IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STEVEN SIMONS, Plaintiff, v. BROOKFIELD ASSET MANAGEMENT INC., BCP IV GRAFTECH HOLDINGS LP, BPE IV (NON-CDN) GP LP, BROOKFIELD CAPITAL PARTNERS LTD., BCP GP LIMITED, DENIS TURCOTTE, JEFFREY DUTTON, DAVID GREGORY, DAVID RINTOUL, ANTHONY TACCONE, MICHEL DUMAS, BRIAN ACTON, CATHERINE CLEGG, LESLIE DUNN, and GRAFTECH INTERNATIONAL LTD., Defendants.	)	C.A. No. 2020-0841-SG **PUBLIC VERSION FILED:** March 29, 2021

DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR MOTIONS TO DISMISS PLAINTIFF'S AMENDED VERIFIED INDIVIDUAL, CLASS ACTION AND DERIVATIVE COMPLAINT

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Defendants submit this opening brief in support of their motions to dismiss Plaintiff's Amended Verified Individual, Class Action and Derivative Complaint (the "Amended Complaint") pursuant to Court of Chancery Rules 12(b)(6) and 23.1.[1]

PRELIMINARY STATEMENT

Plaintiff Steven Simons challenges GrafTech's 2019 repurchase of stock from its controlling stockholder, Brookfield. Plaintiff claims that GrafTech paid too much for Brookfield's shares even though the price paid by GrafTech was set by reference to a separate, simultaneous, arm's-length transaction between Brookfield and a sophisticated third party—at a discount to the prevailing market price. Because the GrafTech Board had a disinterested and independent majority at the time Plaintiff filed this lawsuit, and because Plaintiff did not make a pre-suit demand, Plaintiff is required to allege facts establishing that such a demand was futile in order to move forward with his lawsuit. His Amended Complaint does not satisfy that threshold requirement and should be dismissed.

At the outset, Plaintiff tries to sidestep the demand requirement altogether by making two separate but equally flawed claims. In Count III, Plaintiff seeks to

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[1] "Defendants" include GrafTech International, Ltd. ("GrafTech" or the "Company"), all of the current members of the Company's board of directors (the "Board"), and "Brookfield," which refers to Brookfield Asset Management Inc. and its affiliated entities named as defendants in this action.

overturn the GrafTech board's appointment of an independent director with no ties to the Company's controlling stockholder. This novel attempt to alter the composition of GrafTech's board is based on a patent misreading of the relevant stockholder agreement and GrafTech's certificate of incorporation. Contrary to Plaintiff's allegation, the plain language of both documents permitted the appointment of the independent director in question.

In Count I, Plaintiff asserts a "direct" claim on behalf of GrafTech's minority stockholders. He claims that GrafTech's supposed overpayment for the Brookfield shares breached fiduciary duties owed to, and individually harmed, the minority stockholders. This claim is also invalid. A claim for corporate overpayment, like Plaintiff's claim here, is quintessentially derivative, and cannot be asserted directly.

Because Counts I and III both fail, Plaintiff is left exactly where he began—needing to allege facts demonstrating that a pre-suit demand on this board, with its disinterested and independent majority, was futile. He fails to do so.

First, to the extent Plaintiff tries to allege that at least five directors on GrafTech's nine-member board are not independent or disinterested, he offers only vague allegations about remote professional connections and conclusory assertions relating to fees and income that do not demonstrate that such monies were material. Those allegations are insufficient under well-established law.

Second, Plaintiff fails to allege that a majority of the Board faces a substantial likelihood of liability for approving the repurchase. In suggesting the opposite, Plaintiff glosses over several key facts: (1) the stock buyback was approved by an empowered Audit Committee composed of independent directors; (2) the repurchase was consistent with the Company's existing capital management policy and, rather than diluting the Company's minority stockholders, it *increased* their relative equity stake; and (3) the price of the repurchase (at a discount to the market price of GrafTech stock) was not set via a negotiation between GrafTech and Brookfield, but rather by reference to Brookfield's arm's-length transaction with Morgan Stanley, a sophisticated third party that had no reason to overpay.

For all of these reasons, the Court should dismiss Plaintiff's claims.

STATEMENT OF FACTS[2]

A. GrafTech And Its Long-Term Investor, Brookfield

Founded in 1886, GrafTech is a Delaware corporation headquartered in Brooklyn Heights, Ohio. (¶ 6.) GrafTech manufactures graphite electrode

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[2] Paragraph references ("¶__") are to the Amended Complaint, any well-pled factual allegations of which Defendants accept as true solely for purposes of these motions.

For purposes of these motions to dismiss and by agreement of the parties (Ex. 1, Confidentiality Agmt. ¶ 22), the Court may consider the documents that GrafTech produced in response to Plaintiff's February 13, 2020 demand for books and records pursuant to 8 *Del. C.* § 220, *see Amalgamated Bank v. Yahoo!, Inc.*, 132 A.3d 752 (Del. Ch. 2016). Such materials and others the Court may properly consider on these motions to dismiss are attached as exhibits to the Transmittal products that are essential to the production of electric arc furnace steel and other metals. (*Id.*) Brookfield is an alternative asset management company that has been a GrafTech investor since its first days as a public company. (¶ 7.) After acquiring GrafTech in 2015, Brookfield took the Company public in 2018. Pursuant to a stockholder rights agreement (the "Stockholder Agreement"), three of Brookfield's designees serve on the Board. (¶¶ 16-18; Ex. 2 (Stockholder Agmt.).)

The individual defendants are the current members of the Board. (¶¶ 12-21.) Five of the nine director defendants—Anthony Taccone, Michael Dumas, Brian Acton, Catherine Clegg, and Leslie Dunn—are independent, outside directors. (Ex. 3, 4/3/20 Form DEFA at 6; *see also* ¶¶ 16-20.)[3] David Rintoul is GrafTech's President and CEO. The other three director defendants—Denis Turcotte, Jeffrey Dutton, and David Gregory—are Managing Directors of Brookfield. (¶¶ 12-14.)

B. The Company's Plan For Managing Its Capital Structure

Following its April 2018 IPO and other subsequent stock transactions, GrafTech reassessed its capital structure, driven by its desire to return cash to

Unsworn Declaration of R. Garrett Rice in support of these motions, and are cited as "Ex. __."

[3] "At this motion to dismiss stage, this Court may take judicial notice of publicly available facts such as those contained in filings made with the SEC." *Higher Educ. Mgmt. Grp., Inc. v. Mathews*, 2014 WL 5573325, at *12 n.73 (Del. Ch. Nov. 3, 2014).

stockholders while paying down debt. (¶ 46; *see also* Ex. 4, 4/29/19 Capital Structure Mgmt. Presentation at GRAFTECH_304 (describing [redacted]).) The Board considered the pros and cons of various methods of returning cash to stockholders, including via dividends, open-market repurchases of stock, and direct repurchases. (*See* Ex. 4, 4/29/19 Capital Structure Mgmt. Presentation at GRAFTECH_303 (information to "Determine Preferred Method of Shareholder Returns").)

In mid-2019, the Board considered and adopted a plan to repurchase up to $100 million of publicly traded shares on the open market, which would "return capital to the public stockholders and support GrafTech's stock price." (¶¶ 46-47, 49; *see also* Ex. 4, 4/29/19 Capital Structure Mgmt. Presentation at GRAFTECH_290 (identifying share repurchase as one of two preferred methods of stockholder returns); Ex. 5, 7/30/19 Board Minutes at GRAFTECH_376-382; Ex. 6, 7/30/19 Capital Structure Mgmt. Presentation at GRAFTECH_359 (recommending approval of $100 million share repurchase program and implementation via 10b5-1 share repurchase plan).) Pursuant to this program, GrafTech purchased more than one million shares of its stock on the open market between the end of July and October 2019. (¶¶ 46-47, 49-51.)

After adopting the public repurchase plan, the Company continued to consider how best to manage its capital structure. At a November 6, 2019 meeting, the Board discussed GrafTech's capital structure and received a presentation on the topic. (¶ 52; Ex. 7, 11/6/19 Capital Structure Mgmt. Presentation at GRAFTECH_000400-408.) At this meeting, the Board discussed the Company's financial performance, including its forecasted revenue, adjusted EBITDA, operating cash flow, and free cash flow. (¶¶ 54-55; Ex. 8, Annex A to 11/6/19 Officer's Certificate Re: Funds Available for Paying Dividend and Share Repurchase Plan at GRAFTECH_000423-424.) Three weeks later, the Board met again to discuss possible equity transactions. (¶ 58; Ex. 9, 11/27/19 Board Presentation at GRAFTECH_000429.)

Among the possible transactions considered was a block trade coupled with a direct buyback of GrafTech shares held by Brookfield. (*Id.*) Under this option, Brookfield would sell a block of shares through a process in which investment banks would bid on shares owned by Brookfield (the "Block Trade"), and then GrafTech would purchase another block of shares from Brookfield at the same price (the "Share Repurchase").

As the Board contemplated various options, it weighed considerations favoring direct share repurchases over other alternatives:

[redacted]

(Ex. 7, 11/6/19 Capital Structure Mgmt. Presentation at GRAFTECH_000408.)

Ultimately, the Board identified additional benefits of the Share Repurchase and the Block Trade:

- [redacted]
- [redacted]
- [redacted]

- [redacted]

(Ex. 10, 12/3/19 Capital Structure Mgmt. Presentation at GRAFTECH_000433.)

C. The Board Delegates All Authority To The Audit Committee To Make Decisions About The Share Repurchase

Having long considered various capital management options, the directors were well versed in the Company's alternatives. At a meeting on December 3, 2019, the Board delegated to the Audit Committee—composed of independent directors Dumas, Acton, and Taccone—"the full authority of the Board" to make decisions about the Share Repurchase, including whether to conduct the Share Repurchase and, if so, on what terms. (¶ 66; Ex. 11, 12/3/19 Board Minutes at GRAFTECH_487.)

Later that same day, the Audit Committee resolved to approve the Share Repurchase at a price to be set by reference to the Block Trade transaction, relying on projections of available cash flow, a certificate of the Company's Chief Financial Officer regarding the fair value of the Company's assets and liabilities (which relied on a solvency opinion from a financial advisory firm), and the Company's audited financial statements for 2018 and unaudited financial statements for the first three quarters of 2019, among other things. (Ex. 12, 12/3/19 Audit Comm. Minutes at GRAFTECH_466.)

D. The Company Announces The Block Trade And Share Repurchase

On December 5, 2019, before the stock market opened, the Company announced the Block Trade and Share Repurchase in a press release. (¶ 74.) As described in the press release, Brookfield "launched a Rule 144 secondary block trade to sell 11.18 million shares of the Company's common stock to Morgan Stanley." (¶ 74; Ex. 13, 12/9/19 Form 8-K at 2.) Then, "[s]ubject to the completion of the block trade, the Company will repurchase from the selling stockholder $250,000,000 of common stock at a per share price equal to the price per share payable by the broker-dealer in the block trade." (Ex. 13, 12/9/19 Form 8-K, Ex. 99.1.)

The press release explained the Share Repurchase in terms of the Company's previously disclosed capital allocation strategy, noting that the Share Repurchase was "consistent with management's stated intent regarding potential uses of cash flow," "in-line with GrafTech's capital allocation strategy," and "a tax-efficient and accretive use of cash." (*Id.*) The Share Repurchase, which GrafTech funded with cash on hand, was conditioned on the closing of the Block Trade, but the Block Trade was not conditioned on the completion of the Share Repurchase. (*Id.*)

Ultimately, Brookfield sold 11.2 million shares of GrafTech stock to Morgan Stanley at $13.125 per share, and the Company repurchased $250 million of GrafTech stock (about 19.05 million shares) at the same per-share price. (¶ 3.)

Contrary to the Amended Complaint's erroneous allegations, the $13.125 price was a discount to GrafTech's most recent closing price of $13.93 on December 4, 2019.[4]

E. The Board Adds An Independent Director

On August 5, 2020, the Board appointed Leslie Dunn to serve as an independent director. (¶ 35.)

F. Plaintiff Makes A Section 220 Demand And Then Files This Lawsuit

Plaintiff has owned GrafTech stock since October 17, 2018 (¶ 5), and, in February 2020, sent a Section 220 demand to the Company. Pursuant to an agreed-upon confidentiality agreement that permitted the Company to redact non-responsive information, the Company produced 839 pages of documents in late April and early May 2020.[5]

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[4] The allegation in paragraph 85 of the Amended Complaint that the $13.125 buyback price was at a premium to the opening and closing prices on December 5, 2019 is misleading, because the transaction occurred and was announced prior to the market opening that day. The $13.125 price was a 6% discount to the closing price of $13.93 on December 4. (¶ 87.)

[5] Plaintiff gripes that certain materials were produced with redactions (*e.g.*, ¶¶ 44, 58), but those redactions were permitted by the confidentiality agreement, which also provided a mechanism—never exercised by Plaintiff—to challenge any redactions he believed were improper. (Ex. 1, Confidentiality Agmt. ¶ 2.) Nor did Plaintiff raise any issue with GrafTech or its counsel prior to filing this lawsuit.

On September 30, 2020, Plaintiff filed this lawsuit. Defendants moved to dismiss the complaint and filed a brief in support of their respective motions on December 22, 2020. Rather than oppose those motions, Plaintiff filed his Amended Complaint on February 5, 2021. In the Amended Complaint, which remained substantially the same as the original complaint, Plaintiff asserts two counts relating to the alleged overpayment in the Share Repurchase (Count I, asserted as a direct claim; Count II, asserted as a derivative claim), and one count challenging the appointment of independent director Dunn (Count III).

ARGUMENT

I. COUNT III MUST BE DISMISSED BECAUSE IT MISCONSTRUES THE CERTIFICATE AND THE STOCKHOLDER AGREEMENT.[6]

A motion to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6) must be granted if "the plaintiff would not be entitled to relief under any set of provable facts supporting [its] claims." *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 100 (Del. 2013). When applying this standard, the Court is required to "accept all well-pleaded allegations as true and draw all reasonable inferences in the plaintiff's favor," but it is not required to "credit

[6] Defendants first address Count III of the Amended Complaint because the validity of Dunn's appointment bears on the demand-futility analysis. Defendants next demonstrate that Count I (the "direct" claim for overpayment) can be asserted only derivatively. In the final section, Defendants address Plaintiff's failure to plead particularized facts showing that at least half of the Board could not have considered a demand for the derivative claim asserted in Count II.

conclusory allegations that are unsupported by specific facts or draw unreasonable inferences in the plaintiff's favor." *Id.*

In Count III of the Amended Complaint, Plaintiff challenges the validity of the appointment of independent director Leslie Dunn to the Board. Plaintiff contends that Dunn's appointment violated the Stockholder Agreement in two ways: (1) the expansion of the Board to nine directors violated the Stockholder Agreement, and (2) under the Stockholder Agreement, Brookfield was required to, but did not, designate Dunn as the ninth director. (¶¶ 130-36.) Plaintiff is wrong on both counts. The plain language of both the Stockholder Agreement and the Company's Amended and Restated Certificate of Incorporation (the "Certificate") allowed for the appointment of Dunn as a non-Brookfield-nominated independent director.[7]

[7] "[C]ertificates of incorporation are 'interpreted using standard rules of contract interpretation which require a court to determine from the language of the contract the intent of the parties .... If no ambiguity is present, the court must give effect to the clear language of the Certificate.'" *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 171 (Del. Ch. 2005), *aff'd*, 906 A.2d 114 (Del. 2006). The Stockholder Agreement, as a contract between the parties to it, is governed by the same rules. *Cf. McIlquham v. Feste*, 2002 WL 244859, at *3 (Del. Ch. Feb. 13, 2002) ("The Stockholders Agreement is a fully integrated contract, by its terms.").

A. The Stockholder Agreement And The Certificate Permit The Board To Expand To Nine Directors.

Plaintiff erroneously asserts that the Board's expansion to nine directors violated the Stockholder Agreement and the Certificate. (¶¶ 130, 132, 135.) According to Plaintiff, Dunn's appointment was invalid because the Stockholder Agreement "sets the exact size" of the Board and "does not authorize the Board to increase its size beyond eight members." (¶¶ 131-32.) Plaintiff is wrong. As demonstrated below, the Certificate permitted the Board to expand to a maximum of eleven directors, while the plain language of the Stockholder Agreement did not limit the Board to just eight members at the time of Dunn's appointment.

The Certificate contains a freestanding provision authorizing the Board to have up to eleven directors. (Ex. 14, Certificate, Article VI, Section 1(a).) Within that eleven-member ceiling, the Certificate provides that the "exact number of directors" is "[s]ubject to" the Stockholder Agreement. (*Id.*) While the Stockholder Agreement required the Board's expansion to eight directors by a certain date (Ex. 2, Stockholder Agmt. § 1.1(b)), it contains no provision limiting the size of the Board after that date.

Article I, Section 1.1(a) of the Stockholder Agreement fixed the size of the Board at seven members as of the close of the Company's IPO in April 2018. (*Id.* § 1.1(a) ("[T]he total number of directors constituting the [Board] [is] to be fixed at seven (7) directors as of the IPO Closing[.]").) Plaintiff concedes that, in April

2018, the seven-member Board satisfied the requirements of Section 1.1(a). (¶¶ 34, 131.) Plaintiff further concedes that the March 2019 expansion of the Board from seven to eight members comported with Section 1.1(b). (¶ 132.) Under Section 1.1(b), the Board was required to expand to eight members no later than April 2019, the first anniversary of the IPO. (Ex. 2, Stockholder Agmt. § 1.1(b) ("On or before the first anniversary of the IPO Closing, … the total number of directors constituting the Board [shall] be increased by one (1) director to a total of eight (8) directors[.]").)

Once the Board reached eight members as required under Section 1.1(b), the Stockholder Agreement imposed no further requirements concerning the size of the Board. It neither specifies when nor prescribes under what circumstances the Board may or must expand beyond eight directors.[8] Nor does it restrict further expansion of the Board up to the limit set in the Certificate of not "more than eleven individuals." (Ex. 14, Certificate, art. VI, § 1(a).) Instead, the Stockholder Agreement is silent as to expansion beyond eight members.

Nevertheless, Plaintiff asserts that the August 2020 expansion to nine members violated the Stockholder Agreement because Section 1.1(b) supposedly

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[8] The Stockholder Agreement does address Brookfield's rights to nominate directors for the Board, as discussed below. *See infra* at 18-20. But that provision concerns only who may be nominated, not how many directors may serve.

capped the Board at eight members. (¶ 132.) According to Plaintiff, the Certificate's authorization of up to eleven members is "subject to" the Stockholder Agreement and, unless and until the Stockholder Agreement is amended, the purported eight-member cap set by the Stockholder Agreement controls. (¶ 24.)

Plaintiff's interpretation of the Stockholder Agreement violates the "most central rule of contract interpretation, which is that a contract must be interpreted in accordance with its plain terms as they would normally be understood." *Senior Hous. Capital, LLC v. SHP Senior Hous. Fund, LLC*, 2013 WL 1955012, at *25 (Del. Ch. May 13, 2013) (rejecting argument inconsistent with plain language of agreement). Contrary to Plaintiff's assertion, the Stockholder Agreement is silent on the Board's expansion beyond the eighth director, and so there is nothing to which the Certificate is "subject" with respect to the "exact number of directors." (¶ 29.)

Plaintiff further asserts that expansion beyond eight members was prohibited by Section 1.1(f)(i) of the Stockholder Agreement. That provision provides that, so long as Brookfield has the right to nominate directors under Section 1.1(c), GrafTech must "to the extent necessary cause the total number of directors constituting the Board to be fixed at a number sufficient to permit such [Brookfield-nominated] persons to be added as members of the Board." (¶ 135; Ex. 2, Stockholder Agmt. § 1.1(f).) Plaintiff contends that Section 1.1(f)(i) means the Board either must be "fixed at eight members so that Brookfield could nominate exactly 37.5%, or three members" or must "expand to a size large enough to allow Brookfield to nominate exactly 37.5%, which means at least sixteen members (i.e., 37.5% x 16 = 6)." (¶ 135; *see also* ¶ 26.) Because the Certificate limits the size of the Board to eleven members (and thus the Board could not expand to sixteen), Plaintiff essentially argues that the Board can have only eight members—no more and no less. (¶ 135.)

That interpretation of Section 1.1(f)—that it mandates a Board size of precisely eight (*id.*)—must be rejected, because it renders superfluous the language of Section 1.1(c) of the Stockholder Agreement.[9] If the number of Brookfield-designated directors must be "exactly" 37.5% as Plaintiff contends (¶ 135), then there would be no need for Section 1.1(c) to include language specifying "the higher of" 37.5% of the Board or three directors. (Ex. 2, Stockholder Agmt. § 1.1(c).) The "higher of" language in Section 1.1(c) has meaning only if the Board is permitted to have some number of directors ***other than*** eight. In other words, only if the number of directors is nine or ten would the "higher" than

[9] Plaintiff misconstrues Section 1.1(f), which is a provision to give effect to Section 1.1(c). Rather than "fixing" the size of the Board at eight, Section 1.1(f) means that, in the event Brookfield's right to nominate an additional director under Section 1.1(c) were to be triggered (*see infra* at 18-20), the size of the Board must be "fixed" to permit the rest of the actions set forth in Section 1.1(f) to occur—i.e., the nomination process itself and the stockholder vote.

language have any operative effect. Plaintiff's interpretation nullifies the words in Section 1.1(c), in violation of fundamental principles of Delaware contract law, and must be rejected. *See NAMA Holdings, LLC v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007) ("Contractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court."), *aff'd*, 945 A.2d 594 (Del. 2008); *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 741 n.69 (Del. Ch. 2008) ("'An interpretation which gives effect to all provisions of the contract is preferred to one which renders a portion of the writing superfluous, useless or inexplicable. A court will interpret a contract in a manner that gives reasonable meaning to all of its provisions, if possible.'") (quoting 11 Williston on Contracts § 32:5 (4th ed.)).[10]

Plaintiff's tortured interpretation of the Stockholder Agreement should not be substituted for the plain language of the Certificate and the Stockholder Agreement, which permitted the expansion of the Board to nine directors.

[10] If the intention truly had been to cap the Board at eight directors beginning a year after the IPO and to require Brookfield to designate three of the directors, the Stockholder Agreement surely would have employed very different and simpler language than what appears in Section 1.1(c). In that case, the Agreement would have stated something to this effect: "From and after the first anniversary of the IPO, the Board shall consist of eight directors, three of whom shall be designated by Brookfield."

B. The Stockholder Agreement Did Not Require Brookfield To Nominate The Ninth Director.

Plaintiff separately alleges that Dunn's appointment, as an independent director, was invalid because the Stockholder Agreement required Brookfield to nominate Dunn to be the ninth director but it failed to do so. (¶¶ 134, 136.) This argument distorts the language of the Stockholder Agreement. Contrary to what Plaintiff alleges, the plain language of the Stockholder Agreement did not permit, much less require, Brookfield to nominate more than three directors to a nine-member Board. Because the Board already included three Brookfield-nominated directors, Brookfield would have breached the terms of the Stockholder Agreement if it nominated Dunn as the ninth director.

Section 1.1(c) of the Stockholder Agreement grants Brookfield the right to nominate "***the higher of*** 37.5% of the total number of directors or three (3) directors" where it owns at least 25% of GrafTech stock. (Ex. 2, Stockholder Agmt. § 1.1(c) (emphasis added).) This provision thus allows Brookfield to nominate either three directors or some number of directors greater than three—so long as that number does not increase the percentage of Brookfield-nominated directors beyond 37.5% of the Board. Under a plain reading of those terms, Brookfield is entitled to nominate only three directors whether the Board has eight members (37.5% of 8 = 3), nine members (37.5% of 9 = 3.375), or ten members (37.5% of 10 = 3.75). Because it cannot nominate fractions of people, Brookfield is not entitled to nominate a fourth director until the Board expands to eleven directors (37.5% of 11 = 4.125).

Plaintiff argues that, because 37.5% of 9 is 3.375, Brookfield was required to "round up" and nominate its fourth director when the Board expanded to nine. (¶¶ 25, 134.) Plaintiff's nonsensical interpretation contradicts the plain language of Section 1.1(c): if Brookfield were to have nominated the ninth director, then Brookfield would have nominated 44% of the Board (*i.e.*, 4 of 9 = 44.4%), and 44% is higher than the 37.5% that Brookfield was entitled to nominate under Section 1.1(c). Plaintiff's interpretation thus re-writes the Stockholder Agreement, by providing that Brookfield would be *required* to nominate *more than* 37.5% of the Board. (*See* ¶ 25.) Alternatively, Plaintiff suggests that, if Brookfield was not entitled to nominate its fourth director when the Board expanded to nine, then the Board was not permitted to expand at all. (¶ 135.) Plaintiff contends that the Stockholder Agreement requires Brookfield to nominate *exactly* 37.5% of the Board. (*Id.*) But that interpretation contradicts the plain language of Section 1.1(c), which grants Brookfield the right to nominate "***the higher of*** 37.5% of the total number of directors or three (3) directors." (Ex. 2, Stockholder Agmt. § 1.1(c) (emphasis added).) As explained above, the "higher of" language is without any meaning if Plaintiff's interpretation is accepted.

Moreover, even if the Stockholder Agreement *permitted* Brookfield to nominate the ninth director, it did not *require* Brookfield to do so. Section 1.1(c) plainly provides that, so long as Brookfield owns a specified amount of the Company's stock, Brookfield "shall have the ***right***" to nominate a director. (Ex. 2, Stockholder Agmt. § 1.1(c) (emphasis added).) That "shall have the right to" provides Brookfield an option that it can elect to exercise (or not) is further confirmed by other provisions in the Stockholder Agreement that create obligations where specified conditions are satisfied. (*Cf. id.* § 1.1(a) (Brookfield and the Company "shall take all Necessary Action" to fix the size of the Board at seven); *id.* § 1.1(b) (Brookfield and the Company "shall take all Necessary Action" to expand the Board to eight); *id.* § 1.1(e) (Brookfield "shall take all Necessary Action" to have a sufficient number of independent directors).)[11]

Because Plaintiff's interpretation of the Stockholder Agreement and the Certificate is contrary to the plain language of those documents, Plaintiff has failed to state a claim to challenge the validity of Dunn's appointment.

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[11] Even if the Stockholder Agreement imposed an obligation on Brookfield to nominate the ninth director (and not merely granted a right to do so), Plaintiff has no standing to sue for that purported breach because the Stockholder Agreement expressly provides that it has no third-party beneficiaries. (Ex. 2, Stockholder Agmt. § 5.10.)

C. The Board Did Not Breach Its Fiduciary Duties By Appointing Another Independent Director.

In a single paragraph tacked on to the end of Count III, Plaintiff asserts in conclusory fashion that Dunn's appointment to the Board was itself a breach of fiduciary duty because it was "an invalid sham" to insulate the Board from potential liability stemming from the Share Repurchase. (¶ 139.) That assertion fails to state an actionable claim.

First, "[i]t is a well-settled principle that where a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim. In that specific context, any fiduciary claims arising out of the same facts that underlie the contract obligations would be foreclosed as superfluous." *Nemec v. Shrader*, 991 A.2d 1120, 1129 (Del. 2010). Because Plaintiff's breach of fiduciary duty argument concerning Dunn's appointment arises out of his misinterpretation of the Stockholder Agreement, his ancillary fiduciary-duty claim is "foreclosed as superfluous." *Id.*; *see also Grayson v. Imagination Station, Inc.*, 2010 WL 3221951, at *8 (Del. Ch. Aug. 16, 2010) (dismissing fiduciary claim as duplicative of contract claim where the fiduciary claim could not "be maintained independently of the contract claim"; "[The defendant] cannot be found to have breached his fiduciary duty by causing [the company] to breach its contractual obligations under the Voting Agreement if the Voting Agreement was not violated.").

As demonstrated above, the expansion of the Board to nine members and the appointment of Dunn as an independent director complied with both the Stockholder Agreement and the Certificate. *See also Grayson*, 2010 WL 3221951, at *8 (dismissing fiduciary claim where "the success of [the fiduciary claim] completely hinges on whether [the defendant] breached the Voting Agreement"). Under Delaware law, Plaintiff cannot fashion a fiduciary claim from his non-existent contract claim.

Second, Plaintiff alleges no facts in support of his theory that the Board appointed Dunn specifically to "insulate" itself from liability. (¶ 139.) In fact, Plaintiff concedes that Dunn could exercise her independent and disinterested judgment with respect to a demand. Moreover, Plaintiff alleges no facts from which it could reasonably be inferred that the Board knowingly caused a violation of the Certificate or the Stockholder Agreement. Nor could Plaintiff allege such facts, because there is no dispute here that both the Company and Brookfield interpret the Stockholder Agreement and the Certificate the same way. In other words, to plead a knowing violation of the Stockholder Agreement or the Certificate, Plaintiff must allege facts showing that the Board believed that Brookfield was required to nominate the ninth director to comply with the Stockholder Agreement and the Certificate. But, as evidenced by the arguments presented here, the Board did not believe that Brookfield had the ability to nominate a fourth director, much less the obligation to do so.

Instead of alleging facts to support his "insulation" theory, Plaintiff merely points to the fact that the appointment occurred during the seven-and-a-half month interlude after he sent his Section 220 demand and before he filed this lawsuit. (¶¶ 20, 35.) Plaintiff alleges nothing about the process by which the new director was added to the Board, how long the Board had been considering expansion, or what factors the Board considered when evaluating candidates. Rather, Plaintiff simply asks this Court to infer (without any factual support) that the appointment must have been a breach of fiduciary duty.[12] (¶ 139.) But this Court gives "[n]o credence" to such "conclusory allegations which lack the support of specific factual allegations." *Grayson*, 2010 WL 3221951, at *4.

Under Plaintiff's proposed rule, a board must effectively remain static for some unstated (but apparently lengthy) period following a lone stockholder's request to inspect a company's books and records, or else face potential fiduciary liability. Here, Plaintiff made his Section 220 demand in February 2020, GrafTech

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[12] Had Plaintiff exercised his rights under Section 220 and made another demand to inspect documents before challenging Dunn's appointment, he would have learned that the Governance and Compensation Committee discussed potential expansion of the Board and prospective candidates at least as early as August 2019 (months before Plaintiff submitted his Section 220 demand in February 2020).

produced documents in late April and early May, and this suit was not filed until September 30. Defendants are aware of no Delaware authority suggesting that the composition of a board of directors must remain indefinitely frozen following a Section 220 demand. *Cf. United Food & Commercial Workers Union v. Zuckerberg*, 2020 WL 6266162, at *18 (Del. Ch. Oct. 26, 2020) (noting that "[c]hanges in board composition are common").

Ultimately, the Court should not ignore the context of Plaintiff's singular assertion. Plaintiff seeks to unseat a director whose appointment indisputably made the Board ***more independent*** and ***less controlled*** by the majority stockholder, to the benefit of all of the minority stockholders, including Plaintiff. (*See*, *e.g.*, ¶ 105.) Count III should be dismissed.

II. COUNT I MUST BE DISMISSED BECAUSE IT CAN BE ASSERTED ONLY DERIVATIVELY, NOT DIRECTLY.

This Court does not tolerate attempts to "[a]void[] the demand requirement by restating a derivative claim under the guise of a direct claim." *Protas v. Cavanagh*, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012); *see also Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004) ("Plaintiffs' classification of the suit is not binding"). "'[A]lleging the same fundamental harm in a slightly different way' is the type of bootstrap allegation that this Court has consistently rejected." *Protas*, 2012 WL 1580969, at *6. Count I is such a claim.

Count I purports to assert a direct fiduciary-duty claim against the Board, alleging that GrafTech "overpaid" for the shares it purchased from Brookfield. (¶ 124.) This corporate overpayment claim is "quintessentially derivative." *Klein v. H.I.G. Capital, L.L.C.*, 2018 WL 6719717, at *6 (Del. Ch. Dec. 19, 2018) (dismissing overpayment claims that plaintiff asserted directly); *see also In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 819 (Del. Ch. 2005) (holding that fiduciary-duty claims alleging payment of an excessive merger premium were derivative), *aff'd*, 906 A.2d 766 (Del. 2006).

To determine whether a claim is derivative or direct, this Court asks two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley*, 845 at 1033. Applying the *Tooley* test here confirms that GrafTech, not its individual stockholders, both (1) suffered any alleged harm resulting from the supposed overpayment, and (2) would receive the benefit of any recovery in an overpayment case. Because this overpayment claim cannot be asserted directly, Count I must be dismissed.

A. GrafTech Suffered Any Harm Resulting From The Alleged Overpayment.

Under established Delaware law, overpayment claims, like the one Plaintiff alleges here, are derivative because the corporation—not its individual stockholders—suffers the alleged harm. *J.P. Morgan*, 906 A.2d at 819 ("any alleged harm was suffered by [the corporation]," and "[t]he plaintiffs, if they were harmed at all, were harmed indirectly and only because of their ownership in [the corporation]"); *Feldman v. Cutaia*, 956 A.2d 644, 660 (Del. Ch. 2007) (finding that overpayment claim was derivative because "the damages allegedly flowing from the [purportedly direct claim] are exactly the same as those suffered [by the corporation] in the underlying [derivative] claim, [and thus] the injury alleged in the complaint is properly regarded as injury to the corporation and not to the class"), *aff'd*, 951 A.2d 727 (Del. 2008); *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988) (holding that claim alleging waste of corporate assets through overpayment of "unnecessary options, bonuses, fees and expenses" was "entirely derivative in nature").[13]

Plaintiff fails to allege any direct injury to individual stockholders. To allege a direct injury—as Plaintiff purports to do here—he "must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." *J.P. Morgan*, 906 A.2d at 817; *see*

[13] Plaintiff essentially concedes the derivative nature of the claim by alleging that the Share Repurchase injured only GrafTech. As confirmed in the Prayer for Relief, Plaintiff seeks disgorgement by Brookfield "*to GrafTech*" and an order "requiring Brookfield to return the $250 million" paid to it by GrafTech. (Am. Compl., Prayer for Relief at 71-72.)

also El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff, 152 A.3d 1248, 1251 (Del. 2016) ("[T]o determine if a claim is derivative or direct requires the usual examination of who owns the claim."). But Plaintiff has not made a showing that any duty owed to him was breached. Instead, Plaintiff attempts to recast the harm to GrafTech from the supposed overpayment into unique injuries suffered by GrafTech's minority stockholders. (*See* ¶ 124.) Courts, however, disregard creative pleading and focus on the nature of the alleged injury. Here, the injury is straightforward—the depletion of corporate assets due to supposed overpayment. *See Protas*, 2012 WL 1580969, at *6 ("Though artfully presented as a claim for the unfair treatment of a particular class of stock, the harm associated with the Plaintiff's 'direct' claim is entirely dependent on the harm caused to the Fund by the alleged overpayment for the Preferred Shares.").

Plaintiff's artful pleading does not alter this conclusion. Plaintiff complains that the Share Repurchase afforded Brookfield an opportunity that was not available to Plaintiff. (¶ 124.) In *Protas*, this Court held that this "missed opportunity injury" is not a unique one giving rise to a direct claim. 2012 WL 1580969, at *6; *see also Brook v. Acme Steel Co.*, 1989 WL 51674, at *2 (Del. Ch. May 11, 1989) (plaintiff's claims were derivative; "all of [the company's] stockholders shared in the injury caused by the allegedly excessive payment").

Likewise, Plaintiff's argument that the cash GrafTech used in the Share Repurchase "could have been used to pay all stockholders a dividend" (¶ 124) has been rejected. As this Court explained in *Protas*, while "overpayment may diminish the value of the corporation's stock or deplete corporate assets that might otherwise be used to benefit the stockholders, such as through a dividend, these harms are 'merely the unavoidable result … of the reduction in the value of the entire corporate entity, of which each share of equity represents an equal fraction.'" 2012 WL 1580969, at *6.

Nor does mischaracterization of the effect of the Share Repurchase save Plaintiff's purported direct claim from dismissal. Plaintiff now also seeks cancellation of Brookfield's shares "to remedy the voting and equity power dilution suffered by minority stockholders." (Am. Compl., Prayer for Relief at 71.) Contrary to Plaintiff's description, the Share Repurchase increased—rather than diluted—the relative equity stake of the Company's minority stockholders. As a result, Plaintiff cannot state a derivative claim by alleging a nonexistent injury. *See J.P. Morgan*, 906 A.2d at 817 (rejecting plaintiffs' reliance "on the claim of 'dilution' in an attempt to frame the harm as direct").

B. Any Recovery In This Case Would Benefit GrafTech.

The "underlying legal theory" of overpayment claims "is plainly derivative in nature" because "[t]he benefit of any recovery to remedy [the] alleged harm logically would go to the Company rather than any specific stockholder(s)." *Klein*, 2018 WL 6719717, at *9; *see also Feldman*, 951 A.2d at 733 (a claim is derivative "[w]here all of a corporation's stockholders are harmed and would recover *pro rata* in proportion with their ownership of the corporation's stock solely because they are stockholders").

The Delaware Supreme Court's *El Paso* decision is instructive. There, the Supreme Court found that the plaintiff's overpayment claim was exclusively derivative. 152 A.3d at 1264. The Court endorsed the Court of Chancery's reasoning that, because the alleged injury was corporate overpayment, "'returning the full amount [of the overpayment] to the entity' [is] the 'most obvious' remedy," and noted that any recovery that would be had by individual stockholders would "be proportionate to [the stockholder's] ownership interest." *Id.*

The same logic applies here: Plaintiff's claim is that the Board caused GrafTech to pay too much for the Share Repurchase. (¶¶ 123-24.) That injury would be remedied by Brookfield returning the amount of the alleged overpayment to GrafTech, thereby making GrafTech whole. Any subsequent benefit that stockholders would derive would be solely on a pro rata basis, in accordance with their percentage ownership of GrafTech. Thus, under *Tooley*'s second prong, Plaintiff's claims are derivative and not direct.

In sum, the Court should dismiss Count I because, under both prongs of the *Tooley* test, Plaintiff cannot assert his overpayment claim directly.

III. COUNT II MUST BE DISMISSED BECAUSE THE AMENDED COMPLAINT FAILS TO PLEAD DEMAND FUTILITY AS TO AT LEAST FIVE DIRECTORS.

Because Plaintiff's claims are derivative and not direct, Plaintiff must plead particularized facts showing that his conceded failure to make a pre-suit demand on the Board (¶ 104) is excused. Plaintiff's failure to do so is fatal.

"The demand requirement recognizes a principal tenet of corporate law: that 'directors, rather than shareholders, manage the business and affairs of the corporation.'" *Ryan v. Armstrong*, 2017 WL 2062902, at *10 (Del. Ch. May 15, 2017), *aff'd*, 176 A.3d 1274 (Del. 2017). Having failed to make a demand on the Board, Plaintiff now faces the heavy burden to show that his failure is excused because his "particularized factual allegations … create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand." *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993).

The *Rales* test applies here because Plaintiff "challenges a decision approved by a board committee consisting of less than half of the directors who would have considered a demand, had one been made." *Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44, 56–57 (Del. Ch. 2015) (applying *Rales* where challenged agreement was approved by audit committee consisting of three members of a nine-director board); *see also Conrad v. Blank*, 940 A.2d 28, 37 (Del. Ch. 2007) (where "the challenged transaction was not made by the board, or even half of its members, the test articulated in *Rales* is the proper standard").[14]

Of this nine-member Board, one is the Company's CEO and three directors are affiliated with Brookfield.[15] Thus, to avoid dismissal here, Plaintiff must plead particularized facts supporting a reason to doubt that at least one of the five outside directors is not capable of exercising disinterested and independent judgment regarding a demand. Plaintiff fails to do so.

A. The Amended Complaint Fails To Plead That At Least Half Of The Directors Lack Independence.

To rebut the presumption of director independence in the demand futility context, "the complaint of a stockholder-plaintiff must create a reasonable doubt that a director is not so 'beholden' to an interested director [] that his or her 'discretion would be sterilized.'" *Beam ex rel. Martha Stewart Living Omnimedia,*

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[14] Under either *Aronson* or *Rales*, however, Plaintiff's allegations fail to plead futility because, at bottom, both tests require Plaintiff to demonstrate with particularized factual allegations that the Board is incapable of making an impartial decision regarding the litigation and he has not done so. *See, e.g., Zuckerberg*, 2020 WL 6266162, at *18 ("[D]ecisions from the Court of Chancery have explained on multiple occasions that *Rales* encompasses *Aronson*[.]").

[15] Defendants assume for purposes of argument only that there is a reasonable doubt as to Rintoul's ability to consider a demand.

Inc. v. Stewart, 845 A.2d 1040, 1050 (Del. 2004) (quoting *Rales*, 634 A.2d at 936). "Independence is a fact-specific determination made in the context of a particular case," and "the plaintiff has the burden to plead particularized facts that create a reasonable doubt sufficient to rebut the presumption" that a director is independent or not "beholden" to an interested director. *Id.* at 1049-50. Plaintiff does not satisfy that burden as to any of the five outside directors.

1. Leslie Dunn

Plaintiff does not challenge Dunn's independence (*see* ¶¶ 20, 118); instead, he contests only the validity of her appointment. As demonstrated above, *see supra* Section I, Dunn's appointment was valid, and thus Dunn's membership on the Board must be considered for purposes of assessing demand futility. *See, e.g.*, *Harris v. Carter*, 582 A.2d 222, 228 (Del. Ch. 1990) ("There are many cases that hold that the proper time to measure demand futility is at the filing of the complaint."); *In re Fuqua Indus., Inc. S'holder Litig.*, 1997 WL 257460, at *13 (Del. Ch. May 13, 1997) ("The appropriate test, therefore, is whether the board in existence at the time the complaint is filed is able to properly carry out its fiduciary duty to evaluate demand in a disinterested and independent fashion."). The Amended Complaint alleges no facts about why she could not exercise her disinterested and independent judgment with respect to a demand.

2. Catherine Clegg

Plaintiff alleges no facts calling into question Clegg's ability to impartially consider a demand, effectively conceding that Clegg is independent. (*See* ¶ 119.)[16]

3. Brian Acton

Plaintiff challenges Acton's independence solely on the basis that he was "hand-picked" by Brookfield to be a director. (¶ 117.) That challenge also falls short. "Directors must be nominated and elected to the board in one fashion or another, and to hold otherwise would unnecessarily subject the independence of many corporate directors to doubt." *Khanna v. McMinn*, 2006 WL 1388744, at *15 (Del. Ch. May 9, 2006); *see also McElrath v. Kalanick*, 224 A.3d 982, 995 (Del. 2020) (holding that nomination or election by a controlling stockholder was "insufficient by itself to reasonably doubt a director's independence because '[t]hat is the usual way a person becomes a corporate director'").

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[16] To the extent the allegations in paragraph 19 of the Amended Complaint could be read as an attempt to plead that Clegg is not independent, those allegations fall far short. Plaintiff alleges that Clegg, a General Motors employee, was recommended to the Board by an executive at Brookfield who, in his role as an advisor to the Secretary of the Treasury, was involved in General Motors' restructuring and IPO in 2009-2011. (¶ 19.) This "relationship" provides no basis to reasonably doubt Clegg's independence. *See, e.g.*, *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 980-81 (Del. Ch. 2000) (holding that a 15-year professional relationship, alone, was insufficient to cast reasonable doubt upon a director's independence); *Owens v. Mayleben*, 2020 WL 748023, at *11 (Del. Ch. Feb. 13, 2020) ("naked assertion[s] of a previous business relationship" are "routinely deem[ed] insufficient to meet Rule 23.1's particularity standard"), *aff'd*, 2020 WL 6373169 (Del. Oct. 29, 2020, corrected Nov. 18, 2020).

In short, it is well settled that a director's independence is not called into question by mere allegations related to his or her nomination. *See, e.g.*, *DiRienzo v. Lichtenstein*, 2013 WL 5503034, at *27 (Del. Ch. Sept. 30, 2013) (holding that the fact that independent directors were originally appointed by controlling stockholder did not establish that the independent directors were beholden to the controlling stockholder); *In re Dow Chem. Co. Deriv. Litig.*, 2010 WL 66769, at *9 (Del. Ch. Jan. 11, 2010) ("[T]he mere fact that a director played a role in nominating new directors does not mean that the new director is beholden to the nominating director."); *Blaustein v. Lord Balt. Capital Corp.*, 84 A.3d 954, 958-59 (Del. 2014) (holding that appointment to the board by an alleged control group is, without more, insufficient to demonstrate a lack of independence); *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984) ("[I]t is not enough to charge that a director was nominated by or elected at the behest of those controlling the outcome of a corporate election. That is the usual way a person becomes a corporate director. It is the care, attention and sense of individual responsibility to the performance of one's duties, not the method of election, that generally touches on independence."), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). Defendants made this very point in their motion to dismiss the original complaint and, in the Amended Complaint, Plaintiff offers nothing more than the same deficient allegations about mere appointment.

4. Michel Dumas

Plaintiff contests Dumas's independence on the basis that Dumas was recommended to the Board by Turcotte (a Brookfield-affiliated director), whom Dumas is alleged to have known "for decades," allegedly starting with their "five-year overlapping tenure at Tembec," from 1997 to 2002. (¶¶ 17, 109.) But the Amended Complaint notably lacks any details about that temporally overlapping employment at a company with several thousand employees. Plaintiff still does not allege, for example, that Dumas and Turcotte worked in the same division, at the same location, or even in the same country or that they interacted at all during their time at Tembec.

Even if Plaintiff had pled specific facts suggesting that Dumas and Turcotte had interacted professionally or personally, that would not be enough, as "[n]either mere personal friendship alone, nor mere outside business relationships alone, are sufficient to raise a reasonable doubt regarding a director's independence." *Litt v. Wycoff*, 2003 WL 1794724, at *4 (Del. Ch. Mar. 28, 2003). Plaintiff's particularized facts allege, at most, that Dumas and Turcotte worked for the same company nearly 20 years ago. Without more, that is "insufficient to raise a reasonable doubt about a director's independence." *Beam*, 845 A.2d at 1050.[17]

Plaintiff also alleges that Dumas received $140,000 in director fees in 2018 and 2019. (¶ 109.) This argument similarly fails because mere "allegations [of payment of director's fees], without more, do not establish any financial interest" and do not "lead to a reasonable doubt as to [the director's] independence." *In re Walt Disney Co. Deriv. Litig.*, 731 A.2d 342, 360 (Del. Ch. 1998), *aff'd in relevant part sub nom. Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). Like the original complaint, the Amended Complaint contains no factual allegations suggesting that the director fees here were other than customary or that they were unusual in amount. *See Orman v. Cullman*, 794 A.2d 5, 29, n.62 (Del. Ch. 2002) (rejecting argument that fees for serving on the board created a disabling interest, as such fees would need to "exceed materially what is commonly understood and accepted to be a usual and customary director's fee" to have a disqualifying effect). Without such allegations, the director fees do not create a reasonable doubt as to independence. *See Freedman v. Adams*, 2012 WL 1345638, at *6-7 (Del. Ch. Mar. 30, 2012) (rejecting argument that directors were not independent where

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[17] As with Acton, Plaintiff alleges that Dumas was "hand-picked" by Brookfield for the Board (¶ 109), but this challenge fails for the same reasons stated above. *See supra* at 33-34.

director compensation ranged between $459,676 and $792,198 because plaintiff failed to allege "particularized facts from which this Court could infer that this compensation materially exceeded what is commonly understood and accepted to be a usual and customary director's fee"), *aff'd*, 58 A.3d 414 (Del. 2013).

Nor does the Amended Complaint include particularized factual allegations showing that these fees were material to Dumas. *See Litt*, 2003 WL 1794724 at *5 (a "failure to allege with particularity" the materiality of financial interests "amounts to a failure to raise a reasonable doubt" as to a director's independence). Plaintiff implies as much, alleging that Dumas is now retired and that compensation for his Board service is "his only form of employment." (¶ 109.) But this Court has rejected similar arguments. *See, e.g.*, *VGS, Inc. v. Castiel*, 2003 WL 723285, at *12 (Del. Ch. Feb. 28, 2003) (finding independence where director's sole source of employment was service as a director). Without particularized facts showing that the director fees are, in fact, material to Dumas, the fees do not impugn his independence. *See Ryan*, 2017 WL 2062902, at *5, *16 (complaint failed to plead materiality of director compensation for purposes of demand futility where it "provide[d] no specific factual allegations regarding any actions, or motivations that the [director defendants] had, or their particular financial circumstances").

If it were otherwise, every director who is retired would be deemed to lack independence in a demand-futility analysis. That would transform the exception into the rule. *Cf. Chester Cty. Emps.' Ret. Fund v. New Residential Inv. Corp.*, 2017 WL 4461131, at *8-9 (Del. Ch. Oct. 6, 2017) (refusing to find director fees material to call independence into question just because one director was retired and another was "not wealthy").

5. Anthony Taccone

Plaintiff challenges Taccone's independence based on his receipt of director fees from GrafTech and his co-ownership of a consulting firm, First River, LLC ("First River"), which has done some work for Brookfield and GrafTech. (¶¶ 110-115.)[18] Plaintiff attempts to demonstrate the supposed materiality of those monies to Taccone by relying on speculation about his income and assets, unreliable internet reports, and mischaracterization of Taccone's D&O questionnaire. These allegations fall short of demonstrating that Taccone is incapable of considering a demand.

[18] Plaintiff also alleges that Taccone lacks independence because he was "hand-picked" by Brookfield to become a GrafTech (¶ 110), and that allegation fails for the reasons that same allegation fails to demonstrate Dumas or Acton lack of independence. *See supra* at 33-34, 36.

a. "Implied" payroll expenses and a "public search" about Taccone's assets

Plaintiff contends that the $125,000 in "cash and stock" compensation that Taccone receives as a director of GrafTech is material to him (¶ 110), but that assertion is based solely on conclusory conjecture about his other income and assets, rather than the particularized facts needed to show demand futility.[19]

As to Taccone's income, the Amended Complaint speculates that he receives an annual "salary" from First River of "approximately $140,000," based on First River's alleged receipt of a Paycheck Protection Program ("PPP") loan of $57,800, which supposedly "***implies*** a payroll expense of $277,440." (¶ 110) (emphasis added). On top of this, Plaintiff further "***assum[es]*** Taccone simply splits this payroll expense with his co-founder." (*Id.*) (emphasis added).

There are no particularized facts to back up Plaintiff's assumptions. To begin, the assertion that Taccone is an "employee" of First River who draws a "salary" at all is belied by his director questionnaire, which is incorporated into the

[19] As with the other directors, Plaintiff does not allege that the "$125,000 in cash and stock" Taccone received for his service as a director (¶ 110) was unusually large or otherwise not customary, *see supra* at 36-37. *See also Walt Disney*, 731 A.2d at 360 ("[A]llegations [of payment of director's fees], without more, do not establish any financial interest" and do not "lead to a reasonable doubt as to [the director's] independence."); *Ryan*, 2017 WL 2062902, at *5, *16 (dismissing complaint because it "provide[d] no specific factual allegations regarding any actions, or motivations that the [director defendants] had, or their particular financial circumstances").

Amended Complaint. The questionnaire describes his role at First River as "Founding Partner and Co-Owner," suggesting Taccone would not have received a "salary" at all. (Ex. 15, Director Questionnaire at GRAFTECH_681.) Moreover, Plaintiff does not allege any specific facts showing that the "standard PPP calculation" applies to First River, or any facts to support the assumption that Taccone and his co-founder earn the same "salary."[20] The Amended Complaint also fails to allege that First River is Taccone's only source of income besides his GrafTech directorship. In short, Plaintiff does not plead any specific facts that would permit the Court to "imply" or "assume" anything about Taccone's "salary" or income, let alone that his directorship compensation is a material to him. *See Beam*, 845 A.2d at 1048 (explaining that, under Rule 23.1, "reasonable inferences must logically flow from particularized facts alleged by the plaintiff," and "inferences that are not objectively reasonable cannot be drawn in the plaintiff's favor").

As to Taccone's assets, the Amended Complaint makes the bare allegation that, according to some unspecified "public search," Taccone's total property and

[20] Nor does Plaintiff acknowledge that the PPP eligibility calculations themselves do not permit a company to assume that any employee earns more than a $100,000 per year. (*See* Ex. 16, Paycheck Protection Program Loan Forgiveness Application (limiting "eligible payroll costs").) Yet Plaintiff's assumptions based on the "standard PPP calculation" yield a salary of $140,000, reflecting the objective unreasonableness of Plaintiff's assumptions.

vehicles are worth less than $350,000. (¶ 110.) But the Amended Complaint provides no information to allow the Court to determine the scope or reliability of that "public search." *See Sandys v. Pincus*, 152 A.3d 124, 129 n.16 (Del. 2016) ("Ultimately, any fact pleading has to be based on a source that provides a good faith basis for asserting a fact. Thus, as with any search, an internet search will only have utility if it generates information of a reliable nature."). The conclusory assertion about Taccone's assets, like the conjecture regarding Taccone's annual "salary," fails to raise a reasonable doubt as to Taccone's independence. *See Walt Disney*, 731 A.2d 342 at 361 (assertions based on "conjecture" do not raise a reasonable doubt as to director's independence); *Wilkin ex rel. Orexigen Therapeutics, Inc. v. Narachi*, 2018 WL 1100372, at *8 (Del. Ch. Feb. 28, 2018) (Rule 23.1 requires "particularized factual statements" not "conclusory statements" or "mere speculation or opinion").

b. Unreliable reports about First River's "revenue"

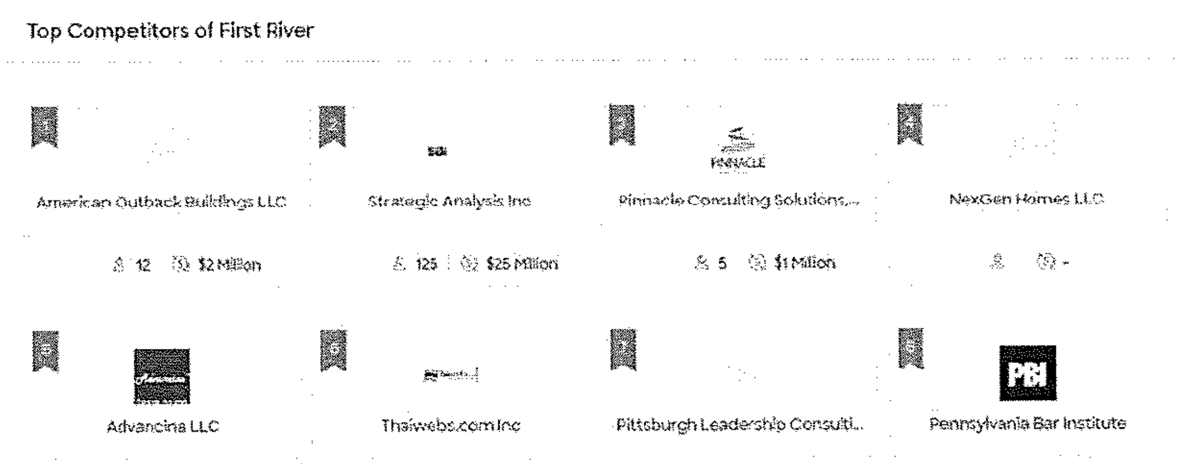
Plaintiff alleges that Taccone is dependent on Brookfield and GrafTech due to the fees they paid to First River for its services, and that he therefore could not have considered a pre-suit demand. (¶¶ 111-115.) That allegation, however, is not predicated on particularized facts that could give rise to serious doubts about his independence. As with Plaintiff's other allegations, this conclusion is based only on inferences drawn from facially unreliable internet sources.

Plaintiff alleges that, "[a]ccording to a report by zoominfo, First River's revenue is approximately $400,000 a year." (¶ 110.) Based on Defendants' independent review, "zoominfo" appears to be a web-scraping service that gathers information for sales leads. But Plaintiff provides nothing to substantiate the "report by zoominfo," or anything to indicate that it is a reliable information source. Plaintiff did not even attach the "zoominfo" report and for obvious reasons. As the Court can see from the report on which Plaintiff apparently relies (which Defendants have attached as Ex. 17), the report is of little value and fails to come even close to providing particularized facts.[21]

The "revenue" figure upon which Plaintiff relies is unsourced and covers no identifiable period of time. (Ex. 17, zoominfo report.) Contrary to the allegations in the Amended Complaint, that same zoominfo report also states that First River's revenue was $2.5 million for the second half of 2019, and almost $1.5 million for the first half of 2020. (*Id.*) Even assuming the accuracy of the zoominfo report, those figures are far higher than the figure Plaintiff cites.

[21] Courts have specifically held that allegations based on information from a zoominfo profile were not sufficient to "meet the heightened pleading standard" under Rule 9(b), which is similar to the one Plaintiff must satisfy to plead demand futility with particularity. *See Hudson v. Tex. W. Mortg., LLC*, 2017 WL 928134, at *2 (S.D. Tex. Mar. 9, 2017); *see also Calvert v. Wolf*, 2016 WL 369520, at *3 (Cal. Ct. App. Jan. 29, 2016) (declining to "take judicial notice of any of the printouts of internet postings," including from zoominfo).

The self-contradictory zoominfo report is suspect at best, given its lack of sourcing, the absence of pertinent information, and the unreliability of other information in the report. For example, the report does not identify First River's co-founder, though his identity is readily available on First River's website. The report's listing of First River's supposed "Top Competitors" is also patently inaccurate. It includes an online business directory headquartered in Thailand, a company that manufactures steel buildings, and the Pennsylvania Bar Institute, the non-profit continuing legal education (CLE) arm of the Pennsylvania Bar Association. (Ex. 17, zoominfo report.) None of these supposed "competitors" are even in the same industry as First River.



Given its facial unreliability, the zoominfo report cannot possibly provide the particularized facts needed to establish demand futility. *See Sandys*, 152 A.3d at 129 n.16 (source of "reliable information" include "articles in reputable newspapers and journals, postings on official company websites, and information on university websites"). And yet this is all Plaintiff offers.

Plaintiff nevertheless invites the Court to assume the materiality to Taccone of the fees First River receives from Brookfield and GrafTech, "considering that First River's annual revenue is likely less than $400,000." (¶ 112.) Given the unreliability of the zoominfo report and the $400,000 figure alleged, however, the inference of materiality is impermissible under the heightened pleading standard for demand futility. *See Brehm v. Eisner*, 746 A.2d 244, 255 (Del. 2000) ("[Rule 23.1] does not permit a stockholder to cause the corporation to expend money and resources in discovery and trial in the stockholder's quixotic pursuit of a purported corporate claim based solely on conclusions, opinions or speculation.").

c. Conjecture about fees for "other" work performed by First River for Brookfield or GrafTech

In attempting to plead the materiality of fees First River earned from Brookfield and GrafTech, Plaintiff also mischaracterizes Taccone's director questionnaire. Allegations based on mischaracterization are not particularized facts that "support an inference that the relationship is so important to [First River] as to compromise [Taccone's] independence." *Zuckerberg*, 2020 WL 6266162, at *23. As to First River, the questionnaire demonstrates the triviality of the nominal fees earned from Brookfield and GrafTech:

- First River was paid [redacted] by GrafTech for data subscriptions in 2019 and 2020, respectively. (Ex. 15, Director Questionnaire at GRAFTECH_693.)
- First River received [redacted] from Brookfield for consulting work (unrelated to GrafTech) in December 2019-January 2020. (*Id.* at GRAFTECH_698-699.)

As to Taccone, the questionnaire likewise reveals the lack of significant earnings from Brookfield or GrafTech:

- Taccone did not, within the three-fiscal-year period covered in the questionnaire, have any [redacted] (*Id.* at GRAFTECH_691.)
- Within the last tax year, neither [redacted] (*Id.* at GRAFTECH_000702; *see also id.* at GRAFTECH_000710 (defining [redacted]

[redacted]).)

Mischaracterizing the questionnaire, Plaintiff contends that "Taccone admits he does other 'occasional' work for Brookfield" and, from that, makes the unreasonable inferential leap that "Brookfield or its affiliates have regularly paid First River tens of thousands of dollars a year." (¶ 114.) There is nothing "reasonable" about that inference. (*Id.*) First, Taccone did not "admit" that First River performs "other" nondisclosed work for Brookfield, as Plaintiff alleges. Rather, Taccone's response to question 37 of the questionnaire expressly refers to information supplied in response to question 31 ([redacted] in fees for consulting work unrelated to GrafTech) and consulting work for Brookfield in connection with Brookfield's acquisition of GrafTech back in 2015. (Ex. 15, Director Questionnaire at GRAFTECH_700-701; *see also* Ex. 18, 8/14/15 Form 8-K (announcing completion of acquisition).) Plaintiff identifies no facts to support the assertion that First River performed work for Brookfield in addition to what he disclosed in the director questionnaire, and alleges nothing about the nature of any such supposed engagement or fees earned for such supposed "other" work.

Overall, Plaintiff's allegations that Taccone would be beholden to Brookfield rest on pure conjecture, a far cry from the particularized allegations of fact required to plead demand futility. *See Walt Disney*, 731 A.2d 342 at 361 ("conjecture" does not show futility); *Ryan v. Gursahaney*, 2015 WL 1915911, at *7 (Del. Ch. Apr. 28, 2015) (dismissing complaint where allegations were "tenuous at best and [] too speculative to raise a reasonable doubt of director disinterest"), *aff'd*, 128 A.3d 991 (Del. 2015).

B. The Amended Complaint Fails To Plead That At Least Half Of The Directors Face A Substantial Likelihood of Liability.

"[T]he mere threat of personal liability for approving a questioned transaction, standing alone, is insufficient to challenge either the independence or disinterestedness of directors." *Rales*, 634 A.2d at 936. Instead, "whether a director faces a substantial likelihood of liability turns primarily on … whether the complaint pleads particularized facts that support a reasonable inference that the director's decision could be attributed to bad faith."[22] *Zuckerberg*, 2020 WL 6266162, at *19. The Amended Complaint contains no particularized facts showing that any of the independent directors faces a substantial likelihood of liability for any bad faith or disloyalty for the Share Repurchase.[23]

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[22] Where a corporation has a § 102(b)(7) provision, "a substantial likelihood of liability may only be found to exist if the plaintiff pleads a non-exculpated claim against the directors based on particularized facts." *Owens*, 2020 WL 748023, at *7. GrafTech's Certificate contains the exculpatory provision authorized by 8 *Del. C.* § 102(b)(7). (Ex. 14, Certificate, art. VII, § I.)

[23] Plaintiff asserts that Clegg, Acton, Dumas, and Taccone are not "disinterested" as to the Share Repurchase (¶¶ 108, 119), but alleges no facts—let alone particularized ones—supporting a reasonable inference that any of them derived a personal benefit from the Share Repurchase. *See Beam*, 845 A.2d at

1. Clegg, Dunn, And Acton Face No Substantial Likelihood Of Liability.

Three of the five outside directors face no likelihood of liability, far less a substantial one, because they did not approve the Share Repurchase. As to Clegg and Dunn, Plaintiff concedes as much. He does not challenge their disinterestedness (*see* ¶¶ 19, 20, 118-119), which makes sense, because Clegg was not a member of the Audit Committee and Dunn joined the Board long after the Share Repurchase was approved. *See, e.g.*, *Zuckerberg*, 2020 WL 6266162, at *22 (finding director was disinterested where, among other things, the director joined the board after the challenged transaction had been approved).

As to Acton, Plaintiff acknowledges that Acton was not present at the Audit Committee meeting when the Share Repurchase was approved or the Board meeting that preceded it. (¶ 117.) "Delaware law clearly prescribes that a director who plays no role in the process of deciding whether to approve a challenged transaction cannot be held liable on a claim that the board's decision to approve that transaction was wrongful." *In re Tri-Star Pictures, Inc., Litig.*, 1995 WL 106520, at *2 (Del. Ch. Mar. 9, 1995). Plaintiff alleges no particularized facts to

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1049 ("A director's interest may be shown by demonstrating a potential personal benefit or detriment to the director as a result of the decision."). Nor would such an allegation make sense, as the directors who own the Company's stock would experience indirect injury to the Company's value (by virtue of their stock ownership) from any alleged overpayment.

displace application of that rule here[24] and, without such facts, Plaintiff cannot show that Acton faces any likelihood of liability for the Share Repurchase.

2. The Audit Committee Directors Face No Substantial Likelihood Of Liability.

Plaintiff contends that demand is excused because the Audit Committee approved the Share Repurchase, which Plaintiff alleges was not "entirely fair" (*see* ¶ 122), but that is not enough. Even if a transaction were assumed to be subject to the entire fairness standard of review and were further assumed not to be entirely fair, "it does not follow from those assumptions that [a director who voted for the challenged transaction] faces a substantial likelihood of liability." *Zuckerberg*, 2020 WL 6266162, at *24.

Instead, Plaintiff must plead particularized facts that "would support a pleading-stage inference that [an Audit Committee director] committed a non-exculpated breach of fiduciary duty and thus could face personal liability as a result of voting to approve the [Share Repurchase]." *Id.* To excuse his failure to make a demand, Plaintiff must allege facts to support an inference of bad faith, on

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[24] Specifically, Plaintiff's allegation that Acton (and Clegg) attended the November 6, 2019 Board Meeting at which the Company's financial projections were discussed, and his bald conclusion that they "went along" with Brookfield's plan to liquidate stock through the GrafTech buyback, do not rise to the level of particularized facts showing that Acton (or Clegg) affirmatively "play[ed a] role" in the Share Repurchase. (¶¶ 54, 57.)

a director-by-director basis, as to at least one member of the Audit Committee. *See id.* at *27. Plaintiff comes nowhere close. *See, e.g., Dow*, 2010 WL 66769 at *12 ("Only an 'utter failure' will satisfy a showing of bad faith.").

Plaintiff contends that the directors on the Audit Committee "did not consider" if the Share Repurchase was in the best interests of the Company's stockholders and overpaid for the shares. (*E.g.*, ¶¶ 2-3.) But Plaintiff ignores that, at previous meetings, the directors repeatedly reviewed alternative methods of returning cash to stockholders, including through direct repurchases, and had discussed the disadvantages with other methods. (*E.g.*, Ex. 4, 4/29/19 Capital Structure Mgmt. Presentation at GRAFTECH_303; Ex. 6, 7/30/19 Capital Structure Mgmt. Presentation at GRAFTECH_367 (comparing four methods of stockholder returns and concluding that direct share repurchases "are the preferred method of returning capital to shareholders").) Plaintiff also ignores that the Audit Committee approved the Share Repurchase only after it reviewed, among other things, projections of available cash flow, a certificate of the Company's CFO regarding the fair value of the Company's assets and liabilities (which relied on a solvency opinion from a financial advisory firm), and the Company's audited financial statements for 2018 and unaudited financial statements for the first three quarters of 2019. (Ex. 12, 12/3/19 Audit Comm. Minutes at GRAFTECH_466.)

Likewise, though Plaintiff complains that the Company overpaid (¶ 106), he ignores that the price was set by reference to the Block Trade price. There is no dispute that the Block Trade was an arm's-length transaction between Brookfield and an investment bank, resulted from a bidding process, and involved a sophisticated third party with every incentive to pay as little as possible.[25] Plaintiff also contends that the Share Repurchase was timed so as to cause GrafTech to "overpay" because, on November 6, the Board learned the Company's 2019 fiscal year financial results would be below plan, and the Share Repurchase occurred before the Company publicly reported those results. (¶ 106.) But this ignores that between November 27, 2019 (when the Board met again to discuss possible equity transactions) and December 4, 2019, the Company's stock closed at a discount to the $13.125 Share Repurchase price ultimately set.[26]

[25] Plaintiff attempts to undercut the arm's-length nature of the transaction between Brookfield and Morgan Stanley (¶ 75), but the Amended Complaint's flimsy allegations cast no doubt on the price and do not justify any assumptions as to a supposed sweetheart deal that Morgan Stanley would have been willing to give to Brookfield by overpaying for the shares. *Cf. S. Muoio & Co. LLC v. Hallmark Entm't Invs. Co.*, 2011 WL 863007, at *18 (Del. Ch. Mar. 9, 2011) ("real world valuations, including especially, valuations performed by potential third-party buyers" verify valuation methodologies), *aff'd*, 35 A.3d 419 (Del. 2011); *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 367 n.104 (Del. 2017) ("The best evidence of value, if available, is third-party sales value.") (quotation omitted).

[26] In fact, the $13.125 Share Repurchase price was a discount to all but three closing prices from November 6 through December 4, 2019. "The court may take judicial notice of the trading price of a listed stock." *In re Lear Corp. S'holder*

Plaintiff pleads no "particularized facts to suggest that the Committee extracted so little value from [Brookfield] that its members could be found to have acted in bad faith." *Zuckerberg*, 2020 WL 6266162, at *27. Nor does Plaintiff allege any facts suggesting that the Audit Committee members did not believe, or could not properly conclude, that this open-market mechanism would assure a fair price for the Share Repurchase. Plaintiff never explains why it was unreasonable (or anything other than, at most, a lack of due care) for the directors to use the Block Trade price for the Share Repurchase.

Nevertheless, according to Plaintiff, the members of the Audit Committee face a substantial likelihood of liability, because the committee did not retain its own advisors and agreed to terms that were supposedly not sufficiently favorable to GrafTech and its minority stockholders. (¶¶ 41, 58, 122, 126, 128.)[27] This argument ignores the facts. There is no dispute that the Block Trade price was set in an arm's-length transaction between Morgan Stanley (which had an incentive to pay the lowest possible price for the shares) and Brookfield, and was a nearly 6%

Litig., 967 A.2d 640, 656 n.65 (Del. Ch. 2008); *see also Howland v. Kumar*, 2019 WL 2479738, at *2 n.9 (Del. Ch. June 13, 2019) (taking judicial notice of "a company's 'share price'").

[27] Plaintiff complains that "Morgan Stanley was not present" for the December 3, 2019 meeting (¶¶ 65, 69), but there was no reason for Morgan Stanley to attend, because it was a counterparty to Brookfield for the Block Trade.

discount to the market price of GrafTech stock. *Cf. Monroe Cty. Emps. Ret. Sys. v. Carlson*, 2010 WL 2376890, at *2 (Del. Ch. June 7, 2010) (dismissing complaint where, "even if plaintiff's factual allegations prove unfair dealing, the complaint posits no basis for concluding that the Intercompany Agreement transactions were priced unfairly").

Plaintiff's allegation that the Share Repurchase was designed to preserve Brookfield's "voting power" (¶¶ 2, 124, 128) likewise misses the mark. The Share Repurchase actually reduced Brookfield's "voting power," as Plaintiff concedes (*see* ¶ 128 (alleging that the Share Repurchase "minimiz[ed] the reduction in Brookfield's voting power"))—while at the same time ***increasing*** the relative equity stake of the Company's minority stockholders. Plaintiff complains that Brookfield's interest could have been reduced to 68.8% if GrafTech had not repurchased shares (¶ 124), even while he acknowledges that the Share Repurchase reduced Brookfield's controlling interest to 73.6% and ignores the many factors the Board considered as it determined the preferred method of returning capital to stockholders. (*See supra* at 50.) Moreover, the Share Repurchase would have had the same effect on Brookfield's "voting power" no matter the per-share price paid by GrafTech.

At their core, all of Plaintiff's allegations simply register his disagreement with the Share Repurchase, but mere disagreement does not give rise to a substantial likelihood of liability for disloyalty or bad faith. *E.g.*, *Zuckerberg*, 2020 WL 6266162, at *25 ("The plaintiff disagrees with how the Committee proceeded, but those disagreements are not sufficient to support an inference of bad faith."). Plaintiff's allegations, "at most, allege a breach of the duty of care," for which Dumas, Acton, and Taccone do not face any threat of liability. *See id.* at *27 (dismissing complaint that "does not plead particularized facts to suggest that the Committee extracted so little value from [the controlling stockholder] that its members could be found to have acted in bad faith"); *In re Crimson Expl. Inc. S'holder Litig.*, 2014 WL 5449419, at *24 (Del. Ch. Oct. 24, 2014) (finding it not "reasonably conceivable that Plaintiffs could show that the merger price so exceeded the bounds of reason as to make it explainable only by bad faith").

* * *

Having failed to plead particularized facts showing that at least one of the five outside directors faces a substantial likelihood of liability for non-exculpated conduct, and having likewise failed to show that at least one of the outside directors lacks independence, Plaintiff has not shown that his failure to make a pre-suit demand is excused. Count II therefore must be dismissed.

CONCLUSION

For the foregoing reasons, the Amended Complaint should be dismissed.

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CERTIFICATE OF SERVICE

I, R. Garrett Rice, hereby certify that on March 29, 2021, I caused a true and correct copy of *PUBLIC VERSION Defendants' Opening Brief in Support of Their Motions to Dismiss Plaintiff's Amended Verified Individual, Class Action and Derivative Complaint* to be served electronically via File & Serve*Xpress* on the following counsel of record:

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