



IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE SEAFARERS PENSION PLAN,
derivatively on behalf of BANK OF
AMERICA CORPORATION and BANK OF
AMERICA, N.A.,

Plaintiff-Below/Appellant,

v.

BRIAN T. MOYNIHAN, LIONEL L.
NOWELL III, SHARON L. ALLEN, JOSÉ E.
ALMEIDA, FRANK P. BRAMBLE, SR.,
PIERRE J. P. DE WECK, ARNOLD W.
DONALD, LINDA P. HUDSON, MONICA C.
LOZANO, DENISE L. RAMOS, CLAYTON
S. ROSE, MICHAEL D. WHITE, THOMAS
D. WOODS, MARIA T. ZUBER, JACK O.
BOVENDER, JR., SUSAN S. BIES,
THOMAS J. MAY, R. DAVID YOST,
ALASTAIR BORTHWICK, GEOFFREY S.
GREENER, LAUREN MOGENSEN, DEAN
C. ATHANASIA, PAUL M. DONOFRIO, and
THOMAS K. MONTAG,

Individual Defendants-Below/Appellees,

and

BANK OF AMERICA CORPORATION and
BANK OF AMERICA, N.A.,

Nominal Defendants-Below/Appellees.

No. 468,2024

On Appeal from the Court of
Chancery, C.A. No. 2023-
0787-JTL

**PUBLIC VERSION FILED:
February 18, 2025**

APPELLANT'S OPENING BRIEF

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NATURE OF THE PROCEEDINGS

This derivative action brought by plaintiff The Seafarers Pension Plan (“Plaintiff”), on behalf of Nominal Defendants Bank of America Corporation and Bank of America, N.A. (together, unless otherwise noted, “BOA” or the “Company”), asserts breach of fiduciary duty claims against BOA’s directors (the “Director Defendants”) and officers (the “Officer Defendants,” and together with the Director Defendants, the “Defendants”) for: (a) consciously failing to implement any reporting or information system or controls and consciously failing to monitor or oversee those systems (*i.e.*, an “Information Systems Claim”); (b) consciously ignoring red flags of noncompliance with BOA’s regulatory obligations under federal and state laws, as well as the Company’s contractual obligations (*i.e.*, a “Red Flags Claim”); and (c) taking affirmative steps in violation of those duties (*i.e.*, a “Massey Claim”). Plaintiff appeals from the Court of Chancery’s (the “Court”) decision¹ and implementing Order dismissing Plaintiff’s complaint (the “Complaint”) with prejudice under Court of Chancery Rule 23.1.²

This lawsuit is brought in connection with BOA’s disbursement of state government-funded unemployment benefits through prepaid debit cards during the

¹ The transcript of the Telephonic Rulings of the Court on Defendants’ Motion to Dismiss is attached hereto as Exhibit A.

² The Order granting Defendants’ Motion to Dismiss is attached hereto as Exhibit B.

COVID-19 pandemic (the “Program”). The Program was subject to extensive federal and state laws, regulations, and BOA’s own contractual obligations to the state unemployment agencies with which it did business, most notably California’s Employment Development Department (the “EDD”). The EDD was BOA’s largest customer in the Program.

The huge increase in unemployment benefits the government made available during COVID led to a predictable increase in fraudulent claims. Under applicable laws and regulations, which governed all of BOA’s consumer banking businesses, including the Program, BOA was required to investigate fraudulent claims and provide notice to consumers before locking their accounts, while also providing human resources to help resolve any disputes. BOA guaranteed these protections to the EDD’s customers, boasting that it “*exceeds* the protections” of federal laws and regulations. A0043, ¶ 65 (quoting A0438).

Seven months into the pandemic, the Program was costing BOA hundreds of millions of dollars in losses due to fraudulent claims and the costs of administering the Program. Consequently, BOA decided to exit the Program altogether. To stem losses and increase profits, on or about September 28, 2020, BOA unilaterally and without notice to the EDD or other regulators implemented a computerized “Fraud Filter” and abandoned any effort to comply with the law.

The Fraud Filter automatically and illegally froze or blocked many legitimate Program accounts. BOA also prevented Program participants from seeking redress and sent them “deceptive disclosures and notices.” A0147-48, ¶ 250; A0296-97; A0332-33. BOA’s misconduct disrupted thousands of lives, causing an almost immediate blizzard of negative press reports that were highly critical of BOA’s conduct, inevitably resulting in regulatory sanctions totaling hundreds of millions, if not billions, of dollars.

Spurred to action, and due to the severity of the situation, less than *sixty days* after BOA started using the Fraud Filter, a bipartisan group of *fifty-nine* California State Senators and Assembly members signed a letter addressed to Defendant Moynihan, BOA’s Chairman and Chief Executive Officer (“CEO”), calling for immediate action. *See* A0024-25, ¶ 11. The letter stated that BOA had “taken it upon themselves to freeze cards and take money from recipients” based on their own “proprietary formula to detect fraud,” which resulted in “at least 350,000 Californians [being] unable to access . . . benefits owed to them.” *Id.* (quoting A0209). The letter noted that consumers were consistently “unable to get through to [BOA] call centers,” were given misinformation (including that the EDD and not BOA was freezing the accounts), and that only 8% of cases had been resolved. *Id.* Defendant Moynihan was unconcerned. He did not share the letter with the Board

and derided it as just one of many “letters from politicians.” A5047. BOA responded to the letter claiming that the EDD was at fault and insisting that the Company complied with the law. A0093-95, ¶¶ 177-78; A1909-13.

Soon thereafter, cardholders illegitimately denied access to their funds filed a class action lawsuit, which was later consolidated into a multi-district federal action and is still pending. A0096-98, ¶¶ 181-84; *see* A1915-56.³ Plaintiffs claimed that the Program was operating illegally and sought a mandatory injunction to prevent the unfolding human catastrophe. A0097-98, ¶ 184. BOA vigorously argued that the Program was completely legal and compliant. A0104-05, ¶ 196; A1972-73; A1981-84.

The plaintiffs prevailed. The court in the California MDL found that the plaintiffs “demonstrated a strong likelihood of success on their claims that [BOA] . . . has violated, and continues to violate, the Electronic Transfers Funds Act” as well as its contractual obligations to card holders. A0025-26, ¶ 13 (quoting A0283). The court ordered BOA to negotiate the terms of a final injunction order with the class plaintiffs (the “Injunction Order”). A0025-26, ¶ 13; A0288-92. The Injunction

³ *Yick v. Bank of America, N.A.*, Case No. 3:21-cv-00376-VC (N.D. Cal.). The *Yick* case was consolidated into the case captioned *In re Bank of America California Unemployment Benefits Litig.*, Case No. 3:21-md-02992-LAB-MSB (S.D. Cal.) (hereinafter, the “California MDL”). All references to *Yick* are hereinafter referred to as the California MDL.

Order forced BOA to stop using the Fraud Filter, but it continued to violate the law and still uses the Fraud Filter. A5194; California MDL, Second Amended Complaint (ECF No. 304), ¶¶ 111-12.

Around the same time, two federal regulators launched separate investigations.⁴ The Office of the Controller of the Currency (the “OCC”) and the Consumer Financial Protection Bureau (“CFPB”) ultimately issued consent orders finding BOA liable for multiple legal violations (collectively, the “Consent Orders”). *See* A0293-379. To settle the investigations, the Director Defendants, who all signed the Consent Orders, agreed to make fundamental changes to the Program and to finally create and oversee controls and reporting systems where none had previously existed.

The regulators found that BOA broke the law in several ways. *See id.* The OCC and the CFPB concluded, among other things, that BOA illegally employed the Fraud Filter, not merely because it was mechanized, but given BOA’s failures to investigate account freezes and provide notice and explication, it was nearly impossible for legitimate card holders to access unemployment funds. On July 14,

⁴ The CFPB was spurred on by a letter from the late Senator Dianne Feinstein. A0100-01, ¶ 189; A1958. Senator Feinstein ominously wrote “that I ask that you do everything within your power to ensure that any Californians harmed by those actions are helped, and to make such *recommendations to Congress as may be warranted.*” A1958 (emphasis added).

2022, the OCC and CFPB entered the Consent Orders. *See id.* Specifically, the Consent Orders sanctioned the Company for its “abusive,” “deceptive,” and “unfair” conduct deliberately perpetrated against Program participants by: (1) using the Fraud Filter to deny unemployment claims without conducting a further investigation; (2) failing to credit wrongly frozen accounts; (3) using the Fraud Filter to reverse prior credits to frozen accounts; (4) preventing account holders from seeking reconsideration of account freezes “as a result of operational deficiencies”; and (5) providing “deceptive disclosures and notices regarding liability” regarding BOA’s handling of frozen accounts. A0296-97; A0332-33. The federal regulators tied these violations to BOA’s fundamental lack of “*effective risk management over the Program.*” A0296; A0323. The Consent Orders found that in violation of the law, BOA maintained “*inadequate internal controls*” and “*inadequate oversight, risk management, and monitoring. . . .*” A0028, ¶ 16 (quoting A0297) (emphasis added).⁵

Left with no recourse, the Director Defendants agreed to oversee the Program. BOA also agreed to pay a total of \$225 million in fines, recompensate harmed customers, and pay undetermined “consequential” damages, which BOA officials

⁵ [REDACTED]

publicly disclosed could cost it hundreds of millions of dollars.⁶ Further, the federal regulators made sure to note that in order to “preserve the deterrent effect of the civil money penalty,” the Company could not offset it against possible recoveries in the California MDL or in any other civil proceeding. A0366, ¶ 103.

Defendants’ misconduct caused devastating harm in the middle of an unprecedented health crisis. In deciding to issue the Injunction Order, the court in the California MDL noted that: “plaintiffs’ evidence shows, continued denial of these [unemployment] benefits will seriously hinder the ability of many class members to feed their families and keep a roof over their heads.” A0284, ¶ 4. The court specifically found that injunctive relief was necessary because plaintiffs showed “that losing wages or benefits will likely cause them to be evicted, go hungry, or be denied necessary medical care.” *Id.* In accord with the court’s findings, the federal regulators imposed huge fines on BOA precisely because of “the severity and scope of the consumer harm caused by the bank’s practices.” A0156-57, ¶ 267 (quoting A0383).

Plaintiff’s 190-page Complaint pled numerous particularized facts raising multiple reasonable inferences that the Defendants violated their fiduciary duties in

⁶ In addition to wrongly withheld funds, the OCC and CFPB required BOA to also pay “consequential” compensation due to the loss of access to unemployment benefits. *See* A0308; A0361; A0335.

bad faith in connection with causing widespread misery to the unemployed. The Complaint makes extensive reference to the Consent Orders and other publicly available documents. In addition, and critically here, the Complaint cites a huge volume of internal, non-public documents Defendants produced in response to Plaintiff's demand for books and records under 8 *Del. C.* § 220 (the "Books and Records Documents"). The parties' briefs and oral argument were predicated on this highly detailed and disputed factual record.

The Court nonetheless summarily dismissed the Complaint based on a short oral ruling. *See Ex. A.* Instead of drawing reasonable inferences in Plaintiff's favor from the facts, the Court virtually ignored the extensive record. It drew almost every inference in Defendants' favor referencing, without attribution or citation, only five of the forty-seven Books and Records Documents in the record⁷ and what it termed to be "helpful summaries" Defendants included in their Reply Brief. *Id.* at 24.⁸

The Court's decision, which is subject to plenary and *de novo* review, should be completely disregarded and reversed. The Complaint contains well-pleaded Information Systems Claims. The Consent Orders, as the Court acknowledged, established that BOA violated the law in numerous ways, including its failure to

⁷ Additionally, the Court did not cite to the Complaint at all. *See Ex. A.*

⁸ Defendants essentially sandbagged Plaintiff by choosing to cram these summaries into their Reply Briefs.

establish legal “enterprise-wide” information systems. *See* A0297; A0324. Directors of a Delaware corporation cannot be excused from liability for creating an illegal information system in a mission critical business operating in a heavily regulated environment. *Ont. Provincial Council of Carpenters’ Pension Trust Fund v. Walton*, 2023 Del. Ch. LEXIS 92, at *94 (Del. Ch. Apr. 26, 2023) (hereinafter “*Walmart*”).

Like the situation in *Marchand*, the Director Defendants did not oversee the Program. *Marchand v. Barnhill*, 212 A.3d 805, 821-22 (Del. 2019). No committee of the Board had specific authority to monitor the Program. No protocols exist to show a system of bringing compliance issues to the Board’s attention, and there are no documents in the record showing the involvement of any third parties in BOA’s compliance efforts.

Further, like the situation in *Marchand*, the redacted Books and Records Documents did not conclusively, as a matter of fact on this record, make it to the Director Defendants, and even if they did, contain only information about the Program’s general operations and lack of profitability. Redacted documents, without explicit references to any Board deliberations, “provide[] no basis to infer that the Board or Audit Committee had any business-oriented discussion about compliance issues or made any business decisions about compliance issues.” *Walmart*, 2023 Del. Ch. LEXIS 92, at *56.

The Complaint also pled actionable Red Flag and *Massey* Claims. Defendants were aware of numerous warnings of the unfolding human disaster through news stories, letters from regulators, and internal documents. The documents raise more than a reasonable inference that Defendants not only ignored these warnings, but consciously disregarded them. [REDACTED]

[REDACTED] An illegal business decision is never protected under Delaware law. Even if it was, the federal regulators found no justification for Defendants' misconduct. A0348, ¶ 46.

Defendants had a strong financial motive to violate their fiduciary duties.

[REDACTED]. BOA, thus, decided to exit the Program. Not willing to invest capital into a money-losing business it decided to abandon, BOA adopted the Fraud Filter as a money saving shortcut. BOA refused to invest the funds to investigate fraudulent claims or provide notice or aid to impacted customers. Nothing was done to remediate the Program's information and reporting systems because the Program was ending for BOA.

As specifically pled in the Complaint, and as set forth below, this case thus fits squarely into the paradigm of situations where Delaware courts sustain claims of bad faith legal violations that resulted in both corporate losses and human distress and injury.⁹ BOA operated in a heavily regulated industry, and Defendants consciously violated the law to stem losses and garner short-term profits, preferring to later “pay the piper” in the form of regulatory fines (as it has done many times in the past),¹⁰ and critically, even in the face of glowing red flags, Defendants did nothing to remediate conduct that had devastating effects on BOA’s constituents, on par with the manufacture of tainted ice cream and poorly designed jets or the illegal distribution of prescription drugs.

⁹ *Marchand*, 212 A.3d at 823-25; *In re Boeing Co. Derivative Litig.*, 2021 Del. Ch. LEXIS 197, at *90-91 (Del. Ch. Sept. 7, 2021) (hereinafter “*Boeing*”); *In re Massey Energy Co. Derivative & Class Action Litig.*, 2011 Del. Ch. LEXIS 83, at *74-78 (Del. Ch. May 31, 2023); *Lebanon Cnty. Emps.’ Ret. Fund v. Collis*, 311 A.3d 773, 803-05 (Del. Ch. 2023).

¹⁰ See *In the Matter of: Bank of America, N.A.; and FIA Card Services, N.A.*, File No. 2014-CFPB-0004 (Apr. 9, 2014) (\$727 million fine); *In the Matter of: Bank of America, N.A.*, File No. 2023-CFPB-0007 (July 11, 2023) (\$250 million fine). BOA has also paid billions in class action settlements. See, e.g., *In re Bank of America Corp. Sec., Derivative & Emp. Ret. Income Sec. Act (ERISA) Litig.*, Case No. 1:09-md-02058-PKC (S.D.N.Y.) (\$2.43 billion settlement of securities fraud class action); *Morris v. Bank of America, N.A.*, Case No. 3:18-cv-00157-RJC-DSC (W.D.N.C.) (\$75 million overdraft fee settlement).

SUMMARY OF THE ARGUMENT

1. Dismissal under Court of Chancery Rule 23.1 was not warranted because Plaintiff more than adequately pled that demand is excused on the basis that a majority of the Individual Defendants face a substantial likelihood of liability for failing to fulfill their oversight duties in bad faith under the standards set forth in *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996), as explicated in *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034 (Del. 2021) (hereinafter “*Zuckerberg*”), namely Information Systems, Red Flags, and *Massey* Claims.

STATEMENT OF FACTS

I. THE PROGRAM WAS SUBJECT TO STRINGENT LAWS, REGULATIONS, AND CONTRACTUAL OBLIGATIONS

The Company operates through its banking subsidiaries. A0041, ¶ 58.¹¹ Through its Global Markets business segment, BOA issues prepaid cards to distribute unemployment benefits. A0041, ¶ 59. Before it exited the Program (excepting California), BOA had contracts with twelve states to issue prepaid cards. A0041, ¶ 60.

BOA admits that it is subject to “extensive regulation and oversight by federal and state regulators” and federal guidelines regarding Board oversight of governance risk frameworks. *See* A0046-53, ¶¶ 74-93. These statutes and regulations, virtually ignored by the Court, specify in exacting detail how BOA was supposed to process denied claims by Program participants and maintain active, substantial Board-level controls.

The Electronic Fund Transfer Act (“EFTA”) is a federal consumer protection law “establishing the rights, liabilities, and responsibilities of participants in

¹¹ The members of the Board, the board of directors of Bank of America, N.A., and the board of directors of Bank of America California, N.A. are, and have at all relevant times been, the same individuals. A0041, ¶ 58. The Board and its committees meet in joint sessions.

electronic fund and remittance transfer systems.” A0048, ¶ 78 (quoting 15 U.S.C. § 1693b). Regulation E is the EFTA’s implementing regulation. *Id.* The EFTA and Regulation E set out *mandatory and specific* resolution procedures for BOA to handle denied claims. A0048-50, ¶¶ 80-83. Regulation E applies to *all of BOA’s consumer banking business*, not just the Program.

Under the EFTA and Regulation E, when a consumer notifies BOA that an error has occurred, BOA *must* investigate within sixty days “and report or mail the results of such investigation and determination to the consumer within ten business days.” A0049, ¶ 81 (quoting 15 U.S.C. § 1693f(a)). If BOA decides that an error occurred, it *must* promptly, within one business day after the determination, correct the error. *Id.* (citing 15 U.S.C. § 1693f(b)). If BOA decides that no error occurred, which can only be done after it has made a “good faith investigation of the alleged error,” and has a “reasonable basis” for that determination, it *must* provide the consumer with an explanation of its findings within three business days of the conclusion of the investigation. A0049-50, ¶ 83 (citing 15 U.S.C. § 1693f(d)-(e)).¹²

The Program was also governed by the Consumer Financial Protection Act of 2010 (“CFPA”). A0050-51, ¶ 86. The CFPA prohibits BOA from engaging in any

¹² Further, upon the determination of no error, if BOA debits a previously provisionally credited amount, it *must* notify the consumer of the date and the amount it will be debiting. A0049-50, ¶ 83 (citing 12 C.F.R. § 1005.11(d)(2)(i)).

“unfair, deceptive, or abusive act or practice” in connection with “any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.” A0051, ¶ 87 (quoting 12 U.S.C. § 5531(a)). Like Regulation E, the CFPA applies to all of BOA’s consumer banking businesses. Among other things, the CFPA prohibits BOA from offering or providing a consumer with “any financial product or service not in conformity with Federal consumer financial law, or otherwise commit any act or omission in violation of a federal consumer financial law.” A0052, ¶ 89 (quoting 12 U.S.C. § 5536(a)(1)(A)). An act or practice is “unfair” under the CFPA if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers” and “such substantial injury is not outweighed by *countervailing benefits* to consumers or to competition.” A0051, ¶ 88 (quoting 12 U.S.C. § 5531(c)) (emphasis added).¹³

Furthermore, the Court ignored BOA’s contractual obligations to California, and other states in the Program. *See* A0042-45, ¶¶ 61, 69-70; A0053, ¶ 95. BOA signed an exclusive contract with the EDD to distribute unemployment benefits through the Program. A0042, ¶ 61. In securing this lucrative contract, BOA made a

¹³ BOA is also governed by the Federal Trade Commission Act. A0051, ¶¶ 91-92 (quoting 15 U.S.C. § 45(a)(1)) (prohibiting “unfair or deceptive acts or practices in or affecting commerce.”).

series of specific contractual commitments, which it ultimately violated in almost every respect. BOA represented that it would fully protect card holders with its so-called “Zero Liability” guarantee, which BOA claimed to be “*a plan that exceeds the protections offered by Regulation E and standard network zero liability plans.*” A0043, ¶ 65 (quoting A00438) (emphasis added).¹⁴ BOA also committed itself to provide “live customer service agent[s] where they will check on the status of an existing claim, and if necessary, follow up with the cardholder if additional information is not available at the time of the call.” A0043, ¶ 67 (quoting A0629). BOA guaranteed the EDD that the Company complied with Regulation E to the letter. A0043-44, ¶ 68 (quoting A0629).

In early 2020, the pandemic caused a huge increase in unemployment. A0063, ¶ 124. In response, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) in March 2020, which created the Pandemic Unemployment Assistance (“PUA”) benefit program. *Id.* Both the CARES Act and PUA expanded unemployment eligibility and provided for greater benefit amounts than previously available. *Id.* Predictably, the size of the Program dramatically

¹⁴ Under the Zero Liability guarantee, BOA promised that “in the event a cardholder’s card is compromised they are protected against unauthorized card use by Bank of America Zero Liability, *a plan that exceeds the protections offered by Regulation E and standard network zero liability plans.*” A0043, ¶ 65; A0438 (emphasis added).

increased during COVID. A0063-64, ¶¶ 125-26.

Throughout the summer and fall of 2020, Defendants knew that there was a surge of claims that BOA could not process. A0064-66, ¶¶ 127-28.¹⁵ Until September 2020, BOA manually investigated potential fraudulent claims. A0069-70, ¶ 135; A0340, ¶ 12. But the increase in fraud was cutting into BOA's profits as BOA could not charge the states for those payments. [REDACTED]

[REDACTED]. Due to these losses, BOA decided to exit from the Program altogether. A0163-66, ¶¶ 281-89, 291.

As a result, and without any consideration of, or regard for the predictable catastrophic consequences, BOA instituted the Fraud Filter on September 28, 2020. A0070, ¶ 136; *see* A0341. The Fraud Filter automatically froze accounts if certain parameters were met. A0071, ¶ 138; A0341. Simultaneously, BOA failed to investigate accounts flagged for fraud and provisionally credit frozen accounts, “impeded many” customers from accessing their accounts and made “deceptive disclosures and notices” about their frozen accounts. A0296-97.

¹⁵ *See* A0065-66, ¶ 128 (quoting A0383) (BOA “met with the [EDD] dozens of times in the summer of 2020 and should have known it was essentially redirecting people into a black hole.”).

The CFPB found that *BOA knew in advance that the Fraud Filter would not work* and would harm legitimate account holders. The CFPB noted that BOA “knew, or should have known, that the Fraud Filter would, in certain cases, incorrectly determine that no error had occurred.” A0342, ¶ 21. The CFPB also found that BOA “*knew, or should have known*, that not all unemployment insurance benefit prepaid accounts meeting its Fraud Filter indicators would be fraudulent and therefore should be frozen.” A0342-43, ¶ 22 (emphasis added). As cited in the CFPB Consent Order, management “acknowledged” in a Board presentation that BOA knew this immediately, even before it implemented the Fraud Filter in September 2020: “Fraudulent determinations would require a detailed review of specific accounts, which given the volume, *is unmanageable.*” *Id.* (Emphasis added).¹⁶

II. THE CONSENT ORDERS

BOA’s “abusive,” “deceptive,” and “unfair” administration of the Program constituted numerous legal violations. The illegality occurred because the Program

¹⁶ [REDACTED]

was rotten to its core. The OCC found that BOA had: (a) inadequate risk management practices in both the front-line units and independent risk management, including ineffective oversight, risk assessment, monitoring, and reporting; (b) inadequate internal controls, including those relating to contract management; (c) inadequate oversight, risk management, and monitoring of vendors; and (d) inadequate oversight and coverage by BOA's independent audit function. *See* A0297; A0324. The OCC also found that Defendants had “*failed to establish an effective enterprise-wide complaints risk management framework that is commensurate with the Bank’s size, complexity, and risk profile.*” A0148, ¶ 250 (quoting A0297) (emphasis added).

In addition to imposing a \$125 million fine, the OCC *forced* the Board to finally act. The Director Defendants agreed in the OCC Consent Order to at last “conduct an analysis of its current controls and risk management processes over the Program to identify gaps.” A0302. The OCC mandated that the analysis had to “address the adequacy of operational controls, fraud investigations, fraud rules and/or strategies, claims intake and processing, accounting practices, complaints management, claims and complaints quality assurance processes, systems and data management, and Program Vendor risk management.” *Id.* BOA had to prepare a

written report about its findings and “take corrective actions to address the gaps.”

Id.

The OCC also required the Director Defendants to approve a comprehensive “Oversight and Risk Management Program” (“ORMP”) to include “policies, procedures, systems, and controls to effectively identify, measure, monitor, and control risks associated with [BOA]’s administration of the Program,” resolving any gaps in controls, standardized reporting, employee and vendor training, and independent risk management. A0302-03. Defendants, on behalf of BOA, also agreed to undertake the following:

- Establish a Compliance Committee (A0298);
- Develop an ORMP (A0299);
- Develop a Consent Order Action Plan specifying, among other things, timelines for completion of corrective actions required by the order (A0299-300);
- Perform a comprehensive and holistic risk assessment of the Program that addresses “all significant risks” (the “Program Risk Assessment”) (A0301);
- Prepare a report of Program Risk Assessment that summarizes the findings from the Program Risk Assessment (the “Program Risk Assessment Report”) (A0301-02);
- Submit the Program Risk Assessment and Program Risk Assessment Report to the OCC (A0301);

- Conduct an analysis of its current controls and risk management processes over the program to identify gaps (A0302);
- Submit for review an acceptable Board-approved Prepaid Card ORMP (*id.*);
- Submit to the OCC a Board-approved enterprise-wide complaints risk management framework (A0304);
- Develop criteria to determine if a contract poses significant risks to the Bank in various scenarios, including adverse conditions (A0305); and
- Revise the audit plan to ensure comprehensive end-to-end coverage of the Program’s operations and risk management processes and that at a minimum includes the testing of controls over the Program’s operations, claims and reconsiderations, and adherence to all applicable consumer protection laws and regulations and bank policies and procedures (A0307).

The CFPB’s Consent Order likewise found that the Company violated federal and state law by employing the same “abusive,” “deceptive,” and “unfair” practices the OCC flagged. *See* A0347-55. The CFPB required the Company to engage in a massive review, evaluation, and reform of the Program. *See* A0356-59. Like the OCC, the CFPB also blamed the Director Defendants, dedicating an entire section of its Order to the “Role of the Board,” A0155-56, ¶ 265 (citing A0359-60), reminding them, as it apparently had to, that “the Board, or a committee thereof, will have the ultimate responsibility for proper and sound management” of the Company. A0360.

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING THE COMPLAINT FOR FAILURE TO PLEAD DEMAND FUTILITY

A. Question Presented

Did Plaintiff adequately plead that demand is excused because a majority of the Company's directors and officers face a substantial likelihood of liability for failing to fulfill their fiduciary duties in bad faith under the standards set forth in *Caremark*, 698 A.2d 959, as explicated in *Zuckerberg*, 262 A.3d 1034, namely Information Systems, Red Flags, and *Massey* Claims. This question was raised below (A0182-205; A5098-122) and considered by the Court (Ex. A at 19-33), excepting the liability of the Officer Defendants, which it ignored.

B. Scope of Review

This Court's assessment a Rule 23.1 order is "*de novo* and plenary." *Zuckerberg*, 262 A.3d at 1047.

C. Merits of Argument

1. Legal Standards

Delaware courts cannot "weigh the evidence, [but] must accept as true all the complaint's particularized and well-pleaded allegations, and must draw all reasonable inferences in the plaintiff's favor." *Id.* at 1048. The Books and Records

Documents were subject to an incorporation-by-reference condition, but that “does not enable [the] court to weigh evidence on a motion to dismiss,” nor does it change the pleading standard. *Walmart*, 2023 Del. Ch. LEXIS 92, at *5-6. The Court could not use “hand selected” documents to “rewrite an otherwise well-pled complaint.” *In re Clovis Oncology, Inc. Derivative Litig.*, 2019 Del. Ch. LEXIS 1293, at *31 n.216 (Del. Ch. Oct. 1, 2019). Delaware courts draw all reasonable inferences in plaintiff’s favor and credit the well-pled reasonable “interpretations” where “different interpretations” of a document are possible. *Walmart*, 2023 Del. Ch. LEXIS 92, at *6.

Plaintiff did not make a pre-suit demand and thus the Complaint pled specific facts alleging that “demand is excused because the directors are incapable of making an impartial decision regarding whether to institute such litigation.” *Id.* at *82 (quoting *Stone v. Ritter*, 911 A.2d 362, 367 (Del. 2006)); *see* A0182-98. Demand is futile in this case because each Board member “faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand.” *Zuckerberg*, 262 A.3d at 1059; *see* A0185, ¶ 333.

The Complaint adequately pled Information Systems, Red Flags, and *Massey* Claims. A0199-205; *see Walmart*, 2023 Del. Ch. LEXIS 92, at *86. The Complaint specifically alleged that over a period of close to two years, acting in bad faith and

through action and inaction, the Director Defendants caused BOA to suffer corporate “trauma” resulting in substantial harm to the Company. *See Walmart*, 2023 Del. Ch. LEXIS 92, at *86. Since there is no “formal documentation” of Defendants’ bad faith conduct, Delaware courts must “look[] at a series of fiduciary inactions and actions made over time, to determine whether they support an inference that the corporate fiduciaries were operating in bad faith.” *Id.* at *88-89 (internal citation omitted).

2. Plaintiff Pled Specific Facts More Than Sufficient To Sustain An Actionable Information Systems Claim

An Information Systems claim sounding in bad faith is established:

When the directors completely fail to implement any reporting or information system or controls, *or* having implemented such a system or controls, consciously fail to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention. In short, to satisfy their duty of loyalty, directors must make a good faith effort to implement an oversight system and then monitor it.

Marchand, 212 A.3d at 821 (internal quotation and footnote omitted). In *Marchand*, the Court specified that while Delaware law allows corporate directors “great discretion to design context- and industry-specific approaches tailored to their companies’ businesses and resources,” they must still “make a good faith effort— *i.e.*, try—to put in place a reasonable board-level system of monitoring and reporting.” *Id.* This obligation “mandate[s]” that boards “rigorously exercise [their] oversight

function with respect to mission critical aspects of [their] company’s business.” *Boeing*, 2021 LEXIS 197, at *26. The Information Systems obligation is especially heightened when a company operates in a heavily regulated business. *Clovis*, 2019 Del. Ch. LEXIS 1293, at *28 (citing *Marchand*, 212 A.3d at 824).¹⁷

a. It is Undisputed That BOA’s Information Systems Were Illegal and Inadequate

The Consent Orders raised more than a sufficient reasonable inference that Defendants acted in bad faith because no information system ever existed and, to the extent it did, the Director Defendants did not make a reasonable effort to monitor it. The OCC Consent Order plainly stated that BOA violated federal law by using the Fraud Filter while failing to provide consumers with credits, freezing accounts, impeding consumers’ ability to access benefits, and making “deceptive disclosures.” A0147-49, ¶ 250 (quoting A0296-97). *The OCC specifically tied these violations to the glaring lack and inadequacy of BOA’s controls.* Among other things, the OCC found that BOA “*failed to establish effective risk management over the Program*” in many respects. *Id.* (quoting A0296-98) (emphasis added).

As alleged in the Complaint, and discussed at length in Plaintiff’s Brief, BOA consented to a specific provision in the OCC Consent Order mandating exacting

¹⁷ The Court found that violations concerning the Program were a central compliance risk. Ex. A at 20.

“General Board Responsibilities.” A0311-12. The CFPB likewise found that BOA violated federal law through the same conduct. A0346-55; *see* A0028-30, ¶ 17; A0153-58, ¶¶ 262-68. Also, like the OCC, the CFPB cited numerous deficiencies in its administration of the Program as the root cause of these violations. A0346-55. Also, like the OCC, having found BOA lacking in oversight and controls, the CFPB *ordered* the Board to engage in its “mission critical” obligations, requiring it to have “the ultimate responsibility for proper and sound management . . . and for ensuring that [BOA] complies with” federal law. A0155-56, ¶ 265 (quoting A0360, ¶ 91). A settlement agreement mandating comprehensive information systems reforms raises a reasonable inference that they did not previously exist. *See Walmart*, 2023 Del. Ch. LEXIS 92, at *133-34.¹⁸

The Court correctly observed that the Consent Orders “involve determinations of inadequate oversight.” Ex. A at 5. The Court concluded “there’s serious problems.

¹⁸ Without *any* reference to the record, the Court drew the negative inference that “it may well be that there were failures lower down in terms of bringing problems to the attention of management team and then getting them up to the board.” Ex. A at 22. The Court’s decision to lay blame at the feet of BOA’s management is contrary to the plain language and meaning of the Consent Orders. In all events, this finding supports Plaintiff’s claims against the Officer Defendants – claims the Court failed to address. Each of the Officer Defendants assumed fiduciary duties. *See In re McDonald’s Corp. S’holder Derivative Litig.*, 2023 Del. Ch. LEXIS 23, at *38 (Del. Ch. Jan. 25, 2023). Given their senior positions and direct involvement in BOA’s wrongdoing as alleged in the Complaint, they are liable for the same misconduct as the Director Defendants.

When you find a regulatory order like this, what’s off the table in terms of real debate is the fact that there was legal noncompliance, at least at the pleading stage.” Ex. A at 18; *see id.* at 5, 16-17. Nonetheless, the Court agreed to dismiss the Complaint, agreeing with Defendants that they could not have possibly acted in bad faith because only a relatively few Program participants suffered harm. *Id.* at 30-31.

This negative inference is completely at odds with the facts and the law. Defendants’ wrongdoing caused significant harm. They prevented many unemployed workers from “feed[ing] their families and keep[ing] a roof over their heads” in the pandemic. A0284. Even a “few” errors in a business like the Program, designed to prevent human suffering, carries immense risk of tragic consequences and resulting corporate injury.¹⁹ That is why the Program is so heavily regulated and that is why the regulators came down very hard on BOA. A0158, ¶ 268 (quoting A0383).

¹⁹ Ex. A at 29-31 (citing *Horman v. Abney*, 2017 Del. Ch. LEXIS 13, at *25 (Del. Ch. Jan. 19, 2017)). *Horman* is completely inapposite as it involved a derivative action brought against the board of UPS for allowing the transportation of untaxed cigarettes over four years. In contrast, this Court found an actionable claim in *Marchand* where “only” three people died of contaminated ice cream. *Marchand*, 212 A.2d at 807. Similarly, in *Boeing*, “only” two planes crashed out of hundreds Boeing manufactured which otherwise flew problem-free for millions of miles. *Boeing*, 2021 Del. Ch. LEXIS 197, at *1.

b. The Record Fully Supports More Than A Reasonable Inference That Defendants Purposefully Failed to Oversee BOA’s Information Systems

As this Court noted in *Marchand*, “plaintiffs usually lose because they must concede the existence of board-level monitoring and oversight such as a relevant committee, a regular protocol requiring board-level reports about the relevant risks, or the board’s use of third-party monitors, auditors or consultants.” *Marchand*, 212 A.3d at 823; *Hughes v. Hu*, 2020 Del. Ch. LEXIS 162, at *41 (Del. Ch. Apr. 27, 2020) (“[t]he mere existence of an audit committee and hiring of an auditor does not provide universal protection against a *Caremark* claim.”).

Accordingly, this Court reversed a dismissal decision, crediting the plaintiff’s allegations in *Marchand* that, among other things:

- no board committee that addressed food safety existed;
- no regular process or protocols that required management to keep the board apprised of food safety compliance practices, risks, or reports existed; [and]
- no schedule for the board to consider on a regular basis, such as quarterly or biannually, any key food safety risks existed. . . .

212 A.3d at 822. The Complaint here specifically pled each of these elements.

No Board committee had specific authority to monitor the Program for regulatory compliance.²⁰ There were *no* Board committees specifically tasked with overseeing the Program compliance until after federal regulators *required* it. Neither the Audit Committee (“AC”) nor the ERC was explicitly tasked with ensuring that BOA complied with Regulation E and other relevant federal and state laws and regulations as well as BOA’s contractual obligations to the EDD. A0077, ¶ 157; *see also* A0172-177, ¶¶ 303-09. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁰ The Court noted that before the federal regulators imposed the Consent Orders, neither the Board nor any of its committees had specific oversight duties over the Program and BOA had no systemic process for management to report on the Program. Ex. A at 21. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

BOA lacked a protocol for bringing compliance issues to the Board and there are no documents in the record showing the involvement of any third parties in BOA's compliance efforts. When specifically asked about this allegation at oral argument, Defendants' counsel could only offer testimony, not record cites, to claim that regulators had "enormous visibility into the company"²¹ and that BOA employed members of its legal, audit, and risk staff to report to the Board and its committees regarding regulatory oversight and compliance. A5229-33.

The Director Defendants did *absolutely nothing* to monitor the Program's illegal information systems. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²¹ [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

As such, like in *Marchand*, BOA’s Board minutes “are devoid of any suggestion that there was any *regular discussion*” of compliance issues. *Marchand*, 212 A.3d at 822 (emphasis added).

The “helpful summaries” of management documents the Court cited in its oral ruling²² do not create a reasonable negative inference that the Director Defendants oversaw the Program’s illegal information systems in good faith. Ex. A at 21, 24.²³

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²² The Court did not specify which documents it was relying on and its decision to rely on Defendants’ summaries of those documents constitutes reversible error. *See Zuckerberg*, 262 A.3d at 1048. In all events, Defendants decided to put the “summaries” in their Reply Brief, thus, preventing Plaintiff from a meaningful written response. A5134-41.

²³ [REDACTED]

²⁴ This case stands in stark contrast to cases where Delaware courts have dismissed oversight claims where minutes show that a board meeting and documents prepared

[REDACTED]

[REDACTED] As in *Marchand*, the lack of a board discussion and the presentation of “favorable information” in a document prepared by management regarding mere positive information about corporate operations raises an inference in favor of an Information Systems claim. *Marchand*, 212 A.3d at 822.³⁰

for that meeting were specifically dedicated to remediation. *See, e.g., McDonald’s*, 291 A.3d at 667-69.

25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]
29 [REDACTED]
30 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

The Court also cited a document purportedly authored for the ERC. Ex. A at

13. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

c. Defendants Had More Than Sufficient Motive To Violate Their Fiduciary Duties

The Court found that “the only conceivable” motive the Complaint pled was profit. Ex. A at 30. The Court reasoned that since the Program was not profitable, Plaintiff was not entitled to a reasonable inference of bad faith. *Id.* That decision is wrong based on a negative, unfair, and incorrectly drawn inference favoring Defendants.

The Complaint repeatedly and precisely alleged that profits drove Defendants’ misconduct. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³¹ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] The Complaint therefore properly alleged that “because the costs and other burdens associated with compliance *would cut into profits*,” Defendants chose to violate their fiduciary duties. *Walmart*, 2023 Del. Ch. LEXIS 312, at *89 (emphasis added).

3. Plaintiff Pled Specific Facts More Than Sufficient To Sustain Actionable Red Flags and *Massey* Claims

The Complaint pled numerous facts showing that *almost immediately* after BOA instituted the Fraud Filter, Defendants received numerous externally generated red flag warnings of the disaster they were causing, which prompted governmental

³¹ The Court mistakenly ruled that Plaintiff had alleged that the decision to exit the Program constituted a separate breach of fiduciary claim. Ex. A at 32-33. Plaintiff did not allege that violation in its Complaint.

³² [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

complaints, regulatory investigations, civil lawsuits, and attendant bad publicity. As this Court noted in *Walmart*, coupled with profiting from “noncompliant behavior,” a complaint can sufficiently allege actionable bad faith conduct where it pleads “a persistent failure to implement a monitoring system for an obvious central compliance risk or a pattern of chancing upon red flags, yet persistently failing to act or resorting to only cosmetic action.” *Walmart*, 2023 Del. Ch. LEXIS 312, at *92. The Complaint alleges in exacting detail that Defendants were virtually “wrapped in” multiple crimson flags but purposefully violated the law and if anything, made meaningless cosmetic changes to the Program. *Id.* at *126.

Maligned in Defendants’ Opening Brief as one of several “letters from politicians,” A5047, less than two months after BOA secretly instituted the Fraud Filter, on November 24, 2020, California legislators wrote to Defendant Moynihan to specifically challenge the legality of the Fraud Filter. A0024-25, ¶ 11; A0083-86, ¶¶ 166-67; A0209-16.³³ The letter reported the chaos the Fraud Filter was causing, namely, the denial of benefits to “at least 350,000 Californians,” the inability of customers to access BOA’s call centers, and the public dissemination of “misinformation.” A0209. The letter posed several specific questions and demanded

³³ Additionally, on April 15, 2021, United States Senator Dianne Feinstein wrote to the CFPB asking that it continue to investigate and take necessary action. A0100-01, ¶ 189, A1958. There is no record that the Board discussed this letter.

a response to be addressed to “Governor Gavin Newsom and the CA Legislature as to how to unfreeze valid cards in a timely manner and prevent this problem from happening again by December 1, 2020.” A0210. [REDACTED]

[REDACTED]

[REDACTED].³⁴

BOA responded to the letter on December 7, 2020. A0093-94, ¶ 177 (citing A1909-13). Sidestepping the lawmakers’ specific inquires, BOA falsely claimed that it complied with federal law and had “collaborated with EDD to help establish additional fraud prevention measures, including implementing” the Fraud Filter. A1910. Instead of terminating the Fraud Filter altogether, BOA claimed that it was supposedly solving the issue by hiring additional call center staff. A1911. BOA placed the blame for any issues on the EDD, which it claimed to be the “agency ultimately responsible for eligibility determinations-also is responsible for validating the identities of those whose accounts have been frozen in order to initiate the reactivation process.” A0094-95, ¶ 178 (quoting A1911). This was patently false as the CFPB found that BOA knew the EDD was understaffed and could not “handle the burden of quickly reverifying the eligible EDD Cardholders whose EDD Prepaid

³⁴ [REDACTED]
[REDACTED]
[REDACTED]

Debit Card Accounts Respondent had frozen through its new strategy beginning on September 28, 2020.” A0346, ¶ 35.

The California MDL constituted yet another contested external red flag. A0096-98, ¶¶ 181-84; A1915-56; *see Walmart*, 2023 Del. Ch. LEXIS 92, at *126. BOA aggressively defended itself in that case claiming that it was *fully compliant* with federal law. A0104-05, ¶ 196; A1960-93. BOA specifically argued that the plaintiffs’ demand for injunctive relief “is based on *groundless assertions* that BANA violated EFTA and Reg E and breached the Account Agreements’ provisions for ‘zero liability’ for unauthorized transactions. . . . Plaintiffs have not supported their assertion that they are likely to succeed on the merits. . . .” A1976 (emphasis added). BOA took this position even knowing that, at the time, the CFPB had *already began* its investigation. A1958 (“the [CFPB] is investigating [BOA’s] . . . handling of fraudulent activity in California’s unemployment benefits system”).

On May 17, 2021, the court in the California MDL found that plaintiffs had established a “strong likelihood of success” on their claims and ordered BOA to negotiate the terms of a mandatory injunction, which, among other things, forced BOA to terminate the Fraud Filter. A0105-06, ¶ 198 (quoting A0283). BOA continued to use the Fraud Filter to retroactively deny legitimate claims it had

previously credited. A0073, ¶ 144; *see* A0349, ¶ 52. BOA continues to use the Fraud Filter to this day.

As alleged in the Complaint, Defendants were also aware of numerous internal red flags that were consciously and deliberately ignored. They included:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

³⁵ As the Court noted in *Walmart*, “a warning from a regulatory authority . . . may demonstrate that a corporation’s directors knew or should have known that the corporation was violating the law” and “[w]hen considering an avalanche of lawsuits [concerning the misconduct at issue], this court held that the lawsuits ‘put

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

The Court turned aside Defendants’ challenges to these warnings and correctly assumed that they constituted red flags. The Court nonetheless decided that

the directors on notice of problems at the Company.” *Walmart*, 2023 Del. Ch. LEXIS 92, at *125-26 (internal citations omitted).

36 [REDACTED]

the Director Defendants had merely made “mistakes” and that did not rise to the requisite level of “bad faith. Ex. A at 26-27. The Court concluded that “given the Board’s response here, I cannot reasonably infer a red flags claim. The Board acted.” *Id.* at 24. The Court presumed that the Board was monitoring compliance, management informed it of remediation, and the Board responded, “[T]hat’s good, keep going. . . .” *Id.*

The Court erred in several respects. As discussed above, the Court improperly relied, without specific attribution, on the content of Defendants’ self-serving summaries of the books and records production culled from seven pages of their Reply Brief. *Id.*; A5134-41. Those summaries are incomplete, inaccurate, and do not show active remediation or efforts to comply with the law.³⁷ *See* Ex. C. In addition, the well-pled allegations of the Complaint showed that the Director Defendants did not oversee the Program. [REDACTED]

[REDACTED]

[REDACTED]

³⁷ The Court cited BOA’s agreement to the Injunction Order as evidence of Defendants’ good faith. Ex. A at 15-16. At this early stage of the litigation, however, the Court could not have equated an agreement to the terms of a mandatory injunction with Board oversight. The Board had no choice but to act or face sanctions and the injunction supports a reasonable inference of bad faith. *See Walmart, 2023 Del. Ch. LEXIS 92, at *133.*

The Court unquestioningly accepted Defendants' claim that they made a protected business decision to use the Fraud Filter to avoid regulatory violations for paying fraudulent claims. Ex. A at 31-32. [REDACTED].³⁸ Further, putting aside the Fraud Filter, BOA's other wholesale "abusive," "deceptive," and "unfair" conduct the regulators cited in the Consent Orders could not have been the product of legitimate business decisions since they all were facially illegal. A0296-98; A0332-33.

Further supporting a reasonable inference of bad faith, BOA initiated the Fraud Filter without consulting the EDD or federal regulators. BOA also knew that its plan would not work. The CFPB specifically found that BOA's management "knew, or should have known," *before* it implemented the Fraud Filter, that: (a) it would illegally prevent legitimate access to funds (Ex. 7 at ¶ 22); (b) it was "unmanageable" (*id.*); and (c) the EDD was not equipped to deal with cardholder complaints about the Fraud Filter. A0342-43, ¶ 22; A0076, ¶ 155; A0346, ¶ 35.

In all events, neither the Court nor Defendants cited any authority for the proposition that BOA faced a "regulatory violation" for paying fraudulent claims. *See* Ex. A at 31. The Court just wrongly assumed it. Furthermore, the federal

³⁸ [REDACTED]

regulators explicitly turned BOA’s business justification aside. In its Consent Order, the CFPB specifically flagged BOA for violating the CFPA by engaging in “unfair acts or practices.” A0347-48, ¶¶ 40-47. The CFPB defines an “unfair act or practice” as one “not outweighed by *countervailing benefits* to consumers or to competition.” A0347, ¶ 42. The CFPB explicitly found in BOA’s case that the damage it caused its customers “was not outweighed by any countervailing benefits to consumer or to competition.” A0348, ¶ 46.

In sum, as the CFPB stated in a press release announcing its Consent Order, “Bank of America failed to live up to its legal obligations. And when it got overwhelmed, instead of stepping up, it stepped back.” A0156, ¶ 266 (quoting A0381). Defendants are all liable for this “step back.” They intentionally acted to cut losses and increase profits in violation of the law at the expense of BOA’s most vulnerable customers, ultimately causing the Company substantial and ongoing monetary and reputational harm.

CONCLUSION

For the reasons stated above, Plaintiff respectfully requests this Court to reverse the dismissal of the Complaint and remand this Action for further proceedings below on the merits.

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