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Case Number 468,2024

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** **E-FILED MARCH 18, 2025**

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NATURE OF PROCEEDINGS[1]

Plaintiff-Appellant ("Plaintiff") appeals the dismissal of its stockholder derivative complaint for failing to plead with particularity demand futility under Court of Chancery Rule 23.1. In its opening brief, Plaintiff asserts that because Bank of America, N.A. ("BANA")[2] entered into two regulatory settlements related to its implementation of the Prepaid Card Program during the COVID-19 pandemic, this Court should infer that the Bank's Board consciously failed to monitor BANA's operations ("Information Systems Claim"), willfully ignored red flags ("Red Flags Claim"), and/or intentionally caused BANA to violate the law ("*Massey* Claim"), such that at least half of the Board faces a substantial likelihood of liability. The Court of Chancery rejected these same arguments below, ruling that Plaintiff failed

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[1] Citations to "Pl. Br." are to Appellant's Opening Brief.

[2] The Nominal Defendants-Below/Appellees are Bank of America Corporation ("BAC") and Bank of America, N.A. ("BANA") (collectively, the "Bank"). The Director Defendants-Below/Appellees, who are current and former members of the Bank's Board of Directors (the "Board"), are 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, and R. David Yost. (A0019 fn. 1.) The Officer Defendants-Below/Appellees are Alastair Borthwick, Geoffrey S. Greener, Lauren Mogensen, Dean C. Athanasia, Paul M. Donofrio, and Thomas K. Montag (together with the Director Directors, the "Individual Defendants"). A0019 n.2. The Nominal Defendants, Director Defendants, and Individual Defendants are collectively, "Defendants."

to plead particularized facts from which to infer that any of the directors acted in bad faith or face a substantial likelihood of liability on any of Plaintiff's claims.[3] This Court should affirm.

The Court of Chancery ruled that Plaintiff's Information Systems Claim failed because, among other things, the Complaint and its exhibits demonstrated on their face that the Board received near monthly reports from management about the Prepaid Card Program throughout the relevant period. From that pleading record, the Court reasoned that "it is not possible to infer that the director defendants failed to establish a reasonable information system."[4] In reaching this conclusion, the Court of Chancery explained that, unlike the companies in the cases cited by Plaintiff that produced a single product, it was not reasonable to infer that the Prepaid Card Program was a central compliance risk or "mission critical" to BANA, given the Program's miniscule size relative to BANA's diversified global operations.[5] The Court of Chancery held that, while certain regulators found that BANA's management-level control over implementation of the Program during the height of the COVID-19 pandemic was deficient in certain areas, it could not "infer based on

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[3] Pl. Br. Ex. A (hereinafter, "Tr.") 5:20-23.

[4] Tr. 20:22-21:3.

[5] *Id.* 7:15-8:8:21.

the record of reports that the Board actually received is that . . . the board failed to implement an adequate information system in bad faith."[6]

The Court of Chancery also ruled that Plaintiff's Red Flags Claim failed because, in response to indications of certain issues with the Prepaid Card Program, "the Board acted."[7] In reaching this conclusion, the Court of Chancery found that the Complaint and its exhibits showed that the Bank and Board responded rapidly to the exigent circumstances caused by the explosive growth to the Program during the pandemic, and they implemented multiple strategies to address the "dual mandate . . . [to] prevent fraud while also ensuring that people got their benefits in compliance with federal regulations."[8] Based on the Board's actions, the Court of Chancery held that "I don't think it's possible for me to reasonably infer that the board consciously disregarded red flags in a manner that supports bad faith."[9]

Finally, the Court of Chancery ruled that Plaintiff's *Massey* Claim failed because there were no well-pleaded allegations from which to infer that the Board

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[6] *Id.* 22:3-16.

[7] *Id.* 23:21-23.

[8] *Id.* 25:5-21.

[9] *Id.* 25:24-26:3.

intentionally violated the law to make a profit.[10] This was particularly clear because, as the Court of Chancery explained, "the Program didn't make a profit."[11] In addition, the Court of Chancery noted that, in analyzing a *Massey* claim, it was important to evaluate the scope of the alleged wrongdoing in the context of the company's overall business.[12] Here, the Court of Chancery correctly observed that the "Bank appears to have done a fairly good job of sifting the fraud from the legitimate accounts," as the Complaint alleged approximately 110,000 out of more than six million accounts were wrongly frozen, which is "below a 2 percent failure rate."[13] Given this context, as well as the "exigent circumstances and ongoing monitoring and tweaks to the Program" by the Bank and Board, the Court of Chancery held that it could not "reasonably infer bad faith."[14]

Each of these holdings was correct and well-supported by controlling case law. Accordingly, this Court should affirm.

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[10] *Id.* 30:6-15.

[11] *Id.*

[12] *Id.* 30:23-31:12.

[13] *Id.*

[14] *Id.*

SUMMARY OF ARGUMENT

Denied. The Court of Chancery correctly held that demand is not excused because Plaintiff failed to plead with particularly that at least half of the Board "would face a substantial likelihood of liability on any of the claims." *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1059 (Del. 2021). In reaching this conclusion, the Court of Chancery correctly ruled that the Complaint failed to plead with particularity that any Board member acted in bad faith by (i) utterly failing to implement an information reporting system or consciously failing to monitor BANA's operations (Information Systems Claim), (ii) willfully ignoring red flags (Red Flags Claim), or (iii) intentionally causing BANA to violate the law (*Massey* Claim).

STATEMENT OF FACTS[15]

I. The Prepaid Card Program

BAC is a large, diversified, global financial institution.[16] BAC conducts its banking activities through its banking subsidiaries, including BANA.[17] One of the services that BANA provides to state governments is the distribution of unemployment benefits through bank-issued debit cards (the "Prepaid Card Program" or "Program").[18]

Under the Program, individuals who qualify for unemployment benefits receive a pre-funded debit card they can use to either make purchases or withdraw cash.[19] The State is responsible for determining eligibility in the Program; BANA

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[15] The Court may properly consider all documents attached to or incorporated by reference in the Complaint. *Okla. Firefighters Pension & Ret. Sys. v. Corbat*, 2017 WL 6452240, at *13 n.233 (Del. Ch. Dec. 18, 2017) ("'If a plaintiff chooses to refer to a document in its complaint, the Court may consider the entire document, even those portions not specifically referenced in the complaint.'") (citation omitted). Documents incorporated by reference include those provided to Plaintiff in response to its inspection demand. Plaintiff impermissibly attached an "Exhibit C" to its Opening Brief on appeal that should be stricken for the reasons explained in Defendants' accompanying Motion to Strike. In any event, none of the arguments contained in that Exhibit C would support reversal of the decision on appeal.

[16] A0040 ¶¶ 56, 57.

[17] A0041 ¶ 58.

[18] A0041 ¶ 59.

[19] A0041 ¶ 59.

supplies the cards; and then the State and BANA work together to administer the Program.[20] Like most areas of banking—and like most government programs—the Prepaid Card Program is heavily regulated.[21] The regulations primarily focus on two subjects. On one side, there are anti-money laundering and anti-fraud laws and regulations, which impose onerous requirements on banks to detect and stop fraud at the risk of severe criminal sanction.[22] On the other side, there are consumer protection laws, which govern the dealings between the banks and cardholders.[23]

Starting in 2010, BANA entered into contracts with twelve states to distribute unemployment benefits using prepaid debit cards.[24] Plaintiff does not dispute that, for nearly a decade, the Program functioned effectively and without issue.[25]

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[20] A2550.

[21] A2068; A2553.

[22] A2068; A2553; *see also* 31 U.S.C. §§ 5318(h), 5322 (statutes requiring financial institutions to maintain adequate AML programs); 18 U.S.C. § 1956(a) (federal statute prohibiting money laundering).

[23] A2068; A2553; A0046 ¶ 74.

[24] A0041 ¶ 60.

[25] A2489-90.

In 2019, the last year before the COVID-19 pandemic hit the country, BAC reported $27.5 billion in annual earnings.[26] That same year, the Prepaid Card Program had $76 million in revenue against $61 million in expenses for an operating margin of $15 million.[27] In other words, the Program represented a tiny fraction of one percent of BAC's annual earnings.

II. The COVID-19 Pandemic

In early 2020, the outbreak of COVID-19 caused an unprecedented increase in unemployment.[28] In response, Congress enacted legislation that added $260 billion into the state unemployment benefit system.[29] With the increased number of unemployed people and the influx of federal dollars, the size of the Prepaid Card Program grew exponentially.[30] In a few short months during early-to-mid 2020, the number of BANA prepaid cards in circulation increased 600% from one million to six million,[31] and the funding on the cards increased 2,700% from $1 billion to $27

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[26] A0056 ¶ 110.

[27] A2556.

[28] A0063 ¶ 124.

[29] A0067 ¶ 131.

[30] A0063-64 ¶ 125.

[31] A0063-64 ¶ 125.

billion.[32] In addition, state governments were eager to distribute the federal money to their residents and therefore relaxed traditional safeguards and prior eligibility requirements, including by (i) permitting applicants to obtain benefits without validating the source of prior income, (ii) allowing self-employed workers to obtain benefits without submitting employment verification documents, and (iii) permitting applicants to post-date their applications and obtain retroactive benefits in one lump sum.[33]

The huge influx of federal money—combined with relaxed eligibility requirements—created a huge target for domestic and international fraudsters and cybercriminals.[34] In mid-2020, federal law enforcement agencies, including the FBI and Secret Service, issued warnings about massive fraud perpetrated against unemployment programs across the country by criminal networks who were sitting on a cache of stolen identities from historic, large-scale, and well-publicized data

[32] A0063-64 ¶ 125.

[33] A1356; A2489.

[34] A1435; A1356; A2489.

breaches.[35] Within a few months of the start of the pandemic, criminals had already stolen billions of dollars of government funds from the Program.[36]

III. BANA's Response

In response to these unprecedented and inherently unexpected events, BANA had to scale up its operations virtually overnight to address the explosive growth in the Program and the dramatic increase in fraud.[37] During this time, senior BANA executives from business, legal, and compliance provided the Board and certain of its committees with near monthly reports on material developments with the Prepaid Card Program and proposed action plans to address issues arising from the Program's rapid expansion.[38]

For example, by September 2020, just a few months after the start of the pandemic, BANA's management informed the Board that it had increased the number of agents at its call centers more than ten-fold (from 350 to 4,000) to address questions and concerns from prepaid cardholders.[39] Over the same period, BANA's

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[35] A2553.

[36] A0066-67 ¶ 130.

[37] A2554.

[38] A2558 (summary of Board updates).

[39] A1547, A2554.

management informed the Board that it had increased the number of claims processors twenty-fold (from 50 to 2,000), and it had brought in fraud prevention experts to advise management on tactics to fight fraud.[40]

Historically, BANA had used a largely manual approach to fraud investigations that included (among other things) comparing where the prepaid card was used to where the cardholder lived, comparing recent transactions to the cardholder's habitual transactions, and looking at ATM camera footage to see if the person looked like the cardholder.[41] With the benefit of expert advice and under immediate time pressure to prevent massive fraud, BANA, with direct oversight from the Board, made the business judgment in late September 2020 to develop an automated solution called the Fraud Filter to help it identify potential fraud.[42] In implementing this new system, BANA attempted to balance its obligations to prevent fraud and comply with anti-money laundering laws while at the same time limiting any negative impacts on individuals who filed legitimate claims.[43] Despite

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[40] A1547, A2554.

[41] A0069-70 ¶ 135.

[42] A1910-11; A1547; A1484.

[43] A0248; A1909-11; A2068.

BANA's best efforts, a relatively small percentage of legitimate unemployment beneficiaries unfortunately had their Prepaid Cards frozen for potential fraud.[44]

IV. The Consumer Class Action Litigation And Regulatory Actions

In January 2021, a consumer class action lawsuit was filed by California residents against BANA, seeking to (among other things) enjoin BANA's use of the Fraud Filter.[45] In June 2021, the court ordered the parties to negotiate an injunction that protected cardholders while at the same time "ensur[ing] that it does not unduly hinder BofA from freezing the accounts of people who are likely to have obtained their cards through fraud."[46] Pursuant to this order, the parties negotiated the terms of an injunction,[47] and BANA's management, with oversight from the Board, promptly implemented it.[48]

The Office of the Comptroller of the Currency ("OCC") and the Consumer Financial Protection Bureau ("CFPB") also conducted investigations that primarily

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[44] Tr. 31:7-12; A0350.

[45] A0096-97 ¶¶ 181-82.

[46] A0285.

[47] A0288.

[48] A0118-19 ¶¶ 212-13; A2068.

focused on the Fraud Filter.[49] Following those reviews, in July 2022, the OCC and CFPB assessed a $225 million combined penalty against BANA related to the Program.[50] The orders do not criticize or even question BANA's and the Board's decision to use automation to address the unprecedented fraud confronting the Prepaid Card Program.[51] Instead, both orders address alleged flaws in management's implementation of the Fraud Filter.[52] Indeed, these orders—which were the product of extensive investigation—*do not question or even mention the Board's conduct at all*.[53]

V. Plaintiff's Section 220 Demand And Complaint

On July 27, 2022, Plaintiff, a stockholder of BAC, sent a letter to the CEO of BAC and the Board requesting access to certain books and records of BAC related to the Prepaid Card Program.[54] In response, BAC produced responsive, non-privileged portions of Board minutes and formal Board presentations from January

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[49] A0023 ¶ 8.

[50] A0152 ¶ 260; A0158 ¶ 268.

[51] A0294-319; A0332-379.

[52] A0296; A0339-44.

[53] A0294-319; A0332-79.

[54] A0039 ¶ 50.

2020 through September 2022 that discuss BANA's administration of the Prepaid Card Program.[55] In total, BAC produced approximately 7,900 pages of documents to Plaintiff.[56]

On August 2, 2023, without first making a demand on the Board, Plaintiff filed the current derivative lawsuit, purportedly on behalf of BAC and BANA, against 23 current and former officers and directors of BAC.[57] BAC and BANA were named as nominal defendants.

VI. The Court Of Chancery Dismisses Plaintiff's Complaint

In response to Defendants' motion to dismiss, the Court of Chancery dismissed Plaintiff's complaint under Rule 23.1, ruling that demand was not excused because Plaintiff failed to plead with particularity that at least half of the Board faced a substantial likelihood of liability under any of Plaintiff's claims.[58]

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[55] A0039 ¶ 51.

[56] A0039 ¶ 52.

[57] A0016-207.

[58] Tr. 5:20-23.

ARGUMENT

I. The Court of Chancery Correctly Held That Plaintiff Failed To Plead Particularized Facts That Demand Was Futile

A. Question Presented

Whether the Court of Chancery correctly held that demand was not excused because Plaintiff failed to plead with particularity that at least half of the Board faced a substantial likelihood of liability on Plaintiff's claims. This question was raised below and addressed by the Court of Chancery.[59]

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's decision to dismiss a derivative suit for demand futility under Rule 23.1. *Zuckerberg*, 262 A.3d at 1047.

C. Merits of the Argument

"A cardinal precept" of Delaware law is "that directors, rather than shareholders, manage the business and affairs of the corporation." *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984). "In order for a stockholder to divest the directors of their authority to control the litigation asset and bring a derivative action on behalf of the corporation, the stockholder must" make a demand on the company's board of directors or plead with particularity facts demonstrating that demand would be futile. *Lenois v. Lawal*, 2017 WL 5289611, at *9 (Del. Ch. Nov. 7, 2017).

[59] A0031 ¶ 20; Tr. 19-33.

Here, Plaintiff failed to make a pre-suit demand on the Board and instead asserted that demand would be futile because, according to Plaintiff, at least half of the Board "would face a substantial likelihood of liability on" Plaintiff's Information Systems Claim, Red Flags Claim, or *Massey* Claim.[60] After an evidently thorough review of the Complaint and its voluminous exhibits, the Court of Chancery rejected Plaintiff's arguments, ruling that it is not possible to infer that the director defendants (i) "failed to implement an adequate information system in bad faith," (ii) "consciously disregarded red flags in a manner that supports bad faith," or (iii) acted in bad faith to violate the law.[61] This Court should affirm each of these holdings.

1. The Complaint Does Not Plead an Information Systems Claim

In order to assert an Information Systems Claim, Plaintiff must show either "(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); *see also In re McDonald's Corp. S'holder Derivative Litig.*, 291 A.3d 652, 676 (Del. Ch. 2023). This Court was "quite deliberate in its use of the adverb

[60] Pl. Br. at 23.

[61] Tr. 25:5-26:3; 31:7-32:22.

'utterly'—a 'linguistically extreme formulation'—to set a high bar when articulating the standard to hold directors personally liable for a failure of oversight under the first *Caremark* prong." *Fisher ex rel. LendingClub Corp. v. Sanborn*, 2021 WL 1197577, at *11 (Del. Ch. Mar. 30, 2021) (citation omitted).

Far from an "utter failure" to establish a reporting system or a "conscious" failure to be informed, the exhibits to the Complaint demonstrate that BANA's management provided frequent and regular updates to the Board and its committees on the action plans it was implementing to address the rapid changes to the Prepaid Card Program brought on by the global pandemic and the federal legislation designed to help newly unemployed individuals. Plaintiff attempts to dismiss the Board's engagement by asserting that the Board minutes and management reports only contain "information about the Program's general operations and lack of profitability."[62] Plaintiff also complains that in rejecting Plaintiff's Information Systems Claim, the Court of Chancery "virtually ignored the extensive record."[63] But it is Plaintiff, not the Court of Chancery, that ignores the pleading record, which demonstrates near-monthly engagement by the Board into every facet of the Prepaid Card Program, including near-real-time reports of issues arising from the Program's

[62] Pl. Br. at 9.

[63] Pl. Br. at 8.

expansion and concrete proposals to address those issues. As the Court of Chancery concluded upon reviewing "the nearly monthly meetings and updates that the board received from management": "What I don't think you can infer based on the record of reports that the Board actually received is that . . . the board failed to implement an adequate information system in bad faith."[64] Below is a summary of some (but not all) of the Board's engagement with the Program:[65]

[redacted]

[64] *Id.* 22:3-16.

[65] A more detailed summary of management's engagement with the Board and its committees regarding the Prepaid Card Program—based entirely on the exhibits to Plaintiff's Complaint—can be found at A5123-63.

[66] A1676.

[67] A1288-89; A0070-71 ¶ 137.

[redacted]

[68] A1547.

[69] A1884; A1435; A1141; A1369; A0064-66 ¶¶ 127-28, A0081-82 ¶ 163.

[70] A1484; A0248; A0066-67 ¶ 130, A0089-91 ¶ 172, A0100 ¶ 188.

[redacted]

[71] A0102-03 ¶ 192; A1355-56.

[72] A2002; A2023; A2068; A0114-15 ¶¶ 205-06, A0118-19 ¶¶ 212-13.

[73] A2489-90; A2549-59; A2489-90; A0125-29 ¶¶ 224-26.

[redacted]

The regular meetings, memos, and presentations show that the Board and its committees were engaged with BANA's management in every aspect of the Prepaid Card Program[76] and clearly demonstrate "a good faith effort to bring timely and actionable information to [the Board's] attention." *Ontario Provincial Council of Carpenters' Pension Tr. Fund v. Walton*, 2023 WL 3093500, at *32 (Del. Ch. Apr. 26, 2023) (hereinafter "*Walmart*"). In addition, the substance of the Board's engagement matched the facts on the ground, with (i) an initial focus on the need to increase staff dramatically to meet the explosion in the size of the Program, (ii) to a

[74] A2723-25; A0130-31 ¶ 229.

[75] A3384-87; A3437; A0135-36 ¶¶ 235-36.

[76] *See*, *e.g.*, A2489-90; A2549-59; A0064-67; A0070-71, A0081-82, A0089-91, A0100, A0102-03, A0114-15, A0118-19, A0125-31, A0135-36.

later focus on fraud prevention as the Program was hit with an unprecedented level of fraud, which threated billions of dollars of taxpayer money and implicated anti-money laundering and other fraud prevention statutes, (iii) to a heightened focus remediating on the unintended consequences that fraud prevention had on legitimate beneficiaries. The regular cadence of on-point reporting and dialogue with the Board—both directly and through its committees—completely negates any suggestion of an "utter failure" to establish "any" information systems or a "conscious failure of oversight" by anyone on the Board.

Plaintiff makes three primary arguments on appeal, none of which have merit. *First*, Plaintiff asserts that it is reasonable to infer from the OCC and CFPB consent orders 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."[77] As an initial matter, it should be noted that BANA entered into these consent orders "without admitting or denying" their contents.[78] But in any event, the OCC and CFPB made no findings whatsoever about the Board or its information reporting system. Instead, the OCC principally found fault with BANA's management of the implementation of the Fraud Filter, finding that the

[77] Pl. Br. at 25.

[78] A0295; A0334.

bank "failed to establish effective risk management over the Program."[79] Far from an "utter failure" of "any" information reporting system, the OCC's finding merely indicates that the risk management system that BANA adopted turned out to be "not effective"—a standard feature of OCC safety and soundness consent decrees. Furthermore, Plaintiff's suggestion that the OCC consent order's inclusion of remedial requirements, including forward-looking "General Board Responsibilities," supports its claim is misleading at best.[80] This provision, which again is customary in OCC consent decrees, merely states that going forward BANA agrees that the "Board shall ensure that the Bank has timely adopted and implemented all corrective actions required by this Order."[81] It does not suggest that the Board consciously failed to implement an information reporting system or say anything about the conduct that led to the consent decree.

Second, Plaintiff wrongly asserts that *Marchand* provides support for its Information Systems Claim.[82] But the Information Systems Claim in *Marchand* was evaluated in the context of a "monoline" company whose only business was to make

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[79] Pl. Br. at 25.

[80] Pl. Br. at 25-26.

[81] A0311.

[82] Pl. Br. at 28-31 (citing *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019)).

ice cream and keep it safe to eat, whereas the company at issue here is "one of the world's largest financial institutions" with a diverse collection of businesses and products that "serve[] individual consumers, small- and middle-market businesses, institutional investors, large corporations, and governments with a full range of banking, investing, asset management, and other financial and risk management products and services."[83] In addition, the record shows that in 2019, BAC reported earnings of $27.5 billion from these diverse businesses, and the Program represented a tiny fraction of one percent of those earnings.[84] Based on these facts, the Court of Chancery ruled that, unlike in *Marchand* where food safety for an ice cream company was "mission critical," it was not reasonable to infer that the Program was a central compliance risk or "mission critical" to the Bank's financial success "[g]iven the small size of the Program and the relatively small amount of revenue that the Program generated."[85] Thus, *Marchand* provides no support at all for Plaintiff's position.

Third, Plaintiff asserts that, while there may have been information flowing to the Board, there was not a specific committee assigned exclusively to overseeing

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[83] A0040 ¶¶ 56-57.

[84] A0056-57 ¶ 110; A2556.

[85] Tr. 7:11-20.

the Program and no regular schedule or process for the Board to receive information about the Program.[86] But the case law does not prescribe a specific or formulaic "schedule" or "process," and in any event, Plaintiff's assertion ignores that the Complaint and its Exhibits establish the regular, "nearly monthly" reporting that senior managers from business, legal, and compliance provided to the Board and its committees, including the Audit Committee and Enterprise Risk Committee, about the problems the Program was confronting and the action plans to address those problems. (*See supra* at 18-21). Indeed, the Court of Chancery considered and rejected Plaintiff's same argument below, stating that "[g]iven the exhibits to the complaint involving how the Board, the Audit Committee, and the Enterprise Risk Committee engaged in regular oversight of the Program, I don't think it's reasonable to infer that the board lacked a system."[87]

For these reasons, Plaintiff has not pleaded with particularity an Information System Claim, and the Court of Chancery's decision should be affirmed.

2. Plaintiff Has Not Pleaded a Red Flags Claim

In order to adequately plead a Red Flags Claim, a plaintiff must allege facts with particularity from which to infer that the board was "put on notice that the

[86] Pl. Br. at 28.

[87] Tr. 21:16-20.

corporation was violating the law . . . [but] willfully turned a blind eye to the evidence and hence consciously decided to do nothing." *Ontario Provincial Council of Carpenters' Pension Tr. Fund v. Walton,* 294 A.3d 65, 91 (Del. Ch. 2023). Plaintiff fails this requirement because there are no facts—let alone particularized facts—pleaded from which to infer that the Board "consciously" or "willfully" disregarded the red flags. In fact, after reviewing the record, the Court of Chancery held that, in response to each purported red flag, the Complaint and its Exhibits confirmed that "the Board acted."[88]

None of Plaintiff's arguments on appeal undermine the Court of Chancery's dismissal of Plaintiff's Red Flags Claim. *First*, Plaintiff asserts the Board willfully ignored a November 24, 2020 letter from California legislators to the Chairman of the Board in which the legislators informed the Chairman that certain California residents were unable to access their unemployment benefits.[89] Contrary to Plaintiff's assertion, BANA promptly and publicly addressed the concerns raised in the letter.[90] Specifically, on December 7, 2020, BANA's Director of California

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[88] Tr. 23:21-23.

[89] Pl. Br. at 36-38.

[90] It is well established that the incorporation-by-reference doctrine "limits the ability of a plaintiff to take language out of context, because the defendants can point the court to the entire document." *Walmart*, 2023 WL 3093500, at *3.

Government Relations responded to the California legislators with a four-page letter that explained in detail the actions BANA was taking, "in partnership with the [California Employment Development Department ('EDD')], to ensure valid claimants have timely access to their benefits against a backdrop of the unprecedented levels of unemployment benefits fraud occurring in California."[91] In the letter:

- BANA informed the legislators of its "collaborat[ion] with EDD to help establish additional fraud prevention measures, including implementing a series of filters and flags that indicate suspected fraudulent activity." Through this process, "we have identified more than 640,000 accounts for EDD to evaluate as to whether they are fraudulent, and the associated card should be frozen or account closed."[92]

- BANA recognized that, while the flags "are highly correlated with the risk of fraudulent activity, the application of these filters will inevitably impact some legitimate claimants. EDD and [BANA] therefore must work to investigate and resolve matters for recipients who are inadvertently impacted." BANA noted that it had "committed significant additional personnel to address the challenges,"

[91] A1909; A0093-94 ¶ 177.

[92] A1910.

including increasing "call center and claim staffing to more than 6,150 dedicated personnel."[93]

- BANA also recommended to EDD additional measures outside the scope of BANA's contract, including a dedicated call center to authenticate blocked and frozen accounts, and a plan to facilitate information flow with law enforcement agencies. BANA indicated that "impacts on legitimate recipients would be significantly reduced through the implementation of these and other front-end, anti-fraud measures."[94]

- BANA explained that "[w]e now provide written notice to the cardholder of a freeze" and invite the cardholder to contact the Bank. "We understand that EDD also contacts claimants whose accounts have been frozen and provides instructions on how to validate their identities so that their accounts can be reactivated."[95]

- BANA also stated that it was "working with EDD to streamline the process for EDD to validate legitimate cardholders through verification of identity so that Bank of America can reactivate their accounts when directed by EDD to do

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[93] A1910-11.

[94] A1911.

[95] A1911; A0094 ¶ 178.

so . . . . Since September 1, we have unfrozen approximately 54,000 accounts at EDD's direction based on its assessment and verification of legitimate claims."[96]

Thus, contrary to Plaintiff's assertion, BANA did not ignore the concerns raised by the legislators; it explained to the legislators (and the world) in detail the ways in which it was attempting, with EDD's support, to limit fraudulent activity while rapidly assisting the affected claimants. In addition, it is clear from the Board materials that BANA's management informed the Board of the issues identified in the public letter, and the Board oversaw many of the remedial measures discussed in the response letter.[97] Therefore, the Complaint and its Exhibits themselves foreclose Plaintiff's argument that BANA's management and the Board "consciously decided to do nothing" in response to the legislators' letter.

Second, Plaintiff erroneously suggests that BANA somehow ignored or reflexively denied the allegations in the consumer class action.[98] Instead, BANA explained to the court the ways in which fraudsters were stealing billions of dollars so that the court would have the benefit of this information when crafting any

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[96] A1911-12; A0093-94 ¶ 177.

[97] A1288-89; A1547; A1141; A1884; A1435; A0064-66, A0070-71, A0081-82, A0089-91, A0100.

[98] Pl. Br. at 38.

remedy.[99] For example, one of the many good faith concerns that BANA raised with the court was that criminals were taking advantage of a provision in the Electronic Funds Transfer Act and Regulation E that required banks to provide claimants with provisional credit if their investigation was not completed in 10 days.[100] BANA noted that "[c]riminals have taken full advantage [of this requirement]: filing fraudulent claims, obtaining provisional credits, then depleting the provisionally credited funds before the credit can be reversed upon completion of the investigation (referred to as "card cracking")."[101] By its action, the court recognized that BANA had raised legitimate concerns and ordered the parties to negotiate an injunction that protected cardholders while at the same time "ensur[ing] that it does not unduly hinder [BANA] from freezing the accounts of people who are likely to have obtained their cards through fraud."[102] Pursuant to this order, the parties negotiated the terms of an injunction,[103] and BANA's management promptly implemented the remedial

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[99] A1971-72.

[100] A1971.

[101] A1972.

[102] A0285.

[103] A0288.

measures in the agreement, including terminating the fraud filter,[104] returning funds to legitimate unemployment claimants,[105] and manually investigating approximately 50,000 claims filed by claimants whose benefits had been frozen—all of which was reported to the Board and its committees.[106] In light of these actions, there is no pleaded basis from which to infer that the Board acted in bad faith and consciously did nothing in response to a known risk.

Third, Plaintiff wrongly claims that "Defendants were also aware of numerous internal red flags that were consciously and deliberately ignored."[107] The purported "internal red flags" that Plaintiff identifies are facially evident distortions of incomplete snippets of management updates to the Board. For example, Plaintiff asserts, without explanation, that [redacted]

[104] A0288.

[105] A2023; A0114-15 ¶ 205-06.

[106] A2068; A0118-20 ¶ 212.

[107] Pl. Br. at 39-40.

[108] Pl. Br. at 39-40.

[redacted] But even if Plaintiff is correct that they were internal red flags, there is no basis to infer that the Board "consciously and deliberately ignored" the red flags. To the contrary, the pleaded

[109] A2068; A0118-20 ¶¶ 212-13, 215 n.88.

[110] A2068; A0118-19 ¶¶ 212-13.

[111] A2068; A0118-19 ¶¶ 212-13.

[112] A2068; A0118-20 ¶¶ 212-13, 215 n.88.

record demonstrates that BANA's management, with oversight from the Board, diligently implemented the Injunction Order. Plaintiff's other examples suffer from similar deficiencies and are easily refuted by the exhibits to the Complaint, which are summarized above. (*See supra* at 18-21).

Finally, Plaintiff attempts to draw parallels between the Board's actions in this case and the board's action in *Walmart*,[113] but that case only highlights the propriety of the Board's response to the problems that arose with the Prepaid Card Program. In *Walmart*, the company entered into a settlement with the Drug Enforcement Agency ("DEA") for violations of Walmart's obligations as a dispenser of opioid prescriptions under the Controlled Substances Act ("CSA"). *Walmart*, 2023 WL 3093500, at *8. Over the next four years, Walmart's board was found to have knowingly failed to allocate the resources needed to implement the settlement reforms and knowingly failed to monitor the progress the company was making in complying with the settlement. *Id.* at *9-16. Among other things, the Court of Chancery concluded from the pleadings that Walmart's board knew that: Walmart's compliance efforts were underfunded by about $30 million. *Id.* at *37; its technological infrastructure "critical" to compliance had "major issues," *id.* at *12;

[113] Pl. Br. at 39-40 n.35.

and Walmart incentivized pharmacists and customers to *increase* the number of opioid prescriptions filled. *Id.* at *38. The Court thus ruled that the record supported "an inference that the directors learned that Walmart was not complying with the DEA [s]ettlement . . . yet consciously chose not to take action to achieve compliance, such as by instructing management to devote more resources to compliance initiatives." *Id*. at *35.

In contrast to the Walmart board's conscious failure to comply with a regulatory settlement for more than five years, the Complaint and its Exhibits establish that BANA, with oversight from the Board, promptly began implementing the remedial measures in the injunction [redacted]

[114] A2068; A0118-20 ¶¶ 212-13, 215 n.88.

[115] A2023; A0114-15 ¶¶ 205-06.

[116] A2068; A0118-20 ¶ 212.

[117] A2725; A0130-31 ¶ 229.

[redacted] Based on the Board's prompt action to implement remedial measures, there is no basis to infer that the Board "willfully ignored the evidence and consciously decided to do nothing." *Walmart*, 2023 WL 3093500, at *32. Accordingly, because Plaintiff cannot adequately plead its Red Flags Claim, the Court of Chancery's decision should be affirmed. *See Okla. Firefighters Pension & Ret. Sys. ex rel. Citigroup, Inc. v. Corbat*, 2017 WL 6452240, at *24 (Del. Ch. Dec. 18, 2017) (rejecting Red Flags Claim based on good-faith steps taken to improve systems and controls related to AML compliance); *Walmart*, 2023 WL 3093500, at *49 (dismissing plaintiff's distributor claim because, when confronted with a "barrage of legal actions" that "were a crimson flag," management responded by making the decision "to stop acting as a distributor of prescription opioids and [winding] down that business").

3. Plaintiff's Massey Claim Was Correctly Dismissed

There is no support—pleaded or otherwise—for Plaintiff's conclusory assertion that the Board "implemented a computerized 'Fraud Filter' and abandoned any effort to comply with the law" to "stem losses and increase profits."[119] *First*,

[118] A3437; A0136 ¶ 236.

[119] Pl. Br. at 2.

Plaintiff ignores the context in which this case arose and what precipitated the issues. For nearly a decade, the Prepaid Card Program functioned effectively.[120] As Plaintiff admits, the COVID crisis caused a "drastic increase in [unemployment]" that "increased substantially" the size of the Prepaid Card Program and forced BANA to suddenly contend with a "surge in fraud" that exposed BANA to potential legal liability and billions in losses.[121] BANA went from administrating $1 billion in unemployment benefits on one million cards to administrating $27 billion in benefits on six million cards.[122] It was in this context—a 27-fold increase in benefits nearly overnight, combined with a massive increase in fraud and amounting to [redacted][123]—that BANA's management, with oversight from the Board, implemented certain automated fraud detection strategies to help identify suspected fraudulent claims.[124]

BANA's automated system identified hundreds of thousands of accounts for EDD to evaluate further, including accounts where (i) benefit cards were issued to

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[120] A2489; A0041-46 ¶¶ 59-73.

[121] A0063-64 ¶¶ 124-26.

[122] A0063-64 ¶ 125.

[123] A0070 ¶ 137.

[124] A1911; A1484; A0093-94 ¶ 177.

infants or centenarians that were unlikely to be recently unemployed, (ii) multiple cards (hundreds in some instances) were sent to the same address, (iii) multiple cards used the same contact phone number, (iv) benefit cards were sent to recipients in states that do not border California, and (v) multiple benefit claims used the same email address.[125] Based on this record, the Court of Chancery stated that the "Bank appears to have done a fairly good job of sifting the fraud from the legitimate accounts."[126] In fact, the Court of Chancery found at most approximately two percent of the 6 million prepaid cards that BANA issued in June 2020 were wrongly frozen.[127] Based on these facts, the Court of Chancery ruled that "I just don't think . . . that you can reasonably infer bad faith."[128] The lack of bad faith was further reinforced by "exigent circumstances" caused by the pandemic and the "dilemma" that BANA faced, which the Court of Chancery summarized as follows: "Actions to prevent fraud, which were a regulatory requirement, could result in wrongfully freezing lawful accounts, which was a regulatory violation. But, likewise, actions to avoid freezing lawful accounts, which was a regulatory requirement, could

[125] A1910; A0093-94 ¶ 177.

[126] Tr. 30:24-31:2.

[127] Tr. 31:2-10.

[128] Tr. 31:13-17.

wrongfully allow fraud to continue, which was a regulatory violation."[129] BANA's management and the Board were acutely aware of this dilemma[130] and dedicated significant resources to the Program to try to find the right balance.[131] Even if BANA's management and the Board, at worst, shifted the balance too much in the direction of limiting fraud, there are no facts from which to infer that the Board intentionally violated the law. *See*, *e.g.*, *Horman v. Abney*, 2017 WL 242571, at *14-15 (Del. Ch. Jan. 19, 2017) (no bad faith where only a tiny fraction of the 18.3 million packages that UPS delivered each day contained illegal cigarettes); *Corbat*, 2017 WL 6452240, at *24 (no *Massey* claim where a "large financial institution[]" . . . "made efforts to comply with the wide range of laws and regulations" that proved unsuccessful); *Reiter v. Fairbank*, 2016 WL 6081823, at *14 (Del. Ch. Oct. 18, 2016) (no *Massey* claim where financial institution's "management made efforts to cope with tightening regulations and more aggressive AML enforcement actions").

Second, Plaintiff asserts in a conclusory manner that the "Complaint repeatedly and precisely alleged that profits drove Defendants' misconduct."[132] The

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[129] Tr. 31:13-32:3.

[130] A0248-49; A0089-91 ¶ 172.

[131] A0248-49; A2002; A2068; A1547; A0070-71 ¶ 137, A0114-15 ¶ 206.

[132] Pl. Br. at 34.

exhibits attached to the Complaint tell a different story. As the Court of Chancery noted below, the record shows that in 2019, the last year before COVID, the Program had $76 million in revenue and $61 million in expenses, for an operating margin of $15 million.[133] After COVID hit in 2020, BANA's expenses related to the Program rose dramatically and BANA's operating margin on the Program "fell permanently and deeply into the red."[134] These facts easily rebut Plaintiff's unsupported assertion that the Board chose to violate their fiduciary duties "because the costs and other burdens associated with compliance would cut into profits."[135] Indeed, there is no support for this assertion anywhere in the record.

Third, Plaintiff wrongly asserts that the Court should infer that the Board acted in bad faith and intended to violate the law based on the July 2022 OCC and CFPB consent orders.[136] But those orders focus on the same conduct that was raised in the class action litigation and had already been remedied a year earlier. As noted above, in connection with the injunction in June 2021, BANA agreed to stop using the automated fraud detection system and instituted a manual investigation process for

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[133] Tr. 6:22-7:2; A2556.

[134] Tr. 7:6-7; A2556.

[135] Pl. Br. at 35.

[136] Pl. Br. at 42.

frozen accounts.[137] Those two issues were the central focus of the consent orders.[138] As a result, by the time BANA entered into the consent orders, BANA's management, with oversight from the Board, had already addressed the primary issues raised by the OCC and CFPB. This case stands in stark contrast to the prototypical *Massey* claim where an entity enters into a regulatory settlement, but then consciously fails to implement the required reforms. *See*, *e.g.*, *Walmart*, 2023 WL 3093500, at *44 (ruling that plaintiff pleaded a *Massey* claim where the "record support[ed] an inference that the directors knew about the noncompliance [with the DEA settlement] and allowed it to happen, meaning that they consciously condoned illegality").

Finally, Plaintiff argues without support that the Court should infer bad faith based on BANA's decision to exit the Program after it started losing money.[139] But Plaintiff provides no particularized factual allegations supporting its conclusory assertion that, by exiting a Program that had changed dramatically in a short period of time and was creating significant financial and legal risks for BANA, the Board was acting in bad faith and trying to violate the law. In fact, the Court of Chancery

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[137] A2002; A2068; A0118-19 ¶ 212-13.

[138] A0296-97; A0339-41 ¶¶ 11-16.

[139] Pl. Br. at 10, 34.

found the opposite, ruling that "given the massive losses that the Bank was suffering and the states were suffering and the dilemma from these conflicting regulatory obligations, . . . the decision to exit was a valid exercise of business judgment."[140] *See Walmart*, 2023 WL 3093500, at *49 (rejecting plaintiff's *Massey* claim where Walmart management responded to a barrage of lawsuits by exiting the distributor business).

In sum, Plaintiff cannot point to any particularized factual allegations supporting the extraordinary conclusion that the Board intentionally violated the law. Instead, the Complaint clearly demonstrates that BANA's management, with continuous oversight from the Board, made a series of good-faith decisions designed to prevent rampant fraud while also protecting legitimate claimants. Certain regulators disagreed with the balance the Board struck in a once-in-a-lifetime crisis, but making mistakes is not tantamount to consciously violating the law, particularly where the purported mistake was to be too restrictive in preventing fraud. The Court should therefore reject Plaintiff's *Massey* claim and affirm the Court of Chancery's decision. *See City of Detroit Police & Fire Ret. Sys. ex rel. NiSource, Inc. v. Hamrock*, 2022 WL 2387653, at *19 (Del. Ch. June 30, 2022) (a "business model

[140] Tr. 33:7-11.

[of] extreme lawlessness . . . cannot be reasonably inferred" where the "Board had multiple committees dedicated to compliance risk and voluntarily took several concrete steps" to mitigate risk).

Because Plaintiff has failed to plead facts with particularity from which to infer that any board member faces a substantial likelihood of liability, the Court of Chancery correctly held that demand was not excused. This Court should affirm.

CONCLUSION

For the reasons set forth above, the decision of the Court of Chancery should be affirmed, and Plaintiff's Complaint should be dismissed for failure to plead demand futility under Rule 23.1.

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