IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FRANK DAVID SEINFELD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	*Civil Action No. 6462-VCG*
	)	
DONALD W. SLAGER; JAMES E. O'CONNOR; JOHN W. CROGHAN; TOD C. HOLMES; DAVID I. FOLEY; RAMON A. RODRIGUEZ; MICHAEL W. WICKHAM; JAMES W. CROWNOVER; NOLAN LEHMANN; ALLAN C. SORENSEN; WILLIAM J. FLYNN; W. LEE NUTTER; JOHN M. TRANI; MICHAEL LARSON; and REPUBLIC SERVICES, INC.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: April 25, 2012
Date Decided: June 29, 2012

Robert D. Goldberg, of BIGGS AND BATTAGLIA, Wilmington, Delaware; OF COUNSEL: Alexander Arnold Gershon and Michael A. Toomey, of BARRACK, RODOS & BACINE, New York, New York; Daniel E. Bacine, of BARRACK, RODOS & BACINE, Philadelphia, Pennsylvania, Attorneys for Plaintiffs.

Andre G. Bouchard, of BOUCHARD MARGULES & FRIEDLANDER, P.A., Wilmington, Delaware; OF COUNSEL: Michele Odorizzi, of MAYER BROWN LLP, Chicago, Illinois, Attorneys for Defendant Republic Services, Inc.

Daniel A. Dreisbach, Allen M. Terrell, Jr., and Susan Hannigan, of RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware, Attorneys for the Individual Defendants.

GLASSCOCK, Vice Chancellor

The Plaintiff is a stockholder in Republic Services, Inc. He has filed suit, purportedly derivatively on behalf of the corporation, alleging breaches of duty on the part of the board of directors and officers of the corporation. The Defendants have moved to dismiss; this Opinion addresses that motion. For the reasons explained below, the Plaintiff's claim arising from the board's granting itself stock awards survives. The Plaintiff's remaining claims are dismissed.

I. BACKGROUND

A. Parties

The Plaintiff, Frank David Seinfeld, is a stockholder of Republic Services, Inc. ("Republic" or the "Company"), who has held Republic stock during all relevant times.

Defendant Republic is a Delaware corporation that engages in waste hauling and waste disposal.[1]

Defendants James E. O'Connor, Donald W. Slager, John W. Croghan, James W. Crownover, William J. Flynn, David I. Foley, Michael Larson, Nolan Lehmann, W. Lee Nutter, Ramon A. Rodriguez, Allan Sorensen, John M. Trani, and Michael W. Wickham are members of Republic's board of directors (collectively, the "Defendant Directors").

Defendants O'Connor, Slager, and Tod C. Holmes are Republic officers.

[1] *Seinfeld v. O'Connor*, 774 F. Supp. 2d 660, 662 (D. Del. 2011).

B. Claims

As explained in detail below, the Amended Stockholder's Derivative Complaint[2] presents five claims that focus on Republic's compensation decisions. The Plaintiff's first claim is that a payment to Defendant O'Connor was made without consideration and was, therefore, wasteful. Second, the Plaintiff alleges that an incentive payment to O'Connor was wasteful because it was not tax-deductible and it also rendered Republic's compensation plan not tax-deductible. Third, the Plaintiff argues that the Defendant Directors paid themselves excessive compensation. Fourth, the Plaintiff asserts that the Defendant Directors breached their duty of loyalty and wasted corporate assets by awarding a certain type of stock option. Finally, the Plaintiff contends that the Defendant Directors improperly awarded employee bonuses because the requirements of the bonus scheme under which the bonuses were awarded were not met.[3]

There is little factual overlap among the claims. For the sake of clarity, I first explain the relevant standards of review, then I address the relevant facts and law with respect to each of the Plaintiff's grounds for recovery.

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[2] Hereinafter the "Complaint" or "Am. Compl." For purposes of the motion to dismiss, facts are drawn from the Complaint, documents incorporated into the Complaint by reference, and publicly available information.

[3] These bonuses were not awarded when the Complaint was filed, but at oral argument the Defendants represented that the bonuses had since been paid. Oral Arg. on Mot. Dismiss Tr. 4:9-19 (Mar. 29, 2012) [hereinafter "Oral Arg. Tr. ___"].

II. STANDARDS OF REVIEW

The Defendants have moved to dismiss all claims under Court of Chancery Rule 12(b)(6) for failure to state a claim. Except for the excessive compensation claim, the Defendants have also moved to dismiss pursuant to Rule 23.1, on the basis that the Plaintiff has failed to make demand or plead particularized facts that demonstrate demand futility.

The Plaintiff alleges that demand is excused for all his claims because the challenged transactions were not the product of a valid exercise of business judgment. The Plaintiff also alleges that demand is futile because the Defendants were interested or lacked independence in the stock option claim and the excessive compensation claim.

A. Rule 12(b)(6)

The pleading standard to survive a motion to dismiss under Rule 12(b)(6) is minimal. As our Supreme Court has made clear, in Delaware, a complaint may not be dismissed "unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances."[4] In determining whether a pleading meets this minimal standard, this Court draws all reasonable inferences in the plaintiff's favor, accepts all well-pleaded factual allegations as true, and even accepts "vague allegations in the Complaint as 'well-pleaded' if they provide the

[4] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011).

defendant notice of the claim."[5] This Court limits its inquiry "to the well-pleaded allegations of the complaint, to the documents incorporated into the complaint by reference, and to judicially-noticed facts."[6]

B. Rule 23.1

Generally, it is within the discretion of the board of directors to decide whether "to initiate or to refrain from initiating legal actions asserting rights held by the corporation."[7] If a stockholder believes such an action is warranted, he may make a demand on the board to so proceed. Court of Chancery Rule 23.1, however, allows stockholders to bring a derivative suit on behalf of the corporation "without the board's approval where they can show either that the board wrongfully refused the plaintiff's pre-suit demand to initiate the suit or, if no demand was made, that such a demand would be a futile gesture and is therefore excused."[8] In recognition of "the primacy of board decision making regarding legal claims belonging to the corporation," Rule 23.1 imposes a more arduous pleading standard than Rule 8(a),[9] and a plaintiff must allege sufficient *particularized* facts showing that demand on the board would have been futile.[10] This requirement does not mean that a plaintiff must demonstrate a reasonable probability of success on the merits; "[r]ather,

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[5] *Id.* at 536.
[6] *See Desimone v. Barrows*, 924 A.2d 908, 928 (Del. Ch. 2007).
[7] *White v. Panic*, 783 A.2d 543, 550 (Del. 2001).
[8] *Id*.
[9] *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 120-21 (Del. Ch. 2009) (internal quotation marks removed).
[10] *McPadden v. Sidhu*, 964 A.2d 1262, 1269 (Del. Ch. 2008).

plaintiffs need only make a threshold showing through the allegation of particular facts[] that their claims have some merit."[11]

C. Demand Futility

The Plaintiff challenges affirmative decisions by Republic's board and has failed to make pre-suit demand; therefore, to show demand futility, under the well-known *Aronson* test, the Plaintiff must allege particularized facts that raise a reason to doubt that "(1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment."[12] Under the first prong of *Aronson*, a director is interested if he sits on both sides of a transaction or derives a benefit from a transaction that is not shared by the corporation or all stockholders generally.[13] A director is not interested merely because he is named as a defendant in a suit, and generally, an inference of financial interest is not imputed to a director solely because he receives customary compensation for his board service.[14] When addressing *Aronson*'s second prong, there is a presumption that the business judgment rule applies, and the plaintiff must rebut this presumption by pleading "particularized facts to create a reasonable

[11] *In re Dow Chem. Co. Derivative Litig.*, 2010 WL 66769, at *6 (Del. Ch. Jan. 11, 2010) (internal quotation marks removed).
[12] *Brehm v. Eisner*, 746 A.2d 244, 253 (Del. Ch. 2000) (quoting *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984)); *see also Freedman v. Adams*, 2012 WL 1099893, at *6 (Del. Ch. Mar. 30, 2012) ("Directoral interest . . . exists where a corporate decision will have a materially detrimental impact on a director, but not on the corporation or stockholders." (quoting *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993))).
[13] *Orman v. Cullman*, 794 A.2d 5, 22-23 (Del. Ch. 2002).
[14] *Freedman*, 2012 WL 1099893, at *6.

doubt that either (1) the action was taken honestly and in good faith or (2) the board was adequately informed in making the decision."[15]

D. Waste

Demand may be excused under the second prong of *Aronson* if a plaintiff properly pleads a waste claim.[16] In a derivative suit, this Court analyzes each of the challenged transactions individually to determine demand futility.[17] The Plaintiff here alleges that he has adequately pled waste for each of his claims and that demand should be excused.

"[T]he doctrine of waste is a residual protection for stockholders that polices the outer boundaries of the broad field of discretion afforded directors by the business judgment rule."[18] As such, a plaintiff faces an uphill battle in bringing a waste claim, and a plaintiff "must allege particularized facts that lead to a reasonable inference that the director defendants authorized 'an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration.'"[19] "Where, however, the corporation has received 'any substantial consideration' and where the board has

[15] *Id.* at *10.
[16] *Orloff v. Shulman*, 2005 WL 3272355, at *11 (Del. Ch. Nov. 23, 2005).
[17] *MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at *18 (Del. Ch. May 5, 2010) ("Demand futility must be determined on a claim-by-claim basis. Just because demand is futile with respect to one of the board's challenged actions does not mean it is futile with respect to other challenged actions.").
[18] *Sample v. Morgan*, 914 A.2d 647, 669 (Del. Ch. 2007).
[19] *Citigroup*, 964 A.2d at 136 (quoting *Brehm*, 746 A.2d at 263).

made 'a good faith judgment that in the circumstances the transaction was worthwhile,' a finding of waste is inappropriate, even if hindsight proves that the transaction may have been ill-advised."[20] This Court has described the waste standard as "an extreme test, very rarely satisfied by a shareholder plaintiff, because if under the circumstances any reasonable person might conclude that the deal made sense, then the judicial inquiry ends."[21] The rationale behind these stringent requirements is that "[c]ourts are ill-fitted to attempt to weigh the adequacy of consideration under the waste standard or, *ex post*, to judge the appropriate degrees of business risk."[22]

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[20] *Protas v. Cavanagh*, 2012 WL 1580969, at *9 (Del. Ch. May 4, 2012) (quoting *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997)).

[21] *Zupnick v. Goizueta*, 698 A.2d 384, 387 (Del. Ch. 1997) (internal quotation marks removed).

[22] *Freedman*, 2012 WL 1099893, at *13 (quoting *Brehm*, 746 A.2d at 263); *Citigroup*, 964 A.2d at 136. The Plaintiff contends that because he alleges that certain transactions are "unusual," he has properly alleged a waste claim and is entitled to discovery. This Court, however, evaluates claims under the aforementioned "normal waste standard," not an "unusualness" standard. In advancing his proposed "unusualness" standard, the Plaintiff relies on *Telxon Corp. v. Bogomolny*, 792 A.2d 964 (Del. Ch. 2001); *Vogelstein*, 699 A.2d 328; and *In re Nat'l Auto Credit, Inc. S'holders Litig.*, 2003 WL 139768 (Del. Ch. Jan. 10, 2003). In *Freedman*, the plaintiff argued the same principle. 2012 WL 1099893, at *16. The plaintiff took this position based upon language in which the *Telxon* court mentioned the "unusual" nature of a transaction when deciding that the waste claim should survive a motion to dismiss. *Id.*; *see also Telxon*, 792 A.2d 964 (Del. Ch. 2001). Commenting on *Telxon*, Vice Chancellor Noble noted that while the *Telxon* court stated the transaction was "unusual," the court still applied the normal waste standard and not a separate "unusualness" standard. *Freedman*, 2012 WL 1099893, at *16. The Vice Chancellor, therefore, analyzed the board's decision "under the normal waste standard and reject[ed] the [p]laintiff's invitation to apply an 'unusualness' standard." *Id*. Similarly, while this Court noted in *Vogelstein* and *National Auto* that certain transactions were "unusual," the plaintiffs' claims were still addressed under the waste standard articulated above. *See Nat'l Auto*, 2003 WL 139768 at *13-*15; *Vogelstein*, 699 A.2d at 336-39.

E. Taxes

The Plaintiff argues that demand should be excused under *Aronson*'s second prong on the ground that he has properly pleaded that the Defendants failed to minimize taxes. The Plaintiff appears to contend that there is an independent duty to minimize taxes, or alternatively that the failure to minimize taxes is *per se* a waste of corporate assets. The Plaintiff, however, does not point to any Delaware jurisprudence for this position; instead, the Plaintiff presents a smattering of inapposite cases from various other jurisdictions which I find logically unpersuasive.[23]

This Court has concluded that "there is no general fiduciary duty to minimize taxes."[24] There are a variety of reasons why a company may choose or not choose to take advantage of certain tax savings,[25] and generally a company's tax policy "typif[ies] an area of corporate decision-making best left to management's business judgment, so long as it is exercised in an appropriate

[23] The Plaintiff states that "although there is a paucity of case law on the subject, four courts that have addressed derivative suits regarding corporate overpayment of taxes have held corporate boards have a duty to minimize them," and cites: *Dodge v. Woosley*, 59 U.S. 331 (1855); *Spirt v. Bechtel*, 232 F.2d 241 (2d Cir. 1956); *Resnick v. Woertz*, 774 F. Supp. 2d 614 (D. Del. 2011); *Truncale v. Universal Pictures Co.*, 76 F. Supp. 465 (S.D.N.Y. 1948). Pl.'s Br. Opp'n Defs.' Mot. Dismiss at 22 [hereinafter "Pl.'s Br. ____"]. In this Court, the plaintiff in *Freedman* raised precisely this argument. 2012 WL 1099893, at *18 n.116. Vice Chancellor Noble then addressed these same cases and adroitly explained why "[t]he cases the Plaintiff cites . . . do not support a broad duty to minimize taxes." *Id*. I find no need to further expand upon his analysis.

[24] *Freedman*, 2012 WL 1099893, at *12.

[25] *Id.* ("A company's tax policy may be implicated in nearly every decision it makes, including decisions about its capital structure, the legal forms of the various entities that comprise the company, which jurisdictions to form these entities in, when to purchase capital goods, whether to rent or purchase real property, where to locate its operations, and so on.").

fashion."[26] I am not foreclosing the theoretical possibility that under certain circumstances overpayment of taxes might be the result of a breach of a fiduciary duty.[27] I am simply noting that a decision to pursue or forgo tax savings is generally a business decision for the board of directors. Accordingly, despite the Plaintiff's contentions, Delaware law is clear that there is no separate duty to minimize taxes, and a failure to do so is not automatically a waste of corporate assets.

Using the above standards, I now address the Plaintiff's claims and the facts relevant thereto.

III. FACTS AND ANALYSIS

A. Past Consideration

Defendant O'Connor worked for Republic, serving as its CEO and a member of its board, for 10 years.[28] During this time, O'Connor was compensated for his services.[29] O'Connor signed an employment agreement (the "Employment Agreement") with the company, effective May 14, 2009, that provided him with retirement benefits such as a $10 million payment, health benefits, and stock

[26] *Id.*
[27] *See id.* at *18 n.114 ("This is not to say that under certain circumstances overpayment of taxes or a poor tax strategy might not result from breaches of the fiduciary duties of care or loyalty or constitute waste.").
[28] Am. Compl. ¶ 25.
[29] *Id.*

options.[30] On June 24, 2010, the Company accepted O'Connor's retirement as CEO, to be effective on January 1, 2011;[31] however, the next day, on June 25, 2010, O'Connor signed a "Retirement Agreement" with the Company that provided him with a variety of retirement benefits in return for stated consideration, which included a release of claims and an assurance that his retirement occurred on "mutually acceptable terms."[32] One of the benefits conferred on O'Connor was a $1.8 million cash payment, given, according to the explicit terms of the Retirement Agreement, "to reward [O'Connor] for [his] long service to the Company."[33]

The Plaintiff contends that this $1.8 million payment was a gift constituting a waste of corporate assets. The Plaintiff alleges that the $1.8 million payment was not included in the May 14, 2009, employment agreement—and thus was not contractually required—and further argues that there is nothing in the expressed purpose of the payment—reward for service—indicating that the amount was reasonable in light of the services rendered.[34] The Plaintiff, therefore, asserts that this $1.8 million payment was retroactive compensation, constituting a gift or

[30] *Id*. ¶ 26.
[31] *Id*. ¶ 25; Defs.' Opening Br. Supp. Defs.' Mot. Dismiss Ex. C [hereinafter "Defs.' Opening Br. ____"].
[32] *See* Am. Compl. ¶ 27; Defs.' Opening Br. Ex. C.
[33] Defs.' Opening Br. Ex. C, at 3.
[34] *See* Am. Compl. ¶¶ 27-28; Defs.' Opening Br. Ex. C.

waste.[35] The Defendants point to the Retirement Agreement and argue that O'Connor provided consideration for the $1.8 million payment, and also point out that the Plaintiff has failed to allege that the $1.8 million payment was unreasonable in light of O'Connor's past service to the company.[36]

The parties disagree about who has the pleading burden for whether the payment was reasonable under the circumstances. The Plaintiff's position is that he only has to plead that past consideration was given and that "reasonableness under the circumstances" is a defense.[37] The Defendants assert that the Plaintiff has to plead particularized facts showing that the payment was for services previously rendered *and* that the payment was not reasonable under the circumstances.[38] In reality, a retroactive payment claim, as described below, is only a species of waste claim. Accordingly, the pleading standard is that required to state a waste claim sufficient to satisfy the second prong of the *Aronson* analysis.

1. Payment for Services Already Rendered

Earlier decisions of Delaware courts held that payment for services previously rendered and compensated generally would constitute a waste of corporate assets.[39] This Court has recognized, however, that there may be many

[35] Am. Compl. ¶ 27.
[36] *See* Am. Compl. ¶¶ 25-28; Defs.' Opening Br. Ex. C.
[37] Oral Arg. Tr. 38:3-15.
[38] Oral Arg. Tr. 21:2-22:2.
[39] *See Fidanque v. Amer. Maracaibo Co.*, 92 A.2d 311, 320-21 (Del. Ch. 1952) (Evidence surrounding an employment contract strongly indicated that "the principal, if not the paramount,

sufficient reasons for a board to award a severance or retirement bonus.[40] Accordingly, the Court has declined to substitute its judgment for that of the board, even absent a contractual basis for the bonus, where the retroactive payment was not unreasonable under the circumstances.[41]

In *Zupnick v. Goizueta*, the Coca-Cola board awarded its CEO stock options based "on the sustained performance of the [c]ompany since [the CEO had] assumed his current role . . . and the remarkable increase in market value of the [c]ompany during [that] period (nearly $69 billion)."[42] The plaintiff alleged that the company "received no consideration because the options were issued to compensate [the CEO] for his past performance."[43] Then-Vice Chancellor Jacobs stated that because a waste claim must meet both the waste standard and the procedural pleading standard under Rule 23.1, "the precise issue becomes whether the particularized factual allegations of the complaint create a reason to doubt that

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consideration was the intent of the board of directors . . . to pay . . . for services previously rendered . . . . Such a contract constitutes an illegal gift of corporate assets.").

[40] *See Zucker v. Andreessen*, 2012 WL 2366448 (Del. Ch. June 21, 2012); *MCG*, 2010 WL 1782271; *Orban v. Field*, 1997 WL 153831, at *11 (Del. Ch. Apr. 1, 1997); *Zupnick*, 698 A.2d 384.

[41] *See MCG*, 2010 WL 1782271; *Zupnick*, 698 A.2d 384; s*ee generally Blish v. Thompson Automatic Arms Corp.*, 64 A.2d 581, 606-07 (Del. 1948); *Underbrink v. Warrior Energy Servs. Corp.*, 2008 WL 2262316, at *19 n.92 (Del. Ch. May 30, 2008); *Technicorp Int'l II, Inc. v. Johnston*, 1997 WL 538671, at *16 (Del. Ch. Aug. 25, 1997) ("The payment of compensation for services previously performed and for which compensation has already been received, will normally constitute an illegal gift of corporate assets. There are exceptions to this rule, however, such as where there is an implied contract or where the amount awarded is not unreasonable under the circumstances.").

[42] *Zupnick*, 698 A.2d at 385.

[43] *Id*. at 387.

reasonable directors could have expected the corporation to benefit from the grant of the options to [the CEO]."[44] The Vice Chancellor noted that "the pleaded facts establish[ed] . . . that reasonable disinterested directors could have concluded—and in this instance did conclude—that [the CEO's] past services" were unusual in character and that the resulting benefits to the corporation were of an extraordinary magnitude.[45] Taking these facts into account, the Vice Chancellor concluded that the case fell "within a recognized exception to the common law rule that otherwise generally prohibits retroactive executive compensation."[46]

In *MCG Capital Corp. v. Maginn*, the plaintiff challenged approvals by the company's compensation committee of salary increases and retroactive bonuses for two of the company's executives.[47] Then-Chancellor Chandler noted that the company's directors apparently had taken "steps to inform themselves of the advisability of approving the [salary increases and retroactive bonuses]."[48] With little discussion, the Chancellor quoted *Zupnick* and noted that "retroactive bonuses are not *per se* impermissible or inappropriate where 'the amount awarded is not unreasonable in view of the services rendered.'"[49] The Chancellor then stated that "[t]he complaint [did] not plead that the retroactive compensation was

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[44] *Id*.
[45] *Id*. at 388.
[46] *Id*. at 388-89.
[47] *MCG*, 2010 WL 1782271, at *2.
[48] *Id*. at *20.
[49] *Id*. (quoting *Zupnick*, 698 A.2d at 388).

unreasonable in light of the services [the company's executives] had provided to [the company]" and that demand, consequently, was not excused under the second prong of *Aronson*.[50]

In *Zucker v. Andreessen*¸ this Court recently addressed whether a generous severance package given to a departing executive in exchange for general releases constituted waste.[51] The plaintiff alleged that the company had no contractual obligation to provide the departing executive with a severance and the company could have avoided paying the executive severance because the company had grounds to terminate him for cause.[52] The *Zucker* court found that the general releases provided at least some consideration, that a portion of the severance pay awarded could represent reasonable compensation for past performance, and that an amicable severance of ties may have had some value.[53] The plaintiff, therefore, had not adequately pleaded that the severance package constituted waste, and the *Zucker* court dismissed the waste claim there under Rule 23.1.[54]

Under the rationale of *Zucker* and *MCG*, I find that the Plaintiff has failed to state a waste claim relating to O'Connor's bonus sufficient to excuse demand.

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[50] *MCG*, 2010 WL 1782271, at *20-21.
[51] 2012 WL 2366448.
[52] *Id*. at *8.
[53] *Id*. at *8-*9.
[54] *Id.* at *10.

2. Past Consideration and Waste

Employment compensation decisions are core functions of a board of directors, and are protected, appropriately, by the business judgment rule.[55] A plaintiff, as here, alleging waste arising from the decision of an independent board concerning employee compensation has set himself a Herculean, and perhaps Sisyphean, task. "Where . . . the corporation has received 'any substantial consideration' and where the board has made 'a good faith judgment that in the circumstances the transaction was worthwhile,' a finding of waste is inappropriate, even if hindsight proves that the transaction may have been ill-advised."[56]

A board of directors may have a variety of reasons for awarding an executive bonuses for services already rendered. For instance, awarding retroactive compensation to an employee who stays with the company may encourage him to continue his employment.[57] In the case of a retiring employee, the award may serve as a signal to current and future employees that they, too, might receive extra compensation at the end of their tenure if they successfully serve their term. Other factors may also properly influence the board, including ensuring a smooth and harmonious transfer of power, securing a good relationship with the retiring employee, preventing future embarrassing disclosure and lawsuits, and so on.

[55] *Brehm*, 746 A.2d at 263.
[56] *Protas*, 2012 WL 1580969, at *9 (quoting *Vogelstein*, 699 A.2d at 336).
[57] *See generally Orban*, 1997 WL 153831, at *11.

Therefore, an informed and disinterested decision whether or not to award an employee a reasonable bonus for services that have already been rendered, for which the employee has already been compensated, properly falls within a board's business judgment.

Looked at in this light, the question then becomes whether the Employment Agreement was a transaction so lacking in value to the Company that no reasonable director could have been in favor of it; in other words, was the transaction so one-sided that it amounted to waste. The fact that an employee has already been compensated for his work goes directly to whether compensation is reasonable and whether there is a rational basis for "directors to conclude that the amount and form of compensation is appropriate and likely to be beneficial for the company."[58] This fact alone, however, is not determinative. It is simply another, albeit important, factor to be considered.

The Plaintiff alleges that one basis of consideration for the bonus stated explicitly in the Retirement Agreement, the general and specific releases of claims, is nugatory, because the Retirement Agreement fails to explain why the underlying claims exist or have value.[59] Beyond that non sequitur, however, the Plaintiff's contention that the releases are without value is purely conclusory. The Retirement

[58] *Zucker*, at 2012 WL 2366448, at *8 (quoting *Steiner v. Meyerson*, 1995 WL 441999, at *8 (Del. Ch. July 19, 1995)).
[59] Am. Compl. ¶ 28.

Agreement, considered as a whole, is clear from its explicit terms that it provided the cash bonus as part of a package intended to secure a general release, to provide continuity in the Board, and to ensure that O'Connor's separation from the Company was amicable.[60] It is clear, therefore, that there was some consideration for the benefits provided to O'Connor.[61]

Moreover, the Plaintiff fails to plead—let alone specifically allege—that the amount of the retirement bonus was unreasonable.[62] The Plaintiff only points to the Board's own description, in the Retirement Agreement itself, that the $1.8 million cash bonus was "to reward [O'Connor] for [his] long service to the Company."[63] The Plaintiff conflates "reward" with unreasonable gift. Most bonuses carry with them an aspect of reward for service, as the word bonus itself necessarily conveys. While the Plaintiff has adequately pleaded that the cash retirement bonus was not contractually required and was meant to, among other factors spelled out in the Retirement Agreement, reward O'Connor's service, he has failed to allege with particularity that the bonus was not made in good faith.

The Plaintiff's complaint is void of allegations which, if true, would lead to the conclusion that the retirement bonus, though retroactive and not required by prior contract, constituted waste. O'Connor had been CEO for ten years. He was

[60] *See* Defs.' Opening Br. Ex. C.
[61] *Zucker*, 2012 WL 2366448, at *8-*10.
[62] Am. Compl. ¶¶ 25-28.
[63] *See* Defs.' Opening Br. Ex. C, at 3.

Chairman of the Board of Directors. The Company had an interest in seeing that his separation was amicable, that he completed his term on the board, and that any potential sources of post-termination litigation were foreclosed, as well as in incentivizing O'Connor's successor and other employees. As part of his retirement package, the Board provided a cash bonus of $1.8 million. Is that bonus, in light of all the circumstances that were known to the board, "too much?" That is a core question for the Board of Directors. Because the Plaintiff has failed to plead with particularity facts that indicate that the amount of this bonus was unreasonable or that otherwise establish waste, the claim must be dismissed.

B. Incentive Award

In addition to challenging the $1.8 million payment to O'Connor, the Plaintiff attacks a $1.25 million incentive award also paid to O'Connor upon his retirement.[64] The Plaintiff contends that by paying O'Connor this award, Republic's compensation plan will be rendered non-tax-deductible.[65] The Plaintiff does not assert that the Defendant Directors were interested in the transaction; instead, the Plaintiff argues that demand is excused because the loss of this tax deduction constitutes a waste of company assets.[66]

[64] Am. Compl. ¶¶ 8-23.
[65] *Id*. ¶ 23.
[66] *Id*.

1. The Taxman Cometh?

Internal Revenue Code ("IRC") § 162 governs trade or business expenses. Generally, § 162 allows a company to deduct "a reasonable allowance" for employee compensation; however, § 162(m) restricts compensation deductions for a company's CEO and its four highest-compensated officers. For these "Covered Employees,"[67] § 162(m) provides that annual compensation in excess of $1 million is not tax-deductible unless the compensation is granted pursuant to a performance-based, stockholder-approved plan that contains pre-established, objective criteria. Subject to the exceptions of death, disability, or change of ownership or control, Treas. Reg. § 1.162(e)(2)(v) then provides that when "the facts and circumstances indicate that the employee would receive all or part of the compensation regardless of whether the performance goal is attained," compensation is not tax deductible.

2. The Company Plan

The Company has such a stockholder-approved compensation plan, the Executive Incentive Plan (the "EIP").[68] Under the EIP, the Company pays performance bonuses to participating employees for meeting or exceeding certain performance goals, as measured by the Company's financial results.[69] The EIP

[67] The Plaintiff and the Defendants also disagree on whether O'Connor was a "Covered Employee" at the time of payment. The dispositive issue appears to be the applicability of Rev. Rul. 2008-13. I assume for purposes of this motion only that O'Connor was a covered employee.
[68] Am. Compl. ¶¶ 6, 24.
[69] *Id*. ¶ 11.

grants participating employees annual performance bonuses for meeting one-year performance goals, and long-term performance bonuses for meeting performance goals in periods longer than one year.[70] Under § 5.2 of the EIP, participating employees who retire during a bonus period, and who would have been entitled to a long-term performance bonus if they had kept working, receive a pro-rata share of the amount that they would have received if they had continued working for the entire bonus period.[71] This pro-rata share is the number of months in which work was completed divided by the total number of months in the bonus period.[72] For example, if the bonus period is 48 months, and the employee works 36 months, the employee receives 75% of his performance bonus.[73] Section 5.2, however, is subject to § 5.3 of the EIP, which provides that "§ 5.2 is inapplicable to the extent provided in any employment agreement between a participant and the Company."[74]

3. O'Connor's Participation in the EIP

O'Connor participated in the EIP in 2009 and 2010[75] and had an employment contract, effective February 21, 2007, which provided that the Company would pay him upon his retirement the "full target amount" of his performance bonuses, i.e., the amount he would have received if he had worked for

[70] *Id.* ¶ 12.
[71] *Id.* ¶ 14.
[72] *Id.*
[73] *See id.*
[74] *Id.* ¶ 15.
[75] *Id.* ¶ 11.

the entire bonus period and achieved his performance goal, with no pro-rata reduction.[76] This contract provided, therefore, that O'Connor would receive "the full target amount" of his performance bonuses regardless of whether O'Connor actually met the performance goal or worked for the entire applicable period.[77] The Company and O'Connor entered into new employment contracts on February 21 and May 4, 2009; however, the parties limited O'Connor's right to receive upon retirement the "full target amount" of his performance bonuses to those bonus periods which began on or before January 1, 2009.[78] For bonus periods beginning after January 1, 2009, O'Connor could receive only a pro-rata share of any performance bonus.[79]

4. Rev. Rul. 2008-13

On February 21, 2008, the IRS issued Rev. Rul. 2008-13 which, citing to Treas. Reg. § 1.162(e)(2)(v), ruled that compensation is not performance-based, and therefore is not tax-deductible, if a Covered Employee receives any of his performance compensation regardless of whether he actually achieves the performance goal.[80] In other words, under this ruling, a plan like that applicable to O'Connor, which provides for full bonuses upon retirement, as if performance

[76] *Id*. ¶ 16.
[77] *Id*.
[78] *Id*. ¶ 20.
[79] *Id*.
[80] Subject to certain non-material exceptions. *See also* Am. Compl. ¶ 17.

goals had actually been met, is not tax-deductible. The IRS, apparently recognizing that some plans already in existence would run afoul of this rule, limited the impact of Rev. Rul. 2008-13 by stating that it "would not be applied to disallow a deduction paid pursuant to an employment contract in effect on February 21, 2008" and "would not be applied to disallow a deduction if the performance period for such compensation [began] on or before January 1, 2009."[81] The IRS, therefore, limited the impact of Rev. Rul. 2008-13 both retroactively and prospectively.[82]

O'Connor's employment agreement, apparently, was meant to comply with Rev. Rul. 2008-13 because it stated that O'Connor would be paid "the full target amount" for periods beginning on or before January 1, 2009, and that he would be paid a pro-rata amount for periods beginning after January 1, 2009.[83]

5. Deductibility of O'Connor's "Full Target Amount Award"

The Plaintiff argues that through § 162(m), Congress intended to limit executive pay[84] and that the IRS only had the power to make Rev. Rul. 2008-13 apply *retroactively*.[85] The Plaintiff, therefore, alleges that the IRS's decision to make Rev. Rul. 2008-13 apply prospectively was beyond the scope of the IRS's power.[86] The Plaintiff asserts that "the January 1, 2009 provision is ineffective"

[81] Am. Compl. ¶ 18.
[82] *See id*. ¶ 19.
[83] *See* Defs.' Opening Br. Ex. B, at 20.
[84] Am. Compl. ¶¶ 9-10.
[85] *Id*. ¶¶ 18-22.
[86] *Id*.

because "[a]n administrative rule out of harmony with the statute is void."[87] The Plaintiff alleges that because the reversal of the January 1, 2009, provision is, in the Plaintiff's opinion, inevitable, O'Connor's performance award will be rendered non-tax-deductible at some undetermined time. The Plaintiff, therefore, alleges that granting what he believes will ultimately be a non-tax-deductible award constituted waste and breached a "fiduciary duty to minimize taxes."[88]

6. Was the $1.25 Million Award Waste?

The Plaintiff's waste claim is that, hypothetically, O'Connor's compensation scheme will lead to an unnecessary payment to the federal government in the future, in the form of a greater tax bill.[89] The Plaintiff's waste claim, concerning the Board's decision to award O'Connor the full target amount, is unusual because the alleged tax ramifications have not actually occurred and there is nothing in the record suggesting when, if ever, they will occur.

In simple terms, the Board structured O'Connor's compensation in a way that avoided tax liability under Rev. Rul. 2008-13. The Plaintiff contends that: (1) the revenue ruling is wrong; (2) the revenue ruling will ultimately be superseded by a correct revenue ruling or court decision, under which O'Connor's compensation and potentially all compensation under the EIP will become taxable;

[87] *Id*. ¶ 18.
[88] *See id*. ¶¶ 21-23, 45, 49.
[89] *See Freedman*, 2012 WL 1099893, at *13.

and (3) the board should have known this fact, and therefore, its decision to structure O'Connor's compensation in accordance with Rev. Rul. 2008-13 constitutes waste. This argument is facially unsound. I find that the decision of an independent board to rely, in setting compensation, on a revenue ruling of the IRS, is within the business judgment of the board, and that the Plaintiff's waste claim arising from this decision must be dismissed.

7. Deductibility of the Entire EIP

Given my determination above, I need to spend little time analyzing the Plaintiff's claims that by granting the "full target amount" of the performance award to O'Connor, the Board rendered the entire EIP non-tax-deductible, and that any payments made thereunder constituted waste.[90] The Plaintiff argues that the entire EIP is not tax-deductible for two reasons. First, the Complaint appears to state that by simply awarding O'Connor the $1.25 million, the EIP was rendered non-tax-deductible.[91] The Complaint does not state why or how the EIP would be rendered non-tax-deductible under this theory. Second, in briefing the Plaintiff argues that O'Connor's award materially amended the entire EIP.[92]

IRC § 162(m) states that for compensation to be deductible under a performance plan, the material terms under which that compensation is paid and

[90] Am. Compl. ¶ 23.
[91] *See* Am. Compl. ¶¶ 21-23, 45, 49.
[92] Pl.'s Br. 33-38.

the applicable performance goals must be disclosed to the stockholders, who must approve the plan by a majority vote. The Plaintiff alleges that while the stockholders approved the original EIP by a majority vote, the Company materially changed it when the Company paid O'Connor his full target amount upon retirement.[93] Since, however, the EIP at § 5.3 permits the Board to enter employment agreements of the type it provided to O'Connor, the Plaintiff has failed to plead facts, which if true, would show that the EIP has been amended or that the Board has otherwise committed waste in connection with O'Connor's compensation under the EIP.[94]

C. Stock Plan Awards

The Company also compensates employees through its 2007 Stock Incentive Plan (the "Stock Plan"), which allows the Company to grant stock awards to its employees, officers, and directors.[95] The Stock Plan's stated purpose is to "enable the Company to attract, retain, reward and motivate" employees, officers, and

[93] *Id*.

[94] In a letter filed after oral argument, the Plaintiff asked the Court to consider an employment agreement that Defendant Slager signed on March 30, 2012, in support of its contention that the compensation committee amended the EIP. This agreement provides that all awards to Slager "pursuant to the Executive Incentive Plan . . . shall fully vest" if Slager provides the Company with at least 12 months notice before he intends to retire. The Plaintiff appears to argue that "shall fully vest" means that Slager will be paid his full target amount, which goes against § 4.2 of the EIP. I note that, "[g]enerally, matters outside the pleadings should not be considered in ruling on a motion to dismiss." *In re Santa Fe Pacific Corp. S'holder Litig.*, 669 A.2d 59, 68 (Del. 1995). In this case, it is of little consequence because consideration of Slager's employment agreement does not alter my decision. The Plaintiff does not plead facts indicating that "fully vest" means that Slager will receive his full target amount or how this language would constitute an amendment of the EIP, let alone that the tax consequences would amount to waste.

[95] *See* Am. Compl. ¶ 29; Defs.' Opening Br. Ex. D, at A-1, A-4.

directors, and to "incentivize them to expend maximum effort for the growth and success of the Company."[96] The Stock Plan is administered by a committee of non-employee members of the Board, or if no committee exists, by the Board itself (the "Committee");[97] however, "with respect to the grant of Awards to non-employee directors, the Committee shall be the Board."[98]

Section 6 of the Stock Plan provides that up to 10,500,000 shares of common stock may be awarded under the plan.[99] For these shares, the Stock Plan provides the following limitations:

> (i) With respect to the shares of Common Stock reserved pursuant to this Section, a maximum of Ten Million Five Hundred Thousand (10,500,000) of such shares may be subject to grants of Incentive Stock Options.
>
> (ii) With respect to the shares of Common Stock reserved pursuant to this Section, a maximum of Two Million Five Hundred Thousand (2,500,000) of such shares may be subject to grants of Options or Stock Appreciation Rights to any one Eligible Individual[100] during any one fiscal year.
>
> (iii) With respect to the shares of Common Stock reserved pursuant to this Section, a maximum of One Million Two Hundred Fifty Thousand (1,250,000) of such shares may be subject to grants of Performance Shares, Restricted Stock and Awards of Common Stock to any one Eligible Individual during any one fiscal year.

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[96] Defs.' Opening Br. Ex. D, at A-1; *see also* Am. Compl. ¶ 31.
[97] Defs.' Opening Br. Ex. D, at A-2 to A-6.
[98] *Id*. at A-3.
[99] *Id*. at A-7.
[100] The Stock Plan defines an "Eligible Individual" as "any employee, officer, director (employee or non-employee director) of the Company and any Prospective Employee to whom Awards are granted in connection with an offer of future employment with the Company." *Id*. at A-4.

> (iv) The maximum value at Grand Date of grants of Performance Units which may be granted to any one Eligible Individual during any one fiscal year shall be four million dollars ($4,000,000).[101]

The Committee can grant awards of restricted stock units.[102] The Stock Plan provides that the Committee can generally grant restricted stock units "in such amounts and on such terms and conditions as the Committee shall determine in its sole and absolute discretion."[103] The Stock Plan also notes that the Committee can make restricted stock units granted under the Stock Plan either time-vesting or performance-vesting.[104] Time-vesting units vest after a certain period of time, whereas performance-vesting units vest when certain performance goals are achieved.[105] Performance-vesting units are tax-deductible under IRC § 162(m); however, time-vesting units are not.[106]

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[101] *Id*. at A-7.
[102] Am. Compl. ¶ 29; *see also* Defs.' Opening Br. Ex. D, at A-12. Section 6(a)(iii), which limits the number of Restricted Stock shares that may be awarded, does not explicitly limit Restricted Stock Units. *Id.* Section 6 of the Stock Plan only limits "Restricted Stock," which is "Common Stock subject to certain restrictions, as determined by the Committee, and granted pursuant to [Section 9 of the Stock Plan]." Defs.' Opening Br. Ex. D, at A-5. A "Restricted Stock Unit", on the other hand, is "the right to receive to receive [sic] a fixed number of shares of Common Stock, or the cash equivalent, granted pursuant to [Section 9 of the Stock Plan]." *Id*. While both Restricted Stock and Restricted Stock Units are granted pursuant to Section 9, Section 9 only addresses Restricted Stock, and the Stock Plan does not otherwise appear to treat the two differently. *See id.* at A-12 to A-13. The Defendants do not argue that there is any substantive difference between the two, where the number of Restricted Stock Units that can be granted would be limited in a way that Restricted Stock would not. For purposes of this motion only, I assume that Section 6(a)(iii) limits both Restricted Stock and Restricted Stock Units.
[103] *Id.* at A-12.
[104] *Id.*; *see also* Am. Compl. ¶ 30.
[105] Am. Compl. ¶¶ 29-35.
[106] *Id.* ¶ 35.

1. Awards to Directors

The Defendant Directors are participants in the Stock Plan, and pursuant to it have awarded themselves time-vesting restricted stock units.[107] In 2009, the Board gave each Defendant Director, except O'Connor, restricted stock units worth $743,700.[108] This award brought their individual annual compensation to between $843,000 and $891,000.[109] In 2010, the Board again gave each of the Defendant Directors, except O'Connor, restricted stock units, but this time the award was $215,000, which brought their individual annual compensation to between $320,000 and $345,000.[110] The Plaintiff alleges that the Defendant Directors' annual compensation far exceeds the compensation of directors by one of the Company's peers.[111]

Because the Defendant Directors awarded themselves these units, the Plaintiff asserts that they are interested in the transaction.[112] The Plaintiff contends that this compensation constitutes waste because the awards are unreasonable and are not tax-deductible.[113] The Defendants argue that the Plaintiff does not allege that the awards violated the provisions of the stockholder approved Stock Plan and that the Board's decisions, therefore, are protected by the business judgment rule.

[107] *Id.* ¶¶ 34-35.
[108] *Id.* ¶ 35.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.* ¶ 43.
[113] *Id.* ¶ 35.

The Defendants also contend that the Plaintiff's allegations are insufficient to support a waste claim.

The Stock Plan before me puts few, if any, bounds on the Board's ability to set its own stock awards. The Plan itself provides that the Committee, comprising the Directors themselves, has the sole discretion, in terms of restrictions and amount, over how to compensate themselves. In regard to restricted stock, the limitations upon the Board are that it can only award 10,500,000 shares total and award an Eligible Individual 1,250,000 shares a year. According to the proxy statement filed on April 1, 2009, the restricted stock units granted to the Defendant Directors had a value of $24.79 per share.[114] Assuming that there were 12 directors, the Board could theoretically award each director 875,000 restricted stock units. At $24.79, the award to each director would be worth $21,691,250 and the total value would be $260,295,000.

In *In re 3COM Corp. Shareholders Litigation*, the plaintiff contended that members of 3COM's board violated their fiduciary duties and wasted corporate assets when they granted themselves stock options under 3COM's stockholder approved Director Stock Option Plan.[115] The *3COM* plaintiff asserted that because the directors granted themselves the options under this plan, this transaction was a self-interested one and the plaintiff's claim should be reviewed under the entire

[114] Defs.' Opening Br. Ex. E, at 17.
[115] 1999 WL 1009210, at *1 (Del. Ch. Oct. 25, 1999).

fairness standard.[116] Then-Vice Chancellor Steele found that corporate directors who "administer a stockholder approved director stock option plan are entitled to the protection of the business judgment rule, and in absence of waste, a total failure of consideration, they do not breach their duty of loyalty by acting consistently with the terms of the stockholder-approved plan." [117] The Vice Chancellor explained:

> I do not see this as a case of directors independently or unilaterally granting themselves stock options, but instead a case where stock options accrued to these directors under the terms of an established option plan with *sufficiently defined terms*. One cannot plausibly contend that the directors structured and implemented a self-interested transaction inconsistent with the interests of the corporation and its shareholders when the shareholders knowingly set the parameters of the Plan, approved it in advance, and the directors implemented the Plan according to its terms. Precedent in this Court clearly establishes that "self-interested" director transactions made under a stock option plan approved by the corporation's shareholders are entitled to the benefit of the business judgment rule.[118]

Here, even though the stockholders approved the plan, the Defendant Directors are interested in self-dealing transactions under the Stock Plan. The Stock Plan lacks sufficient definition to afford the Defendant Directors protection under the business judgment rule. The sufficiency of definition that anoints a stockholder-approved option or bonus plan with business judgment rule protection exists on a continuum. Though the stockholders approved this plan, there must be

[116] *Id.* at *2.
[117] *Id.* at *1.
[118] *Id.* at *3 (emphasis added).

some *meaningful* limit imposed by the stockholders on the Board for the plan to be consecrated by *3COM* and receive the blessing of the business judgment rule, else the "sufficiently defined terms" language of *3COM* is rendered toothless. A stockholder-approved *carte blanche* to the directors is insufficient. The more definite a plan, the more likely that a board's compensation decision will be labeled disinterested and qualify for protection under the business judgment rule. If a board is free to use its absolute discretion under even a stockholder-approved plan, with little guidance as to the *total* pay that can be awarded, a board will ultimately have to show that the transaction is entirely fair.

In reading the Complaint and the Stock Plan, I find no effective limits on the total amount of pay that can be awarded through time-vesting restricted stock units. The plan before me confers on the Defendant Directors the theoretical ability to award themselves as much as tens of millions of dollars per year, with few limitations; therefore, I find that the Defendant Directors are interested in the decision to award themselves a substantial bonus. While the Defendant Directors may be able to show that the amounts they awarded themselves are entirely fair, their motion to dismiss must be denied with respect to this claim.

2. Time-Vesting Stock Options Granted to Employees

The Plaintiff's next claim addresses the Board's decision to award to employees certain forms of compensation instead of others. The Plaintiff alleges

that while the Stock Plan allows the Board to grant both time-vesting and performance-vesting units, the Board breached its duties by only granting non-tax-deductible time-vesting options.[119]

The Plaintiff argues that demand is futile with regard to the decisions to award time-vesting stock units for three reasons. First, the Plaintiff alleges that the Defendant Directors' choice breached the duty of loyalty because the choice did not adhere to the express provisions of the Stock Plan. Second, the Plaintiff asserts that the Defendant Directors' choice wasted corporate assets because awarding performance-vesting units instead of time-vesting units would have led to greater tax savings and better results. Finally, the Plaintiff contends that the Defendant Directors were interested in the transaction, not because they received any direct benefit from awarding the time-vesting stock options to non-director employees, but because they themselves were general participants in the Stock Plan. The decision to award time-vesting stock options is analyzed under *Aronson* and, for the sake of clarity, I address the second *Aronson* prong before I address the first prong.[120] I find that the Plaintiff failed to adequately plead demand futility under either prong of the *Aronson* test.

[119] Am. Compl. ¶¶ 30-31, 47.
[120] *See In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 820 (Del. Ch. 2005) ("The two prongs of the Aronson test are disjunctive, meaning that if either part is satisfied, demand is excused.").

a. Business Judgment and Waste

The purpose of the Stock Plan is to "incentivize [the employees and directors] to expend maximum effort for the growth and success of the Company."[121] As described above, under the Stock Plan, Republic can grant either time-vesting stock units or performance-vesting units. The compensation paid via performance-vesting units is tax deductible; however, compensation paid with time-vesting units is not tax-deductible.

The Plaintiff alleges that the Defendant Directors' choice to award only time-vesting stock units contravened the Stock Plan because granting time-vesting units did not sufficiently align the Covered Employees' interests with the stockholders' and did not incentivize the Covered Employees to expend "maximum efforts."[122] The Plaintiff argues that the Defendant Directors breached their duty of loyalty by not following the terms of the Stock Plan. The Plaintiff also contends that the Defendant Directors' decision wasted corporate assets because the time-vesting units were not tax deductible.[123] The Plaintiff, in support of his position, asserts that three of Republic's "peer group companies" award mainly performance-based stock compensation.[124]

[121] Defs.' Opening Br. Ex. D, at A-1; *see also* Am. Compl. ¶ 31.
[122] Am. Compl. ¶ 31.
[123] *See id.* ¶ 47.
[124] Am. Compl. ¶ 32.

The Plaintiff is challenging quintessential Board decisions: how much to pay employees and how to allocate company assets efficiently.[125] The Plaintiff's contention is that Republic could have received a lower tax bill, while achieving better results, if the Board had chosen performance-vesting units instead of time-vesting units. As discussed above, "there is no general fiduciary duty to minimize taxes,"[126] and the fact that higher taxes were paid, without more, is insufficient to sustain a waste claim.

The Plaintiff only alleges that Republic's peer companies provided a greater percentage of performance-vesting units compared to time-vesting units. The Plaintiff does not allege that no consideration was provided for the time-vesting units, that the dollar amounts of the time-vesting units were disproportionate to employee incentives granted by Republic's peers, or other such information. In fact, the awards granted by the Board, even with the extra tax burdens, might still be considerably less than those awards that the peer companies provided. Without dollar amounts or other metrics, any comparisons I am asked to make would be pure speculation. Accordingly, the Plaintiff does not come close to a particularized pleading that these payments were without consideration or otherwise constituted waste. The Plaintiff has failed to provide particularized factual allegations that

[125] *See Freedman*, 2012 WL 1099893, at *14 ("The size and structure of executive compensation are inherently matters of judgment." (quoting *Brehm*, 746 A.2d at 263)).
[126] *Id.* at *12.

create a reasonable doubt that the compensation decisions made by the Board were not the product of a valid exercise of business judgment.

The Plaintiff's assertion that the Board's decision to award only time-vesting stock units contravened the Stock Plan, because it did not sufficiently incentivize Covered Employees to expend "maximum efforts" is unsupported.[127] The Plaintiff does not allege any facts, or provide any indication whatsoever, that maximum effort cannot be incentivized solely through time-vesting stock units. The Plaintiff's position appears to be that because the Stock Plan calls for maximum effort and allows for a combination of time-vesting and performance-vesting options, maximum effort must only come through some combination of both. This position is entirely conclusory; moreover, the Plaintiff does not allege any facts that allow me to infer that the Board came to its award decision in bad faith, or otherwise abdicated its fiduciary duties. The bare-bone facts alleged by the Plaintiff only show that a select few of Republic's peer companies chose a different compensation scheme.[128] In other words, the Plaintiff mainly disagrees with a business decision by the Board; this disagreement does not state a cognizable claim.

[127] Am. Compl. ¶ 31.
[128] *Id.* ¶ 32. At oral argument, the Plaintiff explained that these three were picked from 12 of Republic's peers; however, the Plaintiff also conceded that he had not checked the other nine and what types of options they awarded. Oral Arg. Tr. 36:20-37:10.

b. Director Interestedness

Under the first prong of *Aronson*, the Plaintiff can show demand futility by pleading particularized facts that create a reasonable doubt that the directors are disinterested and independent.[129] The Plaintiff does not argue that the non-executive Defendant Directors lack independence or are beholden to another; instead, the Plaintiff alleges that they are interested in the transaction because they are covered by the same Stock Plan under which the Board made the decision to award time-vesting options to the Covered Employees.[130] The Plaintiff points out that "[t]he Defendant Directors are all participants in the Stock Plan, and [that] they award themselves as directors . . . time-based stock units from it."[131]

In regard to awards to the employees, the Plaintiff is not challenging the Stock Plan as a whole and does not allege that the Stock Plan itself is inherently wasteful; instead, he is challenging awards to employees, not to the directors themselves. The Plaintiff's claim stems from the Board's choice to award one particular type of option to those non-director employees. The Defendant

[129] *J.P. Morgan Chase*, 906 A.2d at 820 ("The first prong of the Aronson test is whether "a shareholder [has pled] *with particularity* facts that establish that demand would be futile because the directors are not independent or disinterested." (quoting *Jacobs v. Yang*, 2004 WL 1728521, at *2 (Del. Ch. Aug. 2, 2004))).
[130] Oral Arg. Tr. 35:2-22.
[131] Am. Compl. ¶¶ 34, 43.

Directors, therefore, with respect to employee awards, are not interested in the challenged *transactions*.[132]

D. Synergy Incentive Plan Payments

On December 5, 2008, the Republic merged with Allied Waste Industries, Inc. ("Allied Waste").[133] At the Company's 2009 annual meeting, the stockholders approved the Synergy Incentive Plan (the "Synergy Plan").[134] The purpose of the Synergy Plan was to incentivize the Company's officers and employees to have the merger result in "synergies"[135] between $100 million and $150 million.[136] The Company has stated that synergies of $180 million have been achieved and that approximately $69 million in incentives have been paid out.[137]

The Company defines a synergy impact as "any incremental and ongoing impact to [earnings before interest and taxes ('EBIT')] attributable to the combination of Republic and [Allied Waste]."[138] This impact "will be measured over the baseline which includes the operations of the two businesses as standalone

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[132] As to the amounts awarded by the Defendant Directors to themselves, for the reasons described above, I have found that the Defendant Directors are interested under the terms of the Stock Plan.
[133] Am. Compl. ¶ 38.
[134] *Id.*
[135] "A synergy provides ongoing benefit to the shareholders of the new Republic Services as a result of the integration of the two predecessor companies." Defs.' Opening Br. Ex. G, at B-6.
[136] Am. Compl. ¶ 38.
[137] The Complaint stated that the Company marked $68.1 million as accrued liabilities to be paid out in the first quarter of 2012; however, at oral argument the Defendants represented that the bonuses have already been paid out. Oral Arg. Tr. 4:9-19.
[138] Defs.' Opening Br. Ex. G, at B-6.

[sic]. Synergy will be the *net impact* of incremental positive and negative impacts to EBIT *associated with company integration*."[139] Examples of synergies include: headcount and employee cost reductions associated with eliminating duplicative activity; interest improvements associated with debt consolidation; and the adoption of best practices.[140]

The Plaintiff alleges that the Company stated that there is only one performance goal under the Synergy Plan: "measurable earnings improvement over baseline through cost improvements as a result of the integration of the two predecessor companies."[141] In 2007, the last year before the merger, Republic had earnings of $290.2 million and Allied Waste had earnings of $309.8 million, for a total of $600.0 million.[142] In the first nine months of 2008, before the merger, Republic had earnings of $205.5 million and Allied Waste had earnings of $296.5 million, for a total of $502.0 million.[143] In 2009, after the merger, the new Company had earnings of $495.0 million, and in 2010, it had earnings of $506.6 million.[144] The Plaintiff asserts that there has not been a measurable earnings improvement because the sum of Allied Waste's and Republic's earnings before

[139] *Id.* (emphasis added).
[140] *Id.*
[141] Am. Compl. ¶ 38.
[142] *Id.* ¶ 40.
[143] *Id.*
[144] *Id.*

the merger were higher than the new Company's earnings after the merger.[145] The Plaintiff argues, therefore, that Republic should not have to pay anything under the Synergy Plan.

The Plaintiff contends that awarding payments under the Synergy Plan is a waste of corporate assets for two reasons. First, the Plaintiff alleges that the payments would be gifts because the Synergy Plan has generated no synergies. Second, the Plaintiff asserts that the payments are not tax-deductible under IRC § 162(m), because payments under the Synergy Plan would not conform to the stockholder-approved standards, and the Defendant Directors, therefore, wasted corporate assets by failing to minimize taxes.

The Defendants argue that the Plaintiff misconstrues the terms of the Synergy Plan. The Defendants contend that the Synergy Plan does not say that synergies are measured through total earnings growth; rather, the Defendants assert that the Synergy Plan says a synergy is the "incremental and ongoing impact" on earnings *attributable to the merger*. The Defendants allege that "there is nothing in the Synergy Plan that suggests that cost savings must be accompanied by an increase in total net earnings."[146] The Defendants note that total earnings could decrease while cost savings would still result from synergies. The Defendants finally point out that even if the Synergy Plan is ambiguous, the Compensation

[145] *Id.* ¶¶ 38-40.
[146] Defs.' Opening Br. 29.

Committee has "full and complete authority, in its sole and absolute discretion . . . to construe, interpret and implement the Plan."[147]

The Plaintiff's claim fails because the Plaintiff fails to plead particularized factual allegations that create a reason to doubt that the Defendants were acting within the scope of their business judgment. Regarding whether the Synergy Plan's performance goal was met, the only factual allegation that the Plaintiff provides is that the combined earnings of the two companies before the merger did not match those of company remaining after the merger. This allegation does not mean that no savings occurred due to synergies. Savings from the merger may well exist; however, the savings could be masked by falling revenue. That is, revenue could decrease because of external market forces, yet earnings would improve compared to the original baseline because operating expenses also decreased.

Besides the fact that total revenue did not increase after the merger, the Plaintiff has not pled any facts, much less particularized ones, that the Board ignored the plan or did not abide by its guiding precepts. The Plaintiff simply makes a bald assertion of non-conformance with the plan.[148] When questioned about this fact at oral argument, the Plaintiff asserted that the Defendants had the burden to show how they interpreted the plan or how the Defendants believed the

[147] *Id.*
[148] Am. Compl. ¶¶ 38-40.

plan worked.[149] At this stage, however, the Plaintiff has the burden of providing particularized factual allegations under Rule 23.1.

In short, the Plaintiff has failed to describe how any wrongdoing has occurred. The Plaintiff could have brought a Section 220 books and records action[150] to seek information sufficient to make the required pleadings (should such information exist), but he chose not to.[151] As this Court and our Supreme Court have repeatedly advised plaintiffs, when bringing a derivative suit it behooves plaintiffs to use the tools at hand to determine if a suit is warranted, and if so to successfully plead demand futility.[152] Having eschewed this opportunity, the Plaintiff's attempt to rely on conclusory allegations to fulfill the particularized pleadings required by Rule 23.1 must fail.

E. Claims Against Slager and Holmes

The Plaintiff alleges that Slager and Holmes were unjustly enriched. These claims are derivative of the claims that I have already dismissed above. Accordingly, there has been no unjust retention of a benefit by Slager and Holmes.

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[149] Oral Arg. Tr. 30:9-32:12.
[150] *See* 8 *Del. C.* § 220.
[151] Oral Arg. Tr. 32:22-33:19.
[152] *E.g.*, *Litt v. Wycoff*, 2003 WL 179724, at *7 (Del. Ch. Mar. 28, 2003) ("Both this Court and the Supreme Court have admonished plaintiffs to make use of the 'tools at hand' on many occasions. Plaintiffs who fail to do so act at their own hazard.").

IV. CONCLUSION

The Board's self-interested decision to award bonuses to Board members must be evaluated for entire fairness, and the Plaintiff's claim challenging that decision survives the Motion to Dismiss.

For the reasons stated above, with respect to the other causes of action stated in the Complaint, the Plaintiff has failed to demonstrate that demand on the Board is excused, and therefore, the Motion to Dismiss with respect to these causes of action is granted. The parties should submit a form of order consistent with this Opinion.