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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: JUNE 25, 2024

REPLY BRIEF OF PLAINTIFF-BELOW/ APPELLANT MICHAEL CONTE

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INTRODUCTION

Plaintiff's Opening Brief ("POB")[1] detailed numerous decisive flaws with the Court's Opinion finding that not one of Siskind, Erlich, and Blair either lacked independence from Robert or faced a substantial likelihood of liability on the claims herein, and dismissing this action pursuant to Rule 23.1 for failure to plead demand futility.[2] In purportedly answering these arguments, the DAB largely parrots the erroneous analysis from the Opinion, fails to appropriately respond to the POB, and offers no persuasive reason why the Opinion should not be reversed.

Regarding Siskind's lack of independence from Robert, Defendants continue examining Plaintiff's allegations in isolation to support their conclusion that each fact ***standing alone*** does not impugn Siskind's independence from Robert. But when analyzed holistically, as required by law, Plaintiff's allegations easily establish a pleading-stage basis to doubt that Siskind could act impartially with respect to a demand to initiate this litigation challenging Robert's compensation.

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[1] Capitalized terms undefined herein have the same meaning as in the April 26, 2024 POB. Unless otherwise specified, all internal quotation marks and citations herein are omitted, and all emphasis herein is supplied.

[2] Because Defendants conceded demand futility as to Robert, Michael, and Weinberg (*see, e.g.*, May 28, 2024 Defendants' Answering Brief ("DAB") 14), Plaintiff need only establish demand is futile as to ***one*** of Siskind, Erlich, or Blair for the seven-member Demand Board to lack a disinterested majority.

Regarding Committee members Siskind, Erlich, and Blair's substantial likelihood of liability on Plaintiff's *Caremark*[3] claim, Defendants mischaracterize Plaintiff's claim as being that just one stockholder (Plaintiff) finds the Plane Defendants' personal use of the Aircraft to be unreasonable, and trumpet the truism that determinations of whether executive compensation is excessive are "far better suited to the boardroom than the courtroom." DAB 18-19. But this case is not about "[h]ow much [compensation] is too much?" (*id.*)—the Committee itself determined that Plane Defendants' personal use of the Aircraft was unreasonable, excessive, and "too much" when it requested that management recommend limits on personal use and ultimately demanded that management develop an Aircraft policy. POB 13-14.

[redacted]

[redacted] POB 21-22. Instead, Plaintiff's *Caremark* claim concerns the Committee's subsequent failure to implement any of the safeguards it had ***already determined*** were necessary to prevent harm to Skechers, allowing the Plane Defendants' misuse of the Aircraft to continue unabated, causing ongoing and

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

escalating damages to Skechers. Because the Committee's conscious inaction was in bad faith, Siskind, Erlich, and Blair face a substantial likelihood of liability under *Caremark*.

Finally, regarding Siskind and Erlich's substantial likelihood of liability on Plaintiff's *Malone* claim,[4] Defendants refuse to acknowledge the plain materiality of compensation issues to the stockholder vote solicited by the 2021 Proxy, which contained the false and misleading statements. Such materiality is demonstrated by [redacted] It is more than reasonable to infer, particularly given that all inferences must flow to Plaintiff at this stage of the proceedings, that the full extent of the Plane Defendants' misuse of the Aircraft would similarly be material to stockholders. Accordingly, Siskind and Erlich face a substantial likelihood of liability under *Malone*.

Because Plaintiff has shown that at least one (and indeed all three) of Siskind, Erlich, and Blair either lack independence from Robert or face a substantial

[4] *Malone v. Brincat*, 722 A.2d 5 (Del. 1998).

likelihood of liability on the claims herein, demand is futile and the Court's dismissal pursuant to Rule 23.1 should be reversed.

ARGUMENT

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

Throughout the DAB, Defendants repeat the same error as the Court, further establishing that the Court's finding that Plaintiff failed to adequately plead Siskind's non-independence was reversible error. DAB 36-44. Namely, Defendants analyze Plaintiff's independence allegations on an individual basis and urge their interpretations of certain facts are correct, suggesting that Plaintiff should have pled evidence open to no contrary interpretation. But the Court is required to view the facts holistically, indulging all reasonable inferences in *Plaintiff's* favor, and Rule 23.1 only "requires that a plaintiff allege particularized facts…[not] plead evidence." *In re Facebook, Inc. Derivative Litig.*, No. 2018-0307, Tr. at 27:16-23 (Del. Ch. May 10, 2023); AR000027:21-23.[5] When analyzed appropriately, the conclusion is inescapable that there is reason to doubt Siskind's independence from Robert regarding the compensation issues at the heart herein.

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[5] *See also Del. Cty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1020 (Del. 2015) ("all reasonable inferences…must nonetheless be drawn in favor of the plaintiff"); *New Enter. Assocs. 14, L.P. v. Rich*, 292 A.3d 112, 160 (Del. Ch. 2023) ("If the plaintiffs have alleged facts…that support an inference of unfairness, then the court must credit those…nor can a court weigh competing evidence."); *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.").

A. Defendants, Like the Court, Do Not Analyze Plaintiff's Independence Allegations Holistically

In dividing Siskind's ties to Robert into two separate sections—one for allegations concerning Siskind and Robert's social relationship and one for allegations regarding their business "transactions"—Defendants repeat the Court's error, siloing facts into separate tranches and then drawing improper defense-friendly inferences.[6] But Siskind and Robert's intricate web of longstanding social and business ties must be considered together:

- In 1998, while both men were on the board of Siskind's company, Robert purchased a home from Siskind and the two remain neighbors;
- In 1999, while both men were on each other's boards, Siskind's company acquired trademarks from Skechers through Robert's family trust;
- Afterwards, Robert used his controlling interest in Skechers to appoint Siskind to the Board, where he has remained;
- Both men served on the compensation committees of each other's companies concurrently and Siskind has been Chair of Skecher's Committee for nearly twenty years; and
- Siskind's decision-making in that role was recently implicated in the Equity Grant Litigation, which resulted in the cancellation of Robert's allegedly excessive awards, originally awarded under Siskind's purview.[7]

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[6] *Compare* DAB 37-39 (solely addressing "friendship" allegations), *with* DAB 39-44 (solely addressing alleged "bias-producing transactions").

[7] Defendants' contention that this fact is procedurally barred because it was not fairly presented below is wrong. DAB 43. Defendants themselves raised the issue of ***why*** FW Cook was retained below, prompting the Court to consider the engagement when ruling. *See* Op. at 21-22 (concluding the Committee's "request that FW Cook study the executive compensation…reflect attention to the issue, not

POB 10-11, 28. These facts—viewed holistically—establish a pleading-stage inference that Siskind lacks independence. POB 26-34.

Defendants' attempt to silo each fact is further illuminated in the authorities they selected. First, Defendants advance the premise that a "bare allegation of a prior business relationship from over a decade ago" is equivalent to the ongoing reciprocal relationship here. DAB 40. Their cited authority, however, involved a director employed by a network that syndicated the controller's television show a decade ago. *In re Martha Stewart Living Omnimedia, Inc. S'holder Litig.*, 2017 Del. Ch. LEXIS 151, at *57 (Del. Ch. Aug. 18, 2017). Here, in contrast, Robert and Siskind concurrently determined each other's compensation as CEO's and have had a variety of *continuing* business and personal interactions, including remaining neighbors through the present. POB 28.

Second, Defendants contend that a "past business relationship ended twelve years before the transaction at issue" does not support an inference of bias. DAB 40 (citing *In re KKR Fin. Hldgs. LLC S'holder Litig.*, 101 A.3d 980, 997-98 (Del. Ch. 2014)). However, *KKR* involved a past relationship that "had nothing to do with"

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conscious disregard"). It defies reason to assert the issue was not raised when the Court's decision ***directly cited*** the Equity Grant Litigation settlement. Op. at 21, nn.74-75.

the questioned decision-making (*id.*), whereas Siskind and Robert's continuously oversaw one another's compensation, supporting an inference that they influenced Siskind's decision-making as to the ***very same*** issue at the core of this litigation.

Third, Defendants cite *Zuckerberg* to support the Court's finding that Robert and Siskind's real estate or trademark transactions were immaterial or lacked conflicts. DAB 39-40 (citing *United Food & Commer. Workers Union v. Zuckerberg*, 262 A.3d 1034, 1061 (Del. 2021)). This argument ignores that Plaintiff presented a chronological series of ties outside of and in conjunction with those transactions, which, viewed holistically, suggest Siskind's decision-making as to his neighbor's compensation is not independent, particularly because the ***very same type of decision-making*** had been implicated recently. A000979-80. Indeed, in examining the minutia of each transaction the Court strayed from its ultimate task of evaluating Siskind's decision-making capacities as to the challenged compensation by examining his conduct holistically. *See* Op. at 39-40 (finding "Plaintiff has not pled facts from which the Court can infer that the trademark sale was anything other than an arms-length transaction" and "[s]elling another a home nearly twenty-five years ago does not ***alone*** establish a material relationship"). Further, in *Zuckerberg*, the director was found independent because the only allegations were that he bought advertisements from Facebook and contributed to the same charities as the

controller. *Zuckerberg*, 262 A.3d at 1061-1062. Here, Plaintiff did not allege ***solely*** that Siskind bought something from and shared a social circle with Robert; rather, Plaintiff alleged that Siskind and Robert served on the board of Siskind's company together while Siskind sold Robert a house in his same neighborhood, Robert sold Siskind trademarks via a family trust, and, ***as his neighbor***, they concurrently served on each other's compensation committees, and Siskind has continued to exercise oversight over Robert's compensation for the past twenty years.

Fourth, Defendants repeat the Court's piecemeal examination of Robert and Siskind's ties when examining their concurrent service on the board of each other's companies from 1999 to 2002. DAB 41-42. Even if the Court was correct to presume that they did not use their positions to benefit each other at that time (Op. at 39), that does not support an inference that Siskind did not use his position ***recently*** to benefit Robert, particularly when considering their continuous ties since that date. In the same way, Defendants misstep in their cited authorities, all of which dealt with circumstances in which a plaintiff pled that directors were not independent ***solely*** because they overlapped in service as directors and/or employees with an appointing controller.[8]

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[8] *See In re Camping World Holdings, Inc. Stockholder Derivative Litig.*, 2022 Del. Ch. LEXIS 24, at *45-46 (Del. Ch. Jan. 31, 2022) (director did not lack independence because he was appointed to the board by the controller and served on

B. Defendants, Like the Court, Fail to Give Plaintiff the Benefit of Reasonable Inferences

Defendants also incorrectly suggest that the Court indulge inferences in their favor. *Sanchez*, 124 A.3d at 1020 ("[A]ll reasonable inferences from the pled facts must nonetheless be drawn in favor of the plaintiff."); *New Enter. Assocs.*, 292 A.3d at 160 (disallowing a weighing of "competing evidence").

First, Defendants suggest that Plaintiffs erred by failing to plead that Siskind owed his career or wealth to Robert (DAB 42-43), and that the Court was correct to indulge defense-friendly inferences rather than evaluate Plaintiff's actual allegations—the two ***reciprocally*** benefited from their bevy of ties, which implicated Siskind's decision-making as to Robert's Aircraft perquisites. Indeed, Defendants' citation to cases in which the benefits of a relationship flowed from the controller to the director (*id.*), does not imply that circumstances like here (where benefits flow both ways) do not bear on independence. *See, e.g.*, *Sandys v. Pincus*, 152 A.3d 124, 133 (Del. 2016) (finding a "mutually beneficial network of ongoing business

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another with him); *Patel v. Duncan*, 2021 Del. Ch. LEXIS 227, at *44-45 (Del. Ch. Sept. 30, 2022) (allegations that the directors "served together on a few boards of unaffiliated companies" were insufficient to show that they were dominated by or beholden to one another); *compare* CtW Letter (letter to the Board raising "serious questions" concerning Siskind's independence, including because of his and Robert's concurrent service on their compensation committees boards).

relations" created reasonable doubt of directors' independence).[9] Defendants' attempts to distinguish *Tornetta*, which involved Elon Musk providing a director with massive wealth, does not preclude the characterization of Robert as a "Superstar CEO" in the specific Skechers universe, since he—like Musk—held the position of CEO, Chair, and founder (and has remained, with his family, controlling stockholders), enjoyed ties with directors, and effectively set his own compensation—here, his unlimited personal use of the Aircraft, utilized far in excess of the reasonableness restriction in his employment agreement. *Tornetta v. Musk*, 310 A.3d 430, 446 (Del. Ch. 2024).[10]

Second, Defendants inaptly cite *Beam* and *Zuckerberg* (DAB 42) to support the premise that the Court's reasoning was correct even if Robert and Siskind shared

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[9] *See also In re Match Grp., Inc. Derivative Litig.*, 2024 Del. LEXIS 115, at *59 (Del. Ch. Apr. 4, 2024) ("[B]usiness affiliations, particularly those based on mutual respect, are of the sort that can undermine a director's independence."); *City of Pittsburgh Comprehensive Mun. Pension Tr. Fund v. Conway*, No. 2022-0664, Tr. at 19:20-20:3 (Del. Ch. Jan. 22, 2024); AR000067:20-68:3 (finding that just because the plaintiff "has not pled the strong friendship or significant financial ties that have appearance in other demand futility cases" does not preclude him from pleading ties that "have the same effect and give rise to the reasonable inference that the relationship is sufficiently important such that [the director] could not be impartial in considering the demand").

[10] Further, Siskind's paygrade does not contravene the premises for which Plaintiff cited *Tornetta*, namely, that Siskind's "decades-long relationship" with Robert must be "evaluated holistically" considering the "critical role he played as chair of the Compensation Committee." 310 A.3d at 501, 08-09.

substantial business and personal ties—neither case involved "substantial and recent business relationships paired with close relationships" (*id.*)—rather, they involved only conclusory allegations. *See Beam v. Stewart*, 845 A.2d 1040, 1047 (Del. 2004) (director was independent when plaintiff alleged only "several years of business interactions and a single affirmation of friendship by a third party"); *Zuckerberg*, 262 A.3d at 1063 (director was independent when plaintiff alleged "good deal flow" from director's association with the company but did "not identify a single deal that flowed to—or is expected to flow to" the director). In contrast, Plaintiff has alleged with particularity that Siskind and Robert are neighbors who have chosen to live so close together that their boat docks face each other, and who have been engaged in multiple additional transactions together for decades, which is far from a "single affirmation of friendship" examined in *Beam* or the hypothetical future transactions in *Zuckerberg*. Thus, there is reason to doubt Siskind's independence from Robert. *See Tracy v. Morris*, 2024 U.S. Dist. LEXIS 74986, at *16-20 (C.D. Cal. Apr. 23, 2024) (finding that two directors, one with "material [financial] ties" to Morris, the other having a "close personal friendship" spanning decades, coupled with allegations of complicity, were sufficient to impugn directors' independence).

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

A. Defendants Misunderstand the Nature of a "Red Flags" Claim

Defendants' arguments that Plaintiff's *Caremark* claim does not allege violations of laws or regulations is a straw man. DAB 16. Prong two *Caremark* claims can take many forms, not all of which require violations of positive law. *Ont. Provincial Council of Carpenters' Pension Tr. Fund v. Walton*, 2023 Del. Ch. LEXIS 92, at *88-89 (Del. Ch. Apr. 26, 2023). One variant—***not*** alleged here—occurs when there is an inference of intentional lawlessness in pursuit of profits, sometimes called a *Massey* claim. *Id*. at *89.[11] Another actionable breach of fiduciary duty exists when directors have notice that their company is "violating the law ***or otherwise headed for a corporate trauma***, but willfully ignored the evidence and consciously decided to do nothing." *Walton*, 2023 Del. Ch. LEXIS 92, at *89. That is precisely what happened here—the Committee was fully aware that the Plane Defendants' abuse of the Corporate Aircraft in breach of their employment agreements was causing Skechers corporate trauma; yet, after demanding that management put in place an Aircraft policy to prevent such abuse, the Committee took no meaningful

[11] *In re Massey Energy Co. Derivative & Class Action Litig.*, 2011 Del. Ch. LEXIS 83 (Del. Ch. May 31, 2011).

action, allowing the Plane Defendants' misconduct to continue unabated for the next two years. The Committee's conscious inaction—which caused Skechers to incur significant and increasing damage as a direct result—supports an actionable "Red-Flags Claim." *Id.*[12]

Defendants selectively quote *Constr. Indus. Laborers Pension Fund v. Bingle*, 2022 Del. Ch. LEXIS 223 (Del. Ch. Sep. 6, 2022), to suggest that violation of positive law is a mandatory element of a *Caremark* claim. DAB at 16. Not so. *Bingle* holds only that a "connection" between the board and corporate trauma is required, noting that violations of positive law are simply a common way to establish one. *Cf. id.*, *Bingle*, 2022 Del. Ch. LEXIS 223, at *17. But where, as here, directors are consciously derelict in their oversight obligations and knowingly allow wrongful conduct to continue, *Caremark* liability can (and should) attach.

Garfield v. Allen, 277 A.3d 296 (Del. Ch. 2022) is instructive, although not in the way Defendants suggest. DAB 17-18. *Garfield* notes that a "decision-maker

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[12] Defendants' citation (DAB 16-17) to *In re ProAssurance Corp. Stockholder Derivative Litig.*, 2023 Del. Ch. LEXIS 385, at *32-33 (Del. Ch. Oct. 2, 2023), for the proposition that "How (and whether) to respond [to business risks] was entirely within the directors' discretion" has no application here, where the directors already determined "how" to respond—by enacting a policy to put limits on the excessive personal use—but consciously failed thereafter to implement restrictions they knew were needed.

acts disloyally and in bad faith by consciously disregarding a limitation in [a] compensation plan," and that a conscious decision to ignore such violations "supports the similar inference that the decision-maker acted disloyally and in bad faith." *Id*. at 337. This applies equally to restrictions in the Plane Defendants' employment agreements as it did to compensation plan restrictions in *Garfield*. Here, the Plane Defendants' employment agreements limited personal use of the corporate Aircraft to "reasonable" amounts. The Committee and FW Cook both found that the magnitude of the Plane Defendants' personal use of the Aircraft and related gross-up payments were problematic. Further, "it matters that the contractual counterparties on both sides of the [Aircraft abuse]…had a fiduciary duty to fix the violation." *Id*. at 337. In the parlance of *Garfield*, where fiduciaries exist on both sides of the issue:

> The clear answer was to fix the [Aircraft abuse], and the failure to take that action supports an inference of bad faith conduct. A fix was readily available because [the Plane Defendants themselves were] director[s] and [they] therefore had the same fiduciary-fueled obligation to remedy the problem as [their] fellow directors.

Id. at 338. The *Garfield* court rightly denied the motion to dismiss. *Id*. at 144-45.

The same should have occurred here. The Complaint cogently alleges particularized facts showing: (i) the Committee's awareness that the Plane Defendants' personal use of the corporate Aircraft far exceeded the "reasonable"

amounts allowed; (ii) the Committee's recognition that such misuse needed to be curtailed; (iii) the Committee stood idly by as conflicted management affirmatively ignored its requests for recommendations and, later, a formal policy to effectuate such limitations; and (iv) while the Committee and management failed to act, Skechers incurred significant and increasing damage as a result. Thus, the Committee members permitted the Plane Defendants to misappropriate a valuable Company asset, breaching their employment agreements, and eventually triggering the loss of valuable tax treatment of the Aircraft. But rather than exercise proper oversight of conflicted management, the Committee members instead let the foxes guard the henhouse, and then consciously turned a blind eye afterward.

And while Defendants rhetorically suggest that the question "How much is too much?" is better relegated to the boardroom than the courtroom, here the courtroom is needed because the Committee had already determined that this threshold has been passed, and that a policy was needed to restrict the Plane Defendants' unfettered misuse of the corporate Aircraft.[13] The Committee had its

[13] As a result, Defendants' cited authorities are inapposite. DAB 18-19 (citing *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000); *In re infoUSA, Inc. S'holders Litig.*, 953 A.2d 963, 983-84 (Del. Ch. 2007)). Moreover, *infoUSA* actually supports Plaintiff's position as that court found that demand was futile, and the complaint stated a claim. 953 A.2d at 984.

chance to act, and its sustained bad faith failure to do so cedes—as it should—responsibility to the Plaintiff to rectify the situation for Skechers.

B. Defendants' Binary View of Oversight Liability Under *Caremark* Is Unsupported

Defendants' arguments that Plaintiffs did not demonstrate "conscious inaction" (DAB 22-28) fail because they endorse an entirely binary view of oversight that is not supported under Delaware law. In their all-or-nothing construction, Defendants posit that ***any*** action or acknowledgement whatsoever absolves the Committee members of a substantial likelihood of liability under *Caremark*. But a classic "Red Flags" claim involves "a period of time (perhaps prolonged) ***marked by a combination of inaction and occasional action***, followed by a corporate trauma." *Walton*, 2023 Del. Ch. LEXIS 92, at *86. Such is the case here.

Defendants' suggestion that the Committee did not act in bad faith is unsupported, no matter how many descriptors are cherry-picked from the POB. *See* DAB 23 [redacted] establish only that: (i) the "red flags" surrounding the Plane Defendants' excessive personal use of the Aircraft were received by the Committee; and (ii) the Committee acknowledged those "red flags" were sufficient to require action. Mere existence and acknowledgement of red flags may preclude a "prong one" *Caremark* claim, but it would not preclude the "prong two" *Caremark* claims made here. *See generally In re MetLife Inc. Derivative Litig.* 2020 Del. Ch. LEXIS

265 (Del. Ch. Aug. 17, 2020) ("[C]onscious disregard of duty…obviously, can only occur with knowledge of the defect.").

Defendants do not dispute that the Board did nothing concerning personal abuse of the Aircraft in 2018 and 2019. DAB 26. Instead, they point to FW Cook's [redacted] and argue that such action "displac[es] Plaintiff's theory of bad faith inaction."[14] DAB 24. Not so. As an initial matter, [redacted] POB 21-22. Moreover, the case law is clear that, even if the Committee did take ***some*** action, miniscule efforts are insufficient to defeat a *Caremark* claim at the pleading stage.[15] Directors are found to have acted in good

[14] Defendants also quibble that the Complaint made no references to [redacted] but ignore that the Complaint incorporated the entirety of the Section 220 Documents by reference (*compare* DAB 25; *with* A000042-43, A000086, A000751, A001147). Tellingly, Defendants relied on those same books and records below and here.

[15] Defendants misconstrue *Walton*'s facts to suggest that Wal-Mart's board took no action whatsoever. DAB 25. *Walton* noted several instances where directors at least took *some* action, such as "repurpos[ing] an existing inventory tool" and imposing "hard limits" to flag suspicious orders. 2023 Del. Ch. LEXIS 92, at *52; *see also id.* at *97-98 ("Importantly, the contention is not that Walmart did nothing on the compliance front…[it] eventually created an inventory control system…."); *id*. at *124-25 (compliance enhancements "negate[d]" by subsequent adverse events, "when viewed collectively"); *id*. at *126-27 ("directors were not *completely* inactive…."); *id*. at *127-28 (company "amended its pharmacy operating manual" and "restrict[ed] initial acute opioid prescriptions to no more than a seven-day

faith where they take meaningful, tangible action to address red-flags—even if those efforts are not wholly successful.[16]

Defendants (like the Court below) misstep by separating the Committee's delegation of the Aircraft policy to conflicted management from both: [redacted] *Cf.* POB 13-19, 37-38 *with* DAB 27 (citing *City of Fort Myers Gen. Emples. Pension Fund v. Haley*, 235 A.3d 702, 721 n.69 (Del. 2020)). While there may be "nothing inherently wrong with a Board delegating to a conflicted CEO the task of negotiating a transaction," Defendants omit that *Haley* also requires that "the conflict ***must be adequately disclosed*** to the Board, and the Board ***must properly oversee and manage*** the conflict." *Id*. This did not happen here—[redacted]

supply"). And yet *Walton* sustained plaintiff's *Caremark* claim under Rule 23.1; the same result should have obtained here. *Id*. at *151.

[16] *Pettry v. Smith*, 2021 Del. Ch. LEXIS 134 (Del. Ch. June 28, 2021), which Defendants cite, is inapposite. There, FedEx's board acted promptly to curb illegal shipments of cigarettes, including: (i) creating a "Demand Committee" to investigate such shipments; (ii) banning virtually all tobacco shipments; (iii) implementing new training programs and detection measures; and (iv) reprimanding noncompliant employees. *Id*. at *10-11, *21-22. No similarly active measures were taken here. *Clem v. Skinner*, 2024 Del. Ch. LEXIS 49 (Del. Ch. Feb. 19, 2024), is similarly distinguishable. *Id*. at *3, *18, *22-23 (changes made "within months" of board knowledge of whistleblower action).

[redacted] whilst the Board never rose to the occasion with meaningful action.[17] The lack of meaningful interplay and oversight between management and the directors leaves Defendants' proffered authorities inapt.[18]

Defendants' attempt to recast Plaintiff's allegations as "criticism of the manner and timing of the Committee's response" (DAB 28) fails, as this dismissive mischaracterization oversimplifies and misstates the standard. Plaintiffs are not required to show that the Board did ***absolutely*** nothing in response to red flags to prevail—it is enough to plead that, where some miniscule step is taken, the Committee "was aware or should have been aware that its response…fell short." *In*

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[17] Defendants also falsely claim Plaintiffs offered no authority supporting that an admitted "lack of responsiveness" makes it disloyal for the Board to entrust the task to conflicted management, ignoring *Winborne*'s mandate that the Court analyze all facts holistically. POB 38 (citing *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")).

[18] *Firemen's Ret. Sys. v. Sorenson*, 2021 Del. Ch. LEXIS 234, at *35-38 (Del. Ch. Oct. 5, 2021), dismissed *Caremark* claims where management assured (and demonstrated) to the board that red flags surrounding Mariott's post-merger cybersecurity were being noted and addressed. And in *McDonald's*, red flags "led to action," including engagement with management to, *inter alia*, hire outside consultants, revise policies, implement new training, and provide new levels of support to franchisees. *In re McDonald's Corp. Stockholder Derivative Litig.*, 291 A.3d 652 (Del. Ch. 2023). Neither case involved conflicted management, [redacted]

re Boeing Co. Derivative Litig., 2021 Del. Ch. LEXIS 197, at *92 (Del. Ch. Sep. 7, 2021); *see also supra* n.15. The Complaint easily cleared this hurdle. POB 40-42.

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

The POB details why Siskind and Erlich face a substantial likelihood of liability for making the following false and misleading statements and/or omissions in the 2021 Proxy seeking the re-election of Robert and Erlich:

- That the Aircraft were not "designated primarily for business travel";
- The volume of personal use related to total use of the Aircraft;
- The failure to disclose fixed costs;
- That the excessive personal use led to foregone tax deductions; and
- [redacted]

POB 45-50. Defendants contend otherwise, claiming: (1) no facts show that Erlich or Siskind "knowingly" disseminated these false statements; (2) the false statements were immaterial to Robert and Erlich's re-election; and (3) the statements were not false or misleading. DAB 29-35. Each argument is unavailing.

First, Erlich and Siskind's service on the Committee belies any notion that they did not "know" the statements were false and misleading. As described *supra*, as members of the Committee, both Erlich and Siskind were well aware of the Plane Defendants' abuse of the Aircraft at the time they issued the statements in the 2021 Proxy. That is more than sufficient. *See infoUSA*, 953 A.2d at 989-90 (directors

had knowledge of false statements in Form 10-K where weeks earlier they had received a report contradicting those statements).

Second, Defendants' assertion that none of these false and misleading statements was material misses the mark. DAB 30-32. Indeed, the statements were designed to obscure from stockholders both the Plane Defendants' misuse of the Aircraft and the fact that the Committee was complicit in this misuse. That information is highly material to stockholders, much more so than the dollar value of the Aircraft perquisites, because it evidences a more troubling issue at Skechers that the Board was unable and/or unwilling to take action adverse to Robert and his family's personal interests. *City of Sarasota Firefighters' Pension Fund v. Inovalon Holdings, Inc.*, 2024 Del. LEXIS 151, at *40 (May 1, 2024) ("Materiality is to be assessed from the viewpoint of the 'reasonable' stockholder…."); *see also id*. at *39-65 (proxy found materially misleading where it failed to disclose conflicts). Robert and Erlich, whose re-election the 2021 Proxy sought, clearly benefited significantly from keeping this information from stockholders. Indeed, following the stockholder vote on the 2021 Proxy, [redacted]

[redacted][19] It is reasonable to infer that Erlich's support would have been even lower had the 2021 Proxy fully and fairly disclosed the extent to which the Plane Defendants were misusing the Aircraft for personal, luxury vacation travel. There is no reason now to second-guess [redacted] At the very least, Plaintiff is entitled to a pleading-stage inference of materiality. *Inovalon*, 2024 Del. LEXIS 151, at *40 ("It would not be a stretch to say that it is reasonably conceivable that the alleged facts could make a difference to stockholders….").

Finally, each of the statements and omissions was false and misleading. Defendants argue that the representation in the proxy that the Aircraft were "designated primarily for business travel" is not false or misleading because Skechers' primary intended use for the Aircraft was business travel, but it just so happened, due to the Pandemic, that the Aircraft was used more for personal flights than business flights. But that contention simply changes the meaning of the disclosure, from one of fact (how the Aircraft is used) to one of intent (how Skechers intended the Aircraft to be used), and if adopted, would render the disclosure

[19] A001133; POB 24.

meaningless to stockholders. "Primarily" means "for the most part."[20] Thus, once the "most part" of the Aircraft's use became personal, it was no longer "designated primarily" for business. That, in turn, rendered the 2021 Proxy misleading.

[redacted] Consequently, the 2021 Proxy was false and misleading, and Siskind and Erlich face a substantial likelihood of liability on Plaintiff's *Malone* claim.

[20] https://www.merriam-webster.com/dictionary/primarily.

[redacted]

CONCLUSION

For the foregoing reasons, the Court's Opinion should be reversed.

Respectfully Submitted,

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