IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE CLOUDFLARE, INC., STOCKHOLDERS LITIGATION	CONSOLIDATED C.A. No. 2026-0772-JTL

MEMORANDUM OPINION ADDRESSING APPLICATION FOR INTERLOCUTORY APPEAL

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The court granted a preliminary injunction barring the defendants from proceeding with a recapitalization pending final disposition of the case (the "Injunction Opinion").[1] The defendants have asked the court to certify an interlocutory appeal from that decision (the "Application").[2]

The Injunction Opinion interpreted the Safe Harbor Statute, which provides "powerful protection for conflicted transactions."[3] The General Controller Safe Harbor requires that a safe harbor committee act "in good faith and without gross negligence."[4] The statute thus recognizes that even disinterested directors can fail to meet the statute's requirements.[5] The Injunction Opinion held that based on the record presented at the preliminary injunction stage, the plaintiffs had established a

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[1] *In re Cloudflare, Inc., S'holders Litig.* (*Injunction Opinion*), — A.3d —, 2026 WL 3093369 (Del. Ch. Oct. 16, 2026). This decision uses the defined terms from the Injunction Opinion.

[2] Dkt. 101.

[3] *Dodiya v. Franklin*, — A.3d —, —, 2026 WL 2517931, at *1 (Del. Ch. Aug. 26, 2026).

[4] 8 *Del. C.* § 144(b)(1).

[5] *See Dodiya*, 2026 WL 2517931, at *13 (noting that action by a qualified committee is "necessary[,] . . . [b]ut it is not sufficient"); *accord* Eric S. Klinger-Wilensky, John P. DiTomo & Kyle A. Pinder, *Thirty Years Later – Why Corporations Continue to Choose Delaware: General Perspectives and Thoughts on 2025 DGCL Amendments*, Corp. Governance Advisor, July/Aug. 2025, at 1, 10, https://www.morrisnichols.com/media/publication/15513_CorporateGovernanceAdvisor-July-2025-ThirtyYearsLater.pdf [https://perma.cc/93F9-RKDA] ("The statute does leave room for review of any disinterested director or committee approval if adequate facts are alleged that the approval was not provided 'in good faith and without gross negligence.'").

reasonable probability of being able to show at trial that the Committee failed to act in good faith (the "Good Faith Ruling").

The plain language of the Safe Harbor Statute, its legislative history, and extant judicial authority make clear that the Safe Harbor Statute adopted the common-law meanings of the terms "good faith" and "without gross negligence."[6] Good faith requires that directors subjectively pursue the best interests of the corporation and all of its stockholders. Directors fail to act in good faith when motives other than the best interests of the corporation and all of its stockholders drive their decision-making.

That understanding of good faith rests on Delaware Supreme Court precedent. In *Disney*, the Delaware Supreme Court explained that a plaintiff can establish bad faith by proving that a fiduciary intentionally acted "'with a purpose other than that of advancing the best interests of the corporation.'"[7] In *Stone v. Ritter*, the high court reaffirmed that principle, stating: "'A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation.'"[8]

At the Court of Chancery level, the same understanding of good faith enjoys a

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[6] *Dodiya*, 2026 WL 2517931, at *14; *see infra* Section II.A.1.

[7] *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006) (quoting *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 755 (Del. Ch. 2005), *aff'd*, 906 A.2d 27).

[8] *Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006) (quoting *Disney*, 906 A.2d at 67).

distinguished pedigree. In *RJR Nabisco*, Chancellor Allen explained that a failure to act in good faith can result from "any human emotion [that] may cause a director to [intentionally] place his own interests, preferences or appetites before the welfare of the corporation," including greed, "hatred, lust, envy, revenge, . . . shame or pride."[9] In *Guttman*, Chief Justice Strine, then a Vice Chancellor, paraphrased that formulation, stating: "The reason for the disloyalty (the faithlessness) is irrelevant, the underlying motive (be it venal, familial, collegial, or nihilistic) for conscious action not in the corporation's best interest does not make it faithful, as opposed to faithless."[10] In *Portnoy*, Chancellor Chandler relied on *Disney*, *Stone*, and *Guttman* in holding that "a director does not act in good faith if the director acts with a

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[9] *In re RJR Nabisco, Inc. S'holders Litig.*, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989) (Allen, C.); *accord Gagliardi v. TriFoods Int'l, Inc.*, 683 A.2d 1049, 1051 n.2 (Del. Ch. 1996) (Allen, C.) (defining a "bad faith" transaction as one "that is authorized for some purpose *other than* a genuine attempt to advance corporate welfare or is *known to constitute* a violation of applicable positive law" (emphases in original)). *See RJR Nabisco, Inc.*, 1989 WL 7036, at *15 (explaining that the business judgment rule would not protect "a fiduciary who could be shown to have caused a transaction to be effectuated (even one in which he had no financial interest) for a reason unrelated to a pursuit of the corporation's best interests").

[10] *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003). *See generally* Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 Geo. L.J. 629, 633 (2010) ("[W]e demonstrate that the term good faith has long been used as the key element in defining the state of mind that must motivate a loyal fiduciary. To wit, the duty of loyalty most fundamentally requires that a corporate fiduciary's actions be undertaken in the good faith belief that they are in the best interests of the corporation and its stockholders."); *id.* at 657 (referring to "the core concept of loyalty, which is that directors must act in the good faith belief that their decision will benefit the corporation and its stockholders ratably and not for an improper purpose").

subjective belief that her actions are not in the best interest of the corporation," describing that scenario as "'classic, quintessential bad faith.'"[11] Chief Justice Strine and Chancellor Chandler played leading roles in the enactment of the Safe Harbor Statute.[12]

When making the Good Faith Ruling, the Injunction Opinion relied on *Disney*, *RJR Nabisco*, and *Guttman* and applied that well-settled standard (the "*Disney* Standard"). Based on the record presented at the preliminary injunction stage, the Injunction Opinion found that the plaintiffs had established a reasonable probability that they could succeed at trial in showing that the Committee acted "to placate the founders and give them what they wanted, rather than striving to obtain a transaction that served the best interests of the company and its stockholders as a whole."[13] In making this fact-intensive determination, the Injunction Opinion

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[11] *Kahn v. Portnoy*, 2008 WL 5197164, at *7 (Del. Ch. Dec. 11, 2008) ("A director does not act in good faith, even if there is not a direct conflict of interest as to that director, unless the director 'acts in the good faith belief that her actions are in the corporation's best interest.' Thus, a director does not act in good faith if the director acts with a subjective belief that her actions are not in the best interest of the corporation, such as when she is acting for the benefit of a related person at the expense of the company. This is 'classic, quintessential bad faith.'" (first quoting *Stone*, 911 A.2d at 370 (quoting *Guttman*, 823 A.2d at 506 n.34); then quoting *Disney*, 906 A.2d at 64)). *See generally L.A. City Empls.' Ret. Sys. v. Sanford*, 352 A.3d 276, 303 (Del. Ch. 2026) (McCormick, C.) (describing concept "that a fiduciary acts in bad faith when the fiduciary 'intentionally acts with a purpose other than that of advancing the best interests of the corporation'" as "long-settled principles of Delaware law" (quoting *Stone*, 911 A.2d at 369 (quoting *Disney*, 906 A.2d at 67))).

[12] *See Injunction Opinion*, 2026 WL 3093369, at *31 & n.198.

[13] *Id.* at *4.

considered contemporaneous evidence, conflicts between the contemporaneous evidence and the directors' testimony, gaps in the record created by the defendants' destruction of Signal messages, and the defendants' decision to renege on a commitment they made not to close the Recapitalization until after the court had ruled in this case and a related case.

The Application seeks to appeal the Good Faith Ruling and claims the court erred in a variety of ways. Although the Application does not say so explicitly, the core issue is whether to overturn the *Disney* Standard. The defendants argue that a court should only be able to find that directors did not act in good faith if (1) they acted intentionally to harm the corporation, i.e., they acted with malice, or (2) they consciously disregarded known duties, i.e., they engaged in conscious lawbreaking. Those are certainly examples of bad faith—and thankfully rare. But the defendants want those to be the only scenarios in which a lack of good faith exists. The defendants see no role for the *Disney* Standard's additional recognition that a fiduciary fails to act in good faith when the fiduciary consciously pursues a purpose other than the best interests of the corporation and its stockholders.

If the *Disney* Standard is no longer good law, then the outcome of the Injunction Opinion would be different. The plaintiffs do not have a reasonable probability of succeeding in showing that the directors acted with malice. Nothing suggests that the Committee sought to harm the Company and its stockholders.

The plaintiffs could try to reframe their theory of the case as an instance of conscious lawbreaking. Their argument would flow along the following lines:

Directors know they must act in the best interests of the corporation and all of its stockholders. For the Recapitalization, that means striving to obtain the best terms available, including the possibility of saying no to any transaction. The record supports a reasonable probability that the plaintiffs can succeed at trial in proving the Committee consciously acted to benefit the Founders. Therefore, the directors engaged in conscious lawbreaking.

Under *Lyondell*,[14] however, that reframing does not seem viable. There, in a *Revlon* case, the directors had a duty to seek the best transaction reasonably available, and the plaintiffs argued that the directors knowingly shirked that duty. The Delaware Supreme Court held that "[n]o court can tell directors exactly how to accomplish that goal, because they will be facing a unique combination of circumstances, many of which will be outside their control."[15] Therefore, the justices concluded, the directors could not have engaged in conscious lawbreaking by disregarding a known duty.

Lyondell's logic applies to virtually all situations in which directors exercise their fiduciary duties in a business setting. To date, therefore, conscious lawbreaking has played a meaningful role only where statutory and regulatory violations are at

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[14] *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235 (Del. 2009).

[15] *Id.* at 242.

issue, such as under the *Caremark*[16] and *Massey*[17] frameworks.[18] The plaintiffs in this case do not contend that the Committee consciously violated a statute or regulation, and the injunction-stage record would not otherwise support a claim for conscious lawbreaking.

If the *Disney* Standard is no longer good law, then not only would the outcome of the Injunction Opinion be different, but the defendants could likely obtain summary judgment in their favor based on the General Controller Safe Harbor. A ruling on the *Disney* Standard becomes case-dispositive.

If the Injunction Opinion were not one of the first decisions to interpret the

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

[17] *See In re Massey Energy Co.*, 2011 WL 2176479 (Del. Ch. May 31, 2011).

[18] *E.g.*, *In re TransUnion Deriv. S'holder Litig.*, 324 A.3d 869, 887 (Del. Ch. 2024) ("For liability to attach [under *Caremark* or *Massey*], the risks identified and ignored cannot be business matters on which deference to the directors' decision-making is owed. They must be legal violations so obvious and material that disregarding them amounts to bad faith." (footnote omitted)); *In re ProAssurance Corp. S'holder Deriv. Litig.*, 2023 WL 6426294, at *14 (Del. Ch. Oct. 2, 2023) (discussing the difference between legal and business risks under *Caremark*); *In re Clovis Oncology, Inc. Deriv. Litig.*, 2019 WL 4850188, at *12 (Del. Ch. Oct. 1, 2019) ("[A]s relates to *Caremark* liability, it is appropriate to distinguish the board's oversight of the company's *management of business risk* that is inherent in its business plan from the board's oversight of the company's *compliance with positive law*—including regulatory mandates." (emphases in original)); *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 125 (Del. Ch. 2009) (asserting that to apply *Caremark* to business risks would "eviscerate the core protections of the business judgment rule"). That said, the question of *Caremark*'s continuing application to business risk technically remains open, and it is possible "to envision an extreme hypothetical involving liability for bad faith actions of directors leading to such liability." *Constr. Indus. Laborers Pension Fund v. Bingle*, 2022 WL 4102492, at *7 (Del. Ch. Sep. 6, 2022), *aff'd*, 297 A.3d 1083 (Del. 2023) (TABLE).

good-faith requirement of the Safe Harbor Statute, I would not view the attempt to revisit settled law as a substantial issue of material importance sufficient to justify certification.[19] Here, however, context matters. If there were a time for the Delaware Supreme Court to revisit the *Disney* Standard and move in a different direction, it would be now. That is not an endorsement of the defendants' position; I personally believe that the *Disney* Standard remains critical to the integrity of Delaware law. But the timing of the Application causes me to believe that it raises a substantial issue for the Delaware Supreme Court to decide.

One other issue warrants high-court consideration along with the *Disney* Standard: whether a court must consider good faith on a director-by-director basis in the transactional-justification context. Delaware law has required a director-by-director analysis of good faith in the director-liability context and for purposes of Rule 23.1, but not—as in this case—when injunctive relief is at issue.

The Injunction Opinion discussed the conduct of individual Committee members but made a collective determination about the plaintiffs' reasonable

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[19] *See, e.g.*, *MS Pawn Corp. v. Treppel*, 133 A.3d 560 (Del. 2016) (TABLE) (refusing interlocutory appeal from *In re EZCORP, Inc. Consulting Agr. Deriv. Litig.*, 2016 WL 301245 (Del. Ch. Jan. 25, 2016), *reconsideration granted in part*, 2016 WL 727771 (Del. Ch. Feb. 23, 2016); agreeing that interlocutory certification was not warranted where "while there was an arguable conflict in previous Court of Chancery decisions regarding the application of the entire fairness standard under analogous circumstances, the substantial weight of authority supported the application of the entire fairness standard in this case").

probability of success at trial.[20] An answer to the question of collective versus individual analysis will nevertheless enable the parties and the court to properly analyze good faith at trial.

The Application makes a number of other arguments. They do not present substantial issues of material importance and do not warrant interlocutory review.

Raising a substantial question of material importance is not sufficient for an interlocutory appeal. There must also be a good reason why the Delaware Supreme Court should address the issue now. To that end, Supreme Court Rule 42 requires that the trial court provide "its own assessment of the most efficient and just schedule to resolve the case."[21]

If trial were imminent, then waiting until after trial for the Delaware Supreme Court to address the appeal would seem more efficient. In the Injunction Opinion, the court offered the defendants an expedited trial focused on compliance with the General Controller Safe Harbor. In substance, that trial would have turned on the Committee's good faith. The defendants rejected that option, explaining that they

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[20] The court's discussion of the conduct of two directors who comprised a majority of the Committee's members would be sufficient to support a reasonable probability of success on the merits of a claim that each acted purposely to help the Founders in their dealings with the Committee. Both took actions that could be interpreted as undermining the Committee's leverage, including engaging in back-channeling with the Founders and their boardroom allies. Both were the subject of one of the Founder's tirades and could be seen as modifying their behavior in response. Both used Signal messaging to discuss the Committee's work and did not retain those messages.

[21] Supr. Ct. R. 42(b)(iii).

were prioritizing interlocutory review. The court has stated that it will still require that trial be held promptly, but there is no longer the prospect of a near-term trial that could facilitate prompt post-judgment review.[22]

When an interlocutory appeal will not meaningfully disrupt a trial schedule, having the Delaware Supreme Court address potentially case-dispositive issues of law offers considerable efficiency gains and promotes the certainty and predictability of Delaware law. It is presumptuous for a trial judge to tell the justices how to proceed, but from that perspective, the better option is to address the continuing vitality of the *Disney* Standard now. Whether good faith must be evaluated collectively or individually in the transactional-justification context should also be determined now so that the parties can present evidence appropriately and the trial court can analyze the evidence consistent with the governing standard.

This decision therefore grants certification as to those issues. Of course, that does not prevent the Delaware Supreme Court from viewing the matter differently. A trial court's ruling on an application for interlocutory appeal is only a recommendation.

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[22] The prospect of being able to close the Recapitalization does not affect the timing of an appeal. The defendants promised not to close until this court ruled in this action and a companion action invoking a provision in the Company's charter. The charter-based issues are complex, and the court has not yet ruled on them. Whether or not the defendants succeed on the Application does not affect their ability to close.

I. FACTUAL BACKGROUND

The Company provides services that make web-based businesses more secure, improve the performance of their web-based applications, and eliminate the cost and complexity of managing individual network hardware. The Company has been immensely successful.

The Founders currently control a majority of the Company's voting power through high-vote common stock carrying ten votes per share. The public owns low-vote common stock carrying one vote per share.

The Founders' share of the voting power—and the extent of their control as a function of voting power—depends on two inputs: how many votes they control (the numerator) and how many total votes are outstanding (the denominator). The numerator has decreased as the Founders divested shares to generate liquidity, to minimize taxes, and for estate planning. The denominator has increased as the Company has issued low-vote shares for employee compensation and other corporate purposes. If both forms of erosion continued at historical rates, then the Founders would lose majority control by the end of 2026.

The Founders wanted to preserve their control, but they still wanted to achieve their liquidity, tax-related, and estate-planning goals. They also wanted the Company to continue using equity for corporate purposes. For that to happen, something had to change.

The Board created and empowered the Committee to find a solution. The Committee and its advisors met, and under one interpretation of the record,

understood that the Founders would get what they wanted. The advisors therefore focused on how to create a record to justify a pre-ordained result, including anticipated "gives" and "gets." Notes from an initial meeting discuss the "'[n]eed to figure out the narrative and ensure there are 'gets' for [the Founders].'"[23]

The Committee then met with the Founders. The Committee's financial advisor had developed a menu of possible alternatives, but after one Founder identified the capital structure that would meet their needs, the Committee fixated on that path.

The Committee envisioned justifying a transaction that would maintain Founder control with evidence that controlled companies perform better, but the data the Committee's financial advisor assembled did not support that conclusion. The Committee discussed how, from a "'[r]ecord and process standpoint,'" it would be a "'good fact pattern'" to "'engage an outside expert'" and have the expert advise the Committee that maintaining founder control would be good for the Company.[24] The Committee looked for and found an academic who would say that.

The Committee made an opening proposal and the Founders countered. The Committee's chairman planned to have dinner with one of the Founders, and he promised not to discuss the transaction. He broke that promise and told the Founder

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[23] *Injunction Opinion*, 2026 WL 3093369, at *52 (quoting PX 23 at CENTERVIEW_00026890).

[24] *Id.* (quoting PX 43 at CENTERVIEW_00026732).

at dinner that he expected the Committee would end up where he wanted. The Founder expected to receive a proposal from the Committee matching that messaging.

When the Committee's proposal did not match the Founder's expectation, he exploded. He attacked the Committee members in a text-message tirade. He also reached out to a boardroom ally who was not on the Committee. The ally said he would "'fix'" the situation and began backchanneling with the Committee members.[25] He later told the Founder that he had gotten the Committee to change its position.

When the Committee met to consider another proposal, the Founder's ally and another director who was not a member of the Committee participated in the Committee's discussions.[26] After some further back-and-forth, the Committee ended up making a proposal consistent with what the Founder wanted. The Founders accepted, resulting in the Recapitalization.

That view of the record is contested, but there is contemporaneous evidence that both supports it and impeaches the defendants' deposition testimony on key points. There are also substantial holes in the record because the Founders and Committee members used the Signal messaging application to communicate about

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[25] *Id.* (quoting DX 26 at CF_007044).

[26] *Id.* at *20 ("Ledbetter and Cunningham, another director from the compensation committee, joined the Committee meeting to provide their perspectives. Two non-Committee directors had now inserted themselves into the Committee's process.").

the transaction and set their messages to auto-delete irretrievably. They did so after being told by their advisors that they should anticipate litigation over the transaction. The holes in the record undermine the defendants' credibility.

The plaintiffs contend that the Founders breached their fiduciary duties as controlling stockholders by extracting an unfair deal and that the Company's directors breached their fiduciary duties by approving it. The plaintiffs moved for a preliminary injunction enjoining the Company from effectuating the Recapitalization pending a post-trial decision. In related litigation, a different plaintiff contended that the Recapitalization violated the Company's certificate of incorporation. The Company committed not to close the Recapitalization until the court had ruled in this case and in the charter-based action (the "Status-Quo Commitment").

In August 2026, the defendants reneged on the Status-Quo Commitment and said they planned to close the Recapitalization in mid-September. After the court informed the plaintiffs that they would have to seek emergency relief if they wanted to preserve the status quo, the defendants recanted.

On October 16, 2026, the court issued the Injunction Opinion. First, the Injunction Opinion held that the plaintiffs had demonstrated that they would suffer irreparable harm without a grant of injunctive relief. In reaching that conclusion, the court reasoned that the Recapitalization will fundamentally alter the Company's capital structure and result in the issuance of new non-voting shares that will begin trading in the market. The court would not be able to unwind the transaction after the fact. The Injunction Opinion also held that it seemed unlikely that the court could

identify a defensible method of measuring substantive unfairness and awarding damages. The Application does not challenge the finding of irreparable harm.

Second, the Injunction Opinion held that the balancing of hardships favored injunctive relief. The Injunction Opinion reasoned that a court must take care that a status-quo-preserving injunction does not do more harm than good, and hence the loss of a potential transaction can warrant the denial of injunctive relief. Here, however, the Company can implement the Recapitalization unilaterally, so an injunction would not jeopardize the transaction. The Application does not challenge the balancing of hardships.

Turning to whether the plaintiffs had established a reasonable probability of success on the merits, the Injunction Opinion resolved the statutory questions presented by the General Controller Safe Harbor in the defendants' favor. The Injunction Opinion also found that the plaintiffs had not established a reasonable probability that they could succeed in showing that the Committee was grossly negligent. The Application touts those rulings but does not challenge them.[27]

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[27] The Application overstates one ruling by treating the Injunction Opinion as having found that the Committee acted with the requisite due care. *See* App. ¶ 12 ("The Court held the Recapitalization was properly structured to comply with the statutory safe harbor in Section 144(b)—[including that] the Committee acted with the requisite due care, conducting a thorough process."); *id.* ¶ 17 (asserting that the Injunction Opinion found that the Committee acted with due care). An injunction-stage ruling does not make findings of fact, and the Injunction Opinion did not deviate from the strictures of that procedural stage. *E.g.*, *Injunction Opinion*, 2026 WL 3093369, at *3 ("The plaintiffs seek a preliminary injunction. That form of relief preserves the status quo pending trial. The purpose of hearing a motion for a preliminary injunction is not to adjudicate the merits, but to determine whether to

The Good Faith Ruling, by contrast, did not favor the defendants. Applying the *Disney* Standard, the court held that the evidence presented at the preliminary injunction stage made it reasonably probable that the plaintiffs could show at trial that the Committee members failed to act in good faith because they subjectively acted for a purpose other than the best interests of the Company and all of its stockholders.[28]

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prevent a functionally irremediable event from happening before the court can hold a trial, judge credibility, weigh the evidence, and rule on the merits."); *id.* at *6 ("At this stage of the case, the court does not make findings of fact. The account instead reflects what the evidence at trial is reasonably likely to show, based on the record developed to date."). The court addressed whether the plaintiffs had established a reasonable probability of success on the merits. On the due care issue, the court found that the plaintiffs had not established a reasonable probability of showing gross negligence *independent of the evidence that supported a reasonable probability of showing a lack of good faith*. *Id.* at *54–55 ("The plaintiffs do not advance a gross negligence theory as a separate argument; they point to the same evidence that they say supports the Committee's lack of good faith. . . . [I]t seems unlikely that the plaintiffs could establish that the Committee acted in a grossly negligent manner. The due care claim does not support injunctive relief."). It is possible that the evidence at trial could show a lack of good faith. It is also possible that the evidence at trial—viewed as a whole—could support a finding of gross negligence. And it is possible that the evidence at trial could support a finding of good faith without gross negligence.

[28] The Application subtly reframes the Injunction Opinion's holding on this point in an erroneous way. According to the Application, "the Court enjoined the Recapitalization, holding Plaintiffs were likely to prove that those same independent, disinterested, careful directors acted in bad faith by acting with a 'controlled mindset.'" App. ¶ 3. The Injunction Opinion did not hold that the "Plaintiffs were likely to prove" bad faith. That framing depicts the Injunction Opinion as finding that it was more likely than not that the plaintiffs would prevail at trial. As the Injunction Opinion carefully explained, the reasonable probability standard does not require that the plaintiffs show they are more likely than not to prevail at trial. *Injunction Opinion*, 2026 WL 3093369, at *27. It requires that the plaintiffs establish a reasonable likelihood of success, which is a lesser standard. *Id.* Framed in percentages, more likely than not is a 51% chance. A reasonable probability need not

That is not the only possibility. The Committee members may have believed that benefitting the Founders through the Recapitalization served the best interests of the Company and all of its stockholders. The Injunction Opinion explained that at trial, the defendants can prevail under the General Controller Safe Harbor, but they will have to testify so that the court can judge their credibility and determine that they complied with the statute's requirements.

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rise to that level. A hypothetical plaintiff might have a 30% chance of proving their view of the facts, the hypothetical defendants might have a 40% chance of proving their view of the facts, and the remaining 30% might capture scenarios in which the court views the record differently than either side, perhaps favoring the plaintiff on some points and the defendants on others. In that hypothetical, the plaintiff would have a reasonable chance of prevailing at trial. Depending on the strength of the other elements of the preliminary injunction test, a somewhat lower chance of success might provide a sufficiently reasonable likelihood to warrant preserving the status quo pending trial. *See Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998), *abrogated in part on other grounds by State v. Monsanto Co.*, 299 A.3d 372 (Del. 2023); *see also In re Est. of Wolhar*, 2018 WL 721417, at *3 (Del. Ch. Feb. 6, 2018) (explaining that "[s]ome showing is required for each element"). That said, a reasonable probability of success is not a minimal chance. *See Injunction Opinion*, 2026 WL 3093369, at *27 ("[T]he test for a preliminary injunction falls well short of that which would be required to secure final relief following trial, since it explicitly requires only that the record establish a reasonable probability that this greater showing will ultimately be made. That said, the burden is not a light one, and a preliminary injunction will never be granted unless earned." (internal quotation marks and footnote omitted)). The Injunction Opinion held that the plaintiffs have a reasonable probability of prevailing at trial, not that they are more likely than not to prevail at trial.

The Application also errs by asserting that the Injunction Opinion held that the Committee members "acted in bad faith by acting with a 'controlled mindset.'" App. ¶ 3. As discussed below, the Injunction Opinion held that the injunction-stage record supported a reasonable probability that the plaintiffs could prevail at trial in showing that the Committee members failed to act in good faith under the *Disney* Standard, not solely because of a "controlled mindset," but based on the totality of the record. *See infra* Section II.A.3.

The Good Faith Ruling meant that the plaintiffs had shown a reasonable probability of being able to prove at trial that the General Controller Safe Harbor did not apply, meaning the defendants would have to prove that the Recapitalization was entirely fair. The Injunction Opinion held that in that eventuality, a reasonable probability existed that the defendants would not be able to satisfy the unitary standard of entire fairness. The Application does not challenge the entire fairness analysis.

Because the Safe Harbor Statute's powerful protections are intended to obviate the need for entire fairness review, the court offered to bifurcate the proceedings and hold an initial trial limited to the question of whether the statute applies. If the defendants chose that option, the court would require trial to be held promptly, ideally in approximately ninety days. That trial would center on the Committee members' good faith. The court believed that a prompt trial on the issue of good faith offered the most efficient and fair means of securing a just, speedy, and inexpensive determination of the proceeding.[29]

On October 21, 2026, the defendants filed the Application. In their motion to expedite its consideration, the defendants implied that they were again reneging on the Status-Quo Commitment. They stated that the Company's stockholders were "waiting only for final adjudication of this action to know whether the

[29] *See* Ct. Ch. R. 1.

Recapitalization can go forward,"[30] suggesting they would close if the Delaware Supreme Court reversed the Injunction Opinion. But with the charter-based action still pending, the defendants could not close the Recapitalization without breaking the Status-Quo Commitment. After the plaintiffs in the charter-based action pointed out the problem,[31] the defendants reaffirmed the Status-Quo Commitment.[32]

Because the defendants' trial election was material to this decision, the court directed the defendants to make their election by October 24.[33] On that date, the defendants rejected the opportunity for a bifurcated trial limited to the General Controller Safe Harbor. Instead, the defendants made a counteroffer: Stressing that they were focused on obtaining interlocutory review, the defendants said they would accept the safe-harbor trial if the court certified the interlocutory appeal.[34]

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[30] Dkt. 102 ¶ 5.

[31] *See* Letter to Vice Chancellor Laster from David A. Jenkins regarding Recapitalization, *Kaul v. Cloudflare, Inc.*, C.A. No. 2026-0810-JTL (Del. Ch. Oct. 26, 2026), Dkt. 28 ("Plaintiff assumes that the defendants either erred or were incomplete in their description because they are bound by their prior representation not to effectuate the challenged recapitalization until the Court rules on Plaintiff's summary judgment motion.").

[32] *See* Letter to Vice Chancellor Laster from Brad D. Sorrels regarding Plaintiff's October 26, 2026 letter, *Kaul v. Cloudflare, Inc.*, C.A. No. 2026-0810-JTL (Del. Ch. Oct. 28, 2026), Dkt. 29 ("The Company reiterates that it has never planned to, and will not, proceed with the Recapitalization unless and until both litigations are resolved in a manner that allows the Company to proceed with the Recapitalization.").

[33] Dkt. 103.

[34] Dkt. 104.

The court did not intend to start a negotiation. Even in the commercial context, a counteroffer constitutes a rejection of the offer. The defendants have rejected the opportunity for a safe-harbor trial, and the Application therefore must be analyzed without the prospect of a near-term, post-trial adjudication of the Committee members' good faith.

II. LEGAL ANALYSIS

Supreme Court Rule 42 governs the certification of interlocutory appeals. "[T]he purpose of Rule 42 is to prevent wasteful piecemeal litigation from overwhelming the docket of the Supreme Court."[35]

Rule 42 cautions that "[i]nterlocutory appeals should be exceptional, not routine, because they disrupt the normal procession of litigation, cause delay, and can threaten to exhaust scarce party and judicial resources."[36] Certification is "generally not favored."[37] Thus, an application for interlocutory appeal "requires a strict analysis by the trial court."[38]

Rule 42 states that "[n]o interlocutory appeal will be certified by the trial court or accepted by this Court unless the order of the trial court decides a substantial issue

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[35] *Stein v. Blankfein*, 2019 WL 3311227, at *1 (Del. Ch. July 23, 2019).

[36] Supr. Ct. R. 42(b)(ii).

[37] *Id.* 42 cmt.

[38] *Chemours Co. v. DowDuPont Inc.*, 2019 WL 2404817, at *1 (Del. Ch. June 7, 2019).

of material importance that merits appellate review before a final judgment."[39] When determining whether the interlocutory ruling addressed "a substantial issue of material importance," Rule 42 instructs the trial court to consider a non-exclusive list of eight factors.[40] They call for evaluating whether:

- "The interlocutory order involves a question of law resolved for the first time in this State."[41]
- "The decisions of the trial courts are conflicting upon the question of law."[42]
- "The question of law relates to the constitutionality, construction, or application of a statute of this State, which has not been, but should be, settled by this Court in advance of an appeal from a final order."[43]
- "The interlocutory order has sustained the controverted jurisdiction of the trial court."[44]
- "The interlocutory order has reversed or set aside a prior decision of the trial court, a jury, or an administrative agency from which an appeal was taken to the trial court which had decided a significant issue and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice."[45]
- "The interlocutory order has vacated or opened a judgment of the trial court."[46]

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[39] Supr. Ct. R. 42(b)(i).

[40] *Id.* 42(b)(iii)(A)–(H).

[41] *Id.* 42(b)(iii)(A).

[42] *Id.* 42(b)(iii)(B).

[43] *Id.* 42(b)(iii)(C).

[44] *Id.* 42(b)(iii)(D).

[45] *Id.* 42(b)(iii)(E).

[46] *Id.* 42(b)(iii)(F).

- "Review of the interlocutory order may terminate the litigation."[47]
- "Review of the interlocutory order may serve considerations of justice."[48]

The Delaware Supreme Court can waive or otherwise depart from its rules on a case-by-case basis, and therefore can accept an appeal even if, for example, the substantial-issue requirement is not met. Rule 42, however, constrains the trial court's recommendation.

Even if the trial court determines that its ruling decided a substantial issue of material importance, the trial court must also assess whether the issue "merits appellate review before a final judgment."[49] When answering that question, the trial court must conduct "its own assessment of the most efficient and just schedule to resolve the case."[50] The analysis must "identify whether and why the likely benefits of interlocutory review outweigh the probable costs, such that interlocutory review is in the interests of justice."[51] "If the balance is uncertain, the trial court should refuse to certify the interlocutory appeal."[52]

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[47] *Id.* 42(b)(iii)(G).

[48] *Id.* 42(b)(iii)(H).

[49] *Id.* 42(b)(i).

[50] *Id.* 42(b)(iii).

[51] *Id.*

[52] *Id.*

A. A Substantial Issue Of Material Importance

The Application seeks certification of the Good Faith Ruling, and the defendants crowd a lot of subsidiary arguments under that conceptual umbrella. As the Application frames them, none present a substantial issue of material importance. But although the Application does not say so openly, what the defendants really want is to overturn the *Disney* Standard. In the shadow of the recently enacted Safe Harbor Statute, the continuing vitality of the *Disney* Standard presents a substantial issue of material importance. A related issue also warrants interlocutory review: the continuing vitality of collectively assessing good faith in the transactional-justification setting.

1. Whether The Safe Harbor Statute Establishes A Unique Definition Of Good Faith

The Application first argues that "[w]hat is required to show bad faith to overcome Section 144's safe harbors is an important question of first impression that should be settled by the Supreme Court promptly."[53] The Application later asserts that the Injunction Opinion ruled for the first time on the "applicable definition of good faith."[54] Technically, neither is true. The defendants waived any argument about the Safe Harbor Statute using a different definition of good faith. The defendants also have not cited any authority sufficient to raise a credible dispute on that issue, much

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[53] App. ¶ 4.

[54] *Id.* ¶ 20.

less a substantial issue of material importance. What the Application really advances is an across-the-board challenge to the *Disney* Standard.

Under Supreme Court Rule 8, "Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented."[55] That rule rests "on the principle that it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider."[56] It also recognizes that a party should not be able to "remain silent in the trial court" on an issue, hoping for a favorable outcome, then "subsequently assert error on appeal if the outcome in the trial court is unfavorable."[57]

At the trial-court level, the defendants never contended that the Safe Harbor Statute defines good faith differently than the common-law standard. The defendants cited pre-Safe-Harbor-Statute caselaw to define good faith and bad faith.[58] During

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[55] Supr. Ct. R. 8.

[56] *Shawe v. Elting*, 157 A.3d 152, 169 (Del. 2017) (internal quotation marks omitted); *see In re Oracle Corp. Deriv. Litig.*, 339 A.3d 1, 17–18 & n.76 (Del. 2025) ("The plaintiffs did not directly raise the argument below. It is waived on appeal. . . . The Court will generally decline to review questions on appeal unless they were first fairly presented to the trial court for consideration." (internal quotation marks omitted)).

[57] *Shawe*, 157 A.3d at 169 (internal quotation marks omitted).

[58] *E.g.*, Dkt. 82 at 42–43 & n.236 (asserting that "[b]ad faith entails an intentional failure to [sic] 'to act in the face of a known duty to act' or action

oral argument, defense counsel took a similar approach, arguing that "[w]e have a lot of cases that talk about what bad faith is."[59] The idea that the Safe Harbor Statute established a different definition of good faith is wholly new. Any argument to that effect has been waived.

Equally important, the defendants have failed to provide any credible reason to think that the Safe Harbor Statute established a novel definition of good faith. The only prior Court of Chancery decisions to address the issue—ones the defendants otherwise embrace—interpreted the Safe Harbor Statute as adopting the common-law meanings of both "good faith" and "gross negligence."[60]

The Safe Harbor Statute's plain language supports that conclusion. The statute uses the terms "good faith" and "gross negligence" without any words that

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intentionally contrary to positive law or the corporation's interests" (quoting *In re USG Corp. S'holder Litig.*, 2020 WL 5126671, at *26 (Del. Ch. Aug. 31, 2020), *aff'd sub nom. Anderson v. Leer*, 265 A.3d 995 (Del. 2021))).

Consistent with the position the defendants took before the trial court, the firm representing the Committee is currently arguing in another pending litigation that "[t]he potentially dispositive question under Section 144 is discrete and turns on well-established standards of conduct: whether the Special Committee approved the recapitalization 'in good faith and without gross negligence.'" Dkt. 107, Ex. A ¶ 27.

[59] Dkt. 93 at 85.

[60] *See Dodiya*, 2026 WL 2517931, at *14 ("Although the terms 'good faith' and 'gross negligence' are not defined in Section 144(a)(1), a substantial body of Delaware law gives meaning to these concepts for purposes of fiduciary conduct. The legislative synopsis confirms the General Assembly's intent that Section 144 not displace common law fiduciary requirements." (footnote omitted)); *Ayers v. Foley*, 362 A.3d 355, 379–81 (Del. Ch. 2026) (relying on pre-Safe-Harbor-Statute caselaw to define good faith and gross negligence).

might suggest new and different definitions. Strikingly, the statute contains a series of definitions, including for good-faith-adjacent concepts like "disinterested director," "material interest," and "material relationship."[61] The statute does not contain definitions for either "good faith" or "gross negligence."

Although the Safe Harbor Statute is not ambiguous on this point, evidence of legislative intent confirms the conclusion. The synopsis states: "Revised § 144 provides that any approval or recommendation, as applicable, of disinterested directors or a disinterested director committee must be made in good faith and without gross negligence, making clear that the statute does not displace the common law requirements regarding core fiduciary conduct."[62] The drafters thus regarded acting "in good faith and without gross negligence" as "the common law requirements regarding core fiduciary conduct," indicating that they carried their common-law meanings. To similar effect, two of the Safe Harbor Statute's proponents testified before the Senate Judiciary Committee that the statute preserved a court's ability to review director conduct for compliance with the common-law mandate of good faith.[63]

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[61] *See* 8 *Del. C.* § 144(e).

[62] Del. S.B. 21 syn., 153d Gen. Assem. (2025).

[63] *See* Dkt. 106 at 15 (Amy Simmerman of Wilson Sonsini Goodrich & Rosati, P.C. testifying, "Our courts still have an essential role. They will still get to examine that independence question, as well as matters like whether a committee acted with due care and in good faith."); *id.* at 28–29 (Srinivas Raju of Richards, Layton & Finger, P.A. testifying, "Furthermore, the good faith and no gross negligence conduct requirements [and] the rebuttable presumptions on director independence confirm that the Court of Chancery can continue to fulfill its traditional role of applying the

Firms with representatives on the Council of the Corporation Law Section of the Delaware State Bar Association expressed similar views.[64] And the Safe Harbor Statute's provision exculpating controlling stockholders from monetary damages for a breach of the duty of care maintained Section 102(b)(7)'s distinction between "[a]cts or omissions not in good faith" (i.e., the *Disney* Standard) and those "which involve intentional misconduct or a knowing violation of law."[65] If the defendants were correct, then the dual statutory references to "[a]cts or omissions not in good faith" become surplusage.

Whether the Safe Harbor Statute established a new definition of good faith has thus never been at issue in this case. The defendants also have not pointed to any

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law to specific facts and circumstances to ensure Delaware law operates equitably for stockholders.").

[64] *See* Richards, Layton & Finger, P.A., *Delaware Enacts Landmark Amendments to the General Corporation Law* (Mar. 26, 2025), https://www.rlf.com/delaware-enacts-landmark-amendments-to-the-general-corporation-law/ [https://perma.cc/32M2-RDU8] ("By setting forth clear rules for transactions involving an actual or potential conflict of interest, new Section 144 will give good-faith corporate actors greater ability to either obtain dismissal of stockholder litigation at the pleading stage or avoid having to face litigation in the first instance."); Klinger-Wilensky et al., *supra*, at 13 ("More generally, and perhaps most importantly, the statute still leaves room for stockholders to monitor conflict transactions. Regardless of the category of conflict, generally . . . any board or committee approval intended to function as a cleansing mechanism must be provided 'in good faith and without gross negligence . . . .'").

[65] *Compare* 8 *Del. C.* § 144(d)(5)(b) (preserving monetary liability for "[a]cts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law") *with id.* § 102(b)(7)(ii) (preserving monetary liability for "[a] director or officer for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law").

argument that could give rise to a substantial issue of material importance. On top of that, holding that the Safe Harbor Statute enacted a new definition of good faith is insufficient on its own to warrant reversal. The Delaware Supreme Court would *also* have to hold that the new test differed from the common-law definition by rejecting the *Disney* Standard. The defendants' real beef is with the *Disney* Standard.

The defendants' newly embraced position that the Safe Harbor Statute adopts a unique definition of good faith does not provide grounds for interlocutory review. But it reveals what the Application is really about: challenging the *Disney* Standard.

2. Whether The Safe Harbor Statute Requires A Trial

Another way the defendants try to establish an issue of first impression is by asserting that "[n]o case has previously addressed the evidence needed to overcome the safe harbor to obtain an injunction or held that a trial is necessary to obtain Section 144's benefits."[66] The first point is technically correct but trivial. The second point mischaracterizes the Injunction Opinion.

The Injunction Opinion is the first decision to address "the evidence needed to overcome the safe harbor to obtain an injunction,"[67] but that is because it is the first decision to address an application for injunctive relief that implicates the Safe Harbor Statute. The Injunction Opinion did not create or apply new law on this issue. The

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[66] App. ¶ 21.

[67] *Id.*

court held that under the settled standard for a preliminary injunction, the movant must show a reasonable likelihood of success on the merits.[68]

The question of what evidentiary standard a party must meet to obtain a preliminary injunction is also not an issue of first impression. The Safe Harbor Statute does not say anything about an injunction-stage evidentiary standard. It therefore leaves existing law in place.

The Injunction Opinion did hold that at trial, the Safe Harbor Statute's Heightened Presumption will require that the plaintiffs prove by clear and convincing evidence that the Committee members did not qualify as disinterested directors.[69] That holding favored the defendants. It seems unlikely that the defendants want a lower standard.

Contrary to the defendants' contention, the Injunction Opinion did not hold that "a trial is necessary to obtain Section 144's benefits."[70] The Injunction Opinion held that a trial was necessary *in this case* to resolve disputed issues of fact *given the*

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[68] *E.g.*, *Injunction Opinion*, 2026 WL 3093369, at *27 ("For purposes of this case, evaluating whether the plaintiffs have established a reasonable probability of success involves a two-step inquiry. Initially, the court must determine whether the Recapitalization enjoys the protection of the Safe Harbor Statute. If a safe harbor applies, then the Recapitalization may not be the subject of equitable relief, or give rise to an award of damages. If a safe harbor does not apply, then the analysis proceeds to the second step. At that point, the court must assess whether the plaintiffs have established a reasonable probability of success on the merits of their claim." (internal quotation marks omitted)).

[69] *Id.* at *4, *48–49.

[70] App. ¶ 21.

state of the record. That case-specific holding does not mean a trial will always be "necessary to obtain Section 144's benefits."[71] If a party can show that there are no disputes of material fact such that judgment can be entered as a matter of law, then a party could obtain summary judgment on an issue under the Safe Harbor Statute.[72] If a party can show that the pleadings did not give rise to a reasonably conceivable basis to think that the Safe Harbor Statute does not apply, then a defendant could obtain a pleading-stage dismissal.[73]

Although the Application is less clear on this point, the defendants seem to assert that even if the *Disney* Standard remains good law, the factual record presented at the injunction stage could not support a reasonable probability of success on the merits. As they see it, contemporaneous evidence that could be interpreted to suggest a contrived process, conflicts between the contemporaneous evidence and the directors' testimony, the destruction of Signal messages, and the decision to renege on the Status-Quo Commitment could never lead to the court discrediting the Committee members' testimony and finding that the Committee consciously favored the Founders' interests.

That challenge to the trial court's preliminary assessment of the evidence does not present a substantial issue of material importance sufficient to warrant

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[71] *Id.*

[72] *See* Ct. Ch. R. 56.

[73] *See id.* 12(b)(6), 12(c).

interlocutory appeal. Supreme Court Rule 42 focuses on determinations of law, not preliminary factual assessments. Consistent with Rule 42, the Delaware Supreme Court reviews "the grant or denial of a preliminary injunction for abuse of discretion, but without deference to the legal conclusions of the trial court."[74] The Injunction Opinion made a preliminary assessment of the record and preserved the status quo so that the case could go to trial with the prospect of a meaningful post-trial remedy.

A rejection of that preliminary assessment also would not end the case. If the Delaware Supreme Court found an abuse of discretion and reversed, the injunction would lift, but because of the Status-Quo Commitment, nothing would change. The plaintiffs could still proceed to trial and attempt to discredit the directors' accounts. The plaintiffs could also seek an adverse inference based on the directors' destruction of Signal messages. Addressing whether a sufficient factual basis exists to support the Injunction Opinion is not a substantial issue of material importance.

These issues are not suitable for interlocutory review.

3. Whether The Injunction Opinion Expanded The "Controlled Mindset" Concept

The Application emphasizes the concept of a "controlled mindset."[75] The Application claims the Injunction Opinion adopted an "expansive application of the

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[74] *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998); *accord Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996).

[75] *See* App. ¶ 3 (characterizing Injunction Opinion as having relied solely on the "controlled mindset," arguing the controlled mindset can only support a breach of the duty of care, and asserting that "[t]he Opinion conflicts with decisions of the Court

'controlled mindset' concept [that] creates a conflict with how other trial courts have applied that concept (versus the bad faith standard)."[76] In reality, the Injunction Opinion used that phrase when describing a constellation of conduct that could be sufficient on a post-trial record to establish a lack of good faith under the *Disney* Standard. That is how other trial court decisions have used the term.

To manufacture a purported conflict among trial court decisions, the defendants contend that other decisions treat the "controlled mindset" as a term of art that cannot incorporate subjective bad faith.[77] To that end, they cite *Trade Desk*'s

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of Chancery by conflating a 'controlled mindset' with the intentional dereliction of fiduciary duty required to show bad faith"); *id.* ¶ 4 ("Given the safe harbor's purpose to cleanse *controlling stockholder transactions*, it is critical to address whether a 'controlled mindset' premised on controller influence can satisfy the individualized finding of bad faith as to otherwise independent, disinterested, and careful directors under the statute." (emphasis in original)); *id.* ¶ 13 ("In so holding, the Court relied on what it viewed as 'contemporaneous evidence suggesting a controlled mindset' to support its preliminary finding of bad faith."); *id.* (providing an incomplete summary of "[t]he Court's basis for finding a 'controlled mindset'" that presents the evidence from the defendants' perspective); *id.* ¶ 23 ("The Opinion concluded the Special Committee's negotiations were impaired by a controlled mindset."); *id.* ¶ 26 ("Interlocutory review would provide much needed clarity . . . in particular [on] whether the concept of a 'controlled mindset' grounded in second-guessing a special committee's negotiations or outcome can satisfy the statutory burden to demonstrate the scienter required for bad faith."); *see also id.* ¶ 21 ("Other decisions of the Court of Chancery have only defined the good faith element of Section 144 at the pleading stage with reference to Delaware's bad faith standards grounded in scienter.").

[76] App. ¶ 23.

[77] *Id.* ¶ 24 ("[T]o the extent a 'controlled mindset' has any proper place in Delaware's corporate canon, it manifests the opposite of a subjective intent to violate duties."); *see id.* ¶ 3 (arguing the controlled mindset can only support a breach of the duty of care and asserting that "[t]he Opinion . . . conflat[es] a 'controlled mindset' with the intentional dereliction of fiduciary duty required to show bad faith"); *see also*

statement that "'[a]s articulated in *Southern Peru*, operating under a controlled mindset is, alone, at most a breach of the duty of care.'"[78] But *Trade Desk* went on to acknowledge that a controlled mindset could contribute to an inference (or finding) of bad faith "if combined with other well-pleaded allegations" that add up to "a broader constellation of facts that support a finding or reasonable inference of disloyal conduct."[79] The other decisions that the defendants depict as treating the controlled-

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id. ("The 'controlled mindset' language comes from a trial court decision describing a deficient approval process that, although carried out in good faith, fell short of being entirely fair."); *id.* ¶ 23 (noting that in *Southern Peru*, the court granted summary judgment in favor of the committee members because there was no basis to conclude that the committee members "acted in subjective bad faith"); *id.* ¶ 24 n.2 (asserting that "[o]ther Chancery decisions have relied on the controlled mindset concept to find a lack of independence or fair dealing—not bad faith").

[78] *Id.* ¶ 24 (quoting *In re Trade Desk Deriv. Litig.*, 2025 WL 503015, at *22–24 & n.169 (Del. Ch. Feb. 14, 2025), *aff'd*, 350 A.3d 1223 (Del. 2025)); *accord id.* ¶ 3 ("The 'controlled mindset' language comes from a trial court decision describing a deficient approval process that, although carried out in good faith, fell short of being entirely fair."). As a summary of *Southern Peru*, those descriptions are accurate. Before hearing the evidence at trial, then-Chancellor Strine granted summary judgment for the committee members. *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 785 (Del. Ch. 2011), *aff'd sub nom. Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012). He later explained in his post-trial opinion that he saw no basis to find that any committee member had "acted in subjective bad faith to force him to trial." *Id.* at 786. His post-trial opinion used the controlled mindset concept to describe directors who had not acted in subjective bad faith but nevertheless agreed to an unfair transaction despite "the best of intentions." *Id.* at 801; *see id.* at 763 (describing controlled mindset as "the mindset that too often afflicts even good faith fiduciaries trying to address a controller"). The post-trial outcome in this case could well be the same, with any of the shortcomings that seemed at the injunction stage to support a potential finding of bad faith amounting either to good-faith conduct or, at most, breaches of the duty of care.

[79] *Trade Desk*, 2025 WL 503015, at *24.

mindset concept as a term of art similarly recognize that indications of a controlled mindset can contribute to an inference (or finding) of bad faith.[80] In short, "this court has deemed extreme process defects packaged as controlled-mindset theories sufficient to support a reasonable inference of disloyal conduct."[81]

That is how the Injunction Opinion used the concept. The Injunction Opinion primarily referenced the controlled-mindset concept when describing the plaintiffs' contentions, but the decision did use the controlled-mindset concept once in connection with its discussion of bad faith.[82] The Injunction Opinion did not equate a controlled mindset with bad faith, nor did the Injunction Opinion regard "controlled mindset" as a term of art. As the Injunction Opinion strived to explain, the injunction-stage record gave rise to questions of fact about the Committee members' intent.[83] The plaintiffs see directors who acted affirmatively to serve the Founders' interests

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[80] *See In re Viacom Inc. S'holders Litig.*, 2020 WL 7711128, at *23–25 (Del. Ch. Dec. 29, 2020) (holding that the defendants' "actions as special committee members that reasonably infer a controlled mindset," when combined with other facts, give rise to "reasonably conceivable breaches of the duty of loyalty"). *See also In re CBS Corp. S'holder Class Action & Deriv. Litig.*, 2021 WL 268779, at *39 (Del. Ch. Jan. 27, 2021) (inferring bad faith where, based on a controlled mindset and other factors, committee members "acceded to Ms. Redstone's will in breach of their non-exculpated fiduciary duty of loyalty").

[81] *Fishel v. Liberty Media Corp.*, 2026 WL 982224, at *11–12 (Del. Ch. Apr. 13, 2026).

[82] *See Injunction Opinion*, 2026 WL 3093369, at *52 ("Despite the Committee's seemingly sound process, the plaintiffs have amassed considerable contemporaneous evidence suggesting a controlled mindset.").

[83] *See id.* at *50–54.

at the expense of the Company and all of its stockholders, and there is evidence to support that view.[84] Of course, that is not the only reasonably probable outcome. The Committee members may have believed that benefitting the Founders through the Recapitalization was in the best interests of the Company and all of its stockholders. If so, then the General Controller Safe Harbor will apply.

Based on their term-of-art interpretation, the defendants say that "[t]he Supreme Court should settle whether the safe harbor can be overcome by process questions arising from perceived latent deference to a controller as opposed to intentional disregard for duties."[85] There is no dispute on that point. "[L]atent deference to a controller" is not enough to establish bad faith if directors subjectively believe that they are pursuing the best interests of the corporation and all of its stockholders. Under the *Disney* Standard, what rises to the level of bad faith is a conscious desire to serve the best interests of the controlling stockholder instead of pursuing the best interests of the corporation and all of its stockholders. The Injunction Opinion held that based on the contemporaneous evidence, questions about the testimonial evidence, the loss of evidence through deleted Signal chats, and the failure to abide by a commitment not to close the Recapitalization, the plaintiffs had established a reasonable probability that they could prevail on their bad-faith

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[84] *See supra* Part I (describing the Injunction Opinion's assessments of the injunction-stage record regarding the Committee's actions).

[85] App. ¶ 24.

theory at trial. Under the plaintiffs' view, the record supports more than simply latent deference to a controller. It includes conduct deliberately designed to advance the controlling stockholders' interests.

The defendants' controlled-mindset argument thus does not identify a substantial issue of material importance warranting interlocutory appeal. Their argument instead presents another manifestation of their desire to overrule the *Disney* Standard and limit bad faith to malice and conscious lawbreaking.

4. Overruling The *Disney* Standard

Although the Application tries to dress up the issue in other clothing, the defendants' real complaint is that the Injunction Opinion applied the *Disney* Standard. The defendants want Delaware law to recognize only malice and conscious lawbreaking as carrying the necessary level of *scienter* to qualify as action not in good faith.[86] If the defendants were arguing for a change in the law in an ordinary case,

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[86] *See, e.g.*, *id.* ¶ 3 ("The Opinion also fails to undertake the individualized inquiry of subjective bad faith—which requires scienter by each Committee member—required under Delaware law and contemplated by Section 144."); *id.* (arguing the controlled mindset can only support a breach of the duty of care and asserting that "[t]he Opinion . . . conflat[es] a 'controlled mindset' with the intentional dereliction of fiduciary duty required to show bad faith."); *id.* ¶ 20 (asserting that the Injunction Opinion decided a question of first impression by ruling on "whether a bad faith determination can be made as to the Special Committee generally—as the Opinion did—as opposed to assessing each Special Committee member individually to determine whether a majority intentionally acted in bad faith"); *id.* ¶ 21 ("Other decisions of the Court of Chancery have only defined the good faith element of Section 144 at the pleading stage with reference to Delaware's bad faith standards grounded in scienter."); *id.* ¶ 24 ("By contrast, bad faith is the most extreme theory of liability and includes conduct motivated by an actual intent to do harm or a conscious disregard for one's responsibilities." (internal quotation marks omitted)); *id.* ¶ 26

their pitch would not justify certification. Here, their argument warrants certification in the aftermath of the Safe Harbor Statute's enactment and constitutional validation.

Good faith under Delaware law currently has a well-settled meaning: to act subjectively in the best interests of the corporation and its stockholders. As the defendants point out, a director can fail to act in good faith by acting maliciously, i.e.,

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("Interlocutory review would provide much needed clarity . . . in particular [on] whether the concept of a 'controlled mindset' grounded in second-guessing a special committee's negotiations or outcome can satisfy the statutory burden to demonstrate the scienter required for bad faith."); *see also id.* ¶ 21 ("Other decisions of the Court of Chancery have only defined the good faith element of Section 144 at the pleading stage with reference to Delaware's bad faith standards grounded in scienter.").

As cases applying the *Disney* Standard demonstrate, a finding that directors acted for a purpose other than pursuing the best interests of the corporation and its stockholders is a *scienter*-based finding. *E.g.*, *Bingle*, 2022 WL 4102492, at *9 (quoting *Disney*'s three-part formulation of bad faith, including the *Disney* Standard, and stating, "Notably common among all three formulations here is an element of *intent*. That is, to act in bad faith, the directors must have acted with scienter."); *Friedman v. Maffei*, 2016 WL 1555331, at *11 (Del. Ch. Apr. 13, 2016) (quoting *Disney*'s three-part formulation of bad faith, including the *Disney* Standard, and describing it as requiring *scienter*); *see, e.g.*, *Pettry v. Smith*, 2021 WL 2644475, at *7 (Del. Ch. June 28, 2021) (describing *Disney* as adopting a *scienter*-based test), *aff'd*, 273 A.3d 750 (Del. 2022) (TABLE); *Horman v. Abney*, 2017 WL 242571, at *7 (Del. Ch. Jan. 19, 2017) (same); *Clovis Oncology*, 2019 WL 4850188, at *12 (describing *Stone* as adopting a *scienter*-based test); *Desimone v. Barrows*, 924 A.2d 908, 935 (Del. Ch. 2007) (describing *Stone* as adopting a "scienter-based standard"); *Off. Comm. of Unsecured Creditors of Integrated Health Servs., Inc. v. Elkins*, 2004 WL 1949290, at *17 n.92 (Del. Ch. Aug. 24, 2004) ("[T]he *Disney* standard is *scienter*-based."). Because the *Disney* Standard contains a *scienter* element, the defendants' narrower version of *scienter* necessarily seeks to overturn the *Disney* Standard and limit *scienter* under Delaware law to malice and conscious lawbreaking.

with an "actual intent to do harm" to the corporation and its stockholders.[87] A director can also fail to act in good faith by engaging in intentional lawbreaking, whether by "causing the corporation to violate the positive laws it is obliged to obey"[88] or through an "intentional dereliction of duty" such as a "conscious disregard for one's responsibilities."[89]

But those are not the only versions. The Delaware Supreme Court has held in *Disney*,[90] *Stone*,[91] and elsewhere[92] that a fiduciary fails to act in good faith if the

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[87] *Disney*, 906 A.2d at 64; *accord Lyondell*, 970 A.2d at 240.

[88] *Guttman*, 823 A.2d at 506 n.34.

[89] *Disney*, 906 A.2d at 66; *accord Lyondell*, 970 A.2d at 240.

[90] *Disney*, 906 A.2d at 67 (holding a plaintiff can establish bad faith by proving that a fiduciary intentionally acted "'with a purpose other than that of advancing the best interests of the corporation'" (quoting *Disney*, 907 A.2d at 755)).

[91] *Stone*, 911 A.2d at 369 ("'A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation.'" (quoting *Disney*, 906 A.2d at 67)).

[92] *E.g.*, *Hazout v. Tsang Mun Ting*, 134 A.3d 274, 283 n.20 (Del. 2016) ("'A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, [or] where the fiduciary acts with the intent to violate applicable positive law. . . .'" (alterations in original) (quoting *Disney*, 906 A.2d at 67)); *see City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 55 (Del. 2017) ("A *specific example* of bad faith is when the director engages in an 'intentional dereliction of duty' or 'conscious disregard for one's responsibilities,' or acted 'with the intent to violate applicable positive law.'" (emphasis added) (footnotes omitted)). *See also Bingle*, 2022 WL 4102492, at *9 ("*Disney* remains the preeminent word on good faith in Delaware caselaw. In *Disney*, the Delaware Supreme Court adopted the following definitions of bad faith: '[(i) w]here the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, [(ii)] where the

fiduciary consciously acts with a purpose other than advancing the best interests of the corporation. Delaware corporate law luminaries like Chief Justice Strine,[93] Chancellor Chandler,[94] and Chancellor Allen[95] authored decisions saying the same thing while serving on this court.

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fiduciary acts with the intent to violate applicable positive law, or [(iii)] where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.'" (alterations in original) (footnote omitted)).

[93] *Guttman*, 823 A.2d at 506 n.34 (stating that "[a] director cannot act loyally towards the corporation unless she acts in the good faith belief that her actions are in the corporation's best interest" and that "[t]he reason for the disloyalty (the faithlessness) is irrelevant, the underlying motive (be it venal, familial, collegial, or nihilistic) for conscious action not in the corporation's best interest does not make it faithful, as opposed to faithless").

[94] *Portnoy*, 2008 WL 5197164, at *7 ("A director does not act in good faith, even if there is not a direct conflict of interest as to that director, unless the director 'acts in the good faith belief that her actions are in the corporation's best interest.' Thus, a director does not act in good faith if the director acts with a subjective belief that her actions are not in the best interest of the corporation, such as when she is acting for the benefit of a related person at the expense of the company. This is 'classic, quintessential bad faith.'" (first quoting *Stone*, 911 A.2d at 370 (quoting *Guttman*, 823 A.2d at 506 n.34); then quoting *Disney*, 906 A.2d at 64)).

[95] *Gagliardi*, 683 A.2d at 1051 n.2 (defining a "bad faith" transaction as including one "that is authorized for some purpose *other than* a genuine attempt to advance corporate welfare" (emphasis in original)); *RJR Nabisco, Inc.*, 1989 WL 7036, at *15 (explaining that the business judgment rule would not protect "a fiduciary who could be shown to have caused a transaction to be effectuated (even one in which he had no financial interest) for a reason unrelated to a pursuit of the corporation's best interests" and that "any human emotion may cause a director to [intentionally] place his own interests, preferences or appetites before the welfare of the corporation," including greed, "hatred, lust, envy, revenge, . . . shame or pride").

That strain of non-good-faith action is not unique to Delaware. In the landmark decision of *Dodge v. Ford*,[96] minority stockholders sued Henry Ford and others after Ford decided that the Ford Motor Company would reallocate funds away from dividends and toward support for its employees and customers. Ford did not engage in malice or conscious lawbreaking; he staunchly maintained that he was acting for a purpose other than serving the best interests of the stockholders. The Supreme Court of Michigan held that Ford had violated his duty of loyalty by acting for an improper purpose.[97]

When making the Good Faith Ruling, the Injunction Opinion applied the *Disney* Standard. The defendants seek to reverse the Good Faith Ruling by having the Delaware Supreme Court overturn the *Disney* Standard.

The Application asserts that overturning the *Disney* Standard would terminate the litigation.[98] That is not strictly true, but the defendants are correct that if the Delaware Supreme Court reversed on that basis, then the case would be over.

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[96] *Dodge v. Ford Motor Co.*, 170 N.W. 668, 683–84 (Mich. 1919); *see* M. Todd Henderson, *The Story of* Dodge v. Ford Motor Company*: Everything Old Is New Again*, *in* Corporate Law Stories 37–75 (J. Mark Ramseyer ed., 2009).

[97] *See Dodge*, 170 N.W. at 684 ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.").

[98] *See* App. ¶ 5 (claiming the Good Faith Ruling "is case-dispositive").

The defendants' position is not strictly true because the Injunction Opinion granted a preliminary injunction. An interlocutory appeal from that ruling could result in the high court either upholding or vacating the injunction. Technically, the case goes forward either way. But as a practical matter, if the Delaware Supreme Court overturned the *Disney* Standard, then the plaintiffs would have to show malice or conscious lawbreaking, and there is no evidence of either. The defendants could move for summary judgment and get it.

Reversal on the *Disney* Standard is therefore case dispositive. But as decisions have often observed, the fact that a trial court decided a potentially case-dispositive issue cannot alone be enough to warrant certification, because otherwise that rationale "would validate routine appeals."[99] Ironically, one of the interlocutory certification rulings that the defendants cite for the case-dispositive-issue proposition illustrates the point, because the Delaware Supreme Court denied review.[100] In a typical case, a request to overturn settled law would not warrant certification.

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[99] *US Dominion, Inc. v. Fox News Network, LLC*, 2022 WL 100820, at *7 (Del. Super. Jan. 10, 2022) (denying certification), *appeal refused*, 270 A.3d 273 (Del. 2022) (TABLE); *accord JB & Margaret Blaugrund Found. v. Guggenheim Funds Inv. Advisors, LLC*, 2023 WL 2562933, at *7 (Del. Ch. Mar. 17, 2023) (denying certification), *appeal refused*, 294 A.3d 64 (Del. 2023) (TABLE); *see id.* at *3 & n.22 (collecting authorities).

[100] *See UniSuper Ltd. v. News Corp.*, 2006 WL 207505, at *4 (Del. Ch. Jan. 19, 2006) (certifying appeal because "interlocutory appeal has the potential to end this suit, sparing defendants, as well as plaintiffs and this Court, the expense of further litigation"), *appeal refused*, No. 635, 2005, ¶ 4 (Del. Jan. 27, 2006) (ORDER) ("Generally, this Court gives substantial deference to a trial judge's recommendation. In the exercise of its discretion, however, this Court has concluded that the interests

To support interlocutory review, the defendants argue that trial court decisions conflict on the standard for good faith, but their citations do not support that argument. The defendants quote from two pleading-stage decisions, but neither decision openly rejected the *Disney* Standard.[101] One recognized the *Disney* Standard as good law.[102] The other only referenced malice and conscious lawbreaking and thus could be construed as discarding the *Disney* Standard.[103] The latter decision cited a Delaware Supreme Court opinion that similarly omitted any reference to the *Disney* Standard.[104] Neither called for overruling the *Disney* Standard.

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of justice are best served if these proceedings are not interrupted by an interlocutory appeal."). The Application does not cite the Delaware Supreme Court order. *See* App. ¶ 25.

[101] App. ¶ 21 (citing *Dodiya*, 2026 WL 2517931, at *15, and *Ayers*, 362 A.3d at 380).

[102] *See Dodiya*, 2026 WL 2517931, at *15 ("[A] board might exercise due care but act in bad faith by consciously advancing interests other than those of the corporation."); *accord In re Saama Techs. Litig.*, 2026 WL 2921243, at *31–32 (Del. Ch. Sep. 28, 2026) (quoting *Portnoy*, 2008 WL 5197164, at *7, as "describing 'classic, quintessential bad faith' as occurring when a fiduciary 'acts with a subjective belief that her actions are not in the best interest of the corporation, such as when she is acting for the benefit of a related person at the expense of the company'").

[103] *See Ayers*, 362 A.3d at 380 (holding plaintiff had not pled "particularized facts that demonstrate that the directors . . . had actual or constructive knowledge that their conduct was legally improper" sufficient to clear the "high hurdle" that is bad faith, without discussing the *Disney* Standard (internal quotation marks omitted)).

[104] *See McElrath v. Kalanick*, 224 A.3d 982, 993 (Del. 2020) ("[A] showing of bad faith in the context of demand excusal is a high hurdle, and essentially requires the plaintiff to demonstrate intentional wrongdoing by the board.").

Nevertheless, the Injunction Opinion is one of the first decisions to address good faith under the Safe Harbor Statute. If there were ever a time for the Delaware Supreme Court to abandon the *Disney* Standard, it would be now.

I personally do not regard that change of direction as desirable. The *Disney* Standard requires an assessment of intent. That task is difficult, but it has always been a function that courts are called on to perform. Pleading bad faith under the *Disney* Standard is not easy, and proving it is even harder. The plain language of the Safe Harbor Statute and its legislative history indicate that the proponents intended to maintain the status quo, including the *Disney* Standard.[105]

If the *Disney* Standard is off the table, then the Court of Chancery's job will become meaningfully easier. Directors generally do not maliciously harm their corporations, and research identifies only two cases where that theory gained traction.[106] As noted previously, *Lyondell* seems to exclude conscious lawbreaking as a path to bad faith where the broken law involves a breach of fiduciary duty,[107] absent

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[105] *See supra* Section II.A.1.

[106] *See Zync, Inc. v. Porsche Invs. Mgmt., S.A.*, 363 A.3d 1051, 1070–73 (Del. Ch. 2026); *Shocking Techs., Inc. v. Michael*, 2012 WL 4482838, at *9–11 (Del. Ch. Oct. 1, 2012), *vacated*, 2015 WL 3455210 (Del. Ch. May 29, 2015) (ORDER). Though *Shocking Technologies* was later vacated, the underlying principle for which the case is cited "remains viable." *OptimisCorp v. Waite*, 2015 WL 5147038, at *73 n.582 (Del. Ch. Aug. 26, 2015), *aff'd*, 137 A.3d 970 (Del. 2016) (TABLE).

[107] *See Lyondell*, 970 A.2d at 242 ("No court can tell directors exactly how to accomplish that goal, because they will be facing a unique combination of circumstances, many of which will be outside their control.").

perhaps the type of confession seen in *Dodge v. Ford*. A move away from the *Disney* Standard would create greater certainty and predictability for directors, corporations, and practitioners, but at the expense of a vital check on fiduciary misconduct. Despite my personal misgivings about the possibility of further change in the law, the timing of the Application suggests that the viability of the *Disney* Standard raises a substantial issue warranting the Delaware Supreme Court's attention.

In conjunction with that issue, it also makes sense for the Delaware Supreme Court to consider whether, in the transactional-justification setting, a ruling on good faith for purposes of the Safe Harbor Statute "can be made as to the Special Committee generally—as the Opinion did—as opposed to assessing each Special Committee member individually."[108] Although the issue was waived, and although it is not an issue of first impression, it is a question warranting a renewed look in the aftermath of the Safe Harbor Statute.

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[108] App. ¶ 20; *see id.* ¶ 13 ("The Court did not undertake an individualized inquiry into the subjective bad faith of the Committee members.").

Elsewhere, the Application states: "The Opinion also fails to undertake the individualized inquiry of subjective bad faith—which requires scienter by each Committee member—required under Delaware law and contemplated by Section 144." *Id.* ¶ 3; *see id.* ¶ 21 ("Other decisions of the Court of Chancery have only defined the good faith element of Section 144 at the pleading stage with reference to Delaware's bad faith standards grounded in scienter."). Those assertions are more examples of the defendants implicitly attacking the *Disney* Standard. To reiterate, as *Disney* and other authorities demonstrate, a finding that directors acted for a purpose other than pursuing the best interests of the corporation and its stockholders is a *scienter*-based finding. *See supra* note 86. The defendants hope to overturn the *Disney* Standard and establish a different rubric in which only malice and conscious lawbreaking meet the *scienter* requirement.

This decision has already set out the principles governing waiver.[109] In the Application, the defendants argue that the court should have assessed "each Special Committee member individually" as "required under Delaware law and contemplated by Section 144."[110] The defendants never argued before the trial court that the Safe Harbor Statute requires a member-by-member analysis of good faith. They repeatedly referred to the Committee members collectively when responding to the plaintiffs' arguments about bad faith, in contrast to their member-by-member response to the plaintiffs' arguments about interestedness.[111] Because the defendants did not raise the issue, it has been waived.

That issue also challenges settled law and, in the abstract, does not present a question of law suitable for interlocutory appeal. When applying standards of review, the Delaware Supreme Court has long distinguished between the "transactional justification" setting and the "personal liability" setting.[112] Delaware law does not

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[109] *See supra* Section II.A.1.

[110] App. ¶¶ 3, 20; *accord id.* ¶ 20 (asserting that the Injunction Opinion decided a question of first impression by ruling on "whether a bad faith determination can be made as to the Special Committee generally—as the Opinion did—as opposed to assessing each Special Committee member individually to determine whether a majority intentionally acted in bad faith").

[111] *Compare* Dkt. 82 at 43, 45, 47, *with id.* at 49–52.

[112] *See Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1374–75 (Del. 1995) (distinguishing between the "transactional justification" setting, in which enhanced scrutiny applies, and the "personal liability" setting, in which the business judgment rule applies); *Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1284 n.32 (Del. 1989) (distinguishing between "the traditional concept of protecting the decision itself" and

require an individual-by-individual analysis of good faith for transaction-level relief, particularly at the preliminary injunction stage. The Delaware Supreme Court's injunction-stage decisions in *Unocal*[113] and *Revlon*[114] analyzed the board's good faith

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the question of the "directors' personal liability for these challenged decisions"); *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 180 n.10 (Del. 1986) (distinguishing between "the business judgment rule, which insulates directors and management from personal liability for their business decisions, and the business judgment doctrine, which protects the decision itself from attack"; noting that in "transactional justification cases," Delaware decisions had not observed the distinction in terminology, but nevertheless "may be understood to embrace the concept of the doctrine"); *see also Kahn v. Stern*, 183 A.3d 715, 2018 WL 1341719, at *1 n.3 (Del. 2018) (TABLE) ("*Revlon* remains applicable [in a post-closing case] as a context-specific articulation of the directors' duties but directors may only be held liable for a non-exculpated breach of their *Revlon* duties."); *Corwin v. KKR Fin. Hldgs., LLC*, 125 A.3d 304, 312 (Del. 2015) ("*Unocal* and *Revlon* are primarily designed to give stockholders and the Court of Chancery the tool of injunctive relief to address important M & A decisions in real time, before closing. They were not tools designed with post-closing money damages claims in mind . . . ."); *see generally Firefighters' Pension Sys. of City of Kan. City, Mo. Tr. v. Presidio, Inc.*, 251 A.3d 212, 251–52 (Del. Ch. 2021) (elaborating on distinctions between settings involving transaction-related relief and a damages inquiry).

[113] *See Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 949 (Del. 1985) ("The factual findings of the Vice Chancellor, fully supported by the record, establish that Unocal's board, consisting of a majority of independent directors, acted in good faith . . . ."); *see id.* at 958 ("[T]he Court of Chancery specifically found that the 'directors' decision [to oppose the Mesa tender offer] was made in the good faith belief that the Mesa tender offer is inadequate.' . . . [W]e are satisfied that Unocal's board has met its burden of proof." (second alteration in original)).

[114] *See Revlon*, 506 A.2d at 181 ("To that extent the board acted in good faith and upon reasonable investigation. Under the circumstances it cannot be said that the Rights Plan as employed was unreasonable, considering the threat posed."); *see id.* ("The Revlon directors concluded that Pantry Pride's $47.50 offer was grossly inadequate. In that regard the board acted in good faith, and on an informed basis, with reasonable grounds to believe that there existed a harmful threat to the corporate enterprise."); *id.* at 182 ("Selective dealing to fend off a hostile but determined bidder was no longer a proper objective. Instead, obtaining the highest

collectively. Then-Vice Chancellor Strine took the same approach in his injunction-stage decisions in *Mercier*[115] and *Dollar Thrifty*.[116] Chancellor Allen's decision in *Blasius* also analyzed the board's good faith collectively.[117] When a decision-making

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price for the benefit of the stockholders should have been the central theme guiding director action. Thus, the Revlon board could not make the requisite showing of good faith by preferring the noteholders and ignoring its duty of loyalty to the shareholders."); *see also C & J Energy Servs., Inc. v. City of Mia. Gen. Empls.' & Sanitation Empls.' Ret. Tr.*, 107 A.3d 1049, 1053 (Del. 2014) (reversing preliminary injunction; "When a board exercises its judgment in good faith, tests the transaction through a viable passive market check, and gives its stockholders a fully informed, uncoerced opportunity to vote to accept the deal, we cannot conclude that the board likely violated its *Revlon* duties.").

[115] *See Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 813 (Del. Ch. 2007) (denying plaintiffs' motion for preliminary injunction enjoining the merger's consummation; "I address the question of whether the Inter–Tel Special Committee has convinced me that they in fact acted for reasons that were properly motivated. On that score, the record supports the conclusion that the Inter–Tel Special Committee was motivated by a good faith concern that the Mitel Merger was in the best interests of the Inter–Tel stockholders and that if the meeting was held as scheduled on June 29, the advantages the Merger promised to the stockholders would be irretrievably lost.").

[116] *See In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 602 (Del. Ch. 2010) (denying plaintiffs' motion for preliminary injunction enjoining the merger's consummation; finding that "[t]he defendants have convinced me that the entire Board was subjectively well motivated and exercised due care," then "turn[ing] to some of the key decisions of the Dollar Thrifty Board that the plaintiffs challenge," assessing collective board decisions about whether to seek other bidders, whether to reach out to another large industry player before finalizing a deal with the buyer, and ultimately whether to enter into the merger agreement with the buyer); *id.* at 601 ("[T]here is no reason to question the Board's desire to do right by the Dollar Thrifty stockholders.").

[117] *See Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 658 (Del. Ch. 1988) ("I cannot conclude that the board was acting out of a self-interested motive in any important respect . . . . [T]he board saw the 'threat' of the Blasius recapitalization proposal as posing vital policy differences between itself and Blasius. It acted, I

group has acted collectively, a court analyzes its decision collectively.[118] That is true outside the corporate context as well. When examining legislative intent, for example, a court does not examine the intent of each individual legislator.

In the personal-liability setting, a court conducts a director-by-director analysis. When liability is at issue, "each director has a right to be considered individually."[119] For the same reasons, when assessing whether directors are entitled to dismissal on the basis of exculpation, a plaintiff has "the responsibility to plead a non-exculpated claim against each director who moves for dismissal."[120] Delaware courts also consider good faith on a director-by-director basis when evaluating

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conclude, in a good faith effort to protect its incumbency, not selfishly, but in order to thwart implementation of the recapitalization that it feared, reasonably, would cause great injury to the Company. The real question the case presents, to my mind, is whether, in these circumstances, the board, even if it *is* acting with subjective good faith (which will typically, if not always, be a contestable or debatable judicial conclusion), may validly act for the principal purpose of preventing the shareholders from electing a majority of new directors.").

[118] *See also, e.g.*, *Ark. Tchr. Ret. Sys. v. Alon USA Energy, Inc.*, 2019 WL 2714331, at *22 (Del. Ch. June 28, 2019) (at the pleading stage, assessing good faith of the special committee members collectively and holding that "it is reasonably conceivable that the Special Committee Defendants acted in bad faith" when approving the merger).

[119] *In re Cornerstone Therapeutics Inc. S'holder Litig.*, 115 A.3d 1173, 1182 (Del. 2015).

[120] *Id.* at 1180; *see In re Tangoe, Inc. S'holders Litig.*, 2018 WL 6074435, at *12 (Del. Ch. Nov. 20, 2018) ("When a plaintiff seeks to hold multiple directors protected by an exculpatory provision liable for breach of fiduciary duty, that plaintiff must well-plead a loyalty breach against each individual director; so-called 'group pleading' will not suffice.").

allegations of demand futility under Rule 23.1.[121] In the transactional-justification setting, by contrast, a court considers what a board or committee did collectively.

As with the *Disney* Standard, if there were a time for the Delaware Supreme Court to revisit the transactional-justification approach, it would be now. I again do not personally favor a change, but I understand why the idea has appeal. Even if the Delaware Supreme Court stands by the *Disney* Standard, knowing the answer to the need for an individualized versus collective analysis of good-faith in the transactional-justification context will assist the parties in structuring their evidence and the court in rendering a decision.

For these reasons, interlocutory review of the continuing vitality of the *Disney* Standard and the issue of collective good-faith analysis serves considerations of justice. According to the defendants,

> Interlocutory review would provide much needed clarity to corporations and practitioners on the showing required to make Section 144(b)'s safe harbor unavailable and, in particular, whether the concept of a "controlled mindset" grounded in second-guessing a special committee's negotiations or outcome can satisfy the statutory burden to demonstrate the scienter required for bad faith.[122]

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[121] *United Food & Com. Workers Union & Participating Food Indus. Empls. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1059 (Del. 2021) ("[F]rom this point forward, courts should ask the following three questions on a director-by-director basis when evaluating allegations of demand futility . . . ."); *see Trade Desk*, 2025 WL 503015, at *21 (observing in demand futility analysis that "Plaintiffs cannot satisfy their burden by engaging in group pleading").

[122] App. ¶ 26.

That tendentious framing is directionally accurate but wide of the mark. The "showing required" to make a statutory safe harbor available is not at issue, and the controlled-mindset argument is a red herring. This is also not a case where the trial court simply engaged in "second-guessing a special committee's negotiations or outcome."[123] But the defendants are correct that a Delaware Supreme Court decision addressing the continuing vitality of the *Disney* Standard and the collective-versus-individualized nature of good faith in the transactional-justification setting would provide helpful clarity, however the justices come out.

B. Whether The Interlocutory Ruling Merits Appellate Review Before A Final Judgment

Determining that an interlocutory ruling addressed a substantial issue of material importance does not end the certification inquiry. Rule 42 directs the trial court to assess whether the interlocutory ruling merits review before a final judgment. Rule 42 instructs the trial court to conduct "its own assessment of the most efficient and just schedule to resolve the case," then discuss "whether and why the likely benefits of interlocutory review outweigh the probable costs, such that interlocutory review is in the interests of justice."[124] There must be "substantial benefits that will outweigh the certain costs that accompany an interlocutory

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[123] *Id.*

[124] Supr. Ct. R. 42(b)(iii).

appeal."[125] "If the balance is uncertain, the trial court should refuse to certify the interlocutory appeal."[126]

The continuing viability of the *Disney* Standard and the question of collective versus individualized good-faith analysis in transactional-justification settings warrant the Delaware Supreme Court's attention. But when? One path is for the Delaware Supreme Court to address those issues now. The other is for the Delaware Supreme Court to consider those issues after the court has conducted a trial.

Having the Delaware Supreme Court address a potentially case-dispositive legal issue upfront can be exceedingly helpful. If the justices regard a theory as legally flawed, then having a definitive answer prevents the parties and the trial court from expending significant resources litigating the case through a post-trial remedy, only for the justices to reverse on an outcome-determinative legal issue.[127] *Delaware*

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[125] *Id.* 42(b)(ii).

[126] *Id.* 42(b)(iii).

[127] *E.g.*, *In re Columbia Pipeline Gp., Inc. Merger Litig.*, 342 A.3d 324, 357 (Del. 2025) (reversing post-trial decision in multi-year litigation based on issue of law); *Boardwalk Pipeline P'rs, LP v. Bandera Master Fund LP*, 288 A.3d 1083, 1088 (Del. 2022) (reversing post-trial decision in multi-year litigation based on two issues of law); *Oxbow Carbon & Mins. Hldgs., Inc. v. Crestview-Oxbow Acq., LLC*, 202 A.3d 482, 502 (Del. 2019) (reversing post-trial decision in multi-year litigation based on issue of law).

Claims Processing provides an example of a resource-saving intervention.[128] So does *Maffei v. Palkon*.[129]

If the defendants had accepted the trial court's offer of an initial trial within ninety days limited to the issue of good faith, then an interlocutory appeal would not have made sense. The court believed an expedited trial limited to the good-faith issue offered the optimal way to proceed, but the defendants rejected that alternative, and it is no longer available. Although the court proposed to hold a full trial promptly, the defendants' preference for interlocutory appeal demonstrates that they are not meaningfully harmed by delay. If the Delaware Supreme Court adopts the defendants' view that action not in good faith requires malice or conscious lawbreaking, then the case will be over. If the Delaware Supreme Court preserves the *Disney* Standard, then an answer to the collective versus individual good-faith issue will enable the parties to structure their evidence and argument at trial in accordance with the governing law, and the court will be able to apply that law when issuing its ruling.

I therefore believe that the preferable path forward is for the Delaware Supreme Court to accept an interlocutory appeal on the two issues that this decision has identified.

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[128] *Del. Claims Processing Facility, LLC v. DBMP LLC*, — A.3d —, 2026 WL 2207474 (Del. July 31, 2026).

[129] *Maffei v. Palkon*, 339 A.3d 705 (Del. 2025).

III. CONCLUSION

Whether to permit an interlocutory appeal lies in the discretion of the Delaware Supreme Court. The justices' views, not the trial court's, determine whether the defendants' request will be granted. This court's role under Rule 42 is to make a recommendation. In this case, that recommendation is for the Delaware Supreme Court to accept an interlocutory appeal on the continuing viability of the *Disney* Standard and the question of collective versus individualized good-faith analysis in the transactional-justification setting.