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Case Number 76,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL CONTE, derivatively on behalf of SKECHERS U.S.A., INC., Appellant, v. ROBERT GREENBERG, MICHAEL GREENBERG, DAVID WEINBERG, KATHERINE BLAIR, MORTON ERLICH, RICHARD SISKIND, JEFFREY GREENBERG, GEYER KOSINSKI, and RICHARD RAPPAPORT, and SKECHERS U.S.A., INC., Appellees	No. 76, 2024 Case Below: Court of Chancery of the State of Delaware C.A. No. 2022-0633-MTZ **PUBLIC REDACTED VERSION DATED: MAY 13, 2024**

OPENING BRIEF OF PLAINTIFF-BELOW/ APPELLANT MICHAEL CONTE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

GLOSSARY OF TERMS

Abbreviation	Definition
2021 Proxy	Skechers' proxy statement filed with the SEC on April 14, 2021
2023 Proxy	Skechers' proxy statement filed with the SEC on May 1, 2023
Action	The matter captioned *Conte v. Greenberg, et al.*, No. 2022-0633-MTZ
Aircraft	Skechers' two Bombardier BD 700 Global Express jets bearing tail numbers N10SL and N543GL
Blair	Defendant Katherine Blair
Board	Board of Directors of Skechers
CEO	Chief Executive Officer
CFO	Chief Financial Officer
Clarke	Non-party Lindsey Clarke
Committee	The Compensation Committee formed under the Skechers Board
Complaint	The Verified Stockholder Derivative Complaint filed under seal in the Action on July 21, 2022
COO	Chief Operating Officer
Court	Court of Chancery of the State of Delaware
CtW Letter	February 5, 2014 letter from CtW Investment Group to the Skechers Board, *available at* https://static1.squarespace.com/static/5d374de8aae9940001c8ed59/t/5e5eb55980dab745bae8d9cd/1583265114440/Letter-to-Skechers-Board-2-5-14.pdf. (last visited April 24, 2024)
Demand Board	Defendants Robert, Michael, Weinberg, Blair, Erlich, and Siskind, and non-party Garcia
Equity Grant Litigation	The matter captioned *Police & Fire Ret. Sys. of the City of Detroit v. Greenberg*, No. 2019-0578-MTZ (Del. Ch.)
Erlich	Defendant Morton Erlich
FAA	U.S. Federal Aviation Administration
Final Judgments and Orders	The Orders dated February 4, 2024 in the Action (attached hereto as Exhibit B)
FW Cook	The Committee's compensation consultant
Garcia	Non-party Zulema Garcia
Jason	Non-party Jason Greenberg

Abbreviation	Definition
Jeffrey	Defendant Jeffrey Greenberg
Jennifer	Non-party Jennifer Greenberg Messer
Joshua	Non-party Joshua Greenberg
Lubow	Non-party Sheri Lubow
Michael	Defendant Michael Greenberg
Op. or Opinion	Memorandum Opinion dated February 2, 2024 issued in the Action (attached hereto as Exhibit A)
Plaintiff	Plaintiff Michael Conte
Plane Defendants	Defendants Robert Greenberg, Michael Greenberg, and David Weinberg
Robert	Defendant Robert Greenberg
Rule 23.1	Court of Chancery Rule 23.1
SEC	U.S. Securities and Exchange Commission
SEC Order	*In the Matter of Skechers U.S.A., Inc.*, File No. 3-21893, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order ("SEC Order") (Mar. 7, 2024), *available at* https://www.sec.gov/files/litigation/admin/2024/34-99693.pdf (last visited April 24, 2024)
SEC Press Release	SEC Press Release, "SEC Charges Skechers with Making Undisclosed Payments to Executives' Family Members" (Mar. 7, 2024), *available at* https://www.sec.gov/news/press-release/2024-33 (last visited April 24, 2024)
Section 220	8 *Del. C.* §220
Section 220 Documents	The documents Plaintiff obtained pursuant to Section 220
Siskind	Defendant Richard Siskind
Skechers or the Company	Skechers U.S.A., Inc.
Stage II	Stage II Apparel Pty Ltd
Tabalipa	Non-party Paula Tabalipa
Vandemore	Non-party John Vandemore
Weinberg	Defendant David Weinberg
Wendy	Non-party Wendy Greenberg

NATURE AND STAGE OF THE PROCEEDINGS

The actions a controlling stockholder can take at a controlled company are not limitless. Even where, as here, the controlling stockholder "occupie[s] the most powerful trifecta of roles within a corporation"—founder, board chair, and "Superstar CEO,"[1] they are bound by contractual agreements they have entered into with the company. And, as here, when the controlling stockholder chooses to incorporate the company as a publicly-held entity in Delaware, they also must adhere to the fiduciary duty of loyalty and act in the best interest of the company and its stockholders, rather than for personal benefit.

Robert Greenberg is the founder and controlling stockholder of Skechers, the nominal defendant in this Action.[2] Robert dominates Skechers as its CEO, Board chair, and single largest stockholder, and has used his family's 55% controlling interest to install his family and cronies throughout Skechers' corporate structure and enrich himself and those close to him at the expense of Skechers' minority stockholders.

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[1] *Tornetta v. Musk*, 2024 Del. Ch. LEXIS 27, at *3 & n.3, *100 (Del. Ch. Jan. 30, 2024). Unless otherwise specified, all internal quotation marks and citations herein are omitted and all emphasis is added.

[2] For clarity, this brief refers to the members of the Greenberg family by their first names. No familiarity or disrespect is intended.

Indeed, Robert's son, Michael, serves as Skechers' President and a Board member; Robert's loyal business associate and employee of more than thirty years, Weinberg, serves as Skechers' COO and a Board member; and Robert's longtime friend and neighbor, Siskind, also serves on the Board and chairs the Committee. Skechers further employs Robert's four other children in various positions, and even employs Weinberg's two children as well.

In addition to the millions in annual compensation that Robert bestows on his family and friends through Skechers, Skechers also permits the Plane Defendants (Robert, Michael, and Weinberg) personal use of Skechers' two corporate Aircraft. However, the Plane Defendants' employment agreements with Skechers require that their personal use be "reasonable." And for good reason—not only does Skechers incur fixed costs for operating and maintaining the Aircraft during the Plane Defendants' personal trips, but Skechers also follows the unusual practice of making tax gross-up payments to the Plane Defendants to cover the cost of their increased taxes as a result of their personal use of the Aircraft being treated as imputed income. In disclosing in Skechers' proxy statements the gross-up payments made to each of the Plane Defendants, the Board assured stockholders that the Aircraft were "designated primarily for business travel" rather than personal use.

[redacted], racking up millions of dollars in Aircraft-related perquisites that far exceeded the median value of aircraft perquisites among S&P 500 executives.

When the Board's Committee—chaired by Siskind—became aware of that misuse, it determined that Skechers needed a policy governing personal use of the Aircraft to prevent further corporate harm. Rather than taking on the task itself, however, the Committee delegated creation of the policy to Skechers' management, who were beholden to the Greenberg family for their continued employment and had already failed to provide recommended limits on personal use of the Aircraft in response to the Committee's prior request.

Predictably, management never put forth such any policy, and the supine Committee did nothing to implement any controls on the Plane Defendants' excessive personal use of Skechers' Aircraft. As a direct result of Skechers lacking a policy—that the Committee knew was needed—the Plane Defendants continued

their expropriation of the Aircraft unabated, such that in 2020 and 2021 more than 50% of the Aircraft's total flight time was for their personal use. Not only did this level of personal use have significant tax consequences for Skechers, but it also meant that Skechers was essentially maintaining a second Aircraft with all its attendant costs solely for the Plane Defendants' personal travel.

Stockholders, for their part, were unaware of the full extent of the Plane Defendants' misconduct because Skechers' proxy statements continued to misleadingly represent that the Aircraft were designated primarily for business use even after personal use exceeded 50% total flight time, [redacted]. And, as of the filing of this Action—***two and a half years after the Committee first requested it***—Skechers still lacked any Aircraft policy in order to limit the Plane Defendants' unfettered personal use of the Aircraft.

After reviewing Section 220 Documents and FAA records, Plaintiff brought this Action asserting claims for breaches of contract and fiduciary duty against the Plane Defendants for their excessive personal use of the Aircraft, and claims for breach of fiduciary duty against the Board for oversight failures and making false

and misleading statements to stockholders.[3] This appeal follows from the Court's dismissal of Plaintiff's Complaint under Rule 23.1 for failure to adequately plead demand futility.

[3] Plaintiff does not challenge the lower Court's findings with respect to his waste claim. *See* A000098-99; Op. at 24-30.

SUMMARY OF ARGUMENT

1. The appropriate Board for evaluating pre-suit demand comprised seven members: Defendants Robert, Michael, Weinberg, Siskind, Erlich, and Blair, and non-party Garcia. Defendants did not contest that demand was futile as to Robert, Michael, and Weinberg under *Zuckerberg*[4] because they either received a material personal benefit in connection with the challenged conduct or face a substantial likelihood of liability.[5] Accordingly, the only demand futility issue below and the sole issue on appeal is whether ***one*** of Siskind, Erlich, or Blair fail any part of the *Zuckerberg* test.[6] If so, the Demand Board lacks a disinterested majority and demand is futile. The lower Court's finding that demand was not futile is wrong.

2. ***First***, Siskind fails *Zuckerberg*'s third part because he lacks independence from Robert. The Court's contrary conclusion was the result of its failure to consider Plaintiff's allegations holistically and draw inferences in Plaintiff's favor, as is required, and its failure to appreciate the bias-producing nature of Robert and Siskind's decades-long reciprocal relationship. When such allegations

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4 *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034 (Del. 2021).

5 Op. at 14.

6 *Id.* Plaintiff did not allege that demand was futile against Garcia. *Id.*

are properly considered, there is reason to doubt that Siskind could impartially consider a demand to initiate litigation against his friend and neighbor, Robert.

3. ***Second***, Siskind, Erlich, and Blair, as Committee members, fail *Zuckerberg*'s second part because they face a substantial likelihood of liability on Plaintiff's prong-two (or "Red-Flags") *Caremark* claim[7] for failing to take action after learning of the Plane Defendants' misuse of the Aircraft. The Court's contrary conclusion stemmed from its misapprehension of the factual record and erroneous assumption that the Committee had taken actions that it in fact had not.

4. ***Third***, Siskind and Erlich fail *Zuckerberg*'s second part because they face a substantial likelihood of liability under *Malone*[8] for making false and misleading disclosures in Skechers' 2021 Proxy regarding the Plane Defendants' personal use of the Aircraft. The Court's contrary conclusion stemmed from its misapprehension that the disclosures were not material. That was incorrect, as demonstrated by the Committee's own consultant's analysis and a recent cease-and-desist order issued by the SEC in another compensation matter involving Skechers,

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7 *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

8 *Malone v. Brincat*, 722 A.2d 5 (Del. 1998).

whereby Skechers paid a $1.25 million civil penalty for failing to disclose in Skechers' proxy statements related-party compensation of as little as $155,000.[9]

5. Because Plaintiff has established that Siskind, Erlich, and Blair all fail the *Zuckerberg* test, demand is futile and the Court's Rule 23.1 dismissal ruling should be reversed.

[9] *See* SEC Press Release; SEC Order.

STATEMENT OF FACTS

A. Robert Founds Skechers and Installs His Family and Friends as Its Directors and Officers

Robert founded Skechers in 1992 after investors bought out his stake in L.A. Gear, a sneaker and apparel store he owned and operated.[10] Since inception, Robert has been Skechers' CEO, Chairman of the Board, and one of Skechers' largest single stockholders.[11] Robert dominates Skechers through his family's controlling stock interest,[12] and has installed his family and cronies at every level of Skechers' corporate hierarchy.

Robert's son, Michael, has served as Skechers' President and a Board member since inception.[13] Before Skechers, Michael worked with his father at L.A. Gear for nearly a decade.[14]

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10 A000053.

11 *Id.*; A001062.

12 Robert, Michael, and Jeffrey collectively controlled 55% of the votes at Skechers' annual meeting. A000093-94.

13 A000054; A001351.

14 A000054; A001351.

Another of Robert's sons, Jeffrey, is Skechers' Vice President of Electronic Media and a Board member from 2005 until December 2021.[15] Robert's other children—Jason, Joshua, and Jennifer—all hold positions with Skechers.[16]

Robert's longtime business associate, Weinberg, has served as Skechers' COO since January 2006 and has loyally remained in the Greenberg family's employ for more than three decades.[17] Initially, Weinberg worked with Robert and Michael at L.A. Gear.[18] From 1993 through 2006, Weinberg served as Skechers' CFO and, beginning in 1998, as a Board member.[19] Weinberg's sons, Andrew and Jeffrey, also serve as Skechers' employees.[20]

Finally, Robert's friend and neighbor, Siskind, serves on the Board and chairs the Committee.[21] Robert and Siskind's reciprocally-beneficial relationship dates back to the 1990s, when both served on the board of Siskind's company, Stage II.[22] In 1998, Robert purchased a home from Siskind in Lake Boca Raton, where the two

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15 A000056.

16 A000084.

17 A000054; A001351-52.

18 A000054; A001351-52.

19 *Id.*

20 A001103; A001352.

21 A000055.

22 A000095-96.

have remained neighbors in close proximity with piers for their watercraft facing each other.[23] The following year, Siskind caused Stage II to acquire certain trademarks from Skechers by way of the Greenberg Family Trust, just after which Robert appointed Siskind to the Skechers Board.[24] Thereafter, Siskind and Robert served on the Committees of each other's companies until 2002, when Siskind ceased to be CEO at Stage II and Skechers abolished its Committee.[25] Siskind has been Chair of the Committee since it was re-established in 2006.[26] In fact, Siskind's longstanding business ties with Robert were so extensive that, in 2014, a stockholder investment group wrote a letter to the Board raising "serious questions" as to whether Siskind was "truly independent in spirit," including because he and Robert concurrently served on the compensation committees of each other's boards,[27] and threatening to vote against the directors up for re-election and urge other stockholders to do the same.[28]

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23 A000096.

24 *Id.*

25 A001352-53.

26 *Id.*

27 A000055-56.

28 *Id.*; CtW Letter.

B. Skechers Allows the Plane Defendants' "Reasonable" Personal Use of Skechers' Aircraft

Pursuant to their employment agreements, the Plane Defendants are permitted "reasonable" personal use of Skechers' Aircraft, which have a per hour variable operating cost of $4,471.00.[29] That personal use must be "reasonable" is for good reason: if Skechers is "not reimbursed for costs associated with personal use of the aircraft, such costs are considered taxable income to [these individuals] who [are] also provided a tax gross-up reimbursement for applicable imputed income."[30] Thus, if the Plane Defendants do not reimburse Skechers for their personal use—and they do not—Skechers covers the increased income tax payments.[31] The employment agreements also provided that the Committee had the "sole discretion" to "put limitations on [the Plane Defendants'] use of the airplane for purposes treated as compensation to [the Plane Defendants]."[32]

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29 A000044; A000065.

30 A000065.

31 *Id.*

32 A000828.; Op. at 3 & nn.3-4.

From 2019 through 2022, Skechers' proxy statements reinforced to stockholders that the Aircraft were "designated primarily for business," rather than personal, use.[33]

C. The Committee Learns of the Plane Defendants' Misuse of the Aircraft and Directs Management to Create a Policy Governing Personal Use

[redacted][34] [redacted] [redacted][35] [redacted] for 2017, Robert, Michael, and Weinberg had incurred $56,812, $297,885, and $154,344, respectively, in Aircraft-related perquisites.[36] For comparison, the median value of aircraft perquisites among S&P 500 (for which Skechers is too small to qualify) executives in 2015 was only $53,967.[37] [redacted] on April 17, 2018, the Committee requested that

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33 A000044; *see also* A000890 (2019 Proxy); A000954 (2020 Proxy); A001088 (2021 Proxy); A001249 (2022 Proxy).

34 [redacted] non-party Tom Walsh (A001354), who was dismissed from this Action following his death. A000220.

35 A000068.

36 *See* A001433 (2018 Proxy); A001355.

37 A000047.

Skechers' CFO, Vandemore, provide "recommendations" for "limits" to be placed on personal use of Skechers' Aircraft.[38]

[redacted][39] [redacted][40] [redacted] for 2018, Robert, Michael, and Weinberg had incurred $138,823, $610,078, and $188,366, respectively, in Aircraft-related perquisites, [redacted][41] These numbers far eclipsed the Plane Defendants' personal use of the Aircraft for 2017, [redacted].

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38 A000068.

39 A000068-69.

40 A000069.

41 A000047. Even these numbers were underreported. Skechers' 2023 Proxy provided an "adjustment" to Skechers' compensation disclosures for 2018-2021. *See* A003074; A003196. For 2018, Robert, Michael, and Weinberg incurred an additional $135,533, $161,073, and $7,015, respectively, in Aircraft perquisites and tax gross-up payments. A003196.

[redacted][42] [redacted]

[redacted][43]

[redacted][44] [redacted]

42 A000069.

43 A000069-70.

44 A000070.

[redacted][45]

Finally, at a November 26, 2019 Committee meeting, [redacted] [46] [redacted] for 2019, Robert, Michael, and Weinberg had incurred $199,734, $1,079,146, and $357,952, respectively, in Aircraft-related perquisites, [redacted][47]

[redacted], the Committee "requested that management ***develop for review a policy covering personal use of the Company's aircraft***."[48] [redacted]

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45 *Id.* [redacted] A000054.

46 A000070.

47 A000047. Per the 2023 Proxy, for 2019, Robert, Michael, and Weinberg incurred an additional $69,771, $52,202, and $10,743, respectively, in Aircraft perquisites and tax gross-up payments which were not initially reported. A003196.

48 A000070-71.

[redacted]

[redacted]

D. The Committee Never Takes Action to Ensure an Aircraft Policy Is Created, Allowing the Plane Defendants to Continue Their Misuse of the Aircraft Unabated

After demanding in November 2019 that management craft an Aircraft policy governing the Plane Defendants' personal use, the Committee did nothing to ensure that any policy was actually adopted or limitations on personal use put in place.[49] Indeed, as of the filing of the Complaint—two and a half years later—Skechers still lacked an Aircraft policy or any other controls governing personal use.[50]

[redacted][51]

[redacted]

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49 A000071.

50 *Id.*

51 A000074-83.

[redacted][52]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted][53]

[redacted]

[redacted]

[redacted][54] [redacted]

[redacted][55]

[redacted]

[redacted]

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52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

[redacted][56]

In total, Robert, Michael, and Weinberg incurred $277,010, $802,038, and $331,805 respectively, in Aircraft-related perquisites for 2020,[57] and $368,355, $509,724, and $369,579, respectively, for 2021.[58] [redacted][59] [redacted][60] Combined, 53% of total flight time was personal in 2020 and 2021.[61]

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56 *Id.*

57 A001087-88. Per the 2023 Proxy, for 2020, Robert, Michael, and Weinberg incurred an additional $10,339, $51,474, and $19,558, respectively, in Aircraft perquisites and tax gross-up payments which were not initially reported. A003196.

58 A001248-49. Per the 2023 Proxy, for 2021, Robert, Michael, and Weinberg incurred an additional $15,612, $25,933, and $6,040, respectively, in Aircraft perquisites and tax gross-up payments which were not initially reported. A003196.

59 A000072-73.

60 A000073.

61 *Id.*

E. The Plane Defendants' Excessive Personal Use of the Aircraft Has Significant Consequences for Skechers

The misuse of the Aircraft comes at a high cost to Skechers. In addition to substantial fixed costs (including insurance, storage, maintenance, pilot salaries, and the like), in 2020 and 2021 Skechers was unable to take advantage of bonus depreciation for the Aircraft under §280F of the Internal Revenue Code because personal use exceeded 50% of total flight time.[62] The excessive personal flights also meant that Skechers was effectively paying costs for an entire second plane that was not needed for its business use.[63]

Moreover, Skechers makes significant tax gross-up payments to the Plane Defendants.[64] Such payments are a rarity amongst publicly traded companies, [redacted][65]

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62 A000074. There is also cost to Skechers from wear-and-tear on the Aircraft, including maintenance, and pilot salaries and housing costs for when the plane sits idle at a vacation destination. A000050.

63 A000074-84.

64 A000065.

65 A000074-83.

F. The Committee Is Forced to Hire an Independent Compensation Consultant, But Then Ignores Its Recommendations

In August 2020, the Plane Defendants, Siskind, and Erlich (among others) obtained Court approval of settlement of the Equity Grant Litigation, which challenged the Board's authorization of allegedly "excessive and unfair equity awards" to Robert, Michael, and Weinberg in 2018-2020. The settlement provided for cancelling the 2019 and 2020 awards and required the Committee to "engage a consultant and obtain its recommendations on an annual basis concerning new equity awards to be made to any of [the Plane Defendants]" for the next two years.[66]

In September 2020—nearly a year after the Committee had requested an Aircraft policy and then took no further action—the Committee engaged FW Cook

[redacted]

[66] A000988-99.

[redacted][67] In October 2021, FW Cook advised the Committee [redacted][68]; t[redacted][69]; that Skechers' "[t]ax gross-ups on aircraft and auto perquisites are a most problematic pay practice"[70]; [redacted][71] [redacted] FW Cook recommended that the Committee "[e]liminate tax gross-ups on perquisites with no corresponding increase to other compensation amounts," [redacted][72]

The Committee did nothing in response to FW Cook's reports.

G. The Board Issues a False and Misleading Proxy Statement Designed to Conceal the Nature of the Plane Defendants' Misconduct

The full extent of Aircraft misuse escaped stockholder attention only because the Board was issuing false and misleading disclosures. Skechers' 2021 Proxy, which was issued "by order of the Board of Directors" and sought the re-election of Robert and Erlich, falsely asserted that the Aircraft were "designated primarily for

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67 A001114.

68 A001128.

69 A001130.

70 A001129.

71 *Id.*

72 *Id.*

business travel."[73] This was untrue—the Aircraft were designated primarily for the Plane Defendants' personal travel.[74] The 2021 Proxy also falsely represented to investors that, because the Aircraft were primarily designated for business use, Skechers was not including fixed costs when determining executive perquisites.[75] But because the Aircraft were in fact primarily used for personal travel, Skechers' perquisite disclosures were false and misleading for not reflecting such costs.[76]

The 2021 Proxy also failed to disclose the sheer volume of the Plane Defendants' personal use of the Aircraft as compared to total flight hours. A reasonable stockholder would find it material that Skechers needed a second Aircraft because roughly 53% of the combined flight time of the Aircraft was attributable to the Plane Defendants' personal use.[77]

Further, the 2021 Proxy misleadingly failed to disclose to stockholders that Skechers had significant and material disallowed tax deductions, in addition to being unable to take advantage of the bonus depreciation available under §280F of the

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73 A000051-52; *see also* A001104; A001061; A001088. At the time, the Board comprised Defendants Robert, Michael, Jeffrey, Weinberg, Erlich, Blair, Siskind, Kosinski, and Rapparport and non-party Walsh. A001062-64.

74 A000084.

75 *Id.*

76 A000085.

77 *Id.*

Internal Revenue Code, due to Plane Defendants' personal use of the Aircraft exceeding 50% of total flight time.[78]

Finally, the 2021 Proxy misleadingly disclosed that "[d]uring 2020, Robert Greenberg, Michael Greenberg and David Weinberg used our aircraft for personal travel,"

[79]

All of these false and misleading statements (not to mention the underreporting of personal use—uncorrected until 2023) obscured the extent Plane Defendants' misuse of the Aircraft from stockholder scrutiny.

[80]

78 *Id.*

79 A000084.

80 A001133.

H. As of the Filing of the Complaint, No Aircraft Policy or Controls on Personal Use Existed

Plaintiff initiated this Action on July 21, 2022, more than four years after the Committee first asked Vandemore to provide "recommendations" for "limits" to be placed on the Plane Defendants' personal use of the Aircraft; more than two and a half years after the Committee asked management to create a formal Aircraft policy governing personal use; [redacted] Yet, as of the filing of the Complaint, the Committee ***still*** had not adopted a policy or implemented any other controls over Aircraft personal use.[81] Skechers incurred significant and increasing damage as a direct result.[82]

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81 A000071.

82 *Id.*

ARGUMENT

I. The Court Erred by Finding There Was No Reason to Doubt Siskind's Independence from Robert

A. Question Presented

Whether the Court erred in finding that Siskind did not fail part three of the *Zuckerberg* test because he lacked independence from Robert.[83]

B. Scope of Review

"[R]eview of decisions…applying Rule 23.1 is *de novo* and plenary."[84]

C. Merits

The Court was tasked with determining whether demand was futile as to Siskind under *Zuckerberg*'s third part because he lacked independence from Robert, who did not contest that he "either received a material personal benefit in connection with the challenged conduct or face[d] a substantial likelihood of liability."[85]

"The primary basis upon which a director's independence must be measured is whether the director's decision is based on the corporate merits of the subject before the board, rather than extraneous considerations or influences." *Zuckerberg*, 262 A.3d at 1060. "Whether a director is independent is a fact-specific determination

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83 Op. at 37-40. Plaintiff preserved this issue at A000093-96; A001392-97; A003080-83.

84 *Zuckerberg*, 262 A.3d at 1047.

85 Op. at 14.

that depends upon the context of a particular case." *Id.* Delaware requires that "all the pled facts regarding a director's relationship to the interested party be considered in full context in making the...pleading stage determination of independence." *Del. Cty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1022 (Del. 2015). Indeed, "[a] factor that is not sufficiently disqualifying when evaluated alone can still play a role in the overall demand-excusal analysis." *In re EZCORP Inc. Consulting Agreement Derivative Litig.*, 2016 Del. Ch. LEXIS 14, at *129 (Del. Ch. Jan. 25, 2016); *cf. In re Fitbit, Inc. S'holder Derivative Litig.*, 2018 Del. Ch. LEXIS 571, at *38 (Del. Ch. Dec. 14, 2018) (endorsing a "holistic review" of the pleadings for evaluating demand futility).

Plaintiff is not required to plead "a detailed calendar of social interaction to prove that directors have a very substantial personal relationship rendering them unable to act independently of each other." *Sandys v. Pincus*, 152 A.3d 124, 130 (Del. 2016). "A plaintiff is only required to plead facts supporting an inference…that a director cannot act impartially." *Id.* "Though Rule 23.1 requires that a plaintiff plead this lack of independence with particularity, the Court will draw all reasonable inferences in the plaintiff's favor." Op. at 37-38 (citing *Sanchez*, 124 A.3d at 1020).

Here, Plaintiff has pled particularized facts creating a reasonable doubt that Siskind could act impartially in considering a demand to institute litigation against Robert regarding his misuse of the Aircraft:

- Robert is Skechers' founder, Board Chair, CEO, and controlling stockholder;
- In 1998, while Siskind and Robert served on the board of Siskind's company, Stage II, Robert purchased a home ***from Siskind*** where the two have ***remained neighbors*** ever since with piers for their watercraft facing each other;
- In 1999, Siskind caused Stage II to acquire certain trademarks from Skechers ***through the Greenberg Family Trust***;
- ***Just after*** that, Robert used his controlling interest in Skechers to appoint Siskind to the Board—a position Siskind has remained in for over two decades;
- Thereafter, Siskind and Robert served on the compensation committees of ***each other's companies*** until 2002, when Siskind ceased to be CEO at Stage II and Skechers abolished its Committee;
- When Skechers re-established its Committee in 2006, Siskind became its ***Chair*** and remains in this role today; and
- Siskind and Robert were defendants in the Equity Grant Litigation, the settlement of which provided for the cancellation of Robert's allegedly excessive equity awards which Siskind had approved.

A000053; A000055-56; A000979-80. The lower Court's conclusion that these facts did not create reasonable doubt as to Siskind's independence was in error.

First, although the Court stated the correct standard that independence allegations must be viewed holistically, it failed to apply that standard, instead

considering each fact separately. For example, when the Court considered that Siskind "depends on Robert and the Greenberg family for his continued employment," it found that this fact "***alone***…does not impugn Siskind's independence." Op. at 38. While true in a vacuum, the Court ignored how Robert's status as not just controlling stockholder, but also founder, Board Chair, and CEO, colors the rest of the independence analysis. As recently expounded by this Court:

> When directors believe a CEO is uniquely critical to the corporation's mission, even independent actors are likely to be unduly deferential….In essence, Superstar CEO status creates a distortion field that interferes with board oversight….[T]he distortion field can weaken mechanisms by which stockholders hold fiduciaries accountable, a risk that becomes more severe when the Superstar CEO owns a large block of shares.
>
> Faith in a Superstar CEO changes the dynamics of corporate decision making. That is true for all corporate decisions, but the risk becomes more acute for issues where the Superstar CEO's interests are directly concerned. ***Nowhere is that truer than the Superstar CEO's compensation***. In the face of a Superstar CEO, it is even more imperative than usual for a company to employ robust protections for minority stockholders, such as ***staunchly independent*** directors.

Musk, 2024 Del. Ch. LEXIS 27, at *105-106. The Court should have followed this reasoning here and considered the rest of Plaintiff's allegations with a jaundiced eye in light of these dynamics.

Similarly, the Court found "the fact that the two overlapped in their service on Stage II's board of directors does not ***alone*** impugn Siskind's independence," and

that "[s]elling another a home nearly twenty-five years ago does not ***alone*** establish a material relationship." Op. at 39-40. Having knocked out each of Plaintiff's independence allegations individually, the Court stated, "[t]hat leaves one allegation: that the piers face each other," and again found that fact by itself did not impugn Siskind's independence. The Court's failure to consider Plaintiff's allegations holistically was reversible error. *See Sandys*, 152 A.3d at 128 (independence allegations must be "considered in full context"); *Ibew Local Union 481 Defined Contribution Plan & Tr. v. Winborne*, 301 A.3d 596, 618 (Del. Ch. 2023) ("[T]he trial court must consider all the particularized facts pled by the plaintiffs in their totality and not in isolation from each other.…"); *accord Musk*, 2024 Del. Ch. LEXIS 27, at *95 ("Sources of influence and authority must be evaluated holistically, because they can be additive.").

Second, the Court failed to draw reasonable inferences in Plaintiff's favor. For example, the Court found no pled facts from which it could "infer that the trademark sale was anything other than an arms-length transaction." But the sale must be placed in context. In 1998, while Siskind and Robert both served on the board of Siskind's company, Siskind sold a home to Robert, where the two have remained neighbors ever since. Then, just one year later, Siskind purchased the trademarks—not from Skechers, but from the Greenberg Family Trust, evidencing the transaction's

personal nature. And just after that, Robert appointed Siskind to the Skechers Board, where the two served on the compensation committees of each other's companies—a fact the CtW Letter raised as a serious concern as to Siskind's independence.

A reasonable inference from the timing and personal nature of these transactions is that—unlike normal counterparties—Siskind and Robert have a mutually beneficial relationship. This relationship gives reason to doubt Siskind's independence. *See Sandys*, 152 A.3d at 133 ("[P]recisely because of the importance of a mutually beneficial ongoing business relationship, it is reasonable to expect that sort of relationship might have a material effect on the parties' ability to act adversely toward each other. Causing a lawsuit to be brought against another person is no small matter and is the sort of thing that might plausibly endanger a relationship."); *see also Sanchez*, 124 A.3d at 1023 (finding director lacked independence after decades of friendship and "economic relations" supported an inference that the controller "trusts, cares for, and respects" the director).

Similarly, the Court found that Siskind and Robert's cross-service on the compensation committees of each other's companies "does not represent a benefit to either man." But Siskind is not just a member—he is the Chair, and has been since its inception over two decades ago. *See Musk*, 2024 Del. Ch. LEXIS 27, at *108 (facts evidencing director's lack of independence were "too weighty" given the

"critical role he played as chair of the Compensation Committee"); *accord Ont. Provincial Council of Carpenters' Pension Tr. Fund v. Walton*, 2023 Del. Ch. LEXIS 92, at *137-39 (Del. Ch. Apr. 26, 2023) (chair of a committee is "more deeply involved" in the issues facing that committee).

And Plaintiff pled facts from which it is reasonable to infer that Siskind's service as Chair ***has*** been a benefit to Robert. For one, it has allowed Robert to continue misusing Skechers' Aircraft despite the Committee's determination that restricting personal use was necessary. Further, this was not the first time Siskind had used his position to benefit Robert—Siskind approved Robert's equity awards that were the subject of the Equity Grant Litigation, and were ***canceled*** as part of the settlement. It is also telling that, as part of that settlement, the Committee was forced to engage an "independent" compensation consultant, indicating an extant lack of independence on the Committee. *See Walton*, 2023 Del. Ch. LEXIS 92, at *133-34 (when a Company agrees to "implement extensive procedures and controls" as part of a settlement, even despite denying liability, "it is reasonable to infer that before the [settlement], similar procedures were not in place, because otherwise the changes could not have been part of the consideration for the settlement…."). Here, it is reasonable to infer that Siskind's service as Committee Chair has benefitted Robert, and their cross-service on the compensation committees of each other's companies

at least indicates that the two were comfortable with having the other in charge of their compensation, again evidencing a close relationship. *See In re Match Grp., Inc. Derivative Litig.*, 2024 Del. LEXIS 115, at *59 (Del. Ch. Apr. 4, 2024) ("Longstanding business affiliations, particularly those based on mutual respect, are of the sort that can undermine a director's independence.").

Finally, the Court failed to draw inferences in Plaintiff's favor when it asserted, "[i]t is simply not the case that neighbors are unwilling to sue each other: this Court's equitable docket is rife with such suits." Siskind and Robert were not just neighbors. Siskind had ***sold*** Robert the house and they have been neighbors ever since (with watercraft piers facing each other). That Siskind essentially selected Robert as his neighbor is a unique fact that "signal[s] an extremely close, personal bond between [them], and between their families." *Sandys*, 152 A.3d at 130. The Court's likening Siskind and Robert's relationship to the acrimonious relationship between typical neighbors (who have not self-selected to live next to each other) involved in a property dispute elides this and the many other facts regarding their longstanding mutually-beneficial personal and business relationship, ***including that Robert appointed and retained Siskind on the Board of the Company he controlled, and Siskind sets Robert's compensation***. *See Musk*, 2024 Del. Ch.

LEXIS 27, at *107 (finding director lacked independence from controller in part due to "decades-long relationship").

When viewed holistically and with reasonable inferences drawn in Plaintiff's favor, the conclusion is inescapable that there is reason to doubt Siskind's independence from Robert in litigation regarding Robert's compensation. *See Musk*, 2024 Del. Ch. LEXIS 27, at *107 (finding "combination of business and personal ties make it undeniable that [director] lacked independence from [controller]"). The Court's contrary conclusion should be reversed.

II. The Court Erred by Finding That Neither Siskind, Erlich, nor Blair Faced a Substantial Likelihood of Liability on Plaintiff's *Caremark* Claim

A. Question Presented

Whether the Court erred in finding that none of Siskind, Erlich, or Blair failed part two of the *Zuckerberg* test because they face a substantial likelihood of *Caremark* liability?[86]

B. Scope of Review

"[R]eview of decisions…applying Rule 23.1 is *de novo* and plenary."[87]

C. Merits

Caremark claims provide liability against directors that fail to act in the face of a known duty to act; such directors demonstrate a conscious disregard for their responsibilities, breaching their fiduciary duty of loyalty and failing to discharge that obligation in good faith. *Lebanon Cty. Emps.' Ret. Fund v. Collis*, 2023 Del. LEXIS 422, at *5 (Dec. 18, 2023); *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006); *Caremark*, 698 A.3d at 968.[88] Claims based on a failure of oversight where a

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[86] Op. at 15-24. Plaintiff preserved this issue at A000097; A001369-83; A003056-76.

[87] *Zuckerberg*, 262 A.3d at 1047.

[88] *See also Walton*, 2023 Del. Ch. LEXIS 92, at *88-89 ("Sophisticated and well-advised individuals do not formally document bad faith decisions, so rarely will there be direct evidence.…Instead,…the court looks at a series of fiduciary inactions

monitoring system is already in place, as here, are "prong two" *Caremark* claims. *Collis*, 2023 Del. LEXIS 422, at *5; A001370-71.

Here, Plaintiff pled particularized facts showing that the Board "knew of evidence of corporate misconduct—the proverbial red flag—yet acted in bad faith by consciously disregarding its duty to address that misconduct." *In re Boeing Co. Derivative Litig.*, 2021 Del. Ch. LEXIS 197, at *89 (Del. Ch. Sep. 7, 2021) (finding demand futility adequately pled, where red flags established a substantial likelihood of liability under *Caremark*).[89] The Court's contrary conclusion is wrong.

The Court began its analysis by correctly surmising the following:

> Here, it is undisputed that the Committee was aware of the Management Defendants' personal airplane use as of November 2019. That month, the Committee directed management to develop a policy on personal airplane use for the Committee's review. The Committee's action supports the inference that it viewed either the degree of use or absence of meaningful guardrails as a matter worth addressing. Management never presented that policy. The Committee did not receive the policy and did not follow up for more than two and a half years.

Op. at 19-20.

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and actions, made over time, to determine whether they support an inference that the corporate fiduciaries were operating in bad faith.").

[89] *See also In re McDonald's Corp. S'holder Derivative Litig.*, 291 A.3d 652, 677 (Del. Ch. 2023) ("To plead a Red-Flags Claim, a plaintiff must plead particularized facts that the board knew of evidence of corporate misconduct—the proverbial red flag—yet acted in bad faith by consciously disregarding its duty to address that misconduct.").

But the Court made a series of mistakes in concluding that these facts did not amount to a substantial likelihood of *Caremark* liability for Siskind, Erlich, and Blair.

First, the Court erroneously found there was nothing "inherently wrong" with the Committee's November 2019 decision to have conflicted management prepare an Aircraft policy the Committee knew was needed to prevent harm to Skechers. Op. at 20 & n.72. The Court's analysis improperly compartmentalized this inquiry,[90] ignoring allegations that the Committee had ***previously*** sought "recommendations" from Vandemore for "limits" on personal use of the Aircraft in April 2018 and was ignored. A000088-89.[91] The Committee's request, 19 months before the Committee asked for a formal policy, similarly "supports the inference that it viewed either the degree of use or absence of meaningful guardrails as a matter worth addressing" (Op. at 19-20), yet was overlooked by the Court. [redacted] A000069. [redacted]

[90] The Court's sole reference to a "holistic" analysis appears only in its consideration of Siskind's independence. Op. at 37. Its *Caremark* analysis silos and separates allegations from one another, considering them "alone" (*see*, *e.g.*, Op. at 22, considering facts "alone" three times).

[91] *See also* Op. at 7 (compartmentalizing elsewhere: "It does not appear the CFO provided any recommendations").

[redacted] A000069-70.

The Court should have—but did not—considered the Committee's November 2019 delegation against this backdrop. *Winborne*, 301 A.3d at 623 (holistic analysis: "[e]verything goes into that mulligan stew…and if the pleading-stage flavor is foul, the complaint survives dismissal"). [redacted] it strains credulity to infer, as the Court did, that the Committee's decision to task conflicted management with crafting a policy limiting their bosses' personal use of the Aircraft was made in good faith because the Committee purportedly "retained oversight over the process and the [nonexistent] policy's contents." Op. at 20; *see Winborne*, 301 A.3d at 619-20, 623 (bad faith is established by, *inter alia*, demonstrating that a "a purpose other than pursuing the best interests of the corporation and its stockholders tainted [the directors'] actions").

Second, the Court erred in dismissing Plaintiff's allegation that the Committee failed to take any action after determining an Aircraft policy was necessary because the Committee was purportedly "acting in other ways" by assigning FW Cook to conduct a tangential analysis of Airplane perquisites, and suggesting that Plaintiff

should view this as a "prudent decision" by the Committee. Op. at 21 & n.76.[92] But the Committee retained FW Cook solely to comply with the Equity Grant Litigation settlement, which required it to engage a consultant concerning "new equity awards" to the Plane Defendants, [redacted]

Compare Op. at 8, *with* A000045; A000088.

Even if the Committee had voluntarily retained FW Cook—which it did not—this does not insulate Siskind, Erlich, and Blair from a substantial likelihood of *Caremark* liability. *See, e.g.*, *Hughes v. Xiaoming Hu*, 2020 Del. Ch. LEXIS 162, at *40-41 (Del. Ch. Apr. 27, 2020) ("mere existence of an audit committee and [] hiring of an auditor does not provide universal protection against a *Caremark* claim"). Nominal hires of external advisors mean nothing absent meaningful action to address the underlying harm. *Walton*, 2023 Del. Ch. LEXIS 92, at *97 (sustaining *Caremark* claim: "as the reality of noncompliance became clearer…Walmart's directors and officers did nothing other than talk with lawyers.").

[92] The Court found the Committee was acting "in other ways," but no "other ways" appear in the record and the only "other way" discussed in the Opinion concerns FW Cook's compulsory involvement. *See* Op. at 20-22.

Indeed, FW Cook's analysis ***confirmed*** the Committee's determination that the Plane Defendants' personal use of the Aircraft was problematic. In July 2021, FW Cook advised the Committee [redacted] A001114. Three months later, FW Cook advised the Committee that [redacted] Skechers' "[t]ax gross-ups on aircraft [redacted] are a most problematic pay practice"; [redacted] A001128-30.[93] FW Cook even recommended that the Committee "[e]liminate tax gross-ups on perquisites with no corresponding increase to other compensation amounts," [redacted]. A001130.

Yet, the Committee took no action in response to FW Cook's analysis.[94] Curiously, the Opinion recognizes that "[a]fter FW Cook presented its report, nine

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93 [redacted] *See* Op. at 29 ("FW Cook identified ***only*** the tax gross-up payments as potentially problematic.").

94 The authorities relied upon below are inapposite, involving affirmative and demonstrable action to address red flags. In *Pettry v. Smith*, FedEx's board took

months passed without Committee action, and no formal policy was generated." Op. at 22. Despite the Committee's ostrich-like behavior, the Court erred by concluding that FW Cook's mere engagement—solely in connection with an unrelated compensation settlement, more than two-and-a-half years after the Committee first requested recommendations for personal use limits, and nearly a year after the Committee requested a formal Aircraft policy—"reflect[ed] attention to the issue, not conscious disregard." Op. at 22. This is an improper inference. Where, as here, reports and recommendations by external advisors are unaccompanied by meaningful action, they are reasonably interpreted as additional "red flags," and not exculpatory "attention to the issue." *Compare* Op. at 21-22, *with Teamsters Local 443 Health Servs. & Ins. Plan v. Chou*, 2020 Del. Ch. LEXIS 274, at *55 (Del. Ch.

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remedial actions to curb the illegal and unwitting shipment of tobacco products, including banning it and implementing training programs and measures to detect illegal shipments. *See* 2021 Del. Ch. LEXIS 134, at *22 (Del. Ch. June 28, 2021). Similarly, in *In re Qualcomm Inc.*, where the board was faced with ensuring compliance with the Foreign Corrupt Practices Act, "[m]any of the documents the Complaint cites as red flags ***also include planned remedial actions***." *See* 2017 Del. Ch. LEXIS 106, at *8 (Del. Ch. June 16, 2017). Among other things, *Qualcomm*'s documents included "recommendations to address the issue" and described "corrective actions that the company will take," including, *inter alia*, meetings to explain compliance practices, and an expense report review process. *Id.* at *9-10. No remedial measures are present here.

Aug. 24, 2020) ("pertinent to 'prong two' it is reasonably conceivable that the Davis Polk report, at a minimum, served as a red flag…."); *id.* at 57 (same).[95]

The Court further erred by finding that, by failing to regulate the personal use of the Aircraft, the "Company was not violating an internal policy or any regulations, which can support an inference of bad faith." Op. at 23.[96] But Plaintiff alleges, *inter alia*, that Defendants owed duties to ensure that all transactions with the Greenberg family were fair to minority stockholders and that Company interests were placed above personal interests. A000057-59. Skechers' Corporate Governance Guidelines and Code of Ethics similarly required directors to "act in what they reasonably believe to be in the best interests of [Skechers] and its shareholders[,]" and "to assure prompt attention to employee compliance concerns[,]" and "make full, fair, accurate,

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[95] The Court further tipped the scales in Defendants' favor, writing "I assume for purpose of this analysis that Plaintiff has pled the Committee intended to take no further action and decided to not implement a formal policy." Op. at 22. This assumption necessarily gives Defendants the benefit of the doubt, as the Court would view a conscious decision to let the matter go to be protected by the business judgment rule. *See* Op. at 18, n.66. Viewed—as it must be—in a light most favorable to Plaintiff, the reasonable assumption is a lack of meaningful Committee oversight to ensure adoption of the policy they deemed necessary.

[96] The Court's deference to Defendants that no "policy" was broken is entirely circular, given that the Plaintiff's allegations revolve, in part, around the failure to create an Aircraft policy. In any event, by reaching this conclusion, the Court all but ignored Skechers' Corporate Governance Guidelines, Code of Ethics, and the employment agreements' "reasonable" restrictions on personal use.

timely, and understandable disclosures." A000059-61. While the Court grudgingly acknowledges that "[a]t most, there was a breach of the employment agreements' reasonable use requirement," it refused to draw that inference in Plaintiff's favor. *See* Op. at 23 n.82. Doing so, the Court ignored Plaintiff's references to the employment agreements' "reasonable use" requirement (*compare id.*, *with* A000065; A000066; A000071; A000101), and the Committee members' collective failure to place safeguards on the excessive personal use of the Aircraft in violation of those agreements, even after determining that such safeguards were necessary to prevent further harm to Skechers (*see* A000097). Indeed, Plaintiff described the breach of the employment agreements as a "central focus" of his claims. A001380-81; A000100-101.

Finally, the Court's finding that the risk was "contained" rather than a "widespread operational deficiency" misapprehends Defendants' duty of loyalty. Op. at 22-23. Breaches of the fiduciary duty of loyalty under *Caremark* do not require a widespread operational deficiency to be actionable. *McDonald's*, 291 A.3d at 677. "If an officer or director learns of evidence indicating that the corporation is suffering or will suffer harm, then the officer or director has an obligation to respond." *Id*. at 679-80. Similarly, the Court erred by dismissing the Plane Defendants' excessive personal use of the Aircraft as insignificant. Op. at 23-24 (use

was of "relatively minimal magnitude"). Plaintiff pled specific facts establishing that personal Aircraft use at Skechers was excessive and grossly out of proportion with other companies. A000045; A000047-50; *see also* A000074-83 ([redacted]).[97] But the Court ignored this in favor of Defendants' proposition that Aircraft perquisites should be compared against Skechers' gross profit and operating expenses, [redacted]. *Compare* Op. at 23-24, *with* A001377-79; A001381-82. Plaintiff respectfully submits that compensation issues were a material issue for Committee members, and were further material on a Company-wide level, given that Skechers had just settled the Equity Grant Litigation, which also implicated failed oversight of compensation-related issues. *See also* SEC Order at 3 (fining Skechers $1.25 million for failure to disclose $155,000-worth of related-party compensation).

[97] It further appears that the Court did not consider Plaintiff's answering brief in opposition to the Plane Defendants' motion to dismiss, which further compared Skechers' use to other companies, and further detailed the extent of their abuse. *See* A002877-86.

III. The Court Erred by Finding That Neither Siskind nor Erlich Faced a Substantial Likelihood of Liability on Plaintiff's Disclosure Claim

A. Question Presented

Whether the Court erred by finding that neither Siskind nor Erlich failed part two of the *Zuckerberg* test because they face a substantial likelihood of liability on Plaintiff's disclosure claim?[98]

B. Scope of Review

"[R]eview of decisions…applying Rule 23.1 is *de novo* and plenary."[99]

C. Merits

"Whenever directors communicate publicly or directly with shareholders about the corporation's affairs, with or without a request for shareholder action, directors have a fiduciary duty to shareholders to exercise due care, good faith and loyalty." *Malone*, 722 A.2d at 10. Directors who knowingly issue false and misleading statements "may be considered to be interested for purposes of demand." *In re infoUSA, Inc. S'holders Litig.*, 953 A.2d 963, 991 (Del. Ch. 2007).

Plaintiff contends that demand is futile with respect to Siskind and Erlich because they face a substantial likelihood of liability for making five false and misleading statements or omissions in Skechers' 2021 Proxy Statement, which was

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98 Op. at 31-36. Plaintiff preserved this issue at A001383-90; A000099-100.

99 *Zuckerberg*, 262 A.3d at 1047.

issued "by order" of the Plane Defendants, Siskind, and Erlich as members of the Board and sought the re-election of Robert and Erlich.

The 2021 Proxy (i) falsely asserted that the Aircraft were "designated primarily for business travel," when they were in fact designated for personal travel (A000084); (ii) falsely represented that, because the Aircraft were primarily used for business purposes, Skechers was not including fixed costs when determining executive perquisites (*id.*); (iii) failed to disclose the sheer volume of personal use related to total use of the Aircraft (A000085); (iv) misleadingly failed to disclose to that Skechers had significant and material disallowed tax deductions, in addition to being unable to take advantage of the bonus depreciation available under §280F of the Internal Revenue Code, due to Plane Defendants' personal use of the Aircraft exceeding 50% of total flight time (A000074); and (v) misleadingly disclosed that "[d]uring 2020, Robert Greenberg, Michael Greenberg and David Weinberg used our aircraft for personal travel" [redacted] (A000084). The Court's conclusion that these statements were either not false or misleading or not material to stockholders is wrong. Op. at 33-36.

With respect to the first two statements/omissions, the Court held they were not false or misleading because "Plaintiff has not shown or argued each airplane's

designation is tied to the airplane's use in any given year." But Plaintiff *did* argue that use and designation were tied together. A001385; A002891. The minute the "most part" of the Aircraft's use became personal, the Aircraft became "designated primarily" for personal use, not business use. That, in turn, rendered the 2021 Proxy misleading. Moreover, for purposes of the fixed cost disclosure, commentators have noted that, in order to not be misleading, fixed costs should be included in aircraft disclosures when personal use exceeds only 20% to 30%—certainly that is the case when the personal usage exceeds 50%. A001389-90; A002859-63.

With respect to the latter three statements/omissions, the Court found they were not material to stockholders. Op. at 34-36. "Information is material if it would have assumed actual significance in the deliberations of a person deciding whether to buy, sell, vote, or tender stock." *New Enter. Assocs. 14, L.P. v. Rich*, 292 A.3d 112, 151 (Del. Ch. 2023). To show information is material, there is no requirement to show a "substantial likelihood that the information would have caused the reasonable investor to act differently, such as by changing his vote or opting not to buy, sell, or tender stock. Rather, the question is whether there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." *Id.*

Here, the Court erred in finding that the "relative amount" of the Plane Defendants' personal use of the Aircraft (*i.e.*, more than 50% of total flight time), the disallowed tax deductions as a result, [redacted] were not "material in relation to the director election." Op. at 36. The SEC has explicitly recognized the materiality of compensation and perquisite information to investors of full and accurate information, stating "[i]n light of the importance of the subject to many investors, all participants should approach the subject of perquisites and personal benefits thoughtfully." A001388. If, as the Court held, the materiality of compensation and perquisites were valued against the Company's income, all executive compensation disclosures would be immaterial because they would represent such a small percentage of total net income. This is contrary to the purpose and intent of the SEC disclosure requirements. *See id.* (citing 17 C.F.R. §229.402's requirement that perquisites valued at least $10,000 in any year be disclosed and that any perquisite exceeding $25,000 or 10% of total perquisites be identified and quantified).[100]

[100] The Court disregarded Plaintiff's citation to these authorities (*see* A001388), on the misapprehended grounds that Plaintiff was proposing a "per se" materiality rule with respect to compensation. Op. at 35 n.114. To the contrary, as Plaintiff explained, this contention was made in opposition to Defendants' contention that the plane compensation, compared to Skechers' billions in income, was *de minimis*—an argument that would cut against disclosing any compensation.

Moreover, the SEC has recently contradicted the Court's conclusion in another matter involving Skechers' proxy statement disclosures regarding compensation. On March 7, 2024, the SEC instituted cease-and-desist proceedings against Skechers with respect to related party compensation in amounts as little as $155,000, which were not disclosed in Skechers' proxy. SEC Order at 3. This led to a $1.25 million fine. If such compensation transactions are material and relevant to the SEC, then surely information necessary to fully contextualize the Plane Defendants' Aircraft perquisites totaling $1,240,888 in 2018, $1,769,548 in 2019, and $1,492,224 in 2020[101] would be material to stockholders, too.

Moreover, "materiality" means more than just dollars and cents. The Court seems to have adopted a position that issues related to compensation and the use of the Aircraft were not material with respect to Robert's and Erlich's re-election, but only spoke to "scienter." But the whole point of why this compensation information would be material to stockholders is related to: (a) Erlich's subservience to Robert as a controlling stockholder; (b) Robert's misuse of corporate perquisites; and (c) Erlich's position on the Committee. A stockholder voting on whether to retain either of these directors would clearly view as material their past conduct related to the

[101] All numbers given as revised by the 2023 Proxy.

Plane Defendants' compensation and that the utter lack of limits on flight hours allowed the Plane Defendants to abuse their personal access to the Aircraft.

[redacted] A001133. FW Cook also advised the Committee [redacted] (A001114); [redacted] in October 2021 that Aircraft [redacted] tax gross-ups were a "most problematic pay practice," [redacted] A001129-30. [redacted] A001128. These conclusions belie that such issues were not material to stockholders. The Court's materiality determination is wrong and contradicts the Company's own analysis of what was material to stockholders.

CONCLUSION

It is undisputed that three of the Demand Board's seven members (Robert, Michael, and Weinberg) cannot impartially consider demand. Thus, Plaintiff need only show that demand is futile as to one of Siskind, Erlich, or Blair for the Demand Board to lack a disinterested majority. Plaintiff has done so. The Court's Opinion should be reversed.

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PUBLIC REDACTED VERSION
DATED: MAY 13, 2024

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2024, I caused a true and correct copy of Appellant's Public Redacted Version of the Opening Brief, to be served on the following counsel of record via File & Serve*Xpress*:

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