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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.,	
Plaintiff-Appellant,	
v.	No. 76, 2024
ROBERT GREENBERG, MICHAEL GREENBERG, DAVID WEINBERG, KATHERINE BLAIR, MORTON ERLICH, RICHARD SISKIND, JEFFREY GREENBERG, GEYER KOSINSKI, and RICHARD RAPPAPORT,	Case below: Court of Chancery, C.A. No. 2022-0633-MTZ
Defendants-Appellees,	
-and-	
SKECHERS U.S.A., INC.,	
Nominal Defendant-Appellee.	

APPELLEES' ANSWERING BRIEF

OF COUNSEL:

Brad D. Brian
John M. Gildersleeve
Abraham B. Dyk
MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue, 50th Floor
Los Angeles, California 90071
(213) 683-9100

A. Thompson Bayliss (#4379)
E. Wade Houston (#6289)
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, Delaware 19807
(302) 778-1000

Attorneys for Defendants-Appellees Katherine Blair, Morton Erlich, Richard Siskind, Jeffrey Greenberg, Geyer Kosinski, and Richard Rappaport

OF COUNSEL:

Abby F. Rudzin
O'MELVENY & MYERS LLP
7 Times Square
New York, New York 10036
(212) 326-2000

Kenneth J. Nachbar (#2067)
Susan W. Waesco (#4476)
MORRIS, NICHOLS, ARSHT & TUNNELL LLP
1201 North Market Street
Wilmington, Delaware 19801
(302) 658-9200

Attorneys for Defendants-Appellees Robert Greenberg, Michael Greenberg, and David Weinberg

OF COUNSEL:

Kenneth A. O'Brien, Jr.
SHEPPARD MULLIN RICHTER & HAMPTON LLP
333 South Hope Street, 43rd Floor
Los Angeles, California 90071
(213) 617-5402

Matthew F. Davis (#4696)
Tyler J. Leavengood (#5506)
POTTER ANDERSON & CORROON LLP
Hercules Plaza
1313 North Market Street, 6th Floor
Wilmington, Delaware 19801
(302) 984-6000

Attorneys for Nominal Defendant-Appellee Skechers U.S.A., Inc.

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NATURE OF PROCEEDINGS

This stockholder derivative action was correctly dismissed for failure to plead demand futility. Plaintiff alleged that the board of Skechers U.S.A., Inc. breached its fiduciary duties by failing to oversee one small portion of the compensation paid to three executives: the perquisite of reasonable personal use of company airplanes. Plaintiff did not claim that the perquisite was improper in any way. He alleged only that the executives took advantage of it, using it more than he personally deemed reasonable, and that the board's Compensation Committee lacked vigor in curtailing its use.

The Court of Chancery correctly dismissed the Complaint under Rule 23.1. Plaintiff criticized the Committee's effectiveness on one narrow issue, but alleged no violation of law or regulation, nor any widespread operational failing. Plaintiff pleaded no particularized factual basis for inferring the bad faith needed for a substantial likelihood of liability on his *Caremark* claim. On the contrary, the Committee discussed use of the airplane perquisite at sixteen meetings in the relevant period of 2018 through 2021. The Committee reviewed data showing how much the executives were using the perquisite; directed management to recommend limits and to develop for the Committee's review a formal policy covering personal use; and engaged a consulting firm to analyze all executive compensation at Skechers, including the perquisite, and recommend changes.

Plaintiff also failed to show a substantial likelihood of liability on his proxy disclosure claim. The 2021 proxy statement challenged by Plaintiff described the airplane perquisite and listed its dollar value as part of the executives' compensation. The Court of Chancery correctly held that no particularized allegations showed any misstatement or omission material to the stockholder vote. Nor did Plaintiff plead particularized facts showing that any director acted disloyally with respect to these disclosures.

Finally, the Court of Chancery correctly rejected Plaintiff's effort to impugn the independence of Skechers outside director Richard Siskind. Plaintiff sought to conjure between Siskind and Skechers' CEO the sort of deep and meaningful friendship that could excuse demand. But Plaintiff did not even allege that the two were "friends" or ever socialized together—and even that little would be far from enough. Nor did Plaintiff plead anything bias-producing in their limited business dealings more than twenty years before the Complaint was filed. Plaintiff failed to overcome the presumption of independence.

The dismissal under Rule 23.1 should be affirmed.

SUMMARY OF ARGUMENT

1. *Denied*. The Court of Chancery correctly held that Plaintiff failed to plead demand futility with the particularity required by Rule 23.1. The parties agree on the identity of the relevant directors for purposes of assessing demand futility.

2. *Denied*. Plaintiff failed to plead particularized facts showing that Richard Siskind, one of Skechers' outside directors, lacked independence from Skechers' CEO Robert Greenberg. Viewed holistically, Plaintiff's allegations failed to show that Siskind was so beholden to Greenberg that Siskind's discretion would be sterilized. Plaintiff did not allege that they were friends or socialized together and pleaded nothing of a bias-producing nature in their limited business dealings more than two decades ago.

3. *Denied*. Plaintiff failed to plead particularized facts showing that any of the outside directors on the Compensation Committee faced a substantial likelihood of liability on Plaintiff's prong-two *Caremark* claim. Plaintiff failed to show that the Committee consciously disregarded red flags of wrongdoing. Plaintiff failed to allege that an undefined increment of alleged overuse of the airplane perquisite was a red flag, let alone that the Committee consciously disregarded the alleged overuse in bad faith.

4. *Denied*. Plaintiff failed to plead particularized facts showing that outside directors Richard Siskind or Morton Erlich faced a substantial likelihood of liability

on Plaintiff's disclosure claim based on Skechers' 2021 proxy statement, which disclosed the airplane perquisite, its dollar value, and how that value was calculated. Plaintiff failed to allege any misstatement or omission material to the stockholder action being sought, much less that Siskind or Erlich acted disloyally with respect to any disclosure.

5. *Denied*. Plaintiff failed to establish that demand was futile for at least half of Skechers' directors. The dismissal under Rule 23.1 therefore should be affirmed.

STATEMENT OF FACTS

The facts below are drawn from the Complaint's allegations, which are assumed true only for purposes of this appeal, and from its incorporated documents, including those produced to Plaintiff under 8 *Del. C.* § 220 and incorporated contractually into the Complaint. A43, A86 (¶ 132); A1147 (¶ 8).

A. Skechers Compensates Its Executives, in Part, by Allowing Reasonable Personal Use of Company Airplanes

Skechers is a Delaware corporation that designs and markets footwear and apparel. A53 (¶ 43). Robert Greenberg is its CEO and founder, Michael Greenberg is its President, David Weinberg is its Chief Operating Officer, and all three are also directors. A53-54 (¶¶ 44-46). They are referred to in this brief as the "Management Defendants."

The board's Compensation Committee (the "Committee") determines the Management Defendants' compensation. The Committee is tasked to "[r]eview and approve the annual compensation of the Chief Executive Officer ('CEO') and other executive officers" and to "[d]irect preparation of and approve the annual Committee report on executive compensation for inclusion in the Company's annual proxy statement," among other things. A1272; *see* A1068.

The Committee consists entirely of outside directors. Defendants Erlich and Siskind, and non-defendant Thomas Walsh, formed the Committee that approved 2018 and 2019 compensation. A813, A853. Defendant Blair joined the Committee in 2019 and she, along with Erlich, Siskind, and Walsh, approved 2020 and 2021 compensation. A54-56 (¶¶ 47-49); A1017, A1028, A1066. After Walsh resigned in 2021, the Committee comprised Blair, Erlich, and Siskind. A56 (¶ 53), A88 (¶ 140).

The Management Defendants' compensation has included various perquisites in addition to base and incentive pay and equity awards. A1073, A1084. As is typical among publicly traded companies with corporate aircraft, one such perquisite is the ability to use Skechers' two airplanes for personal travel when the airplanes are not needed for business travel. A48-49 (¶¶ 21-22); A828. Personal use of the airplanes must be "reasonable." A65 (¶ 78), A101 (¶ 198); Appellant's Opening Brief ("OB") 2. The Management Defendants also receive a tax gross-up payment reimbursing them for income taxes incurred due to the perquisite's value being treated as income. A65 (¶ 79).

Skechers' annual proxy statements disclose as compensation to each of the Management Defendants the specific dollar value of their actual use of the airplane perquisite, including the tax gross-up payment. *E.g.*, A1087-88. For all three Management Defendants combined, for all four years from 2018 to 2021 combined, the dollar value of the perquisite was about $5.3 million. A890-91, A954-55, A1088-89, A1248-49; *see* Op. 5 (chart). This total—for all three individuals across all four years—was later retroactively adjusted upward by about $0.5 million (including $129,000 for 2020 and 2021 combined), as set forth in Skechers' 2023 proxy statement. A3196.

The dollar value of the airplane perquisite (including the tax gross-up) was under 5% of each Management Defendant's total compensation in each year from 2018 to 2021, except that in one year it was about 10% of one individual's total compensation. Op. 5; A3196. On average—for all three individuals across all four years—the perquisite was about 2.8% of their total compensation.

In 2020, when the COVID-19 pandemic brought business travel to a halt, the percentage of personal use exceeded that of business use for both airplanes (56% and 64%). A72-73 (¶¶ 108-114). In 2021, as the pandemic receded, personal use exceeded business use for only one of the two airplanes (44% and 58%). *Id.* Across both pandemic years and both airplanes, 53% of flight hours were for personal use. A73 (¶ 115). Still, the combined cost of the perquisite for all three Management Defendants decreased from 2019 to 2020, and again from 2020 to 2021. Op. 5; A3196.

B. 2018-2019: The Compensation Committee Monitors Airplane Use and Seeks Recommended Limits and a Policy for Review

At eleven meetings in 2018 and 2019, the Compensation Committee reviewed or discussed data showing how much the Management Defendants were using the airplane perquisite. In addition to monitoring use of the perquisite, the Committee pressed management to report data in a more timely manner, to recommend limits, and to develop an airplane use policy for the Committee's review.

At its regular meetings, the Committee requested and reviewed data showing the Management Defendants' use of the perquisite, including for the purpose of approving disclosure of its value as compensation in Skechers' proxy statements. A814, A819, A821-22, A858-60; *see* A68-70 (¶¶ 89-98). The Committee also discussed with management the process and methodologies used to calculate compensation attributable to the perquisite and asked management to "follow up" about "related backup documentation." A819, A822, A854.

Based on its review of data, the Committee directed Skechers' management to recommend limits on use of the airplane perquisite and then to develop a formal policy for the Committee's review. In April 2018, the Committee asked Skechers' CFO "to provide recommendations for limits to be placed on . . . personal use of the Company's aircraft." A851; *see* A45 (¶ 8), A68 (¶¶ 90-91). In November 2019, the Committee "requested that management develop for review a policy covering personal use of the Company's aircraft." A920-21; A46 (¶¶ 13-14), A70-71 (¶¶ 99-100), A90 (¶ 145).

The Committee also repeatedly directed Skechers' management to provide the Committee with data about perquisite use in a timelier way. In April 2019, the Committee told management to provide data "on a timelier basis in the future."

A909. In both May and July 2019, the Committee requested further "updates" on "revised reporting on personal use of aircraft." A911, A915. In October 2019, the Committee again requested an update, and management "agreed to provide such information to the committee in a timely manner." A917-18.

C. <u>2020-2021: The Committee Hires an Executive Compensation Consulting Firm and Analyzes the Airplane Perquisite with It</u>

In May 2020, Skechers settled a stockholder derivative action challenging equity awards to the Management Defendants. *See Police & Fire Ret. Sys. of the City of Detroit v. Greenberg*, C.A. No. 2019-0578-MTZ (Del. Ch.) ("Equity Grant Action"). That case settled before a ruling on the defendants' Rule 23.1 motion. The settlement called for rescinding certain equity awards and also required the Committee to "engage a compensation consultant and obtain its recommendations on an annual basis concerning new equity awards." A988-89. The Court approved the settlement in August 2020. A1008.

On September 11, 2020, the Committee retained compensation consultant Frederick W. Cook & Co. A1017. Under the Committee's direction and at its request, FW Cook analyzed all components of Skechers' executive compensation program—not just equity awards, but also salary, incentive compensation, and perquisites. A1028.

In February 2021, after having joined the Committee's December 2020 meeting, FW Cook presented to the Committee a lengthy analysis of all executive compensation at Skechers, including perquisites. A1020, A1028; *see* A1034-35 ("2021 Officer Compensation Considerations").

The Committee continued working with FW Cook throughout 2021. In July 2021, FW Cook presented an analysis of Institutional Shareholder Services' 2021 proxy report. A1109. FW Cook told the Committee that ISS had described Skechers' "[a]ircraft, auto, and financial planning perquisites" as "significantly above median" with "[e]xcessive tax gross-ups on aircraft and auto perquisites." A1114. FW Cook advised that criticism would "continue without changes." *Id.* But it also advised that "the absolute quantum of CEO pay at Skechers (including the cancelled award [from the Equity Grant Action]) was 1.66x the median, which is just below the level of 'Cautionary Low Concern.'" A1117.

At that July 2021 meeting, the Committee "requested FW Cook to provide a review and analysis of potential changes to various policies regarding the Company's officers' compensation." A1109.

In October 2021, as requested, FW Cook presented to the Committee on "potential areas for change of the Company's executive compensation policies and procedures in 2022." A1125. One of the "Potential Areas for Change" suggested by FW Cook was to "[e]liminate tax gross-ups on perquisites with no corresponding increase to other compensation amounts." A1127, A1129.

While working with FW Cook in 2020 and 2021, the Committee continued to request and review data showing how much the Management Defendants were using the airplane perquisite. A1017, A1020, A1029, A1109, A1125. The Committee reviewed detailed charts itemizing use of the perquisite. A1026 (December 2020: "Aircraft perquisite detail (2017-2020)"), A1121 (July 2021: "Perquisite Detail"), A1139 (October 2021: "Aircraft Perquisite Detail").

D. The Court of Chancery Dismisses This Action Under Rule 23.1

Plaintiff made a books-and-records demand in September 2021—long after the Committee began working with FW Cook—and received materials. A67 (¶ 85). Plaintiff then filed the Complaint in July 2022. It asserted derivative claims against nine individuals: (i) the Management Defendants; (ii) the outside directors on the Compensation Committee ("Committee Defendants"); and (iii) former directors Jeffrey Greenberg, Geyer Kosinski, and Richard Rappaport. A tenth defendant, Walsh, was voluntarily dismissed in August 2022.

Count I asserted that all Defendants breached their fiduciary duties with respect to the airplane perquisite. A97-98 (¶¶ 176-181). Count II asserted that all Defendants engaged in waste. A98-99 (¶¶ 182-188). Count III asserted that the Management Defendants, and Erlich, Kosinski, and Siskind as members of the Audit Committee, breached a duty of candor with respect to the 2021 proxy statement. A99-100 (¶¶ 189-196). Count IV asserted that the Management Defendants breached their employment agreements by making "unreasonable" personal use of the airplanes. A100-01 (¶¶ 197-201).

All Defendants moved to dismiss the Complaint under Rule 23.1 for failure to plead demand futility, and all Defendants other than Skechers moved to dismiss the Complaint under Rule 12(b)(6) as well. Op. 12. After oral argument, the Court of Chancery issued a memorandum opinion granting the Rule 23.1 motions and dismissing the Complaint.

The Court of Chancery held that Plaintiff failed to plead particularized facts showing that any of Skechers' outside directors faced a substantial likelihood of liability on Plaintiff's *Caremark* claim, Op. 15-24, waste claim, Op. 24-30, or disclosure claim, Op. 31-36. On appeal, Plaintiff does not challenge the Court of Chancery's ruling on his waste claim. OB 5 n.3.

The Court of Chancery also held that Plaintiff failed to plead particularized facts supporting his contention that one director, Siskind, lacked independence from Skechers' CEO Robert Greenberg. Op. 37-40.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY FOUND NO SUBSTANTIAL LIKELIHOOD OF LIABILITY

A. Question Presented

Did the Court of Chancery correctly determine that Plaintiff failed to plead particularized facts showing that the Committee Defendants faced a substantial likelihood of liability on a non-exculpated claim?

This issue was raised below and was considered by the Court of Chancery. A1307-27, A1367-92, A2907-25; Op. 15-36.

B. Scope of Review

"[R]eview of decisions of the Court of Chancery applying Rule 23.1 is *de novo* and plenary." *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1047 (Del. 2021).

C. Merits of Argument

Because Plaintiff made no presuit demand, A86 (¶ 135), he was required to "state with particularity . . . the reasons for . . . not making the effort." Del. Ct. Ch. R. 23.1(a). To plead demand futility, the Complaint must show "on a director-by-director basis" that demand was futile "for at least half of the members of the demand board." *Zuckerberg*, 262 A.3d at 1059. To show futility for a given director, the Complaint must plead with particularity that he or she (1) "received a material personal benefit from the alleged misconduct"; (2) "faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand"; or (3) "lacks independence from someone who received [such] a material personal benefit" or "face[s] [such] a substantial likelihood of liability." *Id.*

The demand board has seven directors: the three Management Defendants, the three Committee Defendants, and non-party Zulema Garcia. A87 (¶ 136); OB 6. Because Plaintiff did not claim that demand was futile for Garcia, and Defendants did not contest that demand was futile for the Management Defendants, the futility inquiry turned on the Committee Defendants. Op. 14. Plaintiff alleged that all Committee Defendants faced a substantial likelihood of liability and that one Committee Defendant, Siskind, also lacked independence. Op. 15.

Because Skechers' certificate of incorporation exculpates its directors from monetary liability to the fullest extent permitted by Delaware law, A808, the Committee Defendants could have faced a substantial likelihood of liability on Plaintiff's claims only if particularized allegations showed "'fraudulent,' 'illegal' or 'bad faith' conduct." *Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008); *see* 8 *Del. C.* § 102(b)(7).

The Court of Chancery correctly held that Plaintiff failed to plead with particularity that the Committee Defendants faced a substantial likelihood of liability on either Plaintiff's *Caremark* claim or his disclosure claim.

1. ***Caremark*: No Substantial Likelihood of Liability**

Directors may be liable for an oversight failure if "(a) the directors 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). Both prongs require that "directors knew that they were not discharging their fiduciary obligations." *Id.* "[B]ad faith conduct . . . is essential to establish director oversight liability." *Id.*

"Because of the difficulties in proving bad faith director action, a *Caremark* claim is 'possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.'" *City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 55 (Del. 2017) (quoting *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996)). "The need to demonstrate scienter to establish liability under an oversight theory follows not only from *Caremark* itself, but from the existence of charter provisions exculpating directors from liability for breaches of the duty of care . . . ." *Rojas v. Ellison*, 2019 WL 3408812, at *8 (Del. Ch. July 29, 2019).

Plaintiff asserted only a prong-two *Caremark* claim. OB 7, OB 36; Op. 15; A1370. Under that prong, 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." *In re McDonald's Corp. S'holder Deriv. Litig.*, 291 A.3d 652, 667 (Del. Ch. 2023) (internal quotation marks omitted). "The pled facts must support an inference that the failure to take action was sufficiently sustained, systematic, or striking to constitute action in bad faith." *Id.*

As the Court of Chancery correctly held, Plaintiff failed to plead particularized facts showing that the Committee Defendants consciously disregarded red flags of corporate misconduct. Plaintiff failed to plead that the Management Defendants' use of the airplane perquisite was a red flag at all for *Caremark* purposes, let alone that the Committee Defendants disregarded it in bad faith.

(a) Plaintiff Failed to Plead Red Flags

For three main reasons, Plaintiff failed to plead red flags of misconduct for purposes of his prong-two *Caremark* claim.

First, Plaintiff alleged no violation of any law or regulation. "*Caremark* cases are generally brought in the context of violations of applicable *laws*" and "no case in this jurisdiction has imposed oversight liability based solely on failure to monitor business risk." *Constr. Indus. Laborers Pension Fund v. Bingle*, 2022 WL 4102492, at *6-7 (Del. Ch. Sept. 6, 2022), *aff'd*, 297 A.3d 1083 (Del. 2023) (ORDER); *see In re ProAssurance Corp. S'holder Deriv. Litig.*, 2023 WL 6426294, at *1 (Del. Ch.

Oct. 2, 2023) ("The only so-called red flags were of business risks—not illegality. How (and whether) to respond was entirely within the directors' discretion."). Plaintiff did not, and could not, allege that overuse of the airplane perquisite posed even a potential risk of Skechers violating the law. Rather, Plaintiff conceded that personal use of company airplanes is a common form of perquisite compensation. A48-49 (¶¶ 20-22). "[I]f a red flag concerns a central compliance risk, then it is easier to draw an inference that a failure to respond meaningfully resulted from bad faith." *McDonald's*, 291 A.3d at 680. Here, Plaintiff pleaded no illegality and no compliance risk of any kind. Inferring bad faith from purported inaction, therefore, is particularly difficult. *See Bingle*, 2022 WL 4102492, at *6-7 (inferring bad faith from red flags absent illegality requires "extreme hypothetical").

Nor did Plaintiff plead any violation of any clear-cut restriction over which the Committee lacked discretion. *Garfield v. Allen*, 277 A.3d 296 (Del. Ch. 2022), is instructive. There, the board was told that equity grants "exceed[ed] an express limitation in an equity compensation plan" that stockholders had approved, but the board declined to rescind the grants. *Id.* at 305, 335. It defied an express numerical limit set by stockholders and "knowingly failed to fix an obvious violation of a clear restriction in a stockholder-approved plan." *Id.* at 341-42. By contrast here, Plaintiff claimed that the extent of perquisite use violated only Plaintiff's concept of reasonableness, not that "the directors invoked authority that they did not possess."

Id. at 330; *see id.* at 324 ("The Committee lacks the authority to take action that contravenes the express limitation of the 2019 Plan.").

Unable to cite any violation of law, regulation, or stockholder-approved plan, Plaintiff argues that use of the perquisite violated the Management Defendants' employment agreements because Plaintiff—that is, one stockholder—deemed it unreasonable. OB 43. Plaintiff did not make this argument below, Op. 23 n.82, for good reason. Under those agreements, the Committee had "sole discretion . . . to put limitations" on use of the airplane perquisite, A828, and as stated in Skechers' proxy statements, the Committee determined that the Management Defendants' compensation was "reasonable." A1084 ("We provide our Named Executive Officers with certain perquisites . . . which we believe are reasonable . . . ."). Unlike in *Garfield*, mere disagreement about whether airplane use was reasonable fails to establish any violation as a matter of institutional competency.

Second, Plaintiff did not define the alleged red flags. Because even Plaintiff could not articulate which flights were red flags, there was still less reason to infer that the Committee ignored red flags in bad faith. The Complaint branded a list of flights generally "problematic," A74 (¶ 119), but never pleaded what particular increment of use of the airplanes was improper and raised a red flag. For some increment of an undisputedly proper form of compensation to be a red flag, Plaintiff must answer '"How much is too much?"' *In re infoUSA, Inc. S'holders Litig.*, 953

A.2d 963, 983 (Del. Ch. 2007). As the Complaint's silence confirms, that question is "far better suited to the boardroom than the courtroom," *id.*, because "size and structure of executive compensation are inherently matters of judgment," *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000). "[R]egal[ing] the Court at length with stories of fancy cars and favored perks" cannot subvert that "simple, fundamental truth of institutional competency long understood in Delaware law." *infoUSA*, 953 A.2d at 983-84.

Third, even if *all* flights were a red flag—which was not Plaintiff's theory—the magnitude was not so great that any purported inaction would indicate bad faith. This perquisite cost Skechers about $1.5 million per year for all three Management Defendants combined, and on average was 2.8% of their overall compensation. In addition, the total cost to Skechers of the perquisite *declined* each year from 2019 through 2021. *Supra* at 7.

If expenditures in the range of the airplane perquisite could be a red flag for *Caremark* purposes, nearly every business decision at any large corporation would be a source of board oversight liability. Set against "the magnitude of [Skechers'] operations," *Pettry v. Smith*, 2021 WL 2644475, at *9 n.101 (Del. Ch. June 28, 2021), *aff'd*, 273 A.3d 750 (Del. 2022) (ORDER), including annual gross profit of $3 billion and operating expenses of $2.5 billion in 2021, A1183, the cost of the airplane perquisite was relatively small. Plaintiff failed to plead "particularized facts that would allow the Court to consider the magnitude of [purported overuse of the perquisite] in the context of [Skechers'] overall operations." *Horman v. Abney*, 2017 WL 242571, at *14 (Del. Ch. Jan. 19, 2017).

Nor does it matter if perquisite use "far exceeded the median value of aircraft perquisites among S&P 500 executives." OB 3. Paying an executive more or less than "median," particularly for one small portion of total compensation, is not bad-faith conduct. *See In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 741 (Del. Ch. 2005) ("[T]he relevant question is not whether the defendants complied with the custom and practice of other Delaware corporations during the relevant time frame, but whether they complied with their fiduciary duties."), *aff'd*, 906 A.2d 27 (Del. 2006); *cf. In re Goldman Sachs Gp., Inc. S'holder Litig.*, 2011 WL 4826104, at *16-17 (Del. Ch. Oct. 12, 2011) (demand not futile despite alleged compensation two to six times greater than at peers).

As the Court of Chancery held, the alleged overuse of the perquisite was not of such magnitude, or so severe, that Delaware law mandated "only one right answer" such that "inaction alone can support an inference of bad faith." Op. 18. Rather, "as the magnitude or severity of the risk decreases, more facts are required to support an inference of bad faith: continued monitoring, or even intentional inaction, may not alone rebut the business judgment rule." *Id.* Plaintiff failed to show that the perquisite use could be a red flag "so vibrant that lack of action implicates bad faith." *Bingle*, 2022 WL 4102492, at *1.

Plaintiff likewise failed to plead a red flag from any loss of favorable tax treatment during the COVID-19 pandemic, when business travel largely shut down and personal use exceeded 50% for both airplanes in 2020 and for one airplane in 2021. A74 (¶ 117); *see* A73 (¶ 115) (alleging that business use alone did not require second airplane in 2020 and 2021); A2871 (conceding that business use declined during pandemic). Even if this transitory effect on tax treatment occurred, it would appear only in hindsight after a given year. Op. 30. By 2021, business use already was recovering and by the end of 2021, it exceeded personal use for one of the two airplanes. In any event, "the decision to sacrifice some tax savings in order to retain flexibility in compensation decisions is a classic exercise of business judgment." *Freedman v. Adams*, 58 A.3d 414, 417 (Del. 2013).

Contrary to Plaintiff's argument, OB 44, the airplane perquisite was not a red flag of magnitude sufficient to infer bad faith in light of the Equity Grant Action or the settlement of an unrelated SEC inquiry into disclosing related-party transactions not involving the perquisite. Nothing about the Equity Grant Action (which Plaintiff calls "unrelated," OB 41) or the SEC settlement (which appears nowhere in the record) increases the magnitude of the airplane perquisite or converts it into a compliance failing. If anything, that an SEC order addressing Skechers' proxy statements each year from 2018 through 2021 *did not mention* the airplane perquisite confirms that it was no red flag.

"A failure to undertake immediate remediation of a reported defect, even where immediate action would be wise, is not evidence of bad faith unless it implies a need to act so clear that to ignore it implies a conscious disregard of duty." *In re MetLife Inc. Deriv. Litig.*, 2020 WL 4746635, at *18 (Del. Ch. Aug. 17, 2020). Here, as the Court of Chancery held, the "risk was contained; it was limited to the use of two corporate assets by a discrete group of individuals"; Skechers "was not violating an internal policy or any regulations"; and the alleged overuse was "of a relatively minimal magnitude." Op. 22-23. Plaintiff failed to plead any need to act so clear that purported inaction could indicate bad faith.

(b) Plaintiff Failed to Plead Conscious Inaction

Regardless of whether the alleged overuse of the airplane perquisite could be a red flag, Plaintiff failed to show that the Committee consciously disregarded it in bad faith.

Alleging that a "board should have done more" does not show that it "acted in bad faith." *McElrath v. Kalanick*, 224 A.3d 982, 994 (Del. 2020). "To the extent the focus is on the manner and timing of the Board's response, that focus misses the mark for a *Caremark* claim." *Pettry*, 2021 WL 2644475, at *9. Plaintiff "must do more than plead that the directors responded in a weak, inadequate, or even grossly negligent manner." *McDonald's*, 291 A.3d at 661-62. "[A] plaintiff's grievance that the board's response came too late and did too little is incompatible with bad faith—a necessary component of any *Caremark* claim." *Clem v. Skinner*, 2024 WL 668523, at *1 (Del. Ch. Feb. 19, 2024).

Each of Plaintiff's attempts to show conscious, bad-faith inaction by the Committee Defendants failed.

First, Plaintiff's descriptions of the Committee's actions confirm its good faith. In Plaintiff's telling, the Committee "found . . . personal use of the Aircraft from 2017 to 2019 to be alarming." OB 16. "[A]lmost immediately after receiving" data showing perquisite use in 2017, the Committee "perceiv[ed] [it] as problematic" and asked Skechers' CFO "to provide 'recommendations' for 'limits.'" OB 13-14. The Committee repeatedly "admonished" and "chided management" to provide timelier data on perquisite use and "delivered this admonition because it already had concerns." OB 15, OB 37.

Faulting the Committee for not executing more effectively on good intentions does not make for a *Caremark* claim. Plaintiff never contends that—despite chiding and admonishing management and being alarmed and concerned—the Committee did not genuinely want timelier data, recommended limits, or a draft policy. Rather, Plaintiff agrees that the Committee "viewed either the degree of use or absence of meaningful guardrails as a matter worth addressing." OB 36 (quoting Op. 19-20). That state of mind suffices to defeat Plaintiff's *Caremark* claim.

Second, Plaintiff failed to show that after asking for a draft policy to review, the Committee "did absolutely nothing," A71 (¶ 101), and "nothing happened," A49 (¶ 23). While the Complaint cut the story short by alleging nothing after November 2019, the incorporated 220 production showed that the Committee retained FW Cook in 2020 to analyze all executive compensation at Skechers and to recommend changes and that it continued to monitor data showing perquisite use. *Supra* at 9-11. As the Court of Chancery put it, "the Committee was acting in other ways, displacing Plaintiff's theory of bad faith inaction." Op. 20-21. "The Board's level of engagement during this time period does not support an inference of bad faith indifference." *Pettry*, 2021 WL 2644475, at *8.

Plaintiff's scattered responses to the Committee's work with FW Cook are unavailing. In calling FW Cook's hiring "compulsory," OB 39, Plaintiff ignores that the Equity Grant Action settlement required a consultant to opine *only* "concerning new equity awards." A988-89. But the Committee expanded FW Cook's mandate to analyze *all* aspects of compensation, further dispelling any inference of bad faith. Directors bent on facilitating overuse of the perquisite would not have expanded FW Cook's remit to embrace it.

Plaintiff next calls FW Cook's analysis of the airplane perquisite "tangential," OB 38, but that characterization reflects only how small the perquisite was (on average, 2.8%) in relation to the Management Defendants' total compensation. *Supra* at 7. In any event, FW Cook addressed the perquisite, "alert[ing] the Committee to significant further red flags" about it, in Plaintiff's words. OB 21. Nor did the Court of Chancery "overlook[]" anything in FW Cook's analysis. OB 40 n.93. FW Cook labeled the tax gross-up payments as "problematic," but not the airplane use itself. A1128-30. And while Plaintiff now argues that the Committee "did nothing in response to FW Cook's reports," OB 22, the Complaint made no such allegation. It did not even mention FW Cook.

Plaintiff's cited cases confirm that the Committee's work with FW Cook precludes inferring bad faith. *See* OB 39-42. In *Hughes v. Hu*, 2020 WL 1987029 (Del. Ch. Apr. 27, 2020), for example, an audit committee "met sporadically, devoted inadequate time to its work, had clear notice of irregularities, and consciously turned a blind eye to their continuation." *Id.* at *14. Here, there were no irregularities, and the Committee actively engaged with FW Cook. In *Ontario Provincial Council of Carpenters' Pension Trust Fund v. Walton*, 2023 WL 3093500 (Del. Ch. Apr. 26, 2023), the board learned that Walmart was violating the Controlled Substances Act and a DEA settlement but "checked out" and "did nothing but listen to lawyers." *Id.* at *1, *21. This case involved no violation of law, and the Committee did not merely listen to FW Cook, but expanded its assignment and then requested "a review and analysis of potential changes." A1109. In *Teamsters Local 443 Health Services & Insurance Plan v. Chou*, 2020 WL 5028065 (Del. Ch. Aug. 24, 2020), a law firm's report was "a red flag that . . . mission critical compliance mechanisms . . . had substantial gaps" as to a "Pre-Filled Syringe Program." *Id.* at *20. Here, Plaintiff pleaded no compliance failures at all, let alone "mission critical" ones. *Id.* at *25.

Third, Plaintiff failed to support his premise that the only possible good-faith course of action for the Committee was to immediately adopt a formal policy on one form of perquisite compensation, without the benefit of FW Cook's holistic analysis of *all* executive compensation. Put differently, Plaintiff failed to show that the alleged airplane overuse was "of such scope, magnitude, or questionable legality that the *only* good faith response was to create a policy." Op. 24 (emphasis added). Plaintiff appears to concede that choosing *not* to adopt a formal policy at all would be a valid exercise of business judgment, OB 42 n.95, yet cannot explain why prioritizing ongoing work with a consultant over a one-off policy change would not likewise be a valid exercise.

What Plaintiff pleaded was only one stockholder's personal preferred course of action. "The decision about what to do in response to a red flag is one that an officer or director is presumed to make loyally, in good faith, and on an informed basis, so unless one of those presumptions is rebutted, the response is protected by the business judgment rule." *McDonald's*, 291 A.3d at 680. "Whether the response fixed the problem is not the test. . . . What [directors] have to do is make a good faith effort." *Id.* at 684.

Fourth, that the Committee directed management to prepare a first draft of a policy does not show bad faith. The Committee told management to develop a policy "for review"; it did not delegate approval authority to them. A920-21; *see also* A851 (Committee asked CFO "to provide *recommendations* for limits to be placed on . . . personal use" (emphasis added)). The Committee retained authority over both the policy and the process of developing it.

Plaintiff failed to show that requesting a first draft from management is bad-faith abdication. *See City of Fort Myers Gen. Empls.' Pension Fund v. Haley*, 235 A.3d 702, 721 n.69 (Del. 2020) ("There is nothing inherently wrong with a Board delegating to a conflicted CEO the task of negotiating a transaction."); *McDonald's*, 291 A.3d at 662 (commending board for "work[ing] with Company management on a response" to alleged red flags); *Firemen's Ret. Sys. of St. Louis v. Sorenson*, 2021 WL 4593777, at *16 (Del. Ch. Oct. 5, 2021) ("[N]o 'red flags' were deliberately disregarded. Rather, management told the Board that it was addressing or would address the issues presented."). Nor does Plaintiff cite authority for his suggestion that a "backdrop" of lack of responsiveness makes it disloyal to involve management rather than write off its input entirely. OB 37-38. Again, Plaintiff offered only "criticism of the manner and timing of the Committee's response, which is insufficient to state a *Caremark* claim." Op. 20.

2. **Disclosure: No Substantial Likelihood of Liability**

The Court of Chancery correctly concluded that Plaintiff failed to plead particularized facts showing that Erlich or Siskind, as members of the board's Audit Committee, faced a substantial likelihood of liability on Plaintiff's claim that the 2021 proxy statement contained material misstatements or omissions about the airplane perquisite. A99-100 (¶¶ 190-192).

The 2021 proxy statement described the airplane perquisite in detail. A1084, A1087-88. It stated: "*Aircraft usage.* During 2020, Robert Greenberg, Michael Greenberg, and David Weinberg used our aircraft for personal travel." A1084. It then described the "tax gross-up reimbursement." *Id.* It also directed readers to "the 'All Other Compensation' column in the table captioned *Summary Compensation Table* in this proxy statement," *id.*, which listed the dollar value of the perquisite for each Management Defendant and broke out the value of the tax gross-up payments, A1087-88. It explained that the perquisite's value was calculated based on "variable operating costs" such as "crew travel expenses" and "landing fees," not "fixed costs" such as "salaries" and "insurance and general maintenance costs." A1088. It further explained that costs generally were allocated to the highest-ranking officer on a flight. *Id.*

For several reasons, Plaintiff failed to show that Erlich or Siskind faced a substantial likelihood of liability on Plaintiff's disclosure claim.

First, Plaintiff failed to plead particularized facts showing that Erlich or Siskind acted disloyally regarding any statement or omission. "[T]o plead a non-exculpated disclosure claim, Plaintiffs are obliged to do more than allege 'erroneous judgment' regarding the 'proper scope and content' of a disclosure. Instead, to plead a breach of the duty of loyalty in this context, Plaintiffs must allege a knowing or intentional misstatement or omission of a material fact." *In re Essendant Inc. S'holder Litig.*, 2019 WL 7290944, at *11 (Del. Ch. Dec. 30, 2019). Particularized pleaded facts must show that an alleged "disclosure violation was made in bad faith, knowingly or intentionally," *In re GGP, Inc. S'holder Litig.*, 282 A.3d 37, 63-64 (Del. 2022) (internal quotation marks omitted). "A finding of bad faith based on omission alone requires that the omitted disclosures were so facially apparent and so clearly insufficient that they are inexplicable other than as made in bad faith." *Ligos v. Tsuff*, 2022 WL 17347542, at *11 (Del. Ch. Nov. 30, 2022).

No particularized pleaded facts showed that Erlich or Siskind acted in bad faith by knowingly disseminating materially false or misleading statements or omissions. Because Plaintiff failed to plead a "knowing or intentional misstatement or omission of a material fact," *Essendant*, 2019 WL 7290944, at *11, Erlich and Siskind did not face a substantial likelihood of liability.

Second, Plaintiff did not plead, even in a conclusory way, that any challenged statement or omission was material to the election of Robert Greenberg, Erlich, or Walsh as directors—the only voting proposal in the proxy statement. A1061; *see* A99-100 (¶¶ 189-194). "Materiality is determined with respect to the shareholder action being sought." *Malone v. Brincat*, 722 A.2d 5, 12 (Del. 1998); *see Stroud v. Grace*, 606 A.2d 75, 85 (Del. 1992) (board need not disclose "all available information," but only "all material facts within its control that would have a significant effect upon a stockholder vote").

Plaintiff cannot explain why the Court should overlook this pleading failure. He argues that a stockholder "would clearly view as material" what he calls "Erlich's subservience" and "Robert's misuse" of the airplane perquisite. OB 49-50. But as the Court of Chancery held, Op. 35, this argument presupposes wrongdoing and fails for the same reasons as the *Caremark* claim. *See Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 145 (Del. 1997) (omission of $6 million in bonuses "would not be material to a reasonable stockholder's determination of how to vote in the directorial election . . . absent well-pleaded facts alleging that the bonuses were improper"). Nor do statements by FW Cook cited by Plaintiff—in Plaintiff's brief, not in the Complaint—show materiality. OB 50. That proxy advisors were attentive to Skechers' overall "compensation program" does not mean that the marginal, "fully contextuali[zing]" information on which Plaintiff based his disclosure claim, OB 49, relating to an undefined increment of one perquisite, itself a small portion of total compensation, was material to the director election.

Plaintiff's references to SEC disclosure rules fail to show materiality as well. Plaintiff claims that "[t]he SEC has explicitly recognized the materiality of compensation and perquisite information to investors of full and accurate information." OB 48. But materiality under Delaware law is not an abstract inquiry into "the importance of the subject to many investors," *id.*, but rather is defined in relation to the stockholder vote being solicited. An SEC rule requiring that a perquisite be disclosed does not mean that the perquisite—let alone an undefined increment of alleged overuse of it—is material *to a director election*.

Plaintiff further undercuts his position by citing, for the first time on appeal, an SEC order addressing a separate aspect of Skechers' proxy statements. Plaintiff argues that the SEC "contradicted" the Court of Chancery's ruling on materiality by challenging non-disclosure of related-party compensation of "as little as $155,000." OB 49. But the SEC applied the disclosure requirements of Item 404 of Regulation S-K, not this Court's materiality standard for requests for stockholder action. Nor did Plaintiff allege that compensation was not disclosed, but rather only that more information was needed "to fully contextualize" it. *Id.* Plaintiff's reliance on what supposedly is "material and relevant to the SEC" undoes his claim in any event. After scrutinizing the compensation disclosures in each Skechers proxy statement from 2018 to 2021, the SEC asserted no violation concerning the airplane perquisite.

Third, Plaintiff failed to plead that any challenged statement or omission was false or misleading.

1. Plaintiff alleged that it was false to state that "the Aircraft are 'designated primarily for business travel,'" A84 (¶ 123), because when a global pandemic put business travel on hold, the airplanes were *used* relatively more for personal travel, albeit slightly (53% across 2020 and 2021). Yet as the Court of Chancery held, Op. 33, Plaintiff pleaded no support for the proposition that an airplane's primary *designation* changes with transitory ebbs and flows in actual use, nor does Plaintiff cite any support for his bald assertion on appeal that "*[t]he minute* the 'most part' of the Aircraft's use became personal, the Aircraft became 'designated primarily' for personal use, not business use." OB 47 (emphasis added).

"[C]onclusory allegations are not considered as expressly pleaded facts or factual inferences." *Brehm*, 746 A.2d at 255; *see also State v. Powell*, 2016 WL 3023740, at *15 n.35 (Del. Super. May 24, 2016) ("The court is not in the business of interpreting 'terms of art' and will address only the allegations as they are presented to the court; that is, literally."), *aff'd*, 173 A.3d 1044 (Del. 2017) (ORDER). Even during the pandemic, personal use was "subject to availability determined by the Company's business needs." A828. The one-off circumstance of a global pandemic did not strip the airplanes of their *designation* as primarily for business travel.

2. Plaintiff next alleged that "[b]ecause the Aircraft are primarily used for personal travel," the proxy statement's calculations should have included fixed costs as well as incremental costs. A85 (¶ 126). This allegation rested on the same faulty premise that the airplanes were no longer primarily designated for business travel in 2020 and 2021, and it failed for the same reason. In any event, the proxy statement disclosed that fixed costs were omitted and why, A1088, belying the notion that investors were misled.

Though his Complaint contained no such allegation, Plaintiff directs the Court on this point to what he calls "commentators." OB 47 ("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%"). Plaintiff refers to a footnote in his brief below, which cited an attorney in private practice in Atlanta, who was quoted in a 2012 newspaper article as saying companies "should *probably*" include fixed costs. A1389 (emphasis added). This one attorney's opinion is not "commentators," or anything helpful.

3. Plaintiff alleged that the proxy statement misleadingly omitted the *ratio* of personal use to total use, based entirely on Plaintiff's assertion that "[c]learly, it is

material to shareholders that the Company needs a second aircraft because roughly 53% of the combined flight time . . . is attributable to personal use." A85 (¶ 128). This supposed omission—which likewise derives from the transitory effect of the pandemic—was not misleading because the proxy statement disclosed the value of the Management Defendants' *compensation* and did not purport to describe every aspect or implication of the perquisite. A1084. The standard for disclosure is not everything Plaintiff might want to know. *See Stroud*, 606 A.2d at 85 (board need not disclose "all available information," but only material facts "that would have a significant effect upon a stockholder vote"). Nor does Plaintiff show that logistical or maintenance needs, or simultaneous business travel, would not call for a second airplane in any event.

4. Plaintiff claimed that while the proxy statement stated that the Management Defendants "used our aircraft for personal travel," it "omit[ted] the material fact that other Greenberg family members" also sometimes used them. A99 (¶ 190). This argument likewise ignores that the proxy statement disclosed the value of the Management Defendants' compensation, not the identity of passengers on flights from which compensation was calculated. OB 36; A1084. Plaintiff did not attempt to plead how it misled stockholders to attribute to a Management Defendant the value of a perquisite that he shared with a family member, especially given that the

proxy statement explained that costs are allocated to the highest-ranked officer aboard "unless circumstances indicate a different allocation is warranted." A1088.

5. Finally, Plaintiff alleged that the proxy statement should have disclosed that the elevated percentage of personal travel—again, in 2020 and 2021 during the pandemic—purportedly had negative tax consequences. A85 (¶ 127). But Plaintiff failed to offer even a conclusory explanation of why that disclosure was required or details about what negative tax consequences occurred. Plaintiff's allegation that Skechers did not disclose the tax gross-up payments, *id.*, is flatly wrong, as the Court of Chancery recognized, Op. 36 n.118; A1088.

II. THE COURT OF CHANCERY CORRECTLY FOUND NO LACK OF INDEPENDENCE

A. Question Presented

Did the Court of Chancery correctly determine that Plaintiff failed to plead particularized facts showing that Richard Siskind lacked independence from CEO Robert Greenberg?

This issue was raised below and was considered by the Court of Chancery. A1327-32, A1392-97, A2925-28; Op. 37-40.

B. Scope of Review

"[R]eview of decisions of the Court of Chancery applying Rule 23.1 is *de novo* and plenary." *Zuckerberg*, 262 A.3d at 1047.

C. Merits of Argument

Directors are entitled to a "presumption of independence." *Beam v. Stewart*, 845 A.2d 1040, 1052 (Del. 2004). To overcome that presumption, "a derivative complaint must plead with particularity facts creating 'a reasonable doubt that a director is' . . . so 'beholden' to an interested director . . . that his or her 'discretion would be sterilized.'" *Zuckerberg*, 262 A.3d at 1060 (quoting *Beam*, 845 A.2d at 1050). "A plaintiff seeking to show that a director was not independent must satisfy a materiality standard." *Id.* "'[T]o render a director unable to consider demand, a relationship must be of a bias-producing nature.' Alleging that a director had a 'personal friendship' with someone else, or that a director had an 'outside business relationship,' are 'insufficient to raise a reasonable doubt' that the director lacked independence." *Id.*

Plaintiff challenges the independence of only one director, Siskind. OB 26; *see* Op. 15. Plaintiff alleged that Siskind had a "longstanding personal and business relationship with Robert Greenberg," Skechers' CEO. A95 (¶ 169). But Plaintiff failed to plead particularized facts showing that Siskind was beholden to Greenberg in any way, much less to the extent that Siskind's discretion would be sterilized. After conducting a "holistic" evaluation of any "social, financial, or other ties reflecting the existence of a bias-producing relationship," and "draw[ing] all reasonable inferences in [Plaintiff's] favor," the Court of Chancery correctly held that Plaintiff failed to overcome the presumption of independence. Op. 37-39.

1. <u>Plaintiff Pleaded No Deep, Meaningful Friendship</u>

Plaintiff defies the Complaint by calling Siskind and Greenberg "longtime friend[s]," OB 2, with an "extremely close, personal bond," OB 33. As the Court of Chancery noted, "Plaintiff . . . did not go so far as to plead that Greenberg and Siskind are friends." Op. 39 n.131. The Complaint did not contain the word "friend" or anything like it, nor did it plead that Siskind and Greenberg, or their families, have ever socialized together in any setting. Plaintiff argues he was not required to plead "a detailed calendar of social interaction." OB 27 (citing *Sandys v. Pincus*, 152 A.3d 124, 130 (Del. 2016)). But Plaintiff pleaded no social interaction at all.

What Plaintiff did plead was that in 1998 Siskind sold Greenberg a house in Boca Raton, and that because Siskind now has a house in Boca Raton, the two men might have been neighbors at some point. A96 (¶¶ 171-174). Plaintiff did not plead they "have been neighbors ever since" 1998, as Plaintiff now claims in his brief, OB 33, which would require Siskind to have had two Boca Raton houses at the time of the sale. Rather, Siskind eventually acquired a new house near where Greenberg "maintains *(or maintained)*" the first house. A96 (¶ 172) (emphasis added). Selling Greenberg one house, then at some later point owning a house "on the same inlet," A96 (¶ 173)—not "next to each other," as Plaintiff now argues, OB 33—does not suggest friendship. Plaintiff did not plead, for example, that Siskind encouraged Greenberg to buy the house so they could spend time together. Nor does he cite any authority holding that geographic proximity implies friendship, much less a strong enough friendship to excuse demand.

Even mere friendship—which Plaintiff did not plead—would not overcome the presumption of independence. *See Zuckerberg*, 262 A.3d at 1063 ("that Thiel is a personal friend of Zuckerberg is insufficient to establish a lack of independence"); *Beam*, 845 A.2d at 1050-51 ("mere personal friendship" or "describ[ing] each other as 'friends'" does not suffice). Instead, this Court has required a "precious" and "rare" relationship of "close friends . . . for a half century," *Del. Cty. Empls. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1019, 1022 (Del. 2015); friendship that "may border on or even exceed familial loyalty and closeness," *Beam*, 845 A.2d at 1050; a "very close personal relationship . . . like family ties," with families that "are extremely close to each other and are among each other's most important and intimate friends," *Sandys*, 152 A.3d at 130-31; and "deep and longstanding friendships" yielding "an important debt of gratitude," *Marchand v. Barnhill*, 212 A.3d 805, 819-20 (Del. 2019).

For Siskind and Greenberg, the closest Plaintiff came to alleging decades of rare intimacy was noting that on an inlet in a vacation destination, "their piers for their watercraft face each other." A96 (¶ 173). The Court of Chancery rightly deemed that insufficient. Op. 39-40.

2. <u>Plaintiff Pleaded No Bias-Producing Transactions</u>

Plaintiff's bare-bones allegations about outside business dealings—more than two decades ago—likewise failed to overcome the presumption of independence. Plaintiff alleged that in 1998, Siskind sold Greenberg the Boca Raton house; that in 1999, Skechers sold trademarks to Stage II Apparel, a publicly traded company of which Siskind was CEO; and that from 1999 to 2002, Greenberg served on the compensation committee of Stage II Apparel's board. A95 (¶ 170) (citing one investor's letter).

Plaintiff failed to show how anything in these past interactions made Siskind beholden to Greenberg decades later. "Consistent with [the] predicate materiality requirement, the existence of some financial ties between the interested party and the director, without more, is not disqualifying." *Zuckerberg*, 262 A.3d at 1061. Plaintiff alleged nothing bias-producing in these dated interactions—and apart from Siskind's service on Skechers' board, pleaded no interactions at all between Siskind and Greenberg for the next 20 years. *See In re Martha Stewart Living Omnimedia, Inc. S'holder Litig.*, 2017 WL 3568089, at *20 (Del. Ch. Aug. 18, 2017) ("bare allegation of a prior business relationship from over a decade ago . . . is precisely the type of conclusory allegation . . . that does not come close to overcoming the presumption of independence"); *In re KKR Fin. Hldgs. LLC S'holder Litig.*, 101 A.3d 980, 997-98 (Del. Ch. 2014) ("that the 'naked assertion of a previous business relationship is not enough'" has "particular force here, where the past business relationship ended *twelve years before* the transaction at issue"), *aff'd sub nom. Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304 (Del. 2015).

As to the house sale in 1998, Plaintiff did not plead that it was not on arm's-length, market terms. Nor did Plaintiff plead anything else about its circumstances or context to show that it had any subjective material importance to Siskind at all, let alone such importance that it would compromise his independence today. *See Zuckerberg*, 262 A.3d at 1061-62 (in assessing independence of Netflix's CEO, requiring allegations that "purchases were material to Netflix or that Netflix received anything other than arm's length terms" from Facebook).

As to the trademark sale in 1999, Plaintiff likewise failed to plead that it was not on arm's-length, market terms. Plaintiff argues that the sale should "be placed in context," OB 30, but Plaintiff pleaded no particularized facts to show that it was material to Siskind or to his company, Stage II Apparel. *See Zuckerberg*, 262 A.3d at 1062. As the Court of Chancery held, "Plaintiff has not pled what was purchased, the price, or whether Siskind or Robert were personally involved." Op. 39. That the sale occurred through the Greenberg Family Trust rather than Skechers neither addresses its materiality to Siskind nor suggests that the parties transacted "unlike normal counter-parties." OB 31. That the parties had other interactions around the same time—that is, that they were not strangers—is not so far from "normal" as to imply any unusual material benefit, let alone one engendering indebtedness decades later.

As to overlapping on Stage II Apparel's board from 1999 to 2002, Plaintiff argues only that it "indicates the two were comfortable with having the other in charge of their compensation." OB 33. But even if that were so, it would not show sterilized discretion now. The Court of Chancery correctly declined to "presume, without any support, that from some time in 1999 through 2002, both Siskind and Robert used their committee positions to benefit the other." Op. 39; *see In re Camping World Hldgs., Inc. S'holder Deriv. Litig.*, 2022 WL 288152, at *18 (Del. Ch. Jan. 31, 2022) ("The fact that Schickli served on the CWGS board and the

Camping World Board alongside Adams and Lemonis for several years likewise cannot overcome the presumption of director independence."), *aff'd*, 285 A.3d 1204 (Del. 2022) (ORDER); *Patel v. Duncan*, 2021 WL 4482157, at *20 (Del. Ch. Sept. 30, 2021) (rejecting allegations of "overlapping board service"), *aff'd*, 277 A.3d 1257 (Del. 2022) (ORDER).

This Court has rejected lack-of-independence challenges based on far more substantial and recent business relationships *paired* with close friendships—neither of which was pleaded here. In *Beam*, a director of Martha Stewart Living who had been Sears's chairman and CEO was independent despite being a "longstanding personal friend" of Martha Stewart, whose company "marketed a substantial volume of products through Sears." 845 A.2d at 1045. Likewise, in *Zuckerberg*, a longtime Facebook director was independent despite being "Zuckerberg's close friend and mentor" and the director's fund "get[ting] 'good deal flow'" from his association with Facebook. 262 A.3d at 1062-63. As here, there was no allegation of "deals that would be material to [the director's] interests." *Id.* at 1063.

Plaintiff did not plead that Siskind owed his career or wealth to Greenberg. At the time of his first pleaded interaction with Greenberg in 1998, Siskind already had been CEO of his own apparel company for seven years, and he also later served for four years as CEO of another publicly traded company. A1227. In *In re Match Group, Inc. Derivative Litigation*, --- A.3d ---, 2024 WL 1449815 (Del. 2024), cited by Plaintiff, a director had a "close and pervasive relationship with IAC and Diller," earning over $55 million from working at IAC for 13 years, and called himself "'more than grateful to Barry Diller.'" *Id.* at *18 & n.171; *see id.* at *18 ("Directors who owe their success to another will conceivably feel as though they owe a 'debt of gratitude' to the individual."). Likewise, while Plaintiff suggests that only "economic relations" were alleged in *Sanchez*, OB 31, there the director's wealth was "largely attributable to business interests over which [the interested person] has substantial influence." 124 A.3d at 1020.

Contrary to Plaintiff's argument, OB 32, settling the Equity Grant Action does not show Siskind lacked independence. This argument was not raised below and "is procedurally barred, because it was not fairly presented to the Court of Chancery." *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 47 n.38 (Del. 2006). In any event, far from adjudicating wrongdoing, the settlement preceded even a ruling on a Rule 23.1 motion—and stated that it could not be used as evidence of wrongdoing, a stipulation by which Plaintiff is bound. A1001. Plaintiff's attempt to weaponize what he calls "an unrelated compensation settlement," OB 41, would deter "the voluntary settlement of claims that Delaware law encourages." *Knight v. Miller*, 2023 WL 3750376, at *7 (Del. Ch. June 1, 2023). *Walton*, which observed that agreeing to adopt procedures implied that "similar procedures were not in place," 2023 WL 3093500, at *46, adds nothing. That the Committee had not previously engaged FW Cook did not mean that Siskind lacked independence.

Finally, attempting to shoehorn this case into the shape of *Tornetta v. Musk*, 310 A.3d 430 (Del. Ch. 2024), Plaintiff calls Greenberg a "Superstar CEO" and asks the Court to apply a "jaundiced eye." OB 29. But *Tornetta* warned that the Superstar CEO "concept should not be deployed far and wide," 310 A.3d at 508 n.632, and Plaintiff cannot reconcile his position with the holdings of leading cases involving prominent CEOs Zuckerberg and Stewart. *See, e.g.*, *Beam*, 845 A.2d at 1054 (directors were not "beholden to Stewart" and "[c]oupling those relationships with Stewart's overwhelming [94%] voting control . . . does not close that gap").

Far from changing the law, *Tornetta* held that directors lacked independence because Musk provided one with "dynastic or generational wealth" and joined him for "joint family vacations," provided another with "life-changing" compensation and another with "a large portion of his wealth," "repeatedly vacationed together with [another and] their respective families," and wielded "significant influence" over the career of another who "invested $75 million in [other] Musk-controlled companies." 310 A.3d at 509-10. Greenberg did none of those things for Siskind. The presumption of independence is intact.

CONCLUSION

The order dismissing the Complaint under Rule 23.1 should be affirmed.

/s/ E. Wade Houston
A. Thompson Bayliss (#4379)
E. Wade Houston (#6289)
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, Delaware 19807
(302) 778-1000

Attorneys for Defendants-Appellees Katherine Blair, Morton Erlich, Richard Siskind, Jeffrey Greenberg, Geyer Kosinski, and Richard Rappaport

OF COUNSEL:

Brad D. Brian
John M. Gildersleeve
Abraham B. Dyk
MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue, 50th Floor
Los Angeles, California 90071
(213) 683-9100

/s/ Susan W. Waesco
Kenneth J. Nachbar (#2067)
Susan W. Waesco (#4476)
Miranda N. Gilbert (#6662)
MORRIS, NICHOLS, ARSHT & TUNNELL LLP
1201 North Market Street
Wilmington, Delaware 19801
(302) 658-9200

Attorneys for Defendants-Appellees Robert Greenberg, Michael Greenberg, and David Weinberg

OF COUNSEL:

Abby F. Rudzin
O'MELVENY & MYERS LLP
7 Times Square
New York, New York 10036
(212) 326-2000

<u>/s/ Tyler J. Leavengood</u>
Matthew F. Davis (#4696)
Tyler J. Leavengood (#5506)
POTTER ANDERSON &
CORROON LLP
Hercules Plaza
1313 North Market Street, 6th Floor
Wilmington, Delaware 19801
(302) 984-6000

Attorneys for Nominal Defendant-Appellee Skechers U.S.A., Inc.

OF COUNSEL:

Kenneth A. O'Brien, Jr.
SHEPPARD MULLIN RICHTER
& HAMPTON LLP
333 South Hope Street, 43rd Floor
Los Angeles, California 90071
(213) 617-5402

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