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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE MCDONALD'S CORPORATION STOCKHOLDER DERIVATIVE LITIGATION	)	CONSOLIDATED
	)	C.A. No. 2021-0324-JRS
	)	Public Version
	)	May 6, 2022

PLAINTIFFS' OMNIBUS ANSWERING BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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Plaintiffs Teamsters Local 237 Additional Security Fund, Teamsters Local 237 Supplemental Fund for Housing Authority Employees, Teamsters Local 237 Welfare Fund, and Phyllis Gianotti (together, "Plaintiffs") respectfully submit this Omnibus Answering Brief in Opposition to Defendants' Motions to Dismiss.

PRELIMINARY STATEMENT

The McDonald's Board[1] has failed the Company and its shareholders time and again. When faced with unavoidable evidence that its policies were being ignored and its workers left to suffer rampant sexual harassment, the Board looked the other way. They looked the other way when the executive they wished to promote to CEO engaged in a prohibited relationship with a vendor; they looked the other way when the head of their Human Resources Department engaged in inappropriate conduct with subordinates; they looked the other way as a booze-filled party atmosphere left women vulnerable to advances from their colleagues and other executives; and they looked the other way when girls and young woman reported serious and severe sexual harassment, assault, and even rape at its franchises across the country.

When the Board was confronted with irrefutable evidence that CEO Stephen Easterbrook had engaged in inappropriate and sexual conduct towards subordinates,

[1] Unless otherwise noted herein, capitalized terms have the meaning provided in Plaintiffs' Verified Consolidated Stockholder Derivative Complaint (Trans. ID 67254508).

the Board chose *not* to thoroughly investigate the allegations. After an inquiry of ***less than a week***—during which time no one bothered to search Easterbrook's email on Company servers—the Board let Easterbrook walk out the door with a cushy compensation package, having dismissed him "without cause." They did so to avoid difficult questions about their own oversight failures.

The Director Defendants' ostrich-like approach to the severe problems plaguing McDonald's is not consistent with the directors' fiduciary duties. Indeed, the nation's foremost authority on harassment in the workplace—the Equal Employment Opportunity Commission ("EEOC")—has explained that "leadership and accountability are critical" to preventing and stopping sexual harassment and misconduct. The EEOC even explicitly warned about "Superstar Harassers" who prey on subordinates but are given a pass by Company leadership, which in turn creates "a breeding ground of harassment."

Here, Defendants' failure to address rampant sexual harassment and predation has damaged the Company's reputation, led to countless EEOC complaints and class action lawsuits, forced workers to walk out of their jobs in protest, and resulted in expensive and embarrassing clawback litigation.

In the face of Plaintiffs' well-pleaded allegations demonstrating that Defendants breached their fiduciary duties by (1) failing to oversee and correct a toxic culture in both the C-Suite and the Company's corporate owned and franchise

restaurants (2) attempting to avoid the discovery of their own failings to awarding Easterbrook a "without cause" termination following a flimsy investigation that was intentionally designed to avoid discovery of damning evidence residing on McDonald's own servers, Defendants attempt to remake the record. They seek inferences in *their* favor and make factual assertions unsupported by the evidence. Defendants also cite materials outside the record, the veracity of which Plaintiffs have not yet had an opportunity to test. Plaintiffs are therefore entitled under Delaware law to a conversion of the motions to dismiss to a motion for summary judgment, and to pursue discovery. In the event the Court is not inclined to convert the motions, Defendants' motions should be denied.[2]

STATEMENT OF FACTS

Defendants enabled, failed to remedy, and/or actively engaged in toxic workplace practices in breach of their fiduciary duties through: (1) Director Defendants' disloyal actions in connection with Easterbrook's and Fairhurst's extreme sexual misconduct; and (2) Defendants' failure to make a good faith effort

[2] In light of the McDonald's settlement with Easterbrook and the accompanying settlement release, Plaintiffs will not continue to press their Count III as to Easterbrook with respect to the allegation that he "violated Company policies by having relationships with employees in violation of the Company's Standards of Professional Conduct, as well as by inappropriately issuing stock grants to at least one employee." Plaintiffs are *not* withdrawing their claim in Count III as to his breach of the duty of care by exercising inadequate oversight.

to respond to the rampant sexual harassment taking place at the Company's restaurants.

A. SEXUAL MISCONDUCT IN MCDONALD'S C-SUITE AND THE BOARD'S FAILED ATTEMPT TO COVER IT UP

1. The Board Promoted Easterbrook to CEO Despite His Clear Misconduct

Pursuant to the Company's Standards of Business Conduct and Human Rights Policy, McDonald's must "cultivate respectful workplaces" and create a professional environment that "builds trust, protects the integrity of our brand and fuels our success."[3] In contradiction of these foundational policies, the Board knowingly accepted predatory misconduct among its highest-ranking executives, starting no later than Easterbrook's promotion to CEO.[4]

In 2015, McDonald's saw its sales decline for the first time in 12 years.[5] In response, the Board replaced the Company's CEO, Don Thompson, with Easterbrook, who had been McDonald's Chief Brand Officer.[6] At the time, Easterbrook was in an intimate relationship with Denise Paleothodoros, a public relations consultant who had been working under a third-party contract with

[3] ¶28.

[4] ¶¶44-52.

[5] ¶45.

[6] *Id.*

McDonald's.[7] This relationship violated McDonald's Dating, Nepotism and Fraternization Policy, which prohibited employees from engaging in relationships with independent contractors and vendors when the employees have "the direct or indirect authority to engage the services of such independent contractor or vendor."[8]

When it chose to promote Easterbrook, the Board knew that he was engaged in a prohibited sexual relationship with Paleothodoros.[9] Rather than address Easterbrook's misconduct and adhere to McDonald's own policies and stated values, the Board opted to "sign[]off on the relationship under assurances that Paleothodoros would be removed from the McDonald's account."[10] The Board relied solely on "assurances."[11] There is no evidence the Board did anything to confirm that Paleothodoros was, in fact, removed by her employer from the McDonald's account.[12] With the Board's blessing, Easterbrook continued his relationship with Paleothodoros.[13]

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[7] ¶46.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] ¶47.

With the Board's capitulation to Easterbrook's policy violation, a permissive and predatory atmosphere predominated at McDonald's headquarters in Chicago.[14] Easterbrook set an improper tone at the top of the Company by allowing and participating in a "party atmosphere."[15] McDonald's had an open bar in its corporate office where executives hosted weekly happy hours.[16] At these events, male employees, including McDonald's executives, routinely made female employees feel uncomfortable.[17] Easterbrook and David Fairhurst, McDonald's Chief People Officer and Easterbrook's long-time personal friend, frequently contributed to this inappropriate tone at the top by attending these happy hours and flirting with female employees, including their executive assistants.[18]

Easterbrook and Fairhurst regularly took McDonald's employees—including the Company's Senior Vice President of Human Resources Melanie Steinbach—out drinking at local bars and during business trips.[19] With Easterbrook at the helm, heavy drinking became a part of McDonald's corporate culture.[20] Offering an

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[14] ¶48.

[15] ¶49.

[16] *Id.*

[17] ¶50.

[18] *Id.*

[19] ¶51.

[20] *Id.*

ominous foreshadow of what was to come, Easterbrook become known as a "player" among McDonald's staff and contractors—a reputation he was not reprimanded for developing.[21] Instead, Easterbrook was indulged: recruiters were instructed to hire "young, pretty females" from high-end stores to work the front desk/reception areas of McDonald's headquarters.[22]

Easterbrook's conduct created an atmosphere where sexual misconduct could—and did—proliferate. According to two former executives, "the environment in HR during Fairhurst's tenure made employees feel as if they had little recourse for reporting bad behavior."[23] Employees felt "HR leaders under Mr. Easterbrook ignored complaints about the conduct of co-workers and executives. Some of those people said they feared retaliation for reporting the conduct of co-workers and executives to HR."[24]

Although the inappropriate behavior was open and well known throughout the Company, the Board did nothing to stop it.[25] The Section 220 Production does not

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[21] *Id.*

[22] *Id.*

[23] ¶59.

[24] *Id.*

[25] ¶52.

indicate that the Board took any curative action to uphold the Company's workplace values that the Director Defendants knew was "critical to McDonald's success."[26]

2. Following Easterbrook's Promotion, the Board Again Failed to Stop Executive Misconduct

In December 2018, the Board failed, once again, to stop sexual misconduct by McDonald's executives.[27] Specifically, reports surfaced that Fairhurst had engaged in inappropriate and harassing conduct. Fairhurst—who was supposed to be leading McDonald's efforts concerning "[r]epresentation of women" in the workplace and to cure its well-known "gender representation gaps"—pulled a female employee onto his lap during a party for the Company's ***human resources staff***.[28] More than 30 employees observed the incident, with "a number" of them reporting it to McDonald's Compliance Department, which concluded that "Fairhurst behaved and put himself in a position inconsistent with the Company's Standards of Business Conduct."[29]

The Audit Committee discussed Fairhurst's misconduct during a December 13, 2018 meeting.[30] Easterbrook had known this type of behavior was an ongoing

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[26] ¶¶28, 52.

[27] ¶53.

[28] ¶54.

[29] *Id.*

[30] ¶55.

issue for Fairhurst, as he advised the Audit Committee—for the first time—that, in December 2016, an employee had reported Fairhurst to the Compliance Department for other improper "events."[31] Easterbrook told the Audit Committee that Fairhurst had previously "been warned about excessive drinking at company events."[32]

As they had with Easterbrook's relationship with Paleothodoros, the Board turned a blind eye.[33] The Audit Committee minutes do not reflect that the directors asked ***any*** questions about the details of Fairhurst's December 2016 misconduct or why Easterbrook had not timely informed them of these incidents.[34] The minutes also reflect that the directors did not ask any questions about Fairhurst's excessive drinking at McDonald's events, or what steps (if any) were taken to ensure that it stopped.[35] Instead, Easterbrook—who the Audit Committee knew had violated these same policies—was permitted to lead the Company's response.[36] Easterbrook proposed that Fairhurst give up "50% of his TIP bonus payment for 2018."[37] Despite Easterbrook's own misconduct, his failure to timely report Fairhurst's prior

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[31] *Id.*

[32] *Id.*

[33] ¶56.

[34] *Id.*

[35] *Id.*

[36] ¶60.

[37] ¶61.

transgressions, and his long-standing personal relationship with Fairhurst, the Audit Committee accepted his proposal and did not conduct its own investigation.[38] Easterbrook tasked Steinbach—another participant in the McDonald's happy hours with senior management—with "communicat[ing] to all participants in the event that management had appropriately addressed the matter."[39]

On December 19, 2018, Fairhurst entered into a "Last Chance" letter with McDonald's, which set forth the compensation changes proposed by Easterbrook (the "Last Chance Letter").[40] The Last Chance Letter also confirmed that Fairhurst's misconduct was not limited to an isolated incident, memorializing "[c]oncerns have been raised to the company in the past and recently about [Fairhurst's] alcohol consumption at company-sponsored and company-related events, and separately about [Fairhurst's] personal conduct during some of those events which made some employees uncomfortable."[41] The Last Chance Letter acknowledged that Fairhurst's actions "place[d] the Company at significant risk," as behavior that "violates the Standards of Business Conduct" will harm the Company's workplace

[38] *Id.*

[39] ¶62.

[40] ¶63.

[41] *Id.*

culture.[42] Despite these findings and concessions, Fairhurst was permitted to continue as Chief People Officer.[43]

3. Executive Misconduct Reached a Breaking Point, and the Board Paid Easterbrook to Quietly Leave

Beyond his relationship with Paleothodoros, Easterbrook continued to violate the Company's Standards of Business Conduct by engaging in numerous other inappropriate sexual relationships, not with independent contractors, but with McDonald's employees.[44] During 2018 and 2019, Easterbrook had sexual relationships with at least three McDonald's subordinates through which, as the Company has since conceded, Easterbrook "exploited his position as CEO."[45] Easterbrook used his McDonald's email account to transmit dozens of nude, partially nude, or sexually explicit photographs and videos of various women, including photographs of three McDonald's employees.[46] Easterbrook engaged in another prohibited relationship with a fourth McDonald's employee ("Employee-4") that included private messages and video calls.[47] Easterbrook granted restricted stock

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[42] ¶64.

[43] *Id.*

[44] ¶65.

[45] ¶66.

[46] *Id.*

[47] *Id.*

units worth hundreds of thousands of dollars to one of these employees shortly after their first sexual encounter and days before their second.[48]

Just four years into Easterbrook's tenure, his ongoing misconduct reached a breaking point.[49] On October 17, 2019, the Board learned that Easterbrook was engaging in a prohibited relationship with Employee-4, marking the second time that the Board was advised of Easterbrook having an undisclosed relationship that violated McDonald's policies.[50] As a majority of the Board had enabled and permitted a hostile work environment to infect the Company's headquarters, the Board knew that digging too deeply into the situation could expose them to liability for having accepted a workplace culture that included partying and drinking, improper sexual conduct and harassment by executives, and Easterbrook's perpetual disregard for McDonald's Standards of Business Conduct.[51] Thus, the Board sought to close out the matter as quickly and quietly as possible.[52]

During a telephonic meeting on October 18, 2019, the Board engaged outside counsel purportedly to "investigat[e]" Easterbrook's misconduct.[53] The Board next

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[48] *Id.*

[49] ¶67.

[50] *Id.*

[51] ¶68.

[52] *Id.*

[53] ¶69.

met eight days later, and Morgan, Lewis & Bockius LLP ("Morgan Lewis") presented the results of the "investigation"—which apparently took just days to complete—to the Board's "independent" directors and general counsel.[54] Instead of independently investigating the full scope of Easterbrook's conduct, the Board accepted a different route: as part of the investigation, Easterbrook was merely ***asked*** whether he had engaged in an improper relationship with any other subordinates other than Employee-4.[55] Facing the loss of tens of millions of dollars in compensation if he were terminated for cause, Easterbrook predictably lied and said he was not involved in relationships with other McDonald's subordinates besides Employee-4.[56] The Board and its investigators accepted this answer (aware that Easterbrook had every incentive to lie) without taking the simplest and most obvious steps to determine whether Easterbrook was being truthful: checking the Company's own servers for inculpatory emails and messages, and asking anyone ***other than Easterbrook himself*** if he was telling the truth.[57] Despite his track record of flouting the same McDonald's policies and concealing similar transgressions by a high-ranking human resources executive, the Board allowed Morgan Lewis to accept

[54] ¶70.

[55] *Id.*

[56] *Id.*

[57] *Id.*

Easterbrook's statement at face value and directed no further investigation—ensuring that no additional misbehavior would be uncovered.[58]

At the end of the October 26 meeting, the Board chose to "negotiate" a separation agreement with Easterbrook, which was completed on October 31, 2019.[59] It is unclear what, if anything, was accomplished through those purported "negotiations" because Easterbrook was allowed to keep ***all*** prior compensation and received the ***full value*** of his severance package.[60] Rather than thoroughly documenting a highly sensitive investigation and separation involving the Company's highest-ranking employee, the Board did not minute its October 18 and October 26, 2019 meetings.[61] Even though the Board allegedly met on these dates specifically to discuss Easterbrook's misconduct and potential termination, the Company informed Plaintiffs' counsel in this action that "***calls on those dates were not separately minuted***."[62]

The events at these two unminuted meetings are indirectly recounted, to some degree, in the minutes of November 1, 2019 meeting. [63] Those *post hac* lawyer-

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[58] *Id.*

[59] ¶¶71-72.

[60] ¶71.

[61] ¶72.

[62] *Id.*

[63] ¶73.

vetted minutes—which were prepared in anticipation of litigation—state that the Board received a "recap" of "the events leading to the [November 1] meeting."[64] In short, the Board intentionally failed to create a contemporaneous record of several critical meetings about highly sensitive misconduct involving the Company's CEO, including the Board's decision to engage outside counsel, the nature and scope of outside counsel's retention (*i.e.*, what, specifically, outside counsel had been engaged to do), the basis for such a limited investigation, and the factual results of that investigation.[65]

At the November 1, 2019 meeting, the Board formalized its decision to terminate Easterbrook "without 'cause' for purposes of the Company's benefit plans and arrangement," and "approve[d] the Separation Agreement."[66] The Separation Agreement provided for highly lucrative "Separation Benefits," including "a cash severance payment equal to 26 weeks of base salary, a prorated annual bonus for 2019, health insurance continuation at active employee rates for approximately six months post-termination, continued vesting of stock options for three years post-termination and prorated vesting of performance-based restricted stock units."[67]

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[64] *Id.*

[65] *Id.*

[66] ¶74.

[67] *Id.*

The total value of this compensation during his tenure as CEO, including his highly lucrative severance package, was more than $125.8 million.[68]

The Board knew that it should have fired Easterbrook for cause.[69] The Company's Officer Severance Plan called for termination for cause for a "serious, reckless or material violation of McDonald's Standards of Business Conduct or other employment policies."[70] According to the minutes, the Board purportedly chose to terminate Easterbrook "without cause" for the sake of "minimizing disruption to the Company and its stakeholders," and because the Board was unsure whether it "would prevail in such a dispute" regarding termination for or without cause.[71] But the Board had its own personal interests for paying off Easterbrook: had the Board fired Easterbrook for cause and Easterbrook fought back—and the Board understood he would have done so—tough questions would have arisen concerning the Board's prior failures when faced with repeated instances of sexual misconduct at the Company's highest levels, including Easterbrook in 2015, Fairhurst (belatedly disclosed) in 2016, and Fairhurst in 2018.[72] As discussed further below, rampant sexual harassment at McDonald's was simultaneously becoming public, with

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[68] *Id.*

[69] ¶75.

[70] *Id.*

[71] ¶76.

[72] *Id.*

McDonald's facing employee walkouts and class action lawsuits from restaurant workers, which would compound the scrutiny the Board would face if additional sexual misconduct by Easterbrook were exposed.[73]

With the Company's toxic workplace culture reaching a breaking point, the Board also had to finally confront Fairhurst's history of misconduct.[74] According to the minutes of the November 1 meeting, McDonald's general counsel apparently updated the Board "on the employment matters related to Mr. David Fairhurst," and "described his recent conversations" with Fairhurst.[75] Fairhurst was then fired "for cause."[76] The meeting minutes provide no explanation as to why Fairhurst was fired at that time, *i.e*., whether he committed additional violations after the Board allowed him to stay, or whether the Board was instead taking belated action for past transgressions given that the Company's toxic work environment was now coming to light.[77] Both explanations, however, equally illustrate the Board's failures.[78]

In a November 3, 2019 press release, McDonald's announced that Easterbrook was leaving the Company, revealing only that Easterbrook had

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[73] *See infra,* 68-75.

[74] ¶77.

[75] *Id.*

[76] *Id.*

[77] ¶78.

[78] *Id.*

"violated company policy and demonstrated poor judgment" describing his relationship with an employee subordinate as "consensual."[79] The Board did not disclose that it had previously waived the same McDonald's policies in connection with Easterbrook's first prohibited relationship, that Easterbrook had covered for Fairhurst's misconduct, that the Board had condoned a party culture at the Company, or that the Board had determined to fire Easterbrook "without cause"—allowing him to receive a lavish severance package—following a highly limited one-week investigation.[80]

The November 3 press release ***did not*** disclose that the Board had fired Fairhurst, let alone that he was fired for his inappropriate conduct towards women.[81] Doing so would have raised obvious questions about the propriety of firing Easterbrook "without cause," about Easterbrook's severance and separation benefits, and whether something larger than a single relationship between Easterbrook and a subordinate was at issue.[82]

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[79] ¶79.

[80] *Id.*

[81] ¶80.

[82] *Id.*

4. The Board's Plan to Keep Executive Misconduct Quiet Quickly Unravels In the Face of Stockholder Pressure

McDonald's handling of the Easterbrook firing also attracted heavy criticism from McDonald's investors.[83] In April 2020, Plaintiffs served Section 220 Demands on McDonald's to investigate, *inter alia*, Easterbrook's conduct, allegations of harassment and discriminatory workplace practices and culture, and the Board's termination of Easterbrook and decision to let him retain all of his compensation and severance.[84] In addition, CtW Investment Group ("CtW"), a union pension plan coalition, publicly criticized the Board's decision to terminate Easterbrook "without cause" in November 2019.

CtW explained that it "def[ied] belief to claim that the termination of an executive who has admitted to violating an express and unambiguous provision of McDonald's Standards of Business Conduct was undertaken 'without cause.'"[85] CtW further argued that the Board's decision to allow Easterbrook to retain his substantial severance package "failed to disincentivize violations of its code of conduct."[86] CtW asserted that it was "hard to imagine how a board could set a worse 'tone at the top' than this, particularly considering the Company's painfully slow

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[83] ¶¶83-85.

[84] ¶83.

[85] ¶85.

[86] ¶86.

and still inadequate response to widespread sexual harassment in McDonald's restaurants."[87]

In April 2020, while McDonald's was facing Plaintiffs' investigations, CtW demanded a change to the Board.[88] In an April 23 letter, CtW asked McDonald's stockholders to vote against the re-election of Defendants Hernandez and Lenny, in an attempt to "hold the board accountable for its poor decision-making" related to Easterbrook's termination. CtW's "Vote No" campaign stemmed from its belief that the Board's "use of discretion in [Easterbrook's] case was unwarranted" and "overly generous" to Easterbrook, in light of the substantial equity awards the Board allowed Easterbrook.[89]

Glass Lewis also recommended that stockholders vote against the Say on Pay proposal and against the re-election of Lenny, noting that the Board's decision to "allow[] a significant portion of Mr. Easterbrook's outstanding equity awards to continue vesting after his departure . . . illustrates a lack of willingness on the board's part to appropriately enforce the Company policy violated by Easterbrook, and sets a poor precedent for the remaining executive team."[90] Glass Lewis further noted

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[87] *Id.*

[88] ¶87.

[89] *Id.*

[90] ¶88.

that "exempting CEOs from key provisions of crucial rules around corporate policy sets a questionable tone at the top, with negative potential ramifications for a firm's culture and even the opportunity to create new, unique governance risks."[91]

In July 2020, as the Board was coming under fire for its actions surrounding Easterbrook's "without cause" termination, the Board was forced to conduct another investigation after a McDonald's employee anonymously reported that Easterbrook had been sexually involved with yet another subordinate, *i.e.*, a relationship in addition to that which he had with Employee-4.[92] This time, following the previous public outcry and Plaintiffs' ongoing inspection demand targeted towards these very issues, the Board had no choice but to conduct an actual investigation, taking the obvious factfinding steps that it purposefully avoided in 2019.[93] This investigation confirmed that, in violation of McDonald's policies, Easterbrook had pornography, including sexually explicit content and photos ***of McDonald's employees***, on the Company's servers, and that Easterbrook was engaged in at least ***three sexual relationships*** with subordinates, each of which constituted an additional violation of McDonald's policies (on top of the violative relationships he had with

[91] *Id.*

[92] ¶89.

[93] *Id.*

Paleothodoros and Employee-4).[94] The investigation further revealed that Easterbrook had approved a stock grant worth hundreds of thousands of dollars to a subordinate while their sexual relationship was ongoing, and that Easterbrook used the Company's private aircraft for personal trips with Paleothodoros.[95]

With public pressure mounting, Plaintiffs actively investigating sexual misconduct in McDonald's C-suite, and the initial attempt to sweep Easterbrook's misconduct under the rug rapidly unraveling, on July 21, 2020, the Board approved a resolution "to pursue claims against [Easterbrook] with respect to the circumstances of his termination of service and the compensation and benefits provided (or to be provided) to him pursuant to the Separation Agreement."[96] After the ensuing investigation laid bare the full extent of Easterbrook's misconduct, and pressured by Plaintiffs' own investigations of the Board's conduct, the Board sued Easterbrook on August 10, 2020, seeking to claw back his severance package. McDonald's alleged that Easterbrook had lied to the Company in the course of its original investigation and had deleted incriminating evidence from his cell phone.[97]

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[94] ¶90.

[95] *Id.*

[96] ¶¶90-91.

[97] ¶92.

In response, Easterbrook asserted that McDonald's ***actually knew*** about his misconduct, with Easterbrook's counsel stating that "discovery will show that McDonald's knew that Mr. Easterbrook had prohibited relationships with McDonald's employees but believed it to be in McDonald's best interests to avoid an investigation that would demonstrate that."[98] Alternatively, Easterbrook argued that McDonald's ***constructively knew*** about Easterbrook's misconduct, asserting that "McDonald's should have known and, in fact, did know about his indiscretions before it signed the Separation Agreement because the evidence of his sexual relationships with employees always resided on the Company's servers."[99]

On December 16, 2021, following months of costly and embarrassing litigation, the Company announced that it had reached a settlement with Easterbrook.[100] Pursuant to that settlement, Easterbrook agreed to return or forfeit cash and stock compensation that the Company represented was worth $105 million.[101] The press release disclosing the settlement does not explain how that figure was calculated or what Easterbrook gave up. Regardless, that litigation did not make McDonald's whole.[102] It does not appear the Company ever attempted to

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[98] ¶93.

[99] *Id.*

[100] ¶96.

[101] *Id.*

[102] *Id.*

"claw back" the compensation Easterbrook accepted during the years of his misconduct, and the litigation undoubtedly cost the Company significant legal fees that were not recouped and exposed the Company to significant reputational harm.[103] Importantly, although Easterbrook admitted in connection with the settlement that he "failed at times to uphold McDonald's values and fulfill certain of my responsibilities," he did not retract any of his representations that the Board knew of his misconduct.[104]

B. SEXUAL HARASSMENT PROLIFERATED AT MCDONALD'S RESTAURANTS

1. Defendants Knew of the Importance of Human Capital Issues to The Business

While it was turning a blind eye to C-suite misconduct, the Board knew that, for a business like McDonald's, the Company's workforce and workplace environment were—and remain—of paramount importance.[105] After all, with 200,000 corporate employees and 2 million franchise employees, McDonald's is one of the largest employers in the world. Although only 27% of McDonald's officers are women, approximately 55% of McDonald's overall workforce are women.

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[103] *Id.*

[104] *Id.*

[105] ¶98.

McDonald's describes itself as "[c]omitted to being America's best first job." The Company's website touts "Inclusion" and "Integrity" among its five Core Values. Similarly, in its Standards of Business Conduct, McDonald's has acknowledged that a "diverse" team, "working together in an environment that fosters respect and drives high levels of engagement, is ***essential*** to our continuing success."[106] Recently, McDonald's represented to the Court that "integrity" is its "most fundamental value," and that "[t]he basis for our entire business is that we are ethical, truthful and dependable."

McDonald's represents in SEC filings that "a diverse workforce is critical to McDonald's success," and the Company needs to "create a strong culture of inclusion within the Company," with "improve[d] diversity representation within leadership roles for both women and historically underrepresented groups." Pursuant to McDonald's Standards of Business Conduct and McDonald's Human Rights Policy, the Company must "cultivate respectful workplaces which builds trust, protects the integrity of our brand and fuels our success."

McDonald's has repeatedly confirmed in SEC filings that the Company's "success" is dependent on the Company's "ability to recruit, motivate and retain a qualified workforce," that "[i]ncreased costs associated with recruiting, motivating and retaining qualified employees" may have a "negative impact on our Company-

[106] TEAM0000175 at 177 (emphasis added); ¶101.

operated margins," and that "[s]imilar concerns apply to our franchisees." In its February 2019 annual report, the Company highlighted among the key risks it faces "retain[ing] a qualified workforce" and remaining compliant with employment regulations as "non-compliance could result in liability and expense to us." It also cited the Company's "potential exposure to reputational and other harm regarding our workplace practices or conditions or those of our independent franchisees or suppliers (or perceptions thereof)," noting they "could have a negative impact on consumer perceptions of us and our business."[107] McDonald's has also publicly recognized that fallout from economic actions like boycotts could "have a material impact on our results."[108]

The Board knew that other stakeholders were intently focused on workforce issues. For example, during a November 30, 2017 meeting, the Board was advised about a "recent increase of sexual harassment issues in the media and in business community." In March 2016, the Board's Sustainability and Corporate Responsibility Committee discussed "the investor community's focus on human capital management." Documents accompanying the meeting reference the "Human Capital Management Coalition," a "group of investors from 24 funds (mostly union and public pension funds) who have been meeting monthly for the past two years."

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[107] ¶99.

[108] *Id.*

The Coalition, which collectively manages approximately $2.6 billion in assets, will "engage[] companies and other market participants with the aim of understanding and improving how human capital management contributes to the creation of long-term shareholder value."

In March 2017, the Governance Committee was alerted about increasing investor outreach regarding human capital management from "some of the Company's largest institutional investors, as well as union and public pension fund holders." In March 2019, the Governance Committee was told yet again by management that "[i]nvestors continue to be interested in our human capital management philosophy and practices, including as they relate to employee engagement and diversity and inclusion."

2. The Board Consistently Failed to Act in the Face of Employee Walk Outs, Numerous Employee Lawsuits and Class Actions, and Stern Scrutiny from Congress

Despite the critical importance of workforce and workplace issues for the Company, sexual misconduct and harassment were rampant not just in McDonald's C-suite, but also at the Company's corporate-owned and franchised restaurants. The Board consistently and utterly failed to take actions to cure these problems.

In October 2016, more than a dozen McDonald's workers from restaurants across the nation filed complaints with the Equal Employment Opportunity Commission ("EEOC"), complaining of unwanted sexual comments, touching, and

kissing, including outrageous acts of groping and sexual assaults taking place on a daily basis.[109] One employee, whose manager had repeatedly tried to rub his genitals against her, reported the incident to her general manager and McDonald's corporate office.[110] When nothing was done, she was forced to quit. Another employee had her breasts repeatedly grabbed by a supervisor, who propositioned her for oral sex.[111] When she reported this to a general manager, her hours were cut.[112] The EEOC complaints alleged that many employees who protested against the harassment and assault were ignored or, worse, retaliated against.[113]

These EEOC complaints were widely publicized in the national press, culminating in a walkout by McDonald's employees across more than 30 U.S. cities in October 2016[114] who sought to draw attention to the EEOC complaints and their allegations of sexual harassment and retaliation.[115] Yet the 220 Documents do not indicate that the Board ever took steps to investigate or respond to these EEOC complaints, nor to address the serious concerns of the employees who participated

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[109] ¶109.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] ¶¶109-10.

[115] ¶110.

in the walk out.[116] With little done to protect McDonald's employees, more sexual harassment allegations surfaced. McDonald's received 20 EEOC charges between May 2018 and June 2019,[117] involving both "restaurant-level conduct" and "systemic harassment[.]"[118] Although many of the allegations involved conduct at franchises, McDonald's refused to require sexual harassment training at its franchise restaurants, deciding merely to "strongly encourage[]" it.[119]

In September 2018, McDonald's employees from 10 cities across the United States went on a one-day strike to protest the culture of sexual harassment and McDonald's management's failure to remedy the ongoing problem.[120] On the heels of the employees' protest, and in response to other alarming events, public officials began to make formal inquiries into McDonald's sexual harassment issues.[121] For example, on December 11, 2018, United States Senator Tammy Duckworth sent Easterbrook (rather ironically) an inquiry regarding the "multiple sexual harassment complaints made by employees who work at McDonald's Restaurants in Detroit,

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[116] *Id.*

[117] ¶111.

[118] *Id.*

[119] *Id.*

[120] ¶112.

[121] ¶113.

Chicago, Los Angeles, and six other cities."[122] Neither the Board nor Easterbrook took any legitimate action to combat the issue, and the problem therefore continued to fester.[123]

The Board's failure to take any action in response to sexual harassment at the Company's restaurants prompted yet another rebuke from United States Senators.[124] On June 11, 2019, seven senators joined Senator Duckworth in sending a letter to Easterbrook insisting that the Company "must do more to combat workplace harassment, abuse and retaliation suffered by McDonald's workers across the country."[125] The senators observed that "[a]fter carefully reviewing [McDonald's] public statements and documents, we remain troubled that the procedures, policies and activities outlined fall short of providing a safe and respectful work environment for all workers who wear the McDonald's uniform."[126] The senators stated, "[s]ince independently owned operations make up the vast majority of the over 14,000 McDonald's locations across the United States, it is imperative that the McDonald's Corporation require all franchise locations to adopt the updated policies to guarantee

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[122] *Id.*

[123] *Id.*

[124] ¶114.

[125] *Id.*

[126] ¶115.

that all workers will be covered by the new protections and support services."[127] Even this scrutiny from members of the U.S. Senate did little to alter the Board's decision not to take action.[128]

Complaints of rampant sexual harassment continued to pour in.[129] On November 12, 2019, the ACLU filed a class action lawsuit on behalf of McDonald's workers to address a "systemic problem" of sexual harassment (the "*Ries* Action").[130] According to the *Ries* plaintiffs, McDonald's "creates and permits a toxic work culture from the very top—as reflected by former-CEO Steve Easterbrook's recent firing for an inappropriate relationship with a subordinate in violation of Company policy-and throughout its thousands of restaurants within the United States that employ over one million workers."[131] As a result, "sexual harassment is pervasive throughout McDonald's restaurants."[132]

The *Ries* complaint details allegations of "routine, severe abuse," often inflicted upon "teenagers."[133] The named plaintiff details outrageous conduct by a

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[127] ¶116.

[128] *Id.*

[129] ¶117.

[130] *Id.*

[131] ¶118.

[132] *Id.*

[133] ¶119.

restaurant manager[134] who would frequently call the plaintiff gender-based obscenities, such as "bitch," "cunt," "slut", and "whore," in front of multiple other co-workers, including the female general manager.[135] It escalated, and the manager groped her crotch, breasts, and buttocks, pushed her against a wall in a freezer, and pushed his penis into her hand.[136] He would not stop even after the plaintiff told him to "stop," "no," "leave me alone" and "do not touch me."[137] And the general manager, despite witnessing the obscenities and misconduct, did nothing, except to promise to talk to the offending manager.[138] When the named plaintiff reported this misconduct to the District Manager, she was transferred to another location, while the manager remained in place.[139]

The *Ries* lawsuit also detailed numerous other instances of sexual misconduct perpetrated against young female victims.[140] Another plaintiff, who was a recent high school graduate, alleged that she was harassed by the same offending manager who harassed the named plaintiff, including by being subjected to the manager

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[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] ¶120.

propositioning her for a "threesome" with her sister or her friends, grabbing her rear, and "dry humping" her; the manager refused to stop even when asked.[141] The complaint notes that this harassment occurred on almost every shift that the plaintiff worked.[142] Furthermore, the offending manager encouraged other male employees to engage in lewd behavior and "count down" to when a female employee reaches 18 years of age.[143] The general manager again did nothing when confronted with the offending manager's behavior. And a more senior employee, to whom the worker complained, also took no action.[144]

The *Ries* lawsuit also details a troubling lack of process at the franchise level: almost two-thirds of employees at McDonald's or its franchises worked at locations that did not provide any sexual harassment training; there was no clear HR function to complain to at many restaurants; and McDonald's corporate HR refused to assist workers at franchises.[145] According to the *Ries* plaintiffs, none of them received any sexual harassment training and were never provided reporting options.[146] The *Ries*

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[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] ¶124.

[146] *Id.*

Action also established that franchises were a part of "The McDonald's System."[147] Workers did not perceive a difference between a franchised restaurant and a company-owned restaurant; indeed, employees at a franchised restaurant viewed themselves as being employees of "McDonald's" because they wore McDonald's uniforms, followed operating standards required by McDonald's, used McDonald's supplied- or approved-equipment and food; had management who attended "Hamburger University" for training; and their restaurant(s) underwent inspections from McDonald's headquarters.[148] They also believed that they were following McDonald's policies and procedures.[149]

The Audit & Finance Committee was informed of the *Ries* Action no later than November 22, 2019.[150] The full Board was informed at its December 6, 2019 meeting.[151] Yet, there is no evidence that the Board took any steps to prevent the systemic harassment of McDonald's female restaurant employees.[152] Not until July 2020 did the Board, through a standing committee, even ***consider the possibility*** of adopting "[n]ew US brand standards [that] will ensure both [Company-owned

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[147] ¶125.

[148] *Id.*

[149] *Id.*

[150] ¶126.

[151] *Id.*

[152] *Id.*

restaurants] and franchisees provide safe, respectful, healthy and inclusive workplaces . . . including . . . sexual harassment training[.]"[153]

On April 13, 2020, Fight for $15, with support from the Time's Up Legal Defense Fund, filed a class action on behalf of a class of Company-owned restaurant workers in Florida, claiming over $500 million in damages from sexual harassment, retaliation, and related misconduct ("*Fairley* Action").[154] The *Fairley* Action involved similar allegations as the *Ries* Action, including pervasive and severe sexual harassment of teenage employees, retaliation, and the utter failure to discipline perpetrators.[155] For example, the *Fairley* Action detailed:

- Lewd sexualized comments directed to female employees, including one employee asking "How much would it take to fuck your [one-year-old] daughter?"[156]
- Physical assaults, such as the grabbing of buttocks or "dry-humping" or trying to place a female employee's hands on male genitalia;[157] and
- Refusals to stop engaging in misconduct, even when being told, "I'm serious, don't touch me!" or similar comments.[158]

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[153] ¶127.

[154] ¶135.

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

According to the *Fairley* Action, "three out of every four female non-managerial McDonald's employees have personally experienced sexual harassment at McDonald's, ranging from unwelcome sexual comments to unwanted touching, groping, or fondling, to rape and assault."[159] And just as troubling, "over 70% of those who reported sexual harassment they witnessed or experienced faced some form of retaliation, with 42% reporting loss of income as a result."[160] The *Fairley* Action also observed that McDonald's had been on notice of these problems because of "hundreds of charges filed with the" EEOC and state agencies "and over 80 federal lawsuits and countless state lawsuits detailing severe or pervasive harassment at McDonald's restaurants across the country[.]"[161]

More troubling still, the *Fairley* Action cited a "recent poll [that] found that workers at corporate restaurants are even *more likely* than workers at franchise restaurants to have experienced sexual harassment, with 83% of female non-managerial workers at corporate restaurants reporting having experienced at least one instance of sexual harassment, and 31% reporting having experienced eight or more types of sexual harassment."[162] The *Fairley* Action also alleges that

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[159] ¶137.

[160] *Id.*

[161] ¶138.

[162] ¶139.

McDonald's "does nothing to assure sexual harassment training actually takes place or actually succeeds in preventing harassment" or to take other steps to prevent harassment or discipline perpetrators.[163] The *Fairley* Action also alleged that even though there was a formal HR process that went to headquarters, it was ineffective, and nothing was done by the Company to make it more effective, therefore making the situation worse because employees were discouraged from lodging pointless complaints.[164]

On July 20, 2021, a federal court sustained the *Fairley* Action because the plaintiffs sufficiently alleged that the Company "had knowledge of the alleged harassment and failed to take appropriate corrective measures, including by implementing and keeping inadequate sexual harassment policies and practices in the face of hundreds of complaints; informing workers to report sex harassment to certain managers who Defendants fail to properly train on how to investigate, discipline, or remediate sexual harassment; failing to monitor serial harassers and instead moving them to other stores; and pressuring managers to continue staffing harassers to meet operational needs."[165]

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[163] ¶140.

[164] *Id.*

[165] ¶141.

The Board's failure to ensure compliance with sexual harassment laws and the Company's own policies had grave consequences.[166] More than ***three-quarters*** of McDonald's workers were sexually harassed at work, according to a 2019 survey.[167] And more than ***71%*** suffered negative consequences for reporting harassment.[168]

ARGUMENT

I. DEFENDANTS IGNORE BASIC PLEADING STANDARDS, AND THE MOTIONS SHOULD BE CONVERTED FOR SUMMARY JUDGMENT WITH A RULING DEFERRED

In considering a motion to dismiss pursuant to Rule 12(b)(6), the Court must "(1) accept all well pleaded factual allegations as true, (2) accept even vague allegations as 'well pleaded' if they give the opposing party notice of the claim, (3) draw all reasonable inferences in favor of the non-moving party, and (4) [not dismiss the claims] unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances."[169] The Court must draw every reasonable factual inference in Plaintiffs' favor rather than weighing competing reasonable inferences

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[166] ¶128.

[167] *Id.*

[168] *Id.*

[169] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 535 (Del. 2011) (citation omitted).

or deciding which inference is the "most" reasonable.[170] "If the well-pled factual allegations of the complaint would entitle the plaintiff to relief under a reasonably conceivable set of circumstances, the court must deny the motion to dismiss."[171] Dismissal is warranted only if a plaintiff fails to plead facts supporting an element of the claim, or if "'it appears with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiffs would not be entitled to relief.'"[172] Therefore, the Court's evaluation of Plaintiffs' claims is limited to the allegations of the Amended Complaint–without regard to the Defendants' attempts to rebut Plaintiffs' allegations using SEC filings, news articles, and documents produced pursuant to 8 *Del. C.* § 220 ("Section 220") that were not referenced or otherwise incorporated into the Amended Complaint.[173]

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[170] *See Firefighters' Pension Sys. of City of Kansas City, Missouri Tr. v. Presidio, Inc.*, 251 A.3d 212, 276-77 (Del. Ch. 2021) ("Nor does a plaintiff have to negate other possible inferences."); *see also In re HomeFed Corp. Stockholder Litig.*, 2020 WL 3960335, at *10 n.104 (Del. Ch. July 13, 2020) (the court cannot "weigh evidence on a motion to dismiss to resolve a factual dispute").

[171] *Perlman v. Vox Media, Inc.*, 2015 WL 5724838, at *9 (Del. Ch. Sept. 30, 2015); *see Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58-59 (Del. 1970) ("Vagueness or lack of detail in the pleaded claim are not sufficient grounds alone to dismiss a complaint for failure to state a claim.") (citation omitted).

[172] *McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000) (citation omitted); *see also Presidio*, 251 A.3d at 276-77 (holding that plaintiff does not need to plead evidence).

[173] *See White v. Panic*, 783 A.2d 543, 547 n.5 (Del. 2001) ("[T]he court may not employ assertions in documents outside the complaint to decide issues of fact against the plaintiff without the benefit of an appropriate factual record."); *Rich v. Chong*, 2013 WL 3353965, at *3 n.21 (Del. Ch. July 2, 2013) ("On a motion to dismiss under Rule 12(b)(6), the Court's sole concern is whether the Plaintiff has adequately stated

Under Rule 12(b), a motion to dismiss "shall be treated as one for summary judgment and disposed of as provided in Rule 56" if "matters outside the pleading are presented to and not excluded by the Court."[174] In that event, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."[175] As contemplated by Rules 12(b) and 56(f), that includes the opportunity for "depositions to be taken or discovery to be had."[176]

Here, because the Defendants rely almost entirely on facts and documents outside the Amended Complaint—which they use in an attempt to refute nearly every allegation contained therein—the Court should convert all Defendants' Rule

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a claim upon which relief can be granted. The time for rebutting the allegations in the Complaint, and for offering competing evidence, is at trial or on a motion for summary judgment."); *see also MCG Cap. Corp. v. Maginn*, 2010 WL 1782271, at *22 (Del. Ch. May 5, 2010) (refusing to try to resolve a conflict over disputed facts on a motion to dismiss).

[174] Ct. Ch. R. 12(b); *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613-14 (Del. 1996) ("If a party presents documents in support of its Rule 12(b)(6) motion and the trial court considers the documents, the proceeding is converted to a Rule 56 motion for summary judgment, unless one of the well-recognized limited exceptions applies."); *see also Abhyanker Family Trust v. Blake*, 2021 WL 2477025, at *8 (Del. Ch. June 17, 2021) ("Because Defendants rely on documents outside of the pleadings in support of their motion, the motion will be treated as one for summary judgment under Rule 56.").

[175] Ct. Ch. R. 12(b).

[176] Ct. Ch. R. 12(b), 56(f); *see also Vanderbilt*, 691 A.2d at 613-14; *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995) ("Before a motion for summary judgment is ripe for decision, the non-movant normally should have an opportunity for some discovery.").

12(b)(6) motions to dismiss into Rule 56 motions for summary judgment.[177] All told, after conceding that the Director Defendants and McDonald's are required to assume the truth of all well-pleaded allegations in the Amended Complaint, Defendants largely ignore the Amended Complaint, citing it in most instances only in attempt to refute Plaintiffs' allegations and raise counterfactual arguments.[178] Tellingly, only ten sentences—barely more than a page all together—of the Director Defendants' 21-page statement of facts cite the Amended Complaint, and half of those merely present the Director Defendants' summary of Plaintiffs' demand futility allegations (replete with the self-serving characterization of well-pleaded allegations as "unspecified").[179] Likewise, both Easterbrook and Fairhurst incorporate the Director Defendants' extraneous allegations and use of documents not cited in the Amended Complaint.[180]

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[177] Fairhurst's motion should be converted to motions for summary judgment because he "joins in the Director Defendants' motion to dismiss the Complaint in its entirety." Fairhurst's Br. ("F.Br.") at 2.

[178] *See, e.g.*, Director Defendants' Br. ("D.D.B.") at 36 (opening attempting to "***refute Plaintiffs suggestion***" that Easterbrook's relationship with Paleothodoros violated McDonald's corporate policies) (emphasis added); *id.* at 48 (arguing that "Plaintiffs' speculation that Easterbrook's termination served to sweep his misconduct under the rug is ***refuted by the record here***") (emphasis added).

[179] *See* D.D.B. at 5-26.

[180] *See* Easterbrook Br. ("E.B.") at 7 n.3, 9; F.Br. at 2.

All other "facts" in the Director Defendants' brief represent a self-serving, inaccurate, and incomplete presentation of their litigation-driven record, a recitation that relies on extraneous facts that largely are untethered from the well-pled allegations in the Amended Complaint. And, rather than actually offering those extraneous documents to illustrate some supposed mischaracterization by the Plaintiffs, Defendants impermissibly and clumsily attempt to incorporate by reference to advance their self-serving narrative.[181] And, if that were not enough, Defendants have continued the "troubling trend" of abusing incorporation-by-reference provisions to the extreme,[182] appending to their briefs 93 exhibits—

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[181] *Contra Voigt v. Metcalf*, 2020 WL 614999, at *9 (Del. Ch. Feb. 10, 2020) ("The incorporation-by-reference doctrine does not enable a court to weigh evidence on a motion to dismiss. It permits a court to review the actual documents to ensure that the plaintiff has not misrepresented their contents and that any inference the plaintiff seeks to have drawn is a reasonable one.").

[182] *See In re CBS Corp. S'holder Class Action & Deriv. Litig.*, 2021 WL 268779, at *19 (Del. Ch. Jan. 27, 2021), *as corrected* (Feb. 4, 2021); *see also In re Clovis Oncology, Inc. Deriv. Litig.*, 2019 WL 4850188, at *14 n.216 (Del. Ch. Oct. 1, 2019) ("Section 220 documents, hand selected by the company, cannot be offered to rewrite an otherwise well-pled complaint. . .. Section 220 documents may or may not comprise the entirety of the evidence on a particular point. Until that is tested, Defendants cannot ask the court to accept their Section 220 documents as definitive fact and thereby turn pleading stage inferences on their head. That is not, and should not be, the state of our law."); *Teamsters Local 443 Health Services & Ins. Plan v. Chou*, 2020 WL 5028065, at *18 n.267 (Del. Ch. Aug. 24, 2020) ("Where the Plaintiffs have adequately pled a fact, a Section 220 document suggesting the facts are otherwise is insufficient at the pleading stage to refuse to draw the reasonable inference in the Plaintiffs' favor."); *In re WeWork Litig.*, 2020 WL 6375438, at *8 (Del. Ch. Oct. 30, 2020).

amounting to nearly ***1,400 pages***—which "substantially dwarf[s] the weight of the motions and briefs supporting the motions themselves," such that "an alarm should sound that perhaps the defendants are bringing their motions under the wrong rule."[183] In fact, Defendants' exhibits more than "rival the heft of what this Court often sees in support of motions for summary judgment … rais[ing] doubt regarding whether this Court can decide the motions under Chancery Rule 12(b)(6)."[184]

The purpose of incorporation by reference in this context is specific and narrow: "It permits a court to review the actual documents to ensure that the plaintiff has not misrepresented their contents and that any inference the plaintiff seeks to have drawn is a reasonable one."[185] However, in just one section of the Director Defendants' statement of facts regarding their purported history of taking action to enforce Company policies, the Director Defendants cite the Amended Complaint just three times, while citing extraneous documents produced in the Section 220 Action nearly thirty times—amounting to a blatant attempt at rewriting the Amended Complaint by presenting the purported "truth" through cherry-picked documents,

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[183] *CBS*, 2021 WL 268779, at *18 n.260.

[184] *Id*.; *see also Acero Cap., L.P. v. Swrve Mobile, Inc.*, 2021 WL 2207197, at *1 (Del. Ch. June 1, 2021) (where motion to dismiss was accompanied by 33 exhibits, "[t]he court will dispose of defendants' motion to dismiss after all parties have had a reasonable opportunity to conduct discovery and present the materials pertinent to such a motion in conformity with Rule 56").

[185] *CBS*, 2021 WL 268779, at *18.

including lawyer-drafted minutes that were created in anticipation of litigation.[186] The following is a non-exhaustive list of Defendants' counterfactual arguments that improperly dispute Plaintiffs' well-pled allegations:[187]

- Plaintiffs allege that Easterbrook had an "intimate relationship with Denise Paleothodoros" that "***violated McDonald's policy***" against members of management dating a subordinate,[188] yet Defendants argue there are "***no allegations that Easterbrook's relationship violated the Dating Policy***";[189]

- Plaintiffs allege that "***Easterbrook was permitted to lead the Company's response regarding Fairhurst***" and what disciplined would be imposed for harassing female employees,[190] but Defendants assert that "***Board Chairman Hernandez and A&F Committee Chairman Mulligan***" were responsible for deciding such discipline;[191]

- Outside counsel, Board Chairman Hernandez, and A&F Committee Chairman Mulligan were involved in determining how to discipline Fairhurst for his November 2018 misconduct;[192]

- Plaintiffs explain that the Board and its investigators did not bother to interview "***a single employee besides Easterbrook himself***" before

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[186] *See* D.D.B. at 18-24.

[187] *See also* Annex A, filed contemporaneously herewith (summarizing counterfactual disputes); *accord CBS*, 2021 WL 268779, at *18 & n.264 (referencing plaintiffs' Annex A that set forth "disputed references to documents" and commenting that "Defendants' serial references to matters outside the pleadings" justified conversion to summary judgment or exclusion of the extraneous documents).

[188] ¶46 (emphasis added).

[189] Easterbrook Br. at 6 (emphasis added); D.D.B. at 18-19.

[190] ¶60

[191] D.D.B. at 20 (emphasis added).

[192] D.D.B. at 19-20.

terminating him without cause;[193] Defendants assert that both "***Easterbrook and the employee with whom Easterbrook had the relationship***" were interviewed as part of that purported investigation;[194]

- Plaintiffs explain that "***the Board did not minute its October 18 meeting or its October 26, 2019 meeting***," leaving no direct contemporaneous record of what was discussed or who attended,[195] but Defendants assert that the Board met for "***several hours***," which included a "***thorough discussion***" of Easterbrook's misconduct and legal advice from multiple law firms;[196] and

- Plaintiffs allege that "***the full Board was informed***" of the EEOC complaints, and they were expressly discussed at PPSC meetings,[197] but Defendants argue that "***Plaintiffs do not allege that the Board was informed of the complaints***."[198]

In the few instances where the opening brief uses specific documents to try to disprove specific factual allegations, Defendants often mischaracterize the allegations at issue or seek to ignore reasonable inferences from the existing facts. But while it may be possible for the Court to address such disputes when confronted with a handful of factual disputes and supporting documents presented by both sides, on a motion to dismiss it is "not the court's duty to wade through the defendants' voluminous submissions, to search for arguments or sub-arguments that could be decided on the basis of the well pleaded facts of the complaint alone" or on

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[193] ¶11.

[194] D.D.B. at 21 (emphasis added).

[195] ¶72 (emphasis added).

[196] D.D.B. at 21 (emphasis added).

[197] ¶126.

[198] D.D.B. at 54 (emphasis added).

documents legitimately subject to incorporation by reference.[199] Accordingly, Defendants' use of SEC filings, corporate governance documents, and news articles that are outside the pleadings requires converting the motions to dismiss to motions for summary judgment and allowing discovery to proceed.[200] In fact, the Director Defendants use the pleading from the Company—whose interests Plaintiffs seek to protect to this litigation—as supposedly dispositive source of facts in support of its the motion to dismiss, even though Easterbrook himself had expressly denied those allegations in the litigation between him and the Company, which Plaintiffs explain in detail in the Amended Complaint.

The fact that Plaintiffs entered into a Confidentiality Agreement with McDonald's in connection with their Section 220 investigations that contained an

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[199] *Black v. Gramercy Advisors, LLC*, 2007 WL 2164286, at *1 (Del. Ch. July 23, 2007) (explaining that a "motion to dismiss [was] properly treated as one for summary judgment," although it was "possible … that parts of the motion could be decided without regard to the mass of factual information that [defendants] chose to place before the court" and "that some portion of the documentation submitted might be relied on by the court in accordance with the rules governing dismissal motions" because "the motion, taken as a whole, plainly introduces and relies on facts and documents not properly before the court on a Rule 12(b)(6) motion").

[200] *See Vanderbilt*, 691 A.2d at 613-14 ("The Court of Chancery's consideration of the prospectus' truthfulness caused the procedural posture of the proceeding to change from a Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment. Before a motion for summary judgment is decided, the non-movant should have an opportunity to take discovery. Accordingly, the Court of Chancery was required to afford the plaintiffs an opportunity for some discovery before ruling.").

incorporation provision is not dispositive.[201] Such an "incorporation" provision "does not enable a court to weigh evidence on a motion to dismiss," but rather "permits a court to review the actual documents to ensure that the plaintiff has not misrepresented their contents and that any inference the plaintiff seeks to have drawn is a reasonable one."[202] Defendants' attempt to abuse the incorporation provision by seeking to inject documents from the Section 220 production that were not cited in the Amended Complaint into the record (or to argue that documents Plaintiffs cited actually support inferences favorable to Defendants) flouts Delaware law.

In sum, it is beyond dispute that the motions to dismiss present "matters outside the pleading"[203] by inappropriately presenting several SEC filings, corporate governance documents, and news articles that Plaintiffs do not reference in their Amended Complaint to support Defendants' version of the facts[204] and

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[201] D.D.B. at 5 n.1.

[202] *Voigt v. Metcalf*, 2020 WL 614999, at *9 (Del. Ch. Feb. 10, 2020); *see also In re Vaxart, Inc. S'holder Litig.*, 2021 WL 5858696, at *1 n.1 (Del. Ch. Nov. 30, 2021) (quoting *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 797 (Del. Ch. 2016), *abrogated on other grounds by Tiger v. Boast Apparel, Inc.*, 214 A.3d 933 (Del. 2019)) ("the incorporation by reference of documents produced under Section 220 'does not change the pleading standard that governs a motion to dismiss,'" and "[i]f there are factual conflicts in the documents or the circumstances support competing interpretations, and if the plaintiff makes a well-pleaded factual allegation, then the allegation will be credited.").

[203] Ct. Ch. R. 12(b).

[204] *Cf. Vanderbilt*, 691 A.2d at 613-14.

inappropriately using the Section 220 Action incorporation-by-reference provision to "'rewrite [Plaintiffs'] well-pled complaint' in favor of [Defendants'] own version of events with documents drafted at a time when litigation relating to their contents was likely. That is not how our Chancery Rule 12(b)(6) works."[205] They do so to such an extent that it is not even possible for the references to such materials to be "excluded by the Court" without rendering the briefs unintelligible. Therefore, the motions "shall" be treated as what they are – "[motions] for summary judgment" – and "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."[206]

If the Court is disinclined to convert Defendants' motions to dismiss to motions for summary judgment, the Court should defer ruling on Defendants' motions until discovery has concluded. "A party does not have a right to a pleading-stage ruling."[207] "Chancery Court Rule 12(d) specifically provides authority for this Court to use its discretion in determining the stage in the litigation at which it will

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[205] *CBS*, 2021 WL 268779, at *18; *see also id*. at *18 n.257 ("Notwithstanding the incorporation condition, the court's focus when deciding a motion under Chancery Rule 12(b)(6) must be on the 'four corners of the complaint'…."); *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 798 (Del. Ch. 2016) ("The Incorporation Condition *does not change the pleading standard* that governs a motion to dismiss."), *abrogated on other grounds by Tiger v. Boast Apparel, Inc.*, 214 A.3d 933 (Del. 2019).

[206] Ct. Ch. R. 12(b).

[207] *Spencer v. Malik*, 2021 WL 719862, at *5 (Del. Ch. Feb. 23, 2021).

decide a motion to dismiss…."[208] More specifically, Rule 12(d) expressly allows the Court to "order[] that the hearing and determination [of a motion to dismiss] be deferred until the trial."[209] Similarly, Rule 12(a)(1) allows the Court to "'postpone[] the disposition' of a pleading-stage motion until a later stage of the case, including 'until the trial on the merits.'"[210]

As noted above, the Motion seeks to force the Court to delve deeply into a hefty factual record, largely divorced from the Amended Complaint, to address Plaintiffs' claims. Such decisions inevitably devolve into complex factual examinations and (often lengthy) opinions, with significant burdens on the public (in terms of the Court's time that could be devoted to other matters) and the parties. Devoting the significant judicial resources necessary to consider Defendants' quasi-summary-judgment motion is the antithesis of judicial efficiency.

Court of Chancery Rule 1 provides that the Rules "shall be construed, administered, and employed by the Court and the parties, to secure the just, speedy and inexpensive determination of every proceeding."[211] Here, the way to secure "the

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[208] *Sci. Accessories v. Am. Rsch. & Dev.*, 1977 WL 176266, at *1 (Del. Ch. Dec. 29, 1977); *accord In re Pattern Energy Grp. Inc. S'holders Litig.*, 2021 WL 1812674, at *46 & n.612 (Del. Ch. May 6, 2021); *Slingshot Techs., LLC v. Acacia Research Corp.*, 2021 WL 1224828, at *3 (Del. Ch. Mar. 30, 2021).

[209] Ct. Ch. R. 12(d).

[210] *Slingshot*, 2021 WL 1224828, at *3 (quoting Ct. Ch. R. 12(a)(1)).

[211] Ct. Ch. R. 1.

just, speedy and inexpensive determination" of this case is to either convert the Defendants' motions to Rule 56 summary judgment motions, or defer considering them until trial, either of which would allow the parties to take appropriate discovery, and the Court to consider a reliable record.[212] Accordingly, if it is disinclined to convert the motions to dismiss to summary judgment motions, the Court should exercise its discretion to defer the hearing of the motions until trial.

II. DEMAND IS EXCUSED FOR ALL CLAIMS, BECAUSE AT LEAST HALF OF THE DIRECTORS FACE A SUBSTANTIAL LIKELIHOOD OF LIABILITY

A. STANDARD FOR DEMAND FUTILITY

Stockholders may pursue derivative claims on behalf of the company without making a pre-suit demand if the "demand would have been futile because the directors are incapable of impartially considering the demand."[213] Demand is futile when a majority of directors either: (1) "received a material personal benefit from the alleged misconduct"; (2) "face[d] a substantial likelihood of liability"; or (3) "lack[ed] independence from someone who received a material personal benefit from the alleged misconduct."[214]

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[212] *See* Ch. Ct. R. 1; *Totta v. CCSB Fin. Corp.*, 2021 WL 4892218, at *4 & n.27 (Del. Ch. Oct. 20, 2021) (collecting cases).

[213] *Rales v. Blasband*, 634 A.2d 927, 932 (Del. 1993).

[214] *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1058 (Del. 2021).

Despite Rule 23.1's heightened requirements, the "requirement of factual particularity does not entitle a court to discredit or weigh the persuasiveness of well-pled allegations."[215] Nor does the particularity requirement obligate a plaintiff "to demonstrate a reasonable probability of success on the claim"[216] or to "plead evidence."[217] Rather, at the motion-to-dismiss phase, the "well-pleaded factual allegations of the derivative complaint are accepted as true[.]"[218] "[O]nce a plaintiff pleads particularized allegations, then the plaintiff is entitled to all 'reasonable inferences [that] logically flow from particularized facts alleged by the plaintiff.'"[219] Plaintiffs only need to "make a threshold showing, through the allegation of particularized facts, that their claims have some merit."[220] In making this

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

[216] *Id.*

[217] *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

[218] *Rales v. Blasband*, 634 A.2d 927, 931 (Del. 1993).

[219] *Pyott*, 46 A.3d at 351 (alteration in original) (quoting *Beam v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004)).

[220] *Id.* (quoting *Rales*, 634 A.2d at 934). Director Defendants assert that establishing demand futility in a case involving a Section 102(b)(7) provision is an "'extremely high burden.'" *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 125 (Del. 2004). Director Defendants selectively quote the sentence in which that phrase appears; in fact, the court was referring to the *combined* burden of overcoming a 102(b)(7) provision *and* establishing *Caremark* liability. Thus, it has no relation whatsoever to Plaintiffs' claims as to the Board's affirmative, non-*Caremark* conduct.

determination, the Court considers all particularized allegations "in their totality."[221] Plaintiffs need not plead evidence or prove their allegations at the pleading stage, and the Court must not "discredit or weigh the persuasiveness of well-pled allegations."[222]

Here, as set forth below, Plaintiffs have pled particularized allegations creating a reasonable doubt that demand would have been futile as to all claims.

B. DEMAND IS FUTILE BECAUSE AT LEAST HALF OF THE DIRECTORS FACE A SUBSTANTIAL LIKELIHOOD OF LIABILITY AS TO THE EASTERBROOK DECISION

The Amended Complaint adequately pleads that the Board could not impartially consider a litigation demand because at least half of the directors face a substantial likelihood of liability with respect to their disloyal actions in connection with Easterbrook's sexual misconduct.[223] At the time this action was filed, the Board consisted of twelve directors. Of them, Kempczinski is not independent—as the Company acknowledges in its annual proxy—because he serves as the Company's CEO.[224] Thus, Plaintiffs need only establish the interest or lack of

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[221] *Del. Cty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1019 (Del. 2015).

[222] *In re China Agritech, Inc. S'holder Deriv. Litig.*, 2013 WL 2181514, at *14 (Del. Ch. May 21, 2013).

[223] *See Seminaris v. Landa*, 662 A.2d 1350, 1354 (Del. Ch. 1995) (citation omitted) ("[A] 'substantial likelihood' of personal liability prevents a director from impartially considering a demand" under Court of Chancery Rule 23.1.)

[224] ¶168.

independence of five of the remaining eleven members of the Board. Plaintiffs have done so, as the eight Director Defendants face a substantial risk of liability for this claim.

1. The Board's Decision to Terminate Easterbrook "Without Cause" Was Self-Interested and Harmed the Company

Directors of Delaware corporations have a duty to act in good faith, which includes an obligation to "exert all reasonable and lawful efforts to ensure that the corporation is not deprived of any advantage to which it is entitled."[225] Stockholders may state a claim that directors breached this obligation by pleading facts "raising reason to doubt" that "the directors honestly and in good faith believe that the action was in the best interests of the of the corporation" rather than to serve their personal interests.[226] Rather than solely pecuniary interests, "a range of human motivations … can inspire fiduciaries and their advisors to be less than faithful" to the company and its stockholders.[227]

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[225] *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989).

[226] *In re Walt Disney Co. Deriv. Litig.*, 825 2d 275, 288 (Del. Ch. 2003) ("*Disney I*").

[227] *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 439 (Del. Ch. 2012); *see also In re RJR Nabisco, Inc. S'holder Litig.*, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989) ("Greed is not the only human emotion that can pull one from the path of propriety; so might hatred, lust, envy, revenge, or, as is here alleged, shame or pride. Indeed, any human emotion may cause a director to place his own interests, preferences or appetites before the welfare of the corporation.").

Here, the Board's decision to allow Easterbrook to quietly exit the Company was made to further the Director Defendants' personal interests and harmed the Company. As the Amended Complaint sets forth, the Director Defendants sought to keep secret the problems plaguing the Company—including its C-suite—with respect to pervasive sexual harassment and sexual misconduct and to prevent the discovery of their own failures to put a stop to it. By agreeing to terminate Easterbrook "without cause" and paying him tens of millions of dollars to quietly leave the Company, the Director Defendants acted to advance their interests and sought to keep hidden their own actions in enabling the toxic environment that had developed at McDonald's headquarters, including, *inter alia*: (1) promoting Easterbrook to CEO despite his known violation of Company policy by engaging in a prohibited relationship with Paleothodoros; (2) taking no actions after learning that Easterbrook had kept hidden Fairhurst's 2016 misconduct; (3) rubber-stamping Easterbrook's recommendation that Fairhurst receive a mere slap on the wrist for his policy violations and predatory behavior; (4) allowing booze-fueled revelries at McDonald's corporate offices, which included an open bar and weekly happy hours; and (5) failing to respond to red flags of pervasive sexual harassment at McDonald's corporate-owned and franchised restaurants, including numerous EEOC complaints and employee walkouts and strikes.[228] These allegations are sufficient to implicate

[228] ¶¶98-128.

a breach of the Director Defendants' duty of loyalty, thus subjecting the Director Defendants to a substantial likelihood of liability.

Faced with these well-pled allegations, the Director Defendants attempt to interpose a defense based on Section 141(e).[229] While directors are permitted to rely upon the advice and opinions of directors, employees and advisors, this is an "affirmative defense" that requires the directors to demonstrate their "good faith" reliance on such advice or opinions, "which is a fact-intensive inquiry that is not appropriate for disposition in the context of a motion to dismiss under Court of Chancery Rule 12(b)(6)."[230] Plaintiffs' Amended Complaint prevents any finding of "good faith" as a matter of law at the pleading stage, because Plaintiffs' well-pleaded allegations are sufficient to suggest that the Director Defendants accepted a bogus investigation because they sought to hide their own misconduct.[231] Rather than acting in good faith, the Director Directors—while personally motivated to keep matters quiet— knowingly eschewed a real investigation in favor of a 'check the box' inquiry that involved little more than asking Easterbrook himself whether he

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[229] D.D.B. at 42.

[230] *Ogus v. SportTechie, Inc.*, 2020 WL 502996, at *14 (Del. Ch. Jan. 31, 2020); *see also Ash. v. McCall*, 2000 WL 1370341, at *9 (Del. Ch. Sept. 15, 2000) (explaining that a Section 141(e) affirmative defense does not protect directors if, *inter alia*, their reliance was not in good faith).

[231] ¶¶65-81.

had been involved in any other inappropriate relationships.[232] There is substantial reason to doubt the Director Defendants' good faith in failing to do more than checking a cell phone and asking Easterbrook to incriminate himself, while intentionally creating no contemporaneous record of its deliberations in terminating Easterbrook without cause so as to shield their decisions from scrutiny.[233] At the pleading stage, when the Court need only determine that Plaintiffs have pled "reasonably conceivable" claims, the Director Defendants cannot attempt to fill this intentional void of information with their "factual inferences that run counter to those supported in the complaint."[234]

In sum, Plaintiffs' "[a]llegations that [McDonald's] directors abdicated all responsibility to consider appropriately an action of material importance to the corporation puts directly in question whether the board's decision-making processes were employed in a good faith effort to advance corporate interests."[235] Thus, the

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[232] *Supra* n.229.

[233] *Id.* (indicating that a Section 141(e) defense will be defeated where the issue was "so obvious that the board's failure to detect it was grossly negligent regardless of the experts' advice").

[234] *CBS*, 2021 WL 268779, at *18.

[235] *Disney I*, 825 A.2d at 278; *see also Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 783 (Del. Ch. 2016) (recognizing that a Board's agreement to a "without cause" separation when a "for cause" termination is available which would avoid a severance payout can support a fiduciary claim), *abrogated on other grounds*, 214 A.3d 933 (Del. Aug. 7, 2019).

directors who approved the terms of Easterbrook's termination without cause as a means to avoid scrutiny of their own actions—including all eight Director Defendants—face a substantial risk of liability.

2. Director Defendants' Termination Decision Was Not a Good Faith Exercise of Their Business Judgment

Director Defendants argue the Board's termination decision is entitled to business judgment review, ostensibly because sometimes such decisions ***are*** made consistent with directors' good faith business judgment.[236] Plaintiffs' well-pleaded allegations create a reasonable inference that that is not the case here.

Plaintiffs' well-pleaded allegations are sufficient to create a reasonable inference that Easterbrook's termination "without cause" served no defensible corporate purpose. It did not save the Company from expensive, protracted, and embarrassing litigation. Instead, the Director Defendants' attempt to sweep the predation under the rug served their interests, not the Company's. Termination "for cause" would have prevented Easterbrook from receiving his generous severance package, avoiding the waste inherent in shelling out millions to someone who seriously and serially abused his office. The Board's later decision to initiate litigation against Easterbrook to recover his severance package should be viewed as a tacit acknowledgement that its original decision harmed the Company.

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[236] D.D.B. at 44-45.

This creates much different circumstances than those in *Zucker* and *Shabbouei*, because here the negotiations with Easterbrook were conducted with a high likelihood of litigation whether he was terminated "for cause" or "without cause," and the Board's litigation against Easterbrook further shows that his violation of Company policy should have initially resulted in his termination "for cause." The "benefits" contemplated by the separation agreement with Easterbrook (*i.e.*, Easterbrook's cooperation, noncompetition, non-disparagement, confidentiality agreements, and a release) all provided a benefit to the Director Defendants by preventing him from ever detailing their oversight failures, but provided ***nothing*** to the Company and its stakeholders.

Because the "benefits" of the separation agreement and the Board's termination of Easterbrook "without cause" flowed only to the Director Defendants, the decision was inherently self-interested. Plaintiffs are not "evaluating whether decision-makers made a 'right' or 'wrong' decision," and instead focus only on the fact that the Director Defendants violated their duty of loyalty by acting with self-interest and against the Company's best interest. Plaintiffs' assertion that the Board's investigation should not be afforded the shield of business judgment is not based on its cursory nature and inadequate scope. Rather, Plaintiffs' well-pleaded allegations establish that those inadequacies were ***precisely*** what the Director Defendants wanted—*i.e.*, by deliberately failing to uncover the full scope of

Easterbrook's misconduct, the Director Defendants were able to feign ignorance of the true extent of his misconduct and thus advance their goal in preventing their own shortcomings with regard to enforcing Company policy in the past from coming to light.

The problems with the Board's decision-making process turn on the Director Defendants' self-interest with regard to the ultimate decisions, and the lack of disclosure regarding the process (*i.e.*, no minutes contemporaneously detailing discussions and process of the most monumental decision made by the Board). While the Director Defendants argue that the minutes purportedly substantiate their good faith exercise of business judgment in deciding to terminate Easterbrook "without cause," this provides no basis for dismissing Plaintiffs' claim at the pleading stage, as the redactions and the failure to create minutes for certain critical meetings fail to provide a contemporaneous evidence to support any such proposition.[237] Rather, like in *In re Walt Disney Co. Derivative Litigation*, 825 A.2d 275 (Del. Ch. 2003), Plaintiffs provide sufficient "reason to doubt whether the

[237] *See 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").

board's actions were taken honestly and in good faith," preventing that decision from "fall[ing] within the protective ambit of § 102(b)(7)."[238]

The Director Defendants' wrongdoing cannot be erased merely because they now regret it. They made a decision to let Easterbrook walk away scot free so as to avoid further scrutiny of their own failings. A fiduciary who favors herself over the Company does not get to back to "GO" and start all over. If that were the case, the important deterrent effects of derivative liability would be undermined.

In addition, the Board's lawsuit against Easterbrook and the alleged settlement recovery do not eliminate the harm to McDonald's. Not only did Easterbrook apparently get to keep tens of millions of dollars in compensation, but the Director Defendants—who looked out for themselves and not the Company—have caused McDonald's to endure extraordinary "publicity, scrutiny, and litigation," to use the Director Defendants' words.[239] And McDonald's has more than just egg on its face: the Company has had to suffer from the very type of misconduct that McDonald's own public filings represented would impair its "success" and have a "negative impact" on the Company's financial performance.[240]

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[238] *Id.* at 286.

[239] D.D.B. at 4.

[240] ¶25.

3. The Board's Affirmative Decisions with Respect to Fairhurst Also Constitute Bad Faith

The Board's affirmative decisions concerning Fairhurst also demonstrate the Director Defendants' bad faith. Director Defendants Dean, Georgiadis, and Mulligan were each on the Audit & Finance Committee on December 13, 2018, when that Committee was advised by management that Fairhurst had pulled a McDonald's employee onto his lap at a Company party for human resources staff in front of dozens of other employees.[241] They also learned at the same meeting that a complaint had been lodged as early as December 2016 with respect to Fairhurst's "improper" conduct.[242] They were also told that Fairhurst had been "warned" concerning his "excessive drinking at company events."[243]

Despite the seriousness of these allegations, the Board did not investigate Fairhurst. The directors did not ask any questions. They did not inquire as to why Easterbrook had not previously made this information known to the other directors. They merely accepted the slap-on-the-wrist discipline recommended by Fairhurst's buddy, Easterbrook. In addition, the Board—which included each of the Director Defendants—gave Fairhurst a "last chance," permitting him to stay in his position despite the many "[c]oncerns [that] had been raised to the company in the past and

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[241] ¶54.

[242] ¶55.

[243] *Id.*

recently about" his conduct at Company-related events and concerning his "personal conduct" at the events "which made some employees uncomfortable."[244] The Board's affirmative decision to let Fairhurst remain in his position as Chief People Officer—given the directors' knowledge of his previous misconduct—constitutes bad faith. Worst still, it directly led to Fairhurst remaining in a position to abuse his power yet again by continuing to prey on Company employees, conduct for which he was only finally terminated in December 2019.

4. The Director Defendants' Other Arguments Fail

Director Defendants suggest that they should not be liable because they acted properly with respect to Easterbrook's relationship with Paleothodoros[245] asserting that Easterbrook's relationship with Paleothodoros was not a "red flag."[246] But Director Defendants misconstrue the nature of Plaintiffs' claim: the issue here is *not* whether the Board's decision in 2015 was appropriate, nor whether it gives rise to a *Caremark* claim. Rather, it is whether the Director Defendants' affirmative decision to allow Easterbrook off scot free in 2019—while foregoing a thorough inquiry to apprise itself of all of Easterbrook's misconduct—was made in bad faith, given that the Board was fully aware that Easterbrook's flouted Company policies, including

[244] ¶63.

[245] D.D.B. at 18.

[246] D.D.B. at 35.

when they elevated him to CEO and named his close friend Fairhurst as McDonald's Chief People Officer.

Relatedly, the Director Defendants contend that Plaintiffs' allegations concerning "a party atmosphere" do not give rise to "red flags."[247] The Director Defendants' argument in this regard is remarkable: they contend that "Plaintiffs merely allege that the Company previously had a weekly happy hour where alcohol was served (¶49) and that Easterbrook and Fairhurst, on an unspecified number of occasions, took employees out for drinks. ¶51."[248] The Director Defendants studiously ignore that Plaintiffs allege far more, including that, at these events, executives made female employees feel uncomfortable, that "Easterbrook and Fairhurst developed a reputation for flirting with female employees, including with their executive assistants,"[249] that "Easterbrook had become known as a 'player' among McDonald's staff and contractors," and that "[r]ecruiters were instructed to hire 'young, pretty females' from high-end stores to work the front desk/reception areas of McDonald's headquarters."[250] That Director Defendants would attempt to

[247] D.D.B. at 36.

[248] *Id.*

[249] ¶50.

[250] ¶51.

minimize these allegations and characterize them as "merely" having happy hours and going "out for drinks" is both troubling and telling.

Aside from Director Defendants' improper framing of Plaintiffs' allegations, Director Defendants' argument has a more significant flaw: it misapprehends Plaintiffs' claim. Plaintiffs do not contend that the allegations concerning McDonald's sexually predatory party atmosphere were red flags that give rise to *Caremark* liability with respect to the Board's affirmative decisions concerning the Easterbrook and Fairhurst termination. Instead, those allegations show the Board's sham "investigation" and termination of Easterbrook initially without cause after his continuing and flagrant sexual misconduct was exposed was intended to advance the Director Defendants' self-interest in covering up their own inaction. After all, the majority of the directors had served on the Board when Easterbrook engaged in the prohibited relationship with Paleothodoros, when the Board decided to elevate Easterbrook to CEO despite this relationship, when the Board discovered that Easterbrook had "sat on" information about serious allegations of misconduct by Fairhurst for more than two years, and when the Board had permitted Easterbrook to address Fairhurst's repeated misconduct with a slap on the wrist.[251]

[251] ¶68.

C. DEMAND IS ALSO FUTILE BECAUSE AT LEAST HALF OF THE DIRECTORS FACE SUBSTANTIAL RISK OF LIABILITY AS TO PLAINTIFFS' *CAREMARK* CLAIM

1. The Legal Standard for a "Prong 2" *Caremark* Claim

Demand is also futile because at least half of the directors face a substantial risk of liability as to Plaintiffs' *Caremark* claim. "A breach of fiduciary duty claim that seeks to hold directors accountable for the consequences of a corporate trauma is known colloquially as a *Caremark* claim, in a tip of the judicial hat to Chancellor Allen's landmark decision."[252] A *Caremark* claim "draws heavily upon the concept of director failure to act in good faith,"[253] arising when a company's directors either "set in motion or allowed a situation to develop and continue which exposed the corporation to enormous legal liability."[254]

Stockholders may state a *Caremark* claim by, *inter alia*, alleging facts showing that "the board knew of evidence of corporate misconduct—the proverbial red flag—yet acted in bad faith by consciously disregarding its duty to address that misconduct."[255] "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

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[252] *La. Mun. Police Emps. Ret. Sys. v. Pyott*, 46 A.3d 313, 340 (Del. Ch. June 11, 2012).

[253] *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

[254] *Pyott*, 46 A.2d at 341.

[255] *Teamsters Local 443 Health Servs. & Ins. Plan v. Chou*, 2020 WL 5028065, at *24 & n.314 (Del. Ch. Aug. 24, 2020).

decision to act."[256] Allegations that directors "had notice of serious misconduct and simply brushed it off or otherwise failed to investigate state[] a claim for breach of duty."[257] Indifference to widespread misconduct constitutes an "intentional dereliction of duty" and "a conscious disregard of one's responsibilities," which is a "violation of the fiduciary duty to act in good faith."[258]

As Defendants' own authorities acknowledge, "litigation or a warning from a regulatory authority—irrespective of any admission or finding of liability—may demonstrate that a corporation's directors knew or should have known that the corporation was violating the law."[259] When directors are on notice of such "red flags," they are duty-bound to take "remedial steps" and address "any misconduct uncovered."[260] "For fiduciaries of Delaware corporations, there is no room to flout the law governing the corporation's affairs."[261]

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[256] *Pyott*, 46 A.2d at 341.

[257] *Lebanon Cty. Empls' Ret. Fund v. AmerisourceBergen Corp.*, 2020 WL 132752, at *10, *20 (Del. Ch. Jan. 13, 2020).

[258] *Ryan v. Lyondell Chem. Co.*, 2008 WL 4174038, at *3 (Del. Ch. Aug. 29, 2008) (citing *Walt Disney*, 906 A.2d at 66).

[259] *Rojas v. Ellison*, 2019 WL 3408812, at *11 (Del. Ch. July 29, 2019).

[260] *In re Boeing Co. Deriv. Litig.*, 2021 WL 4059934, *34 (Del. Ch. Sept. 7, 2021).

[261] *In re Massey Energy Co.*, 2011 WL 2176479, at *20-*21 (Del. Ch. May 31, 2011).

2. Defendants Failed to Act to Abate Sexual Harassment at McDonald's Restaurants

Defendants failed to take affirmative remedial steps in the face of clear red flags from lawmakers, regulators, civil rights groups, and—perhaps most glaringly—McDonald's own employees concerning the rampant sexual harassment occurring at the Company's restaurants.[262] While Defendants were permitting the Company's highest-ranking executives to engage in prohibited sexual conduct and disregard the Company's own policies and purported values, Defendants were also failing to take affirmative steps to remedy the hostile work environment facing restaurants employees and to provide a "safe and respectful work environment for all workers who wear the McDonald's uniform."[263]

According to research conducted in 2019, more than ***75% of McDonald's workers had been sexually harassed*** while on the job, and ***71% of those employees suffered negative consequences for reporting harassment***.[264] As detailed in the Amended Complaint, the red flags for the Director Defendants of such widespread misconduct included:

- In July 2012, the EEOC sued McDonald's for sexual harassment in the workplace, alleging that male employees were subjecting female co-workers

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[262] ¶¶98-148.

[263] ¶115.

[264] ¶128.

to unwanted sexual comments, kissing, touching of their private areas, and forcing their hands onto the men's private areas;[265]

- In October 2016, numerous McDonald's restaurant employees again filed complaints with the EEOC, complaining of unwanted sexual comments, touching, and kissing, including outrageous acts of groping and sexual assaults taking place on a daily basis;[266]

- In October 2016, McDonald's restaurant employees across 30 cities staged a walk out, organized by a fast-food worker advocacy group, in order to draw attention to the EEOC complaints filed earlier that month and their allegations of sexual harassment and retaliation;[267]

- Between May 2018 and June 2019, McDonald's received 20 additional EEOC charges, which concerned "restaurant-level misconduct" and "systematic harassment" and a refusal by the Company to provide anti-sexual-harassment training;[268]

- In September 2018, McDonald's employees from 10 cities across the United States went on a one-day strike to protest the culture of sexual harassment and McDonald's management's failure to remedy the ongoing problem;[269]

- In December 2018, U.S. Senator Tammy Duckworth sent a letter to the Company—ironically, addressed to Easterbrook concerning the "multiple sexual harassment complaints made by employees who work at McDonald's Restaurants in Detroit, Chicago, Los Angeles, and six other cities";[270]

- In June 2019, seven senators joined Senator Duckworth in sending Easterbrook a letter insisting that the Company "must do more to combat workplace harassment, abuse and retaliation suffered by McDonald's workers

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[265] ¶109 n. 53.

[266] ¶¶108-09.

[267] ¶110.

[268] ¶111.

[269] ¶112.

[270] ¶113.

across the country," and explaining that "continued reports of workplace misconduct are unacceptable";[271]

- In November 2019, the ACLU filed a class action lawsuit on behalf of McDonald's workers to address a "systemic problem" of sexual harassment and explaining that McDonald's "creates and permits a toxic work culture";[272] and

- In April 2020, Fight for $15, with support from the Time's Up Legal Defense Fund, filed a class action on behalf of a class of Company-owned restaurant workers, claiming over $500 million in damages from sexual harassment, retaliation, and related misconduct.[273]

Defendants knew that their failure to address these workplace concerns would harm the Company. McDonald's repeatedly stated in SEC filings that the Company's "success" is dependent on the "ability to recruit, motivate and retain a qualified workforce," that "[i]ncreased costs associated with recruiting, motivating and retaining qualified employees" may have a "negative impact on our Company-operated margins," and that "[s]imilar concerns apply to our franchisees."[274] McDonald's also publicly acknowledged that "potential exposure to reputational and other harm regarding our workplace practices or conditions or those of our independent franchisees or suppliers (or perceptions thereof) could have a negative impact on consumer perceptions of us and our business."[275] McDonald's further

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[271] ¶¶114, 116.

[272] ¶¶117-18.

[273] ¶135.

[274] ¶25.

[275] ¶27.

conceded in public filings that "economic action, such as boycotts, protests, work stoppages or campaigns by labor organizations, could adversely affect us (including our ability to recruit and retain talent) or the franchisees and suppliers that are also part of the McDonald's System and whose performance may have a material impact on our results."[276]

Nonetheless, Defendants were indifferent. Following the EEOC complaints and the related employee walk out in 2016—which came following similar EEOC charges in 2012—the 220 Documents do not show that the Defendants took ***any*** steps to respond to these systemic problems.[277] Similarly, after workplace issues boiled over in 2018, including more EEOC complaints, an employee strike, and scathing letters from members of the U.S. Senate, the 220 Documents—once again—do not show that Defendants took ***any*** steps to cure the patently widespread sexual harassment taking place at McDonald's restaurants.[278] Even when the Defendants learned of active class action litigation on behalf of McDonald's workers involving these issues, including the *Ries* Action, Defendants delayed rather than respond.[279] Not until July 2020, after the harm had already occurred and

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[276] *Id.*

[277] ¶109.

[278] ¶162.

[279] ¶¶117-26.

McDonald's was forced to deal with the fallout, did the Board's PPS Committee even consider the possibility of adopting "[n]ew US brand standards [that] will ensure both [Company-owned restaurants] and franchisees provide safe, respectful, healthy and inclusive workplaces," including "sexual harassment training."[280]

Thus, "[i]nstead of using their supervisory authority over management to make sure that [McDonald's] genuinely changed its culture," Director Defendants acted in bad faith and breached their fiduciary duties by doing "nothing of actual substance to change the direction of the company's real policy."[281]

3. Defendants Make Unsupported Legal and Counterfactual Agreements

In response to these detailed factual allegations, the Director Defendants contend that they do not face any likelihood of liability and therefore demand was not was excused.[282] However, Defendants rely on wholly unsupported and legal and counterfactual arguments.

EEOC Complaints. In responding to the EEOC complaints, which explained that sexual assaults were taking place on a near daily basis at McDonald's restaurants, the Board argues that it was not "informed of the complaints" and the

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[280] ¶127.

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

[282] *See* E.B. at 25-30; F.Br. at 10-13; D.D.B. at 49-64.

widespread misconduct discussed therein.[283] This argument seeks to draw improper factual inferences in Defendants' favor.[284] Plaintiffs allege that, amid the steady stream of mounting workplace issues throughout the Company, the Board knew and had been expressly advised that "***McDonald's faces constant pressure from unions, campaign groups, media, and politicians on issues of wage [and] sexual harassment***."[285] McDonald's annual stockholder reports, which each one of the Company's directors signed, expressly acknowledges the potential harm that can be caused through "boycotts, protests, work stoppages or campaigns by labor organizations" with respect to workplace matters.[286]

Moreover, not only did the EEOC complaints received broad news coverage and spark an employee walk out across 30 cities,[287] but Director Defendants tout a

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[283] D.D.B. at 54.

[284] The Director Defendants' cited legal authority is also inapposite. *See, e.g.*, *Fisher ex rel. LendingClub Corp. v. Sanborn*, 2021 WL 1197577, at *12-13 (Del. Ch. Mar. 30, 2021); *Fisher*, 2021 WL 1197577, at *12–13, 16 (involving a single FTC action rather than numerous EEOC complaints, inquiries from lawmakers, employee strikes and walkouts, and numerous class actions); *Pettry ex rel. FedEx Corp. v. Smith*, 2021 WL 2644475, at *9 n.101 (Del. Ch. June 28, 2021) (unlike here, plaintiffs failed to make allegations that the subject matter—the relatively small shipment of cigarettes among FedEx's overall operations—was material to the company).

[285] ¶106.

[286] ¶27.

[287] ¶110.

"reporting system" that would have brought such information to its attention.[288] While making strawman arguments with respect to a "Prong 1" claim (whereas Plaintiffs' action concerns solely a "Prong 2" challenge), Director Defendants concede that it "received numerous reports related to these issues on a regular basis."[289] What the Director Defendants do not identify, however, are any affirmative and mandatory "remedial steps" that were taken to address the "misconduct uncovered" by the EEOC complaints in both 2012 and 2016 and to prevent it from happening again, which is the crux of a "prong 2" claim.[290] The Director Defendants identify mere "discussion" of the problem and a passive hope for the best.

Employee Class Actions. In response to the pervasive workplace harassment issues identified in the *Ries* Action, filed by the ACLU, and the *Fairley* Action, filed with support from the Time's Up Legal Defense Fund, the Director Defendants counter that the *Ries* Action was purportedly "dismissed," and McDonald "denied liability" in the *Fairley* Action. These arguments fail. The Board fails to acknowledge that the *Ries* Action parties informed the court on April 4, 2022, that

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[288] D.D.B. at 7, 49, 51.

[289] D.D.B. at 51.

[290] *Boeing*, 2021 WL 4059934, at *34. While Defendants identify Board materials that set forth certain of McDonald's workplace policies, they do not identify any new remedial actions taken in response to the pervasive sexual harassment confirmed by the EEOC complaints.

they had settled, which news outlines have reported will provide for multimillion-dollar recovery for abused restaurant workers.[291] The Director Defendants also fail to address that the *Fairley* Action—which seeks approximately $500 million damages on behalf of McDonald's workers – has survived a motion to dismiss, leaving McDonald's exposed to ungoing defense costs and risks of liability.[292]

The Director Defendants further argue that the Company was "taking extensive action to combat sexual harassment" at the time the *Ries* and *Fairley* actions were filed in November 2019 and April 2020, respectively.[293] This argument misses the point. Again, the Director Defendants do not identify affirmative changes and mandatory "remedial steps" taken following the obvious concerns raised by the EEOC complaints in 2012 and 2016 to avoid the harm identified in the *Ries* and *Fairley* Actions.[294] In rejecting a similar argument in *Boeing* and drawing a

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[291] *ABC News*, "McDonald's Workers Reach Settlement Deal Over Harassment (April 4, 2022) (available at https://abcnews.go.com/US/wireStory/mcdonalds-workers-reach-settlement-deal-harassment-83872735).

[292] ¶141.

[293] D.D.B. at 57. The Director Defendants makes similar arguments concerning McDonald's risk disclosures added to SEC filings in 2019, which acknowledged the harm that would flow from "sexual harassment or discrimination" problems at McDonald's restaurants. *Id.* at 62-63. These arguments fail for the same reason.

[294] *Boeing*, 2021 WL 4059934, at *34. While Director Defendants identify Board materials that set forth certain of McDonald's workplace policies, they do not identify any new remedial actions taken in response to the pervasive sexual harassment confirmed by the EEOC complaints.

distinction between remedial steps taken before and after the corporate trauma at issue, the court denied defendants' motions to dismiss and explained that subsequent corrective measures "did not rectify the significant damage the Lion Air and Ethiopian Airlines Crashes and the 737 MAX Grounding caused to Boeing's profitability, credibility, reputation, and business prospects," "[n]or did they unwind Boeing's exposure to substantial criminal, regulatory, and civil liability."[295] Even if the Director Defendants here finally took certain necessary remedial steps, these belated measures do not "rectify the significant damage" that occurred due to years of inaction in the face of undeniable sexual harassment occurring at McDonald's restaurants.[296]

Franchise Oversight. Because some of McDonald's pervasive workplace harassment occurred at McDonald's franchises rather than corporate-owned restaurants, the Director Defendants argue that they are relieved from liability. They contend that the franchise agreements required "owner operators" to "comply with all federal, state, and local laws."[297] But the Board had authority through the franchise agreements to take steps that could stop the sexual harassment that created

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[295] *Id.* at *20.

[296] *Id.*

[297] D.D.B. 58.

a toxic workplace environment at McDonald's franchise restaurants.[298] The McDonald's franchise agreements provided that the Company could supervise and impose requirements to ensure that franchised restaurants were "in compliance with all applicable laws, rules, and regulations," "operated in a diligent, honest, and prudent manner," and any "imprudent or unsound conditions or practices" were corrected.[299] Tellingly, the Director Defendants approached sexual harassment at McDonald's franchises the same way they addressed sexual misconduct from Easterbrook and Fairhurst: with inaction and indifference.[300] Although the franchise agreements contained requirements for the color of employee uniforms, the types of cheeseburger containers, and even the style of kitchen lighting, Defendants chose not to impose requirements to abate rampant sexual harassment or discrimination, as owner-operators had no affirmative obligations with respect to sexual-harassment prevention training, reporting or employee discipline.[301] Thus, Defendants were on "notice of serious misconduct" and the reputational harm and damage to the workforce it would cause, but chose to "simply brush[] it off."[302]

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[298] ¶¶129-33.

[299] ¶143.

[300] ¶¶132-33.

[301] ¶132.

[302] *AmerisourceBergen*, 2020 WL 132752, at *20. Director Defendants' cited legal authority is factually distinguishable and/or legally inapposite. *In re Qualcomm Inc. FCPA S'holder Deriv. Litig.*, 2017 WL 2608723, at *1–2 (Del. Ch. June 16, 2017)

Whatever McDonald's contractual agreements with franchises, McDonald's *does* exercise a significant degree of control over those franchises, as alleged in the Complaint.[303] It was therefore with the Company's power—and thus the Board's power—to implement systems to prevent and address the harassment. To the extent Director Defendants are arguing that they do not exercise *de facto* control over those franchises, that is a matter to be resolved in discovery, not on a motion to dismiss.

Letters from U.S. Senators. As explained here, numerous U.S. Senators sent letters to McDonald's leadership expressing their concerns over the "multiple sexual harassment complaints made by employees who work at McDonald's Restaurants,"[304] calling for the Company "do more to combat workplace harassment, abuse and retaliation suffered by McDonald's workers across the country," and explaining that "continued reports of workplace misconduct are unacceptable."[305] In response, Director Defendants argue that "[n]o case law" supports that such demands from lawmakers or regulators can constitute a "red flag" requiring change "in company practices."[306] ***Not so***.

(involving isolated "FCPA violations" rather than years of patent and obvious illegalities, as alleged here); *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) (no *Caremark* claim at issue).

[303] ¶¶129-33.

[304] ¶113.

[305] ¶¶114, 116.

[306] D.D.B. 60-61.

For example, in *Rojas*—a decision that the Director Defendants rely upon in support of their own motion—then-Chancellor Bouchard explained that a "warning from a regulatory authority—irrespective of any admission or finding of liability—may demonstrate that a corporation's directors knew or should have known that the corporation was violating the law."[307] Here, the concerns of U.S. Senators, which came in response to numerous EEOC complaints and concerns from McDonald's employees themselves, similarly support the Director Defendants' "conscious disregard for their responsibilities."[308]

Officer Liability. Despite being McDonald's CEO and Chief People Officer, respectively, Easterbrook and Fairhurst contend that they face no liability for the widespread sexual harassment that took place at McDonald's restaurants, arguing that *Caremark* liability does not apply to officers.[309] Delaware law says otherwise. As the Court has explained on numerous occasions, "officers of a corporation owe the same fiduciary duties as directors."[310] The key distinction between director and

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[307] *Rojas*, 2019 WL 3408812, at *11.

[308] *Stone*, 911 A.2d at 362.

[309] E.B. at 26; F.Br. at 11-13.

[310] *City of Warren Gen. Emps' Ret. Sys. v. Roche*, 2020 WL 7023896, at *10 n.132 (Del. Ch. Nov. 30, 2020); *Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009) (explaining that a company's officers and directors both owe the same "fiduciary duties of care and loyalty").

officer liability is that officers cannot be exculpated for a breach of the duty of care and therefore remain liable for "gross negligence."[311]

In *In re American International Group, Inc.*, the court found that stockholders properly pled fiduciary claims against officers on a *Caremark* claim under Prong 2.[312] Then-Vice Chancellor Strine distilled his analysis to the following question: "does the Complaint plead facts supporting an inference that Matthews and Tizzio knew that AIG's internal controls were broken?"[313] The court found that, based on the facts alleged, that these officers were not only "aware of misconduct, but they were "directly responsible for business units" within which that conduct was taking place, whose conduct was critical to the pervasive misconduct" and chose to do nothing to fix it.[314] Similarly, here, Easterbrook and Fairhurst—who were themselves engaging in predatory and prohibited sexual misconduct—chose to do nothing and were "conscious of the fact that they were not doing their jobs."[315] Indeed, Easterbrook conceded as much.[316]

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[311] *In re Coty Inc. S'holder Litig.*, 2020 WL 4743515, at *8 n.92 (Del. Ch. Aug. 17, 2020).

[312] 965 A.2d 763 (Del. Ch. 2009), *aff'd sub nom. Teachers' Ret. Sys. of La. v. PricewaterhouseCoopers LLP*, 11 A.3d 228 (Del. 2011).

[313] *Id.* at 799.

[314] *Id.*

[315] *Id.* at 799-800 n.127 (citing *Guttman v. Huang*, 823 A.2d 492, 506 (Del. Ch. 2003)).

[316] ¶96.

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Thus, Plaintiffs have stated a *Caremark* against the Defendants by alleging detailed facts showing that they "knew of evidence of corporate misconduct," and "acted in bad faith by consciously disregarding its duty to address that misconduct."[317]

CONCLUSION

For these reasons, Plaintiffs respectfully request that the motions to dismiss be denied in their entirety for the Director Defendants and denied for Easterbrook and Fairhurst as to Plaintiffs' *Caremark* claims related to sexual harassment that has taken place at McDonald's restaurants.

[317] *Chou*, 2020 WL 5028065, at *17.

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