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
Plaintiff,	:	Judge Beckwith Magistrate Judge Wehrman
v.	:	**MOTION TO DISMISS OF DEFENDANTS COX, BYRNES, HAUSSLER, MAIER, SHUMATE, WENTWORTH, ZRNO, CASSIDY, WOJTASZEK, AND WILSON**
PHILLIP R. COX, et al.,	:	
Defendants.	:	

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants Phillip R. Cox, Bruce L. Byrnes, Jakki L. Haussler, Craig F. Maier, Alex Shumate, Lynn A. Wentworth, John M. Zrno, John F. Cassidy, Gary J. Wojtaszek, and Christopher J. Wilson (hereinafter "Individual Defendants") move to dismiss this action because (1) Plaintiff fails to adequately allege a proper excuse for failing to make a pre-suit demand upon the Board of Directors of Nominal Defendant Cincinnati Bell Inc. ("Cincinnati Bell" or "the Company"), as required by Fed. R. Civ. P. 23; and (2) Plaintiff's complaint fails to state a claim upon which relief can be granted. This Motion is supported by the pleadings and the following Memorandum.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This case presents two questions for the Court: (1) whether mere approval by directors of an executive compensation decision excuses the long-standing requirement that a shareholder must make demand on the corporation before filing a derivative action, and (2) whether the advisory vote of Cincinnati Bell's shareholders pursuant to the recently enacted Dodd-Frank act concerning Cincinnati Bell's executive compensation is sufficient to overcome the well-established protections afforded by Ohio's business judgment rule despite explicit statutory language providing that such vote is not binding and does not create, alter, or amend directors' fiduciary duties.

Plaintiff's Complaint should be dismissed for two independent reasons. Initially, Plaintiff fails to adequately allege a proper excuse for its failure to make a pre-suit demand on the Cincinnati Bell Board of Directors. Both substantive Ohio law and the pleadings requirements of Rule 23.1 of the Federal Rules of Civil Procedure require that any Plaintiff attempting to maintain a derivative action on behalf of a corporation against directors and officers must plead either that he or she made a pre-suit demand on the board of directors, or that there is a legally valid excuse for not having done so. Here, Plaintiff does not allege that it made a pre-suit demand; instead, it asserts a series of reasons why demand was allegedly excused. As discussed herein, each of Plaintiff's purported excuses fail under well-settled precedents. For that reason, Plaintiff's Complaint should be dismissed.

Additionally, the Complaint should be dismissed because it fails to state a claim upon which relief may be granted. It is well-established that the business judgment rule protects the decisions made by a corporation's board of directors regarding executive compensation.

Plaintiff alleges that a recent "say-on-pay" vote by Cincinnati Bell's shareholders is sufficient to overcome the business judgment rule. Plaintiff's assertions in this regard, however, are precluded by the express language of the very federal statute that required Cincinnati Bell to hold the "say-on-pay" vote. That statute provides that such "say-on-pay" votes **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; or (3) to create or imply any additional fiduciary duties for the company or its board of directors. 15 U.S.C. § 78n-1(c). Accordingly, Plaintiff's Complaint fails to state a claim upon which relief should be granted and should be dismissed.

Finally, Plaintiff's unjust enrichment claims should be dismissed because unjust enrichment operates in the <u>absence</u> of an express contract, and during 2010, Defendants Cassidy, Wojtaszek, and Wilson were employed pursuant to agreements with the Company. Additionally, Plaintiff has not alleged that the executives failed to render services to the Company and, therefore, Plaintiff has failed to plead that Defendants Cassidy, Wojtaszek, and Wilson improperly retained the compensation paid to them pursuant to the employment agreements.

II. <u>BACKGROUND</u>

A. The Parties

Plaintiff NECA-IBEW Pension Fund (The Decatur Plan) ("Plaintiff") is a shareholder of Cincinnati Bell. (Compl., par. 9).[1] Cincinnati Bell is a full-service regional provider of data and voice communications services over wireline and wireless networks and a full-service provider

[1] Solely for purpose of this Motion, Plaintiff's non-conclusory allegations in its Complaint will be taken as true.

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).[2]

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 Wojtaskek and Defendant Wilson. The following is a brief description of each of the Individual Defendants.[3]

- Phillip R. Cox is the Chairman of the Cincinnati Bell Board of Directors and is a member of the Board's Compensation Committee. He currently serves on several other boards, and is a former director of the Federal Reserve Bank of Cleveland, Duke Energy Corporation, and Long Stanton Manufacturing Company. He currently serves as the CEO of Cox Financial Corporation.

- Bruce L. Byrnes is a member of the Board's Compensation Committee. Mr. Byrnes formerly served as Vice Chairman of the Board of Directors of the Procter & Gamble Company, where he served as President of Global Household Care and President of Global Beauty & Feminine Care and Global Health Care for Procter & Gamble. He currently serves as a director of three other companies.

- Jakki L. Haussler serves as the Chairman and CEO of Opus Capital Group, a registered investment advisory firm. Ms. Haussler is a certified public accountant (inactive) and a licensed attorney in the State of Ohio.

- Craig F. Maier serves on the Board's Compensation Committee. He is the President and CEO of Frisch's Restaurants, Inc., where he also serves on the board of directors.

- Alex Shumate serves on the Board's Compensation Committee. He is the Managing Partner, North America, of Squire, Sanders & Dempsy (US) LLP. He previously served on the board of directors of the Wm. Wrigley Jr. Company and Nationwide Financial Services.

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[2] Plaintiff's complaint quotes from and cites to the Proxy Statement. (See, e.g., Compl., par. 27). In determining whether to grant a Rule 12(b)(6) motion, the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account, as well as documents that a defendant attaches to a motion to dismiss if they are referred to in the plaintiff's complaint and are central to its claim. Amini v. Oberlin College, 259 F.3d 493, 502 (6th Cir. 2001); Local 295/Local 851 IBT Employer Group Pension Trust and Welfare Fund v. Fifth Third Bancorp., 731 F.Supp.2d 689, 702 (S.D.Ohio 2010)(Beckwith, J.) ("In deciding a Rule 12(b)(6) motion, the trial court may consider, in addition to the allegations in the complaint, other materials that are integral to the complaint, are public records, or are otherwise appropriate for the taking of judicial notice.").

[3] The Board currently consists of 9 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).

- Lynn A. Wentworth formerly served as Senior Vice President, Chief Financial Officer, and Treasurer of BlueLinx Holdings, Inc., a building products distributor. Prior to that, Ms. Wentworth served as Vice President and Chief Financial Officer of Bell South Corporation's Communications Group. Ms. Wentworth is a certified public accountant.

- John Zrno is a member of the Board's Compensation Committee. He formerly served as the President and CEO of IXC Communications, Inc., a telecommunications company. Prior to that, he served as the President and CEO of ALC Communications Corporation, another large telecommunications company.

- John F. Cassidy is the President and CEO of Cincinnati Bell and is also a director of the Company. Mr. Cassidy has served as the Company's President and CEO since 2003. Mr. Cassidy previously served as the President and Chief Operating Officer of Cincinnati Bell Telephone Company and as the President of Cincinnati Bell Wireless.

- Gary J. Wojtaszek is the Chief Financial Officer of Cincinnati Bell.

- Christopher J. Wilson is the Vice President, General Counsel and Secretary of Cincinnati Bell.

(Compl., par. 12-13; Proxy Statement, pg. 17-19).

All of the Board members, except Mr. Cassidy, 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). (Hereinafter, Defendants Cox, Byrnes, Haussler, Maier, Shumate, Wentworth and Zrno are referred to as "the Independent Directors.").

B. <u>Say-On-Pay Votes Under Dodd-Frank</u>

Plaintiff's claims in this matter focus on a recent "say-on-pay" vote by Cincinnati Bell's shareholders. The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), 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 Dodd-Frank adds a new Section 14A to the Securities Exchange Act of 1934 that requires companies that provide executive 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 Dodd-Frank. 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 <u>the most recent</u> 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.

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.

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)

C. Plaintiff's Allegations

Plaintiff contends that the Cincinnati Bell Board of Directors ("the Board") has historically represented to Cincinnati Bell shareholders that the Company's executive compensation practices are firmly rooted in a pay-for-performance philosophy, noting that the Proxy Statement indicates that:

- A significant portion of the total compensation for each Cincinnati Bell executive is directly related to the Company's earnings and revenues and other performance factors;

- The Company's compensation program ties a substantial portion of executive compensation to the Company's long-term company performance and shareholder returns;

- Compensation must be competitive with other companies to attract and retain high-quality executives;

- A significant portion of total executive compensation should be "at risk" and tied to the achievement of specific short-term and long-term performance objectives, principally the Company's earnings, cash flow and the performance of the Company's common shares;

- Compensation should provide a balance among each executive's base salary and short-term and long-term incentive components appropriate to the current and long-term goals and strategy of the Company.

(Compl., par. 27).

Plaintiff alleges that, in 2010, Cincinnati Bell posted a $61.3 million decline in net income and a negative 18.8% annual shareholder return, and that net income applicable to common shareowners, earnings per share, and total shareholders' equity all materially declined. (Compl., pr. 28). Plaintiff alleges that, despite the decline in net income and negative annual shareholder return, the Cincinnati Bell Board approved "excessive" pay hikes for Defendants Cassidy, Wojtaszek, and Wilson for 2010. (Compl., par. 31).

Plaintiff alleges that Cincinnati Bell held a Dodd-Frank say-on-pay advisory vote on May 3, 2011 and that 66% of voting Cincinnati Bell shareholders voted against the 2010 executive compensation. (Compl., par. 35).[4] 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).

[4] 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 C). 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.).

D. 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 in terms of base compensation and short-and long-term incentive compensation and benefits. (Proxy Statement, pg. 8-9).

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 retains 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).

E. <u>2010 Executive Compensation</u>

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' 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.

Cincinnati Bell executives' annual "at-risk" 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 and because they also 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 a annual incentive award, and the annual incentive plan is voted on and approved by shareholders.

For 2010, the Compensation Committee generally allocated the annual 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 the determination of 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 level of attainment of the revenue and 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).

III. ARGUMENT

A. Dismissal Is Required Because Plaintiff Has Failed To Meet The Pleading Standards Under Fed. R. Civ. P. 23 For Derivative Actions

In a shareholder derivative action, Federal Rule 23.1 of the Federal Rules of Civil Procedure requires the plaintiff to allege with particularity the reasons for failing to make a pre-suit demand upon the corporation's board of directors. In re Ferro Corporation Derivative Litigation, 511 F.3d 611, 617 (6th Cir. 2008). Even when the derivative claims are brought under federal law, the court applies the substantive law of the state of incorporation—here Ohio—to determine whether plaintiff's failure to make a demand is excused. Id.

In Ohio, the "directors of a corporation are charged with the responsibility of making decisions on behalf of the corporation and are the proper parties to bring a suit on behalf of the corporation or, in their business judgment, to forego a lawsuit." Ferro, 511 F.3d at 617-618, quoting Drage v. Proctor & Gamble, 119 Ohio App.3d 19, 694 N.E.2d 479, 482 (Hamilton App. 1997) ("Drage"). "Under Ohio law, it is presumed that any action taken by a director on behalf of the corporation is taken in good faith and for the benefit of the corporation." Ferro, 511 F.3d at 618, quoting Drage. Because the "board of directors has the primary authority to file a lawsuit on behalf of the corporation," the shareholders "may make a demand on the directors to bring a suit on behalf of the corporation, but no shareholder has an independent right to bring suit unless the board refuses to do so and that refusal is wrongful, fraudulent or arbitrary, or is the result of bad faith or bias on the part of the directors." Id., quoting Drage.

Establishing demand futility under Ohio law "is not an easy task." In re Keithley Instruments, Inc. Derivative Litigation, 599 F.Supp.2d 875, 889 (N.D. Ohio 2008), quoting In re Ferro Corp. Derivative Litigation, 2006 WL 2038659 at *5 (N.D. Ohio Mar. 21, 2006). Further, the demand requirement is not a procedural technicality. "Rather, it serves the very important purpose of ensuring that before a shareholder derivative suit is brought, the company's board of directors has considered all possible intracorporate remedies." Id., quoting Grand Council of Ohio v. Owens, 86 Ohio App.3d 215, 220, 620 N.E.2d 234 (Franklin App. 1993); see, also, Ferro, 511 F.3d at 618 ("The demand requirement is essentially a requirement that the shareholder exhaust his or her intracorporate remedies before going to court with a derivative suit. The corporate management must be given the first opportunity to institute the litigation since, as a general principle, the responsibility for determining whether a corporation should use the courts to enforce a cause of action is, like other business questions, ordinarily a matter of internal management left to the discretion of the directors.").

Ohio recognizes an exception to the general demand rule, which permits a shareholder to proceed with an independent suit without making a demand when the shareholder can demonstrate that the demand would have been futile. Id. Plaintiffs carry the burden of showing that "the directors cannot exercise independent, unbiased judgment when determining whether to sue themselves." Ferro, 511 F.3d at 618, quoting Carlson v. Rabkin, 152 Ohio App.3d 672, 789 N.E.2d 1122 (Hamilton App. 2003)("Rabkin"). "Futility means that the directors' minds are closed to argument and that they cannot properly exercise their business judgment in determining whether the suit should be filed." Id., quoting Rabkin. Ohio law presumes "that directors can make an unbiased, independent business judgment about whether it would be in the corporation's best interests to sue some or all of the other directors. Thus, courts have consistently rejected the idea that demand is always futile when the directors are targeted as the wrongdoers in the suit the shareholders wish the corporation to bring." Id., quoting Drage.

"Merely alleging futility will not suffice; rather, in accordance with Rule 23. 1, plaintiff must state with particularity the reasons for circumventing the demand requirement." Ferro, 511 F.3d at 618, quoting Granada Invs., Inc. v. DWG Corp., 717 F.Supp. 533, 536 (N.D.Ohio 1989). That is, "the plaintiff must *point to facts* which show that the presumed ability of the directors to make unbiased, independent business judgments about whether it would be in the corporation's best interests to file the action does not exist in this case." Id. (internal citations omitted). "Broad, generalized and conditional statements ... do not constitute facts pleaded with particularity." Id. (internal citations omitted).

1. *Cincinnati Bell's Board of Directors is Independent and Disinterested and, for that Reason, Demand is not Futile.*

Plaintiff's Complaint fails to adequately plead that a majority of Cincinnati Bell's Board of Directors lacks independence. Seven of Cincinnati Bell's eight directors – including all five members of the Compensation Committee – are non-management directors. Of the eight directors, only one – Mr. Cassidy – is alleged to have received any compensation of the kind challenged in the Complaint. Plaintiff has not alleged that any of the Independent Directors are dominated by, controlled by, or beholden to, Mr. Cassidy. Thus, Plaintiff has not pled any particularized facts that would create any reasonable doubt about the independence of Cincinnati Bell's Board of Directors.

Similarly, any effort to excuse demand on the ground that a majority of Cincinnati Bell's Board of Directors have a disabling "interest" with respect to the claims must be rejected. As discussed above, to excuse demand, Plaintiff must demonstrate that a majority of Cincinnati Bell's Board of Directors suffers from an alleged conflict of interest. Mr. Cassidy is the only director alleged to have received compensation challenged in this action. Thus, this is not a case where demand is excused because a majority of the applicable board of directors is alleged to have been personally interested in the challenged transaction.

2. *Cincinnati Bell's Board of Directors Do Not Face a Substantial Likelihood of Liability.*

Absent the ability to allege any genuine lack of independence or conflict of interest, Plaintiff resorts to arguments that the full Board approved the compensation at issue in the Complaint and that the directors could face personal liability as a result. Specifically, Plaintiff alleges that a pre-suit demand is futile solely "because the entire Cincinnati Bell Board faces a substantial likelihood of liability for breach of loyalty." (Compl., par. 42). Plaintiff further contends that the May 3, 2011 shareholder advisory say-on-pay vote is direct and probative evidence that the 2010 executive compensation was not in the best interests of the Company's shareholders, and the result of the advisory vote is to rebut the presumption that the Board's executive compensation decisions are entitled to the protection of the business judgment rule. (Compl., par. 42).

As is demonstrated below in the section concerning Plaintiff's failure to state a claim, under the specific provisions of Dodd-Frank and under Ohio law, the Board faces **no** liability as a result of the Dodd-Frank advisory say-on-pay vote. Moreover, federal and state courts applying Ohio law have routinely rejected similar bare conclusory allegations that pre-suit demand is futile because all or a majority of the board of directors are defendants in the derivative action. Ferro, 511 F.3d at 619 (rejecting assertion that pre-suit demand would have been futile "because the directors do not want to sue themselves or expose themselves to liability…"); Rabkin, 152 Ohio App.3d at 681 ("Courts have consistently rejected the idea that a demand is always futile when the directors are targeted as the wrongdoers in the suit the shareholders or members wish the corporation to bring."); Drage, 119 Ohio App.3d at 29 (plaintiff failed to allege that the directors were not disinterested or appeared on both sides of the transaction).

Additionally, Ohio courts have repeatedly rejected the assertion that board approval of the challenged transaction is sufficient to render pre-suit demand futile. For example, in Drage, the court held that board's approval of the same transaction challenged by the plaintiff in the derivative complaint was not enough to meet the demand futility pleading burden. Id. The Drage court cited Lewis v. Graves, 701 F.2d 245 (2nd Cir. 1983) for this proposition. In Lewis, the court summarized well the reasoning behind this rule:

> While we have not had occasion to rule on the issue of whether mere approval or acquiescence establishes futility, there is more than ample authority from other circuits that it does not. The fact that a corporation's directors have previously approved transactions subsequently challenged in a derivative suit does not inevitably lead to the conclusion that those directors, bound by their fiduciary obligations to the corporation, will refuse to take up the suit.

Lewis, 701 F.2d at 248 (internal citations omitted); see, also, Potter v. Hughes, 546 F. 3d 1051 (9th Cir. 2008) ("[W]here the mere approval of corporate action, absent self interest or other indication of bias, is the sole basis for establishing [a] director's wrongdoing and hence for excusing demand on them, plaintiff's suit should ordinarily be dismissed."); Aronson v. Lewis, 473 A.2d 805, 817 (Del. 1984)("[M]ere directorial approval of a transaction, absent particularized facts supporting a breach of fiduciary duty claim, or otherwise establishing the lack of independence or disinterestedness of a majority of the directors, is insufficient to excuse demand.")(overruled on other grounds).

The Lewis court also explained why merely suing a majority of directors does not excuse making a demand on the board:

> The single fact that the plaintiff named as defendants more than a majority-in this case all-of McDermott's then serving directors in our view falls short of excusing demand. To construe it as sufficient would mean that plaintiffs could readily circumvent the demand requirement merely by naming as defendants all members of the derivative corporation's board. Permitting plaintiffs to employ this tactic would eviscerate Rule 23.1, a rule that this Court has vigorously enforced. Plaintiff unpersuasively argues that-like magic-naming all of McDermott's directors as defendants caused the demand requirement to vanish. This transparent litigation tactic is like sleight of hand that is slower than the eye.

Lewis, 701 F.2d at 248 (internal citations omitted); Morrone v. Erlich, 2011 WL 1322085 at *7 (E.D.N.Y. 2011)(demand is not excused simply because plaintiff has chosen to sue all directors); Grimes v. Donald, 673 A.2d 1207, 1216 n. 8 (Del. 1996), overruled on other grounds by Brehm v. Eisner, 746 A.2d 244 (Del. 2000)("Demand is not excused simply because plaintiff has chosen to sue all directors. Likewise, a plaintiff cannot necessarily disqualify all directors simply by attacking a transaction in which all participated. To hold otherwise would permit plaintiffs to subvert the particularity requirements of Rule 23.1 simply by designating all the directors as targets.").

In this action, Plaintiff's sole basis for asserting that a majority of Cincinnati Bell's board of directors faces a substantial likelihood of liability is that a majority of Cincinnati Bell's current Board of Directors approved the executive compensation that is the subject of the Complaint. Under Ohio law, however, the mere approval of the challenged transaction is not sufficient to excuse demand. The business judgment rule protects the Board's executive compensation decisions (as discussed below) and, therefore, Plaintiff's Complaint fails to plead that a majority of the members of the Board face a substantial likelihood of liability. Plaintiff's Complaint should be dismissed.

B. Dismissal Is Required Because Plaintiff Has Failed To Rebut The Presumption of 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, including decisions regarding executive compensation, 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). 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).

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.§1701.59(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 mattes that the director reasonably believes are within the person's professional or expert competence.

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. Plaintiff asserts that the adverse say-on-pay advisory vote "is direct and probative evidence rebutting the presumption that the Cincinnati Bell Board's 2010 executive pay decisions were in the best interests of Cincinnati Bell shareholders and shifts the burden of proof to defendants to prove that the 2010 executive compensation was independent, made in good faith and in the best interests of Cincinnati Bell shareholders." (Compl., par 36).

Plaintiff's burden shifting argument is specious at best, given that Dodd-Frank specifically provides that the vote is non-binding and **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; or (3) to create or imply any additional fiduciary duties for the company or its board of directors. The non-binding advisory say-on-pay vote under Dodd-Frank simply in no way alters the business judgment rule in Ohio or any other state. 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).

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 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. 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.").

Moreover, Plaintiff ignores the actual incentive compensation performance measures used by the Compensation Committee in determining 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 the EBITDA and revenue targets. These objective performance metrics are not the metrics highlighted in Plaintiff's Complaint. Plaintiff, however, has not asserted that Cincinnati Bell's policy of using EBITDA and revenue as the appropriate performance measuring sticks is an irrational or impermissible exercise of the Board's discretion. Similarly, Plaintiff has not 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. Accordingly, the claims against the Independent Directors should be dismissed.

C. Plaintiff's Unjust Enrichment Claims Against Defendants Cassidy, Wojtaszek, and Wilson Fail As A Matter of Law

Plaintiff alleges that the 2010 "pay hikes" for Defendants Cassidy, Wojtaszek, and Wilson violated Cincinnati Bell's pay-for-performance policy and were unwarranted in light of Cincinnati Bell's "dismal 2010 financial performance." Plaintiff asserts, therefore, that Defendants Cassidy, Wojtaszek, and Wilson have been unjustly enriched. (Compl, par. 56). Plaintiff's unjust enrichment claim fails as a matter of law for several reasons.

First, 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, Messrs. Cassidy, Wojtaszek, and Wilson were employed pursuant to agreements with the Company. (Proxy Statement, pg. 49). Each employment agreement sets 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]

[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.

IV. CONCLUSION

For the foregoing reasons, the Individual Defendants respectfully request the Court grant their Motion to Dismiss Plaintiff's Complaint.

Respectfully submitted,

/s/ Grant S. Cowan

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July, 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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