IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-02142-WYD-BNB

CHARLES D. SWANSON,
derivatively on behalf of JANUS CAPITAL GROUP, INC.,

Plaintiff,

v.
RICHARD M. WEIL, et al.,

Defendants,

and

JANUS CAPITAL GROUP, INC,
Nominal Defendant.

PLAINTIFF'S BRIEF IN OPPOSITION TO THE
INDIVIDUAL DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Plaintiff Charles D. Swanson respectfully submits this memorandum of law in opposition to the Individual Defendants'[1] motions to dismiss.

I. INTRODUCTION

A board of directors has an unwavering duty to act in the best interests of the corporation and its shareholders. Here, Plaintiff's Amended Verified Shareholder Derivative Complaint (the "Complaint") details indisputable facts demonstrating that Janus Capital Group Inc.'s ("Janus" or the "Company") board of directors (the "Board") have acted directly against the best interests of the Company's shareholders and harmed Janus by giving excessive compensation to its senior executives in violation of the Company's own stated pay for performance plan. The Board established and represented to shareholders that it would reward Janus' executives only if they achieved "strong performance against financial and strategic (non-financial) objectives" and that Janus' pay-for-performance" policy "provide[s] a strong and direct link between pay and both Company and individual performance." The Board nonetheless increased executive compensation in the aggregate by 41% for 2010 (including more than $20 million to Richard M. Weil, the Company's CEO, upon his appointment on or about February 1, 2010) notwithstanding that Janus' stock *declined* by 7% in 2010 and underperformed the Dow Jones (which *increased* by 9%), by 16% in 2010 at the hands of these executives. Moreover, the more than $40 million paid out to the Company's top executives in 2010 represented *30% of Janus' 2010 net income*. Accordingly, contrary to the Board's stated commitment to "pay for performance," the Executive Defendants' compensation was *not* tied to performance.

[1] The Individual Defendants are: Richard M. Weil, Steven L. Scheid, Timothy K. Armour, Paul F. Balser, G. Andrew Cox, Jeffrey J. Diermeier, J. Richard Fredericks, Deborah R. Gatzek, Lawrence E. Kochard, Robert T. Parry, Jock Patton and Glenn S. Schafer (collectively, the "Director "Defendants"), and Jonathan D. Coleman, Gregory A. Frost, James P. Goff, R. Gibson Smith and Weil (collectively, the "Executive Defendants").

Janus' shareholders soundly rejected the Board's 2010 executive compensation plan, with approximately 58% voting "against" these increased awards at the Company's first Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") mandated "say-on-pay" vote on April 29, 2011, placing Janus as one of only a tiny handful of companies to have its Board's executive compensation plan voted down by shareholders. This resounding "no" vote, combined with the decline in Janus' stock value under the stewardship of the Executive Defendants, powerfully evidences that the Board acted against the best interests of Janus and its shareholders in hiking the executives' 2010 pay, and, thus, breached its fiduciary duties of loyalty and good faith.

On March 16, 2011, Janus filed a Schedule 14A Definitive Proxy Statement (the "Proxy Statement") with the U.S. Securities and Exchange Commission (the "SEC"), which set forth the Board's chosen compensation scheme and requesting Janus' shareholders "vote for or against" the plan. Because the Proxy Statement represented that the Company's pay-for-performance policy was intended to "provide a strong and direct link between pay and both Company and individual performance" and that the Company's top executives' pay was based "primarily upon Company and individual performance" -- but the Board did something entirely different, the Director Defendants further breached their fiduciary duty of candor and Section 14(a) of the Securities Exchange Act of 1934 by misrepresenting and omitting material information concerning the compensation program upon which shareholders were asked to vote.

While a board of directors is usually protected by the "business judgment rule" when making decisions about executive compensation, the business judgment rule is rebutted where, as here, a plaintiff alleges facts showing that board members acted disloyally. Here, there can be no real dispute that the 2010 executive compensation awards were not in the best interest of Janus or its shareholders. Indeed, the key facts substantiating Defendants' liability are indisputable. To wit, the Complaint alleges as follows: (i) Janus' stock price declined by 7% in 2010, while the Dow increased by approximately 9%, demonstrating Janus' performance lagged, on average, 16% behind the Dow; (ii) the Board nevertheless awarded large compensation increases (41% in the aggregate) to senior executives for 2010; (iii) the Board sought shareholder approval of the 2010 awards by way of a Proxy Statement that falsely claimed that pay would be tied to the Company's financial performance for the purpose of ensuring Janus' management and its shareholders' interests were aligned; and (iv) the shareholders voted down the Board's 2010 executive compensation plan by a wide margin.

These facts rebut any presumption that the Board faithfully acted in shareholders' best interests in paying Janus' senior executives outsized raises despite the evisceration of stockholder value on their watch. Therefore, not only has Plaintiff sufficiently pled that Defendants are liable, but Plaintiff has also alleged sufficient facts to establish that demand on the Board is excused as futile (or at least to raise the requisite reasonable doubt that the Board would impartially consider a demand). Indeed, these facts demonstrate that (a) the Board was incapable making an independent determination about whether to institute proceedings against themselves and the Executive Defendants for their various breaches of duty because the Board faces a substantial likelihood of liability and (b) the Board's conduct was not the product of a valid good faith business judgment. Tellingly, the Board effectively admitted demand would be futile by failing to respond to a demand made by another Janus shareholder based upon the same breach of fiduciary duty allegations, made months before Plaintiff commenced this action.

In arguing that Plaintiff has not stated a claim for breach of fiduciary duty, Defendants seem to have overlooked (or ignored) most of the Complaint. Indeed, Defendants' papers are littered with hyperbolic proclamations to the effect that Plaintiff has "failed to allege any factual support." As indicated above, this is simply not true and the dispositive facts are well pled and largely beyond dispute.

The advisory nature of the Dodd-Frank say-on-pay vote similarly provides Defendants no shelter, as contrary to Defendants' misinterpretation of the Complaint, this action is not about creating or implying any additional fiduciary duties for Defendants, but instead about enforcing their well-established duties of loyalty and good faith. The negative shareholder vote is certainly, at the very least, probative, if not the best evidence, that the 2010 executive compensation awards were not in the best interests of Janus and its shareholders.[2]

Accordingly, Defendants' Motion should be denied in its entirety.

II. ARGUMENT[3]

A. Demand Is Futile

1. The Applicable Legal Standards

Both Delaware law and the Federal Rules of Civil Procedure require a plaintiff to state with particularity either that he made a demand on the board of directors prior to initiating a derivative lawsuit or the reasons a demand was not made.[4] It is well settled under Delaware law that a pre-suit demand need not be made when the facts alleged tend to demonstrate that a demand would have been futile. *See Aronson v. Lewis*, 473 A.2d 805, 806-07 (Del. 1984).

---

[2] *See, e.g.*, Dodd-Frank, S. Rpt. No. 111-176, at 231 (2010) ("shareowner votes on pay would serve as a direct referendum on the decisions of the compensation committee and would offer a more targeted way to signal shareowner discontent than withholding votes from committee members"); *IBS Fin. Corp. v. Seidman & Assocs., L.L.C.*, 136 F.3d 940, 949 (3d Cir. 1998) ("'[The shareholder franchise] is critical to the theory that legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own.'") (quoting *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988)); *Mainiero v. Microbyx Corp.*, No. 14228-NC, 1996 Del. Ch. LEXIS 107, at *7-8 (Del. Ch. Aug. 15, 1996) ("Delaware Courts support the enfranchisement of Delaware's corporations' shareholders. The importance of allowing shareholders to vote at an annual meeting is critical to effective corporate governance.").

[3] Plaintiff respectfully refers the Court to Plaintiff's Opposition to Janus' Motion to Dismiss, Section II, and Plaintiff's Complaint for a summary of the facts in this Action.

[4] *See* Del. Ct. Ch. R. 23. 1(a); Fed. R. Civ. P. 23.1(b)(3); *Kamen v. Kemper*, 500 U.S. 90, 108-09 (1991).

Where, as here, a derivative claim involves a contested transaction, demand is futile under *Aronson* when "a reasonable doubt is created that: (1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." *Aronson*, 473 A.2d at 814. The test enunciated in *Aronson* is disjunctive; a plaintiff that meets either prong is excused from making a pre-suit demand. *See Weiss v. Swanson*, 948 A.2d 433, 441 (Del. Ch. 2008). Under *Aronson*, directors that, as here, are *prima facie* liable for a breach of loyalty face a substantial likelihood of liability sufficient to excuse demand. *Aronson*, 473 A.2d at 814-15; *Carmody v. Toll Bros.*, 723 A.2d 1180, 1189 (Del. Ch. 1998) ("A demand is excused if the complaint's particularized factual allegations create a reason to doubt that the board would consider the demand in a disinterested, impartial manner.").

In assessing whether a demand was needed, all reasonable inferences must be drawn in the light most favorable to Plaintiff and a determination of demand futility is to be based on the totality of the circumstance. *See Weiss,* 948 A.2d at 441; *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993). The facts alleged here show the futility of demand under both prongs of *Aronson*.

2. Pre-Suit Demand Is Excused As Defendants Acted Disloyally And Not In Good Faith, And Face A Substantial Likelihood Of Liability

a. Plaintiff Has Alleged Facts Sufficient To Rebut Any Business Judgment Rule Presumption Regarding The 2010 Awards

Plaintiff has demonstrated the futility of demand under the second prong of *Aronson*. With respect to this controlling standard, "the alleged facts need only give rise to a reason to doubt business judgment protection, not 'a judicial finding that the directors' actions are not protected by the business judgment rule.'" *In re Walt Disney Co. Deriv. Lit.*, 825 A.2d 275, 289 (Del. Ch. 2003). Plaintiff has alleged with particularity facts easily creating *a reason to doubt* that the 2010 executive awards were the product of a valid exercise of business judgment.

A reasonable doubt sufficient to rebut the business judgment rule is created where, as here, Defendants have effectively conceded that demand is futile by failing to respond to a shareholder demand (by a different Janus shareholder) made several months ago based upon substantially similar state law claims (Compl. ¶ 89). As Defendants' counsel confirmed in open court during the schedule conference on October 18, 2010, Defendants have not responded to that shareholder demand. *See* Exhibit A, attached hereto. A failure to respond to another shareholder demand constitutes direct evidence that demand would futile. Accordingly, Plaintiff has adequately pled demand is futile and Defendants have confirmed it.

Moreover, the facts alleged show that a board knowingly and intentionally "exceed[ed] the shareholders' grant of express (but limited) authority," or where the complaint "alleges bad faith and, therefore a breach of the duty of loyalty." *Ryan*, 918 A.2d at 357.[5] The facts alleged easily demonstrate that, in approving and later failing to rescind the 2010 executive compensation plan, the Board breached its fiduciary duty of loyalty to Janus' shareholders.

As specifically alleged (and as the uncontestable facts confirm), this is a Board that granted top executive pay raises of 41% in 2010 at a time when the Company's stock price was declining and the Company's performance was markedly negative. Further, this is a Board that granted extravagant outlay of assets equal to approximately *30% of the Company's total net income for the year*. Moreover, this is a Board that misrepresented to shareholders that the Company supposedly pays for performance while nevertheless granting lavish awards in the face of failure, and then maintaining its outrageous executive compensation plan despite shareholders' express rejection of that plan. Such a Board plainly was not "deal[ing] fairly and

[5] *See also In re Tyson Foods, Inc.*, Civ. A. No. 1106-CC, 2007 WL 2351071, at *4 (Del. Ch. Aug. 15, 2007) ("Loyalty. Good faith. Independence. Candor. These are words pregnant with obligation. The Supreme Court did not adorn them with half-hearted adjectives. Directors should not take a seat at the board table prepared to offer only conditional loyalty, tolerable good faith, reasonable disinterest or formalistic candor.").

honestly with the shareholders for whom [it] is a fiduciary." *Tyson Foods*, 919 A.2d at 592.[6] The Board's "egregious conduct" more than amply raises a reasonable doubt as to the Board's disinterestedness and demonstrates demand is futile because these directors face "a substantial likelihood of liability." *Seminaris v. Landa*, 662 A.2d 1350, 1355 (Del. Ch. 1995); *NECA-IBEW Pension Fund v. Cox, et. al*, No. 1:11-cv-00451-TSB, at 5-7, 9 (S.D. Ohio Sept. 20, 2011).

Weiss, *Tyson* and *Ryan* are instructive. In all three cases, plaintiffs challenged stock option grants made by the directors pursuant to a shareholder-approved option plan. In denying defendants' motions to dismiss, the courts concluded that plaintiffs adequately pled claims of breach of fiduciary duty against the companies' boards based on the issuance of options not authorized by the companies' plans and, as such, the allegations created a reasonable doubt as to whether the grants were a valid exercise of business judgment, thus excusing demand. *Weiss*, 948 A.2d at 442-44; *In re Tyson Foods*, 919 A.2d at 593-94; *Ryan*, 918 A.2d at 357-58.

In *Weiss*, the Court specifically noted that while compensation decisions are typically protected by the business judgment rule, "the rule applies to the directors' grant of options pursuant to a shareholder-approved plan only when the terms of the plan at issue are adhered to." *Weiss*, 948 A.2d at 441; *see also Ryan*, 918 A.2d at 357-58 (excusing demand where board's contravention of stock option plans raised a reasonable doubt "that the challenged transactions resulted from a valid exercise of business judgment"). The animating force behind these decisions calls for the same result here. Similar to *Weiss, Tyson* and *Ryan*, the Janus Board has approved executive compensation that violates the terms of its executive compensation policy, which Defendants themselves claimed was designed "provide a strong and direct link between

[6] *See also Pfeiffer v. Toll*, 989 A.2d 683, 707 (Del. Ch. 2010) ("The duty of loyalty has paramount importance under Delaware law. Delaware's consistent corporate philosophy has been to grant deference to boards in exercising their authority to direct and oversee the business and affairs of the corporation, balanced by assiduous protection of the shareholders' right to . . . meaningful enforcement of fiduciary duties, with particular emphasis on the duty of loyalty.").

pay and both Company and individual performance" and to align the "interests between [Janus'] executives and [the Company's] public and fund shareholders."

Defendants nonetheless argue that executive compensation should somehow always enjoy the protection of the business judgment rule, and that neither the negative shareholders' say-on-pay vote nor s significant decline in the Company's stock value, particularly as compared to market performance, is sufficient to rebut this presumption. Defs.' Mem. at 4-9. Plaintiff does not dispute that Delaware law grants a company wide discretion in determining executive compensation. However, "there is an outer limit to that discretion." *Brehm v. Eisner*, 746 A.2d 244, 262 (Del. 2000).[7] Here, well beyond any reasonable or rational discretion, the Board awarded huge executive pay increases despite not only abysmal performance but also shareholders' own business judgment (as loudly expressed by their vote) that the 2010 raises were not in the best interests of the Company or its shareholders. Directors choosing to govern a corporation's affairs counter to shareholders' best interests – guided instead by the desire to serve themselves and the interests of corporate management – cannot seek refuge from their fiduciary breach in the protections of the business judgment rule. *Pfeiffer v. Toll*, 989 A.2d 683, 707 (Del. Ch. 2010) ("The duty of loyalty has paramount importance under Delaware law. Delaware's consistent corporate philosophy has been to grant deference to boards in exercising their authority to direct and oversee the business and affairs of the corporation, balanced by assiduous protection of the stockholders' right to . . . meaningful enforcement of fiduciary duties,

[7] Defendants' citation to *Brehm* is misplaced. (Def. Mem. at 7, 9). In *Brehm*, the executive compensation was never subject to a shareholder vote, let alone rejected, as was the case here. Further, *Brehm* survived both dismissal and summary judgment motions, and proceeded to trial. At trial, although the Court ultimately ruled against plaintiffs, the Court noted that its decision may have been different if the compensation was granted in "an era that has included the Enron and Worldcom debacles, and the resulting legislative focus on corporate governance." *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 697 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006). With the enactment of Dodd-Frank, we now live in such an era, requiring a different result here.

with particular emphasis on the duty of loyalty."). The Janus Board did just that by approving the 2010 executive compensation contrary to the Company's pay-for-performance policy.[8]

Defendants also rely upon the undisputed fact that the "Dodd-Frank Act does not 'overrul[e]' a decision by the Board or 'create or imply any additional fiduciary duties' to rescind or otherwise respond to a say on pay vote." Def. Mem. 7-8. Plaintiff, however, does not contend that the shareholders' rejection of the 2010 pay raises alters the Directors' fiduciary duties in any way or creates or implies any additional fiduciary duties. Rather, the shareholders' rejection of the increased pay package granted by the Board has two key effects here. First, it is powerful evidence that the Directors in fact breached their existing, well-established fiduciary duties of loyalty and good faith by not acting in the best interests of the Company and its shareholders. Second, contrary to Defendants' contention[9] (Defs.' Mem. at 8-9), it confirms that the Board is not entitled to the business judgment rule presumption that -- in directly contravening the expressed will of the shareholders -- it acted loyally and in good faith.[10]

Indeed, the shareholder vote proves that the Board's actions would cause a reasonable

---

[8] Defendants concede that the Company's say-on-performance policy was based in part on "Company profits" but attempt to justify the excessive compensation awards by pointing to other subjective factors upon which compensation was purportedly based. Defs.' Mem. at 7. The reality, however, is that Defendants failed to meet so many Company performance goals that Janus' stock price has declined, resulting in the significant loss in shareholder value. Defendants should not be reward for the Company's poor performance. Moreover, they should not be permitted to rely on broad, subjective factors, as here, to escape liability. Otherwise, companies would always implement broad subjective policies in order to enable themselves to escape liability under any circumstance.

[9] Memorandum of Law in Support of Individual Defendants' Motion to Dismiss ("Defs.' Mem.").

[10] The business judgment rule shields directors only if they acted in the best interests of shareholders. *See, e.g.*, *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 36-37 (Del. Ch. 2010). Thus, to qualify for business judgment protection, it is imperative that directors consistently place the best interests of shareholders ahead of their own interests and those of corporate executives. *See, e.g.*, *Cede* 634 A.2d at 360 (Del. 1993) ("In exercising [business judgment], directors are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders.").

person to doubt that it acted with good faith business judgment.[11] In fact, shareholders' unequivocal rejection of the 2010 executive compensation plan demonstrates that *many* reasonable persons *did* doubt the propriety of the Board's decision and rejected it outright. Indeed, shareholders holding more than 83.7 *million shares*, or 58% of Janus common stock voted against the Board's plan, determining in their independent business judgment -- as the true owners of the Company -- that the increased awards were not in their best interests or those of the Company.[12] In light of this referendum, the Board's subsequent decision to keep the 2010 executive compensation in place only reinforces that the Board's actions were "so egregious on [their] face that board approval cannot meet the test of business judgment." *Aronson*, 473 A.2d at 815.[13] Thus, demand is excused under the second prong of *Aronson.*[14]

[11] Defendants' contention that the negative say-on-pay vote cannot be construed as evidence that the Board acted in bad faith because the shareholder vote had not happened at the time the Board approved the vote and, thus, the Board was unaware of the vote (Defs.' Mem. at 8-9) is misplaced and misstates Plaintiff's argument. Rather, Plaintiff contends that Defendants' failure to act in response to the negative shareholder vote demonstrates their bad faith and the fact that Janus' shareholders overwhelmingly voted against the 2010 executive compensation demonstrates its unreasonableness. The cases Defendants cite in support of their argument are distinguishable. In Jacobs, a California state court decision, the court provided no reasoning for its opinion and there was no effective admission by the Board, as here, that demand was futile because it did not intend to respond to a prior shareholder demand.

[12] While the Company may not be obligated to accept or implement the shareholders' views regarding the excessiveness of the compensation grants at issue (Defs.' Mem. at 8-9), the Directors' utter disregard of the shareholders' views should remove any presumption that in doing so the Directors complied with their well-settled fiduciary duties under Delaware law. Indeed, the vote -- whether advisory or not -- reflects the will of the shareholders and is direct evidence that the 2010 pay raises were not in their best interests. *See Gantler*, 965 A.2d at 713 (stating that even non-legally binding shareholder votes can have dispositive effect). Notably, the Senate Banking Report confirms that the purpose of the say-on-pay vote is to provide an efficient means for shareholders, as the owners, to collectively express whether the corporation's executive compensation is in their best interests as shareholders. S. Rep. No. 111-176, at 133 (2010) ("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."). Given the Dodd-Frank Act, courts now have a mechanism to objectively determine whether executive compensation is in the best interests of shareholders. Courts no longer need to rely heavily on process-oriented factors to try to discern whether executive compensation serves the best interests of shareholders.

[13] Delaware law has long held that, in appropriate circumstances, directors are not entitled to the business judgment rule's deference when the directors' actions or inactions are contrary to a vote of the shareholders. *See, e.g., In re John Q. Hammons Hotels Inc. S'holder Litig.*, No. 758-CC, 2009 WL 3165613, at *12 (Del. Ch. Oct. 2, 2009) (holding that given "deficiencies in the specific procedures used" the business judgment rule would apply only "if the transactions were (1) recommended by a disinterested and independent special committee, *and* (2) approved by stockholders in a non-waivable vote of the majority of all the minority stockholders") (emphasis in original); *In re*

b. Plaintiff Has Alleged Facts Sufficient To Create A Reasonable Doubt That The Board Is Independent And Disinterested

Even if approving and maintaining the 2010 executive pay hikes were protected by the business judgment rule (though they are not), demand was not required because the Board was not disinterested and thus could not properly consider a demand. *Aronson*, 473 A.2d at 814.

One means by which Plaintiff may raise a reasonable doubt as to the disinterestedness of the Board is by demonstrating that it is subject to a substantial likelihood of liability. *See Ryan*, 918 A.2d at 356-57. Here, the entire Board faces a substantial likelihood of liability for breach of fiduciary duty for approving and not rescinding Janus' 2010 awards to top executives despite the shareholders' express rejection of those very awards. As the Complaint alleges, every member of the Janus Board is interested because each directly engaged in the incriminating conduct, *i.e.*, approving the excessive 2010 executive compensation awards despite Janus' abysmal performance, recommending that shareholders vote for the awards by way of a Proxy that falsely stated that pay was tied to performance, and then maintaining the awards despite shareholders' demand to rescind them. These actions and inactions constituted an "intentional dereliction of duty" and "a conscious disregard for one's responsibilities," each of which is

---

Wheelabrator Techs., Inc. S'holders Litig., 663 A.2d 1194, 1202-3 (Del. Ch. 1995) ("[T]he ratification cases involving duty of loyalty claims have uniformly held that the effect of shareholder ratification is to alter the standard of review, *or* to shift the burden of proof, *or* both.") (emphasis in original)). The Directors' disloyal behavior here in maintaining excessive levels of compensation -- despite the fact that a wide majority of Janus' shareholders expressly rejected these awards -- likewise should alter the standard of review from the deference of business judgment to the scrutiny of entire fairness and shift the burden of proof to the Directors (to show that the awards were entirely fair to the Company). *See*, *e.g.*, *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1162 (Del. 1995) (once business judgment rule rebutted burden shifts to defendants to prove entire fairness). This is compelling evidence that the Board breached its duty of loyalty by failing to act in the best interests of shareholders when giving the 2010 executive pay raises. *Nagy v. Bistricer*, 770 A.2d 43, 64 (Del. Ch. 2000) (holding directors liable for breach of loyalty for failing to act in shareholders' best interest).

[14] That the Board has breached its fiduciary duty is further evident from the false disclosures it made in the Proxy Statement regarding executive compensation. When the directors of a Delaware corporation communicate with shareholders, the "shareholders are entitled to honest communication from directors, given with complete candor and in good faith." *In re INFOUSA, Inc. Shareholders Litig.*, 953 A.2d 963, 990 (Del. Ch. 2007). Departure from this responsibility violates the fiduciary duties that protect shareholders, and such violations are sufficient to subject directors to liability in a derivative claim for harm caused to the corporation. *Id.*

"properly treated as a non-exculpable, non-indemnifiable violation of the fiduciary duty to act in good faith." *Ryan v. Lyondell Chem. Co.*, C.A. No. 3176-VCN, 2008 WL 4174038, at 2-3 (Del. Ch. Aug. 29, 2008) (citations omitted); *NECA-IBEW Pension Fund ex. Rel. Cincinnati Bell, Inc. v. Cox*, No. 1:11-CV-451, 2011 U.S. Deist. LEXIS 106161, at *9 (S.D. Ohio Sept. 20, 2011),

In this sense, the Board's actions mirror those of the board of directors in *Cincinnati Bell*. In *Cincinnati Bell*, the court found that plaintiff had "pled specific facts to give reason to doubt that the directors could make unbiased independent business judgment about whether to sue" where the directors were the very same people who "devised the challenged compensation, approved the compensation, recommended shareholder approval of the compensation and suffered a negative shareholder vote on the compensation." *Id.* at 9. These are sufficient allegations to raise a reason to doubt the disinterestedness of the current board and to suggest that they are incapable of impartially considering demand.").

As in *Cincinnati Bell*, the Board ran afoul of the shareholders' will here by proceeding with a compensation plan that directly contravened the shareholders' express demand as communicated by their resounding vote "against" that plan. Further, in asking shareholders to approve their plan, the Director Defendants misrepresented in the Proxy Statement to shareholders that pay was tied to performance.[15] The Complaint adequately alleges that the Board acted against the best interests of shareholders and therefore faces a substantial likelihood of liability. Thus, Plaintiff has satisfied the first prong of *Aronson* as well as the second.

[15] Defendants erroneously contend they are shielded from liability by Janus' certificate of incorporation, adopted pursuant to 8 Del. Code § 102(b)(7), which they mistakenly claim negates the "substantial likelihood" of liability they face. Def. Mem. at 10. Section 102(b)(7), however, does not allow exculpation for acts or omissions not in good faith, which constitute a breach of the duty of loyalty, or which involve intentional misconduct or knowing violation of law. *Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2001). The misconduct at issue here -- awarding the 2010 executive raises despite terrible performance, and then failing to rescind the raises after the shareholder vote demanding that they do so -- indisputably implicates the duties of loyalty and good faith, *i.e.*, non-exculpated claims. *See, e.g.*, *Lyondell*, 2008 WL 4174038, at *3 ("a conscious disregard of one's responsibilities" is "'properly treated as a non-exculpable, non-indemnifiable violation of the fiduciary duty to act in good faith'").

3. The Complaint Adequately States Claims For Relief

a. The Complaint Adequately Pleads Breaches of Fiduciary Duty

"A claim for breach of fiduciary duty requires proof of two elements: (1) that a fiduciary duty existed; and (2) that the defendant breached that duty." *Beard Research, Inc. v. Kates*, 8 A.3d 573, 601 (Del. Ch. 2010). Here, the same facts demonstrating that demand was excused because the Board's excessive 2010 executive compensation plan could not have been a valid business judgment also provide a sufficient basis for sustaining Plaintiff's breach of fiduciary duty claims. "[W]here [the] plaintiff alleges particularized facts sufficient to prove demand futility under the second prong of *Aronson*, that plaintiff *a fortiori* rebuts the business judgment rule for the purposes of surviving a motion to dismiss pursuant to Rule 12(b)(6)."[16]

Moreover, it is well established that directors "are under a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action." *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992). Accordingly, a violation of Section 14(a) accompanies a violation of a director's duty of candor. *Seinfeld*, 2006 WL 890909, at *3. Thus, because the Complaint adequately pleads demand futility and states a claim for violation of Section 14(a), it also adequately states a claim for breach of fiduciary duty.

b. The Complaint States A Claim For Unjust Enrichment

Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." *Schock v. Nash*, 732 A. 2d 217, 232-33 (Del. 1999) (internal quotation marks omitted). The Complaint adequately pleads a claim for unjust enrichment under Delaware law against defendants Weil, Coleman, Frost, Goff and Smith because it alleges that there was "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and

[16] *Weiss*, 948 A.2d at 448 (citing *Ryan*, 918 A.2d at 357).

impoverishment, (4) the absence of justification and (5) the absence of a remedy provided by law." *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 585 (Del. Ch. 1998) (citation omitted).

In particular, Plaintiff sufficiently pleads unjust enrichment by alleging that, as a result of the Board's approval of the undeserved and unjustifiable 2010 executive compensation awards (and its failure to rescind those awards following the shareholder vote) in breach of the Board's fiduciary duties, the above-referenced executives unjustly received (and continue to retain) excessive and undeserved compensation at the expense of the Company. Because these benefits were not obtained "justifiably," but rather were obtained against "the fundamental principles of equity and good conscience," these Defendants were unjustly enriched.[17] These facts are easily sufficient at this stage to support a claim for unjust enrichment.

Defendants incorrectly claim that Plaintiff's unjust enrichment claim cannot stand because defendants Weil, Coleman, Frost, Goff and Smith performed services in exchange for that compensation. Defs.' Mem. at 14. Defendants, again, are wrong. The mere fact that Defendants may have purportedly performed "services" in exchange for compensation does not justify the excessive compensation grants awarded here, in violation of Janus' own say-on-performance policy.

c. **<u>The Complaint Adequately Pleads A Violation Of Section 14(a)</u>**

The Proxy Statement misrepresented that the Board utilized an executive compensation policy that "provide[d] a strong and direct link between pay and both Company and individual performance", that the Company's top executives' pay was based "primarily upon Company and

---

[17] *Schock*, 732 A.2d at 732; *Ryan*, 918 A.2d at 361 (retention of challenged options constituted unjust enrichment at the expense of the corporation); *Weiss*, 948 A.2d at 449-50 (same). *See also Jackson Nat. Life Ins. Co. v. Kennedy*, 741 A.2d 377, 394 (Del. Ch. 1999) ("Having pleaded sufficiently the allegations [of] breach of fiduciary duty . . . it is axiomatic that Plaintiffs have likewise pleaded sufficiently the allegations that Defendants were enriched by their actions [and it is therefore] likely they will also be able to prove that neither [Defendant] can retain any benefit resulting from the disputed transaction.").

individual performance" and that Janus' say-on-performance policy was designed to align the "interests of between [Janus'] executives and [its] public and fund shareholders." (Compl. ¶¶ 50, 97) when that was not true. The Proxy misleadingly failed to disclose that the Board did not follow a pay for performance policy in 2010, executive compensation had no meaningful relationship to the Company's performance, and the Board did not emphasize pay for performance in establishing executive compensation and, instead intended to use highly subjective criteria that would always allow the Board to award excessive compensation, despite its statements to the contrary. This information is plainly material.[18]

"When directors speak out about their own compensation, or that of company managers, shareholders have a right to the full, unvarnished truth." *In re Tyson Foods,* 2007 WL 2351071, at n.18. Thus, Defendants breached their fiduciary duties and violated Section 14(a) by making the above, among other, material misrepresentations in the Proxy Statement.

Moreover, the Complaint also satisfies the "essential link" element of a Section 14(a) claim. Contrary to Defendants' suggestion (Def. Mem. at 13), in addition to the harm of a misinformed shareholder vote on executive compensation, the Complaint alleges that the same misleading Proxy also tainted the stockholder vote for the directors in violation of Section 14 of the Exchange Act, which is sufficient harm to state a claim for relief. *See, e.g., Weisberg v. Coastal States Gas Corp.*, 609 F.2d 650, 654 (2d Cir. 1979) (holding that "the challenged transaction is the election of the directors, and we have no doubt that the proxy solicitation itself . . . was an essential link in the accomplishment of that transaction") (quotation marks omitted).[19]

---

[18] *Shaev v. Saper*, 320 F.3d 373 (3d Cir. 2003) (sustaining 14(a) claim and holding that information relating to executive compensation is material). Contrary to Defendants' contention (Def. Mem. at 12), Plaintiff has also adequately pled injury. *See, e.g.*, *In re Countrywide Fin. Corp. Derivative Litig.*, 554 F. Supp. 2d 1044, 1075 (C.D. Cal. 2008) (sustaining 14(a) claim holding "interference with the processes of corporate democracy results in direct harm to the corporation [as well as] to shareholders who were actually deceived.").

[19] Further, Plaintiff need not make a demand or show a "substantial likelihood" of liability in pleading a Section 14(a) claim because whether or not to comply with proxy rules is not a matter of business judgment. *See, e.g.*,

III. CONCLUSION

For the reasons set forth above, the Court should deny Defendants' motions to dismiss.

DATED: February 1, 2012

Respectfully submitted,

CHARLES LILLEY & ASSOCIATES, P.C.

/s/ Charles W. Lilley

Charles W. Lilley
Karen Cody-Hopkins, Of Counsel
730 17th Street, Suite 670
Denver, Colorado 80202
Telephone: (303) 293-9800
Facsimile: (303) 298-8975
Email: clilley@lilleylaw.com

LEVI & KORSINSKY LLP
Shannon L. Hopkins, Esq.
Allen Schwartz, Esq.
30 Broad Street, 15th Floor
New York, New York 10004
Telephone: (212) 363-7500
Facsimile: (212) 363-7171
Email: shopkins@zlk.com
Email: aschwartz@zlk.com

Seinfeld v. Barrett, Civ. A. No. 05-298-JJF, 2006 WL 890909, at *3 (D. Del. Mar. 31, 2006) (when defendants makes false or misleading statements to shareholders, a plaintiff is not required to make a demand on the board of directors before filing a lawsuit); *In re Westinghouse Sec. Litig.*, 832 F. Supp. 989, 997-98 (W.D. Pa. 1993) ("business judgment analysis is inapplicable" to alleged violation of federal securities laws).