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PUBLIC VERSION DATED
OCTOBER 13, 2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEBORAH PETTRY, derivatively on behalf of FEDEX CORPORATION, Plaintiff Below, Appellant, v. FREDERICK W. SMITH, DAVID J. BRONCZEK, ALAN B. GRAF, JR., HENRY J. MAIER, DAVID P. STEINER, SHIRLEY ANN JACKSON, JOHN A. EDWARDSON, JOSHUA A. RAMO, R. BRAD MARTIN, KIMBERLY A. JABAL, PAUL S. WALSH, SUSAN C. SCHWAB, MARVIN R. ELLISON, JOHN C. INGLIS, STEVEN R. LORANGER, GARY W. LOVEMAN, and JAMES L. BARKSDALE, Defendants Below, Appellees, -and- FEDEX CORPORATION, a Delaware corporation, Nominal Defendant Below, Appellee.	No. 239, 2021 On appeal from the Court of Chancery of the State of Delaware, C.A. No. 2019-0795-JRS

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APPELLANT DEBORAH PETTRY'S CORRECTED OPENING BRIEF

Dated: October 12, 2021

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NATURE OF PROCEEDING

Plaintiff Appellant ("Plaintiff"), a stockholder of FedEx Corporation ("FedEx" or the "Company"), brought this action derivatively to seek redress for harm caused to FedEx as a result of Defendants' knowing and prolonged failure to address ongoing violations of law.[1]

[redacted] In 2006, FedEx resolved a government investigation into its illegal cigarette shipments by way of an Assurance of Compliance (the "AOC") in which FedEx agreed to comply with applicable laws and to establish effective monitoring systems going forward. [redacted]

[1] "Defendants" refer collectively to Individual Defendants Appellees Frederick W. Smith ("Smith"), David J. Bronczek ("Bronczek"), Alan B. Graf, Jr. ("Graf"), Henry J. Maier ("Maier"), David P. Steiner ("Steiner"), Shirley Ann Jackson ("Jackson"), John A. Edwardson ("Edwardson"), Joshua A. Ramo ("Ramo"), R. Brad Martin ("Martin"), Kimberly A. Jabal ("Jabal"), Paul S. Walsh ("Walsh"), Susan C. Schwab ("Schwab"), Marvin R. Ellison ("Ellison"), John C. Inglis ("Inglis"), Steven R. Loranger ("Loranger"), Gary W. Loveman ("Loveman"), and James L. Barksdale ("Barksdale"), and Nominal Defendant Appellee FedEx.

[redacted]

Lawsuits by the City and State of New York accusing FedEx of shipping untaxed cigarettes in violation of federal and state laws and failing to comply with the AOC soon followed. [redacted]

Plaintiff here has adequately alleged that there is a reason to doubt that eleven of the twelve members of the Board could independently or disinterestedly investigate a pre-suit demand under Delaware law because they face a substantial threat of liability for their prolonged failure to remedy known compliance failures that allowed FedEx to repeatedly violate the AOC and tobacco transportation laws.[2] Such bad faith conduct renders a pre-suit demand on them futile.

On June 28, 2021, the Court of Chancery ("Chancery") granted the Defendants' motion to dismiss ("Opinion") (Ex. A), finding that Plaintiff failed to allege particularized facts to support a reasonable inference that the Director Defendants consciously ignored red flags "in a manner demonstrating a conscious failure to monitor or oversee corporate operations" (Opinion at 22-37). Chancery erred in improperly failing to read all well-pleaded facts and all reasonable inferences therefrom in Plaintiff's favor, granting competing inferences in Defendants' favor, and creating hypothetical excuses for the Board's prolonged failure to act. A fair

[2] At the time this case was commenced, the Board had twelve members, comprised of defendants Edwardson, Ellison, Jabal, Jackson, Martin, Ramo, Schwab, Smith, Steiner, Walsh, and Inglis, and nondefendant Susan Patricia Griffith ("Griffith"). Plaintiff therefore has to establish demand futility as to at least six of the Director Defendants. "Director Defendants" refer to Individual Defendants Appellees Smith, Steiner, Jackson, Edwardson, Ramo, Martin, Jabal, Walsh, Schwab, Ellison, Inglis, Loranger, Loveman, and Barksdale.

reading of the Board minutes and presentations obtained through Plaintiff's books and records inspection and other particularized allegations in the Verified Stockholder Derivative Complaint for Breach of Fiduciary Duty (the "Complaint"), and the reasonable inferences therefrom, compels the conclusion that demand on the Board was futile, and that the motion to dismiss should have been denied.

SUMMARY OF ARGUMENT

1. Chancery erred in holding that the Complaint fails to adequately allege facts from which it may reasonably be inferred that the Director Defendants face a substantial likelihood of personal liability for allowing the Company to violate laws governing the transportation of tobacco.

2. In rejecting Plaintiff's particularized allegations that the Director Defendants face a substantial likelihood of liability for knowingly failing to halt illegal activities, Chancery improperly discredited Plaintiff's reasonable interpretation of Board minutes (and the conspicuous absence of certain Board minutes) and presentations, failed to read all well-pleaded facts and all reasonable inferences therefrom in Plaintiff's favor, and improperly granted competing inferences in Defendants' favor. The Board minutes, considered in their totality with the other particularized facts alleged in the Complaint and with all reasonable inferences read in Plaintiff's favor, support a pleading stage finding that the Director Defendants acted in bad faith in failing to undertake efforts to remedy FedEx's compliance failures and violations of law. By declining to assess the demand futility allegations as a whole and to make reasonable inferences in Plaintiff's favor, as is required under Delaware law on a motion to dismiss, Chancery erred. Accordingly, the Court should reverse Chancery's order granting Defendants' motion to dismiss.

STATEMENT OF FACTS

A. Factual Background

FedEx is a holding company that provides transportation, e-commerce and business services internationally through wholly-owned subsidiaries including FedEx Express Corporation, FedEx Ground Packing System, Inc. ("FedEx Ground"), FedEx Freight Corporation and FedEx Corporate Services, Inc. (A032).[3]

B. FedEx's Long History of Noncompliance with Federal and State Laws Regulating the Shipment of Tobacco

For years, FedEx has violated state and federal laws governing the transportation and delivery of tobacco products. In 2004, the State of New York opened an investigation into FedEx's practices regarding shipments of cigarettes and its compliance with New York's cigarette taxing and shipment regulatory regime. (A034-35). The investigation focused on violations of N.Y. PHL § 1399–ll, which makes it unlawful for common carriers such as FedEx to deliver cigarettes to residents or entities unlicensed to deal in tobacco products. (A033-35).

On February 3, 2006, FedEx entered into an AOC with the New York Attorney General ("NYAG") to resolve the investigation. (A034-35). The AOC required FedEx to, *inter alia*, comply with N.Y. P.H.L. § 1399-ll, terminate

[3] Citations to the Appendix to Appellant's Opening Brief are designated herein as "A__."

relationships with shippers that unlawfully attempted to use FedEx to ship cigarettes to residential addresses, and report those shippers to the NYAG's office. *Id.* The AOC also required FedEx to "revise any and all internal policies ... to ensure they are consistent with the terms of th[e] Assurance of Compliance," and notify the NYAG if FedEx found that one of its customers had attempted to ship cigarettes more than once. (A641-42; *see also* A034-35). Thus, the AOC required FedEx to put in place rigorous corporate governance measures to ensure both that FedEx employees are aware of the prohibition against shipping untaxed cigarettes to unauthorized recipients, and that FedEx identifies unauthorized shipments and terminates delivery services to repeat offenders. (*Id.*). The terms of the AOC provided that FedEx would pay a $1,000 penalty for every violation of the AOC. (A034-35; A644). The AOC expressly bound the directors of FedEx to its terms. (A647).

C. Defendants' Responsibility for Overseeing FedEx's Compliance with the AOC and State and Federal Laws Governing the Transportation of Tobacco Products

Defendants were duty-bound to oversee and ensure FedEx's compliance with the AOC and federal and state laws concerning the shipment of cigarettes and tobacco related products. The Board's responsibility for overseeing the Company's compliance with the laws is reflected in the Company's Corporate Governance

Guidelines (the "Guidelines").[4] (A027-29). As stated in the Guidelines, "[t]he Board of Directors is responsible for monitoring the Company's compliance with legal and regulatory requirements and overseeing the Company's corporate integrity and compliance programs." (A027-28).

The Board delegated much of this responsibility to the Audit Committee. (*Id*.). According to the Audit Committee Charter, the Audit Committee was required to oversee "the Company's compliance with legal and regulatory requirements and the implementation and effectiveness of the Company's corporate integrity and compliance programs." (A030-31). The Audit Committee was required to discuss such compliance and compliance programs with the Company's Executive Vice President, General Counsel and Secretary and its Corporate Vice President and Global Chief Compliance & Governance Officer. (*Id*.).

While management had day-to-day responsibility for assessing and managing the Company's risk exposure, the Audit Committee was also responsible for providing oversight in connection with these efforts. (A027-30). In particular, the Audit Committee was required to review and discuss with management and the

[4] The Complaint mistakenly refers to the Corporate Governance Guidelines as the Code of Conduct. (A027-29).

Board the Company's "risk exposures and the steps management has taken to monitor and control such exposures." (A029-30).

Collectively, these controls demanded that the Board oversee and assume responsibility for FedEx's compliance with the AOC and federal, state, and local laws regulating the shipment and delivery of tobacco products. Defendants failed to do so, and FedEx continued violating the law and the AOC for years.

[redacted]

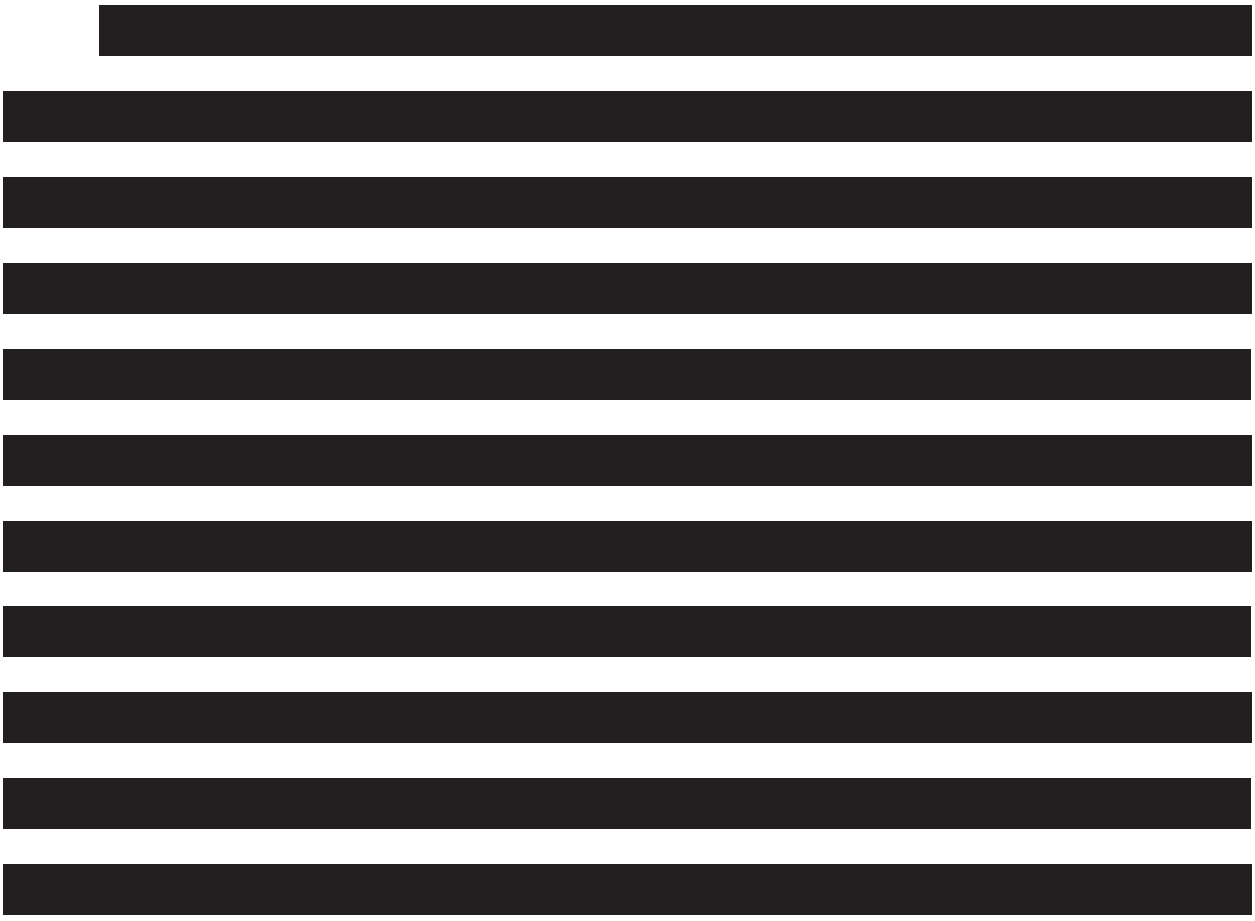
[redacted]

[redacted]

[redacted] Despite the directors' obligations to monitor FedEx's compliance with legal requirements and oversee the effectiveness of the Company's compliance programs, [redacted]

On December 30, 2013, the City of New York filed a lawsuit against FedEx in the U.S. District Court for the Southern District of New York accusing it of unlawfully shipping cigarettes in violation of federal and New York state laws. (A036). On March 30, 2014, New York State joined the lawsuit and added claims

regarding FedEx's breaches of the AOC. (*Id.*). On November 12, 2014, the New York authorities filed a second lawsuit against FedEx Ground (together with the first action, the "N.Y. Actions"). (A668). The New York authorities alleged that from at least 2005 through 2013, FedEx knowingly delivered contraband cigarettes from various cigarette trafficking enterprises to consumers. (A958). The City of New York and State of New York subsequently amended their complaint in April 2016 to allege that FedEx Ground's unlawful deliveries continued to the present. (*Id.*).



[redacted]

[redacted]

[redacted]

[redacted]

[7] All references to "FDX _____" and "FDX(R) _____" are from the books and records produced in response to Plaintiff's Demand.

[redacted]

F. Defendants' Actions Exposed FedEx to Significant Liability

[redacted]

exposed the Company to substantial liability. FedEx was forced to expend millions

of dollars in defending itself in and settling multiple lawsuits arising from illegal cigarette shipments. (A046). On October 5, 2018, the District Court granted plaintiffs in the N.Y. Actions' motion for summary judgment, finding no genuine dispute of material fact that FedEx knowingly shipped over 10,000 unstamped cigarettes in violation of N.Y. PHL § 1399-ll and the AOC. (A040). In doing so, the District Court noted that "[i]t is beyond doubt that [FedEx] knew [it] was shipping unstamped cigarettes," and "insofar as FedEx knew it was shipping cigarettes, it also knew it was shipping unstamped cigarettes." (*Id.*). In December 2018, FedEx paid $35.3 million to settle the N.Y. Actions and agreed to reform its policies and procedures concerning tobacco shipments. (*Id.*).

ARGUMENT

CHANCERY ERRED IN FINDING THAT THE COMPLAINT FAILED TO PLEAD DEMAND FUTILITY

A. Question Presented

1. Does the Complaint adequately allege there is reason to doubt the disinterestedness of a majority of the members of FedEx's Board at the time this action was commenced based on Plaintiff's allegations that the Director Defendants face a substantial likelihood of liability for their conscious failure to oversee FedEx's compliance with state and federal laws governing the transportation and delivery of cigarettes? (Transcript of Oral Argument on Defendants' Motion to Dismiss Held Via Zoom ("MTD Transcript") (Ex. B) at 34-54; *see also* Notice of Appeal filed July 28, 2021).

B. Scope of Review

The Court's review of the decision on a motion to dismiss under Chancery Court Rule 23.1 for failure to plead demand futility is *de novo*.[8] The Court must accept all well-pleaded allegations as true and draw all reasonable inferences in Plaintiff's favor.[9]

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[8] *Marchand v. Barnhill*, 212 A.3d 805, 817 (Del. 2019). Here, as throughout, all emphasis is added and citations and footnotes are omitted unless otherwise noted.

[9] *Sandys v. Pincus*, 152 A.3d 124, 126-28 (Del. 2016).

C. Merits of the Argument

1. Legal Standards Applicable to Demand Futility

Under Chancery Court Rule 23.l, a derivative complaint must "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors ... and the reasons for the plaintiff's failure to obtain the action or for not making the effort."

Demand is excused as futile where the particularized facts alleged create a reason to doubt that "the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand."[10]

One way to establish demand futility is to allege there is reason to doubt the disinterestedness of a majority of the members of the board because the directors would face a "substantial likelihood of liability on any of the claims that would be the subject of the litigation demand."[11] A plaintiff does not have to demonstrate a reasonable probability of success on the claim—in *Rales*, the Delaware Supreme

[10] *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993); *United Food & Commerical Workers Union & Participating Food Industry Emps. Tri-State Pension Fund v. Zuckerberg, et. al.*, No. 404, 2020, 2021 WL 4344361 (Del. Sept. 23, 2021).

[11] *United Food*, 2021 WL 4344361, at *17; *see also Rales*, 634 A.2d at 936; *Hughes v. Hu*, No. CV 2019-0112-JTL, 2020 WL 1987029, at *12 (Del. Ch. Apr. 27, 2020).

Court rejected such a requirement as "unduly onerous."[12] The plaintiff need only "make a threshold showing, through the allegation of particularized facts, that the[] claims have some merit."[13]

With respect to disinterestedness, "reasonable doubt" can be said to mean that there is "a reason to doubt," which is "akin to the concept that the stockholder has a 'reasonable belief' that the board lacks independence or that the transaction was not protected by the business judgment rule"—an "objective test."[14] It is "sufficiently flexible and workable to provide the stockholder with 'the keys to the courthouse' in an appropriate case where the claim is not based on mere suspicions or stated solely in conclusory terms."[15]

Plaintiff "need not plead evidence."[16] The requirement of factual particularity at this stage "does not entitle a court to discredit or weigh the persuasiveness of well-pled allegations."[17] "[A]lthough the plaintiff is bound to

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[12] *Rales*, 634 A.2d at 934-35.

[13] *Id.* at 934.

[14] *Grimes v. Donald*, 673 A.2d 1207, 1217 & n.17 (Del. 1996).

[15] *Id*. at 1217.

[16] *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984).

[17] *La. Mun. Police Emps.' Ret. Sys. v. Pyott*, 46 A.3d 313, 351 (Del. Ch. 2012), *rev'd on other grounds*, 74 A.3d 612 (Del. 2013).

plead particularized facts in pleading a derivative complaint, so too is the court bound to draw all inferences from those particularized facts in favor of the plaintiff, not the defendant, when dismissal of a derivative complaint is sought."[18] This is true even if the Court believes an inference in favor of Defendants is more likely.[19] In addition, "it is important that the trial court consider all of the particularized facts pled by the plaintiffs … in their totality and not in isolation from each other."[20]

At the time this action was commenced, the Board was comprised of the following twelve members: defendants Edwardson, Ellison, Jabal, Jackson, Martin, Ramo, Schwab, Smith, Steiner, Walsh, and Inglis, and nondefendant Griffith. (A048). Plaintiff need only plead demand futility as to six of these Board members. As set forth below, Plaintiff has done so here.

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[18] *Del. Cty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1022 (Del. 2015) (quoted in *Sandys*, 152 A.3d at 126-28).

[19] *Pyott*, 46 A.3d at 356.

[20] *Sanchez*, 124 A.3d at 1019.

2. [redacted] Exposes Them to a Substantial Likelihood of Liability

a. Directors' Fiduciary Duties Require Them to Timely Address Known Legal Violations

Delaware law imposes three primary fiduciary duties on the directors of corporations: the duty of care and the interrelated duties of loyalty and good faith.[21]

It is a breach of the fiduciary duty of loyalty for a director to consciously allow a company to operate in violation of positive law. "Delaware law does not charter law breakers" and "a fiduciary of a Delaware corporation cannot be loyal to a Delaware corporation by knowingly causing it to seek profit by violating the law."[22]

To establish demand futility for a claim where at least half the members of a company's board consciously allowed the company to engage in illegal conduct, a plaintiff may plead:

> [T]hat the board consciously failed to act after learning about evidence of illegality—the proverbial "red flag."
>
> * * *

[21] *Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2001) (citing *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998)).

[22] *In re Massey Energy Co.*, No. CIV.A. 5430-VCS, 2011 WL 2176479, at *20 (Del. Ch. May 31, 2011); *see also In re Clovis Oncology, Inc. Derivative Litig.*, No. CV 2017-0222-JRS, 2019 WL 4850188, at *12-13 (Del. Ch. Oct. 1, 2019).

> A board that fails to act in the face of such information makes a conscious decision, and the decision not to act is just as much of a decision as a decision to act…. The decision to act and the conscious decision not to act are thus equally subject to review under traditional fiduciary duty principles and equally able to create the requisite connection to the board.[23]

Thus, demand is excused where the plaintiff "plead[s] particularized facts that the Defendant Directors knew of red flags, but acted in bad faith by consciously disregarding their duty to address the misconduct alerted to by such red flags."[24]

[redacted]

Plaintiff alleges particularized facts showing that [redacted]

[redacted]

[23] *Pyott*, 46 A.3d at 341.

[24] *Teamsters Local 443 Health Servs. & Ins. Plan v. Chou*, No. CV 2019-0816-SG, 2020 WL 5028065, at *17 (Del. Ch. Aug. 24, 2020).

[redacted]

Neither Chancery nor the Defendants dispute that the K&L Gates Report constituted a "red flag" that alerted the Board that FedEx was illegally shipping untaxed cigarettes. *See* Opinion at 35 (calling the K&L Gates Report an "undisputed red flag received by the FedEx Board in July 2012"); A108 (arguing only that "Plaintiff does not plead any 'red flags' suggesting that Defendants knew of alleged corporate misconduct at any time *between February 2006 and July 2012*."). Nor is there any dispute that the Board had a duty to address this issue. *See* Opinion at 28 (stating that the "illegal cigarette shipments were problematic" and that they did "need[] to be addressed").

[redacted]

Plaintiff has alleged with particularity that [redacted] resulted in substantial corporate losses. [redacted]

[redacted][25] The absence of this evidence in the form of Board minutes, or otherwise, entitles Plaintiff to the reasonable inference [redacted][26] [redacted] is the very essence of a breach of the fiduciary duties of loyalty and good faith.

Teamsters, 2020 WL 5028065, at *20 is directly on point. In *Teamsters*, 2020 WL 5028065, at *1, the plaintiffs alleged that the defendant directors acted in bad faith by ignoring red flags that a company subsidiary was engaged in

[redacted]

[26] *See, e.g.*, *Hughes*, 2020 WL 1987029, at *16 ("The Company could have produced documents in response to the plaintiff's Section 220 demand that would have rebutted this inference. The absence of those documents is telling because '[i]t is more reasonable to infer that exculpatory documents would be provided than to believe the opposite: that such documents existed and yet were inexplicably withheld.'") (alterations in original); *In re Tyson Foods, Inc.*, 919 A.2d 563, 578 (Del. Ch. 2007) ("[I]t is more reasonable to infer that exculpatory documents would be provided than to believe the opposite: that such documents existed and yet were inexplicably withheld.").

unsterile and illegal pharmaceutical distribution practices. There, AmerisourceBergen Corporation ("ABC") retained Davis Polk & Wardwell ("Davis Polk") to conduct an investigation into the adequacy of the company's compliance program. *Id.* at *10. Davis Polk found deficiencies in ABC's compliance program and recommended improvements to the audit committee. *Id.* The plaintiffs alleged that following the Davis Polk report, there was no evidence in ABC's internal books and records that the directors ever received any reports specifically concerning compliance at the operating segment with identified compliance shortcomings. *Id.* The court found that the Davis Polk report represented a red flag regarding compliance failures, and, noting that ABC's internal documents did not evidence any action taken with regard to the compliance issues identified, held that the plaintiffs adequately alleged the directors breached their fiduciary duty of loyalty by ignoring the recommendations and failing to take any steps to ensure that the inadequate compliance system was remedied. *Id.* at *20.[27]

[27] *See also In re Cardinal Health Inc. Derivative Litig.*, 518 F.Supp.3d 1046, at *1066-67 (S.D. Oh. Feb. 8, 2021) (applying Delaware law) (finding a substantial likelihood of liability where red flags of compliance issues were "met with more silence from the Board: not a single member pressed management to ensure that noncompliance was a thing of the past, or that the compliance program was operating as the law would intend it").

[redacted]

The Court of Chancery rejected Plaintiff's reasonable inference, listing five "actions" it purports evidence the Board responding in good faith to red flags: (i) the Board received updates on the N.Y. Actions, (ii) the Company disciplined three employees, (iii) in response to a stockholder demand, the Board formed a committee to investigate and consider appropriate legal action, (iv) the Company banned cigarette shipments in April 2016, and (v) the Company instituted certain training and compliance programs in 2019. Opinion at 13, 23-26.

The key actions Chancery relied on in finding an active board—reprimanding certain employees and banning the shipment of cigarettes—[redacted]

[redacted]

Nonetheless, the Court accepted Defendants' contention that *the Board* undertook these actions. *See* Opinion at 29-30 (listing responses by the Board including "the Board ultimately directing that the Company ban most cigarette shipments and reform processes for detecting illegal shipments"); MTD Transcript at 22:4-6 (counsel for Defendants stating that "*the board* received constant updates on the litigation, established a demand committee to review, *and took corrective action*"); *id.* at 17:24-18:1-7 (counsel for Defendants characterizing the decision to discontinue shipping tobacco as one made by the Demand Review Committee).[28] Chancery erred in crediting Defendants' preferred interpretation of the facts and not granting reasonable inferences in Plaintiff's favor based on the Board minutes (or lack thereof).

[redacted]

The inference of good faith the Court of Chancery drew from the fact some action was taken by *management* is also unwarranted. Opinion at 25-26, 30. Delaware law is clear that a *Board* must make a "good faith effort to oversee the company's operations" and "monitor the corporation's operational viability, legal compliance, and financial performance."[29] As the Court of Chancery stated in *Lebanon County Employees' Retirement Fund v. Amerisourcebergen Corporation*, No. CV 2019-0527-JTL, 2020 WL 132752, at *20 (Del. Ch. Jan. 13, 2020), the *Board* itself must be active: "Directors cannot take an ostrich-like approach to their fiduciary obligations, and so they must take active steps to oversee the operations of the corporation and become informed about the risks confronting the company."

Chancery's reliance on *Horman v. Abney*, 2017 WL 242571, at *13 (Del. Ch. Jan. 19, 2017) and *Oklahoma Firefighters Pension & Retirement System v. Corbat*, No. CV 12151-VCG, 2017 WL 6452240, at *20 (Del. Ch. Dec. 18, 2017) to find an inference of good faith based on action by management is misplaced. In both of those cases, the board knew of, and therefore at least tacitly approved of, remedial actions management was undertaking. As Chancery recognized, in *Horman* "*the board was informed* of a multitude of management remediation

[29] *Marchand*, 212 A.3d at 809, 820.

efforts." Opinion at 30 n.107. And in *Corbat*, "[s]oon after the [issue] came to light," *the Citigroup board was informed* that management was taking a number of actions, including performing "a global, end-to-end assessment of Citi's management effectiveness" and reviewing the problem subsidiary's overall collateral framework. 2017 WL 6452240, at *20. The court found this sufficient to show that "the board did not decide 'to do nothing about the control deficiencies that it knew existed.'" *Id.*

Unlike *Horman* and *Corbat*, [redacted]

[30] *In re Boeing Co. Derivative Litig.*, No. CV 2019-0907-MTZ, 2021 WL 4059934, at *34 (Del. Ch. Sept. 7, 2021) (inferring that the board did not request information about a software issue because Section 220 production "[did] not reveal evidence of

Rather than giving Plaintiff this inference, Chancery instead credited Defendants' preferred interpretation of the facts and drew an inference in Defendants' favor that the Board discussed remedial efforts, but that those discussions were intentionally left out of the Board minutes for fear of undermining the Company's defense of the N.Y. Actions. Opinion at 28-29 & n.109; MTD Transcript at 22: 14-17. This inference is illogical. Any remedial efforts undertaken by FedEx after the New York authorities alerted the Company that it was violating the law could not be used against the Company in litigation to show liability.[31] Thus, there was no reason to intentionally leave evidence of remediation efforts out of the Board's minutes. More importantly, at the pleading stage, Defendants are not entitled to an inference that the Board discussed remedial efforts

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any director seeking or receiving additional written information about [the software issue]").

[31] *See* Federal Rule of Evidence 407 ("When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: [] negligence; [or] [] culpable conduct."); *Greblewski v. Strong Health MCO, LLC*, 161 A.D.3d 1336, 1337 (N.Y. Sup. Ct. May 10, 2018) (stating that proof of subsequent remedial measures is not admissible to establish negligence or culpable conduct).

in un-minuted conversations, where there is no evidence in the record that any such conversations took place.[32]

The other key action the Court points to is that as part of FedEx's settlement with the City and State of New York, management implemented training programs and reformed FedEx's processes for detecting illegal shipments. Opinion at 26. These reformsdid not take place until 2019, [redacted] does not refute Plaintiff's allegations that the directors consciously failed to discharge their fiduciary duties.[33]

[32] *See Feuer v. Redstone*, No. CV 12575-CB, 2018 WL 1870074, at *14 (Del. Ch. Apr. 19, 2018) ("Perhaps discovery will bear out that these concerns actually were addressed as defendants imply, but the record currently before the court does not. To the contrary, there is no indication [of that] in plaintiff's pleading, or in the many documents defendants chose to place in the record from the Section 220 production.…"); *City of Hialeah Emps. Ret. Sys. v. Begley*, No. 2017-0463-JTL, 2018 WL 1912840, at *4 (Del. Ch. Apr. 20, 2018) ("[a]t the pleading stage, a court cannot determine what actually happened or choose among reasonable inferences").

[33] *See In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1966) (holding that "a sustained or systematic failure of the board to exercise oversight… will establish the lack of good faith that is a necessary condition to [director] liability"); *In re Abbott Lab'ys Derivative S'holders Litig.*, 325 F.3d 795, 809 (7th Cir. 2003) (describing the failure to address problems over a six-year period as "an inordinate amount of time" sufficient to "establish[] a lack of good faith").

The only actions the Chancery Court points to [redacted] are the Board (1) discussing the N.Y. Actions, and (2) forming the Demand Review Committee. *See generally* Opinion at 23-26. As for the discussions, Chancery accepted Defendants' argument that because the Board was kept apprised of the "ongoing enforcement actions," the Board received "reports specifically concerning compliance." Opinion at 23-24. [redacted] *See* MTD Transcript at 16:17-20; *id.* at 22:4-5 (Defendants' acknowledging that the updates merely concerned the "status of the litigation"); *see also* A078 [redacted]

[34] As such, Chancery's distinguishing of *Teamsters*, 2020 WL 5028065, at *20 on that basis is flawed. Opinion at 24.

[redacted] Instead, the Court is drawing that unwarranted inference in Defendants' favor.[35]

Lastly, Chancery found that because the Board formed a Demand Review Committee to investigate and respond to a stockholder demand, the directors must have acted in good faith. Opinion at 25. In doing so, the Chancery Court ignored that [redacted] The formation of the Demand Review Committee, without more, is insufficient to render unreasonable the inference that Defendants failed to act in good faith.

Under Delaware law, it is not enough to simply go "through the motions."[36] Rather, the directors must take "tangible action [ ] to remedy the underlying …

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[35] *Teamsters*, 2020 WL 5028065, at *22 ("The Section 220 documents put forward by the Defendants, however, at most give rise to multiple inferences, and at this pleading stage that means the Plaintiffs receive the inference."); *Voigt v. Metcalf*, No. CV 2018-0828-JTL, 2020 WL 614999, at *9 (Del. Ch. Feb. 10, 2020) (stating that plaintiffs are "entitled to 'all reasonable inferences' [and] if a document supports more than one possible inference ... [Plaintiffs] receive[] the inference"); *Feuer*, 2018 WL 1870074, at *14 n.146 ("Defendants argue that 'there is no requirement under Delaware law that board minutes adopt any level of particularity.' … True enough, but at this stage of the litigation all reasonable inferences must be drawn in favor of plaintiff.").

[36] *Massey*, 2011 WL 2176479, at *19.

issues."[37] In *Teamsters*, defendants argued that in response to red flags the Company took steps to improve its systems and controls, and therefore the plaintiff could not state a *Caremark* claim. *Id*. at *20. The court disagreed. It explained that while the defendants put forward evidence of "some Board-level (and Audit Committee-level review) … [they] put forth nothing to show *tangible action taken to remedy the underlying ... issues*." *Id.* at *25. The court explained that the Section 220 production must show "a tangible reaction to—*as opposed to a review of*—the mission critical compliance failures." *Id*. Noting that "the Defendants have not pointed to any part of the Section 220 production that refers to actions taken with regard to the shortcomings at [issue,]" the court found it reasonable to infer that the Board consciously ignored red flags. *Id.* at *20.

Similarly, in *Boeing*, the court held that the directors faced a substantial likelihood of liability for consciously ignoring red flags of potential safety issues. In finding an inference of bad faith, the court noted that after the board of directors learned of a potential engineering defect, the "Board did not request any information about it from management, and did not receive any until … over one week [later]." 2021 WL 4059935, at *34. And rather than investigate the safety

[37] *Teamsters*, 2020 WL 5028065, at *25.

issue, "the Board formally resolved to 'delay any investigation until the conclusion of the regulatory investigations.'" *Id*. On these facts, the court held that the Board "was aware or should have been aware that its response … fell short." *Id*.[38]

In *Massey*, where the board members did take some concrete steps toward improving miner safety, the court still credited plaintiffs' plausible inferences that the outside directors went "through the motions—rather than make good faith efforts to ensure that Massey cleaned up its act" because the directors were alleged "to have done nothing of actual substance to change the direction of the Company's real policy." 2011 WL 2176479, at *19.

[redacted]

Nonetheless, the Chancery Court concluded that the Board's prolonged failure to act was reasonable because remedial actions would have undercut the

[38] *See also Abbott*, 325 F.3d 795, 809 (finding a reasonable inference of bad faith not because the company did nothing to comply with the law, but because Abbott's directors "took no steps in an effort to prevent or remedy the situation"); *In re Intuitive Surgical S'holder Derivative Litig.*, 146 F. Supp. 3d 1106, 1118 (N.D. Cal. 2015) (holding demand futile where board monitored potentially illegal conduct and repeatedly discussed conduct at issue, but failed to act).

Company's defense of the N.Y. Actions. Opinion at 27; *see also id.* at 31 n.109. This would create a giant loophole for directors to continue to violate the law with impunity. Unsurprisingly, Delaware has repeatedly found bad faith where directors failed to act despite the existence of related litigation and/or investigations. *See, e.g.*, *Teamsters*, 2020 WL 5028065, at *21-25 (finding demand futile where board failed to address compliance risk despite existence of ongoing litigation and investigations into the same issues); *Boeing*, 2021 WL 4059935, at *34 (finding demand futile where board resolved to delay investigation until the conclusion of regulatory investigation).

Moreover, it is simply not true that halting the illegal practices would undercut the Company's defense of the N.Y. Actions. We know this because in similar circumstances the United Parcel Service, Inc. board of directors implemented a host of remedial efforts while defending itself against a substantially similar lawsuit by New York authorities, without undermining UPS's defense of that litigation. *See Horman*, 2017 WL 242571, at *13-14. [redacted]

Defendants do not assert that this undercut any defenses to the then-ongoing N.Y. Actions. In short, there is no basis for finding that the Board acted in good faith by allowing this illegal activity to continue.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests reversal of Chancery's decision.

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BIGGS AND BATTAGLIA

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CERTIFICATE OF SERVICE

I, Robert D. Goldberg, do hereby certify that on this 13th day of October, 2021, I have caused the foregoing Public Version of Appellant Deborah Pettry's Corrected Opening Brief to be filed and served electronically via File & ServeXpress upon the following:

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