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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE MCDONALD'S CORPORATION STOCKHOLDER DERIVATIVE LITIGATION	)	C.A. No. 2021-0324-JRS

OPENING BRIEF IN SUPPORT OF DIRECTOR DEFENDANTS' AND NOMINAL DEFENDANT'S MOTION TO DISMISS VERIFIED CONSOLIDATED STOCKHOLDER DERIVATIVE COMPLAINT FOR BREACH OF FIDUCIARY DUTY

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

THE ALLEGATIONS OF THE COMPLAINT AND THE DOCUMENTS IT INCORPORATES 5

A. The Parties 5

B. The Board And Company Maintained A System Of Reporting And Control And Took Action Regarding Sexual Harassment And Related Workplace Misconduct 7

1. McDonald's Maintained—and the Board Oversaw —Strong Policies and Reporting Systems to Deter Sexual Harassment and Related Misconduct 7

2. The Company and Board Enhance Anti-Harassment Efforts 12

C. The Board's History Of Actively Enforcing Company Policies 18

1. Easterbrook's Relationship with Paleothodoros 18

2. Fairhurst's 2018 Misconduct 19

D. The Board's 2019 Terminations Of Easterbrook And Fairhurst 20

E. McDonald's Successful Litigation Against Easterbrook 24

F. The Complaint's Counts And Demand Futility Allegations 26

PROCEDURAL HISTORY 27

ARGUMENT 28

I. THE COMPLAINT SHOULD BE DISMISSED UNDER RULE 23.1 28

A. Legal Standards 29

B. Count I, Concerning The Board's Treatment Of Easterbrook And Fairhurst, Should Be Dismissed Under Rule 23.1 34

1. Plaintiffs' Allegations Concerning the Pre-October 2019 Treatment of Easterbrook and Fairhurst Do Not Establish a Substantial Likelihood of Liability 34

2. Plaintiffs' Criticisms of the Not-For-Cause Termination of Easterbrook in 2019 Do Not Establish a Substantial Likelihood of Personal Liability....40

(a) Plaintiffs' criticisms do not bring the Board's decision outside the protection of the business judgment rule and Section 102(b)(7)....40

(b) Alleged prior oversight failures do not provide an avenue for liability....46

C. Count II, Concerning The Board's Oversight Of Sexual Harassment Issues, Should Be Dismissed Under Rule 23.1 49

1. *Caremark* Prong 1: Plaintiffs Do Not Allege Particularized Facts Showing the Board "utterly failed to implement any reporting or information system or controls" 50

2. *Caremark* Prong 2: Plaintiffs Do Not Allege Particularized Facts Showing the Board "consciously failed to monitor or oversee" the Systems In Place 52

D. Count III, Which Asserts Claims Only Against Easterbrook And Fairhurst, Should Be Dismissed Under Rule 23.1 65

E. Count IV Should Be Dismissed Under Rule 23.1 Because The Not-For-Cause Termination Of Easterbrook Served A Corporate Purpose And Gave The Company Consideration 65

II. THE COMPLAINT SHOULD BE DISMISSED AS AGAINST THE DIRECTOR DEFENDANTS UNDER RULE 12(B)(6) 66

CONCLUSION 67

TABLE OF AUTHORITIES

Cases **Page**

In re Am. Int'l Grp., Inc. Consol. Deriv. Litig.,
965 A.2d 763 (Del. Ch. 2009) 29

Amalgamated Bank v. Yahoo! Inc.,
132 A.3d 752 (Del. Ch. 2016) 5

Aronson v. Lewis,
473 A.2d 805 (Del. 1984).....29, 30

In re BGC Partners Inc. Deriv. Litig.,
2021 WL 4271788 (Del. Ch. Sept. 20, 2021).....32

Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart,
845 A.2d 1040 (Del. 2004).....31, 48

In re Boeing Deriv. Litig.,
2021 WL 4059934 (Del. Ch. Sept. 7, 2021).....44, 45, 65, 66

Brehm v. Eisner,
746 A.2d 244 (Del. 2000).....30, 43, 60, 66

In re Camping World Holdings, Inc. S'holder Deriv. Litig.,
2022 WL 288152 (Del. Ch. Jan. 31, 2022) 30

In re Caremark Int'l, Inc. Deriv. Litig.,
698 A.2d 959 (Del. Ch. 1996) 32

In re Citigroup Inc. S'holder Deriv. Litig.,
964 A.2d 106 (Del. Ch. 2009) 29, 31, 43, 64, 66

In re Citigroup Inc. S'holders Litig.,
2003 WL 21384599 (Del. Ch. June 5, 2003) 37

In re Clovis Oncology, Inc. Deriv. Litig.,
2019 WL 4850188 (Del. Ch. Oct. 1, 2019).....5

In re Cornerstone Therapeutics Inc., S'holder Litig.,
115 A.3d 1173 (Del. 2015).....67

Firemen's Ret. Sys. of St. Louis ex rel. Marriott Int'l, Inc. v. Sorenson,
2021 WL 4593777 (Del. Ch. Oct. 5, 2021) 51, 63

Fisher ex rel. LendingClub Corp. v. Sanborn,
2021 WL 1197577 (Del. Ch. Mar. 30, 2021) 54, 58

Genworth Fin., Inc. Consol. Deriv. Litig.,
2021 WL 4452338 (Del. Ch. Sept. 29, 2021).....33

In re Goldman Sachs Grp., Inc. S'holder Litig.,
2011 WL 4826104 (Del. Ch. Oct. 12, 2011).....46

Horman v. Abney,
2017 WL 242571 (Del. Ch. Jan. 19, 2017) 33, 52, 56

McDonald's Corp. v. Easterbrook,
2021 WL 351967 (Del. Ch. Feb. 2, 2021).....25

McDonald's Corp. v. Easterbrook,
C.A. No. 2020-0658-JRS (Del. Ch. Mar. 29, 2021)
(TRANSCRIPT).....25

McElrath v. Kalanick,
224 A.3d 982 (Del. 2020).....31, 32

McPadden v. Sidhu,
964 A.2d 1262 (Del. Ch. 2008) 7

*Melbourne Mun. Firefighters' Pension Tr. Fund ex rel. Qualcomm,
Inc. v. Jacobs*, 2016 WL 4076369 (Del. Ch. Aug. 1, 2016).....36, 60

Okla. Firefighters Pension & Ret. Sys. v. Corbat,
2017 WL 6452240 (Del. Ch. Dec. 18, 2017) 52, 63

In re Oracle Corp. Deriv. Litig.,
2018 WL 1381331 (Del. Ch. Mar. 19, 2018) 31, 32, 64

Pettry ex rel. FedEx Corp. v. Smith,
2021 WL 2644475 (Del. Ch. June 28, 2021) 55, 63

Protas v. Cavanagh,
2012 WL 1580969 (Del. Ch. May 4, 2012) 65

In re Qualcomm Inc. FCPA S'holder Deriv.e Litig.,
2017 WL 2608723 (Del. Ch. June 16, 2017) 60

Rales v. Blasband,
634 A.2d 927 (Del. 1993).....30

Reiter ex rel. Capital One Fin. Corp. v. Fairbank,
2016 WL 6081823 (Del. Ch. Oct. 18, 2016).....56

Richardson ex rel. Richardson Living Tr. v. Clark,
2020 WL 7861335 (Del. Ch. Dec. 31, 2020) 64

Rojas ex rel. J.C. Penney Co. v. Ellison,
2019 WL 3408812 (Del. Ch. July 29, 2019) 33, 34, 57, 58

In re Santa Fe Pac. Corp. S'holder Litig.,
669 A.2d 59 (Del. 1995).....5

Shabbouei v. Potdevin,
2020 WL 1609177 (Del. Ch. Apr. 2, 2020) .....*passim*

Stone ex rel. AmSouth Bancorp. v. Ritter,
911 A.2d 362 (Del. 2006).....*passim*

Teamsters Local 443 Health Servs. & Ins. Plan v. Chou,
2020 WL 5028065 (Del. Ch. Aug. 24, 2020).....33

United Food & Com. Workers Union & Participating Food Indus. Emp'rs Tri-State Pension Fund v. Zuckerberg,
262 A.3d 1034 (Del. 2021).....30, 40

In re Walt Disney Co. Deriv. Litig.,
906 A.2d 27 (Del. 2006).....32, 67

In re Walt Disney Co. Deriv. Litig.,
907 A.2d 693 (Del. Ch. 2005).....65

Zucker v. Andreessen,
2012 WL 2366448 (Del. Ch. June 21, 2012) 44, 45, 48, 66

Rules and Statutes

Rule 12(b)(6) 66, 67

Rule 23.1 ..... *passim*

8 *Del. C.* § 102(b)(7) ..... *passim*

8 *Del. C.* § 141(e) 42

8 *Del. C.* § 220 ..... *passim*

PRELIMINARY STATEMENT

When the McDonald's Board learned that the Company's now-former CEO, Steven Easterbrook, had engaged in an inappropriate relationship that violated Company policy, it promptly investigated and, once the investigation confirmed the allegation, fired Easterbrook—just two weeks after the relationship was first reported. When the Board learned, eight months later, that Easterbrook had engaged in other inappropriate relationships and had lied about them during the first investigation, the Company sued Easterbrook in this Court to recover the cash and equity that he retained by fraudulently obtaining a without-cause termination. That lawsuit recently settled, yielding what the *New York Times* called "one of the largest clawbacks in the history of corporate America."

As Easterbrook's firing and the suit to claw back his compensation demonstrate, the Board has paid careful attention to allegations of sexual harassment and related workplace misconduct. The Board actively oversaw the Company's policies and responses to claims of sexual harassment, whether at its corporate offices or McDonald's-branded restaurants located throughout the U.S. For example, the Board supervised significant efforts by the Company to improve anti-harassment policies and standards, increase opportunities for reporting and training, and provide resources for franchisees, all while receiving frequent reports on compliance and litigation activity related to these issues. The Board also

responded forcefully to specific allegations of misconduct, as when it fired Chief People Officer David Fairhurst for cause.

Despite this record of decisive action and careful oversight, Plaintiffs are pursuing derivative claims against the McDonald's Board. Having made no demand, Plaintiffs contend that the Board is incapable of acting, even though it *already pursued successful litigation* against Easterbrook. The sole basis Plaintiffs offer for excusing demand is that a majority of directors face a substantial likelihood of personal liability—an excuse that requires alleging particularized facts demonstrating bad faith or disloyalty. Plaintiffs have not met that exacting standard.

First, Plaintiffs second-guess the *process* by which the Board terminated Easterbrook (and Fairhurst). To make their case, Plaintiffs resort to hindsight-driven critiques about the timing of the Board's decision-making and the scope of outside counsel's investigation. But the facts pleaded in the Complaint, and reflected in the incorporated materials, show that far from acting in bad faith, the Board actively enforced the Company's policies against Easterbrook and Fairhurst.

Second, Plaintiffs assert a *Caremark* claim challenging the Board's oversight of efforts to prevent sexual harassment and workplace misconduct more broadly. But absent an utter failure to establish a system of reporting and control or a conscious disregard of "red flags," there can be no breach of the *Caremark* duty of

loyalty, and thus no likelihood of personal liability for a majority of the Board. Plaintiffs come nowhere near the particularized factual allegations required to meet this standard. The documents produced in response to the Section 220 demands—which Plaintiffs largely ignore in their pleading—reflect that the Board maintained robust reporting and information systems, received frequent reports on issues related to sexual harassment, and oversaw development and deployment of enhancements to McDonald's policies and resources supporting anti-harassment efforts at the corporate and franchise level. Indeed, Plaintiffs tacitly concede this significant Board attention when they criticize particular actions that the Board took.

This case exemplifies why stockholders may not easily wrest control of litigation from a company's board. Under the Board's leadership, McDonald's has taken substantial action on the issues raised in the Complaint: (i) adopting and strengthening policies and procedures to prevent and deter harassment of employees; (ii) encouraging its franchisees to adopt similar protections for their employees and providing resources for franchisees seeking to do so; (iii) investigating an alleged policy violation by its CEO and promptly firing him when the allegation was substantiated; (iv) upon learning that the CEO's misconduct was more egregious than previously known, promptly suing him and ultimately settling that litigation for cash and equity worth $105 million at the time

of settlement; and (v) disciplining, then firing for cause, the Company's Chief People Officer.

Fulfilling its duties has exposed McDonald's Board to publicity, scrutiny, and litigation; but in fulfilling its duties, the Board had to act in real time, incorporating new information as it learned it and weighing the pros and cons of various courses of action. In contrast, Plaintiffs have the luxury of hindsight. And while Plaintiffs have the right to their own opinions, they do not have the right to usurp the Board's authority to act without particularized factual allegations showing that a majority of directors acted in bad faith or disloyally. Because the Complaint fails to meet that high bar, this action must be dismissed.

THE ALLEGATIONS OF THE COMPLAINT AND THE DOCUMENTS IT INCORPORATES[1]

A. The Parties

Plaintiffs[2] are stockholders of McDonald's and owned shares at the time of the event described in the Complaint. ¶¶19-21.[3]

Nominal Defendant McDonald's is a Delaware corporation headquartered in Chicago. McDonald's, its subsidiaries, franchisees and licensees operated more than 39,000 restaurants as of year-end 2020.[4] Approximately 14,000 of those

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[1] For purposes of this motion only, Director Defendants and McDonald's assume the truth of any well-pleaded allegations of fact in the Complaint. However, they do not assume as true the Complaint's conclusory allegations, or inferences derived from conclusory allegations. *See In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 65-66 (Del. 1995). The Court may also consider documents that are integral to or incorporated by reference in the Complaint. *See, e.g.*, *Stone ex rel. AmSouth Bancorp. v. Ritter*, 911 A.2d 362, 372-73 (Del. 2006). The Complaint quotes and paraphrases a variety of documents, including media articles, letters to McDonald's, complaints and hearing transcripts in recent litigation involving McDonald's, and SEC filings, thereby incorporating those documents by reference. The Court may also consider documents produced in response to a demand for books and records under 8 *Del. C.* § 220 under an agreement that such documents be deemed incorporated by reference in any complaint. *See 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); *see also In re Clovis Oncology, Inc. Deriv. Litig.*, 2019 WL 4850188, at *2 n.8 (Del. Ch. Oct. 1, 2019). Citations to exhibits, unless otherwise stated, refer to exhibits to the Transmittal Declaration of S. Reiko Rogozen, filed herewith.

[2] Terms used to refer to the parties are defined in the accompanying motion.

[3] Except as otherwise noted, paragraph citations are to the Complaint.

[4] Ex. 1 at 20.

restaurants are in the United States.[5] Approximately 93% of those restaurants are owned and operated by franchisees, who are independent local business owners.[6] "[McDonald's] is primarily a franchisor and believes franchising is paramount to delivering great-tasting, food, locally relevant customer experiences, and driving profitability. Franchising enables an individual to be their own employer and maintain control over all employment related matters, marketing and pricing decisions, while also benefiting from the strength of McDonald's global brand, operating system and financial resources."[7] McDonald's franchisees and licensees employ over 2 million workers, and McDonald's and its subsidiaries employ an additional 200,000 workers globally.[8]

The Director Defendants comprise nine of the twelve current members of McDonald's Board. ¶¶31-39, 153. They include (1) former CEOs of Mattel, Abbott Labs, Dignity Health, and Ancestry, (2) the current or former chairs of InterCon Security Systems, ConAgra Brands, and Jones Lang La Salle, (3) the founder, chairman and co-CEO of the largest Black-owned investment firm in the United States, and (4) the current COO and Executive Vice President of Target.[9]

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[5] *Id.*

[6] *Id.*

[7] *Id.* at 3.

[8] *Id.* at 6.

[9] Ex. 2 at 15-20.

McDonald's certificate of incorporation provides, "[t]o the fullest extent" permitted by Delaware law, that "no director of the Corporation shall be liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director."[10]

B. The Board And Company Maintained A System Of Reporting And Control And Took Action Regarding Sexual Harassment And Related Workplace Misconduct.

1. *McDonald's Maintained—and the Board Oversaw—Strong Policies and Reporting Systems to Deter Sexual Harassment and Related Misconduct.*

Dating back even before 2015, which is the starting point for Plaintiffs' claims, the Company, under the Board's oversight, has implemented numerous policies aimed at protecting its employees—at both the corporate level and in its company-owned stores—from sexual harassment or similar workplace misconduct. McDonald's Standards of Business Conduct affirm that "[e]ach of our employees throughout the world deserves to be treated with fairness, respect and dignity," and that "McDonald's is committed to diversity and equal opportunities for everyone."[11] To that end, employees "have the right to work in a place that is free from harassment, intimidation or abuse, sexual or otherwise, or acts or threats of

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[10] Ex. 3 at 11. The Court may take judicial notice of a company's governance documents when considering a motion to dismiss. *See, e.g.*, *McPadden v. Sidhu*, 964 A.2d 1262, 1273 n.28 (Del. Ch. 2008).

[11] Ex. 4 at `185.

physical violence."[12] McDonald's prohibits "verbal or physical conduct that demeans another person, unreasonably interferes with another's work performance or creates an intimidating, abusive, hostile or offensive work environment," including sexual harassment, which "includes unwelcome sexual advances, requests for sexual favors and other conduct of a sexual nature."[13]

McDonald's Policy Against Discrimination and Harassment reiterates that sexual harassment "will not be tolerated," and defines harassment to include any "conduct of a sexual nature that unreasonably interferes with another person's work performance; creates an intimidating, hostile or offensive work environment; or adversely affects another person's employment opportunities."[14] To encourage reporting of violations, "McDonald's prohibits retaliation against any employee who has made a complaint about harassment or discrimination or has cooperated in the investigation of such a complaint."[15] Both the Standards of Business Conduct and the Policy Against Discrimination and Harassment provide resources for reporting harassment, including the phone number for McDonald's Business

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[12] *Id.*

[13] *Id.*

[14] Ex. 5 at `240-41.

[15] *Id.* at `242.

Integrity Line, through which employees can make confidential, anonymous complaints.[16]

McDonald's Dating, Nepotism and Fraternization Policy (the "Dating Policy") prohibits "[e]mployees who have a direct or indirect reporting relationship to each other … from dating," because such relationships can "create a conflict of interest."[17] The Dating Policy defines "[d]ating" to include any "romantic or intimate relationship."[18] In response to a violation of this policy, "McDonald's may take such steps as it deems reasonable and appropriate to correct the violation, including (but not limited to) transferring or reassigning one or both of the employees involved; asking the employees involved to cease dating or to agree not to begin dating; or terminating the employment of one or both of the employees."[19]

The Company has also paid attention to workplace conduct concerns at its franchised locations, although these efforts look different by design. As noted, the majority of McDonald's-branded restaurants are franchised, or independently owned, and are therefore separate and distinct from the Company. Thus, employees of franchisees are not employees of McDonald's. Accordingly,

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[16] *Id.* at `243-44; Ex. 4 at `180, `185, `200.

[17] Ex. 6 at `01.

[18] *Id.*

[19] *Id.* at `02.

McDonald's employee policies do not apply to employees of franchisees, who "manage their businesses independently, and therefore are responsible for the day-to-day operation of their restaurants."[20] Nevertheless, McDonald's U.S. franchise agreement obligates franchisees to "comply with all federal, state, and local laws, ordinances and regulations affecting the operation of [their] Restaurant[s]."[21]

The Board's Audit & Finance ("A&F") Committee and the Public Policy & Strategy ("PPS") Committee shared responsibility for overseeing McDonald's efforts to develop and enforce compliance with the types of policies described above. Indeed, in January 2015, the Board approved additional risk oversight provisions in committee charters, specifically including oversight of harassment issues.[22]

These committees met regularly with the Company's Chief Compliance Officer on topics such as "efforts to increase awareness around the Company's harassment policies,"[23] and received recurring updates regarding allegations of misconduct received via the Business Integrity Line and other sources, as well as

[20] Ex. 1 at 31.

[21] Ex. 7 at `1308-09.

[22] Ex. 8; Ex. 9.

[23] Ex. 10 at `1271; Ex. 11 at `1875; Ex. 12; Ex. 13 at `750.

investigations of significant matters identified by Compliance.[24] They also reviewed the Company's Annual Compliance Reports,[25] which include statistics on allegations related to sexual harassment and other workplace conduct issues. The annual reports provide further detail regarding (1) allegations substantiated by Compliance and (2) resulting employee terminations.[26]

Committee members also refined these processes, requesting further detail regarding Compliance's "criteria used to determine matters that are reported" to the Board[27], and offering suggestions for further improvements (such as "information regarding trends and materiality tiering") to reporting.[28] In the course of these discussions, the Chief Compliance Officer assured the Board that she has "the full support of senior management and the appropriate resources to maintain and advance the Company's compliance program."[29]

Committee members also reported regularly to the full Board regarding McDonald's compliance efforts,[30] and the Board and its committees received

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[24] Ex. 14; Ex. 15; Ex. 16; Ex. 17; Ex. 18; Ex. 19; Ex. 20; Ex. 21; Ex. 22; Ex. 23; Ex. 24.

[25] *See, e.g.*, Ex. 25; Ex. 26.

[26] *Id.*

[27] Ex. 24 at `1900.

[28] Ex. 13 at `750.

[29] Ex. 27 at `1004.

[30] *Id.*; Ex. 28 at `1065; Ex. 29 at `784.

litigation updates from counsel on a regular basis.[31] In total, the Board and its committees received 25 reports from management related to these issues during the period on which Plaintiffs base their claims.[32]

2. *The Company and Board Enhance Anti-Harassment Efforts.*

In 2017, McDonald's Chief Compliance Officer reported to the A&F Committee that the social environment outside the Company had "provided an opportunity to reinforce a culture within the Company that encourages employees to report and to intercede if issues arise."[33] Directors questioned the Chief Compliance Officer concerning continuing support from management, "tone at the top," and "efforts to increase awareness around the Company's harassment policies."[34] The Chief Compliance Officer assured the directors that the Company's harassment policies "are strong," and outlined related efforts undertaken by the Company.[35]

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[31] *See, e.g.*, Ex. 30; Ex. 31; Ex. 32; Ex. 33; Ex. 34 at `2723-24.

[32] Ex. 35; Ex. 36; Ex. 25; Ex. 26 (Annual Compliance Reports); Ex. 37; Ex. 38; Ex. 39; Ex. 40; Ex. 41; Ex. 42; Ex. 43; Ex. 44; Ex. 45; Ex. 46; Ex. 15; Ex. 17; Ex. 18; Ex. 20; Ex. 22; Ex. 23 (Business Integrity Case Updates); Ex. 30; Ex. 31; Ex. 32; Ex. 33; Ex. 34 at `2723-24 (Litigation Updates).

[33] Ex. 13 at `750.

[34] *Id.*

[35] *Id.*

Nonetheless, in 2018, the Company took proactive steps to strengthen its existing policies, and undertook efforts to improve in response to complaints made to the EEOC—efforts later detailed in a report to the PPS Committee.[36] The Company comprehensively reviewed policies applying to corporate employees and the employees of company-owned restaurants in the U.S. to "ensure alignment of zero-tolerance policies towards all forms of … sexual harassment."[37] The Company also "sought industry-leading outside perspectives" on policies and training from third-party experts, including the largest anti-sexual violence organization in the country.[38] Franchisees, too, reaped the benefits of these efforts: although not mandated, the Company provided U.S. franchisees and their employees with access to anti-harassment resources the Company developed, and strongly encouraged their adoption, including through financial incentives.[39] In particular, McDonald's made interactive, third-party facilitated training modules available to all U.S. franchisees and their restaurant managers, provided anti-harassment guides to franchisees, and offered a third-party hotline for anonymously reporting complaints by restaurant employees to franchisees.[40]

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[36] Ex. 47.

[37] Ex. 48 at `233.

[38] Ex. 47 at `683-84.

[39] Ex. 49 at `734.

[40] Ex. 47 at `683-84.

McDonald's franchisees welcomed these initiatives, with the vast majority of franchisees ("almost 90%") adopting the training modules by May 2019.[41]

The Board, A&F Committee, and PPS Committee continued to monitor and guide management's efforts to strengthen the Company's protections against harassment, and oversaw the Company's evolving approach to these issues. Indeed, in May 2019, the Board requested and received a status report on the Company's initiatives to enhance protections against harassment in both company-owned and franchised restaurants.[42] Directors discussed with management "how to bolster the Company's current efforts and improve the environment at the restaurants," and told management to "report back to the Board with further enhancements to the program and its strategy."[43]

Following the May 2019 Board meeting, the PPS Committee requested an additional meeting "to discuss these issues in more detail."[44] At that meeting, management reported further enhancements to resources provided to both company-owned and franchised restaurants, including revised training and "enhanced measures to address any instances of retaliation."[45] After "robust

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[41] *Id.* at `684; Ex. 50 at `418-19.

[42] Ex. 51 at `430-31.

[43] *Id.* at `431.

[44] Ex. 47 at `682.

[45] Ex. 50 at `418-19.

discussion," the committee confirmed with senior management that "[McDonald's] (i) has developed a comprehensive plan around the issues of sexual harassment and safe and respectful workplace environments; (ii) will continue to be proactive; and (iii) will further evaluate how best to execute its strategy and be a leader on the issues."[46] In July 2019, the PPS Committee reported to the Board that the Company had "made meaningful progress with a strong anti-harassment policy and upgraded training."[47] In response, directors "encouraged the Company to focus on turning the challenges into an opportunity," and to "continue to pursue more proactive steps in this area."[48]

Consistent with this increased focus on combating sexual harassment, McDonald's Enterprise Risk Management ("ERM") system elevated "Respectful Workplace" to a second-tier risk beginning in 2019.[49] During the same year, McDonald's mandated "third-party facilitated and interactive" anti-harassment training for all general managers at company-owned restaurants, and revised its anti-harassment policies for all McDonald's corporate employees to "more clearly inform[] employees of their rights, more clearly define[] sexual harassment … and

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[46] *Id.*

[47] Ex. 29 at `784.

[48] *Id.*

[49] Ex. 52 at `1138.

provide[] examples of what unacceptable behavior looks like."[50] It also provided live, interactive anti-harassment training to all McDonald's headquarters staff, and gave further instruction to human resources personnel on techniques "to properly conduct investigations."[51]

In 2019 and early 2020, the Company developed and implemented additional training modules on harassment for use in company-owned restaurants, which were also offered to franchised restaurants, including both "interactive and computer-based training programs and in-person discussions."[52] McDonald's "strongly encouraged" their adoption by franchisees[53], and partnered with key franchisee leadership associations to drive adoption and promote further collaboration on these issues.[54] In December 2019, management informed the PPS Committee that its initiatives had been "broadly supported by franchisee leadership," and "demonstrat[ed] with clear actions the Company's commitment to safe and respectful workplaces."[55] Following continued assessment of enterprise risks facing the Company, McDonald's ERM process further elevated sexual

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[50] Ex. 47 at `683-84.

[51] *Id.* at `684.

[52] Ex. 55 at `952, `954.

[53] Ex. 56 at `1625.

[54] Ex. 53 at `831-32, `840.

[55] Ex. 53 at `816; Ex. 54 at `884-85.

harassment and workplace conduct issues to a first-tier risk in 2020.[56] The Board's ERM discussion addressed 2020 enhancements to the Company's efforts, including: (1) additional corporate employee training, (2) the development and planning for the future implementation of McDonald's Brand Standards specifically related to harassment and workplace conduct in company-owned and franchised restaurants, (3) enhanced tools and resources for franchisees, and (4) a new system for case management and quarterly review of workplace complaints.[57]

In July 2020, the Board was updated on management's efforts to reach consensus with franchisees on Brand Standards related to harassment and workplace misconduct, and plans to increase investments in anti-harassment training for both company-owned and franchised restaurants.[58] Nine months later, on April 14, 2021, McDonald's announced that it would implement new Brand Standards for the prevention of violence, harassment, and discrimination at *all* McDonald's restaurants, even those that are franchise-owned; all restaurants will be "assessed and held accountable" for compliance with the Brand Standards in accordance with McDonald's business evaluation process.[59]

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[56] Ex. 57 at `2730-31.

[57] *Id.* at `2734.

[58] Ex. 56 at `1620, `1622.

[59] Ex. 58.

C. The Board's History Of Actively Enforcing Company Policies

The Complaint makes allegations regarding two instances of the directors' enforcement of Company policies. Far from showing a Board that ignored policy violations or misconduct, each demonstrates the Board exercising vigilance.

1. *Easterbrook's Relationship with Paleothodoros*

Easterbrook was promoted to CEO in 2015. ¶5. Before becoming CEO, he began dating Denise Paleothodoros, an executive with a public relations firm that did business with McDonald's. ¶46. Plaintiffs allege that Easterbrook violated the Dating Policy because, after he became CEO, he had "direct or indirect authority" to engage the services of Paleothodoros' employer. *Id.* The Board allegedly "signed off" on the relationship after receiving "assurances that Paleothodoros would be removed from the McDonald's account,"[60] which is among the actions the Dating Policy states that McDonald's may take "to correct [a] violation" of the Dating Policy.[61] Although Plaintiffs assert that there is "no evidence" that the Board confirmed that the removal "in fact" occurred, the very article Plaintiffs cite confirms that "[Paleothodoros] was removed from the McDonald's account to avoid any conflicts of interest."[62] As the Court has put it: "The Easterbrook

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[60] Ex. 59 (quoted in ¶46).

[61] Ex. 6 at `02.

[62] *Compare* ¶46 *with* Ex. 59 at 3 (quotations omitted).

relationship with the named contractor had nothing to do with harassment or discrimination. When the Board learned of the relationship, it resolved any potential conflict of interest issue by removing the contractor from the account and then engaging in a dialogue with the Company where the contractor worked." Ex. 60 at 20-21.

2. *Fairhurst's 2018 Misconduct*

On December 13, 2018, the A&F Committee met to address a report of inappropriate conduct on Fairhurst's part.[63] Easterbrook told the Committee that the Compliance Department had investigated a report concerning Fairhurst's conduct at a November 2018 work function and found that Fairhurst had violated the Company's Standards of Business Conduct.[64] Easterbrook also told the Committee that, during the investigation, an employee had reported another, different matter involving Fairhurst "in December 2016 that had not been previously reported to Compliance."[65] Easterbrook explained to the Committee that Fairhurst "had once before been warned about excessive drinking at Company events."[66]

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[63] Ex. 61 at `1492.

[64] *Id*.

[65] *Id*.

[66] *Id*.

Easterbrook then described steps taken by management in response to Fairhurst's conduct: consultation with outside counsel to "assist the Company in assessing its options," and discussion with Board Chairman Hernandez and A&F Committee Chairman Mulligan regarding proposed discipline, which required Fairhurst to "forfeit[] 50% of his [Target Incentive Plan] bonus payment for 2018" and additionally "sign[] an agreement regarding the conduct."[67] The Committee "made a number of inquiries about the events described as well as management's plans to address the circumstances" and all "questions were answered to their satisfaction."[68] Fairhurst signed a "last chance" letter, acknowledging that if he failed to "abide by all Standards of Business Conduct," he would be "subject to immediate termination from employment with McDonald's Corporation with no entitlement to severance pay or equity extensions."[69]

D. The Board's 2019 Terminations Of Easterbrook And Fairhurst

In October 2019, the Company received an allegation that Easterbrook had engaged in an undisclosed relationship with a McDonald's employee.[70] General Counsel Jerome Krulewitch swiftly notified Hernandez of that allegation on October 17, 2019. Hernandez acted immediately—discussing the matter with

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[67] *Id*.

[68] *Id.* at `1493.

[69] Ex. 62.

[70] Ex. 63 at `859.

McDonald's outside corporate governance counsel at Wachtell Lipton Rosen & Katz.[71] Within 24 hours, Hernandez alerted the independent directors on the Board's Executive Committee and independent director Penrose, and promptly instructed Krulewitch to engage outside counsel to investigate the allegation.[72] Over the next week attorneys with the outside law firm (Morgan Lewis & Bockius LLP) conducted that investigation, interviewing both Easterbrook and the employee with whom Easterbrook had the relationship, and "searched images and videos saved on [Easterbrook's] phone, as well as any retained text messaging activity, for evidence of a relationship with … any other Company employee."[73] In his interview by outside counsel, Easterbrook denied any other relationship with Company employees.[74]

All the independent directors convened with their advisors for several hours on October 26, 2019.[75] The partner from Morgan Lewis who led the investigation at the instruction of the directors shared his firm's findings.[76] After a thorough discussion, "the directors determined that Mr. Easterbrook violated Company

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[71] *Id.*

[72] *Id.*

[73] Ex. 64 ¶¶20-22.

[74] *Id.* ¶21.

[75] Ex. 63 at `859.

[76] *Id.*

policy and demonstrated poor judgment involving a recent consensual relationship with an employee."[77] Wachtell Lipton provided additional legal advice.[78] The directors "discussed various possible terms of a separation of Mr. Easterbrook, including whether or not Mr. Easterbrook's separation should be a termination with or without cause and the implications of that decision to Mr. Easterbrook and the Company."[79]

During the October 26 discussion, it was "noted that a termination for cause would likely be challenged" by Easterbrook, possibly triggering "a disruptive public dispute that would continue for a substantial period."[80] After discussing various factors bearing on the termination decision, the directors judged that:

> on balance it would in the best interest of the Company if Mr. Easterbrook's separation from the Company were accomplished with as little disruption as possible and that while the Company should seek Mr. Easterbrook's cooperation and certain other benefits (including noncompetition, non-disparagement and confidentiality agreements and a release) it need not seek to effect a termination of Mr. Easterbrook's employment for cause.[81]

The directors then instructed the officers and advisors present to prepare for Easterbrook's termination and related tasks "with the view of presenting the results

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[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

to the Board for final decision and action at a formal Board meeting to be scheduled in approximately one week."[82]

That formal Board meeting took place on November 1, 2019. Hernandez asked Krulewitch to "recap for the directors and for the record the events leading to the meeting," providing an opportunity to document in the minutes the events of the previous two weeks.[83] The directors then discussed the matter further, approved a Separation Agreement with Easterbrook, and adopted the formal resolution to terminate him.[84] The Separation Agreement gave Easterbrook nothing more than what he was entitled to after a "without cause" termination under the Company's then-existing Officer Severance Plan.[85] McDonald's publicly announced both Easterbrook's termination and its reason: "the Board's determination that he violated company policy and demonstrated poor judgment involving a recent consensual relationship with an employee."[86]

Separately, during the same time period, McDonald's Compliance Department received a report that Fairhurst had behaved inappropriately at an

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[82] *Id.* at `860.

[83] *Id.* at `859.

[84] *Id*. at `860-62.

[85] *Id.* at `865-81.

[86] Ex. 65.

October 2019 event.[87] As the "last chance" letter had warned, the Board promptly terminated Fairhurst's employment for cause.[88]

E. McDonald's Successful Litigation Against Easterbrook

On July 21, 2020, Hernandez notified the Board that following a recent report of an alleged relationship between Easterbrook and another McDonald's employee, McDonald's Compliance Department had launched an investigation into that allegation.[89] In the course of the new investigation, the Company discovered emails that Easterbrook had previously deleted to prevent their discovery in the prior investigation.[90] These emails included as attachments dozens of nude or sexually explicit photographs Easterbrook had sent from his work email account to a personal email account in the United Kingdom.[91] The investigation ultimately found evidence of multiple improper sexual relationships between Easterbrook and McDonald's employees in the year before Easterbrook's termination.[92] This

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[87] *See* Ex. 66.

[88] Ex. 63 at `863-64.

[89] Ex. 67 at `1441.

[90] Ex. 64 ¶¶35-39.

[91] Ex. 67 at `1441.

[92] Ex. 64 ¶¶35-39.

evidence revealed that Easterbrook had lied to Morgan Lewis during the October 2019 investigation.[93]

After describing these discoveries to the Board, Hernandez explained that McDonald's retained control over a "substantial portion of Mr. Easterbrook's separation compensation," and that Hernandez and the Executive Committee of the Board believed the Company should seek to claw back the compensation and benefits Easterbrook had received as a result of the not-for-cause termination.[94]

The Board resolved to sue Easterbrook.[95] For more than a year, the Company litigated vigorously against Easterbrook in this Court. *See McDonald's Corp. v. Easterbrook*, 2021 WL 351967 (Del. Ch. Feb. 2, 2021) (denying Easterbrook's motion to dismiss); *McDonald's Corp. v. Easterbrook*, C.A. No. 2020-0658-JRS, at 53-59 (Del. Ch. Mar. 29, 2021) (TRANSCRIPT) (denying Easterbrook's motion for a protective order and to stage discovery). Just over a year after filing, "in one of the largest clawbacks in the history of corporate America," McDonald's announced the settlement of the litigation, which required

[93] *Id.*; *see also* ¶90.

[94] Ex. 67 at `1441.

[95] *Id.* at `1444-45.

Easterbrook to return cash and equity to the Company, valued at over $105 million at the time of settlement.[96]

F. The Complaint's Counts And Demand Futility Allegations

Count I asserts that the Director Defendants breached fiduciary duties by terminating Easterbrook without cause, and by unspecified "bad faith conduct" with respect to "known sexual misconduct" by Easterbrook and Fairhurst. ¶¶169-173. Count II asserts that the Director Defendants breached fiduciary duties by "fail[ing] to attempt to remedy severe, widespread sexual harassment occurring at the Company, including at McDonald's restaurants." ¶¶174-178. Count III charges Easterbrook and Fairhurst with breaching fiduciary duties by engaging in inappropriate conduct with female employees, and conducting inadequate enterprise risk management. ¶¶179-184. Count IV asserts a claim for waste against the Director Defendants, based on the not-for-cause termination of Easterbrook. ¶¶185-188.

The Complaint concedes that Plaintiffs made no demand to bring suit. Plaintiffs attempt to excuse their failure by asserting that "each member of the Demand Board faces a substantial likelihood of personal liability." ¶166; *see also* ¶¶153-155.

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[96] Ex. 68; Ex. 69. Plaintiffs allege that "the total value of Easterbrook's compensation during his tenure as CEO, including his severance package, was more than $125.8 million." ¶11.

PROCEDURAL HISTORY

In response to Section 220 demands, including from Plaintiffs, McDonald's produced 389 documents containing 3,422 pages of Board minutes and Board materials dating from January 1, 2015, to August 10, 2020, as well as certain documents between August 10 and December 21, 2020. Plaintiffs agreed that all materials produced would be "deemed incorporated by reference, as though it were appended in its entirety, into any complaint" filed by Plaintiffs.[97] Teamsters and Gianotti filed derivative complaints on April 15, 2021, and July 23, 2021, and later agreed to file a consolidated amended complaint.[98]

On August 2, 2021, another stockholder group (the "220 Litigants") filed a Section 220 action against McDonald's, seeking numerous categories of additional documents.[99] After trial, this Court ruled in McDonald's favor on each category of documents the 220 Litigants sought, and entered judgment for McDonald's. Ex. 60 (bench ruling); Ex. 73 (judgment).

During the Section 220 action, McDonald's also offered to—and did—produce three additional documents related to Fairhurst's termination: the "last chance" letter, the separation agreement detailing his termination for cause, and the

[97] Ex. 70 ¶9; Ex. 71 ¶8.

[98] Ex. 72.

[99] Ex. 74.

October 2019 report of misconduct that had triggered Fairhurst's termination for cause.[100] The three documents were produced to Plaintiffs on November 18, 2021, and December 3, 2021.[101] Plaintiffs agreed to treat those documents as part of the Section 220 production, consistent with their prior agreement.[102]

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED UNDER RULE 23.1.

To protect directors' authority to make decisions for a corporation, Delaware law sets a high bar before a stockholder can pursue a derivative action. The allegations of the Complaint do not clear that bar. Plaintiffs made no pre-litigation demand on the Board, and they fail to plead particularized facts supporting the only excuse they offer for not making one: a substantial likelihood of personal liability that renders the majority of the Board incapable of considering a demand. Neither the allegations concerning the treatment of Easterbrook and Fairhurst, nor the allegations seeking to invoke *Caremark* liability concerning issues of sexual harassment, overcome the presumption that directors have faithfully carried out their fiduciary duties, and the protection against personal liability provided by McDonald's § 102(b)(7) charter provision.

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[100] Ex. 62; Ex. 75; Ex. 66.

[101] Ex. 76; Ex. 77; Ex. 78; Ex. 79.

[102] *Id.*

A. Legal Standards

"A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation." *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984), *overruled in part by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). Delaware's "demand requirement and the strict requirements of factual particularity under Rule 23.1 'exist[] to preserve the primacy of board decisionmaking regarding legal claims belonging to the corporation.'" *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 120 (Del. Ch. 2009) (quoting *In re Am. Int'l Grp., Inc. Consol. Deriv. Litig.*, 965 A.2d 763, 807-09 (Del. Ch. 2009)). Thus, "[t]o wrest control over the litigation asset away from the board of directors, the stockholder must demonstrate that demand on the board to pursue the claim would be futile such that the demand requirement should be excused." *Shabbouei v. Potdevin*, 2020 WL 1609177, at *6 (Del. Ch. Apr. 2, 2020).

To excuse demand, a plaintiff must plead particularized facts showing that for at least half of the members of the demand board, (i) "the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand"; (ii) "the director faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand"; or (iii) "the director lacks independence from someone who received a material personal

benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand." *United Food & Com. Workers Union & Participating Food Indus. Emp'rs Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1059 (Del. 2021).[103]

"Plaintiffs who forgo making a demand must 'comply with stringent requirements of factual particularity' when alleging demand futility." *In re Camping World Holdings, Inc. S'holder Deriv. Litig.*, 2022 WL 288152, at *6 (Del. Ch. Jan. 31, 2022) (quoting *Brehm*, 746 A.2d at 254). While "plaintiffs are entitled to 'all reasonable inferences' that logically flow from 'particularized facts' alleged in the complaint," the Court "need not credit 'conclusory allegations' or 'inferences that are not objectively reasonable' when testing the sufficiency of the plaintiff's pleading." *Shabbouei*, 2020 WL 1609177, at *6.

Plaintiffs do not allege that a majority of the Board received a material personal benefit or lacked independence from Easterbrook and Fairhurst. Their

[103] The three-part test is "consistent with and enhances" *Aronson* and its progeny. *Zuckerberg*, 262 A.3d at 1059. *Zuckerberg* rejected the argument that a demand could be excused merely by showing that a transaction was not "the product of a valid exercise of business judgment," *Aronson*, 473 A.2d at 814: "exculpated care claims do not satisfy *Aronson's* second prong." *Zuckerberg*, 262 A.3d at 1054. But "cases properly construing *Aronson*, *Rales* [*v. Blasband*, 634 A.2d 927 (Del. 1993)], and their progeny remain good law." *Zuckerberg*, 262 A.3d at 1059.

only argument for excusing demand is that a majority of the Board faces a substantial likelihood of personal liability. But "the protection of an exculpatory § 102(b)(7) provision" leaves Plaintiffs with "an extremely high burden." *Citigroup*, 964 A.2d at 125. They must overcome the "*presumption* that [directors] were faithful to their fiduciary duties," *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004) (emphasis in original).

Plaintiffs attempt to plead that a majority of the Board faces a substantial likelihood of liability under two primary legal theories: first, that the directors breached their fiduciary duties through specific actions of the Board surrounding Easterbrook and Fairhurst's terminations and second, that the directors are liable for lack of oversight under *Caremark.*

Because McDonald's certificate of incorporation contains a Section 102(b)(7) exculpation clause, no director will face a substantial likelihood of liability for a breach of the duty of care. *See McElrath v. Kalanick*, 224 A.3d 982, 992 (Del. 2020) ("Gross negligence, without more, is insufficient to get out from under an exculpated breach of the duty of care."). Therefore, a director will only face a substantial likelihood of liability if a breach of the duty of loyalty is plead with particularity. *See In re Oracle Deriv. Litig.*, 2018 WL 1381331, at *10 (Del. Ch. Mar. 19, 2018). Where, as here, there are no allegations a director was self-interested in the

transaction or lacked independence from someone who was interested, a plaintiff must allege that a director "acted in bad faith." *In re BGC Partners Inc. Deriv. Litig.*, 2021 WL 4271788, *9 (Del. Ch. Sept. 20, 2021) (cleaned up).

"Pleading bad faith is a difficult task and requires 'that a director acted inconsistent with his fiduciary duties and, most importantly, that the director knew he was so acting.'" *McElrath*, 224 A.3d at 991-92 (citing *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 66 (Del. 2006)). It is not enough to allege facts supporting an inference that "the board should have done more," or that it "approved a flawed transaction." *Id*. at 994. Only particularized allegations showing a decision made in "'conscious disregard for [fiduciary] duties'" are sufficient to show a likelihood of liability for that decision. *Id*. at 993 (cleaned up); *see also Oracle*, 2018 WL 1381331, at *11 ("As long as a board attempts to meet its duties, no matter how incompetently, the directors did not consciously disregard their duties.") (cleaned up).

Turning to the standard for Plaintiff's oversight claims, a *Caremark* claim is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *Stone*, 911 A.2d at 372 (quoting *In re Caremark Int'l, Inc. Deriv. Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996)). To assert such a claim, a plaintiff must plead and prove that the directors either [*Caremark* Prong 1] "utterly failed to implement any reporting or information system or controls; or [*Caremark*

Prong 2] having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." *Id.* at 370.

As to *Caremark* Prong 1, "our Supreme Court appears to have been quite deliberate in its use of the adverb 'utterly'—a 'linguistically extreme formulation'—to set the bar high when articulating the first way to hold directors personally liable for a failure of oversight under *Caremark*." *Rojas ex rel. J.C. Penney Co. v. Ellison*, 2019 WL 3408812, at *9 (Del. Ch. July 29, 2019) (quoting *Horman v. Abney*, 2017 WL 242571, at *8 n.46 (Del. Ch. Jan. 19, 2017)). "Delaware courts routinely reject the conclusory allegation that because illegal behavior occurred, internal controls must have been deficient, and the board must have known so." *Genworth Fin., Inc. Consol. Deriv. Litig.*, 2021 WL 4452338, at *13 (Del. Ch. Sept. 29, 2021) (citation omitted).

Caremark Prong 2 is equally demanding. It requires "[particularized facts] 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." *Teamsters Local 443 Health Servs. & Ins. Plan v. Chou*, 2020 WL 5028065, at *17 (Del. Ch. Aug. 24, 2020) (emphasis added) (quoting *Horman*, 2017 WL 242571, at *10).

Moreover, where, as here, the plaintiff asserts that the subject matter of the claim is illegal activity (¶1 ("workplace harassment is an actionable form of discrimination")), it is not enough that the directors may have been aware of the underlying conduct. To show the requisite bad faith, the "complaint must allege *particularized facts* to show 'that the directors knew or should have known that the corporation was violating the law.'" *Rojas*, 2019 WL 3408812, at *13 (citation omitted) (emphasis added); *see id.* at *11-14 (no "red flag" where legal settlement did not put directors on notice of "ongoing violations of law").

Regardless of whether the claim is asserted under Prong 1 or Prong 2, "imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations." *Stone*, 911 A.2d at 370.

B. Count I, Concerning The Board's Treatment Of Easterbrook And Fairhurst, Should Be Dismissed Under Rule 23.1.

Count I should be dismissed. The Complaint alleges no particularized facts supporting a substantial likelihood of personal liability for (i) the Board's pre-termination oversight of Easterbrook and Fairhurst, or (ii) the investigation and termination of Easterbrook in 2019.

1. *Plaintiffs' Allegations Concerning the Pre-October 2019 Treatment of Easterbrook and Fairhurst Do Not Establish a Substantial Likelihood of Liability.*

No particularized allegations of fact support Plaintiffs' conclusory assertion the Director Defendants face a substantial likelihood of personal liability for either

"bad faith conduct" in connection with "known sexual misconduct" on the part of Easterbrook and Fairhurst or under *Caremark's* second prong for a "failure to address" said misconduct. We address in turn each of Plaintiffs' efforts to plead such facts:

The Easterbrook/Paleothodoros relationship. The first alleged prior oversight failure Plaintiffs raise concerns Easterbrook's relationship with Paleothodoros, which allegedly raised conflict of interest concerns under McDonald's Dating Policy when Easterbrook was promoted to CEO. ¶46. According to Plaintiffs, "the Board opted to 'sign[]off on the relationship under assurances that Paleothodoros would be removed from the McDonald's account.'" *Id.* (citing Ex. 59). To begin with, this consensual relationship with a non-employee was not a "red flag" of sexual harassment: indeed, in ruling for McDonald's in the Section 220 action, the Court found that "[t]he Easterbrook relationship with the named contractor had nothing to do with harassment or discrimination."[104]

Nor have Plaintiffs adequately alleged that the Board's response to the relationship was made in bad faith. To the contrary, the removal of Paleothodoros from the McDonald's account is precisely what the Dating Policy allows:

[104] Ex. 60 at 20.

"transfer[] or reassign[ment]" of an employee or contractor is an express remedy for a violation of the Dating Policy if the Company deems it "reasonable and appropriate."[105] Plaintiffs may disagree with that decision, but "[s]imply alleging that a board incorrectly exercised its business judgment and made a 'wrong' decision in response to red flags … is insufficient to plead bad faith." *Melbourne Mun. Firefighters' Pension Tr. Fund ex rel. Qualcomm, Inc. v. Jacobs*, 2016 WL 4076369, at *9 (Del. Ch. Aug. 1, 2016) (citation omitted), *aff'd*, 158 A.3d 449 (Del. 2017).

Easterbrook's and Fairhurst's alleged participation in a "party atmosphere." Plaintiffs allege that Easterbrook and Fairhurst contributed to a "permissive and predatory" "party atmosphere" involving drinking and conduct that made employees feel uncomfortable. ¶¶48-52. But again, the Complaint is short on particularized allegations: 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. These too are not "red flags" of sexual misconduct, illegal conduct, or violations of Company policy.

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[105] Ex. 6 at `02. Multiple media accounts cited and relied upon in the Complaint refute Plaintiffs' suggestion (¶46) that there is "no evidence" the Board confirmed Paleothodoros' removal from her firm's work for McDonald's. *See, e.g.*, Ex. 59 at 3; Ex. 80 at 3.

The only other matters Plaintiffs cite—i.e., that the behavior of male employees made female employees feel uncomfortable, and that Easterbrook and Fairhurst developed a reputation for flirting—are based on articles published in January 2020 and April 2021, respectively, well after the Board already had acted decisively by terminating both Easterbrook and Fairhurst. Plaintiffs allege no facts suggesting that these matters had been brought to the Board's attention when Easterbrook and Fairhurst were employed by the Company. *See In re Citigroup Inc. S'holders Litig.*, 2003 WL 21384599, at *2 (Del. Ch. June 5, 2003) ("'Red flags' are only useful when they are either [waved] in one's face or displayed so that they are visible to the careful observer."). The Court's observation in *Citigroup*, where the complaint was dismissed under Rule 23.1, is instructive: "How, exactly, a member of the … board of directors was supposed to be put on inquiry notice by something he or she never saw or heard of is not explained." *Id.* Nor does the Complaint allege that once these allegations became public, the Board improperly ignored them—to the contrary, at that point, the Board already had acted.

Reports of Fairhurst's conduct. Plaintiffs allege that the Board ignored "red flags" related to David Fairhurst, and also suggest that Easterbrook's reporting about Fairhurst should have made directors suspicious of Easterbrook himself. Plaintiffs allege that the Committee was told Easterbrook had known

about Fairhurst's misconduct "no later than December 2016"—which, Plaintiffs suggest, would have put the Committee on notice that *Easterbrook* had wrongfully ignored that misconduct for two years and so was unworthy of trust. *See* ¶¶55-60. But these allegations are belied by the document Plaintiffs' allegations characterize. The minutes of the A&F Committee's December 2018 meeting, which actually show Easterbrook summarizing the results of a Compliance investigation of a report about Fairhurst *first received in November 2018*.[106] Easterbrook "described events reported by another employee about matters with Mr. Fairhurst in December 2016 *that had not been previously reported to Compliance*."[107] In other words, while the "events reported by another employee" occurred in 2016, the employee did not report them to Compliance until its November 2018 investigation. The inference Plaintiffs seek is simply wrong.

In addition, far from "turn[ing] a blind eye" on Fairhurst's misconduct and leaving the investigation and decision-making to Easterbrook alone (as alleged at ¶¶56, 57), the Board acted once it became aware of Fairhurst's alleged misconduct. The A&F Committee relied on the investigation and findings of "the Compliance department," and "made a number of inquiries about the events described as well as management's plans to address the circumstances," and the discipline imposed

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[106] Ex. 61 at `1492.

[107] *Id.* (emphasis added).

on Fairhurst was discussed among Easterbrook, Board Chairman Hernandez, and A&F Committee Chairman Mulligan.[108] Fairhurst was required to forfeit half his annual incentive bonus, and made to sign a "last chance agreement."[109]

The Board again acted forcefully when, in October 2019, Fairhurst was reported again to have engaged in misconduct.[110] The Board promptly caused McDonald's to terminate him for cause.[111] Where "[t]he Board has responded to the threat it perceived [in an executive]'s inappropriate behavior, [that] is inconsistent with a theory of liability exposure predicated on a conscious indifference to red flags." *Shabbouei*, 2020 WL 1609177, at *8 (internal citations and quotation marks omitted). This record of swift and decisive discipline of Fairhurst provides no basis to infer bad faith or a failure of oversight, and therefore the Director Defendants do not face a substantial likelihood of liability.

2. *Plaintiffs' Criticisms of the Not-For-Cause Termination of Easterbrook in 2019 Do Not Establish a Substantial Likelihood of Personal Liability.*

None of Plaintiffs' criticisms of the process leading to Easterbrook's termination, and the decision to enter the Separation Agreement with him, are

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[108] *Id.* at `1492-93; *see also* Ex. 60 at 19-20 ("The document plaintiffs point to does not establish that Easterbrook conducted the investigation himself …. [T]he minutes clearly state that the compliance department did the investigation ….").

[109] *See* Ex. 61 at `1492, Ex. 62.

[110] Ex. 66.

[111] Ex. 63 at `863-64; Ex. 75.

sufficient to bring the directors' conduct outside the protection of the business judgment rule, let alone adequately allege their conduct was in bad faith. Nor do Plaintiffs' allegations of fact support a claim for a "*non-exculpated* breach of their fiduciary duties," which would be required to plead "a substantial likelihood of liability" and avoid dismissal under Rule 23.1. *Zuckerberg*, 262 A.3d at 1060.

(a) Plaintiffs' criticisms do not bring the Board's decision outside the protection of the business judgment rule and Section 102(b)(7).

Plaintiffs raise three criticisms of the process employed by the Board in the lead-up to the termination. Namely they complain that the Board: (1) held informal discussions in two instances that were not documented as formal meetings; (2) allegedly should have directed counsel to undertake a more expansive investigation; and (3) acted "too quickly" in addressing allegations of Easterbrook's misconduct. Plaintiffs also criticize the substance of the decision to terminate Easterbrook without cause. As discussed further below, these allegations are insufficient to raise a substantial likelihood of liability as to the Director Defendants.

Turning to their first argument, Plaintiffs allege that the directors' discussions with each other and counsel between October 18 and October 26 were not separately minuted. ¶¶72-73. However, those discussions were not formal "Board meetings," as Plaintiffs assert. ¶72 n.26. Board meetings would have

required notice to Easterbrook,[112] a non-starter for a setting in which independent directors and counsel would commission a confidential, independent investigation *about Easterbrook*.

In any event, it was for the directors, not Plaintiffs in hindsight, to decide how best to structure their communications. A decision to engage in "off the record conversations" among directors "concerning what should be done about the Company's CEO is entitled to deference." *Shabbouei*, 2020 WL 1609177, at *12 (citation omitted). McDonald's independent directors' decision to discuss Easterbrook's future outside Easterbrook's presence, in confidential conversations culminating in the November 1 Board meeting deserves similar deference, and does not support an inference of bad faith. *See also Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1039-41 (Del. 2014).

Second, Plaintiffs criticize outside counsel for searching Easterbrook's cell phone but not the Company's email servers. ¶¶11, 66, 70, 90, 93. But they ignore that the employee told counsel that Easterbrook had communicated with her via texts and videos from his mobile phone[113]—making his phone the logical place to

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[112] *See* Ex. 81, art. III § 7 ("Notice of a special meeting shall be given to each Director at least twenty-four (24) hours prior to such meeting.").

[113] Ex. 64 ¶20.

search for relevant evidence—and the investigation was sufficient to substantiate that allegation.

More fundamentally, Plaintiffs' second-guessing of *counsel's* investigation is irrelevant to whether the *Board* breached its duties. The Board was entitled to rely on judgments made by sophisticated, highly-credentialed counsel during the course of the investigation regarding the appropriate scope of the search of electronic records. 8 *Del. C.* § 141(e) (directors are "fully protected in relying in good faith" upon "information, opinions, reports or statements" from professionals as to matters the director "reasonably believes are within such other person's professional or expert competence"). Plaintiffs nowhere allege that the professionals retained to investigate the allegations fail to meet this standard. The Complaint thus alleges no fact that would put the directors' reliance on the investigation outside the protection of Section 141(e), much less facts that suggest the Board's decision was made in bad faith.

Third, Plaintiffs claim the Board acted *too quickly* because it commissioned an investigation and decided to terminate Easterbrook, all within the period of October 18 to November 1, 2019. ¶¶70, 74. But the business judgment rule "calls for deference to the board's decisions regarding … how much information it needed before it decided to act." *Shabbouei*, 2020 WL 1609177, at *10. Not even Plaintiffs dispute that, by the time it made its decision on November 1, the Board

knew enough to conclude that Easterbrook should go, even if it lacked sufficient evidence to pursue a termination with cause. The Board was entitled to act then, allowing the Company to reap the benefits of a quick, decisive, and final termination. "Business decision-makers must operate in the real world, with imperfect information, limited resources, and an uncertain future…. Indeed, this kind of judicial second guessing is what the business judgment rule was designed to prevent." *Citigroup*, 964 A.2d at 126.

Finally, Plaintiffs allege that the directors' substantive decision to terminate Easterbrook without cause was undertaken in bad faith. Those allegations also fail. To begin with, Plaintiffs do not deny that the Board relied on outside counsel's investigation and advice when it approved the Separation Agreement with Easterbrook. ¶¶69-70; *see also* Ex. 63 at '859. More importantly, Delaware courts have held that even where "an *argument*—perhaps a good one" existed for termination for cause, a board's decision to opt for a no-cause termination is still quintessentially a matter that is protected by the business judgment rule and will not be second-guessed. *Brehm*, 746 A.2d at 265. A finding of "cause" would require "persuad[ing] a trier of fact and law of this argument in any litigated dispute," and "that process of persuasion could involve expensive litigation, distraction of executive time and company resources, lost opportunity costs, more bad publicity and an outcome that was uncertain at best and, at worst, could have

resulted in damages against the Company." *Id.* Thus, courts have repeatedly held that there is nothing "egregious on its face" about a decision to avoid such litigation. *See, e.g.*, *Zucker v. Andreessen*, 2012 WL 2366448, at *8-10 (Del. Ch. June 21, 2012) ("Although the Board *could* have elected to pay Hurd nothing" and plaintiff was "entitled to the presumption" on a motion to dismiss that Hurd could have been terminated for cause, plaintiff's allegations failed to raise a reasonable doubt that the board's decision to pay Hurd $40 million under a separation agreement "was the product of a valid exercise of business judgment." (emphasis in original)); *Shabbouei*, 2020 WL 1609177, at *11 ("I see no basis to impose [a] duty" to fire a CEO before attempting to negotiate his resignation; "[t]he far more reasonable decision-making process would be … to determine whether [he] would leave peacefully on mutually acceptable terms before deciding to go to war with him."); *In re Boeing Deriv. Litig.*, 2021 WL 4059934, at *36 (Del. Ch. Sept. 7, 2021) (even if Board permitted CEO to resign "to avoid further public criticism, it is reasonable to infer that doing so was in furtherance of the legitimate business objective of avoiding further reputational and financial harm").

Plaintiffs' allegations here are even weaker than those found insufficient in other cases to establish a substantial likelihood of board liability for termination decisions. In *Zucker*, for example, the departing CEO (who had settled a sexual harassment claim brought against him, and had filed inaccurate expense reports to

conceal the alleged harassment) received severance allegedly worth $40 million despite no contract entitling him to anything upon termination, with or without cause. 2012 WL 2366448, at *3-4. In *Shabbouei*, the board paid the CEO, who had allegedly engaged in harassment and created a toxic work environment, $5 million to resign. 2020 WL 1609177, at *5. In *Boeing*, the board permitted the CEO to "receive unvested equity-based compensation in a quiet retirement" despite the directors' alleged knowledge that he had misled federal aviation regulators and failed to address multiple deadly plane crashes. 2021 WL 4059934, at *20, *35. Here, in contrast, Plaintiffs do not allege that Easterbrook received anything under his Separation Agreement beyond what he was contractually entitled to for a no-cause termination, and Plaintiffs concede that the Company publicly announced that he had been terminated after violating Company policy, ¶79, an allegation that is inconsistent with Plaintiffs' theory that the Board wished to "sweep the matter under the rug."

As in each of the cases cited above, McDonald's "Board was operating well-within the bounds of proper business judgment when it decided to settle with [Easterbrook] rather than fire him 'for cause,' a decision that could have embroiled the Company in an embarrassing legal battle with its former CEO." *Shabbouei*, 2020 WL 1609177, at *12. McDonald's directors explicitly considered the likelihood that Easterbrook would challenge a termination for cause, the relative

strengths of the Company's and Easterbrook's positions based on the information known to the Board at that time, the potential impact on stakeholders and the benefits of seeking to manage a leadership transition with a goal of minimizing disruption to the Company and its stakeholders.[114] The directors concluded "on balance" that it would be best for the Company to accomplish Easterbrook's separation "with as little disruption as possible," to seek the benefits to the Company that a separation agreement would bring, and not to "seek to effect a termination … for cause." *Id*. Plaintiffs have failed to allege particularized facts showing a substantial likelihood that the Director Defendants' judgment amounted to "intentional dereliction of duty or a conscious disregard for their responsibilities, amounting to bad faith." *In re Goldman Sachs Grp., Inc. S'holder Litig.*, 2011 WL 4826104, at *12 (Del. Ch. Oct. 12, 2011) (quotations omitted).

(b) Alleged prior oversight failures do not provide an avenue for liability.

Lacking any particularized allegation of *fact* showing that the termination decision was made in bad faith, Plaintiffs plead a *hypothesis*: that when Easterbrook's misconduct came to light in October 2019, the Board had an incentive to avoid "digging too deeply" for fear it would "expose them to liability" for having *previously* failed "to put an end to the repeated instances of sexual

[114] Ex. 63 at `859.

misconduct" involving Easterbrook and Fairhurst. ¶¶68, 76. In other words, Plaintiffs allege that the Board acted disloyally, making decisions regarding Easterbrook's departure to cover-up prior oversight failures.

Plaintiffs' allegations parallel those in *Shabbouei*. There, the plaintiffs sued lululemon's directors for negotiating the resignation of a CEO who allegedly created a "toxic culture" that included a "boys club" and a pattern of "harassment and sexual favoritism," had an unapproved relationship with one employee, and engaged in unspecified "inappropriate conduct" on more than one occasion. 2020 WL 1609177, at *3-4. The Court rejected Shabbouei's theory that the "[CEO's separation] agreement, in essence, allowed the Board, acting with undue haste, to sweep its oversight failures under the carpet," *id.* at *5, and dismissed the complaint for lack of "facts supporting an inference that the Separation Agreement extinguished a *substantial likelihood* of Board liability," *id*. at *7. Because the plaintiff had failed to allege facts giving rise to a substantial likelihood of liability for the alleged earlier failures of oversight, the court held, the plaintiff could not use the "failure of oversight claim as the background to well plead that the Board was somehow interested in the Separation Agreement." *Id*. at *8.

The same is true here. As discussed in Section B.1 above, Plaintiffs have failed to allege a substantial likelihood of personal liability for the directors' pre-October 2019 oversight of Easterbrook. Like the plaintiff in *Shabbouei*, Plaintiffs

here cannot use a hypothetical oversight liability to take the Easterbrook termination decision outside the protections of the business judgment rule and § 102(b)(7).

Moreover, Plaintiffs' speculation that Easterbrook's termination served to sweep his misconduct under the rug is refuted by the record here and decisions in similar cases. Announcing publicly that a prominent company's CEO violated company policy by engaging in a relationship with a subordinate and that the CEO had been terminated—with or without cause—inevitably triggers media attention, investor inquiries, Section 220 demands, and (generally unsuccessful) stockholder litigation. *See, e.g.*, *Shabbouei*, 2020 WL 1609177 at *4-5; *Zucker*, 2012 WL 2366448, at *1, *11 (Hewlett Packard's termination of Mark Hurd; derivative suit dismissed under Rule 23.1). Such an announcement is certainly not consistent with an effort to sweep facts under the rug, and "inferences that are not objectively reasonable cannot be drawn in the plaintiff's favor." *Beam*, 845 A.2d at 1048. McDonald's termination of Easterbrook was no exception, and Plaintiffs do not allege that the media attention, investor activism, and information requests described in the Complaint came as any surprise to the Board (and allegations that they influenced the Board's response to Easterbrook's misconduct are without support). Nor do Plaintiffs even attempt to allege that Easterbrook's more egregious misconduct, discovered in July 2020, was known to the Board in 2019

(such that the Board might have sought to conceal it). To the contrary, Plaintiffs concede that Easterbrook "lied and said he was not involved in relationships with other McDonald's subordinates." ¶70.

C. Count II, Concerning The Board's Oversight Of Sexual Harassment Issues, Should Be Dismissed Under Rule 23.1.

Count II, a *Caremark* claim, asserts that the Board failed to address allegedly widespread sexual harassment, including at McDonald's restaurants. ¶176. Plaintiffs fall far short of alleging particularized facts showing a substantial likelihood of *Caremark* liability. First, Plaintiffs ignore the record of robust reporting and sustained Board engagement and leadership on these issues, which appears in documents incorporated by reference in the Complaint. Under the Board's leadership, the Company:

- established Standards of Business Conduct and a Policy Against Discrimination and Harassment, each prohibiting harassment of any Company employee;
- maintained a robust system of compliance reporting and controls, with recurring, detailed reports to the Board's committees;
- provided training on sexual harassment at its corporate offices and company-owned restaurants, which was also made available to franchisees, and strongly (and successfully) encouraged its franchisees to undertake such training;
- made a reporting system available to corporate employees and employees at company-owned restaurants and offered a similar system to franchisees; and
- developed standards related to maintaining a safe and respectful workplace at all McDonald's restaurants.

See supra pp. 7-17. And since 2015, the Board and its committees:

- received 25 management reports, including litigation updates, periodic compliance updates, and annual compliance reports;
- actively encouraged the Company's efforts to strengthen its protections against sexual harassment;
- sought out further management reporting and an additional committee meeting to discuss the Company's approach in greater detail; and
- oversaw the continued elevation of these issues in the Company's risk oversight hierarchy.

Id.

Faced with this record, which would not support an allegation that the Board "utterly failed" to implement a good faith system of oversight with regard to sexual harassment, Plaintiffs simply complain that the specific measures undertaken were not what *Plaintiffs* believe would have been most effective. This is insufficient. Second, Plaintiffs' efforts to plead that the Board was presented with but willfully ignored any "red flag" of sexual misconduct are similarly insufficient to show a substantial likelihood of liability.

1. ***Caremark* Prong 1: Plaintiffs Do Not Allege Particularized Facts Showing the Board "utterly failed to implement any reporting or information system or controls."**

Nowhere does the Complaint allege, even generally, that the Board "utterly failed to implement any reporting or information system or controls." *Stone*, 911 A.2d at 370. That is because the documents incorporated in the Complaint demonstrate that, under the Board's leadership, the Company established multiple

policies prohibiting harassment, maintained a robust system of compliance reporting and controls, and made a whistleblower reporting system available. *See supra* pp. 7-12. The Board and its committees received numerous reports related to these issues on a regular basis, discussed them multiple times with management, and frequently encouraged the Company's efforts to strengthen its protections against harassment. *Id.* These reports alone refute any attempt to argue that the Company "'utterly failed' to establish a relevant information and reporting system." *Shabbouei*, 2020 WL 1609177, at *7 (citations omitted). The nearest that Plaintiffs come—hearsay criticism that the reporting system was not sufficiently effective—falls far short of the "utter failure" required to plead a *Caremark* Prong 1 claim. *See* ¶¶13 (citing demands that McDonald's adopt "more effective … reporting"), 140 (citing lawsuit alleging "that even though there was a formal HR process that went to headquarters, it was ineffective"). Indeed, the fact that Plaintiffs level particular critiques of the reporting system is a tacit admission that the Company in fact had such a system. *See infra* Section C.2; *see also Firemen's Ret. Sys. of St. Louis ex rel. Marriott Int'l, Inc. v. Sorenson*, 2021 WL 4593777, at *12-13 (Del. Ch. Oct. 5, 2021). As such, Plaintiffs do not raise a serious issue, much less a substantial likelihood of personal liability, with respect to *Caremark's* first prong.

2. *Caremark Prong 2: Plaintiffs Do Not Allege Particularized Facts Showing the Board "consciously failed to monitor or oversee" the Systems In Place.*

To be absolutely clear: McDonald's employees "have the right to work in a place that is free from harassment, intimidation or abuse, sexual or otherwise, or acts or threats of physical violence."[115] Any sexual harassment is unacceptable, and McDonald's has devoted significant resources to preventing such misconduct. But far from showing that the Board "ignored red flags in a manner that demonstrates a conscious failure to monitor or oversee" reporting and controls relating to sexual harassment, *Horman*, 2017 WL 242571, at *14, "Plaintiffs' pleading, which includes the documents it incorporates by reference, paints a different picture." *Okla. Firefighters Pension & Ret. Sys. v. Corbat*, 2017 WL 6452240, at *17 (Del. Ch. Dec. 18, 2017).

Plaintiffs do not meet the threshold requirement of alleging with particularity circumstances constituting "red flags," much less red flags consciously ignored by the Board.

EEOC report. Plaintiffs open their Complaint with a report from a task force of the Equal Employment Opportunity Commission ("EEOC") that addresses workplace harassment across all industries and the public sector.[116] The report

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[115] Ex. 4 at `185.

[116] Ex. 82.

notes the "myriad and complex issues" associated with workplace harassment, and emphasizes (as Plaintiffs also do) that this is a "persistent problem" across the private sector and government.[117] Nowhere, however, does the report assert a harassment problem specific to McDonald's, and therefore it cannot reasonably be considered a "red flag." ¶¶1-3. To the contrary, the report singles out McDonald's *for praise*, for adopting an "intriguing" strategy, in partnership with a human rights organization, to combat harassment through a "human rights based Code of Conduct" for its tomato growers that "prohibits sexual harassment and sexual assault."[118] Moreover, that sexual harassment was an issue of growing societal concern is no "red flag" under *Caremark*. Indeed, a similar allegation that the "'#MeToo movement' created 'heightened awareness' with respect to allegations of harassment" did "not support an inference of any liability exposure, much less a substantial likelihood of liability" in *Shabbouei*, and it does not support such an inference here. 2020 WL 1609177, at *8.

In any event, the Board actively responded to the heightened awareness of harassment issues. Plaintiffs quote from November 2017 Board minutes stating that the Board was "advised about a recent increase of sexual harassment issues in the media and in [sic] business community." ¶102. But the minutes show that *the*

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[117] *Id.* at iv, 6.

[118] Ex. 82 at 36.

day before the meeting cited by Plaintiffs, the A&F Committee questioned McDonald's Chief Compliance Officer on the strength of the Company's harassment policies and efforts "to reinforce a culture within the Company that encourages employees to report and to intercede if issues arise," and suggested enhancements to future reports.[119]

EEOC complaints. Plaintiffs allege that "more than a dozen" workers at McDonald's restaurants made complaints to the EEOC beginning in 2016, and that a "fast-food worker advocacy group" organized a walkout of an unspecified number of employees over the complaints. ¶¶108-110. But Plaintiffs do not allege that *the Board* was informed of the complaints, which (if any) of the complaints were upheld, or any facts showing that the "Board would or should have known at the time that the Company was violating the law." *Fisher ex rel. LendingClub Corp. v. Sanborn*, 2021 WL 1197577, at *12-13 (Del. Ch. Mar. 30, 2021) (allegations concerning FTC investigation (known to the directors) into the company's lending practices were not a "red flag") (citation omitted). And Plaintiffs do not allege that any of those complaints was brought by any employees of the Company.

[119] Ex. 13 at `750.

Plaintiffs also rely on 20 EEOC complaints in 2018 and 2019, again connected to a one-day walkout involving an unspecified number of restaurant workers. ¶¶111-112. Quoting a report provided to the PPS Committee by McDonald's management, Plaintiffs claim that these complaints to the EEOC in 2018 and 2019 evince "systemic" issues (¶111), but neglect to mention that the same report (prepared after several "Board and Committee meetings" on the subject, and following "a request from the PPS Committee to hold a separate meeting to discuss these issues in more detail") provided critical context: the complaints involved approximately 21 (less than 0.2%) of the nearly 14,000 McDonald's restaurants in the U.S.[120] Plaintiffs make no attempt to contextualize the number of complaints and claims against "the magnitude of [the] operations" of McDonald's and its subsidiary's franchisees, or make any other argument that these EEOC complaints should have constituted a "red flag" to the McDonald's Board. *See Pettry ex rel. FedEx Corp. v. Smith*, 2021 WL 2644475, at *9 n.101 (Del. Ch. June 28, 2021), *aff'd*, --- A.3d ---, 2022 WL 569325 (Del. Feb. 25, 2022). And, crucially, the report also described the Company's ongoing and future initiatives in response to these matters, including a comprehensive anti-harassment policy review, the engagement of experts, and initiatives and resources for

[120] Ex. 47 at `682.

company-owned restaurants, franchised restaurants, and corporate management.[121] Allegations that management "explained to the directors in considerable detail on a regular basis the initiatives management was taking to address those problems" are "fundamentally inconsistent" with an inference of bad faith conduct by directors. *Reiter ex rel. Capital One Fin. Corp. v. Fairbank*, 2016 WL 6081823, at *13 (Del. Ch. Oct. 18, 2016).

Plaintiffs' effort to build a *Caremark* claim on individual restaurant workers' complaints further overlooks a crucial distinction in Delaware law. "[A]lleging directors failed to act in good faith is significantly different from alleging that corporate wrongdoing has occurred. This distinction takes into account that 'directors' good faith exercise of oversight responsibility may not invariably prevent employees from violating criminal laws, or from causing the corporation to incur significant financial liability, or both.'" *Horman*, 2017 WL 242571, at *8 (quoting *Stone*, 911 A.2d at 373). Allegations regarding a limited number of EEOC complaints made by restaurant staff, reported to the Board in connection with an update on the Company's affirmative actions on those issues, do not support any reasonable inference of bad faith supporting a *Caremark* claim.

[121] Ex. 47 at `683-84.

***Ries* and *Fairley* Lawsuits.** Plaintiffs similarly point to allegations of sexual harassment contained in two complaints filed by the same law firm—*Ries*, filed in November 2019 and alleging harassment at a single franchised McDonald's in Michigan, and *Fairley*, a putative class action filed in April 2020 and seeking to represent female employees at company-owned restaurants in Florida. ¶¶117-128, 134-141. But these allegations are not enough.

To begin with, these lawsuits were filed years after Plaintiffs claim that the Board was on notice of purported "systemic" issues, at a point in time when the Company plainly was taking extensive action to combat sexual harassment issues. *See supra* pp. 12-17. Moreover, these allegations suffer from the same defects as those that exist with respect to the EEOC complaints. Not only were the allegations unsubstantiated at the time they were filed, McDonald's now has been dismissed from the *Ries* action and has denied liability in the *Fairley* lawsuit.[122] Plaintiffs' reliance on allegations of misconduct in two lawsuits, neither of which has resulted in a judgment, penalty, or settlement paid by the Company, does not support reasonable inference that the Board consciously ignored red flags in bad faith. *See Rojas*, 2019 WL 3408812, at *12-13 (rejecting allegations that board consciously disregarded its duties following a $50 million settlement without

[122] Ex. 83; Ex. 84.

admitting wrongdoing, and contrasting circumstances where "federal government enforcement proceedings" or a "guilty plea in a criminal case" led other courts to find demand excusal); *see also Sanborn*, 2021 WL 1197577, at *16 (allegations regarding "litigation that remains ongoing and is hotly disputed" did not constitute particularized facts that showed the board was aware of violations of the law).

Franchise Oversight. Plaintiffs further complain that McDonald's had "the power to mandate" that the owner-operators of its franchised restaurants adopt particular "changes concerning harassment and discrimination," but did not do so. ¶¶129-133. In particular, Plaintiffs rely on misleadingly incomplete quotations from a McDonald's Franchise Agreement. In paragraph 131 of the Complaint, Plaintiffs list seven separate requirements in the Franchise Agreement concerning various aspects of restaurant operations; all seven are quoted from section 12(a-i).[123] But Plaintiffs omit section 12(k): the requirement that the franchisee "comply with all federal, state, and local laws … affecting the operation of the Restaurant."[124] Plaintiffs also omit these words from section 12: "*Compliance With Entire System*. Franchisee acknowledges that every component of the McDonald's System is important…. Franchisee shall comply with the entire

[123] Ex. 7 at `1308-09.

[124] *Id.*

McDonald's System, including, but not limited to [subsections (a) through (k)]."[125] To the extent that the Complaint implies the Franchise Agreement did not require franchisees to comply with all applicable laws, including those that forbid sexual harassment, it is refuted by the record it incorporates. Thus, "compliance with sexual harassment laws" (to borrow Plaintiffs' characterization, ¶128) was already an express requirement of McDonald's franchise agreements and any participation in the "McDonald's System."

Beyond this requirement, directors were informed in early 2019 that 90% of franchisees had *already* adopted the additional training tools offered by the Company as part of its continuing efforts to address sexual harassment and workplace misconduct, and in December 2019, that the rollout was "broadly supported by franchise leadership" as implementation continued.[126] And as noted above, McDonald's further announced in April 2021 that it would implement new Global Brand Standards for both company-owned and franchised restaurants.

Thus, Plaintiffs have not alleged a conscious and bad faith failure to act, but only that the Board did not cause McDonald's to take the *particular* actions Plaintiffs say it should have, at the time Plaintiffs say it should have. This is not the stuff of *Caremark* liability. Indeed, "Plaintiffs … simply seek to second-guess

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[125] *Id.* at `1307-08.

[126] Ex. 53 at `816.

the timing and manner of the board's response to the [alleged] red flags, which fails to state a *Caremark* claim." *In re Qualcomm Inc. FCPA S'holder Deriv. Litig.*, 2017 WL 2608723, at *4 (Del. Ch. June 16, 2017). Such second-guessing is "foreign to the business judgment rule. Courts do not measure, weigh or quantify directors' judgments." *Brehm*, 746 A.2d at 264. And here, where the Section 102(b)(7) provision sets the bar higher than the business judgment rule, Plaintiffs' second-guessing is even more futile. *See Melbourne*, 2016 WL 4076369, at *9 (pleading a "wrong" decision in response to red flags does not establish bad faith).

Letters from United States Senators. Plaintiffs also allege that McDonald's received two letters from United States Senators. The first, sent in June 2018, inquired about the "development of new practices at McDonald's to address and prevent sexual harassment," and sought to "learn more about [McDonald's] policies and actions aimed at protecting employees and establishing an equal and harassment-free workplace."[127] The second, sent in June 2019, acknowledged the Company's efforts to partner with a leading nonprofit to "develop updated company policies to create a safe and more respectful work environment," and suggested additional measures.[128] No case law supports the proposition that engagement with politicians who advocate changes in company practices

[127] Ex. 85 at 1.

[128] Ex. 86 at 1; ¶¶114-116.

constitutes a "red flag" informing the Director Defendants of "corporate misconduct" or "illegal activity" as contemplated under *Caremark*'s second prong. More fundamentally, the letters demonstrate that McDonald's had anti-harassment policies and procedures in place and was in the process of enhancing them—the antithesis of red flags being consciously ignored.[129]

Risk Disclosures. Plaintiffs further fault the Board for alleged inaction at a time when risk disclosures in its July 2019 10-Q noted the possibility of liabilities related to claims of "sexual harassment or discrimination (or perceptions thereof)." ¶100. But Plaintiffs ignore the PPS Committee's report to the full Board that same month regarding the Company's efforts to enhance anti-harassment policies and training.[130] Similarly, Plaintiffs emphasize presentations made to the Board in November 2019 regarding potential risks sexual harassment and workplace conduct could present to the Company. ¶106. But, again, they ignore contemporaneous (and earlier) Board initiatives responding to those potential risks. In 2019, these included: (1) instructions to management "to bolster the Company's current efforts and improve the environment at the restaurants," and "report back to the Board with further enhancements to the program and its strategy,"[131] (2) special

[129] Ex. 86 at 2.

[130] Ex. 29 at `784.

[131] Ex. 51 at `431.

meetings called at the Board's request "to discuss [sexual harassment and workplace conduct] issues in more detail" and receive updates on enhancements to the Company's efforts,[132] and (3) encouragement from the Board to senior management to "focus on turning the challenges into an opportunity," and "continue to pursue more proactive steps in this area."[133] Plaintiffs also quote references in Board materials to investors expressing concerns about workplace conduct and sexual harassment (¶105), while neglecting to mention that the directors did indeed meet with investors to discuss McDonald's current and future plans to respond to these those issues.[134]

Further refuting the claim that directors willfully ignored issues of sexual harassment, in 2019 the directors oversaw an enterprise risk management process that elevated issues of sexual harassment and "Respectful Workplace" to a Tier 2 risk, and in October 2020 elevated "Safe, Respectful & Inclusive Workplace" to Tier 1.[135] Thus, far from consciously ignoring a problem in bad faith, the Board prioritized attention to these matters. Consistent with that, McDonald's continued to enhance its anti-harassment initiatives, including by announcing new Global

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[132] Ex. 47; Ex. 50 at `418-19.

[133] Ex. 29 at `784.

[134] Ex. 87 at `811-13.

[135] *See* Ex. 52 at `1138; Ex. 57 at `2731.

Brand Standards for the prevention of harassment and other workplace misconduct.[136]

Considered together, these collective facts are a far cry from "a board that learned of red flags suggesting corporate misconduct and chose to do nothing about them." *Corbat*, 2017 WL 6452240, at *17. To the contrary, "[t]he Board's level of engagement during this time period does not support an inference of bad faith indifference." *Pettry*, 2021 WL 2644475, at *8 (no reasonable inference of bad faith indifference where board and audit committee were repeatedly notified of updates in enforcement action that resulted in $35 million settlement); *Sorenson*, 2021 WL 4593777, at *16 (concluding that 220 documents establishing that "management told the Board that it was addressing or would address the issues presented" was "not reflective of a board that has decided to turn a blind eye to potential corporate wrongdoing").

Failure to "Cure" Sexual Harassment. Finally, Plaintiffs repeatedly characterize the Board's alleged breach of duty as a "failure to cure widespread sexual harassment" (*e.g.*, ¶165), which demonstrates their misunderstanding of *Caremark*. "Curing" is not what *Caremark* requires. Even where, unlike here, the allegations show that directors acted ineffectively, negligently or even grossly

[136] Ex. 58.

negligently, that would be no substitute for allegations that the directors, in bad faith, failed to act. *See Oracle*, 2018 WL 1381331, at *11 ("As long as a board attempts to meet its duties, no matter how incompetently, the directors did not consciously disregard their obligations."); *Citigroup*, 964 A.2d at 125 (no "specter of being held personally liable" for failure of oversight just because "decisions turn out poorly"); *Richardson ex rel. Richardson Living Tr. v. Clark*, 2020 WL 7861335, *2 (Del. Ch. Dec. 31, 2020) ("Bad oversight is not bad-faith oversight ….").

* * * * *

As detailed extensively above, McDonald's (led by its Board) has a clear anti-harassment policy, has a detailed and comprehensive system for reporting misconduct, including sexual harassment, and has devoted significant resources to implementing anti-harassment training. As further detailed above, the Director Defendants have been closely involved in those efforts. Plaintiffs cannot transform these vigorous efforts to address and combat what they expressly acknowledge to be a persistent, challenging issue into allegations of substantial likelihood of liability for bad faith conduct, under possibly the most difficult theory in corporation law for a plaintiff to win.

D. Count III, Which Asserts Claims Only Against Easterbrook And Fairhurst, Should Be Dismissed Under Rule 23.1.

Count III is asserted only against Easterbrook and Fairhurst, not the Director Defendants. Plaintiffs do not attempt to plead that a majority of the Board faces a substantial likelihood of personal liability on that claim. Therefore, Count III should be dismissed. *See Boeing*, 2021 WL 4059934, at *36 (dismissing under Rule 23.1 the claims against officer defendants, even where demand was excused as against director defendants).

E. Count IV Should Be Dismissed Under Rule 23.1 Because The Not-For-Cause Termination Of Easterbrook Served A Corporate Purpose And Gave The Company Consideration.

"[T]he standard for waste is a very high one that is difficult to meet." *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 758-59 (Del. Ch. 2005). To plead waste in connection with an executive's separation agreement a plaintiff must show that the agreement "amounted to 'a transfer of corporate assets that serve[d] no corporate purpose[,] or for which no consideration at all [was] received.'" *Shabbouei*, 2020 WL 1609177, at *10 (alterations in original) (quoting *Protas v. Cavanagh*, 2012 WL 1580969, at *9 (Del. Ch. May 4, 2012)).

The separation agreement with Easterbrook ended the tenure of a CEO the Board had determined should go, secured his agreements to non-competition and cooperation clauses, and "allowed the Company to avoid potentially costly and embarrassing litigation." *Id.* at *13. "These, by any measure, are corporate

benefits," inconsistent with a claim of waste. *Id*. By approving the separation agreement, the Board obtained Easterbrook's swift exit with a letter of apology, a release from Easterbrook of potential claims against the Company (without giving Easterbrook a release in return), non-competition, non-solicitation, and non-disclosure agreements, and a commitment to cooperate with the Company on post-termination matters.[137] Thus, the Board obtained substantial consideration for the Company.

Delaware courts routinely recognize the validity of such considerations under the business judgment rule, and have rejected hindsight allegations that separation agreements with executives constituted corporate waste. *See Shabbouei*, 2020 WL 1609177, at *10; *Boeing*, 2021 WL 4059934, at *35; *Zucker*, 2012 WL 2366448, at *7-10; *Citigroup*, 964 A.2d at 137-138; *Brehm*, 746 A.2d at 245. Plaintiffs' attempt fails here as well. Because the Complaint fails to state a claim for waste, much less establish a substantial likelihood of Board liability for waste, Count IV should be dismissed.

II. THE COMPLAINT SHOULD BE DISMISSED AS AGAINST THE DIRECTOR DEFENDANTS UNDER RULE 12(B)(6).

The Complaint should be dismissed as to the Director Defendants under Rule 12(b)(6). Where, as here, the certificate of incorporation contains an

[137] Ex. 63 at `860, `867-81.

exculpation provision pursuant to 8 *Del. C.* § 102(b)(7), a complaint seeking damages for breach of fiduciary duty must be dismissed against a director unless it pleads "facts supporting a rational inference that the director harbored self-interest adverse to the stockholders' interests, acted to advance the self-interest of an interested party from whom they could not be presumed to act independently, or acted in bad faith." *In re Cornerstone Therapeutics Inc., S'holder Litig.*, 115 A.3d 1173, 1179-80 (Del 2015). Similarly, "[a] claim of waste will arise only in the rare, 'unconscionable case where directors irrationally squander or give away corporate assets.'" *Disney*, 906 A.2d at 74 (citation omitted). This Complaint fails to surmount these high hurdles for any Director Defendant for the reasons discussed above.

CONCLUSION

In each of their alleged claims against the Director Defendants, Plaintiffs seek to second-guess the particulars of the oversight, actions, and judgments of the Board. But Plaintiffs cannot transform their hindsight view into particularized allegations of fact that create a reasonable inference that the Board acted (or consciously failed to act in defiance of a known duty) in bad faith. The Board's prudent and decisive actions offer no basis for such an inference. Accordingly, this action should be dismissed in its entirety under Rule 23.1, and dismissed as against the Director Defendants under Rule 12(b)(6).

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