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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 FILED: April 2, 2025**

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Defendants[1] assert three major falsely positive and self-serving narratives throughout their Answering Brief, which they claim put this Action into "context" and exculpate them all, namely: (i) focusing solely on the Fraud Filter, BOA did its best to cope with the rapid expansion of the Program during COVID and "balanced" its obligations to cardholders while trying to diminish fraudulent claims for unemployment benefits[2]; (ii) Defendants had diminished oversight duties because BOA is a large financial institution and the Program generated a fraction of its overall profits[3]; and (iii) Defendants "oversaw" the Program and took remedial "action" as necessary.[4]

The narrative is not new or unique to this Action.[5] The federal court in the California MDL rejected BOA's almost *verbatim* account, enjoined it, and years later denied its dismissal motion for several causes of action.[6] The federal regulators likewise held BOA liable for violating federal law in the Consent Orders precisely

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[1] Capitalized terms not defined herein have the meaning defined in Appellant's Opening Brief ("Opening Brief") (hereinafter cited as "PB"). Appellees' Answering Brief ("Answering Brief") is hereinafter cited as "DB."

[2] DB at 11, 32, 36-38, 41.

[3] *Id*. at 2, 4, 8, 38-39.

[4] *Id*. at 2, 10-11, 17-21, 29, 34, 36, 41.

[5] *See* A1967-75; A1982-85.

[6] A0288-92 (Injunction Order); A2153-57 (fiduciary duty claim).

because it had no legitimate business or legal justification for its overall conduct.[7]

Defendants' narrative focuses on the decision to deploy the Fraud Filter. But the Complaint challenges far broader misconduct for which Defendants have no possible justification. BOA has been held to account for a litany of "illegal," "unfair," "deceptive," and "abusive" misconduct other than its use of the Fraud Filter.[8] The Consent Orders *also* charged BOA with violating the law because it lacked compliant information systems.[9] The decision to engage in such illegal conduct is not protected under Delaware law.

Defendants nonetheless claim that their conduct is exculpated because the Program accounted for a "$15 million" profit margin.[10] But this argument deliberately misses the point. Like the Program, a relatively small business segment can carry outsized legal and business risk.

The Program, which operated in a heavily regulated environment, was designed to deliver unemployment funds. BOA also owed contractual and fiduciary duties to the Program's state sponsors and participants. The Program was therefore

[7] PB at 43 (citing A0348, ¶ 46).

[8] A0294, A0296-98, A0321, A0324-25, A0345.

[9] A0294, A0297, A0321, A0324.

[10] DB at 8, 39.

inherently risky. Failure to deliver benefits to unemployed workers carried significant negative consequences, which only increased as the Program grew during COVID and Program participants were in more desperate need of assistance.

This is not a pleading fiction; it is an undisputed and demonstrable fact. Plaintiff is entitled to a reasonable inference that the federal regulators recognized the Program's huge risk profile from the fundamental remediation the Consent Orders imposed on BOA even though it had decided to exit the business. The massively disproportionate difference between the Program's purported "$15 million" profit margin and the serious reputational and monetary harm BOA has already incurred raises another reasonable inference that the Program was extremely risky and merited exacting oversight, not less.[11]

In this "context," even the Court did not find Defendants wholly blameless. It held that what Defendants "did was insufficient" and that they had made "mistakes."[12] But the Court also improperly employed its own "holistic" assessment of the record, which fully credited Defendants' rehashed and twice-rejected version of events.[13] Defendants' third effort should not have been "a charm."

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[11] A0209-216; A1958.

[12] PB Ex. A at 25-27.

[13] *See, e.g., id*. at 5 ("The regulatory findings complicate matters because they involve determinations of inadequate oversight. Considered holistically, however,

The Complaint pled particularized facts supporting actionable Information Systems, Red Flags, and *Massey* claims. These claims are all based on reasonable inferences the Court must now draw in Plaintiff's favor from the well-pled allegations in the Complaint. The documents Defendants cite do not raise undisputed reasonable inferences that they made informed business decisions about the Program and oversaw its remediation. Defendants' claims of innocence are based on impermissible testimonial assumptions that warrant consideration only after Plaintiff develops a full, vetted factual record.

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the facts of the complaint do not support a reasonable inference that the directors face a substantial likelihood of liability.") *Id*. at 7, 9, 14, 25, 29, 31 (drawing multiple favorable inferences for Defendants from "context.").

ARGUMENT

I. THE COMPLAINT STATES ACTIONABLE CLAIMS

A. Defendants Did Not Act In Good Faith

BOA was not caught off guard. Defendants fully anticipated the unemployment surge during the pandemic and the accompanying increase in potentially fraudulent claims for benefits.[14] Defendants also knew that BOA's administration of the Program would negatively impact legitimate unemployment claims.[15] The Individual Defendants, through BOA -- no stranger to paying hefty regulatory fines and civil settlements for mistreating its customers --[16] did not make a business decision to deploy the Program after "balancing" fraud prevention against its possible impact on legitimate unemployment claimants.

No Board minutes exist to indicate that the Director Defendants made *any* business decisions concerning the Program and did not specifically approve implementation of the Fraud Filter (neither did the EDD).[17] Putting the Fraud Filter

[14] PB at 2, 16-17; A0064, ¶ 127; A0067-68, ¶¶ 131-132; A0078-82, ¶¶ 159-163.

[15] PB at 18 & n.16.

[16] *Id.* at 11 & n.10.

[17] *See infra* at 11-17; A0346; A0065-66, ¶ 128 (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.").

aside, Defendants do not, because they cannot, explain how the other wrongdoing the Consent Orders described legitimately aided them in preventing the payment of fraudulent claims including: (i) failing to credit wrongly frozen accounts; (ii) reversing prior credits to frozen accounts; (iii) preventing account holders from seeking reconsideration of account freezes "as a result of operational deficiencies"; and (iv) providing "deceptive disclosures and notices regarding liability" regarding BOA's handling of frozen accounts.[18] Avoiding fraud also could not have justified Defendants' illegal failure to oversee and monitor the Program and, as the Consent Orders found, to implement "enterprise wide" information systems "commensurate with the Bank's size, complexity, and risk profile."[19] Even assuming Defendants deployed these strategies to reduce fraud, a director of a Delaware corporation cannot "make a business judgment to . . . break the law."[20] [redacted]

[18] PB at 6 (citing A0296-97; A0332-33).

[19] *Id.* at 8-9, 19, 21 (citing A0297; A0324; A0148, ¶ 250).

[20] *Ont. Provincial Council of Carpenters' Pension Trust Fund v. Walton*, 2023 Del. Ch. LEXIS 92, at *94 (Del. Ch. Apr. 26, 2023) (hereinafter "*Walmart*").

[redacted][21]

Studiously ignored in Defendants' Brief -- and what makes this Action most unique -- is the fact that, on a far more robust factual record, the California MDL court enjoined BOA's use of the Fraud Filter, rejecting the *very same almost word-for-word balancing arguments* Defendants make here.[22] Similarly, the CFPB rejected BOA's "balancing argument," finding instead that it acted unfairly and deceptively precisely because its conduct "was not outweighed by any countervailing benefits to consumer or to competition."[23]

Thus, in the absence of a developed record that includes complete document discovery and sworn testimony, this Court cannot make any factual assumptions in Defendants' favor regarding what, if anything, Defendants supposedly balanced even if they did so. Indeed, considering the California Injunction Order and the Consent Orders, this Court can, and should, draw the reasonable inference that a decision to deceive unemployed workers and prevent them from accessing funds

[21] *See* A1884; A0248; A2068; A2489-90; A2549-59.

[22] PB at 4; A1969-85; A1984 (BOA claimed that "[t]he equities do not compel the imposition of immense costs on [BOA], EDD, and the public (which would suffer not just from the loss of taxpayer money but also from the infusion of cash to criminal enterprises . . .")); *see* DB at 30.

[23] PB at 43 (quoting A0348, ¶ 46).

needed to "feed their families and keep a roof over their heads"[24] states actionable breach of fiduciary duty claims.

B. The Program Was Highly Regulated and The Consequences of Violating The Law Were Catastrophic For BOA

In its Opening Brief and in the proceedings below, Plaintiff argued that the Complaint stated actionable Information Systems claims based on this Court's ruling in *Marchand v. Barnhill*, 212 A.3d 805, 821-22 (Del. 2019) (hereinafter "*Marchand*"). Defendants concede that BOA operates in a heavily regulated legal environment and is subject to a host of federal and state statutes and rules.[25] BOA's obligations to the Program's participants were further heightened by BOA's contractual obligations to state unemployment agencies,[26] and the fact that BOA owed fiduciary duties to its cardholders.[27] Nonetheless, because BOA is a large diversified financial services company, and the Program accounted for a small portion of BOA's profits, Defendants assert that they should be exculpated.[28] The Court cited this "context" in its misguided "holistic" assessment.[29]

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[24] A0284.

[25] PB at 13; DB at 7.

[26] PB at 15-16.

[27] *See supra* at 2.

[28] DB at 2-3, 23-24.

[29] PB Ex. A at 8.

The Court's decision is incorrect as a matter of fact and law. Like a "monoline" company, the *same* rigorous regulatory scheme and legal obligations the law imposed on the Program extended across BOA's consumer businesses.[30] These facts are undisputed.[31] The Consent Order found that BOA lacked compliant information systems and mandated strict board oversight in redesigning them precisely *because of BOA's large size*.[32]

Defendants' focus on the small size and profitability of the Program ignores the critical issue of legal and business risk. Any defects in the Program could and did have dramatic negative consequences for BOA due to the nature of the Program itself, which was to aid customers who could not otherwise pay for necessities.[33] This already exceptional risk exponentially increased with the onset of COVID, the unemployment that followed, and the consequent explosive growth of the Program.

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[30] *Id.* at 13-17; DB at 7.

[31] A0046-53, ¶¶ 74-93.

[32] PB at 6, 18-21; *see* A0148, ¶ 250 (quoting A0297) (BOA "failed to establish an effective enterprise-wide complaints risk management framework that *is commensurate with the Bank's size, complexity, and risk profile*.") (Emphasis added).

[33] *See* A0284 ("The harm being suffered by the class members is irreparable. The class is comprised of people who depend on unemployment benefits to get through the pandemic . . . continued denial of these benefits will seriously hinder the ability of many class members to feed their families and keep a roof over their heads.").

If not before, as of the summer of 2020, the Program was as a significant and "essential," and "mission critical" risk to BOA as food safety was to the defendant in *Marchand*.[34]

The Program's massive risk profile is a fact and not a creative pleading taken out of context as Defendants contend. As alleged in the Complaint, even though the Program purportedly had a "miniscule size relative to [BOA's] global operations,"[35] BOA's misconduct caused massively disproportionate harm to itself and to its customers. As the Program expanded, BOA was subject to multiple negative press reports, demands for action from state and federal lawmakers, class action lawsuits that are still ongoing, regulatory investigations, and ultimately hundreds of millions of dollars in fines as well as liability for "consequential harm."[36] Defendants do not dispute the total could exceed over *a billion* dollars.[37]

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[34] *Marchand*, 212 A.3d at 824.

[35] DB at 2.

[36] A0079-82, ¶¶ 161-163; PB at 3-5; A1958; PB at 4-6, 18-21.

[37] PB at 6-7 & n.6; A0158-59, ¶ 269; A0308; A0335, A0361-64 (holding BOA liable for "Consequential Harm," defined as "the financial harm Affected Consumers incurred due to the time of their unemployment insurance benefit prepaid debit card account remained frozen or blocked" and establishing detailed procedures for BOA to measure and account for those damages).

Defendants' abject failures to adopt "enterprise-wide" risk controls and monitor those risks were the central focus of the Consent Orders.[38] The federal regulators imposed huge fines and "consequential harm" *exactly because* of the "severity and scope of the consumer harm caused by the bank's practices."[39] Defendants must account for the devastating harm their misconduct caused.[40]

C. There Was No Board Oversight

Defendants argue that the Board was actively engaged in "every facet" of the Program.[41] However, as established in Plaintiff's Opening Brief and the proceedings below, the record does not, and cannot, support the sole reasonable inference that the Board complied with its fiduciary duties. Defendants primarily rely on the Court's decision in *In re McDonald's Corp. S'holder Derivative Litig.*, 291 A.3d 652, 667-68 (Del. Ch. 2023) (hereinafter "*McDonald's*").[42] In fact, *McDonald's* actually proves Plaintiff's case.

The Court dismissed the complaint in *McDonald'*s because the board minutes provided exact and detailed record support for defendants' claim that the issue of

[38] PB at 18-21; A0294, A0296-98, A0303-05; A0321, A0323-25.

[39] PB at 7.

[40] *See id.* at 39-40.

[41] DB at 17.

[42] DB at 16.

sexual harassment was actively considered and discussed at board meetings, including a special board meeting convened for that purpose.[43] In addition, after receiving a "joint letter" from several United States Senators, McDonald's management prepared a detailed report for the board to discuss before the company responded.[44] That document, entitled "How is McDonald's Responding to the issue of allegations of sexual harassment?" was a "[c]omprehensive review and update of the Company's anti-harassment policy" and included, among other things, a "holistic" review of McDonald's training programs and the retention of a major law firm to assist in that effort.[45]

The record here is completely different. [redacted].[46] [redacted].[47] Further, unlike the situation in *McDonald's*, at no time did the Director Defendants engage in any review of the Program let alone a "holistic" one. Indeed,

[43] *McDonald's*, 291 A.3d at 667-68.

[44] *Id.* at 667.

[45] *Id*. at 667-68.

[46] *See* PB at 33, 36-37.

[47] *Id.*

Defendants acted only after the OCC forced BOA to engage in an actual and specific "holistic" review of the Program.[48]

In the absence of a clear record like the one existing in *McDonald's*, Defendants rely on a mashup of excerpts from highly redacted minutes and management documents to claim that the Board "oversaw" the risks to the Program, the development of the Fraud Filter, and purported remedial measures,[49] the Board "engaged with BANA's management in every aspect of the Prepaid Card Program,"[50] and the Board and management "dedicated significant resources" to try and "balance" "freezing lawful accounts" and "allow[ing] fraud to continue."[51] Defendants' self-serving testimonial account of the contents of the record should not distract the Court, which must undertake a *de novo* and plenary review of the record.[52]

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[48] A0301 ("[t]he Bank shall perform a comprehensive and holistic risk assessment of the Program . . .").

[49] DB at 11, 18-19, 29.

[50] *Id.* at 21.

[51] *Id.* at 37-38.

[52] *See United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1047 (Del. 2021).

[redacted].[53] [redacted][54] [redacted]

[redacted],[55] [redacted]

[redacted].[56] None of those indicate *any* Board decision making or oversight. At this stage of the proceedings, BOA should be held at fault for this glaring lack of documentation as the absence of a record of Board deliberations heavily favors reversal.[57]

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[53] A1676; A1288-89; A1547; A1884; A1435; A1141; A1369; A1484; A0248-49; A1355-56; A2002, A2023; A2068; A2489-90; A2549-59; A2723-25; A3384-87; A3437.

[54] A1676; A1884; A1369; A2489-90; A2723-25; A3384-87; A3437.

[55] [redacted] According to the annual proxy statements filed by BOA with the SEC, between 2020 and 2022, the full Board met *sixty-eight times*, the Audit Committee met *thirty-two times*, and the ERC met *thirty-seven times*. This Court can take judicial notice of facts publicly available in SEC filings. *See Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1167 n.3 (Del. Ch. 2002) (citing *In re Santa Fe Pacific S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995)).

[56] DB at 22; A2489-90; A2723-25 [redacted]; A3384-87.

[57] Leo E. Strine Jr., *Minutes Are Worth the Minutes: Good Documentation Practices Improve Board Deliberations and Reduce Regulatory and Litigation Risk*, HARVARD

[redacted][58] [redacted].[59] [redacted].[60] [redacted] [redacted].[61] [redacted]

L. SCH. F. ON CORP. GOVERNANCE (Apr. 4, 2024) ("[w]hen books and records were produced before a complaint was filed and contain no indication of efforts to address a compliance risk, that absence of effort has contributed to a pleading stage inference of the absence of a good-faith effort to fulfill *Caremark* duties and thus the denial of motions to dismiss.").

[58] [redacted]

[59] *See* A1288-89; A1547; A1435; A1141; A1484; A0248-49; A1355-56; A2002; A2023; A2068; A2549-59.

[60] *See* PB at 31, 33-34.

[61] DB at 19; A1141 (emphasis added).

[redacted]

[redacted][62] [redacted]

[redacted][63] [redacted][64] T[redacted]

[redacted][65] [redacted]

[redacted][66]

[redacted]

[redacted][67] The Consent Orders, however, did not focus on the size of BOA's staff. Instead, BOA was held liable because its new hires -- employees of BOA's outside vendors -- were

[62] A1288-89; A1547; A1435; A1141; A1484; A0248-49; A1355-56; A2002; A2023; A2068; A2549-59.

[63] A1288-89; A1141; A1484; A0249; A1355-56; A2002; A2023; A2068.

[64] A0248-49; A1355-56; A2002; A2023; A2068; A2549-59.

[65] A1288-89; A1547; A1435; A1141; A1484; A0248-49; A1355-56; A2023; A2068; A2549-59.

[66] A1288-89; A1547; A1435; A1141; A1484; A0248-49; A1355-56; A2002; A2023; A2068; A2549-59.

[67] DB at 9 (citing A1547), 20 (citing A1355-56), 21, 28 (quoting A1910).

untrained, mislead Program customers, and critically, BOA had "inadequate oversight, risk management, and monitoring" of its vendor staff.[68] [redacted] As the Court held in *Marchand*, management reporting of operations is not a substitute for actual board oversight, otherwise *Caremark* would be reduced to "be chimera."[69]

D. Plaintiff More Than Adequately Pled Information Systems Claims

Defendants cannot avoid the explicit findings of the OCC and the CFPB in the Consent Orders.[70] As Plaintiff pled in the Complaint, the Consent Orders found that BOA's information systems were legally "inadequate" and ordered the Director Defendants to create a whole new system of oversight and monitor that effort.[71] While Defendants argue that they did not admit to wrongdoing by agreeing to the

[68] A0324; *see* A0303 (BOA must ensure that its call center operators and employees comply with the law); A0345 (noting that call center employees provided "inaccurate information"); A348 (cardholders were given "conflicting and delayed information"); A0353-54 (cardholders were given "misinformation" by call center staff).

[69] *See Marchand*, 212 A.3d at 824. The parties do not contest this proposition of Delaware law. PB at 9; DB at 17.

[70] DB at 22-23.

[71] PB at 18-21.

Consent Orders,[72] they say nothing about the fact that on a motion to dismiss, their agreement creates a reasonable inference that the information systems and monitoring program the Consent Orders mandated did not previously exist.[73] The Court came to the same conclusion holding that "what's off the table in terms of real debate is the fact that there was legal noncompliance, at least at the pleading stage."[74]

Defendants' argument that the Consent Orders are distinguishable because they did not directly implicate the Board fares no better.[75] The entire Board signed the Consent Orders, which placed exclusive responsibility on them to oversee the creation and implementation of the Program's new information systems.[76] Defendants claim, without citation, that such relief is "a standard feature" and "customary" of consent orders but even if that is so, it proves Plaintiff's point. Culminating in this Court's decision in *Marchand*, decades of Delaware precedents place responsibility for creating and monitoring information systems on the board.[77]

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[72] DB at 22.

[73] *See Walmart*, 2023 Del. Ch. LEXIS 92, at *133-34.

[74] PB Ex. A at 18; *see id.* at 5, 16-17.

[75] DB at 22-23.

[76] A0318-19; A0329-30.

[77] *Marchand*, 212 A.3d at 824 (Delaware law "require[s] that a board make a good faith effort to put in place a reasonable system of monitoring and reporting about the corporation's central compliance risks.").

Had the OCC and CFPB blamed BOA's management, as Defendants again argue without citation,[78] any mention of the Board's duties and responsibilities over BOA's information systems in the Consent Orders would have been entirely superfluous. The fact of its inclusion creates a reasonable inference that board oversight and monitoring were previously non-existent.[79]

Given its overwhelming impact, Defendants try to distinguish *Marchand* on its facts arguing that BOA is not a "monoline" company and the Program accounted for a small portion of BOA's profits.[80] As discussed, this argument fails for two basic reasons. First, the Program was "monoline" in the sense that it was indisputably heavily regulated by many of the same laws and regulations that governed all of BOA's consumer banking operations. Thus, the federal regulators penalized BOA in the Consent Orders precisely because of its large size.[81]

Second, the Program was a massively risky business due to the harsh consequences any defects would have on its participants and BOA, especially as it expanded in 2020.[82] The Program's outside business risk mandated exacting controls

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[78] DB at 23.

[79] *Walmart*, 2023 Del. Ch. LEXIS 92, at *133-34.

[80] DB at 23-24.

[81] *See supra* at 8-9 & n.32.

[82] *See supra* at 5.

and supervision, not less as Defendants contend. The fact that Defendants' conduct devastated unemployed workers and caused BOA to incur penalties, fines, and costs that exceed a huge multiple of the Program's purported "operating margin of $15 million"[83] establishes a reasonable inference of its "mission critical" status.

Defendants concede, as they must, that BOA did not have a Board committee with specific responsibility for overseeing the Program and also lacked a regular schedule or process for management reporting.[84] [redacted][85] While Defendants correctly posit that Delaware law does not mandate a "specific" procedure, an information reporting system must still be a "system," not the chaotic, informal, and legally insufficient process Defendants tout in their Answering Brief.[86] Thus, as this Court aptly observed in *Marchand*, a pleading (like the Complaint here) that alleges

[83] Def Br. at 39.

[84] DB at 25.

[85] PB at 32-33; *see supra* at 14-17.

[86] DB at 25; PB at 31-33. The *Merriam Webster* dictionary definition of a system is "an organized or established procedure." *System*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/system (last visited Mar. 13, 2025).

the absence of a dedicated board committee, a process of keeping directors "apprised," and a regular schedule, powerfully supports the legal sufficiency of an information systems allegation.[87]

E. Plaintiff Sufficiently Pled Red Flags Claims

The Complaint contained numerous factually detailed allegations that the Director Defendants received many external and internal red flags that BOA was operating in violation of the law.[88] Again relying on snippets of the record and offering testimony in place of what the documents say, Defendants contend that Plaintiffs' Red Flags claims fail because the Director Defendants took responsive remedial action.[89] Defendants are wrong.

Defendants' contention that the Director Defendants "acted" in response to the letter BOA's Chairman received from the California Legislators is pure fiction.[90] [redacted] This glaring oversight failure standing alone raises more than a reasonable inference that the Program lacked *any* information system.[91]

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[87] *Marchand*, 212 A.3d at 822.

[88] PB at 35-40.

[89] DB at 26-35.

[90] *Id.* at 26-29.

[91] *Compare* A5148 ("it does not appear that the legislators' letter was shared with

Even had the Board approved it, the response raises a reasonable inference of bad faith because BOA falsely blamed the EDD and reported that it was curing the Program's defects.[92] In truth, the CFPB Consent Order explicitly states that BOA *knew* the EDD could be of no help because it could not "handle the burden of" providing remediation.[93] Defendants cannot backfill the record based on their claim that they subsequently "oversaw" "many" of the items mentioned in the reply letter.[94] [redacted][95]

Defendants also cannot sustain their incredible claim that the injunction proceedings in the California MDL raised an incontrovertible inference of good faith.[96] [redacted]

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the Board") *with McDonald's*, 291 A.2d at 667-68; *see supra* at 11-13.

[92] A1909-12.

[93] *See* A0346, ¶ 35.

[94] DB at 29.

[95] *See supra* at 11-17.

[96] DB at 29-31.

[redacted].[97] The parties in the California MDL did negotiate a final form of an injunction order, but BOA "implemented" that order only under threat of a civil contempt violation and with no Board knowledge or input.

In fact, Defendants ignored the Injunction Order which did not end the California case or result in remediation both to the Program or BOA's "inadequate" illegal controls.[98] BOA continued to violate the law while maintaining its innocence in the California MDL. At the same time, the Director Defendants also knew that the Program was under regulatory scrutiny and had received numerous other internal red flag warnings that the Program was legally deficient.[99] The Director Defendants did nothing until, like the Injunction Order, the Consent Orders *forced* them to act.

F. Plaintiff Sufficiently Pled Massey Claims

Defendants again revert to their false "balancing" narrative in defense of Plaintiff's well-plead *Massey* claims.[100] Defendants also argue that they did not act in bad faith because only a "few" Program participants suffered injury.[101] These

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[97] *See supra* at 11-12; PB at 38-39.

[98] In denying BOA's dismissal motion in 2023, the California MDL court noted that many accounts "remain frozen." A2100.

[99] PB at 38-40.

[100] DB at 35-38.

[101] *Id*. at 37.

arguments, exhaustively debunked in Plaintiffs' Opening Brief and herein, are incorrectly predicated on unreasonable assumptions culled from a barebones record. Even assuming that the Board acted, approving "illegal," "unfair," "deceptive," and "abusive" conduct[102] as well as legally deficient information systems cannot be justifiable as a matter of law. It is well settled that "the business judgment rule plays no role in a decision to proceed in a way that violates the law."[103]

Defendants also claim that they cannot be held liable because their misconduct ended when BOA lost in the California MDL injunction proceedings.[104] Defendants claim that they stopped using the Fraud Filter and "manually investigated" accounts as mandated in the Injunction Order a year before the date of the Consent Orders whose purported "focus" was on the same conduct.[105] Once again, Defendants' argument is a contested factual inference based on, at best, a gross distortion of the record.

As discussed at length, as an initial matter, when (and even if) Defendants' misconduct ever stopped is a hotly contested factual issue. The California MDL

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[102] *See* A0294; A0298; A0321; A0350.

[103] *Walmart*, 2023 Del. Ch. LEXIS 92, at *95.

[104] DB at 39.

[105] *Id.*

amended complaint filed in January 2025 claims that BOA continues to use the Fraud Filter and seeks damages for that conduct.[106] In 2023, almost two years after the Injunction Order, and a year after the date of the Consent Orders, the California MDL court denied BOA's dismissal motion in part, noting that many accounts "remain frozen."[107] The Consent Orders also specify that BOA violated the law because it failed to "correct" the reversal of credits previously given to Program participants based on the output of the Fraud Filter until almost a year after the Injunction Order.[108] Further, the imposition of "[c]onsequential harm" remedy in the CFPB Consent Orders creates another reasonable inference that cardholders were not made whole.[109] Nothing in the records shows that BOA has made these payments.

In all events, the plain text of the Consent Orders undermines Defendants' efforts to characterize them as narrowly focused on the Fraud Filer. As discussed, the Consent Orders actually sanctioned BOA for numerous forms of other "unfair," "deceptive," and "abusive" conduct, including misleading legitimate Program

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[106] PB at 4-5.

[107] A2100.

[108] A0349, ¶ 52.

[109] *See supra* 10 & n.37.

participants and denying them access to their accounts.[110] Fairly read, and lending to a reasonable inference, the plain text of the Consent Orders is that they "focused" far less on the mechanics of BOA's misconduct and found BOA liable for its legally deficient information and reporting systems.[111] The federal regulators ordered BOA to holistically and completely investigate and overhaul the Program's controls and oversight.[112] Defendants' agreement to do so, even without an admission of liability, shows that BOA did not decide to attempt to adopt legally compliant corporate governance until it was forced to act.[113] There is nothing in the current record to show that BOA has completed this task to the satisfaction of either the OCC or the CFPB.

Why did Defendants violate the law? The Complaint answers this question with detailed allegations that they had a strong profit motive.[114] Defendants saw no future in the unemployment card business and decided to exit the Program. BOA did not want to spend huge sums on a money-losing business "because the costs and

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[110] *See supra* 24 & n.102; PB at 3, 5-6.

[111] PB at 6.

[112] *See supra* 12-13 & n.48.

[113] *See Walmart*, 2023 Del. Ch. LEXIS 92, at *133-34; *see supra* at 17-18, PB at 19-21.

[114] A0021-22, ¶¶ 5-7; A0056-58, ¶¶ 108-113; PB at 34-36, 43.

other burdens associated with compliance would cut into profits" of the *entire enterprise*, not just the Program.[115] Plaintiff did not invent this motive. Defendants knew about the mounting losses and the costs BOA was incurring.[116] Defendants fully embraced the maxim of not throwing "good money after bad" and purposefully caused BOA to injure its customers for the sake of profits just as it has done so many times before.[117]

[115] *Walmart*, 2023 Del. Ch. LEXIS 92, at *89. The Program was part of BOA's very profitable "global" operations. DB at 2; A0056-58, ¶¶ 108-113.

[116] PB at 17, 31, 34-35, 43.

[117] *Id.* at 11 & n.10 (collecting settlements and fines).

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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