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
JANUS CAPITAL GROUP, INC.'S MOTION TO DISMISS

Plaintiff Charles D. Swanson respectfully submits this memorandum of law in opposition to the Janus Capital Group Inc.'s ("Janus" or the "Company") dismiss.

I. INTRODUCTION

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.

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.

The facts alleged in the Complaint and summarized below rebut any presumption that the Board faithfully acted in shareholders' best interests in paying Janus' senior executives excessive raises despite the evisceration of stockholder value on their watch.

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. Thus, demand would clearly be futile as to Plaintiff.

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

II. STATEMENT OF FACTS

Defendants filed Janus' Schedule 14A Definitive Proxy Statement with the Securities and Exchange Commission ("SEC") on March 16, 2011 (the "Proxy Statement").[1] ¶ 6. In the Proxy Statement, Janus stated that the Company's "pay-for-performance" policy is designed to "provide a strong and direct link between pay and both Company and individual performance" and "reward strong performance against financial and strategic (non-financial) objectives." ¶¶ 50, 61, 97. Additionally, the Board represented that "compensation of our most senior executives, those who have the greatest ability to influence Janus' performance, should be primarily based on Company and individual performance – an approach that reinforces the alignment of interests between our executives and our public and fund shareholders." ¶¶ 50, 97.

Rather than adhere to of Janus' performance-based executive compensation plan, the Board awarded defendants Weil, Coleman, Frost, Goff and Smith substantial bonuses for their *underperformance*. ¶¶ 3-4, 51-56. Specifically, the Board drastically 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, $10 million of which he received before even performing a single duty. *Id.* The total compensation award of $40 million represented approximately *30% of the Company's net income and 2% of its average market value during 2010*. ¶¶ 3, 12.

The Board increased compensation notwithstanding the fact that Janus' stock price *declined* by 7% in 2010 and underperformed the Dow Jones (which *increased* by 9%), by 16% in 2010 at the hands of these executives. ¶ 4. The price of Janus' stock has not recovered and was down more than 50% from 2009. ¶ 2. Indeed, Defendant Weil admitted in a May 30, 2011

[1] References to "¶__" are to Plaintiff's Amended Verified Shareholder Derivative Complaint (the "Complaint" or the "Compl."), filed on November 4, 2011.

article in Pensions & Investments, entitled "Janus CEO Weil faces uphill climb in 2nd year on job" as admitting "[w]e know that we haven't yet delivered the results that we need to deliver." ¶ 58. Thus, Weil has effectively admitted that the Board granted excessive compensation despite the fact that the Company was significantly underperforming.

An article in the New York Times on June 18, 2011, entitled "Paychecks as Big as Tajikistan" (the "NY Times Article"), stated that Janus "topped the list" of companies that compensated executives irrespective of performance, noting Janus was the *worst offender* of 483 companies examined. ¶ 12. Moreover, in 2009, Glass, Lewis & Co. ranked Janus' CEO as being the 15th most overpaid CEO in the country. ¶ 13.

The Board recommended shareholder approval of the 2010 executive compensation plan in the Proxy Statement. ¶ 60. On April 29, 2011, Janus shareholders overwhelmingly voted against the 2010 executive compensation in the Company's first ever say-on-pay vote. ¶ 7. The results were astounding. Approximately 59.89 million shares voted against the 2010 executive compensation recommended by the Board. *Id.* In other words, approximately 58 % of Janus' shareholders publicly stated that the 2010 compensation package was ***not*** in their best interests. *Id.* This adverse vote, alone rebuts any presumption of business judgment concerning executive compensation. Moreover, despite this powerful evidence that the Board did not exercise valid business judgment, the Board has made no attempt to rescind or even modify Janus' executive compensation for 2010. ¶ 10.

III. ARGUMENT

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.[2] 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). 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*.

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[2] *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).

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. 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.[3] The facts alleged

[3] *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.").

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 honestly with the shareholders for whom [it] is a fiduciary." *Tyson Foods*, 919 A.2d at 592.[4] 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).

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. Janus Def's. Mem. at 13-14. 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*,

[4] *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.").

746 A.2d 244, 262 (Del. 2000). 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, 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.

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." Janus Def's. Mem. at 14. 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[5], it confirms that the Board is not entitled to the business judgment rule presumption that -- in directly contravening

[5] Memorandum of Law in Support of Janus Capital Group Inc.'s Motion to Dismiss ("Janus Def's.' Mem.").

the expressed will of the shareholders -- it acted loyally and in good faith.

Indeed, the shareholder vote proves that the Board's actions would cause a reasonable person to doubt that it acted with good faith business judgment. 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. 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. Thus, demand is excused under the second prong of *Aronson.*

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 "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.[6] The Complaint adequately alleges that the

[6] 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. Janus Def.'s Mem. at 13. 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

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.[7]

IV. CONCLUSION

For the reasons set forth above and those set forth in Plaintiff's Opposition to the Individual Defendants' Motion to Dismiss, the Court should deny Janus' 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
Email: karen@codyhopkinslaw.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

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'").

[7] Plaintiff also respectfully refers the Court to the arguments made in Plaintiff's accompanying Opposition to the Individual Defendants' Motion to Dismiss, filed contemporaneously herewith.