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Case No. 11812-VCG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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<tr><td>BRETT KANDELL, derivatively on behalf of FXCM, INC.,

Plaintiff,
v.

DROR NIV, WILLIAM AHDOUT, KENNETH GROSSMAN, DAVID SAKHAI, EDUARD YUSUPOV, JAMES G. BROWN, ROBIN DAVIS, PERRY FISH, ARTHUR GRUEN, ERIC LEGOFF, BRYAN REYHANI and RYAN SILVERMAN,

Defendants,

and

FXCM, INC., a Delaware Corporation

Nominal Defendant.</td><td>)
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DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS THE VERIFIED SECOND AMENDED SHAREHOLDER DERIVATIVE COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules and Regulations

I. INTRODUCTION

Just days after the Swiss National Bank ("SNB") reassured the market that it was committed to maintaining the exchange ratio of the Swiss franc ("CHF") to the euro ("EUR") at 1.2 CHF to 1 EUR, the SNB shocked currency markets on January 15, 2015 when it completely abandoned the currency peg in the middle of a trading day. This unexpected and abrupt action caused a flash crash—within seconds the EUR/CHF exchange rate dropped over 40%, liquidity providers stopped providing quotes, and investors on the wrong side of the EUR/CHF peg (*i.e.*, long EUR, short CHF) lost billions (the "SNB Flash Crash").

As FXCM repeatedly warned its investors, competitive pricing and liquidity is vital to its agency model and, therefore, in the event of exceptional volatility and a suspension of liquidity FXCM customers are exposed to risk of default and trading losses that exceed the value of their margin account. Moreover, given FXCM's disclosed policy not to generally pursue claims for negative equity against its customers, investors also understood that an extreme market movement and freeze of liquidity could have severe consequences on the Company's business, operations, and financial performance.

Unfortunately for FXCM and its customers and investors, this is exactly what happened as a result of the SNB Flash Crash. By the close of business on January 15, 2015, FXCM customers invested in the EUR/CHF pair sustained losses of approximately $225 million. As a result of such losses, FXCM experienced for the first time a regulatory capital shortfall. The U.S. Commodity Futures Trading Commission ("CFTC") immediately informed FXCM that it would place the Company into receivership unless it cured the regulatory capital deficiency within 24 hours. The CFTC refused to give the Company any additional time.

In light of this ultimatum and the imminent threat of bankruptcy, FXCM's board of directors (the "Board") worked around the clock to raise the funds needed to cure its regulatory shortfall. To this end, the Company hired UBS to explore emergency funding options and met with multiple potential investors. But when the CFTC-imposed deadline expired, the Board had only one viable option—a $300 million loan from Leucadia Corporation (the "Leucadia Loan"). This loan was the only life-line available to FXCM. The Board could either accept the Leucadia Loan or declare bankruptcy, which undeniably would have been more financially devastating for FXCM's shareholders and creditors.

The Board's decision to enter into the Leucadia Loan is the centerpiece of Plaintiff's Verified Second Amended Shareholder Derivative Complaint (the "SAC"), which alleges breach of fiduciary duty and related claims. Plaintiff ignores the dire reality facing the Board on January 16, 2015, while second-guessing the Board's decision under the false pretense that the Board had the luxury of time and did not consider other (unidentified) alternatives to the Leucadia Loan. This litigation is insult to injury—particularly for FXCM's founders, who lost hundreds of millions of dollars from the decline in value of FXCM's common stock caused by the surprise actions of the SNB.

It is a bedrock principle of Delaware law that a Company's board of directors—not individual shareholders—decide whether to pursue legal claims on behalf of the company. For this reason, a shareholder who does not first make a demand on a company's board lacks standing to pursue derivative litigation unless the shareholder pleads particularized facts establishing that a pre-suit demand would be futile (*e.g.*, that a majority of the company's board is interested in the challenged transaction or lacks independence, or the challenged transactions were not rational exercises of business judgment).

The Court should grant Defendants' Motion to Dismiss because the SAC fails to establish that a pre-suit demand would have been futile. As shown below, a majority of the Board members are independent and lack any financial interest in the transactions challenged by Plaintiff. And while Plaintiff may be unhappy with the terms of the Leucadia Loan, he cannot dispute that the loan served a rational business purpose (*i.e.*, to avoid a CFTC-imposed receivership). Accordingly, Plaintiff lacks standing to assert these claims.

The Court should also dismiss the SAC under Rule 12(b)(6) because Plaintiff has failed to plead particularized facts demonstrating that Defendants breached their fiduciary duties. Nor has Plaintiff alleged misconduct with sufficient particularity to overcome the protection of Delaware's business judgment rule. For these reasons and others more fully set forth below, the Court should grant Defendants' Motion to Dismiss.

II. FACTUAL BACKGROUND[1]

A. FX Trading And FXCM's Agency Model

FXCM was founded in 1999 and is one of the world's largest online foreign exchange ("forex" or "FX") trading firms. SAC ¶ 31. FX trading used to be the domain of large financial institutions and ultra-high-net-worth individuals, but the growth of online brokers like FXCM changed that—enabling the public to trade in the global FX market. *Id.* In 2013, FXCM provided online FX trading to retail and institutional customers around the globe with 800 employees in 13 countries.

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[1] This section is based on the allegations contained in the SAC, documents cited or referred to in the SAC (including the Board minutes), and other public documents of which the Court can take judicial notice. *See* DEL. R. OF EVID. 201(f) ("Judicial notice may be taken at any stage of the proceeding."); *Desimone v. Barrows*, 924 A.2d 908, 928 (Del. Ch. 2007) ("I confine myself to the well-pled allegations of the complaint, to the documents incorporated into the complaint by reference, and to judicially-noticed facts."); *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170 (Del. 2006) (upholding trial court's consideration, on a motion to dismiss, of SEC filings used to ascertain facts appropriate for judicial notice). Along with this opening brief, Defendants also submit and rely upon the Declaration of Kenneth Nachbar ("Decl."), dated July 15, 2016, and the exhibits attached thereto.

See Decl., Ex. 1, SEC Form 10-K (Mar. 17, 2014) ("2013 Annual Report"), at 9. FXCM handled approximately $1.4 trillion in FX trades a quarter. SAC ¶ 31 n.2.

FX markets are generally the least volatile financial markets because daily fluctuations in currency pairs are very small, especially for currencies of highly-developed countries. *Id.* ¶ 32. Because of low volatility in the FX markets, traders typically rely on highly-leveraged trades to make FX investments. *Id.* Unlike their counterparts in equity markets, FX brokers offer their clients highly leveraged trading with lower margin requirements. *Id.* High-margin trading is the industry standard in FX trading.[2] For example, the CFTC sets FX margins at 2% (50:1 leverage ratio). *Id.* Other countries set margin ceilings at 0.20% (500:1). *Id.*

During the relevant period, FXCM was unique among FX brokers because it operated primarily on an agency-execution model (also known as a "No Dealing Desk" model) that it pioneered in 2007.[3] FXCM's trading model provides its clients immediate access to the interbank market.[4] This is different than trading

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[2] SAC ¶ 32; *see also* Decl., Ex. 2, Stafford, Binham, and Johnson, *Swiss franc fallout claims more casualties*, FINANCIAL TIMES, (Jan. 19, 2015) ("In London it is customary to offer 100–200 times the amount deposited into an account, although higher sums are available.").

[3] SAC ¶ 35; 2013 Annual Report, at 79. Recently, FXCM has started offering some of its customers the option of trading on the "Dealing Desk" model.

[4] SAC ¶¶ 34, 35. The interbank market is the financial system and trading of currencies among banks and financial institutions, excluding retail investors and smaller trading parties. While some interbank trading is performed by banks on

through the dealing desks that are found in many banks and financial institutions. SAC ¶¶ 34, 35. Under FXCM's agency model, FXCM receives price quotes from its interbank-liquidity providers—often large banks and financial institutions who are the counter-parties to the trades FXCM's customers' execute—and passes those prices on to its customers. *Id.* ¶ 35. FXCM essentially acts as a price aggregator: taking the best available bid/ask prices from liquidity providers and then streaming those prices to its customers via its online trading platform.[5] Because FXCM operates on an agency model, it is simply a bridge between its client and the liquidity providers. SAC ¶ 35. FXCM's interests are aligned with its clients, and it does not profit from its clients' losses. *Id.* Consequently, the agency model does not expose FXCM to typical market risks because it does not take a position in the market itself. *Id.*

In contrast, most FX dealers operate on a principal-execution model (also known as a "Dealing Desk" model). Dealing Desk execution is not conducted on an exchange. The dealer acts as the counter-party in its client's FX trades, which creates a conflict of interest—*i.e.*, the dealer makes money when the market moves

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behalf of large customers, most interbank trading takes place from the banks' own accounts.

[5] SAC ¶ 35. In many jurisdictions, FXCM streams the bid/ask prices it receives to its customers without a markup. In these jurisdictions, FXCM charges a per-lot commission as its fee. In other jurisdictions, FXCM earns its fee by increasing the spread (the difference between the ask and bid price) prior to streaming the price quotes to its customer.

against its clients' positions. 2013 Annual Report at 79. Unlike the agency model, the dealer faces market risk as a result of entering into trades with its clients and must hedge against this market risk. *Id.*

As FXCM candidly disclosed to investors, its agency model is not without risks. *Id.* at 10–11, 25. Specifically, FXCM disclosed that if the Company's computer trading system—which monitors customer accounts "in real time" to make sure customers have enough margin—is unable to close out positions in a customer's account before the customer goes into a negative equity balance (*i.e.*, if the account is not closed out within the customer's margin deposit), FXCM will have to cover the client's losses to the financial institution on the other side of the trade. SAC ¶ 32. This is because, as FXCM disclosed in its risk factors: "[o]ur policy is generally not to pursue claims for negative equity against our customers." *Id.* FXCM also disclosed that it may not be able to "close out customer positions at a level where margin posted by the customer is sufficient to cover the customer's losses" when there is "exceptional volatility" and a "suspension of liquidity." 2013 Annual Report at 25. Indeed, FXCM warned that a loss of competitive FX pricing or liquidity levels "will materially adversely affect our business, financial condition and results of operations and cash flows." *Id.* FXCM further warned investors that its risk management policies and procedures may not be effective and may not adequately prevent losses during "extreme market movements." *Id.* at 11.

B. The Euro-Swiss Franc Currency Peg

In 2011, the Swiss franc and the euro nearly reached parity after the euro-zone economic crisis triggered large inflows into the franc. SAC ¶ 35. On September 6, 2011, the SNB stated that "it will no longer tolerate a EUR/CHF exchange rate below the minimum rate of CHF 1.20," and that it will "enforce this minimum rate with the utmost determination and is prepared to buy foreign currency in unlimited quantities." Decl., Ex. 3, SNB Press Release (Sept. 6, 2011); SAC ¶ 35. The European Central Bank itself also wanted an exchange rate of no higher than CHF 1.20 per euro.[6] Thus, the Swiss franc was effectively pegged to the euro at CHF 1.20—*e.g.*, from January 14, 2014 to January 14, 2015, the euro traded in a very stable range of CHF 1.20095 to 1.23640[7]—a spread of just 354 PIPs.[8]

On September 18, 2014, the SNB affirmed its commitment to the minimum exchange rate of CHF 1.20 per euro,[9] and reiterated this commitment in a

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[6] Decl., Ex. 4, Matt Levine, *No One Was Supposed to Lose This Much Money on Swiss Francs*, BLOOMBERG VIEW, (Jan. 16, 2015).
[7] *See* note 6, *supra*.
[8] "PIP" stands for Point in Percentage—one PIP equals 0.0001.
[9] Decl., Ex. 5, SNB Press Release (Sept. 18, 2014).

December 18, 2014 press release.[10] The SNB stated that it will "continue to enforce [the minimum exchange rate of CHF 1.20 per euro] with utmost determination" and that the "SNB is prepared to purchase foreign currency in unlimited quantities" for this purpose.[11] On January 5, 2015, SNB chairman Thomas Jordon publicly announced that the SNB's cap on the franc at 1.20 per euro is "absolutely central" to maintaining the right monetary conditions in Switzerland, given an increased threat of deflation.[12] And again on January 12, 2015, SNB vice-chairman Jean-Pierre Danthine stated that the cap on the Swiss franc will remain the *cornerstone* of Swiss monetary policy; "We took stock of the situation less than a month ago, we looked again at all the parameters and *we are convinced that the minimum exchange rate must remain the cornerstone of our monetary policy*."[13]

C. The SNB Flash Crash

On January 15, 2015—only three days after SNB vice-chairman Danthine declared that the cap on the franc is the *cornerstone* of Swiss monetary policy—the SNB shocked the market by announcing that it was "discontinuing the minimum

[10] Decl., Ex. 6, SNB Press Release (Dec. 18, 2014).
[11] *See* note 10, *supra*.
[12] Decl., Ex. 7, *SNB Chairman says cap on Swiss franc absolutely central*, REUTERS, (Jan. 5, 2015).
[13] Decl., Ex. 8, *SNB's Danthine says cap on franc remains policy cornerstone*, REUTERS, (Jan. 12, 2015) (emphasis added).

exchange rate of CHF 1.20 per euro." Decl., Ex. 9, SNB Press Release (Jan. 15, 2015). Within seconds of this surprise announcement, there was market chaos with respect to the EUR/CHF pair, including extreme pricing and spreads and nearly zero available liquidity.[14] The following is a timeline of what transpired when the SNB announced the removal of the minimum exchange rate:

- 47 seconds after the announcement, the EUR/CHF pair drops below 1.20 for the first time since September 6, 2011;
- 9 seconds later, the major international banks that provide price quotes to FXCM rapidly remove liquidity as quotes go as low as 1.1659;
- 21 seconds later, only one bank provides FXCM liquidity at 1.1094;
- 35 seconds later, one major international bank quotes a bid of 1.0037 and another quotes a bid of 1.1556 (a difference of 1556 pips in the two bids);
- 58 seconds later, FXCM receives quotes at 0.9831;
- 51 seconds later, a major international bank quotes a bid of 0.6374 and another quotes a bid of 1.1220 (a difference of 4846 pips in the two bids);
- one minute and 44 seconds later, FXCM receives 3 bid quotes of 1.1078, 0.5696, and 0.9769 within a 2-second period;
- 7 minutes and 12 seconds later, EBS quotes a bid of 0.9550;
- 1 second later, EBS quotes a bid of 0.5000;
- 5 seconds later, EBS quotes a bid of 0.9600;
- 13 minutes and 6 seconds later, the range of bid quotes is between 0.8700 and 1.0001 (a range of 1300 pips);

[14] SAC ¶¶ 38, 39; *see* note 15, *supra*, and notes 18, 20, *infra*.

- 14 minutes and 40 seconds later, the market begins to stabilize around 1.0400 and the range of bid quotes is between 1.0120 and 1.0600 (a range of 480 pips).

SAC ¶ 39; Decl., Ex. 10, FXCM Press Release (Mar. 11, 2015).

A currency strategist at the Bank of Tokyo-Mitsubishi UFJ described the currency move on January 15 as "unprecedented."[15] Another FX research analyst stated that the SNB Flash Crash "was a bigger move than when the USSR collapsed, it was bigger than when George Soros bet against the pound, and it was even bigger than 9/11, in terms of the currency markets at least."[16] To put it in perspective, on January 15, euro price quotes ranged from CHF 1.20091 to 0.2000 (a range of 10,000 pips).[17] In the 12-month period preceding the SNB Flash Crash, the euro traded in a range of CHF 1.2009 to 1.2364 (a range of 354 pips).[18] During this 12-month period, the average daily fluctuation in the EUR/CHF pair was 0.1%.[19] In the end, the Swiss franc soared as much as 41% versus the euro that

[15] Decl., Ex. 11, Pete Evans, *Swiss franc surge knocks out brokerages, roils financial markets*, CBC NEWS, (Jan. 16, 2015).

[16] *See* note 15, *supra*.

[17] This price represents the lowest price quoted for EUR/CHF on ECN during the Flash Crash. *See* Decl., Ex. 10, FXCM Press Release (Mar. 11, 2015). The lowest price quote that FXCM received from one if its liquidity providers was 0.5696. *Id*. By the end of the Flash Crash, the price of EUR/CHF had stabilized at 1.0400. *Id*.

[18] *See* note 6, *supra*.

[19] *See* note 6, *supra*.

day and the Swiss stock market tumbled over 10 percent—wiping out about CHF 100 billion off the main Swiss index.[20]

Significantly, SNB chairman Thomas Jordan admitted that the SNB purposely misled the market—a remarkable admission for the leader of one of the world's largest central banks. He stated that "[i]f you decide to exit such a policy [*i.e.*, removing a currency peg], you have to take the markets by *surprise*" and that "[m]arkets tend to overreact when confronted with such a *surprise*."[21]

The SNB Flash Crash had a devastating impact on FX traders and brokers throughout the world. For example, Citigroup, Deutsche Bank, and Barclays reported losses of $400 million as a result of the SNB Flash Crash.[22] Bloomberg reported that one large "hedge fund manager who survived at least five emerging-market debt crises, is closing his largest hedge fund, which had about $830 million in assets at the end of the year, after losing virtually all its money on the SNB's decision."[23]

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[20] Decl., Ex. 12, Baghdjian and Koltrowitz, *Swiss central bank stuns market with policy U-turn*, REUTERS, (Jan. 16, 2015); Ex. 13, Elena Logutenkova, *Bank Losses From Swiss Currency Surprise Seen Mounting*, BLOOMBERG BUSINESS, (Jan. 19, 2015).

[21] *Id.*, Ex. 12.

[22] *See* note 20, *supra*, Ex. 13.

[23] *Id.*

FXCM likewise did not escape the carnage caused by the SNB Flash Crash—it lost $225 million because of its customers' negative equity balances. SAC ¶ 40. As publicly disclosed, FXCM relies on its technology and liquidity providers to close out positions in a customer's account before the customer goes into a negative equity balance. *Id.* ¶ 32; 2013 Annual Report at 25. But during this unprecedented market move on January 15, 2015, liquidity became extremely scarce and FXCM could not close out customer positions in time. SAC ¶ 39. In light of FXCM's stated policy at the time not to pursue negative equity balances from its customers (*id.* ¶ 32)—which was fully disclosed to investors—it was forced by governmental regulators to raise approximately $300 million in less than 24 hours to meet regulatory capital requirements. *Id.* ¶¶ 44, 45.

D. The Board's Actions in the Aftermath of the SNB Flash Crash

1. January 15, 2015

Within a few hours of the SNB Flash Crash, the Board met to discuss its impact on the Company. Decl., Ex. 14, Minutes of the Board meeting (Jan. 15, 2015). At the meeting, [redacted]

[redacted]

A few hours later the Board reconvened to [redacted]

[redacted]

2. January 16, 2015

Throughout the night, certain members of the Board and management worked tirelessly on finding potential capital sources to avoid a Company shut-down and bankruptcy. The Board next convened at 8:30 a.m. on January 16, 2015. Decl., Ex. 15, Minutes of the Board meeting (Jan. 16, 2015). [redacted]

[redacted]

[redacted]

The Board reconvened at 11:15 a.m. *Id.* at 3. [redacted]

[24] Net proceeds from the loan were $279 million, which replaced capital in FXCM regulated entities to cover negative client balances and also paid down outstanding revolving debt. Decl., Ex. 16, FXCM Press Release (Jan. 19, 2015).

[redacted]

[redacted]

[redacted]

III. LEGAL STANDARD

A. Rule 23.1

Under Court of Chancery Rule 23.1, a derivative complaint must "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors ... [or] the reasons ... for not making the effort." Ct. Ch. R. 23.1(a). The demand requirement embodied in this Rule "is a recognition of the fundamental precept that directors manage the business and affairs of corporations," *Aronson v. Lewis*, 473 A.2d 805, 811–12 (Del. 1984), which includes "controlling litigation brought on the corporation's behalf," *Zucker v. Andreessen*, 2012 WL 2366448, at *5 (Del. Ch. June 21, 2012).

Demand is only excused as futile "where there is reason to believe that the board could not properly consider a demand." *Id*. at *6. Demand will not be excused based on conclusory allegations of futility. Rather, when a plaintiff challenges actions by the board, the plaintiff must "allege particularized facts creating a reason to doubt either that (1) the directors are disinterested and independent or that (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." *Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008). Absent such facts, the court will presume that in making a business decision, the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company. *Friedman v. Khosrowshahi*, 2014 WL 3519188, at *9 (Del. Ch. July 16, 2014) (quoting *Aronson*, 473 A.2d at 812).

Under the first prong of the *Aronson* test, a plaintiff must allege particularized facts establishing that a majority of the board was not disinterested and independent. *Aronson*, 473 A.2d at 814. Delaware courts have clarified that directors are interested in a transaction when they "appear on both sides of a transaction [or] expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally." *Id.* at 812. A director may also be interested when Plaintiff pleads sufficient particularized facts establishing that the director faces a substantial likelihood of personal liability from the approved transaction. *See Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993). This interest must be material. *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 363 (Del. 1993).

A director is considered independent when they act with the best interests of the company in mind and their "decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences." *Aronson*, 473 A.2d at 816. It is not enough for a plaintiff to simply conclusorily allege that a director is interested in a transaction or lacks independence. *See Spiegel v. Buntrock*, 1988 WL 124324, at *4 (Del. Ch. Nov. 17, 1988), *aff'd* 571 A.2d 767 (Del. 1990) (dismissing allegations of board disqualification that were "skeletal and conclusory"). A plaintiff bears a high burden when seeking to disqualify directors as either interested or lacking independence. *See In re Goldman Sachs Grp., Inc. S'holder Litig.*, 2011 WL 4826104, at *6 (Del. Ch. Oct.

12, 2011) (noting that burden to plead demand futility is even more onerous than pleading burden under Rule 12(b)(6)).

B. Rule 12(b)(6)

A motion to dismiss under Court of Chancery Rule 12(b)(6) tests whether the plaintiff has pleaded sufficient facts to state a claim for relief "under any reasonably conceivable set of circumstances susceptible of proof." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings. LLC*, 27 A.3d 531, 536 (Del. 2011). In assessing the motion, the Court accepts as true only well-pled factual allegations and disregards "allegations which are merely conclusory and lack factual support." *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 972 (Del. Ch. 2000); *see also Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 140–41 (Del. 1997) (rejecting plaintiffs "conclusory statement of his claims").

The Court does not "blindly accept as true all allegations, nor must it draw all inferences from them in plaintiffs' favor unless they are reasonable inferences." *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999), *aff'd sub nom. Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000). Finally, a "claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law." *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).

IV. ARGUMENT

A. The SAC Fails To Adequately Allege That Pre-suit Demand Is Excused

Plaintiff alleges six counts against the Defendants based in part on four separate decisions made by FXCM's Board—(1) approval of the Leucadia loan; (2) adoption of a shareholder rights plan ("Rights Plan"); (3) approval of the Leucadia MOU; and (4) approval of amended severance and compensation plans for FXCM's executives. SAC ¶¶ 149–180. Because Plaintiff challenges these affirmative Board actions, this Court must apply the test articulated in *Aronson* to those claims. *See Sandys v. Pincus*, 2016 WL 769999, at *6 (Del. Ch. Feb. 29, 2016) (*Aronson* provides the appropriate test for challenged transactions where the board took affirmative action.). Whether or not Plaintiff has adequately pleaded demand futility must be analyzed independently for each transaction. *Id*.

In addition, Plaintiff alleges that the Defendants breached their duties of oversight and their responsibilities to "manag[e] the business of FXCM in a manner consistent with the duties imposed upon them by law." SAC ¶ 153. Because this claim is based "not [on] a business decision of the Board but rather a violation of the Board's oversight duties," the Court must apply the demand futility test expressed in *Rales*, 634 A.2d at 933–34, which requires that Plaintiff "allege particularized facts establishing a reason to doubt that the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand." *Wood*, 953 A.2d at 140.

1. A majority of FXCM's Board was disinterested and independent under *Aronson*'s first prong

To establish demand futility under the first prong of *Aronson*, Plaintiff must allege particularized facts for each of the four challenged Board decisions establishing that a majority of the Board was not disinterested and independent at the time that Plaintiff first asserted legal claims based on those transactions. *Aronson*, 473 A.2d at 814. Plaintiff has failed to plead such facts for any of the four challenged Board decisions and, accordingly, has failed to establish demand futility under the first prong of *Aronson*.

a) Approval of the Leucadia Loan

Plaintiff has failed to allege particularized facts demonstrating that a majority of the Board is not independent and disinterested with respect to the Leucadia Loan. At the time of the filing of Plaintiff's first complaint, FXCM's Board consisted of eleven directors: Messrs. Niv, Ahdout, Grossman, Sakhai, Yusupov, Brown, Davis, Fish, Gruen, LeGoff, and Silverman. SAC ¶ 125. Because at least six of these directors were independent outside directors with no personal financial stake in the Leucadia Loan, Plaintiff cannot plead any excuse for his failure to make pre-suit demand on the Board before asserting breach of fiduciary duty claims based on the Leucadia Loan.

Defendants concede that, as insiders and employees of FXCM that relied on FXCM for their primary compensation, Messrs. Niv, Ahdout, Grossman, Sakhai, and Yusupov were not fully independent directors. But, as disclosed by FXCM in its SEC filings and demonstrated below, each of the remaining six directors were fully independent outside directors. *See* Decl., Ex. 17, SEC Form DEF-14A (Apr. 30, 2014) ("2014 Proxy"), at 7.

(i) Mr. Brown

Plaintiff conclusorily alleges that Mr. Brown was not independent because of his annual director compensation of $150,000. SAC ¶ 131. This allegation falls far short of the particularized pleadings required to call a director's independence into question. *See Grobow v. Perot*, 539 A.2d 180, 188 (Del. 1988) (allegations of director compensation "without more, do not establish any financial interest."), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

Plaintiff does not explain why this compensation is material to Mr. Brown, who is a managing partner of Long Ridge Equity Partners (a private equity fund specializing in financial services investments which he founded in 2007), a managing director of TH Lee Putnam Ventures since 1999, and a former Senior Vice President at GE Equity. *See* Decl., Ex. 18, SEC Form DEF-14A (May 1,

2015) ("2015 Proxy"), at 6. Nor does Plaintiff allege that the amount paid by FXCM to its directors exceeded the compensation received by directors at peer companies. *See New Jersey Bldg. Laborers Pension Fund v. Ball*, 2014 WL 1018210, at *4 (D. Del. Mar. 13, 2014). Plaintiff has therefore failed to meet his burden and allege particularized facts showing that Mr. Brown's independence was compromised by his receipt of routine director compensation. *Id*.

Plaintiff's only other allegations against Mr. Brown are that he served on FXCM's Compensation Committee, SAC ¶ 143, and "showed an incredible lack of judgment" when he offered, in the midst of FXCM's liquidity crisis, to participate personally in a potential plan to raise funds for FXCM. *Id*. ¶ 61. Neither of these facts plausibly impugn Mr. Brown's independence or disinterestedness.

It is well-settled that merely serving on a corporate committee that had oversight over a challenged transaction (in this case, the amendment to FXCM's severance agreements and stock option grants) is not enough to subject a director to a "substantial likelihood" of personal liability for the decisions of the committee. *See In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 127 (Del. Ch. 2009) (rejecting as insufficient allegations based on directors' membership on Audit & Risk Management Committee). Nor is it enough, as Plaintiff contends, that Mr. Brown would have been asked to institute litigation against himself and the other members of the compensation committee. *See In re Dow Chem. Co. Deriv. Litig.*, 2010 WL 66769, at *12 (Del. Ch. Jan. 11, 2010). Because, as detailed in sections IV(B)(1) & (2), *infra*, Plaintiff's claims for breach of fiduciary duty and corporate waste based on the Compensation Committee's actions are wholly without merit, Mr. Brown's service on that Committee offers no support for Plaintiff's demand futility argument.

Plaintiff's criticism of Mr. Brown's attempt to help save FXCM during the liquidity crisis is equally irrelevant. Plaintiff alleges that, as the lead independent director on FXCM's Board, Mr. Brown "stepped out of that role" and "contaminated the proceedings" when he offered to personally participate in raising funds to keep FXCM afloat. SAC ¶ 61. Not surprisingly, Plaintiff fails to explain how this proposal by Mr. Brown would have compromised his independence or disinterestedness when considering Plaintiff's pre-suit demand. *Id*. In fact, Mr. Brown ultimately did not participate in the transaction and recused himself from the Board vote approving the transaction. *Id.* 61–66. Thus, Mr. Brown actually had the ***least*** exposure to Plaintiff's claim challenging the Board's approval of the transaction and had not personal stake whatsoever in considering a demand from Plaintiff at the time he filed the initial complaint in this matter.[25]

[25] Under the demand futility test expressed in *Aronson*, the relevant time period for assessing independence and disinterestedness is the date when the complaint was originally filed, not the date of the transaction itself. *Aronson*, 473 A.2d at 809.

For these reasons, Plaintiff has failed to allege with particularity any facts that call into question Mr. Brown's ability to independently and disinterestedly consider Plaintiff's pre-suit demand with respect to the Leucadia Loan.

(ii) Mr. Fish

Plaintiff similarly challenges Mr. Fish's independence based on his director compensation of $150,000. But Plaintiff does not offer any allegation or analysis of Mr. Fish's income or assets to support such a contention. To the contrary, the publicly available information concerning Mr. Fish's credentials—which Plaintiff apparently did not bother to review—reveal that Mr. Fish has a distinguished legal career spanning nearly 50 years. *See* 2015 Proxy, at 7. The fact that Mr. Fish decided to end his legal practice in 2015 provides no plausible support for Plaintiff's contention that Mr. Fish was financially dependent on his director compensation and lacked independence.

The allegation that Mr. Fish could not have impartially considered Plaintiff's demand because he was a member of FXCM's compensation committee is also without merit. *See Citigroup*, 964 A.2d at 127. Plaintiff has not made any particularized allegations that the members of the compensation committee were self-interested in any of their decisions or face a substantial likelihood of personal liability from their decision to amend FXCM's severance agreements and stock option plan. *See* section IV(B)(1), *infra*. Because mere service on a committee is not enough to compromise independence, Mr. Fish was entirely capable of impartially considering a pre-suit demand by Plaintiff.

(iii) Mr. Gruen

Plaintiff makes a similar allegation with respect to Mr. Gruen. According to Plaintiff, Mr. Gruen is also dependent on his annual director compensation because he is merely the Vice President of Broker Online Exchange ("BOX"), a centralized exchange for the deregulated energy industry that connects brokers and suppliers. *See* 2015 Proxy, at 8. Relying solely on outdated filings from the Maryland Public Services Commission, Plaintiff argues that BOX is "a money-losing startup," and Mr. Gruen must therefore be reliant on his director compensation from FXCM. SAC ¶ 131(b).

This theory is riddled with holes. Plaintiff ignores the fact that Mr. Gruen is a highly-qualified individual with years of executive experience at a subsidiary of a publicly-traded energy retail company. *See* 2015 Proxy, at 8. Plaintiff relies on state filings from 2013 and 2014 to opine on the health and profitability of BOX in 2015. SAC ¶ 131(b). And, most egregiously, Plaintiff alleges nothing about the actual compensation received by Mr. Gruen from Box or about his personal assets. *Id*. This concocted theory of why Mr. Gruen was not independent should be rejected by the Court as wholly unsupported by any factual allegations.

(iv) Mr. Silverman

Plaintiff alleges that Mr. Silverman is not independent and disinterested because (1) he received annual director compensation and (2) he previously served as a director for two FXCM affiliate companies (FXCM Securities and Forex Capital Markets Limited). SAC ¶ 131(c). Neither of these allegations is sufficient.

As with the other Directors, Plaintiff does not offer any information whatsoever about Mr. Silverman's income or assets; without this information it is impossible for the Court to determine whether or not the receipt of $150,000 is material to Mr. Silverman. SAC ¶ 131(c). Instead, Plaintiff only alleges that Mr. Silverman is CEO of MSR Solutions, Inc. which, based on Plaintiff's information and belief, has annual revenue of $130,000. *Id*. Even if true, this fact is irrelevant, as Mr. Silverman is CEO of a financial consulting firm and has held a number of high level positions in banks and specialty finance companies. *See* 2015 Proxy, at 9. In light of this fact, Plaintiff's meager allegations are wholly insufficient to establish the materiality of his director compensation. *See Grobow*, 539 A.2d at 188 (allegations that directors are paid for their services "without more, do not establish any financial interest.").

Nor does his prior service on the boards of two FXCM affiliates undermine his independence. At the time of the Leucadia Loan and the filing of Plaintiff's first complaint, Mr. Silverman no longer served on these boards. SAC ¶ 131(c). Moreover, Plaintiff does not allege how much compensation Mr. Silverman received from his board service in 2011 and 2012. *Id*. And mere service on the board of FXCM's affiliates is not enough to give rise to "longstanding ties to FXCM" that would "prevent him from acting in an independent and disinterested manner." *Id*.; *see Spiegel*, 1988 WL 124324, at *4 (holding conclusory allegations that business ties among directors compromised independence are insufficient).

(v) Messrs. Davis and Legoff

Finally, Plaintiff makes threadbare allegations against Messrs. Davis and Legoff that consist solely of (1) the fact that Mr. Davis served on FXCM's Audit Committee; and (2) the conclusory statement that FXCM's $150,000 Director compensation was "material to all of these directors." SAC ¶ 131. Aside from these two allegations, Plaintiff offers no particularized facts regarding these two directors. Because these two facts fall far short of Plaintiff's high pleading burden, for the reasons already discussed with respect to other Directors, Plaintiff's claim that Messrs. Davis and Legoff lacked independence fails.

* * *

In short, because a majority of the Board was both independent and disinterested at the time when Plaintiff first asserted his claim based on the Leucadia Loan against the Defendants, pre-suit demand by Plaintiff would not have been futile, and this claim must be dismissed pursuant to Rule 23.1.

b) The Rights Plan

Plaintiff alleges that the Defendants also breached their fiduciary duties by adopting a Rights Plan that was "designed to further entrench FXCM's Board and management in office by blocking any takeover efforts from third parties." SAC ¶ 87. Delaware law requires that the complaint must create a reasonable doubt that entrenchment was the directors' "sole or primary purpose," and demand is not excused if from the complaint it appears that the challenged action "could, at least as easily, serve a valid corporate purpose as an improper purpose, such as entrenchment." *Cottle v. Standard Brands Paint Co.*, 1990 WL 34824, at *8 (Del. Ch. Mar. 22, 1990).

Plaintiff's own allegations make clear that there was a valid corporate purpose for the Board's adoption of the Rights Plan. Plaintiff notes that following the SNB Flash Crash, FXCM's stock price declined from $12.63 to $1.60. SAC ¶ 46. This low stock price left FXCM vulnerable to takeover by a person or group that could gain control of FXCM by open market accumulation or other coercive takeover tactics without paying a control premium for all the FXCM's shares. The Rights Plan was therefore a valid response to this stock price decline to protect shareholder value.

Plaintiff admits that this is the reason FXCM moved for the adoption of the Rights Plan. *Id*. ¶ 86. And Plaintiff offers no specific facts supporting a motive of entrenchment, beyond the conclusory assertion that there were no "perceived takeover threats by any third parties when the Board adopted the Rights Plan." *Id*. at ¶ 87. This conclusory allegation is implausible given that FXCM's stock price had just declined 87%, making the Company was more vulnerable than ever to an open market hostile takeover.

Simply put, the Defendants' adoption of the Rights Plan was a business decision to protect FXCM's shareholders at a time when FXCM was especially vulnerable. It was a reaction to the fact that the SNB Flash Crash had greatly damaged the Company and it exposed it to the risk of an open market takeover. Because the adoption of the Rights Plan could "just as easily, serve a valid purpose as an improper purpose," demand is not excused for Plaintiff's breach of fiduciary duty claim premised on adoption of the Rights Plan. *Cottle*, 1990 WL 34824, at *8.

c) The Leucadia MOU

Plaintiff also challenges the decision by FXCM's Board to negotiate an updated preliminary MOU with Leucadia revising various terms of the original agreement. SAC ¶ 139. FXCM announced this MOU on March 10, 2016, well after Plaintiff filed its original complaint. *Id*. ¶ 81. Because the challenged transaction occurred after the original complaint, the analysis for determining whether the Board was independent and disinterested for the purpose of reviewing Plaintiff's pre-suit demand must focus on the date when the SAC was filed. *See*

Harris v. Carter, 582 A.2d 222, 230 (Del. Ch. 1990) (stating that the court must look to the date of the amended complaint when applying the *Aronson* test to claims not raised in the original complaint).

Under the first prong of the *Aronson* test, there was a clear majority of independent directors at the time of the SAC. By this time, Mr. Fish had retired from the Board and been replaced by Mr. Reyhani.[26] Plaintiff's only allegation concerning Mr. Reyhani is that he served on FXCM's compensation committee. SAC ¶ 143. Because this fact alone is not sufficient to call Mr. Reyhani's independence into question, he was fully capable of considering a demand by Plaintiff prior to the filing of the SAC. *See Citigroup*, 964 A.2d at 127.

Nor were a majority of the directors personally interested in the negotiation of the Leucadia MOU. Plaintiff has not alleged that any of the outside directors stood to personally benefit from the renegotiated terms. Plaintiff instead alleges that the Leucadia MOU was a bad business deal for FXCM because it "funnel[ed] more of the Company's value away from shareholders and towards both Leucadia and FXCM's management." SAC ¶ 139. Because Plaintiff has not alleged that

[26] SAC ¶ 113. Mr. Reyhani has previously served as Vice President and General Counsel at Merrill Lynch, as a partner at the law firm of Loeb & Loeb LLP, and as a named partner at Reyhani Nemirovsky LLP. *See* Decl., Ex. 19, SEC Form DEF-14A (Apr. 26, 2016) ("2016 Proxy"), at 10. He is currently the Executive Director and General Counsel for SolidX Partners, Inc., where he oversees development of block-chain software applications for business and consumers. *Id*.

the outside directors, who formed a majority of the Board, stood to personally benefit in any way from the MOU, this decision is protected by the business judgment rule. *See Brehm*, 746 A.2d at 262.

Nor has Plaintiff alleged that the Defendants face a substantial likelihood of personal liability for approving the MOU. As discussed in section IV(B)(1), *infra*, there is no merit to Plaintiff's claim that the defendants breached their fiduciary duty by negotiating the MOU with Leucadia because the MOU came with very important benefits to FXCM—namely, an additional year to pay off the Leucadia Loan. SAC ¶ 76. As Plaintiff notes, a default by FXCM on the Leucadia loan could have a disastrous effect on the Company. *Id*. ¶ 77. Securing more time to pay off the loan and avoid default is clearly a valid business purpose. Thus, when the Directors made the decision to negotiate the terms of the MOU, they were applying their own independent business judgment by weighing the benefits of an expanded payment period to the costs of increasing Leucadia's share of FXCM's cash flows.

The same is true of the Board's decision to restructure the deal with Leucadia to provide additional incentives to FXCM's officers. *Id*. ¶ 79. Plaintiff does not allege that any of the outside directors stood to personally benefit from this new arrangement. In its announcement of the MOU, FXCM made clear that one purpose of the changes in the MOU was to retain key executives at a difficult time for the company. *See* Decl., Ex. 20, SEC Form 8-K (Mar. 10, 2016), at Exhibit 99.1. As with any decision on executive compensation, the retention of key talent inevitably comes at some cost to the company; this is a business decision that was properly undertaken by a disinterested Board. *See Brehm*, 746 A.2d at 262 ("To be sure, directors have the power, authority and wide discretion to make decisions on executive compensation."). Accordingly, the Board does not face a substantial likelihood of personal liability for their decision to adopt the MOU.

d) The Severance Agreements and Bonus Plans

The fourth transaction challenged by Plaintiff is the adoption and subsequent amendment of FXCM's executive severance agreements and bonus plans in March 2015. SAC ¶ 92. Because Plaintiff first challenged this decision in its SAC, the Court must determine whether a majority of FXCM's Board was disinterested and independent as of the date when the SAC was filed. *See Harris*, 582 A.2d at 230. Plaintiff has failed to allege any particularized facts excusing pre-suit demand.

As previously discussed, a majority of the Board were independent, outside directors at the time Plaintiff filed the SAC. Plaintiff does not allege that any of these outside directors benefitted personally from the amended severance agreements or bonus plans. SAC ¶ 143. Plaintiff instead alleges that the directors, specifically the members of the compensation committee, violated their fiduciary duties by approving "unearned windfalls" for FXCM's officers. *Id*. ¶ 7. Plaintiff repeatedly alleges that this was a way for FXCM's management to "pay themselves" while ignoring the fact that it was the members of the independent compensation committee, not the officers receiving the benefits, who approved the changes. *Id.* ¶ 94.

Plaintiff is free to disagree with the prudence of the Compensation Committee's decision to revise management's severance agreements and bonus plans. But Delaware courts have repeatedly emphasized that unless the Compensation Committee is interested in some way in the decision, courts should not interfere with the Directors' compensation decisions. *See White v. Panic*, 783 A.2d 543, 553 n.35 (Del. 2001) ("If an independent and informed board, acting in good faith, determines that the services of a particular individual warrant large amounts of money, whether in the form of current salary or severance provisions, the board has made a business judgment").

As with the Board's decision to adopt the MOU, the changes to the severance agreement and the bonus plans reflect the reality of FXCM's need to retain key personnel at a crucial time for the company. Because Plaintiff has failed to allege any fact calling into question the Compensation Committee's independence or disinterestedness, Plaintiff's claims must be dismissed for failure to bring pre-suit demand.

2. Plaintiff has failed to allege that the challenged transactions were not a valid exercise of business judgment under *Aronson*'s second prong

Demand may be excused under the second prong of the *Aronson* test if Plaintiff pleads particularized facts showing that the challenged transactions were not valid exercises of the directors' business judgment. *See Aronson*, 473 A.2d at 814. This prong is only met if Plaintiff pleads specific facts establishing that the Board employed a faulty process that resulted in an "irrational" decision. *See Brehm*, 746 A.2d at 264. For all of the reasons detailed in section IV.B, *infra*, Plaintiff has failed to allege that any of the challenged transactions were not valid exercises of the directors' business judgment. Consequently, Plaintiff has failed to establish demand futility under either prong of *Aronson*, and the SAC must be dismissed for failure to comply with Chancery Rule 23.1.

3. Plaintiff's *Caremark* claim fails to meet the *Rales* demand futility test

Plaintiff asserts that the Defendants breached their fiduciary duties by failing to adequately oversee FXCM's operations and risk management policies, which ultimately resulted in the losses incurred following the SNB Flash Crash. SAC ¶ 153. For claims based on lack of Board oversight, courts apply the demand futility test expressed in *Rales*, 634 A.2d at 936. This test requires a plaintiff to allege particularized facts establishing a reason to doubt that the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand. *Id*.

As outlined in section IV(A)(1), *supra*, a majority of the Board is composed of outside, independent directors. In the context of an alleged oversight violation, there is no transaction in which the directors may be interested. *Sandys*, 2016 WL 769999, at *15. Thus, for the directors to have a disabling interest, they must face meaningful litigation risk with a substantial likelihood of personal liability for the alleged violation. *Id*.

A *Caremark* claim "is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996). As discussed in section IV(B)(1), *infra*, Plaintiff has not plead any particularized allegations that the Directors were aware of any 'red flags' prior to the SNB's removal of the currency peg that would have called into question FXCM's extensive risk management practices. It is not enough for Plaintiff to simply allege conclusorily that FXCM's risk management practices were insufficient to prevent losses from the SNB Flash Crash. *See Canadian Commercial Workers Indus. Pension Plan v. Alden*, 2006 WL 456786, at *7 (Del. Ch. Feb. 22, 2006) ("[A]bsent supporting facts, such bald conclusions need not and will not be accepted.")

Because Plaintiff has not plead any specific facts that the Directors acted in bad faith or with conscious disregard for their duties as directors, the Defendants do not faces a substantial likelihood of personal liability, and demand is not excused under the *Rales* test.

B. The SAC Fails To State A Claim Under Court of Chancery Rule 12(b)(6)

Plaintiff alleges claims against Defendants for breach of fiduciary duty, contribution and indemnification, corporate waste, abuse of control, and unjust enrichment. SAC ¶¶ 149–180. The Court should dismiss all six counts of the SAC because Plaintiff has failed to allege sufficient facts to state a claim under Rule 12(b)(6).

1. Plaintiff fails to state a claim for breach of fiduciary duty

a) FXCM's exculpation provision protects the Defendants from all claims based on breach of the duty of care

As an initial matter, FXCM's articles of incorporation include a provision exculpating its directors from any liability for any alleged breaches of their duty of care. *See* Decl., Ex. 21, SEC Form S-1 (Sept. 3, 2010), at Exhibit 3.1, Article VIII. This exculpatory clause, of the type specifically authorized by 8 Del. C. § 102(b)(7), effectively immunizes all of the Defendants from any claim by Plaintiff other than "intentional dereliction of duty, a conscious disregard for one's responsibilities." *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 240 (Del. 2009).

This is true not only for FXCM's outside directors, but also for those Defendants who are both officers and directors. Because Plaintiff has failed to allege that any of the challenged conduct falls within those individuals' duties as an officer—as opposed to a director—FXCM's 102(b)(7) provision exculpates them from liability for any violation of their duty of care. *See In re Celera Corp. S'holder Litig.*, 2012 WL 1020471, at *27 (Del. Ch. Mar. 23, 2012), *aff'd in part, rev'd in part on other grounds*, 59 A.3d 418 (Del. 2012).

b) Plaintiff has not pleaded any plausible facts establishing that the process employed by the Board when approving the Leucadia Loan was flawed

After the SNB Flash Crash, FXCM's Board had only two options—raise sufficient funds within 24 hours to meet the CFTC's regulatory capital requirements or shut down. SAC ¶ 51. Given the extreme time constraints, the Board worked around the clock and took every reasonable step possible to get the best deal for FXCM's shareholders while ensuring survival of the Company. A CFTC-imposed receivership would have been even more disastrous for FXCM's shareholders.

Plaintiff alleges that the Board breached their fiduciary duties by entering into the Leucadia Loan because the terms of the loan are allegedly "so one-sidedly favor[able] to Jeffries/Leucadia that it is hard to fathom why FXCM's Board agreed to these terms." SAC ¶ 68. Yet Plaintiff answers this question when he notes that "[b]eginning with this first Board meeting, [redacted]" *Id*. ¶ 52.

Plaintiff alleges that FXCM's Board had other options, but fails to specify those other options. Plaintiff's entire theory of the Defendants' motivation to breach their fiduciary duties is that they wanted to agree to the onerous terms of the Leucadia Loan because the alternative would have been the purchase of FXCM by a third party, which would have cost Defendants' their jobs. *Id.* ¶ 29. But not surprisingly, the SAC is devoid of allegations that there was any third-party who offered to purchase FXCM and rescue it from its regulatory capital shortfall. *Cf. id*. ¶ 88 ("there were no … expressions of interest from any specific third parties.")

Plaintiff contends that had the Board employed a more fulsome process, a third-party buyer would inevitably have been found. *Id.* ¶ 62. Plaintiff also complains that FXCM should have taken its time in reaching a decision by seeking a 10-day extension under CFTC Regulation 5.7 or, in the alternative, permitting the CFTC to shut FXCM down. *Id*. Both of these assertions strain the bounds of credulity.

CFTC Regulation 5.7 states that the CFTC "***may in its discretion*** allow such registrant up to a maximum of 10 business days." *Id.* (emphases added). FXCM had no right to a 10-day extension. The CFTC used its discretion in granting FXCM a period of time to secure capital, and the result was a 24-hour deadline to arrange financing. *Id.* ¶ 4. FXCM pleaded for additional time, but no such additional time was granted by the CFTC. To the contrary, the CFTC repeatedly demanded that the Company immediately close on a funding source and repeatedly threatened to shut down the Company if it did not meet its 24-hour deadline. In fact, in the afternoon of January 16, 2015, [redacted] Decl., Ex. 15, Minutes of the Board meeting (Jan. 16, 2015), at 10.

It is equally preposterous for Plaintiff to allege that Defendants should have permitted the CFTC to shutdown FXCM rather than enter into the Leucadia Loan. SAC ¶ 51. If FXCM had shutdown, it probably would never have re-opened. It cannot be the case that the fiduciary duties of FXCM's directors required them to roll-the-dice on the Company's future and permit a shutdown by the CFTC. Indeed, had they chosen this option in the hopes of ***maybe*** securing a deal at a later time, and then failed to do so, shareholders would inevitably have instituted litigation criticizing the Board for failing to take the Leucadia Loan when the option presented itself. *See In re Bear Stearns Litig.*, 23 Misc. 3d 447, 468, 870 N.Y.S.2d 709, 732 (N.Y. Sup. Ct. 2008) (applying Delaware law and finding that "*Revlon* duties may be fulfilled where … the corporation is operating under extreme time pressure and can locate only one bona fide bidder despite its best efforts to find competing offers”).

Having failed to establish that the Board had any other viable option besides the Leucadia Loan, Plaintiff falls back on criticizing the process employed by the Board during the 24-hour period that it had to secure financing. SAC ¶¶ 47–66. Plaintiff alleges that the Board should have hired a financial advisor to advise it on the terms of the Leucadia Loan, and relied too much on Mr. Niv when making its decision. *Id.* ¶¶ 136–137. With this accusation, Plaintiff blindly ignores the realities of FXCM’s position following the SNB Flash Crash. Simply put, FXCM did not have time to hire a financial advisor. It is implausible that during the 24-hour period available to FXCM it could have retained a financial advisor, had them review all of the substantive terms of the loan (which were constantly in flux), conduct a thorough financial analysis, and offer their professional opinion to the Board.

Even if such a financial analysis could have been undertaken, the Board’s failure to hire a financial adviser cannot constitute a breach of fiduciary duty because although the Board met with multiple potential investors, there was ultimately only one viable funding alternative available to the Board. *Id.* ¶ 64. It is not the case that FXCM had multiple options, and should have hired a financial advisor to determine which option maximized shareholder value. Their choice was between survival as a going concern of a shut down by the CFTC.

Nor was it wrongful conduct for the Board to rely on Mr. Niv's opinion during its deliberations. As FXCM's founder and CEO, not only is Mr. Niv the person most knowledgeable about FXCM's business, he is also FXCM's largest shareholder.[27] *See* 8 DEL. C. § 141(e) (expressly permitting directors to rely on advice of corporate officers and employees). Defendants rightfully relied on Mr. Niv for valuable input on the nature of the Leucadia Loan. SAC ¶ 137. Plaintiff quotes at length from Board meeting minutes that reflect a thorough description of the terms of the proposed deal. *Id*. ¶ 60. This is evidence that the Board was fully aware of the terms of the loan and applied its own business judgment in making its decision.

Dismissal under Rule 12(b)(6) is proper when a plaintiff fails to plausibly allege facts upon which relief may be granted. *See La. Mun. Police Emps. Ret. Sys. v. Morgan Stanley & Co. Inc.*, 2011 WL 773316, at *3 (Del. Ch. Mar. 4, 2011). While the SAC is rife with conclusory allegations that the Leucadia Loan was a "bad deal" and the process employed by FXCM's Board was deficient, there are not plausible facts establishing that the Defendants had any other viable options to save the Company other than the Leucadia Loan. And there are no plausible

[27] SAC ¶ 15; note 28, *infra*.

facts establishing that any other process undertaken by the Board could have produced such an option during the extremely limited time frame—24 hours—permitted by the CFTC. For these reasons, Plaintiff's breach of fiduciary duty claim based on the Leucadia Loan must be dismissed.

c) Plaintiff has failed to sufficiently allege that adoption of the Rights Plan was improper under the *Unocal* standard

Delaware courts have long recognized that shareholder rights plans are an important, sometimes mandatory, corporate tool to protect shareholder value. *See Moran v. Household Int'l, Inc.*, 490 A.2d 1059 (Del. Ch. 1985), *aff'd,* 500 A.2d 1346 (Del. 1985)*; La. Mun. Police Emps.' Ret. Sys. v. Fertitta*, 2009 WL 2263406, at *8 (Del. Ch. July 28, 2009) (holding that boards may have an obligation to adopt a shareholder rights plan to prevent a takeover). The adoption of rights plans has become commonplace in Delaware and every other state. *See Leonard Loventhal Account v. Hilton Hotels Corp*., 2000 WL 1528909, at *1 (Del. Ch. Oct. 10, 2000), *aff'd* 780 A.2d 245 (Del. 2001).

Decisions undertaken by a Board to prevent hostile takeovers are protected by the business judgment rule. *See Unitrin, Inc. v. Am. Gen. Corp*., 651 A.2d 1361, 1372 (Del. 1995). Under the Delaware Supreme Court's decision in *Unocal*, a board's decision to adopt a shareholder rights plan will be protected by the business judgment rule unless (1) the board did not have a reasonable basis to believe that a danger to corporate policy and effectiveness existed; or (2) the board's response was not reasonable in relation to the threat posed. *See Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985).

Plaintiffs' own allegations establish both of these requisites to business judgment protection for the Board's adoption of the Rights Plan. As Plaintiff describes, the Board adopted the Rights Plan soon after the large losses suffered by FXCM as a result of the actions of the SNB. SAC ¶ 86. These losses resulted in a stock price decline of 87%, which clearly left FXCM vulnerable to a low-priced hostile takeover. *Id.* ¶ 5. These facts supply a reasonable basis for the Defendants to adopt the Rights Plan to prevent a hostile takeover of FXCM through open market transactions that would permit a third-party to gain control of FXCM without paying a control premium to FXCM's shareholders. *Id.* ¶ 86.

Plaintiff claims that the Rights Plan was unnecessary and "disproportionate" because there was not a specific takeover threat. *Id.* ¶ 88. Again, Plaintiff ignores reality—FXCM was at risk of a takeover because its stock price had declined by nearly 90% following the SNB Flash Crash. Moreover, as Plaintiff notes, a presentation by UBS to the Company on January 28, 2015 noted that almost one-fifth of S&P 600 companies with rights plans employed ownership triggers of less than 15%. *Id.* ¶ 89 n.21. Plaintiff points to this fact as evidence of the 'unreasonable' nature of the Rights Plan, when in fact the opposite is true—

FXCM's Rights Plan had terms very similar to those adopted by many public companies.

The ownership threshold of the Rights Plan is also reasonable. The amended Rights Plan is triggered when a person acquires more than 4.9% of FXCM's stock. Decl., Ex. 22, SEC Form 8-K (Jan. 26, 2016), at item 1.01. FXCM adopted this threshold because one of the primary purposes of the amended Rights Plan was to protect the Company's net operating loss carryforwards and tax credits. Decl., Ex. 22, FXCM Press Release (Jan. 26, 2016) at 1. The Delaware Supreme Court has previously held that a net operating loss rights plan with a 4.99% trigger satisfied the *Unocal* test. *See Versata Enterprises, Inc. v. Selectica, Inc.*, 5 A.3d 586, 601 (Del. 2010).

Because Plaintiff's own allegations establish both the need for a rights plan and the reasonableness of the specific terms adopted by FXCM's Board, Plaintiff's breach of fiduciary duty claim must be dismissed under Rule 12(b)(6). *See Unocal*, 493 A.2d at 955.

d) Plaintiff has failed to state a claim based on the Board's approval of the Leucadia MOU

Plaintiff cannot credibly dispute that the Board's decision to adopt the Leucadia MOU was made by a majority of independent, disinterested directors. *See* section IV(A)(1), *supra*. Accordingly, to overcome the presumption of the business judgment rule on a motion to dismiss, Plaintiff must allege particularized facts demonstrating that "the decision is one so egregious as to be beyond any reasonable business judgment." *In re INFOUSA, Inc. S'holders Litig.*, 953 A.2d 963, 1001 (Del. Ch. 2007). Plaintiff has fallen short of this very high standard.

Plaintiff expresses two criticisms of the MOU: (1) that it disproportionately favors Leucadia by "funnel[ing] more of the Company's value away from shareholders and towards Leucadia;" and (2) that its incentive program for FXCM's senior management grants those individuals a "windfall of millions of dollars in additional compensation." SAC ¶ 139. Neither of these allegations is sufficient to establish that adoption of the MOU was beyond any reasonable business judgment.

FXCM's restructuring of the Leucadia Loan gained FXCM a crucial additional year to pay off the loan without triggering the loan's onerous default provisions. *Id*. ¶ 6. It provided FXCM with additional time to conduct the sale of non-core assets to raise funds to repay the loan and ensured that each sale recovers maximum value for FXCM's shareholders. *See* Decl., Ex. 23, FXCM Press Release (Mar. 10, 2016), at 1. The restructured deal also grants FXCM the right to defer any three of the remaining interest payments by paying interest in kind. *Id*. Payments in kind will permit FXCM to honor its debt obligations, while maintaining maximum flexibility to invest and grow its core business. *Id*. The

MOU is beneficial to FXCM and solidifies Leucadia's role as a long-term partner of FXCM. *Id*. at 2. All of these are clearly business benefits of the MOU.

The MOU's creation of a long-term incentive plan for FXCM's management was also driven by a key business rationale—to retain and incentivize management to maximize cash flow generation and the growth of the business. *Id*. at 1. It is true that this goal comes at a cost to FXCM and its shareholders, but this is always the case with executive compensation. Plaintiff has not alleged that any of the independent, outside directors who make up a majority of the Board would receive any benefits under the terms of MOU. SAC ¶ 79. Nor has Plaintiff alleged any specific facts suggesting that any of the outside directors are beholden to any of the executives. The Board's business decision to compensate and incentive management through the long-term incentive plan that would be created by the MOU is therefore protected by the business judgment rule, and Plaintiff's claim must be dismissed under Rule 12(b)(6). *See Brehm*, 746 A.2d at 262.

e) Plaintiff has failed to adequately allege that FXCM's Compensation Committee breached its duties by adopting severance and bonus plans

Similarly, Plaintiff has fails to state a claim for breach of fiduciary duty based on the Compensation Committee and Board's decision to adopt, and later amend, new severance agreements and bonus plans for certain FXCM executives. SAC ¶¶ 92–100. According to Plaintiff, these changes were unwarranted because sale of the Company was increasingly likely as a result of the Leucadia Loan, and management stood to benefit from the terms of the new severance agreements. *Id*. ¶ 143. But Plaintiff again ignores the valid business justification common to all executive compensation decisions—retention of key management.

Delaware courts afford Board's with broad discretion when setting executive compensation, so long as the decisions are made by disinterested directors, *i.e.*, no executive is setting their own compensation. *Brehm*, 746 A.2d at 262. Plaintiff has not alleged any facts suggesting that the adjustments to the severance agreements or bonus plans were approved by the individuals actually receiving those benefits. Accordingly, to overcome the business judgment rule on a 12(b)(6) motion, Plaintiff must plead that the compensation, when "compared with the services to be received in exchange, constitute waste or could not otherwise be the product of a valid exercise of business judgment." *Grimes v. Donald*, 673 A.2d 1207, 1215 (Del. 1996) *overruled on other grounds by Brehm*, 746 A.2d 244.

Plaintiff failed to meet this high burden by ignoring the value of the services rendered by the executives. Plaintiff does not allege that any of the executives are paid more than executive at peer companies, or that the individuals do not contribute to the successful operations of the company. Plaintiff boldly proclaims that the compensation changes are wasteful, but never explains why. Yet the reality of the situation is clear—after weathering a historically unprecedented flash crash, successfully obtaining funding to keep FXCM alive, and continuing to build the Company that they founded, it was reasonable for the Board to decide that retaining its executive team was crucial to the Company's continued operations.

Moreover, under the terms of the Leucadia Loan—which was a necessary transaction to avoid bankruptcy—management had little up-side incentive to continue to grow and build the Company. Because the profits of such growth would flow primarily to Leucadia until the loan was successfully repaid, FXCM needed to take action to further incentivize management to remain with the company. SAC ¶ 67. That the individuals who benefitted from the increased compensation were the original architects and founders of FXCM is further proof that their departure would have been disastrous for FXCM's ability to repay the Leucadia Loan and retain shareholder value.

At the end of the day, these business considerations and others were the type of factors carefully considered by FXCM's neutral outside directors. Their decision to amend the executives' severance agreements and bonus plans, as with their decision to create a long-term incentive plan under the MOU, are classic business judgment decisions that this Court should honor and preserve. *See In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 52 (Del. 2006). Having failed to plead any facts establishing that this compensation is grossly disproportionate to the value of services rendered by FXCM's executives, Plaintiff's claim must be dismissed. *See Brehm*, 746 A.2d at 262 n.56.

f) Plaintiff has failed to meet the very high pleading standard required for *Caremark* claims

Plaintiff's final breach of fiduciary duty theory is that the Board abdicated their duties as directors by failing to provide adequate oversight to FXCM's risk management policies that could have prevented the Company's losses from the Flash Crash. SAC ¶ 153. Such claims are "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *Caremark*, 698 A.2d at 967. To adequately allege a *Caremark* claim, a plaintiff must plead with particularity either that the board (a) "utterly failed to implement any reporting or information system or controls" or (b) "having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations. *Id*.; *Guttman v. Huang*, 823 A.2d 492, 506 (Del. Ch. 2003) (*Caremark* "premises liability on a showing that the directors were conscious of the fact that they were not doing their jobs."). This high pleading burden is in shareholders' interests, as it makes "board service by qualified persons more likely, while continuing to act as a stimulus to good faith performance of duty by such directors." *Stone*, 911 A.2d at 372.

Plaintiff does not even come close to meeting this extremely high pleading standard. The fundamental premise of Plaintiff's theory is implausible because it asks the Court to accept that FXCM's Board should have predicted the unprecedented impact of the SNB's removal of the currency peg. The SNB Flash Crash was a 'black swan' event that was not predicted by any major bank or analyst. *See* section II.C, *supra*. Because the impact of the SNB announcement was unpredictable, many banks, hedge funds, and traders suffered massive losses as a result of the Flash Crash. *Id.*

The law does not require that directors be prescient. *See Citigroup*, 964 at 124 (rejecting Caremark's claims against Citigroup's board for failing to recognize the risks posed by subprime securities). To overcome the business judgment rule, Plaintiff must allege 'red flags' that the Board ignored ***before*** the loss occurred. *See Guttman*, 823 A.2d at 507. It is not enough to rely on hindsight, as Plaintiff does, to second-guess a board's decision and claim that the board should have seen the loss coming. *Id*.

The SAC contains numerous criticisms of FXCM's risk management policies, but no allegation that the Board ignored any red flag or knew that they were failing to discharge their fiduciary obligations. For example, Plaintiff alleges that FXCM should have raised its leverage requirements on the EUR/CHF currency pair. SAC ¶¶ 37, 42. According to Plaintiff, such an increase was warranted in light of the risks posed by that currency pair, and would have been consistent with margin policy changes enacted by two of FXCM's competitors. *Id*. ¶ 37. But Plaintiff fails to allege any facts establishing that the Board should have been aware of any risk posed by that currency pair. The EUR/CHF pair was one of over 59 pairs traded by FXCM's customers. SAC ¶ 34. The SAC identifies no red flags that should have served as a warning to the Defendants of the coming Flash Crash—the fact that the market as a whole was taken completely by surprise by the SNB's announcement is evidence that no such red flags existed. *See* section II.C, *supra*.

Nor is the fact that FXCM subsequently raised its leverage policies evidence that the Board abdicated its responsibilities by failing to adopt these changes earlier. SAC ¶ 74. This is exactly the type of hind-sight allegation rejected by Delaware courts; directors cannot be held liable for failing to prevent unforeseen risks on the basis that the market is now (with the benefit of hindsight) aware of those risks. *See In re Walt Disney Co. Deriv. Litig*., 907 A.2d 693, 698 (Del. Ch. 2005) (recognizing that companies must take risks with imperfect information, and their actions should be "free of post hoc penalties from a reviewing court using perfect hindsight").

Plaintiff also alleges a number of other ways in which the Board was allegedly deficient in overseeing FXCM's risk management practices, including: (i) failing to have sufficient regulatory capital to meet the CFTC's requirements after the Flash Crash; (ii) failing to conduct stress tests for each currency pairs; and (iii) failure to secure a line of credit (presumable for an amount in excess of $300 million) that could have obviated the need for the Leucadia Loan. SAC ¶¶ 41–44. Plaintiff again misses the mark. This is not a claim for negligence, or even gross negligence—if it were, liability would be precluded by FXCM's 102(b)(7) exculpatory provision. *See* section IV(B)(1)(a), *supra*. Plaintiff has instead alleged a *Caremark* claim, and it is not enough for him to identify actions that he believes the Board ***could*** or ***should*** have taken. None of these allegations evince a conscious disregard by the Board of their duties as directors.

Plaintiff also relies on two additional contextual allegations, neither of which improves his claim. Plaintiff recites heavily from FXCM's public disclosures as evidence that FXCM's shareholders were misled about the riskiness of FXCM's agency business model. SAC ¶¶ 30–35. These allegations, which are parroted from the pending securities class action in the Southern District of New York, are irrelevant to Plaintiff's derivative claims because they say nothing about what the Board knew about the risks posed by EUR/CHF prior to the Flash Crash. In reality, FXCM did indeed disclose that FXCM was subject to significant risks, and that the Board had taken significant steps to mitigate those risks. *See, e.g.*, *id*. ¶ 32 (describing FXCM's margin watcher feature that mitigated risks from currency volatility).

Plaintiff also points to stock sales by Messrs. Ahdout and Yusupov prior to the Flash Crash as evidence that "the directors were fully aware of the Company's risky prospects and were eager to unload their shares before the true nature of the Company's unsound agency model was revealed." SAC ¶ 85. This allegation is based on a fundamental misunderstanding of these individuals' stock interests.

FXCM's founders, including Messrs. Ahdout and Yusupov, own primarily a type of equity interest known as "Holding Units." 2014 Proxy, at 26. These Holding Units are exchangeable for Class A shares on a one-to-one basis. 2013 Annual Report, at F-10. This distinction is important. Plaintiff alleges that the stock sales by Messrs. Ahdout and Yusupov were suspicious because they sold 100% of their stock holdings. SAC ¶¶ 83–84. In reality, both individuals only sold 100% of the number of Holding Units that they converted on those specific occasions.[28] Taking into account Holding Units and Class A shares held at the time of the SNB Flash Crash, the alleged "massive" stock sales by these individuals amounted to only ***1%*** of Mr. Yusupov's total stock ownership and only ***8%*** of Mr. Ahdout's total stock ownership. Note 28, *supra*.

[28] Decl., Ex. 24, Stock Loss Chart.

Moreover, the allegation that the Directors knew about the risks of the upcoming Flash Crash is squarely contradicted by the massive personal losses incurred by the Directors as a result of the SNB Flash Crash. Mr. Niv lost over $112 million; Mr. Yusupov lost over $100 million; and Mr. Ahdout lost approximately $36 million. Note 28, *supra*. The reality is that the interests of the Directors were aligned with FXCM's shareholders, and it is absurd for Plaintiff to argue that the Directors—who themselves sustained personal losses totaling hundreds of millions of dollars—were aware of, yet consciously disregarded, the risk of the EUR/CHF currency pair.

Because Plaintiff has failed to allege any conscious disregard by Defendants of red flags and foreseeable losses, Plaintiff's *Caremark* claim should be dismissed pursuant to Rule 12(b)(6).

2. Plaintiff fails to state a claim for corporate waste

The Court should dismiss Plaintiff's waste claims because the SAC is devoid of facts showing that FXCM received *no consideration* from its officers for the amended service agreements and bonus plans and that the Leucadia transaction served *no corporate purpose*.[29] To state a claim for waste, Plaintiff must allege

[29] *See Official Comm. of Unsecured Creditors of Integrated Health Servs., Inc. v. Elkins*, 2004 WL 1949290, at *17 (Del. Ch. Aug. 24, 2004) (stating that "there are only two ways for a waste claim to survive a motion to dismiss: the Complaint

facts that if taken as true establish that the defendant directors "authorized an exchange that was so one sided that no business person of ordinary sound judgment could conclude that the corporation has received adequate consideration."[30] It is not up to the Court to assess the "adequacy" of consideration of the waste standard, or, *ex post facto*, to judge appropriate degrees of business risk.[31] A waste claim will not stand unless Plaintiff shows that FXCM received no consideration or the transaction served no corporate purpose. *Brehm*, 746 A.2d at 263.

Plaintiff contends that the Board's decision to approve the Leucadia transaction resulted in the waste of corporate assets because the transaction was a "bad deal" for the Company. *See, e.g.*, SAC ¶¶ 6, 68, 69, 163. But these

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alleges facts showing the corporation received no consideration, or that a transfer of corporate assets served no corporate purpose").

[30] *Wagner v. Selinger*, 2000 WL 85318, at *3 (Del. Ch. Jan. 18, 2000) ("The standard for a waste claim is high and the test is extreme … very rarely satisfied by a shareholder plaintiff. The transfer in question must either serve no corporate purpose or be so completely bereft of consideration that the transfer is in effect a gift."); *see also Brehm*, 746 A.2d at 263 ("[W]aste entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade.").

[31] *See Leung v. Schuler*, 2000 WL 264328, at *10 (Del. Ch. Feb. 29, 2000) ("Thus, even if the complaint alleges facts that if true would show that in hindsight the consideration was inadequate, that alone will not satisfy the waste standard. The particularized pleaded facts must show that the consideration received for the stock was so minimal that issuing the … stock was the functional equivalent of making a gift to the Insiders.").

conclusory allegations fail to show that the Leucadia transaction served no corporate purpose. *See* note 30, supra. The Board had two choices—accept the loan from Leucadia or be forced in bankruptcy by the CFTC. *See* section II.D.2, *supra*. Even if the Leucadia transaction was a "bad deal," it was the only option to save FXCM from being liquidated by the CFTC. Thus, the transaction served a proper corporate purpose. Plaintiff's hindsight claim that bankruptcy would have been a better option, SAC ¶ 127, does not change this conclusion. *See Brehm*, 746 A.2d at 263. Moreover, FXCM did receive *consideration* from Leucadia for the transaction—$300 million. *See* note 31, *supra*. Thus, the Court should dismiss Plaintiff's claim that the Board's decision to approve the Leucadia transaction resulted in the waste of corporate assets.

Plaintiff also claims that the Compensation Committee's decision to approve "the amended severance agreements and bonus plans" resulted in the waste of corporate assets. Specifically, Plaintiff contends that the executives' compensation was extravagant and the severance agreements and bonus plains merely served to enrich the executives at the expense of the Company, SAC ¶¶ 114, 169. As an initial matter, the SAC is devoid of allegations that compare the executives' compensation packages to peer companies. Plaintiff also does not contend that the executives wholly abdicated their duties—*i.e.*, they did not show up to work, did not attend meetings, etc.

Plaintiff's waste claim against the Compensation Committee is based on his belief that the executives got paid too much and did not deserve their bonuses and severance packages. SAC ¶¶ 92–95, 98-100. In *Zucker*, plaintiff similarly alleged that the $40 million severance plan that Hewlett Packard entered into with its CEO was corporate waste. 2012 WL 2366448, at *8. The *Zucker* Court found that the severance agreement "memorialize[d] an exchange in which at least *some* consideration [ran] to HP," such as the CEO's agreement to extend certain confidentiality agreements, to not disparage the company, to cooperate with a corporate transition, and to release all claims he had against HP. *Id.* Once the *Zucker* Court found that the severance agreement "reflect[ed] at least some element of bilateral exchange and that there were rational bases for the Board to agree to it, Plaintiff's waste claim reduces to his belief that $40 million was just too much." *Id.* at *10. Based on the Delaware Supreme Court's opinion in *Brehm*, the *Zucker* Court held that the value of the severance agreement was insufficient to outweigh board's business judgment. *Id.*

Like HP in *Zucker*, FXCM got consideration from its executives in exchange for the severance agreements and bonus plans in the form of their continued employment at the Company during a crucial time period.[32] The Board determined that retaining FXCM's management team was critical to the Company's survival

[32] Decl., Ex. 25, SEC Form 8-K (Mar. 17, 2015).

and future success. *See* Decl., Ex. 23, SEC Form 8-K (Mar. 10, 2016), at Exhibit 99.1. Because the SAC fails to plead that the severance agreements and bonus plans were the functional equivalent of making a gift to the executives, the Court should dismiss Plaintiff's waste claims.

3. Plaintiff fails to state a claim for unjust enrichment

The Court should dismiss the unjust enrichment claims against Defendants Niv, Sakhai, Ahdout, and Yusupov because they were each awarded severance and bonus compensation pursuant to a contract. It is well settled that a claim for unjust enrichment is not available if there is a contract that governs the relationship between parties that gives rise to the unjust enrichment claim. *Kuroda v. SPJS Holdings, LLC*, 971 A.2d 872, 891 (Del. Ch. 2009). Because the SAC alleges an express enforceable contract that controls each Officer Defendant's severance and bonus compensation, the Court must dismiss Plaintiff's claims for unjust enrichment. *Id.*; *see* note 32, *supra*.

4. Plaintiff fails to state a claim for abuse of control

The Court should dismiss Plaintiff's claims for abuse of control because Delaware does not recognize an independent cause of action against directors and officer for abuse of control. *See Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Stumpf*, 2012 WL 424557, at *8 (N.D. Cal. Feb. 9, 2012) (stating that "claims for abuse of control are often considered a repackaging of claims for breach of fiduciary duties instead of being a separate tort"). Plaintiff's abuse of control claim is based on the allegation that Defendants used their "positions of control within the Company for their own personal interests and contrary to the interest of the Company's public shareholders." SAC ¶ 173. Because Plaintiff is merely repacking his breach of fiduciary duty claim as a separate tort and for the reasons stated in section IV.B.1, the Court should dismiss the claim for abuse of control.

5. Plaintiff fails to state a claim for contribution and indemnification

The Court should dismiss Plaintiff's contribution and indemnification claims because the SAC failed to state a claim for any actionable wrong-doing by Defendants. *Commonwealth Land Title Ins. Co. v. Funk*, 2015 WL 1870287, at *2 (Del. Super. Ct. Apr. 22, 2015).

V. CONCLUSION

For all the foregoing reasons, the Court should grant Defendants' motion and dismiss all of Plaintiff's claims in the SAC.

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<u>CERTIFICATE OF SERVICE</u>

I hereby certify that on July 22, 2016, the foregoing document was served on the following counsel of record via File & Serve*Xpress*:

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