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Case No. 2020-0786-SG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE THE CHEMOURS COMPANY DERIVATIVE LITIGATION)))	CONSOLIDATED C.A. No. 2020-0786-SG

AMENDED PUBLIC VERSION
FILED ON: MAY 17, 2021

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE VERIFIED STOCKHOLDER DERIVATIVE COMPLAINT

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INTRODUCTION

This action—purportedly brought on behalf of nominal defendant The Chemours Company ("Chemours" or the "Company")—asks this Court to set aside the judgment of concededly independent, disinterested directors concerning whether the Company had adequate capital to pay dividends and repurchase stock and to hold those same independent, disinterested directors liable for the money they returned to stockholders like the Plaintiffs here. Decades of settled law say the answer to that request must be no.

Chemours became an independent company on July 1, 2015 as a result of a spin-off by E. I. du Pont de Nemours & Company ("DuPont"). Chemours faced significant financial struggles following the spin, but its Board confronted them, including by immediately slashing its dividend to a nominal amount of just $0.03 per share—the level at which it stayed for nine consecutive quarters. Since the spin-off, Chemours's leadership has actively managed the Company, including environmental indemnification liabilities assigned to it by DuPont. As Chemours's financial conditions improved, the Board authorized modest increases to the dividend and a share repurchase program, all to the benefit of Plaintiffs here and other stockholders.

When the environmental exposures began to grow, Chemours sued DuPont in this Court to establish responsibility for legacy environmental liabilities that significantly exceeded potential liability amounts DuPont certified as "maximums" in obtaining a solvency opinion in connection with the spin-off. Chemours contended that DuPont should not be able to enforce indemnification obligations beyond those maximums. That suit posed novel questions on the limits on a parent's discretion in connection with a spin-off, and although this Court dismissed the action in favor of arbitration, the parties eventually settled the case—with the DuPont parties agreeing to share in half of the future liabilities related to per- and polyfluoroalkyl substances (PFAS) for the next 20 years or until the combined spending on those liabilities reaches $4 billion, and establishing an escrow fund to support and manage such liabilities, to the extent they ever come due.

After that lawsuit was filed, Plaintiffs here sent demands seeking books and records concerning the Chemours Board's management of environmental liabilities. The gravamen of the demands was clear: The stockholders wanted to explore whether there was a potential *Caremark* claim in connection with the Chemours Board's oversight of its environmental liabilities as discussed in the suit. What the stockholders received was an extensive record of hundreds of documents that instead showed active management by the Board of Chemours's environmental liabilities. There was no *Caremark* claim to be had.

Plaintiffs, not to be outdone of a lawsuit, filed an action nonetheless. But the theory changed. Gone was the *Caremark* claim, and in its place was a contention that the Board had issued dividends (to Plaintiffs and other stockholders) and had authorized share repurchases (also to the benefit of stockholders) illegally. Why? Because, Plaintiffs said, Chemours had supposedly admitted in the very suit that it filed against DuPont that Chemours was insolvent at the time of the spin-off and should be considered insolvent every day since—all in spite of the uncontested reality that Chemours employs thousands of people, makes hundreds of millions of dollars in revenue, issues bonds, receives financing from leading banks, and has never failed to pay a creditor. Plaintiffs also alleged that the Chemours Board had authorized these dividends and repurchases without any appropriate assessment of the Company's capital. But Plaintiffs had never asked for the record of the Board's approval of dividends and share repurchases.

After discussions between the parties, Chemours produced that record to Plaintiffs—another several hundred pages. And what that record showed, again, was an active Board that thoroughly reviewed Company records in connection with proposed dividends and share repurchases and consulted with financial and legal advisors before doing so. Plaintiffs nonetheless filed an amended suit that barely changed their original allegations. The essence of Plaintiffs' claim is that this concededly majority-disinterested Board should be liable for approving dividends and share repurchases because it failed to properly value the environmental liabilities inherited from DuPont—the same liabilities that the Board had been actively managing, the same liabilities that they sued DuPont over, and the same liabilities that DuPont, as a result of that suit, had agreed to settle with a cost sharing agreement, in which DuPont departed from its position in the spin-off and in subsequent litigation that it owed nothing to Chemours. Presumably, the relief would be to return to Chemours the same money that had been paid out to these and other stockholders.

Plaintiffs believe they can survive a motion to dismiss because Section 102(b)(7) provides that directors may not be exculpated for an illegal dividend. They also rely on Section 174, which they say creates a negligence standard for dividend cases. But this ignores settled law that respects a board's judgment in determining whether there is sufficient surplus from which to pay dividends in the first place. *See Klang* v. *Smith's Food & Drug Ctrs, Inc.*, 702 A.2d 150 (Del. 1997). A board's judgment in this regard is only to be questioned if the board makes that calculation in bad faith. Here, the allegations of the complaint itself make clear that the Chemours Board, relying both on GAAP and non-GAAP measures and after consultation with financial advisers and counsel, actively considered whether the Company had sufficient surplus to pay dividends or authorize share repurchases. This Court need not wade through the Section 220 record to conclude that nothing could be alleged, and in fact nothing is alleged, to suggest that the Board made the calculation in bad faith. Nor do the long-established protections of boards that rely on the records of the company and competent advisors go out the door simply because a case involves dividends or share repurchases—in fact, to the contrary, boards are "fully protected" when they so rely. 8 *Del. C.* § 172. In other words, the Board does not face a substantial risk of liability here, and since there is no other claim of lack of disinterestedness for eight of the nine directors, the Complaint must be dismissed for failure to make a demand.

And, of course, that's exactly how it should be, as Delaware courts do not second-guess the judgments of independent boards that, after careful consideration and in light of expert advice, determine there is sufficient surplus to pay dividends to stockholders. That this particular suit was instigated not by creditors who claim to have not been paid their due, but by the very stockholders themselves who benefited makes this even more the case. Plaintiffs' action should be dismissed with prejudice.

BACKGROUND[1]

A. Chemours, Its Board, and Its Senior Officers

Chemours is a Delaware corporation that manufactures industrial and performance chemical products. ¶ 32.[2] Chemours became an independent company on July 1, 2015 as a result of a spin-off by DuPont, its former parent. At the time of the Complaint, Chemours was organized in three main segments: Fluoroproducts, which includes producing refrigerants and industrial fluoropolymer resins, among other applications; Titanium Technologies, which produces titanium dioxide (TiO2), which is known to be subject to cyclical demand; and Chemical Solutions, which includes producing chemicals used in certain mining applications. *Id.* Defendant Mark P. Vergnano is Chemours's President and Chief Executive Officer and a director since July 1, 2015. ¶ 33. Likewise, Defendants Richard H. Brown, Curtis V. Anastasio, Bradley J. Bell,

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[1] By agreement of the parties, Chemours's Section 220 production is deemed incorporated by reference into the Complaint and so is part of the record before the Court and cognizable on this motion. Ex. 1, at § 10 (Confidentiality Agreement, March 26, 2020); *Amal. Bank* v. *Yahoo!*, 132 A.3d 752, 797 (Del. Ch. 2016). Citations in the form "Ex. ___" refer to exhibits attached to the Transmittal Declaration Pursuant to 10 *Del. C.* § 3927 of Joel Friedlander in Support of Defendants' Motion to Dismiss. Defendants stand ready to provide any additional documents to the Court that it requests.

[2] Citations in the form "¶ ___" refer to the Complaint, Trans. ID 66350056. Citations to SEC filings are to Chemours's SEC filings.

Mary B. Cranston, Curtis J. Crawford, and Dawn L. Farrell have all been directors since July 1, 2015, ¶¶ 34-39; Defendant Sean D. Keohane has been a director since May 2018, ¶ 40; Defendant Erin N. Kane has been a director since June 2019, ¶ 41; and defendant Stephen D. Newlin was a Chemours director from July 1, 2015 to May 2018, ¶ 42. Defendant Mark E. Newman is a Chemours officer, formerly its Senior Vice President and Chief Financial Officer from July 1, 2015 until June 2019, when he was appointed Chief Operating Officer. ¶ 43.

At the time the complaint was filed, Chemours's Board comprised nine members (defendants Vergnano, Brown, Anastasio, Bell, Cranston, Crawford, Farrell, Keohane, and Kane), all but one of whom (Vergnano) is an outside director. ¶ 260. The complaint does not challenge the independence of any of the eight outside directors. *See* ¶¶ 33-42; 259-62. Instead, it alleges that all nine of the members of the "demand board face[] a substantial likelihood of liability for their misconduct in connection with the authorization of the Share Repurchase Programs and the dividends." ¶ 260. Chemours's certificate of incorporation contains a provision that exculpates its directors from personal liability to the fullest extent permitted by law. Ex. 2 (Amended and Restated Certificate of Incorporation of

The Chemours Company (the "Chemours Certificate of Incorporation"), at § 7.01 (Current Report (Form 8-K) (July 1, 2015), at Exhibit 3.01)).[3]

B. The Chemours Spin-Off

DuPont spun off Chemours pursuant to a Separation Agreement drafted by DuPont and its counsel. ¶¶ 73-74. The Separation Agreement included provisions that oblige Chemours to indemnify DuPont for transferred liabilities. ¶ 77. Prior to approving the separation, DuPont's board concluded that Chemours would be solvent and viable as an independent company. ¶ 67. To do so, DuPont's board had retained a financial advisor to provide a solvency opinion and had directed that advisor to rely on certifications of "High End (Maximum)" exposure figures provided by DuPont's management for each of the liabilities transferred to Chemours. ¶ 68. DuPont's financial advisor opined that Chemours would be solvent as an independent company based upon these certified maximums.

After the spin-off, Chemours struggled, quickly suffering an 85% decline in its stock price. ¶ 83. Under the leadership of Defendants Vergnano and Newman, and overseen by the Director Defendants, Chemours worked to reduce

[3] "A court may take judicial notice of an exculpatory charter provision in resolving a motion addressed to the pleadings." *In re Tangoe, Inc. S'holders Litig.*, 2018 WL 6074435, at *12 n.79 (Del. Ch. Nov. 20, 2018) (citation omitted).

its expenses and relieve its debt burden—an effort known as the "Five-Point Transformation Plan." ¶¶ 84-85. In addition, to bolster its balance sheet, Chemours obtained several significant infusions of cash. In November 2015, Chemours sold its aniline plant in Beaumont, Texas to Dow for $140 million in a transaction. ¶ 82. In addition, in January 2016, DuPont agreed to provide $190 million in cash to Chemours, as an advance for goods and services Chemours would provide to DuPont through mid-2017. ¶ 83. Also in January 2016, DuPont and Chemours agreed to extinguish a $110 million cash "true-up" payment owed to it by Chemours under the Separation Agreement. Ex. 3 (The Chemours Company, Annual Report (Form 10-K) (Feb. 17, 2017), at 45); Ex. 4 (Board Report, Financial Review, 3Q15 Actual and FY 15 Outlook, at 84 (CHEM_HIALEAH_220_00012086)).

These efforts were successful. Overall, Chemours's free cash flow from operations increased from negative $337 million in 2015 to (positive) $642 million in 2018, from increased revenues and restructured debt agreements. Ex. 5 (Annual Report (Form 10-K) (Feb. 16, 2018) at 69); Ex. 6 (Annual Report (Form 10-K) (Feb. 15, 2019) at 58). Chemours's net profits increased from negative $90 million in 2015 to (positive) $7 million in 2016, $746 million in 2017, and $995 million in 2018. ¶ 243.

C. The DuPont Lawsuit and Plaintiffs' Misreading of It; Chemours's Recent Settlement

Despite this financial success, Chemours still faced the environmental liabilities assigned to it from DuPont, and certain of the maximums DuPont certified for those liabilities eventually proved to be incorrect. DuPont Compl. ¶¶ 69-98.[4] As an example, following a series of trial losses in a multi-district personal injury litigation in Ohio federal court, in early 2017 DuPont entered into a settlement in that litigation and Chemours announced a cost-sharing agreement with DuPont for liabilities arising from historical emissions of perfluorooctanoic acid (PFOA). ¶¶ 93-99. The amount of this settlement was "five times greater than DuPont's 'maximum' that it had certified" for that liability. ¶ 99. Also in 2017, state regulators took action on environmental discharges from a Chemours

[4] Citations of "DuPont Compl. ¶ __" refer to Chemours's Verified Complaint filed in *The Chemours Company* v. *DowDuPont, Inc.*, C.A. No. 2019-0351-SG (Del. Ch.), Trans. ID 63260140 (the "DuPont Complaint"), which the complaint here cites and quotes extensively. *See, e.g.*, ¶¶ 2-3, 24, 70, 76, 216-23. In considering this motion to dismiss, the Court may take judicial notice of and evaluate "documents referred to in [the] complaint" or "judicial notice of matters that are not subject to reasonable dispute." *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006). Review of such documents extrinsic to the complaint is proper because "[w]ithout the ability to consider the document at issue in its entirety, complaints that quoted only selected and misleading portions of such documents could not be dismissed under Rule 12(b)(6) even though they would be doomed to failure." *Windsor I, LLC* v. *CWCapital Asset Mgm't LLC*, 238 A.3d 863, 874 (Del. 2020) (quoting *In re Gen. Motors*, 897 A.2d 169-70).

(and former DuPont) facility in Fayetteville, North Carolina, seeking abatement and site remediation and that has resulted in a public resolution also significantly above DuPont's certified maximum for that risk. ¶¶ 110-13, 222.

PFOA is part of a broader class of chemicals known as PFAS. Since its spin-off, Chemours has been named in PFAS lawsuits brought by private litigants and faced investigations by regulators, putting DuPont's maximums at risk. ¶¶ 53, 102-18, 222. Many of these lawsuits arise, in whole or part, from the products or legacy emissions of PFAS compounds from DuPont's manufacturing facilities.

In 2019, Chemours sued DuPont in the Court of Chancery seeking declarations that DuPont is not, in fact, entitled to indemnification for historical liabilities that exceed the maximums DuPont certified. DuPont Compl. ¶¶ 100-01; *see also* ¶¶ 216-18. Plaintiffs allege that Chemours "admitted" in its complaint against DuPont that it "was 'insolvent' from the date of the Spin-Off." ¶ 217. What the DuPont complaint actually alleges is that if DuPont's "maximums" did not cap Chemours's obligations, then Chemours would have been insolvent at the time of the spin-off, such that both the spin-off and the dividend paid to DuPont would have violated Delaware law. DuPont Compl. ¶¶ 10, 101. Chemours did not allege that it is presently insolvent or that it was insolvent following the spin-off.

See, e.g., ¶ 219 (quoting the DuPont Complaint's allegation that "if Chemours had unlimited responsibility for the true potential maximum liabilities, it would have been insolvent as of the time of the spin-off"). Nor did Chemours "admit" that it had been transferred uncapped indemnification obligations for liabilities, as plaintiffs allege. ¶ 79. Instead, the complaint against DuPont sought to enforce the liability "maximums" certified in the spin-off. DuPont Compl. ¶ 100 ("Chemours accordingly seeks relief from this Court declaring that Defendants [(DuPont)] are bound by the maximums DuPont certified.").

Plaintiffs' misreading of the complaint against DuPont forms the predicate for many of the allegations here. Plaintiffs allege that "in Chemours's own sworn pleading, the Company admitted to $2.56 billion in inherited liabilities at the time of the Spin-Off," and then list several categories of liabilities, styling them as "Company Conservative Estimate[s]." ¶ 222. Plaintiffs allege that given these supposed liabilities, Chemours has been insolvent every day since the spin-off nearly six years ago, including currently. ¶ 217. But Plaintiffs ignore the components of that figure, which reflected largely demands by the adverse litigants in those actions—and thus the potential maximums—but not amounts that Chemours had paid out or would imminently pay out. Plaintiffs also ignore that Chemours employs thousands of people and has never failed to pay a creditor, having borrowed money from leading financial institutions throughout that period. *See, e.g.*, Ex. 7 (Annual Report (Form 10-K) (Feb. 14, 2020), at 11, 21-23, F-38-F-42). And Plaintiffs ignore the purpose of the suit against DuPont: to protect Chemours's stockholders, such as Plaintiffs here. Indeed, as the complaint here concedes, Chemours had long asserted its indemnification obligations to DuPont were capped; that position had been the basis for the February 2017 PFOA agreement. ¶ 96. Chemours explained in its complaint against DuPont that it was compelled to take action as a result of DuPont's continued repudiation of "maximums" it certified and developments since the spin-off that established that the maximums had not been reasonable. DuPont Compl. ¶¶ 9-10.

This Court dismissed Chemours's action against DuPont in favor of arbitration pursuant to the arbitration provision in the Separation Agreement. *Chemours Co.* v. *DowDuPont Inc.*, 2020 WL 1527783, at *15 (Del. Ch. Mar. 30, 2020), *aff'd* 2020 WL 7378829 (Del. Dec. 15, 2020). As noted, Chemours had argued that if the Separation Agreement were interpreted to require uncapped indemnification of DuPont by Chemours, then Chemours would have been insolvent at the time of spin-off and the spin-off would have violated Delaware law. ¶¶ 24-26. The Court nevertheless dismissed this claim in favor of arbitration.

Chemours pressed its claims against DuPont in arbitration, and, on January 22, 2021, Chemours and DuPont settled their dispute over PFAS liabilities. ¶ 253. That settlement provides for a $4 billion cost sharing agreement for PFAS liabilities split between Chemours and DuPont and Corteva, Inc. (another company spun-off from DuPont). Plaintiffs allege that the $4 billion magnitude of the settlement also proves Chemours has been insolvent since the spin-off. ¶ 255. But the settlement does not stipulate or specify that there are currently such liabilities; rather, it reaches a deal on how to allocate them if they come to fruition in the future. ¶ 29 (noting the cost-sharing arrangement is "for potential future exposure"). And the settlement with DuPont supports Chemours's position and its decision to seek to enforce its interpretation of the Separation Agreement and the spin-off's certified maximum liabilities, and that, under that interpretation, Chemours has always been a viable company.

D. Plaintiffs' Books-and-Records Demand, Initial Complaint, and the Now-Consolidated Complaint

Plaintiffs' lawsuit follows their books-and-records demands made to Chemours under 8 *Del. C.* § 220. ¶ Introduction (at 1-2). Plaintiffs' demands, the first of which was made on February 5, 2020, sought to investigate and were premised on a different theory of liability than the one plaintiffs now press. The books-and-records demands asserted that the Board had failed to properly manage

Chemours's environmental and litigation risks and liabilities, effectively stating that the purpose was to investigate potential wrongdoing under *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996). Ex. 8 (City of Hialeah Employees' Retirement System Demand for Inspection of Books and Records of The Chemours Company, February 5, 2020, at 1-2 (stating the purpose of the demand is to investigate "whether the Board had knowledge of and consciously disregarded pervasive wrongdoing or neglect by the Company's senior management with respect to Chemours'[s] environmental liabilities"). None of Plaintiffs' demands articulated any purpose concerning the Company's issuance of dividends or stock repurchases. In response to Plaintiffs' demands, Chemours produced hundreds of pages of the Company's board materials from the spin-off to the time of the demand in early 2020.

Those materials revealed an extensive system for reporting risks to the Board and robust Board oversight of those risks, as the Complaint itself describes. *See, e.g.*, ¶¶ 15, 17, 107, 177, 221.[5] Plaintiffs, therefore, were left to abandon their

[5] Just by way of example, the Complaint acknowledges "quarterly internal Board reports highlighting the ever-increasing risk of environmental liabilities," ¶ 17, that the Board regularly engaged in an extensive "Enterprise Risk Management" review that covered "Legacy/Future Environmental-Operational Sustainability" and that "such environmental risks were considered Chemours's ***number one*** risk," ¶ 107 (emphasis in original), and that the Board and officers "were each regularly informed of the environmental litigation risks," ¶ 221.

Caremark-based theory of liability. Hialeah's first complaint against Defendants instead accused Defendants, just as the new consolidated Complaint now does, of authorizing dividends and share repurchases in violation of statute and fiduciary duty. *See* Hialeah Complaint ¶¶ 251-88 (Claims for Relief) (Trans. ID 65934211).[6]

Because the original Section 220 demands did not articulate any theory of liability relating to the authorization of dividends and share repurchases, materials concerning the Board's process in this regard were not responsive and were not produced. Lacking the dividend record and documentation of the Board's repeated calculation and discussion of surplus, Hialeah's complaint focused on the Board's alleged failure to discuss the authorization of dividends or share

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[6] This action is a consolidated action comprised of *City of Hialeah Employees' Retirement System* v. *Vergnano, et al.*, C.A. No. 2020-0786-SG (Del. Ch.) and *Pinto* v. *Vergnano, et al.*, C.A. No. 2021-0152- (Del. Ch.). These two actions were consolidated per the parties' stipulation and so-ordered by the Court as *In re The Chemours Company Derivative Litigation*, C.A. No. 2020-0786-SG (Del. Ch.). Stipulation and Order of Consolidation, Trans. ID 66364516 ("Consolidation Stipulation"). On September 16, 2020, plaintiff City of Hialeah Employees' Retirement System ("Hialeah") filed its complaint, Trans. ID 65934211 (the "Hialeah Complaint"), and later determined to amend that complaint following Chemours's supplemental production of Board materials pertaining to Chemours's dividend and repurchase authorizations. *See* Consolidation Stipulation at 2. Instead of ultimately filing that amended complaint, Pinto brought his action and Plaintiffs (and Defendants) agreed to treat Pinto's Complaint as the operative Complaint in a consolidated action with counsel for Hialeah to serve as lead counsel. *Id.*

repurchases "in conjunction with" Chemours's environmental and litigation reserves. *E.g.*, Hialeah Complaint ¶ 172. The Hialeah Complaint also repeatedly alleged that the Section 220 record did not contain any "consideration of statutory surplus" by the Board, *see e.g.*, *id.* ¶¶ 173, 177, and accused the Company of only utilizing "GAAP accounting" in calculating liabilities in connection with surplus, *id.* ¶¶ 218-19, 231.

Following discussions between the parties, Chemours made a supplemental production of the Board's dividend and share repurchase record. Those supplemental materials document that the board retained expert advisors when considering its dividends and share repurchases, received regular reporting on the Company's environmental and litigation liabilities prior to doing so, and discussed those liabilities in connection with the Board's consideration of surplus. *See, e.g.*, Ex. 9 (Board Minutes, July 30–August 1, 2018 (receiving reporting on and discussing finances, business, capex (including at Fayetteville), and litigation from management, and receiving reporting on and discussing dividend and share repurchases from management and external financial advisor, Dyal Partners L.P.) (CHEM_HIALEAH_220_00001175-90)).

Plaintiffs' theory nevertheless changed little in the now-operative Complaint. Although Plaintiffs continue to allege that the environmental liabilities were not considered "in conjunction with" the authorization of dividends and share repurchases when those liabilities were evaluated in the Board's Audit Committee, Plaintiffs now acknowledge that the full Board considered those liability reserves when calculating surplus, but offer the conclusion that the Board did so "rotely." ¶ 17. Plaintiffs similarly concede that the books and records evidence that Chemours's Board concluded—in connection with each and every dividend and share repurchase authorization—that there was adequate surplus, and that the authorizations complied with the requirements of the DGCL, but Plaintiffs label the Board's resolutions as "boilerplate." *E.g.*, ¶ 162, 171, 178. And Plaintiffs maintain their allegation that the Board only utilized GAAP figures in computing surplus and environmental liabilities, even though their Complaint itself acknowledges that the Board "focus[ed]" on non-GAAP measures like Chemours's "free cash flow" when computing surplus. ¶ 131.

E. What the Record Actually Shows: Authorization of Dividends and Share Repurchases

As discussed below, because the Complaint itself admits that Chemours's Board undertook a real process, aided by advisors and based on the Company's records, and concluded that the Company had adequate surplus before authorizing any dividend or repurchase, Plaintiffs' claims fail on the face of the allegations alone. *See* Point I.A, *infra*. The Court thus need not consider any other documents. But the Complaint does expressly incorporate many documents, and the parties agreed that the entirety of the books-and-records production would be implicitly incorporated into the Complaint.[7] And even a cursory review of the very minutes that Plaintiffs cite and reference in their Complaint document that, at each Board meeting, and in each instance in which the Board authorized dividends or share repurchases, the Board received presentations from management on Chemours's financial performance and calculation of free cash flow and surplus, in addition to the Board's normal review and evaluation of environmental risks and liabilities and the Company's accruals for them. *E.g.*, Ex. 10 (cited at ¶ 140) (Board Minutes, August 2, 2017 (receiving reporting on and discussing finances, business, and litigation from management, and receiving reporting on and discussing dividends and share repurchases from management and external financial advisors, Barclays plc and Dyal Partners L.P.) (CHEM_HIALEAH_220_00010498-507)). In addition, at multiple points and at each point in which an increase in the dividend was authorized, the Board received reports from external expert financial advisors, such as Greenhill, Barclays, and

[7] Such an incorporation agreement "ensure[s] that the plaintiff cannot seize on a document, take it out of context, and insist on an unreasonable inference that the court could not draw if it considered related documents." *Amalgamated Bank* v. *Yahoo! Inc*., 132 A.3d 752, 798 (Del. Ch. 2016), *abrogated on other grounds*, 214 A.3d 933 (Del. 2019)).

Dyal, analyzing the Company's ability to pay a dividend or undertake a share repurchase. *E.g.*, Ex. 10; Ex. 11 (Board Minutes, August 5, 2015 (receiving reporting and discussion on finances, business, and litigation from management, and receiving reporting and discussion on dividends from management, outside counsel, and external financial advisor, Greenhill & Co., Inc.) (CHEM_HIALEAH_220_00005151-71)). And the Board also acted after consultation with legal counsel. *E.g.*, Ex. 11, 12 (Board Minutes, July 30-31, 2019 (receiving reporting and discussion on business, finances, litigation, dividends from management, and receiving discussion on dividends from outside counsel) (CHEM_HIALEAH_220_00003469-85)).

Two specific examples bear mention: First, the very first dividend Chemours authorized as an independent company, the Q4 2015 dividend. ¶ 241. That dividend was $.03 per share, for a total of $5.5 million, a reduction from the $.55 per share the prior quarter. *Id.*[8] In setting even this nominal dividend, the Board proceeded with caution and on the basis of expert advice. The Complaint

[8] Plaintiffs' table in ¶ 241 indicates that Chemours's DuPont-declared Q3 2015 dividend had a "Declaration Date" of July 23, 2015. ¶ 241. This is incorrect. That dividend was declared prior to the July 1, 2015 spin-off of Chemours and was declared when Chemours was a wholly owned subsidiary of DuPont by Chemours's pre-spin-off board, which consisted of DuPont employees. *See, e.g.*, Ex. 15 (Annual Report (Form 10-K) (Feb. 25, 2016) at 35 n.1, 37 n.4).

does not mention that, in setting this Q4 2015 dividend, [redacted]. *See* Ex. 13 (Presentation to the Board of Directors, August 5, 2015 (Greenhill & Co., Inc.) (CHEM_HIALEAH_220_00012005-30). At the Board's August 2015 meeting, the Board's financial advisor, Greenhill & Co., [redacted] *Id.* at 13-16 (CHEM_HIALEAH_220_00012017-20). Management later recommended, and the Board adopted, [redacted]. *See* Ex. 14 (Board Report – Dividend Discussion, September 1, 2015, at 3; Presentation to the Board of Directors, September 1, 2015 (Greenhill & Co., Inc.), at 2 (CHEM_HIALEAH_220_00012031-60). *Id.* In recommending that dividend level, [redacted] *Id.* Management and Greenhill also noted [redacted] *Id.* This dividend level continued for eight more quarters as Chemours worked to recover from the disadvantageous position it started from in the spin-off.

Second, the documents likewise reflect significant effort whenever the Board concluded to increase the amount of the dividend or authorize share repurchases. By way of example, Plaintiffs note that, in the Board's July 30–August 1, 2018 meeting, the Board increased its dividend from $.17 per share to $.25 per share, and increased its authorization of its share repurchase program to $750 million. ¶¶ 170-71. At this meeting, Plaintiffs acknowledge, as they must, that the Board received updates regarding and considered the Company's litigation and environmental liabilities and the reserves allocated to them under the applicable accounting standards. ¶¶ 167-69. Yet, Plaintiffs gloss over all of it. ¶¶ 170-71. In fact, as the Section 220 record shows, the Board received reports from management and an external advisor, Dyal Partners LP, providing advice as to the Board's options on capital allocation for dividends and share repurchases. Ex. 16 (Capital Allocation Discussion Materials, July 31, 2018, Dyal Partners, L.P. (CHEM_HIALEAH_220_00012988-97)), Ex. 17 (Capital Allocation Discussion, August 1, 2018 (CHEM_HIALEAH_220_12998-3008)). [redacted]

[redacted] Ex. 18 (Financial Update – June 2018, July 30, 2018, at 46 (CHEM_HIALEAH_220_00012964)). [redacted], *id.*, and, as Plaintiffs do note, that the Company paid $44.2 million in dividends that quarter, ¶ 171. [redacted] The Complaint attempts to generate smoke by suggesting that the dividend increases and share repurchases were driven by a desire to satisfy investors. *E.g.*, ¶ 15. Putting aside that it is curious for stockholder Plaintiffs to take issue with a board considering the interests of stockholders, Plaintiffs allege no actual facts to suggest that investor concerns overrode financial analysis. This is because there is nothing to allege: The record is devoid of any director, advisor, or analyst adopting the position that Chemours, a company capable of achieving and that did in fact achieve hundreds of millions in profits a year, could not pay a dividend or repurchase shares on the ground that its surplus was overwhelmed by unaccrued contingent litigation and environmental liabilities transferred to it by DuPont.

ARGUMENT

Plaintiffs seek, derivatively on behalf of Chemours, to challenge as statutory violations and breaches of fiduciary duty approximately $1.74 billion of share repurchases and dividends. But it is "the board of directors, not stockholders, [who] manages the business and affairs of the corporation, including the business decision to cause the corporation to sue." *In re GoPro, Inc. S'holder Litig.*, 2020 WL 2036602, at *8 (Del. Ch. Apr. 28, 2020). Stockholders accordingly may not bring an action in the right of the corporation without first demanding that the board act itself or pleading with particularity the reasons such a demand would be futile. Ct. Ch. R. 23.1. The Complaint here must be dismissed because Plaintiffs concede they made no demand and because the Complaint pleads no basis—let alone the particularized facts required by law—to doubt the independence, disinterestedness, or good faith of the Board such that demand would have been futile. The Complaint should be dismissed for the additional reason that its core logic is refuted by its own allegations, the documents incorporated therein, and decades of well-established law, and it therefore fails to state a cognizable claim for which relief can be granted. Ct. Ch. R. 12(b)(6).

I. THE COMPLAINT SHOULD BE DISMISSED UNDER RULE 23.1 BECAUSE DEMAND WAS NOT MADE AND IS NOT EXCUSED.

Plaintiffs here concede that they did not make a litigation demand on Chemours's nine-member Board. ¶ 259. Plaintiffs argue that such demand was excused because seven of the nine directors "have been continuously on the Board since the Spin-Off," approved the share repurchases and dividends undertaken by the company during that time, and face "a substantial likelihood of liability" for those decisions. ¶ 260. Because the Complaint thus challenges "conscious business decision[s]" of the board, the *Aronson* test applies to assess demand futility. *Wood* v. *Baum*, 953 A.2d 136, 140 (Del. 2008). To establish demand futility under that test, the complaint must allege particularized facts creating a reason to doubt that (1) a majority of directors are disinterested and independent or that (2) the challenged decisions were otherwise the product of a valid exercise of business judgment. *Aronson* v. *Lewis*, 473 A.2d 805, 814 (Del. 1984). By alleging that seven of Chemours's directors face a "substantial likelihood of liability," Plaintiffs seek to show those directors are "interested" under the first prong of *Aronson*. *GoPro*, 2020 WL 2036602, at *9. Plaintiffs cannot do so here.

Chemours's certificate of incorporation contains an exculpatory provision authorized by 8 *Del. C.* § 102(b)(7). As a result, its directors do not face a "substantial likelihood of liability" for their decisions to approve the share repurchases and dividends unless the Complaint "pleads a *non-exculpated* claim against the directors based on particularized facts." *Wood*, 953 A.2d at 141. For the reasons set forth below, it does not and cannot do so. And, as a result, the Complaint must be dismissed under Rule 23.1.

A. The Complaint does not plead particularized facts establishing a non-exculpated violation of any statute (Counts I & II).

Counts I and II of the Complaint contend that the directors violated Sections 160, 170, 173, and 174 of the Delaware General Corporation Law by "authorizing the Share Repurchase Programs when the capital of Chemours was impaired or when such repurchases caused an impairment of the capital of the Company" and by "authorizing the Company to issue dividends when (a) Chemours did not have a surplus and (b) the dividends exceeded the Company's net profits from the fiscal year in which the dividend was declared and/or the preceding fiscal year." ¶¶ 266, 271. Because personal liability for violations of Section 174 cannot be exculpated under 8 *Del. C.* §102(b)(7)(iii), Plaintiffs say, their Complaint states non-exculpated claims.

The problem with this argument is that nothing alleged in the Complaint undermines the board's determination of surplus here. Under Delaware law, a corporation's repurchase of shares or issuance of a dividend is generally left to the sound exercise of the board's business judgment. *Gabelli & Co., Inc.* v.

Liggett Grp. Inc., 479 A.2d 276, 280 (Del. 1984). These statutory provisions permit a board to repurchase shares or pay dividends so long as doing so would not impair the corporation's capital, and, under the relevant statutes, that just means the funds used for a repurchase or dividend may not exceed the corporation's "surplus."[9] 8 *Del. C.* §§ 160, 170. "Surplus," in turn, is defined as the excess of net assets over the par value of the corporation's issued stock. 8 *Del. C.* § 154.[10] "Net assets means the amount by which the total assets exceed total liabilities." *Id.*

The core theory of Plaintiffs' 111-page complaint is simple: DuPont saddled Chemours with such large contingent environmental liabilities in the spin-off that, Plaintiffs posit, the Company's assets could not have exceeded those liabilities and created any surplus from which dividends could be paid or shares could be repurchased. ¶ 235; *see also* ¶ 245 (same allegation for dividends). Any conclusion otherwise by the Board cannot be credited, Plaintiffs say, because the

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[9] A corporation may also pay dividends when it has no surplus: "In case there shall be no such surplus," a corporation may declare and pay dividends "out of its net profits for the fiscal year in which the dividend is declared and/or the preceding fiscal year." 8 *Del. C.* § 170(a)(2). While there was surplus justifying each and every one of the Company's dividends, the Complaint's own allegations dictate that the Company's net profits defeat liability for all of the Company's dividends in 2015, 2017, 2018, 2019, and 2020. ¶ 243. As for the dividends in 2016, they are justified by the Company's surplus and, in part, its net profits. *Id.*

[10] Like many companies, the par value of Chemours's stock is set at the nominal amount of $.01 per share. Ex. 2 (Chemours Certificate of Incorporation, at § 4.01).

directors "knew, or reasonably should have known, that Chemours's capital was impaired at the time of the Spin-Off or shortly thereafter." ¶ 237.

Putting aside that this factual contention is based on a misreading of the DuPont Complaint, the legal theory cannot be squared with Delaware law. Plaintiffs focus their pleadings on the negligence standard under 8 *Del. C.* § 174, but Section 174 is only implicated if, in fact, a board failed to calculate surplus appropriately. And our Supreme Court has made it clear that—to show an improper surplus calculation—negligence is *not* the standard; a plaintiff would need to show "bad faith or fraud on the part of the board." *Klang* v. *Smith's Food & Drug Centers Inc.*, 702 A.2d 150, 156 (Del. 1997) (citing *Morris* v. *Standard Gas & Electric Co.*, 63 A.2d 577, 583 (Del. Ch. 1949)).

As the Supreme Court explained, the statute "does not require any particular method of calculating surplus, but simply prescribes factors that any such calculation must include." *Id.* at 155. As a result, this court "may defer to the board's measurement of surplus unless a plaintiff can show that the directors 'failed to fulfill their duty to evaluate the assets on the basis of acceptable data and by standards which they are entitled to believe reasonably reflect present values.'" *Id.* (quoting *Morris*, 63 A.2d at 582); *see also SV Invs. Partners, LLC* v. *ThoughtWorks, Inc.*, 7 A.3d 973, 988 (Del. Ch. 2010) (courts will not set aside the board's judgment unless it "acted in bad faith, relied on methods and data that were unreliable, or made a determination so far off the mark as to constitute actual or constructive fraud").

Far from pleading particularized facts showing "bad faith or fraud on the part of the board," or "actual or constructive fraud," the Complaint here pleads just the opposite. Plaintiffs concede (i) that Chemours's Board "repeatedly and regularly received updates on the array of threatened and actual litigation the Company faced regarding its environmental liabilities," ¶ 2; (ii) that the Board considered "GAAP-based accruals" and "GAAP-based accounting reserves" to value those liabilities vis-à-vis the company's assets, ¶¶ 131, 132; (iii) that the Board focused "on the appropriate dividend yield and the relative size of stock repurchases compared to Chemours's free cash flow," ¶ 131; and (iv) that the Board concluded—at each and every meeting where it approved a repurchase or dividend—that the action complied with the DGCL's requirements, ¶¶ 126, 146, 162, 171, 178, 191, 203. The Complaint also admits that the Board received independent, expert advice in connection with all of this from financial advisors, ¶ 141, and acted after consultation with legal counsel, ¶ 156. And, of course, not a word is alleged to say that Chemours could not pay its debts as they came due or that it was forced into bankruptcy or restructuring; to the contrary, Chemours has maintained a thriving business that "Wall Street analysts [have] celebrated." ¶ 150. As discussed below, these allegations do not state a claim for bad faith, they refute it. *See* Point I.B., *infra*.

Plaintiffs' only response to this is to say that the Board should not have relied on GAAP-based measures. ¶¶ 234, 244. Even if it were true that the Board solely relied on GAAP—and the Complaint itself pleads otherwise—the suggestion that such reliance is impermissible is wrong as a matter of law and, in any event, does nothing to overcome the deference due to the Board's reasonable reliance on outside experts under Section 172.

1. The Board may rely on generally accepted accounting principles when calculating surplus.

Throughout the Complaint, Plaintiffs criticize the Board for its use of GAAP-based principles in connection with its surplus calculations. ¶¶ 7, 131, 132, 139, 147, 155, 165, 189. This criticism is both misplaced and misleading.

It is hornbook law that "[t]he determination of the amount that is to be 'capital' and the amount that is to be 'surplus' is one that essentially is within the control and discretion of the board." Balotti and Finkelstein, The Delaware Law of Corporations and Business Organizations § 5.22 (4th ed., Dec. 2020 update). This is because the "General Corporation law contains no prescriptions as to the form or manner of preparing and maintaining books of account and financial statements nor the manner in which the corporation values its assets for such purposes." *Id.* And, although they are not required to do so, "Delaware corporations generally follow generally accepted accounting principles," or "GAAP," for such purposes. *Id.*

That such "generally accepted accounting principles" are "generally accepted" cannot be disputed. *See Alliant Techsystems, Inc.* v. *MidOcean Bushnell Holdings, L.P.*, 2015 WL 1897659, at *10 (Del. Ch. Apr. 24, 2015) (describing GAAP as "normal accounting principles"). Unsurprisingly, therefore, our courts have often upheld reliance on GAAP in a variety of circumstances. *See, e.g.*, *Schlossberg* v. *First Artists Prod. Co.*, 1986 WL 15143, at *5 (Del. Ch. Dec., 17, 1986) (rejecting claim that board should have disclosed more about a deferred tax liability that was recorded and disclosed in accordance with GAAP); *Prod. Resources Grp., L.L.C.* v. *NCT Grp., Inc.*, 863 A.2d 772, 803 (Del. Ch. 2004) (in responding to discovery, "defendants can obviously define 'assets' and 'liabilities' the way [the company] does when it makes public filings" and "assume that usage would conform to Generally Accepted Accounting Principles").

Plaintiffs offer no particularized, pleaded basis to support any inference, let alone a reasonable one, that the Court should not accept the "*generally accepted* accounting principles" here. Because, as noted, Delaware corporations generally do follow GAAP in this regard, to take up Plaintiffs' invitation to reject GAAP for purposes of calculating surplus would call into question the general practice of the majority of our state's corporations. That invitation should be declined.

Plaintiffs contend that the Board should have engaged in some sort of other valuation on a liability-by-liability and asset-by-asset basis. ¶ 244. But this same basic argument was rejected by the Supreme Court in *Klang*, where the Court held that a board need not engage in a "'facts and figures balancing of assets and liabilities' to determine by what amount, if any, total assets exceeds total liabilities." 702 A.2d at 155. (quoting *Farland* v. *Wills*, 1975 WL 1960, at *5 (Del. Ch. Nov. 12, 1975)). The calculation of surplus must "fully take into account the assets and liabilities of the corporation," but boards have discretion in how to do so and their methods are not improper because they "fail[ed] to calculate 'total assets' and 'total liabilities' as separate variables." *Id.*

To try to distinguish this case, Plaintiffs point to Chemours's litigation against DuPont and repeatedly mischaracterize Chemours's position there:

- Plaintiffs say Chemours "has now admitted" that it was "insolvent at the time of the Spin-Off" based on the allegations of the DuPont complaint and the arguments Chemours made in opposition to

DuPont's motion to dismiss. ¶¶ 13, 25, 26. Not so: Chemours alleged and argued that DuPont's position that DuPont bore no further responsibility for the liabilities it transferred could not have been correct because it could not be reconciled with DuPont's pre-spin-off estimates of liabilities and its admission that it would not have spun off an insolvent entity. And, of course, Chemours was right—DuPont has subsequently agreed in the 2017 and 2021 settlements to share up to billions of dollars of potential future expenses. ¶¶ 98, 253, 254.

- Plaintiffs say that Chemours admitted in the DuPont litigation that its "own conservative estimate" shows Chemours faced "about $2.56 billion" in liabilities. ¶ 24. This is incorrect too. Plaintiffs cobble together that number by cherry-picking various large damages claims and judgments Chemours has faced since the spin-off, each of which Chemours provided in the DuPont Complaint to show only that DuPont's corresponding pre-spin-off "maximum" liability did not reflect Chemours's maximum possible exposure in the context of approving the spin-off.[11] The fact that a party has made a claim of a particular amount does not mean that such amount should appropriately have been construed as a "liability" of the corporation; it is for that exact reason that GAAP only requires a corporation to recognize such a claim as a liability when it is "probable" (more likely than not) and "reasonably estimable." Chemours's Board considered such claims in connection with its surplus determinations—as well as liabilities that Chemours believed were "reasonably possible" (with more than slight likelihood). *See, e.g.*, Annual Report (Form 10-K)

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[11] As an example, Plaintiffs claim that Chemours "admitted," as a "Company Conservative Estimate," that environmental remediation liabilities at Chambers Works, a long-time DuPont facility in New Jersey for which Chemours took on responsibility, would cost $1.1 billion. ¶ 222. But here is what Chemours actually alleged: "[A] New Jersey municipality has brought suit against DuPont seeking over $1 billion to address alleged clean-up costs." DuPont Compl. ¶ 92. Chemours did not admit that a damages demand in a plaintiff's complaint reflected the environmental remediation liability Chemours actually faces.

(Feb. 16, 2018) at 61-62.[12] "[W]hen directors have engaged deliberatively in the judgment-laden exercise of determining whether funds are legally available" to repurchase stock or issue a dividend, "a dispute over that issue does not devolve into a mini-appraisal." *ThoughtWorks*, 7 A.3d at 988.

Plaintiffs, in other words, seek to criticize Chemours's directors for not blindly valuing the Corporation's assets based on pre-spin-off estimates completed by its former parent. But it is "the present value of a corporation's assets" and liabilities that "should be used in making this determination." Folk on the Delaware General Corporation Law § 154.02 (7th ed., Dec. 2020 update). As the Complaint itself sets forth, Chemours engaged in significant restructuring

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[12] Chemours thus acted in accordance with guidance from the Accounting Standards Codification, whose rules are designed in part "to prevent accrual . . . of amounts so uncertain as to impair the integrity of" the company's financial statements, Ex. 19 (ASC 450-20-25-4), and recognize that even under the high standards for accrual "[u]ncertainties . . . are pervasive, and they often result in wide ranges of reasonable possible losses," Ex. 20 (ASC 410-30-50-9). In addition, these rules require a complex sequence of accounting judgments about the likelihood of liability and the estimation of contingent liability, judgments that entail the consideration of the advice of numerous subject-area experts, including legal counsel and remediation experts. Unasserted claims require an even more complex assessment of both the likelihood of assertion and the likelihood of an unfavorable outcome, and environmental remediation requires evaluation of lengthy, complex guidance on its accrual. Ex. 21 (ASC-450-20-55-14); Ex. 20 (ASC 410).

efforts immediately following the spin-off and the Chemours Board appropriately looked to its then-current estimates of assets and reasonable and estimable liabilities in connection with each and every share repurchase and dividend. Nothing more is required. *Morris*, 63 A.2d 582 (directors may "evaluate the assets on the basis of acceptable data and by standards which they are entitled to believed reasonably reflect present values").

In any event, the contention that the Board "only considered inappropriately low GAAP-based accruals," ¶ 131, is belied by the Complaint itself: in the very same paragraph Plaintiffs make this allegation, they admit that the Board considered free cash flows, which "are not accepted under the Generally Accepted Accounting Principles." *Kruse* v. *Synapse Wireless, Inc.*, 2020 WL 3969386, at *12 n.152 (Del. Ch. July 14, 2020). Likewise incorrect is the suggestion that the Board did not consider the environmental liabilities: Throughout the rest of the Complaint, Plaintiffs are forced to concede that the Audit Committee and Board received update after update on the Company's environmental liabilities and exposure at the very same meetings where the directors were evaluating the propriety of dividends and stock repurchases. *See, e.g.*, ¶¶ 151-63. And there's more still: The extensive Board materials incorporated by reference into the Complaint show, over and over again, that the board considered far more than GAAP numbers in connection with its decision-making respecting dividends and stock repurchases. *See, e.g.*, Ex. 9; Ex. 16, at 46 (CHEM_HIALEAH_220_00012964).

2. The Board was "fully protected" because it relied in good faith on the corporation's records and expert advisors.

Plaintiffs' statutory claims fail for the additional reason that the complaint admits Chemours's Board acted based on the Corporation's own records and with the advice of expert, outside advisors. Under 8 *Del. C.* § 172, the Board "shall be fully protected" when it does so. Specifically, when determining "the value and amount of the assets, liabilities, and/or net profits of the corporation or any other facts pertinent to the existence and amount of surplus," a board may rely "in good faith upon the records of the corporation and upon such information, opinions, reports or statements presented to the corporation by any of its officers or employees, or committees of the board of directors, or by any other person as to matters the director reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation[.]" 8 *Del C.* § 172.

To survive a motion under Rule 23.1 in a situation "where an expert has advised the board in its decision-making process, the complaint must allege particularized facts (not conclusions) that, if proved, would show, for example, that: (a) the directors did not in fact rely on the expert; (b) their reliance was not in good faith; (c) they did not reasonably believe that the expert's advice was within the expert's professional competence; (d) the expert was not selected with reasonable care by or on behalf of the corporation, and the faulty selection process was attributable to the directors; (e) the subject matter . . . that was material and reasonably available was so obvious that the board's failure to consider it was grossly negligent regardless of the expert's advice or lack of advice; (f) that the decision of the Board was so unconscionable as to constitute waste or fraud." *Brehm* v. *Eisner*, 746 A.2d 244, 262 (Del. 2000) (interpreting 8 *Del. C.* § 141(e)); *see also Klang*, 702 A.2d at 156 n.12 (recognizing similarity of § 141(e) and § 172). The Complaint here fails this test.

For each and every dividend and share repurchase the Board authorized, the Board calculated surplus based upon reasonable methods and advised by the Company's officers and/or outside advisors. As the Complaint acknowledges, the Board valued its total liabilities, including its litigation and environmental liabilities, on at least a quarterly basis in the Audit Committee and the full Board, *see, e.g.*, ¶ 187, and those valuations were incorporated into the Board's evaluation of surplus, *see, e.g.*, Ex. 22 (4Q 2017 & FY 2017 Financial Update, February 13, 2018, at 112 n.1 (noting free cash flow calculation included

DuPont PFOA settlement) (CHEM_HIALEAH_220_00012809); Ex. 23 (Chemours Strategic Roadmap: Strategic Capital Allocation, April 2017, at 24-25, 40 (noting impact of PFOA settlement on Company's cash flow) (CHEM_HIALEAH_220_00012273-303)).[13] Plaintiffs also admit that the Board retained and relied on advice from outside legal counsel, *see, e.g.*, ¶¶ 156, 202, 228, and from at least two different financial advisors, ¶¶ 126, 141. Nowhere does the Complaint suggest there was in fact no reliance, that the Board's reliance was done in bad faith, that these advisors lacked competence on such matters, or that the advice and ultimate decisions were so egregious as to constitute fraud. The statutory claims, accordingly, cannot stand. 8 *Del. C.* § 172; *Klang*, 702 A.2d at 155 (rejecting attack where "Plaintiff has provided no reason to distrust [the outside financial advisor's] analysis").

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[13] Plaintiff assails these valuations by arguing that they were not "discussed ***in conjunction***" with the share repurchases or dividends. *E.g.*, ¶ 189. But the Board's valuations of its liabilities were indeed factored into the Board's evaluation of surplus, *see, e.g.*, Ex. 22, at 112 n.1 (noting impact of PFOA settlement on free cash flow); Ex. 15, at 46 (noting impact of capex on free cash flow), and the Company's review of its total liabilities. And, as noted, there is no requirement that directors, in any event, engage in a "facts and figures balancing of assets and liabilities to determine by what amount, if any, total assets exceeds total liabilities." *Klang*, 702 A.2d at 152 (quotation omitted). Nor is there any requirement that the Board discuss the authorization of a dividend and calculate its liabilities in the same breath.

As in *Morris*, Plaintiffs' case here "comes down to a disagreement with the directors as to value under circumstances where the directors took great care to obtain data on the point in issue, and exercised an informed judgment on the matter." 63 A.2d at 584-85. Here, as there, "this court cannot substitute either plaintiff's or its own opinion of value for that reached by the directors." *Id.* at 585. Counts I and II should be dismissed.

B. The complaint does not plead particularized facts establishing a non-exculpated breach of fiduciary duty (Count III).

Count III of the Complaint puts forth an alternative theory: "even if Chemours did not lack sufficient 'capital,' 'surplus,' and/or 'net profits' at the time of each of the stock repurchases of and dividends"—and thus did not violate any provision of the DGCL—"the Director Defendants breached their fiduciary duties by authorizing the share repurchases and the dividends when they knew that the Company faced a serious risk of insolvency, and at a time when management had made materially misleading disclosures pertaining to the Company's liabilities and solvency." ¶ 30; *see also* ¶ 275. This claim fails because, as discussed above, the Complaint does not plead any facts—let alone particularized facts—that Chemours was insolvent or that the directors knew Chemours was insolvent. Plaintiffs' contentions regarding solvency are predicated on their misreading or misrepresentation of the allegations of Chemours's complaint against DuPont.

Chemours was not, and is not, insolvent. Because that is the only stated basis for the alleged breach of fiduciary duty, the claim must be dismissed.

Nor can any other basis for a breach of fiduciary duty be reasonably inferred here. To state a non-exculpated bad-faith claim in this context, a plaintiff must plead with particularity that the directors engaged in a "conscious disregard for their duties" or undertook a decision that was "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *In re Alloy, Inc.*, 2011 WL 4863716, at *10 (Del. Ch. Oct. 13, 2011) (quoting *Lyondell Chem Co.* v. *Ryan*, 970 A.2d 235, 243 (Del. 2009), and *Crescent/Mach I Partners, L.P.* v. *Turner*, 846 A.2d 963, 981 (Del. Ch. 2000)). But the allegations here support no such inference. To the contrary, the Complaint alleges that the Board actively and aggressively monitored the Company's environmental liability exposure, *see, e.g.*, ¶¶ 132, 138, 140, 144, 166, 174, that the Board acted after consultation with inside and outside counsel, ¶¶ 132, 138, 140, 144, 156, 174, 187, 201, 202, 204, that the Board even analyzed both GAAP and non-GAAP metrics in connection with its consideration of surplus, ¶ 131, and that the Board concluded the company had adequate surplus or net profits (or both) in connection with each and every dividend and stock repurchase that the complaint challenges. "Simply put, the behavior of the [directors] in the instant case is not conscious and intentional disregard on the . . . spectrum of bad faith." *Lenois* v. *Lawal*, 2017 WL 5289611, at *17 (Del. Ch. Nov. 7, 2017); *see also Alloy*, 2011 WL 4863716, at *10-12.

C. Because the complaint fails to plead particularized facts creating reason to doubt the disinterestedness of a majority of the directors, it fails to plead demand futility with respect to its claims against the officers (Counts IV-VII).

Counts IV, V, VI, and VII are aimed at only defendants Vergnano and Newman. ¶¶ 277-300. They allege common law insider trading claims pertaining to alleged stock sales or to preparing improperly Chemours's public disclosures (Count IV), unjust enrichment from such purported insider trading (Count V), and (despite the repeated allegations that the Board was aware of the scope of the liabilities transferred to Chemours) that Vergnano and Newman breached their fiduciary duties by not fully informing the Board of those liabilities (Counts VI and VII). Vergnano is a director and the CEO of Chemours, ¶ 33; Newman is Chemours's COO, but is not a director at all, ¶ 43.

These counts do not name or concern eight of the nine directors on the demand Board. "Courts assess demand futility on a claim-by-claim basis." *In re MetLife Inc. Deriv. Litig.*, 2020 WL 4746635, at *12 (Del. Ch. Aug. 17, 2020). The Complaint here, however, pleads not one word as to why demand should be excused with respect to these four counts, and they must therefore be dismissed under Rule 23.1.

Because Counts IV-VII do not concern decisions made by the demand Board, the *Rales* test applies. *Fisher* v. *Sanborn*, 2021 WL 1197577, at * 8 (Del. Ch. March 30, 2021) (discussing *Rales* v. *Blasband*, 634 A.2d 927 (Del. 1993)). That test requires a plaintiff to plead particularized facts that "impugn the ability of at least half the directors in office when plaintiff initiated [his] action to have considered a demand impartially." *Id.* (quoting *Teamsters Union 24 Health Servs. & Ins. Plan* v. *Baiera*, 119 A.3d 44, 57 (Del. Ch. 2015)). But the Complaint's only pleaded basis for demand futility is that "a majority of the demand Board faces a substantial likelihood of liability." ¶ 260; *see also* ¶¶ 261-62. The eight members of the nine-member demand Board who are not named in these counts cannot face a substantial likelihood of liability—or any risk of liability at all—on claims that do not even *seek* to hold them liable. Nor do Plaintiffs make any effort to plead that any of the eight unnamed directors are beholden to Vergnano or Newman such that they could not be trusted to bring a suit against them. Accordingly, there is nothing alleged that could "impugn the ability" of those eight directors to impartially consider a demand to bring these four claims. Demand is, accordingly, not excused, and these claims should be dismissed.

II. THE COMPLAINT SHOULD BE DISMISSED UNDER RULE 12(b)(6) BECAUSE IT FAILS TO STATE A COGNIZABLE CLAIM.

The Complaint must also be dismissed for failure to state a claim under Rule 12(b)(6). Plaintiffs' core theory, as discussed above, is incongruent with Delaware's law on surplus, which gives boards broad discretion to calculate surplus so long as the means utilized in doing so was not fraudulent or undertaken in bad faith, and further exculpates such calculations when done in reliance on the company's officers and outside financial advisors. Here, the Complaint itself alleges that the Board, advised by the Company's officers and several external expert advisors, calculated surplus and undertook the underlying valuations of present assets and liabilities utilizing reasonable and "generally accepted" means that, far from amounting to being "so far off the mark as to constitute actual or constructive fraud," *Klang*, 702 A.2d at 152, were reasonable and appropriate under the circumstances. There are therefore no "reasonably conceivable set of circumstances" that Plaintiffs could point to in which the Board's use of these methods to calculate surplus and its valuations of its present liabilities could amount to actual or constructive fraud. *Central Mortg. Co.* v. *Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 535 (Del. 2011). Further, the

Complaint's own allegations refute liability for nearly every dividend Chemours declared because, as the Complaint admits, Chemours had enough net profits to justify every dividend except for roughly $9 million of dividends declared in 2016. ¶ 243.[14] These profits, and the Board's reasonable calculations of surplus, defeat liability for Plaintiffs' claims.

As to Counts IV, V, VI, and VII, brought solely against Vergnano and Newman, these Counts also fail to state a claim. Counts IV and V are based on purported insider trading and alleged resulting unjust enrichment from sales of stock by Vergnano and Newman, apparently on the theory that any stock sales prior to "[w]hen the truth about the Company's true environmental liabilities was fully exposed" constituted insider trading because these defendants "knew" "Chemours was insolvent (or was teetering on insolvency) from day one of the Spin-Off." ¶¶ 248-52.

A common law insider trading claim (a "*Brophy*" claim) requires the plaintiff to show that (1) "the corporate fiduciary possessed material, non-public company information" and (2) "the corporate fiduciary used that information improperly by making trades because she was motivated, in whole or in part, by

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[14] As explained above, the dividends in 2016 are justified by the Company's surplus and, in part, its net profits.

the substance of that information." *Kahn* v. *Kolberg Kravis Roberts & Co., L.P.*, 23 A.3d 831, 838 (Del. 2011) (quotation omitted). The Complaint fails to meet these elements. Putting aside that the Complaint does not allege what material, nonpublic information Vergnano and Newman possessed but the public did not, the Complaint does not contain facts that support a "reasonable inference that each sale by each individual defendant was entered into and completed *on the basis of, and because of*, adverse material non-public information." *Tilden* v. *Cunningham*, 2018 WL 5307706, at *20 (Del. Ch. Oct. 26, 2018).

The Complaint alleges that all Vergnano's and Newman's stock sales were made with scienter because they were undertaken prior to "[w]hen the truth about the Company's true environmental liabilities was fully exposed," sometime after March 11, 2019, ¶ 252, purportedly through the May 6, 2019 Glenview presentation or Chemours's filing of the DuPont Complaint, which was unsealed on June 28, 2019. This allegation is not enough to create the reasonable inference that *each sale* was made on the basis of and because of insider information. There was nothing unusual about Vergnano's and Newman's stock sales set out in ¶ 251. Indeed, all of Vergnano's sales, and much of Newman's, were undertaken according to 10b5-1 plans. *See* Ex. 24 (Statement of Changes in Beneficial Ownership (Form 4) (May 10, 2018) at 1 (reporting Vergnano's sale of 200,151 shares)); Ex. 25 Statement of Changes in Beneficial Ownership (Form 4) (May 10, 2018) (reporting Newman's sale of 43,675 shares). Trades undertaken pursuant to 10b5-1 plans are "of minimal value in establishing an inference of scienter." *In re Synchronoss Techs., Inc. Sec. Litig.*, 2020 WL 2786936, at *17 (D.N.J. May 29, 2020). And, in the case of Newman, the sales were undertaken over the course of nearly two years. Further, that the sales represented 15.6% of Vergnano's holdings and 39% of Newman's holdings, ¶¶ 249-50, does not amount to adequate allegations of scienter. *Guttman* v. *Huang*, 823 A.2d 492, 504 (Del. Ch. 2003) (noting that sales of 32%, 20%, and 10% are "much smaller stakes" and that the "mere fact" even of sales of an entire stake or half of one does not by itself support a rational inference of scienter). Overall, these allegations do not sufficiently allege whether these "executed trades [were] the product of an orchestrated scheme to defraud the market and the Company's shareholders or good faith adherence to Company policy or consistent with prior individual practices." *Rattner* v. *Bidzos*, 2003 WL 22284323, at *12 (Del. Ch. Sept. 30, 2003).

Finally, as for Counts VI and VII—the alternatively pleaded counts alleging that Vergnano and Newman breached their fiduciary duties when they purportedly withheld information from the Board—such claims require a showing of bad faith amounting to a "conscious disregard for their duties" to constitute a breach of fiduciary duty. *Alloy*, 2011 WL 4863716, at *10; *Gantler* v. *Stephens*, 965 A.2d 695, 708-09 (Del. 2009) (holding that the "fiduciary duties of officers are the same as those of directors"). There are no allegations that support that Vergnano and Newman withheld, in bad faith, information from the Board. There are no allegations to suggest that Vergnano and Newman acted in their own self-interest or were disloyal, and, indeed, the robust and constant reporting to the Board reflected in the Complaint's allegations and the Section 220 record refutes any such inference. These Counts, too, fail to state a claim even if demand were excused.

As a result, all counts of the Complaint must be dismissed as inadequately pleaded under Rule 12(b)(6).

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed in its entirety and with prejudice.

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Dated: April 23, 2021

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2021, I caused a true and correct copy of **Amended Public Version of Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss the Verified Stockholder Derivative Complaint** to be served upon the following individuals in the manner indicated below:

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