith and regularity carries particular force when the challenged decision concerns employee compensation.")(applying New Jersey law).

The presumption that Cincinnati Bell's executive compensation was the product of valid business judgment is further enhanced by the fact that the Board's responsibilities with respect to executive compensation are carried out by a Compensation Committee comprised of independent non-management directors. Prod. Res. Group, LLC v. NCT Group, Inc., 863 A.2d 772, 779 (Del. Ch. 2004) ("Informed decisions regarding employee compensation by independent boards are usually entitled to business judgment rule protection."); Orban v. Field, No.1280, 1997 WL 153831, at *10 (Del. Ch. Apr. 1, 1997) ("Where, as here, a payment decision has been approved by a majority of disinterested directors, it is entitled to the protection of the business judgment

rule."). Moreover, under O.R.C.§ 701.59(B), in performing his or her duties, a director is entitled to rely on information, opinion, reports or statements, prepared by persons such as consultants, as to matters that the director reasonably believes are within the person's professional or expert competence. The Compensation Committee and the Board had the benefit of the expert consulting work performed by two compensation specialists—Mr. Mazza and Tower Watson.

Accordingly, under Ohio's business judgment rule, the decisions of disinterested directors will not be disturbed if they can be attributed to any rational business purpose. Koos, 94 Ohio App. 3d at 590, citing Gries Sports Ent., Inc. v. Cleveland Browns Football Co., 26 Ohio St.3d 15, 20, 496 N.E.2d 959 (1986). Disinterested directors are those who neither appear on both sides of the transaction nor expect to derive any personal benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally. Id. Plaintiff has not made any such allegation of self-dealing on the part of the Independent Directors.

Plaintiff has similarly failed to plead any facts sufficient to rebut the presumption that the business judgment rule applies to protect the Independent Directors' decisions concerning the Company's 2010 executive compensation. Plaintiff appears to contend that a board of directors cannot award incentive payments to a company's executives in any year in which the company's stock price declined or net income declined. Such a theory is not sufficient to state a claim, much less demonstrate a likelihood of success on the merits. See, e.g., Jannett v. Gilmartin, 2006 WL 2195819, at *7 (N.J. Super. L. 2006) (business judgment rule applies despite contention by shareholder that board annually approved increases in executive compensation "despite Merck's poor financial performance since 2001"); Production Resources Group, LLC v.

NCT Group, Inc., 863 A.2d 772, 799 (Del. Ch. 2004) ("And the fact that [executives] received substantial salaries during a period when NCT was performing poorly would not, without more, ordinarily sustain a claim.").

Plaintiff cites the Walt Disney-Michael Ovitz executive compensation dispute for the proposition that "under modern principles of corporate governance the Disney Board's decision to pay Ovitz millions might not withstand scrutiny under Delaware's business judgment rule." (Motion, pg. 14, fn. 8) (citing In re Walt Disney Company Derivative Litigation, 906 A.2d 27 (Del. 2006)). Disney involved a severance payment of $140 million to Ovitz, after he had worked for Disney for only 15 months. See, Campbell v. Potash Corporation of Saskatchewan, Inc., 238 F.3d 792, 801 (6th Cir. 2001).

In Campbell, the Sixth Circuit noted that the Delaware Supreme Court found that the $140 million severance payment to Ovitz for 15 months of work only "pushes the envelope of judicial respect for the business judgment of directors in making compensation decisions." Campbell, 238 F.3d at 801. The Sixth Circuit went on to state:

> If the Ovitz severance payment, which included $39 million in cash, only pushes the envelope under Delaware law, then the smaller sum here spread across three executives with longer tenure at their company is well within the confines respected by the business judgment rule.

Id. As in Campbell, the compensation payments involved in this case—individually and collectively—paid to 3 officers (2 of whom have a substantial tenure with the Company) do not come close to the $39 million cash payment/$140 million total award made to Ovitz by the Walt Disney Company. Accordingly, such payments are, as in Campbell, "well within the confines respected by the business judgment rule."

More importantly, Plaintiff's claims in this matter ignore the actual incentive compensation performance measures used by the Compensation Committee to determine executive compensation. The compensation policy—as fully disclosed in the CD&A contained in the Proxy Statement—measures the Company's EBITDA and revenues in determining whether—and to what extent—to award bonuses. In 2010, the Company met or exceeded established EBITDA and revenue targets, resulting in the bonus payments to the Officer Defendants pursuant to the incentive compensation policies. These objective performance metrics are not the metrics which Plaintiff seeks to use to measure the performance of Cincinnati Bell's executives. Plaintiff, however, has not asserted that Cincinnati Bell's policy of using EBITDA and revenue as the appropriate performance measuring sticks for executive performance is an irrational or impermissible exercise of the Board's discretion. Similarly, Plaintiff has not offered any evidence, or pled any facts, to support a claim that the Independent Directors' acted in bad faith. Accordingly, Plaintiff has not and cannot rebut the business judgment rule which protects the Board's executive compensation decisions. Plaintiff has thus failed to demonstrate any likelihood of success on the merits of this action.

Lacking any evidence that the Independent Directors acted in bad faith or self-interest, Plaintiff is forced to rely on a recent "say-on-pay" vote by Cincinnati Bell's shareholders in an effort to rebut the business judgment rule.[3] The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), signed into law in July 2010, contains a number of corporate governance provisions affecting public companies, including provisions requiring say-on-pay and golden parachute shareholder votes. Section 951 of the Dodd-Frank Act adds a new Section 14A to the Securities Exchange Act of 1934 that requires companies that provide executive

[3] The burden is on the party challenging a board's decision to establish facts rebutting the presumption of good faith of directors invoked by the business judgment rule. Koos, 94 Ohio App.3d at 590; Radol, 772 F.2d at 257.

compensation disclosure under the SEC's proxy rules to include nonbinding "say-on-pay" proposals in their proxy statements at least once every three years. Specifically, 15 U.S.C. § 78n-1 (Shareholder approval of executive compensation) provides that, not less frequently than once every three years, a company's proxy must include a separate resolution, subject to shareholder vote, to approve the compensation of executives. 15 U.S.C. § 78n-1(a)(1).

New Section 14A, however, also contains a "rule of construction" section, which provides that the shareholder vote on executive compensation **shall not be binding** on the company or its board of directors, and the shareholder vote **may not** be construed (1) as overruling a decision by the company or its board of directors; (2) to create or imply **any change** to the fiduciary duties of such company or its board of directors; (3) to create or imply any additional fiduciary duties for the company or its board of directors; or (4) to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation. 15 U.S.C. § 78n-1(c).

On January 25, 2011, the SEC issued final rules relating to the implementation of the Dodd-Frank Act. In particular, the SEC amended its proxy disclosure rules to require companies to address in their Compensation Discussion & Analysis ("CD&A") whether and, if so, how their compensation policies and decisions have taken into account the results of the most recent shareholder advisory vote on executive compensation. (SEC Release Nos. 33-9178 and 34-63768). In other words, in its **next** CD&A, the Compensation Committee will address whether it has taken into account the May 3, 2011 advisory shareholder vote in connection with its compensation policies and decisions and, if so, how it has taken the vote into account.

There is no requirement under the SEC regulations for the Compensation Committee to take any action or respond in any way to the "say-on-pay" vote until that time. The SEC states in

its final rules: "The manner in which individual issuers may respond to such votes in determining executive compensation policies and decisions will likely vary depending upon facts and circumstances. We expect that this variation will be reflected in the CD&A disclosures." Id., at pg. 27. Similarly, the SEC, in an Investor Bulletin issued March 2011, said this about the non-binding say-on-pay votes:

> The Dodd-Frank Act specifies that the shareholder vote to approve executive compensation 'shall not be binding on the issuer or the board of directors of an issuer.' (An issuer in this context is a public company subject to the proxy rules.) **It is up to the company's board of directors to determine what it considers to be the best compensation policies and practices for the company. Unlike a binding vote, advisory votes do not require the company or its board of directors to take a specific action**. The company's board of directors **may** consider advisory votes and **may** follow up with other communications or dialogue with shareholders as part of its deliberative process in making policy decisions. (emphasis added).

In the Cincinnati Bell Proxy, setting forth the Advisory Vote on Executive Compensation, the Company states:

> The say-on-pay vote is advisory and, therefore, not binding on the Company, the Compensation Committee or the Board of Directors. Our Board of Directors and or Compensation Committee value the opinions of our shareholders and **to the extent there is any significant vote against the named executive officer compensation as disclosed in this Proxy Statement, we will consider our shareholders' concerns and the Compensation Committee will evaluate whether any actions are necessary to address those concerns**.

(Proxy, pg. 20) (emphasis added).

Faced with overwhelming evidence—including the express language of the Dodd-Frank Act—that "say-on-pay" votes under the Dodd-Frank Act are purely advisory votes and have no substantive impact on the business judgment rule or on shareholder lawsuits for breach of fiduciary duty—Plaintiff relies on a single excerpt of witness testimony cited, but not adopted or

endorsed, by the Report of the Senate Committee on Banking, Housing, and Urban Development regarding the Dodd-Frank Act. The Committee Report states that:

> Ms. Ann Yerger, **representing the Council of Institutional Investors**, wrote in congressional testimony for the Committee that "**the Council believes** an annual, advisory shareowner vote on execute compensation would efficiently and effectively provide boards with useful information about whether investors view the company's compensation practices to be in the shareowner's best interests.

S. Rep. No. 111-176, at 134 (2010) (emphasis added).

As the Committee Report makes clear, however, this testimony reflects the position of the Council of Institutional Investors, not Congress. Indeed, conspicuously absent from the Committee Report is any indication that the Committee, let alone Congress, adopted or endorsed the Council of Institutional Investors' testimony.[4] For that reason, the cited portion of the Committee Report does not constitute relevant legislative history. Wolff v. Moore, 104 F.Supp.3d 892, 902 (S.D. Ohio 2000) ("Statements by witnesses at hearings are not significant indicators of legislative intent, but rather reflect the biases and beliefs of the individual witnesses.") citing Kelly v. Robinson, 479 U.S. 36, 51 n.13 (1986) ("We acknowledge that a few comments in the hearings … may suggest that the language bears the interpretation…. We decline to accord any significance to these statements."); Dunn McCambell Royalty Interest, Inc. v. Nat'l Park Service, 964 F.Supp. 1125, 1137 (S.D. Tex. 1995) ("Statements by individual legislators or witnesses during legislative debates or hearings are not determinative of legislative intent.").

[4] Had the Senate Committee wished to endorse the Council of Institutional Investors' position, it certainly could have done so. See V Secret Catalogue, Inc. v. Moseley, 605 F.3d 382, 392 n.3 (6th Cir. 2010) (citing to committee report that stated "[w]itnesses at the legislative hearings focused on the standard of harm threshold . . . . The Committee endorses this position").

The Committee on Banking, Housing, and Urban Affairs did set forth its view of the say-on-pay provision in the Legislative History, stating:

> Section 951 provides that any proxy or consent or authorization for an annual or other meeting of the shareholders will include a separate resolution subject to shareholder advisory vote to approve the compensation of executives. The Committee believes that **shareholders**, as the owners of the corporation, have a right to express their **opinion** collectively on the appropriateness of executive pay. **The vote must be tabulated and reported, but the result is not binding on the board or management**.

S. Rep. No. 111-176, at 134 (2010) (emphasis added).

The Board's fiduciary duties before and after the say-on-pay vote remain the same. The Board is protected by the business judgment rule—the presumption that the Board acted in good faith in doing what they believe to be in the best interests of the Company. See, e.g., Heine v. Streamline Foods, Inc., 2011 WL 3296199 (N.D. Ohio July 29, 2011). To rebut this presumption, a shareholder must make a showing of director interest in the transaction in question coupled with a demonstration by the plaintiff that the transaction was not approved by a majority of disinterested directors. Id. Plaintiff has failed to do so.

Nowhere does the Legislative History of the Dodd-Frank Act suggest that a negative "say-on-pay" vote "rebuts" the business judgment rule. If an adverse say-on-pay vote were to be construed as rebutting the presumption of the business judgment rule, such construction would clearly result in a change to the fiduciary duties of the Board. The Dodd-Frank Act, however, clearly and unambiguously provides that the shareholder vote **may not** be construed (1) as overruling a decision by the company or its board of directors or (2) creating or implying any change to the fiduciary duties of the company or its board of directors. An advisory say-on-pay vote is a legal nullity in determining whether Plaintiff may overcome the business judgment rule.

(2) *Plaintiff's Claims for Unjust Enrichment are Not Viable Under Ohio Law.*

To the extent that Plaintiff's Motion for Preliminary Injunction seeks to prevent the Officer Defendants from dissipating their assets, Plaintiff must demonstrate by clear and convincing evidence that it is substantially likely to prevail on its unjust enrichment claim against the Officer Defendants. Plaintiff has failed to do so.

Plaintiff has not demonstrated—and cannot demonstrate—that there is any likelihood it will succeed on the merits of its claim for unjust enrichment. In Ohio, unjust enrichment operates in the **absence** of an express contract or a contract implied in fact, to prevent a party from retaining money or benefits that in justice and equity belong to another. Gallo v. Westfield National Insurance Co., 2009 WL 625522 (Cuyahoga App. March 12, 2009). During 2010, the Officer Defendants were employed pursuant to agreements with the Company. (Proxy Statement, pg. 49). Each employment agreement set forth, among other things, the executives' base salary, bonus opportunities, entitlement to participate in the Company's benefit and pension plans and to receive equity awards and post-termination benefits and obligations. (Proxy Statement, pg. 49). Thus, Plaintiff's unjust enrichment claim fails as a matter of law. Patterson v. Rite Aid Corp Hdqtrs., 752 F.Supp.2d 811, 817-818 (N.D. Ohio 2010) (citing Ohio cases which hold that unjust enrichment cannot exist where there is a valid and enforceable written contract).

Plaintiff's unjust enrichment claim also fails because Plaintiff cannot establish the elements of an unjust enrichment claim. A claim of unjust enrichment requires a Plaintiff to show (1) a benefit conferred upon the defendant; (2) knowledge by defendant of the benefit; and (3) retention of the benefit in circumstances where it would be unjust to do so without payment. Ziegler v. Findlay Industries, Inc., 464 F.Supp.2d 733, 739 (N.D. Ohio 2006). Plaintiff has not

alleged that the executives did not render services to the Company. Obviously, they did. Thus, they have not improperly retained the compensation paid to them pursuant to the employment agreements. Rather, Plaintiff merely alleges that "[u]nder the circumstances—the dismal financial performance of the Company—it would be unjust to allow defendants Cassidy, Wojtaszek and Wilson to retain the benefits of the excessive executive compensation." (Compl., par. 59). Under such a theory, any time a company fails to perform as a shareholder desires, the company's executives would be required to disgorge their prior year's compensation. For obvious reasons, such a theory is not viable under Ohio or any other state's law.[5]

C. Plaintiff Has Failed to Demonstrate That It Will Suffer Irreparable Harm Absent the Issuance of an Injunction

In order to obtain a preliminary injunction, the harm that would result in the absence of an injunction must be irreparable, not merely substantial. Anderson v. Kelley, 12 F.3d 211 (table), 1993 WL 524235, *5 (6th Cir. Dec. 15, 1993). To demonstrate irreparable harm, Plaintiff must show that the alleged injury it will suffer is actual and imminent, and not speculative, remote, or unsubstantiated. Abney v. Amgen, Inc., 443 F.3d 540, 552 (6th Cir. 2006); Gilreath v. Plumbers, Pipefitters & Service Tech. Local 502, No. 1:09-cv-628, 2010 WL 723753, *3 (S.D. Ohio Feb. 24, 2010). Thus, Plaintiff must produce evidence "of both a past injury and the likelihood of a future injury in order to support [a] claim of irreparable harm." Airlink Communications, Inc. v. Owl Wireless, LLC, No. 3:10-cv-2296, 2010 WL 4723586, * 3 (N.D. Ohio Nov. 15, 2010) citing Cincinnati Sub-zero Products, Inc. v. Augustine Medical, Inc., 800 F.Supp. 1549, 1560 (S.D. Ohio 1992). Plaintiff cannot establish irreparable harm if monetary damages would adequately compensate for the asserted harm. Gilreath, 2010 WL

[5] It is worth repeating here that the Company did meet the objective financial objectives established under the Company's annual incentive plan. EBITDA exceeded the target goal and revenues equaled the target goal. (Proxy Statement, pg. 36-37). Accordingly, while Plaintiff suggests that the Company performed dismally, the facts demonstrate otherwise.

723753, at *3. Moreover, the "possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." Anderson v. Kelley, 12 F.3d 211 (table), 1993 WL 524235, *6 (6th Cir. Dec. 15, 1993).

For these reasons, preliminary injunctions seeking to freeze a defendant's assets are uniformly denied where a plaintiff is unable to provide actual evidence that the defendant has actually dissipated, or will attempt to dissipate, its assets. For example, in Orrand v. Horner, the plaintiff sought a preliminary injunction prohibiting the defendant from transferring any of its assets pending a final resolution of its claims. No. 2:07-cv-185, 2008 WL 5142415, *1 (S.D. Ohio Dec. 5, 2008). In support of its motion, however, the plaintiff provided only a statement of the amount it believed to be due to it from the defendant and the basis for defendant's alleged obligations. Id. Plaintiff failed to provide the court with any evidence "that there [was] a risk … [defendant] will squander or dissipate its assets." Id. For that reason, the court held that the plaintiff had failed to demonstrate irreparable harm and that plaintiff was not entitled to the issuance of a preliminary injunction. Id.

The court in Advocate Capital, Inc. v. Law Office of A. Clark Cone, P.A. reached a similar conclusion. No.3:06-0847, 2006 WL 3469576 (M.D. Tenn. Nov. 29, 2006). In Advocate Capital, the plaintiff sought an injunction prohibiting defendants from disposing of their assets prior to a final resolution of the litigation. Id. at *2. The court, however, noted that "Plaintiff has presented no evidence regarding irreparable harm, other than a conclusory statement … that without the granting of injunctive relief, [plaintiff] would suffer irreparable injury." Id. at *3 (internal quotations omitted). The court also explained that "[a]lthough counsel argued at the hearing that irreparable harm exists because [defendant's] collateral, the account receivables, are

being dissipated, there was absolutely no proof of this fact." Id. And, because "there [was] not a scintilla of evidence that any funds [were] being dissipated" the court held that plaintiff was not entitled to a preliminary injunction. Id.; see, also, Newby v. Enron Corp., 188 F.Supp.2d 684, 707 (S.D.Tex. 2002) ("In the cases in which such a prejudgment asset-freezing injunction is granted, the courts have been presented with allegations and evidence showing that the defendants were concealing assets, were transferring them so as to place them out of the reach of postjudgment collection, or were dissipating the assets.")(citations omitted).

In this case, Plaintiff has failed to provide **any evidence** that would establish irreparable harm. Plaintiff speculates that without an injunction, the Officer Defendants **might** dissipate their assets prior to trial. Plaintiff, however, fails to provide any evidence whatsoever to support that speculation. Indeed, Plaintiff has not offered a single affidavit, exhibit, or other piece of evidence that would demonstrate, or even suggest, that any of the Officer Defendants have dissipated or will dissipate their assets prior to the resolution of this matter. Accordingly, Plaintiff's Motion should be denied.

D. Plaintiff's Requested Relief Does Not Meet the Specificity Requirements of Rule 65(d)

Rule 65(d), Federal Rules of Civil Procedure, provides that every order granting an injunction must (a) state the reasons why it issued; (b) state its terms specifically; and (c) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required. The specificity provisions of Rule 65(d) are no mere technical requirements: "The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood. Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of

precisely what conduct is outlawed." Schmidt v. Lessard 414 U.S. 473, 476, 94 S.Ct. 713, 715 (1974); Owner-Operator Independent Drivers Ass'n, 1997 WL 525411, 2 (6th Cir. 1997)(Table).

Plaintiff's Motion does not provide "explicit notice" of what conduct Plaintiff seeks to enjoin. For that reason, Plaintiff's Motion should be denied. See, e.g., Lamon v. Adams, 2011 WL 148275 (E.D. Cal. Jan. 18, 2011) ("To obtain relief, Plaintiff must identify a specific threat of future irreparable harm and request relief that is narrowly tailored to correct that harm. The Court will not issue an 'order of protection' when it is unclear what such an order would entail, what threat of future irreparable harm would be prevented, or how the 'order of protection' would prevent that harm."); Duham-Bey v. Wemple, 2010 WL 432319 (W.D. Mich. Jan. 25, 2010) (plaintiff's failure to identify what specific injunctive relief he requests warrants denial of motion for preliminary injunction).

IV. CONCLUSION

For the foregoing reasons, the Individual Defendants respectfully request the Court deny Plaintiff's Motion for Preliminary Injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2011, a copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

/s/ Grant S. Cowan

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