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***Marchand v. Barnhill's* Impact on the Duty of Oversight: New Factors to Assess Directors' Liability for Breaching the Duty of Oversight**

Katherine M. King
Boston College Law School

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MARCHAND v. BARNHILL'S IMPACT ON THE DUTY OF OVERSIGHT: NEW FACTORS TO ASSESS DIRECTORS' LIABILITY FOR BREACHING THE DUTY OF OVERSIGHT

Abstract: In 2019, in *Marchand v. Barnhill*, the Delaware Supreme Court reversed the dismissal of a complaint alleging that the defendants, Blue Bell directors, breached their duty of oversight. In doing so, the court invoked two new factors—whether the corporation is monoline and whether it is heavily regulated—to consider when evaluating claims against directors for an oversight failure. These factors inform whether a court can identify an essential compliance concern, such that a court can infer the directors violated their obligation to act in good faith by consciously disregarding a known duty. This inference allows a court to find that a plaintiff alleged sufficient facts to state a claim for a breach of the duty of oversight. This Note examines the upper and lower boundaries of the monoline as well as heavily regulated factors established in *Marchand* via a derivative complaint against The Boeing Company's directors. Ultimately, this Note isolates factors most important for a plaintiff to consider when evaluating the strength of their breach of the duty of oversight claim, including (1) whether the company makes only one product or has one product that is particularly significant to the company's success and (2) whether one, primary, external regulator governs the company's business.

INTRODUCTION

On March 25, 2019, Blue Bell Creameries USA, Inc. (Blue Bell) announced the return of its ice cream to grocery stores in Virginia.¹ This news brought particular joy to my family of Texans who celebrated when Blue Bell's ice cream originally came to Virginia and lamented when Blue Bell recalled its products after the outbreak of *Listeria monocytogenes* (*Listeria*) infections in 2015.² This outbreak took three lives and caused at least ten infections.³

¹ Press Release, Blue Bell Creameries, Blue Bell Ice Cream Returns to Richmond, Hampton Roads and Surrounding Cities Today (Mar. 25, 2019), https://www.bluebell.com/press_releases/blue-bell-ice-cream-returns-to-richmond-hampton-roads-and-surrounding-cities-today/ [<https://perma.cc/N5PC-5Y4D>]; see Gregory J. Gillian, *Blue Bell Ice Cream Returning to Stores in Richmond and Elsewhere in Virginia Beginning This Week*, RICHMOND TIMES-DISPATCH (Mar. 25, 2019), https://www.richmond.com/business/blue-bell-ice-cream-returning-to-stores-in-richmond-and/article_da49d6d7-cd15-58e9-9989-8a13d5892fae.html [<https://perma.cc/29SY-BYDN>] (noting the three-year period where Blue Bell Creameries USA, Inc. (Blue Bell) ice cream was not available in grocery stores in Virginia after the recall).

² See Zeke Hartner, *Blue Bell Ice Cream Returns to Virginia After 3-Year Absence*, WASH. TOP NEWS (Mar. 27, 2019), <https://wtop.com/virginia/2019/03/blue-bell-ice-cream-returns-to-virginia->

Following the outbreak, the plaintiffs, Blue Bell shareholders, brought a derivative suit against the Blue Bell board of directors.⁴ Pursuant to *In re Caremark International Inc. Derivative Litigation*, which established the duty of oversight in a Delaware Chancery Court case in 1996, the plaintiffs alleged that the Blue Bell board of directors breached their duty of oversight by failing to make a good faith attempt to institute a monitoring system for the corporation.⁵ Historically, shareholder derivative suits did not survive the corporation's motion to dismiss for failing to state a claim of a breach of a duty of oversight due to the significant decision-making deference afforded to the boards of corporations.⁶ Consequently, the court's denial of Blue Bell's board's motion to dismiss disrupted corporate law with the first successful "*Caremark* claim."⁷

after-3-year-absence/ [https://perma.cc/2G3B-G6DK] (noting the fans of the ice cream brand). A *Listeria* outbreak is a colloquial term used to explain when the bacterium, *Listeria monocytogenes*, contaminates food and causes listeriosis. *Listeria* (*Listeriosis*), CDC, https://www.cdc.gov/listeria/index.html [https://perma.cc/8HYM-AK3N]. *Listeria* is an infection common in pregnant women, newborns, adults over sixty-five, and people with compromised immune systems. *Id.* The symptoms are wide-ranging and include fever, nausea, chills, diarrhea, and also may impact the nervous system. *Listeria Infection*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/listeria-infection/symptoms-causes/syc-20355269?page=0&citems=10 [https://perma.cc/E9V8-EDG6]; see *infra* note 137 and accompanying text (explaining the symptoms of listeriosis).

³ Angela Spivey et al., *The Blue Bell Ice Cream Listeria Outbreak and Its Fallout*, FOOD SAFETY NEWS (Aug. 1, 2019), https://www.foodsafetynews.com/2019/08/the-blue-bell-ice-cream-Listeria-outbreak-and-its-fallout/ [https://perma.cc/72TG-KW4Y].

⁴ See generally Verified Stockholder Derivative Action Complaint, *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019) (en banc) (No. 2017-0586) (alleging the Blue Bell directors' oversight failure).

⁵ *Id.* at 57; see *infra* note 77–126 and accompanying text (explaining the development of the duty of oversight via *In re Caremark International Inc. Derivative Litigation* and its progeny). In 1996, in *In re Caremark International Inc. Derivative Litigation*, the Delaware Court of Chancery explained that the board is responsible for overseeing the company so long as the duty does not go so far as to require the board to establish a "system of espionage." 698 A.2d 959, 969 (Del. Ch. 1996). Employees of Caremark International, Inc. (Caremark) had allegedly violated federal law by accepting referral payments in a health care context. *Id.* at 961–62.

⁶ See *Marchand*, 212 A.3d at 807 (alleging directors breached their fiduciary duties). See generally *In re Caremark*, 698 A.2d 959 (articulating the elements for assessing oversight liability for directors); Spivey et al., *supra* note 3 (describing the board's oversight failures generally). A claim alleging a failure to fulfill a duty of oversight is frequently referred to as a "*Caremark* claim." See *Marchand*, 212 A.3d at 807–08 (describing the failure to oversee Blue Bell's food safety operations as a breach of duty under a *Caremark* claim); Stone v. Ritter, 911 A.2d 362, 364 (Del. 2006) (en banc) (describing the allegations in the derivative complaint, and referring to them as *Caremark* violations). This Note also refers to a claim alleging a breach of a duty of oversight as a "*Caremark* claim." See, e.g., *Marchand*, 212 A.3d at 808, 820 (using the phrase "*Caremark* claim"); Mercer Bullard, *Caremark's Irrelevance*, 10 BERKELEY BUS. L.J. 15, 33 (2013) (same); Todd Haugh, *Caremark's Behavioral Legacy*, 90 TEMP. L. REV. 611, 618 (2018) (same); Ezra Wasserman Mitchell, *Caremark's Hidden Promise*, 51 LOY. L.A. L. REV. 239, 242 (2018) (same); Joseph W. Swanson, *Yellow Flags Are Not Red Flags: Delaware Court of Chancery Rejects Caremark Claim in Reiter v. Fairbank*, 27 CLASS ACTIONS & DERIVATIVE SUITS 9, 9 (2017) (same).

⁷ *Marchand*, 212 A.3d at 820, 824 (explaining that alleging and proving a *Caremark* claim is challenging for plaintiffs, but finding that the plaintiff pled sufficient facts to deny the defendants' motion to dismiss). See generally *In re Caremark*, 698 A.2d 959 (establishing the *Caremark* claim).

On June 20, 2019, in *Marchand v. Barnhill*, the Delaware Supreme Court denied the motion to dismiss a derivative action against Blue Bell directors for failing to fulfill their duty of oversight.⁸ Emphasizing that regulatory compliance was so essential for Blue Bell's success, such that the board's alleged failure to act when facing "red flags" concerning the product's safety could rise to the level of an oversight failure, the court held that the derivative suit could survive a motion to dismiss.⁹ This Note discusses how *Marchand* altered corporate directors' oversight responsibilities in certain industries by placing more emphasis on whether a business has a monoline structure and whether it has one primary regulator.¹⁰ Furthermore, this Note argues that the holding in *Marchand* will have significant implications for directors managing industries uniquely capable of causing irreparable harm.¹¹ To illustrate the impact of this decision, this Note analyzes a derivative action against The Boeing Company (Boeing) to demonstrate how courts may apply *Marchand* in future claims for a breach of the duty of oversight.¹²

On October 29, 2018, and March 10, 2019, two 737 MAX planes crashed and killed 346 people.¹³ Both incidents occurred because the planes' automatic

⁸ See 212 A.3d at 824 (reversing the Delaware Court of Chancery's holding that the plaintiff did not plead facts to support a *Caremark* claim).

⁹ *Id.* at 820.

¹⁰ See *infra* notes 156–190 and accompanying text.

¹¹ See *infra* notes 156–190 and accompanying text.

¹² See *infra* notes 191–274 and accompanying text; see also Tom Hals & Tracy Rucinski, *Lawsuit Against Boeing Seeks to Hold Board Liable for 737 MAX Problems*, REUTERS, <https://www.reuters.com/article/us-boeing-737max-lawsuit-board/lawsuit-against-boeing-seeks-to-hold-board-liable-for-737-max-problems-idUSKBN1XS2I3> [<https://perma.cc/A5DH-ZFK3>] (Nov. 18, 2018) (noting that the plaintiff accused the board of failing to investigate 737 MAX safety); Matthew Yglesias, *The Emerging 737 Max Scandal, Explained*, VOX (Mar. 29, 2019), <https://www.vox.com/business-and-finance/2019/3/29/18281270/737-max-faa-scandal-explained> [<https://web.archive.org/web/20210516140419/https://www.vox.com/business-and-finance/2019/3/29/18281270/737-max-faa-scandal-explained>] (detailing the 737 MAX crashes).

¹³ *Timeline: Boeing 737 Max Jetliner Crashes and Aftermath*, CHI. TRIB. (Oct. 14, 2019), <https://www.chicagotribune.com/business/ct-biz-viz-boeing-737-max-crash-timeline-04022019-story.html> [<https://web.archive.org/web/20210518205309/https://www.chicagotribune.com/business/ct-biz-viz-boeing-737-max-crash-timeline-04022019-story.html>]. The 737 MAX is a commercial plane designed as an alternative to a competing Airbus plane, the A320neo. Kent German, *2 Years After Being Grounded, the Boeing 737 Max Is Flying Again*, CNET (Apr. 12, 2021), <https://www.cnet.com/news/boeing-737-max-8-all-about-the-aircraft-flight-ban-and-investigations/> [<https://perma.cc/T5VS-BDSU>]. The first flight, which flew from Indonesia, crashed into the sea less than thirteen minutes after taking off, killing 189 people. Sinéad Baker, *This Timeline Shows Exactly What Happened on Board the Lion Air Boeing 737 Max That Crashed in Less Than 13 Minutes, Killing 189 People*, BUS. INSIDER (Oct. 29, 2019), <https://www.businessinsider.com/lion-air-crash-timeline-boeing-737-max-disaster-killed-189-2019-10> [<https://perma.cc/C53R-DX4Y>]. The crash report showed the pilots' persistent efforts to prevent the plane's computer from causing a nosedive into the ocean. *Id.* The second flight, which flew from Ethiopia, also crashed soon after take-off, killing 157 people. *Ethiopian Airlines Plane Crash: No Survivors Among 157 on Board*, AL JAZEERA (Mar. 10, 2019), <https://www.aljazeera.com/news/2019/03/ethiopian-airlines-flight-nairobi-crashes-deaths-reported-190310082515738.html> [<https://perma.cc/Q933-ADCV>].

safety systems forced the planes' noses downward.¹⁴ By March 13, 2019, the United States grounded all Boeing 737 MAX jets.¹⁵ These accidents resulted in a multi-billion-dollar loss for Boeing—its first reported loss since 1997.¹⁶

On November 18, 2019, Kirby Family Partnership, an investor in Boeing, filed a derivative complaint on behalf of Boeing against its board of directors.¹⁷ The complaint alleged that the board ignored warning signs and failed to

¹⁴ Darryl Campbell, *The Many Human Errors That Brought Down the Boeing 737 Max*, THE VERGE (May 2, 2019), <https://www.theverge.com/2019/5/2/18518176/boeing-737-max-crash-problems-human-error-mcas-faa> [<https://perma.cc/56CM-YLJE>]; William Langewiesche, *What Really Brought Down the Boeing 737 Max?*, N.Y. TIMES MAG., <https://www.nytimes.com/2019/09/18/magazine/boeing-737-max-crashes.html> [<https://perma.cc/4F7G-SHJG>] (Jan. 9, 2021); Todd Shields et al., *Boeing 737 MAX Crashed After System Forced Its Nose Down 'Uncommanded,' Ethiopia Says*, TIME (Apr. 4, 2019), <https://time.com/5564224/ethiopia-boeing-737-max-crash-report/> [<https://perma.cc/9ELR-J8A8>]; *Timeline: Boeing 737 Max Jetliner Crashes and Aftermath*, *supra* note 13 (describing the pilots' attempts to manage a sudden decline in the plane's nose).

¹⁵ Hals & Rucinski, *supra* note 12 (describing the worldwide grounding of The Boeing Company (Boeing) 737 MAX jets); Leslie Josephs & Kevin Breuninger, *US Grounds Boeing 737 Max Planes, Citing Links Between 2 Fatal Crashes*, CNBC, <https://www.cnbc.com/2019/03/13/boeing-shares-fall-after-report-says-us-expected-to-ground-737-max-fleet.html> [<https://perma.cc/B5QL-VQFA>] (Mar. 14, 2019); Thomas Kaplan et al., *Boeing Planes Are Grounded in U.S. After Days of Pressure*, N.Y. TIMES (Mar. 13, 2019), <https://www.nytimes.com/2019/03/13/business/canada-737-max.html> [<https://perma.cc/W6L3-BDUC>]; *Timeline: Boeing 737 Max Jetliner Crashes and Aftermath*, *supra* note 13. As of March 2021, some airlines in the United States have started flying 737 MAX planes again; however, some countries continue to have safety concerns and will not fly the planes. See Niraj Chokshi, *United Adds to Its Orders for Boeing 737 Max Planes*, N.Y. TIMES (Mar. 1, 2021), <https://www.nytimes.com/2021/03/01/business/united-airlines-boeing-737-max.html> [<https://perma.cc/FK6W-MULJ>] (explaining that United Airlines recently began to fly the 737 MAX again and thus ordered more planes for its fleet). But see Orange Wang, *Boeing 737 MAX: China's Flight Ban Won't Be Lifted Until Safety Concerns 'Properly Addressed,' CHINA MACRO ECON.* (Mar. 1, 2021), <https://www.scmp.com/economy/global-economy/article/3123635/boeing-737-max-chinas-flight-ban-wont-be-lifted-until-safety> [<https://perma.cc/6QUH-PD6E>] (stating that China will continue its ban on the 737 MAX until Boeing fixes its safety concerns).

¹⁶ Ankit Ajmera & Eric M. Johnson, *Boeing Abandons Outlook, Takes \$1 Billion Cost Hit in MAX Crisis*, REUTERS (Apr. 24, 2019), <https://www.reuters.com/article/us-boeing-results/boeing-abandons-outlook-takes-1-billion-cost-hit-in-max-crisis-idUSKCN1S01GP> [<https://perma.cc/Z93L-9SCH>] (describing Boeing's first quarter losses in 2019); Associated Press, *Boeing Posts First Annual Loss Since 1997, Expects 737 Max Costs to Top \$18 Billion*, L.A. TIMES (Jan. 29, 2020), <https://www.latimes.com/business/story/2020-01-29/boeing-annual-loss-737-max> [<https://web.archive.org/web/20200131130433/https://www.latimes.com/business/story/2020-01-29/boeing-annual-loss-737-max>]; Doug Cameron & Andrew Tangel, *Boeing Posts Full-Year Loss Amid 737 MAX Setbacks*, WALL ST. J. (Jan. 29, 2020), <https://www.wsj.com/articles/boeing-falls-to-full-year-loss-11580302091> [<https://perma.cc/QBL7-YLSG>] (reporting a loss of at least \$19 billion resulting from the 737 MAX crisis).

¹⁷ Public Version of the Verified Stockholder Derivative Complaint at 1, Kirby Fam. P'ship, LP v. Muilenburg, 2020 WL 4504307 (Del. Ch. Aug. 3, 2020) (No. 2019-0907); see *infra* note 4738 and accompanying context (describing derivative suits). The Kirby Family Partnership became a stockholder of Boeing in 2018. Public Version of the Verified Stockholder Derivative Complaint, *supra*, at 1. The Delaware Court of Chancery granted motions to intervene submitted by the Construction and General Building Laborers' Local Union No. 79 General Fund, the Cleveland Bakers, and the Teamsters Pension Fund. Slotroff v. Bradway, Nos. 2019-0941, 2019-0907, 2019-0794, 2020 WL 474680, at *1 (Del. Ch. Jan. 28, 2020). The court has since consolidated the *Kirby Family Partnership, LP v. Muilenburg* Complaint (*Kirby* Complaint) with other derivative actions, such as complaints brought

fulfill its oversight obligations following the first crash.¹⁸ The court since consolidated it with other derivative complaints against Boeing to create *In re the Boeing Co. Derivative Litigation*.¹⁹ This Note uses the *Marchand* decision to predict how the court will analyze the alleged failure to maintain oversight in *In re the Boeing Co.*²⁰ This Note argues that the *Marchand* decision strengthens the plaintiffs' position in *In re the Boeing Co.* and may result in the court denying the defendants' motion to dismiss.²¹ Finally, this Note isolates important factors to evaluate when assessing the likelihood of a complaint's dismissal, which can guide practitioners bringing derivative complaints and explain to corporate boards which elements of their business may make them vulnerable to derivative litigation post-*Marchand*.²²

Part I of this Note describes the duties of care, loyalty, and good faith, which are the fiduciary duties that corporate directors must uphold.²³ Part I further explains how the duty of good faith factors into the duties of care and loyalty as an element of liability for the breach of the duty of loyalty.²⁴ Part I additionally explains the development of the duty of oversight as established in

on behalf of retirement funds invested in Boeing, establishing *In re the Boeing Co. Derivative Litigation*. Kirby Fam. P'ship, 2020 WL 4504307, at *1.

¹⁸ Public Version of the Verified Stockholder Derivative Complaint, *supra* note 17, at 23.

¹⁹ Kirby Fam. P'ship, 2020 WL 4504307, at *1. The plaintiffs in *In re the Boeing Co. Derivative Litigation* filed a consolidated complaint (*Boeing Complaint*) on January 5, 2021. See generally Verified Amended Consolidated Complaint, *In re the Boeing Co. Derivative Litig.*, No. 2019-0907 (Del. Ch. filed Jan. 5, 2021), 2021 WL 496766 (alleging that Boeing officers inadequately monitored Boeing 737 MAX's safety). This Note relies on the Kirby Complaint and Boeing Complaint when analyzing the oversight failures attributed to the 737 MAX disaster. See generally Verified Amended Consolidated Complaint, *supra*, at 9 (alleging oversight failures after gaining more access to records); Public Version of the Verified Stockholder Derivative Complaint, *supra* note 17, at 9 (alleging oversight failures without extensive access to records). The Boeing Complaint outlines the interaction between Boeing and the Federal Aviation Administration (FAA) after a prolonged series of records requests. See Verified Amended Consolidated Complaint, *supra*, at 7 (describing Boeing's efforts to reduce costs by asserting that the 737 MAX was similar to Boeing's original 737 plane, thus reducing the FAA's involvement and required pilot training); Rose Krebs, *Chancery Pauses Boeing 737 Suits Amid Records Blitz*, LAW360 (Jan. 21, 2020), <https://www.law360.com/articles/1236044/chancery-pauses-boeing-737-suits-amid-records-bid-blitz> [<https://perma.cc/8WAZ-9TLM>].

²⁰ See *infra* notes 208–264 and accompanying text.

²¹ See generally *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019) (en banc) (introducing a new understanding of a *Caremark* claim for heavily regulated, monoline corporations, and imposing a more onerous oversight burden on directors of corporations within that category); Defendants' Opening Brief in Support of Their Motion to Dismiss at 1–4, *In re the Boeing Co.*, No. 2019-0907 (Del. Ch. filed Feb. 8, 2021), 2021 WL 530962 (seeking dismissal based on plaintiffs' failure to successfully plead defendants' failure to implement a monitoring process and ignorance of warning signs); Verified Amended Consolidated Complaint, *supra* note 19, at 9 (alleging a claim for breach of duty of oversight after the board supposedly ignored red flags of a compliance breakdown, and emphasizing the 737 MAX's significance in Boeing's business to establish criteria fulfilling the monoline descriptor in *Marchand v. Barnhill*).

²² See *infra* notes 265–274 and accompanying text.

²³ See *infra* notes 31–55 and accompanying text.

²⁴ See *infra* notes 56–76 and accompanying text.

In re Caremark.²⁵ Finally, Part I explores how these fiduciary duties inform the duty of oversight.²⁶ Part II discusses *Marchand* as the first well-pled *Caremark* claim, emphasizing how the monoline nature of Blue Bell's business influenced the court's decision to deny the motion to dismiss.²⁷ Part III examines the upper and lower boundaries of the factors established in *Marchand*, namely evaluating whether the corporation meets the monoline and whether it is heavily regulated criteria, meaning a "mission critical" compliance concern is identifiable.²⁸ Part III also considers the implications of *Marchand* by applying these factors to the facts alleged in *In re the Boeing Co.*, predicting that the court will likely deny a motion to dismiss for failure to state a claim for the breach of the duty of oversight.²⁹ Finally, Part III summarizes the key factors that potential plaintiffs should consider in a breach of the duty of oversight claim.³⁰

I. CORPORATE DIRECTORS' FIDUCIARY DUTIES & THE DEVELOPMENT OF THE DUTY OF OVERSIGHT

The duties of care and loyalty serve as the dominant sources of liability for corporate directors.³¹ In the early 2000s, legal observers reacted to the Delaware courts' rhetoric regarding good faith by asserting that the duty of good faith should serve as an independent basis for director liability.³² Despite this

²⁵ See *infra* notes 77–98 and accompanying text.

²⁶ See *infra* notes 99–126 and accompanying text.

²⁷ See *infra* notes 127–190 and accompanying text.

²⁸ See *infra* notes 191–207 and accompanying text.

²⁹ See *infra* notes 208–264 and accompanying text.

³⁰ See *infra* notes 265–274 and accompanying text.

³¹ BRIAN J.M. QUINN, INTRODUCTION TO THE LAW OF CORPORATIONS 280 (6th ed. 2019) (defining the duty of care as obligating the director to use the care of a reasonably prudent director and the duty of loyalty as requiring the director to pursue the corporation's best interests in good faith); Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457, 464 (2009) (highlighting the traditional duties of care and loyalty and questioning where good faith fits among them); Nicholas D. Mozal, *Why the Delaware Courts Express Two, and Only Two, Fiduciary Duties: A Response to How Many Fiduciary Duties Are There in Corporate Law?*, 83 S. CAL. L. REV. 1231 (2010), 87 S. CAL. L. REV. POSTSCRIPT 156, 156–57 (2014), http://www.ramlp.com/media/article/68_Mozal%20USC%20Law%20Review.pdf [<https://perma.cc/MB63-58UW>] (explaining the court's articulation of the duties of care and loyalty in *Stone v. Ritter*, and arguing that consolidating duties better applies corporate law's objectives to directors and would have greater social impact); Hillary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456, 463 (2004) (including good faith in the description of three fiduciary duties); Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 631 (2010) (identifying care and loyalty as directors' conventional fiduciary duties); Julian Velasco, *How Many Fiduciary Duties Are There in Corporate Law?*, 83 S. CAL. L. REV. 1231, 1232–33 (2010) (suggesting that the two primary fiduciary duties are care and loyalty).

³² See Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1, 1 (2006) (highlighting the importance of fleshing out the nuances of the duty of good faith); Gold, *supra* note 31, at 464 (explaining the evolution of fiduciary duties in corporate law). One scholar discusses the idea of the duty of good faith as its own source of director liability rather than a subsidiary element of the duty of loyalty. See Sale, *supra* note 31, at 482 (noting that Delaware cases discuss the duty of

advocacy, Delaware courts continued to rely on the duties of care and loyalty as the claims necessary to attach liability to corporate directors.³³ For example, in 2006 in *Stone v. Ritter*, the Delaware Supreme Court explicitly described the duty of good faith as an elemental obligation within the duty of loyalty, not a cause of action on its own.³⁴

The duties of care and loyalty stem from corporate directors' fiduciary obligations to the corporation for which they serve on the board.³⁵ Those with a fiduciary responsibility must act in the beneficiary's interest.³⁶ The duty of care protects the beneficiary's interest by requiring directors to make decisions on an informed basis and with the diligence that a person with the same training and skills would typically have in the relevant circumstances.³⁷ Although this

good faith separately). This development triggered significant scholarly discussion calling for a more robust duty of good faith. See, e.g., Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 3 (2005) (noting references to the duty of good faith along with duties of care and loyalty); John L. Reed & Matt Neiderman, "Good Faith" and the Ability of Directors to Assert § 102(b)(7) of the Delaware General Corporation Law as a Defense to Claims Alleging Abdication, Lack of Oversight, and Similar Breaches of Fiduciary Duty, 29 DEL. J. CORP. L. 111, 140 (2004) (calling for the clarification of the duty of good faith in response to the power of exculpation provisions, which eliminate damages for breach of fiduciary duties other than duties of loyalty and failing to act in good faith); David Rosenberg, *Making Sense of Good Faith in Delaware Corporate Fiduciary Law: A Contractarian Approach*, 29 DEL. J. CORP. L. 491, 495–96 (2004) (identifying confusion regarding whether good faith is an independent duty capable of creating liability).

³³ See Mozal, *supra* note 31, at 160–61 (relying on *Stone* to explain that the Delaware Supreme Court addressed the question of whether good faith was an independent basis for liability, and noting that the threat of liability has not increased with the reliance on duties of care and loyalty).

³⁴ 911 A.2d 362, 369 (Del. 2006) (en banc) (describing good faith as a condition necessary for liability, such that "a failure to act in good faith is not conduct that results, *ipso facto*, in the direct imposition of fiduciary liability"); see *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996) (describing a violation of good faith as a precondition for liability). In 2006, in *Stone v. Ritter*, the Delaware Supreme Court's assertion that good faith is a prerequisite for the duty of loyalty relied on a footnote in the 2003 Delaware Court of Chancery case *Guttman v. Huang*, which explains that it is necessary to act in good faith to act loyally and it is impossible to behave in bad faith and still fulfill the duty of loyalty. *Stone*, 911 A.2d at 370 & nn. 30 & 34 (citing *Guttman v. Huang*, 823 A.3d 492, 506 n.34 (Del. Ch. 2003)). Consequently, there is no use in separating the duty of good faith from the duty of loyalty. *Guttman*, 823 A.2d at 506 n.34.

³⁵ Julian Velasco, *Fiduciary Principles in Corporate Law*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 61, 71 (Evan J. Criddle et al. eds., 2019).

³⁶ John C.P. Goldberg, *The Fiduciary Duty of Care*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 35, at 405, 405. In the case of a corporation, the directors' beneficiaries are the stockholders. Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 412 (explaining directors' fiduciary obligations to stockholders).

³⁷ Goldberg, *supra* note 36, at 406; Velasco, *supra* note 35, at 69. The Delaware Supreme Court established the minimum conduct required to satisfy the directors' duty to inform themselves in 1984 in *Aronson v. Lewis*. 473 A.2d 805, 812 (Del. 1984) (explaining that directors must stay apprised of all reasonably accessible material information), *overruled on other grounds by* *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). In *Aronson*, the court considered the directors' approval of an employment agreement, which included \$225,000 in loans without interest, with a director and stockholder. *Id.* at 808–09. The plaintiff, a stockholder of the company, alleged that such an agreement in no way benefited the corporation. *Id.* at 809.

standard of conduct requires the directors to act with ordinary care, the applicable standard of review for a care claim requires a plaintiff to allege that a director acted with gross negligence.³⁸ Thus, if a director fulfills their obligations under the duty of care, they are not subject to liability on the basis of a care violation even if the decision resulted in an undesirable outcome for the stockholders.³⁹ This deference to directors is a manifestation of the business judgment presumption, which reflects the position that the courts should not substitute their business judgment for the director's business judgment.⁴⁰ Stockholders may only overcome this presumption, which assumes that corporate directors "act[] on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company," by proving gross negligence for a care claim or asserting the directors' conflict of interest.⁴¹

The duty of loyalty requires directors to pursue the corporation's interest, as opposed to the directors' personal interests or a third-party's interests.⁴²

³⁸ *Aronson*, 473 A.2d at 812 (explaining that director conduct must rise to gross negligence to warrant liability due to the deference accorded to directors under the business judgment presumption); Velasco, *supra* note 35, at 68–69 (noting that liability for care claims is uncommon due to this standard of review). The applicable standard of review informs how the court considers lower court decisions and applies presumptions to alleged facts. *Standard of Review*, BLACK'S LAW DICTIONARY (11th ed. 2019). A presumption creates a lens through which the court examines facts, skewing the interpretation towards a specific result unless the opposing party defeats the presumption. *Presumption*, *id.* In the case of the business judgment presumption, the court defers to directors' business judgment to protect the board's ability to take risks for the corporation's benefit and avoid substituting the court's business judgment for that of the board's. *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971); Goldberg, *supra* note 36, at 412. Gross negligence entails the absence of "even slight diligence or care." *Gross Negligence*, BLACK'S LAW DICTIONARY, *supra*. Gross negligence captures "willful and wanton misconduct" or, more relevant in the context of fiduciary duties, "a conscious, voluntary act or omission in reckless disregard of a legal duty." *Id.* (emphasis omitted).

³⁹ Goldberg, *supra* note 36, at 406 (noting that the standard for a duty of care claim is objective); see also A. GILCHRIST SPARKS, III, DELAWARE LAW FOR CORPORATE LAWYERS: RECENT DEVELOPMENTS 100 (1985) (explaining that the court will not look at the merits of the board's decision, assuming that the board adhered to its fiduciary obligations in procedure and intent).

⁴⁰ See, e.g., *Sinclair Oil Corp.* 280 A.2d at 720 (emphasizing how directors benefit from the business judgment presumption, such that a court "will not substitute its own notions of what is or is not sound business judgment."); see Velasco, *supra* note 35, at 69–70 (suggesting that the business judgment presumption gives directors discretion to take risks). This presumption insulates directors and enables them to make risky decisions that benefit the corporation. See Goldberg, *supra* note 36, at 412; Velasco, *supra* note 35, at 63 (describing the policy interest in allowing corporate directors to make risky decisions to encourage profit maximization). Overall, the business judgment presumption operates in the directors' favor when assessing liability. See SPARKS, *supra* note 39, at 102 (noting the business judgment presumption's effects).

⁴¹ *Aronson*, 473 A.2d at 812; see Andrew S. Gold, *The Fiduciary Duty of Loyalty*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 35, at 385, 385 (explaining that most loyalty claims base liability in the directors' self-dealing or conflicting duties).

⁴² *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (defining the duty of loyalty as directors' fiduciary obligation to prioritize the corporation and stockholders' interests ahead of the directors' self-interest), *modified decision on reargument*, 636 A.2d 956 (Del. 1994) (explaining the reargument after return of remand without changing duty of loyalty definition); Gold, *supra* note 41, at 387; Velasco, *supra* note 35, at 66 (noting that the duty of loyalty requires directors to prioritize the

When directors' interests are in conflict with the corporation's, they must prioritize the corporation's interests, abstain from self-dealing, and decline benefits unavailable to stockholders.⁴³ If directors have a conflict of interest, the Delaware statute allows them to absolve their conflict by disclosing it to the disinterested board members or the stockholders.⁴⁴ Disclosure can clear the transaction of director interest, making a loyalty violation claim against a director difficult.⁴⁵ The business judgment presumption creates a high bar for plaintiffs to meet when asserting claims for breach of the duty of loyalty.⁴⁶ Because loyalty claims are typically derivative causes of action, a complaint may only survive a pre-trial dismissal if it sufficiently alleges the director's interest in the transaction or issue or their lack of independence from an interested party.⁴⁷

corporation's interests over their own); see Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 259, 280 (2011) (describing the duty of loyalty as a requirement that directors exercise their discretion exclusively for the benefit of the beneficiary's interest).

⁴³ Sale, *supra* note 31, at 483. The duty of loyalty also precludes directors from appropriating opportunities that would have otherwise benefitted the corporation. *Id.*; Velasco, *supra* note 35, at 68.

⁴⁴ DEL. CODE ANN. tit. 8, § 144 (West 2020); see Sale, *supra* note 31, at 483. Delaware law gives directors an opportunity to disclose their conflicts and allows an interested transaction to move forward through a ratification process. DEL. CODE ANN. tit. 8, § 144; Gold, *supra* note 41, at 388 ("A majority of disinterested, independent directors may approve a conflicting interest transaction, and often a decision is delegated to a special committee formed with this aim in mind."). The directors may also seek ratification from stockholders before the transaction. DEL. CODE ANN. tit. 8, § 144; Gold, *supra* note 41, at 388.

⁴⁵ DEL. CODE ANN. tit. 8, § 144; Gold, *supra* note 41, at 388.

⁴⁶ See *Malpiede v. Townson*, 780 A.2d 1075, 1089 (Del. 2001) (en banc) (describing the business judgment presumption as an "uphill battle" for plaintiffs); *Aronson*, 473 A.2d at 812 (emphasizing a courts' regard for the business judgment presumption, and noting that it is a plaintiff's burden to overcome it); Sale, *supra* note 31, at 483 (explaining the procedural requirements for a loyalty claim); see also *supra* note 38 and accompanying text (describing the business judgment presumption).

⁴⁷ Sale, *supra* note 31, at 483. Loyalty claims are often derivative claims because the corporation rather than any one individual suffers the harm. *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004) (en banc). A derivative suit is an action where a stockholder compels the corporation to file a suit to vindicate the corporation's losses or correct the corporate action at issue. Donald J. Wolfe, Jr., Potter Anderson & Corroon LLP, *Distinguishing Derivative Claims for Direct Claims Under Delaware Law*, in WHAT ALL BUSINESS LAWYERS & LITIGATORS MUST KNOW ABOUT DELAWARE LAW DEVELOPMENTS 1293, 1295–96 (2005). Derivative claims are susceptible to pretrial dismissal for failing to demand that the board vindicate the corporation's rights prior to initiating the derivative action. *Id.* at 1298 (listing other reasons for pretrial dismissal, including not meeting standing requirements, insufficient evidence resulting from the plaintiff's lack of access to discovery, and the corporation's special litigation committee terminating the suit). The derivative claim must seek relief on the corporation's behalf. Velasco, *supra* note 35, at 75; Wolfe, *supra*, at 1298. Defendants frequently move to dismiss a derivative action for not complying with Delaware Court of Chancery Rule 23.1, which requires a plaintiff to either make a demand upon the directors or explain why they did not attempt to make a demand. DEL. CH. CT. R. 23.1; QUINN, *supra* note 31, at 163. The requirement stems from the management authority vested in the board by section 141(a) of the Delaware Code. DEL. CODE ANN. tit. 8, § 141(a); QUINN, *supra* note 31, at 175; Velasco, *supra* note 35, at 75. Section 141(a) requires the board to manage the corporation's legal claims. DEL. CODE ANN. tit. 8, § 141(a); QUINN, *supra* note 31, at 175; Velasco, *supra* note 35, at 75 (noting that the decision to pursue a cause of action on behalf of the corporation belongs to the board). Under section 141(a), the directors have the priority to sue on the corporation's behalf, not the shareholders. DEL. CODE ANN.

The proliferation of exculpation provisions in certificates of incorporation have forced plaintiffs to rely on the duties of loyalty and good faith to hold directors liable for breaches of fiduciary duties.⁴⁸ Title 8, section 102(b)(7) of the Delaware Code provides the option to include an exculpation provision in a corporation's certificate of incorporation to eliminate the possibility of money damages for a breach of the duty of care.⁴⁹ These provisions protect disinterested and independent directors from care claims because plaintiffs cannot fulfill the requirements of a duty of care violation without alleging damages, and, therefore, they cannot survive a motion to dismiss for failure to state a claim.⁵⁰

tit. 8, § 141(a); QUINN, *supra* note 31, at 175 (explaining that control over legal claims naturally flows from the board's responsibility to manage the corporation). As a result of the demand requirement, stockholders can act on behalf of the corporation in derivative actions only after a plaintiff attempts to make a demand on the board or asserts the futility of making a demand on the board. *See* QUINN, *supra* note 31, at 176 (noting the impracticality of expecting a board to proceed with legal action against themselves); Velasco, *supra* note 35, at 75 (explaining that directors are often the subject of the suit and thus plaintiffs cannot trust them to pursue an action against themselves). The Delaware Supreme Court established the standard for analyzing the futility of making a demand on the board in 1984 in *Aronson v. Lewis* and in 1993 in *Rales v. Blasband*. *See generally* *Rales v. Blasband*, 634 A.2d 927, 933–35 (Del. 1993); *Aronson*, 473 A.3d at 814–15. The test in *Aronson* requires that the complaint allege facts creating a reasonable doubt “that: (1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment.” 473 A.2d at 814. *Aronson* applies when a plaintiff challenges a specific business decision, such as executing an agreement or a transaction. *Rales*, 634 A.2d at 930. In contrast, the test in *Rales* applies when there is not a specific business decision to challenge but there is questionable conduct to allege, such as insider trading. *Id.* *See generally* *Guttman v. Huang*, 823 A.2d 492 (Del. Ch. 2003) (applying *Rales* to a derivative complaint concerning insider trading). The test articulated in *Rales* analyzes (1) whether the complaint alleged sufficient facts to create a reasonable doubt that the directors could use their “independent and disinterested business judgment” when evaluating a demand and (2) whether directors risked substantial likelihood of liability such that impartially considering a demand became impracticable. *Rales*, 634 A.2d at 934, 936; *see also* *Guttman*, 823 A.2d at 501–02.

⁴⁸ DEL. CODE ANN. tit. 8, § 102(b)(7) (allowing a corporation to include a provision in its certificate of incorporation that eliminates damages for breaching a fiduciary duty except for violations of the duty of loyalty or an act not in good faith); Mitchell, *supra* note 6, at 255 (commenting that exculpation provisions predominantly ended direct care claims); Rosenberg, *supra* note 32, at 507 (describing how exculpation provisions eliminate liability for a breach of the duty of care); Sale, *supra* note 31, at 462 (noting that care claims comprise only a small portion of derivative actions); Velasco, *supra* note 35, at 73 (explaining that exculpation provisions remove liability for care claims, functioning like a waiver).

⁴⁹ DEL. CODE ANN. tit. 8, § 102(b)(7). The statute allows a corporation's certificate of incorporation to include “[a] provision eliminating or limiting the personal liability of a director . . . for monetary damages for breach of fiduciary duty . . .” *Id.* The language specifically prohibits exculpation for a director's breach of the duty of loyalty or “for acts or omissions not in good faith or which involve intentional misconduct or knowing violation of law . . .” *Id.* Therefore, the statute only eliminates money damages for a duty of care claim. *Id.* Exculpation provisions made successful duty of care claims essentially impossible by eliminating damages for duty of care violations; thus, plaintiffs cannot satisfy the elements for stating a claim because most allege damages in the form of money. Velasco, *supra* note 35, at 76. Plaintiffs, however, can still seek injunctive relief for a breach of duty of care. *Id.*

⁵⁰ Elizabeth A. Nowicki, *Director Inattention and Director Protection Under Delaware General Corporation Law Section 102(b)(7): A Proposal for Legislative Reform*, 33 DEL. J. CORP. L. 695, 711

As a result of corporations' adoption of exculpatory provisions, claims seeking monetary damages for a breach of the duty of care are no longer viable for plaintiffs.⁵¹ Instead, plaintiffs must rely on breaches of the duty of loyalty and the duty of good faith for recourse.⁵² Unlike the fiduciary duties of care and loyalty, the role of good faith remains nebulous.⁵³ Part A of this Section explores how good faith operates as a condition for the duty of loyalty.⁵⁴ Part B explains how the duty of oversight developed and describes its relationship to the fiduciary duties of care, loyalty, and good faith.⁵⁵

A. Violating the Duty of Good Faith as a Required Element to Establish Director Liability

Due to the improbability of successful care claims, the only way for plaintiffs to capture conduct traditionally within the duty of care is by alleging either a breach of the duty of loyalty or alleging that a director acted in bad faith.⁵⁶ Commentators sought to convert care claims into non-exculpable good faith claims to avoid barred damages resulting from pervasive exculpation provisions.⁵⁷

Due to the elusive definition of good faith, it is helpful to understand good faith as excluding conduct exercised in bad faith.⁵⁸ Bad faith conduct ne-

(2008). Where a plaintiff alleges a claim without damages, the defendant can seek dismissal or summary judgment for failure to state a claim. *Id.* at 709 n.40.

⁵¹ Mitchell, *supra* note 6, at 255; Velasco, *supra* note 35, at 73.

⁵² Velasco, *supra* note 35, at 72.

⁵³ *Id.* at 71 (noting that the duties of care and loyalty are two distinct categories of corporate directors' fiduciary duties, and explaining good faith's role either as an independent fiduciary duty or as a component of the duty of loyalty).

⁵⁴ *In re the Walt Disney Co. Derivative Litig. (Disney I)*, 907 A.2d 693, 760 n.487 (Del. Ch. 2005) (noting that the duties of care and loyalty sometimes insufficiently protect stockholders, and explaining that good faith may fill this space by ensuring directors operate "with an honesty of purpose and with an understanding of whose interests they are there to protect"), *aff'd*, 906 A.2d 27 (Del. 2006); *see infra* notes 56–76 and accompanying text (explaining that the duty of good faith operates as a subsidiary of the duty of loyalty).

⁵⁵ *See infra* notes 77–126 and accompanying text.

⁵⁶ Velasco, *supra* note 35, at 72.

⁵⁷ QUINN, *supra* note 31, at 411; *see* John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value*, 6 J. LEGAL ANALYSIS 35, 53 (2014) (explaining how using the business judgment presumption as a benefit to corporations without any "stick" risks misconduct); Hillary A. Sale, *Monitoring Caremark's Good Faith*, 32 DEL. J. CORP. L. 719, 724 n.18 (2007) (explaining the rhetorical shift to good faith as a response to exculpation provisions); Reed & Neiderman, *supra* note 32, at 140 (describing the impact of exculpation clauses).

⁵⁸ *See* Pat Andriola, *Leap of Faith: Determining the Standard of Faith Needed to Violate the Implied Covenant of Good Faith and Fair Dealing for Delaware Limited Liability Companies*, 58 B.C. L. REV. E. SUPP. 1, 3 (2017), <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3532&context=bclr> [<https://perma.cc/G4T7-A5GL>] (defining bad faith as conscious wrongdoing); Eisenberg, *supra* note 32, at 21 (relying on contract law to understand that good faith conduct is conduct not in bad faith); Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provi-*

cessitates scienter, meaning that a director acted with intent.⁵⁹ In 2006, in *In re the Walt Disney Co. Derivative Litigation*, the Delaware Supreme Court articulated the culpability required to establish bad faith conduct.⁶⁰ In one example, the court described conduct where the director intentionally acted to advance interests other than the corporation's.⁶¹ Despite this conduct's similarity to a breach of the duty of loyalty, the court used this conduct as an example of a failure to act in good faith and emphasized a different part of the director's misconduct—intent.⁶² The same emphasis applied where a director consciously disregarded a known duty, thus failing to act in good faith.⁶³ Although this conduct aligns with a violation of the duty of care,⁶⁴ the court's analysis focused on the director's intentional actions to demonstrate bad faith conduct,

sions of the Uniform Commercial Code, 54 VA. L. REV. 195, 196 (1968) (describing the use of good faith as excluding bad faith).

⁵⁹ Elizabeth A. Nowicki, *Not in Good Faith*, 60 SMU L. REV. 441, 454 (2007) (describing good faith as "honesty, lack of ill-intentions, fairness, full disclosure, and sincere attempts to honor an obligation"); Velasco, *supra* note 35, at 71 (asserting that negligence is not enough to establish bad faith conduct). According to the Delaware Court of Chancery, acting with scienter in the fiduciary context means that the director acted in opposition to their fiduciary duties and that the director knew they were doing so. *In re Clovis Oncology, Inc. Derivative Litig.*, C.A. No. 2017-0222, 2019 WL 4850188, at *12 (Del. Ch. Oct. 1, 2019) (citing *In re Massey Energy Co. Derivative & Class Action Litig.*, C.A. No. 5430, 2011 WL 2176479, at *22 (Del. Ch. May 31, 2011)). Scienter refers to the requirement that an individual act with the necessary knowledge to establish a person as legally accountable for their acts or failure to act under the relevant statute. *Scienter*, BLACK'S LAW DICTIONARY, *supra* note 38.

⁶⁰ *In re the Walt Disney Co. Derivative Litig. (Disney I)*, 906 A.2d 27, 67 (Del. 2006). In 2006, in *In re the Walt Disney Co. Derivative Litigation*, the Delaware Supreme Court explained that the Walt Disney Company (Disney) hired Michael Ovitz as the president in 1995. *Id.* at 35. Just over a year after Disney hired Ovitz, Disney terminated him without cause and with a severance package valued around \$130 million. *Id.* The plaintiffs alleged that Disney's directors violated their duties of care and good faith by approving the employment agreement and the severance payment. *Id.* at 46. In reviewing the board's process, the Delaware Supreme Court described the relevant committee's review of the information provided by the expert as "not so tidy." *Id.* at 56. Nonetheless, the court concluded that the committee evaluated similar employment and reasonably trusted the expert to competently provide the committee with guidance for a compensation decision. *Id.* at 59. Furthermore, the Delaware Supreme Court affirmed that Disney's board acted in good faith throughout its decision to hire Ovitz. *Id.* at 67–68. The court also affirmed the lower court's interpretation of the facts, which determined that Michael Eisner, chairman of the committee and chief executive officer (CEO) of Disney, weighed alternatives and knew all material facts before terminating Ovitz. *Id.* at 36, 73 (citing *In re the Walt Disney Co. Derivative Litig. (Disney I)*, 907 A.2d 693, 778 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006)).

⁶¹ *Id.* at 67.

⁶² *See id.* at 66–67 (analyzing bad faith and inferring that it requires scienter).

⁶³ *See id.* at 67. Disregarding a known duty has similarities with a breach of the duty of care because uninformed directors prevent themselves from becoming aware of their duties. *See In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 968 (Del. Ch. 1996) (connecting a director's effort to inform themselves to fulfill the duty of attention as an example of good faith).

⁶⁴ *See Disney II*, 906 A.2d at 67 (using a failure to act as an example of a violation of good faith); QUINN, *supra* note 31, at 280 (defining the duty of loyalty).

which it considered more blameworthy.⁶⁵ The court's language suggested that the director did not negligently breach his fiduciary obligations but purposefully failed the corporation's stockholders, which rose to the level of bad faith conduct.⁶⁶

Corporate directors' fiduciary obligations create a baseline expectation that directors must act in the best interests of the stockholders, but the duty of good faith's concern with intent operates to further impose a moral obligation on the directors.⁶⁷ This moral obligation is context-dependent.⁶⁸ For example, a director sincerely acting in what the director perceives as the stockholders' best interest does not act in good faith when the stockholders' best interest necessitates a violation of the law.⁶⁹

The Delaware Supreme Court most explicitly conveyed its understanding of the duty of good faith in *Stone v. Ritter*.⁷⁰ According to the court, failing to act in good faith does not automatically result in fiduciary liability.⁷¹ The court cited a decision from the Delaware Chancery Court, which reiterated that good faith operates as a subordinate element of the traditional duty of loyalty.⁷² Alt-

⁶⁵ *Disney II*, 906 A.2d at 67 (describing bad faith to attribute greater emphasis on the state of mind of the director).

⁶⁶ See *id.* (emphasizing the intentionality and culpability aspect of bad faith conduct).

⁶⁷ Nowicki, *supra* note 59, at 447 (noting that the law obligates directors to manage the corporation's business and affairs); see Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 4–5, 14 (2005) (describing good faith in relation to the duties of care and loyalty and interpreting the reference to good faith in section 102(b)(7) of the Delaware Code to consider intent); see also DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2020) (allowing corporations to include exculpatory provisions that limit their liability for breaches of the duty of care).

⁶⁸ See *Disney II*, 906 A.2d at 67 (identifying different examples involving good faith).

⁶⁹ Eisenberg, *supra* note 32 at 31; see Griffith, *supra* note 32, at 29 (suggesting a definition of a violation of good faith as “egregious, subversive, or knowing behavior” (quoting Sale, *supra* note 31, at 488)).

⁷⁰ 911 A.2d 362, 369–70 (Del. 2006) (en banc).

⁷¹ See *id.* (addressing whether acting in bad faith can serve as its own basis for director liability, which the Delaware Court of Chancery in *In re the Walt Disney Co. Derivative Litigation* left explicitly open).

⁷² *Stone*, 911 A.2d at 369–70 (citing *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003)). In *Guttman v. Huang*, a 2003 Delaware Chancery Court case, the plaintiff brought a derivative action on behalf of a technology corporation, NVIDIA Corporation. 823 A.3d at 493. The plaintiff argued that the NVIDIA directors breached their fiduciary duty by “failing to ensure that there was an adequate system of financial controls in place at the company,” which led to the issuance of materially misleading financial statements. *Id.* at 497. After explaining how difficult such *Caremark* claims are to prove, the court in *Guttman* proceeded to reject the plaintiff's assertion that directors breached their duty of oversight. *Id.* at 505–08. The court explained that the basis of liability for failure of oversight depends on directors' awareness that they were not fulfilling their jobs. *Id.* at 506 (explaining how a *Caremark* claim imposes a requirement to act with greater care coupled with a requirement to act in good faith, which predicates liability on a demonstration that directors consciously failed to exercise care); see also *Emerald Partners v. Berlin*, C.A. No. 9700, 2003 WL 21003437, at *39 n.133 (Del. Ch. Apr. 28, 2003) (sharing the view that the duty of loyalty subsumed the independent duty of good faith), *aff'd*, 840 A.2d 641 (Del. 2003).

though this decision did not recognize the duty of good faith as its own basis of liability, the analysis enabled the same outcome of filling the gaps left by traditional notions of the duties of care and loyalty.⁷³ Despite this potential, the rhetorical difference between good faith as an independent duty and good faith as a subsidiary element foreshadowed the courts' hesitance to interpret care violations as a breach of good faith.⁷⁴

By keeping good faith claims within the duty of loyalty, the court left open the possibility that a care claim alleging facts so outrageous that the directors' culpability rises to bad faith conduct can convert into a loyalty violation, even if the director did not engage in self-dealing or otherwise prioritize another's interests over the corporation's.⁷⁵ Then in 1996, in *In re Caremark International Inc. Derivative Litigation*, the Delaware Court of Chancery further defined how a care claim can convert into a loyalty claim by establishing that directors are responsible for overseeing the corporation.⁷⁶

B. *The Development of the Duty of Oversight*

With exculpation provisions essentially eliminating the ability to successfully bring care claims seeking monetary damages, plaintiffs sought other avenues of recourse, such as good faith claims.⁷⁷ Alleging a breach of the duty of good faith allows plaintiffs to address directors who acted without conflicts of interests but with processes so inadequate that the conduct exceeded gross negligence and escalated to a breach of the duty of good faith.⁷⁸ The legal hook for

⁷³ See *Stone*, 911 A.2d at 369 (describing good faith as a necessary element to prove the duty of loyalty); Eisenberg, *supra* note 32, at 5 (explaining how the duty of good faith can fill the space left open by the duties of care and loyalty).

⁷⁴ See Griffith, *supra* note 32, at 18–19 (explaining that the plaintiff's re-pled in *In re the Walt Disney Co.* relied on an exculpable care claim because a loyalty claim was not available). According to Sean J. Griffith, in 2005, the Delaware Court of Chancery in *In re the Walt Disney Co. Derivative Litigation* “rescue[d]” the plaintiffs’ revised complaint through good faith. *Id.* at 19. In relying on the duty of good faith, the court discussed issues traditionally raised under the duty of care and the duty of loyalty, suggesting that facts related only to care claims would not have the same result. See *id.* at 20 (“[T]hroughout the opinion he applied an analytic technique that essentially alternated between issues traditionally raised in analyses under the duty of loyalty, on the one hand, and the duty of care, on the other.”).

⁷⁵ Nowicki, *supra* note 59, at 457.

⁷⁶ 698 A.2d 959, 970 (Del. Ch. 1996) (articulating the duty of oversight).

⁷⁷ QUINN, *supra* note 31, at 411; see also *Emerald Partners v. Berlin*, 787 A.2d 85, 92 (Del. 2001) (emphasizing that even when plaintiffs defeat the business judgment presumption by alleging a care violation amounting to gross negligence, the exculpation provision still affords directors protection); *In re the Walt Disney Co. Derivative Litig. (Disney I)*, 907 A.2d 693, 754–55 (Del. Ch. 2005) (explaining the exculpation provisions’ impact, admitting the confusing jurisprudence surrounding good faith, and describing intentional disregard of a duty as a violation of good faith and a disloyal act), *aff’d*, 906 A.2d 27 (Del. 2006)); Griffith, *supra* note 32, at 13 (describing good faith as a limit to exculpatory powers).

⁷⁸ *In re Caremark*, 698 A.2d at 969–70; QUINN, *supra* note 31, at 411; see Eisenberg, *supra* note 32, at 5 (discussing how the duties of care and loyalty do not include all director misconduct).

a breach of the duty of good faith stems from the interpretation of good faith as a requirement of the duty of loyalty; thus, plaintiffs showing *bad* faith could demonstrate a breach of the duty of loyalty.⁷⁹ The duty of oversight became entangled with the duty of good faith in *In re Caremark* because the Delaware Court of Chancery used the rhetoric of good faith to establish minimum oversight responsibilities for directors.⁸⁰ Subsection 1 of this Section explores *Graham v. Allis-Chalmers Manufacturing Co.*, a 1963 case, to provide the context precipitating the *In re Caremark* decision.⁸¹ Subsection 2 showcases the difficulty of pleading a *Caremark* claim and discusses the status of oversight claims prior to the *Marchand v. Barnhill*, a 2019 decision.⁸² Subsection 3 explains how acting in bad faith goes beyond breaching the duty of care to lay the foundation for Subsection 4,⁸³ which describes how a failure to act in good faith operates as a condition for establishing oversight liability and a breach of the duty of loyalty.⁸⁴

1. The Foundation for a *Caremark* Claim

In 1963, in *Graham v. Allis-Chalmers Manufacturing Co.*, the Delaware Supreme Court provided the foundation from which the Delaware Court of Chancery later created the oversight duty in *In re Caremark*.⁸⁵ The court considered whether the directors knew or should have known about four employee's conduct in violation of antitrust laws.⁸⁶ The plaintiffs, stockholders in the

⁷⁹ See *supra* notes 56–76 and accompanying text (discussing good faith as required to fulfill the duty of loyalty).

⁸⁰ 698 A.2d at 970 (articulating the importance of the directors acting with “good faith judgment” to ensure the oversight system is adequate); see *Marchand v. Barnhill*, 212 A.3d 805, 820 (Del. 2019) (en banc) (explaining that a plaintiff must demonstrate that directors acted in bad faith to successfully bring a *Caremark* claim); Griffith, *supra* note 32, at 4 (describing good faith as an “amorphous principle”).

⁸¹ See *infra* notes 85–98 and accompanying text. See generally *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125 (Del. 1963) (establishing the basis for the decision in *In re Caremark*).

⁸² See *infra* notes 99–112 and accompanying text. See generally *Marchand*, 212 A.3d at 820–24 (denying a motion to dismiss for failure to state a claim of a breach of the duty of oversight).

⁸³ See *infra* notes 113–118 and accompanying text.

⁸⁴ See *infra* notes 113–126 and accompanying text.

⁸⁵ See *Graham*, 188 A.2d at 130 (explaining that unless suspicion prompts them, directors do not have a duty to seek details to prevent wrongdoing); see also *Stone v. Ritter*, 911 A.2d 362, 367 (Del. 2006) (en banc) (noting that the concept of an oversight duty was first articulated in *Graham v. Allis-Chalmers Manufacturing Co.*); *In re Caremark*, 698 A.2d at 970–71 (holding that a corporation's board must employ “a good faith effort” to oversee the corporation's operations via a monitoring system designed to provide the board with “appropriation information . . . in a timely manner as a matter of ordinary operations”).

⁸⁶ *Graham*, 188 A.2d at 127 (noting that the indicted employees were not directors). In 1963, in *Graham v. Allis-Chalmers Manufacturing Co.*, the Delaware Supreme Court explained that these indictments charged the employees with conspiring to fix prices and manipulate bids. *Id.* at 128. When no evidence supported the contention that directors knew about the misconduct, the plaintiffs'

company, alleged that the directors' lack of oversight prevented them from learning about and stopping the employees' illicit activities.⁸⁷ The court upheld the lower court ruling that the company's directors were not liable on this basis.⁸⁸ An important factor in the court's decision was the absence of facts showing that the directors should have been so "on guard" that a need to prevent the antitrust violations was obvious.⁸⁹ The relevance of these facts, or lack thereof, implies that directors can have a duty to prevent misconduct in certain circumstances.⁹⁰

The *Graham* decision did not provide specific criteria indicating when directors have sufficient notice that they should be "on guard" to prevent employee misconduct.⁹¹ The court instead offered insight into when the directors do *not* have an oversight duty.⁹² Noting that directors have the right to depend on employees until they suspect wrongdoing, the court explained that directors do not have a duty to implement a system designed to investigate the trustworthiness of its employees.⁹³

In 2006, in *Stone v. Ritter*, the Delaware Supreme Court outlined two interpretations of the *Graham* analysis.⁹⁴ The first—a broad interpretation—is that absent any reason to suspect misconduct, directors do not have any duty to maintain reporting mechanisms to gather information concerning the corporation's material acts altogether.⁹⁵ The second, a narrower interpretation of *Graham*, is that directors are not subject to liability for assuming employees' hon-

theory of the case shifted to assert that the directors' misconduct was their failure to know and then prevent the employees' activities. *Id.*

⁸⁷ *Id.* at 127.

⁸⁸ *Id.* at 131 (affirming the Delaware Court of Chancery's decision).

⁸⁹ *See id.* at 129 (holding that the plaintiffs did not show that the directors had notice of the unlawful activity). This reasoning extends to *Marchand v. Barnhill*, where the Delaware Supreme Court in 2019 held that "mission critical" regulatory requirements provide notice, such that the directors are on guard to act in an oversight capacity regarding that issue. 212 A.3d 805, 824 (Del. 2019) (en banc); *see Graham*, 188 A.2d at 129 (explaining that directors must first be on notice that regulatory compliance is a risk to their business).

⁹⁰ *See Graham*, 188 A.2d at 129–30 (opting not to address what oversight duties directors will have when there are facts showing a cause for suspicion). In 1996, *In re Caremark International Inc. Derivative Litigation*, the Delaware Court of Chancery further developed the occasion where a director does have an affirmative duty. 698 A.2d at 970. *Marchand* further defines the scope of a *Caremark* claim by identifying criteria that provides enough notice to trigger directors' attention to a potential source of risk. 212 A.3d at 824 (explaining that critical components of the corporation always provide enough notice that triggers oversight obligations).

⁹¹ *See* 188 A.2d at 130 (describing what directors do not have a duty to do).

⁹² *Id.* (explaining that directors do not have to be so "watchful" as to anticipate all misconduct).

⁹³ *Id.* ("[A]bsent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists.").

⁹⁴ 911 A.2d 362, 367–68 (Del. 2006) (en banc) (explaining how the court interpreted *Graham* in *In re Caremark*); *see In re Caremark*, 698 A.2d at 969 (analyzing *Graham*).

⁹⁵ *Stone*, 911 A.2d at 367–68.

esty unless they have reason to suspect the reporting system's integrity.⁹⁶ This interpretation acts as an outer limit to the directors' oversight responsibilities because it leaves open the possibility that the directors still have an obligation to establish a reporting system, but they do not have to be wary of their employees' integrity without cause.⁹⁷ Ultimately, the court chose the broader interpretation, which allowed the Chancery Court in *In re Caremark* to hold that directors have a duty to maintain an oversight system.⁹⁸

2. *In re Caremark International Inc. Derivative Litigation* Established a Nearly Impossible Standard That Created an Overlap Between the Duty of Good Faith & the Duty of Oversight

In 1996, in *In re Caremark International Inc. Derivative Litigation*, the Delaware Court of Chancery noted that although directors do not have to go so extreme as to have a "system of espionage," the board is responsible for some level of oversight.⁹⁹ Like the plaintiffs in *Graham*, the plaintiffs in *Caremark* alleged that the directors should have known about employees violating federal law.¹⁰⁰ The plaintiffs argued that the directors violated a duty to monitor corporate function and therefore exposed the company to legal liability.¹⁰¹

⁹⁶ *Id.* In *In re Caremark*, the Delaware Court of Chancery explained why the Delaware Supreme Court's interpretation of *Graham* was too narrow. *In re Caremark*, 698 A.2d at 969; see also *Graham*, 188 A.2d at 130 (emphasizing the need for suspicion before an oversight duty arises). The court provided three reasons for rejecting this interpretation of *Graham*. *In re Caremark*, 698 A.2d at 970; see also *Graham*, 188 A.2d at 130; First, the court emphasized the corporate board's importance in corporate law. *In re Caremark*, 698 A.2d at 970. Then, the court emphasized the need for pertinent and prompt information for the board to fulfill its management responsibilities under section 141(a) of the Delaware Code, which entitles directors to manage the corporation's affairs. DEL. CODE ANN. tit. 8, § 141(a) (West 2020); *In re Caremark*, 698 A.3d at 970. Finally, the court observed the importance of reduced sentencing for companies when the organization makes a good faith effort to meet governance responsibilities. *In re Caremark*, 698 A.2d at 970. The court offered both explanations and then ultimately chose a broader approach. *Id.* at 969.

⁹⁷ See *Stone*, 911 A.2d at 368 (viewing the decision in *In re Caremark* as an acknowledgement that directors are not subject to liability for assuming employees' honesty, but noting they still have a duty to establish a monitoring system).

⁹⁸ See *id.* (explaining the duty of oversight within a *Caremark* claim); see also *In re Caremark*, 698 A.2d at 970.

⁹⁹ 698 A.2d at 969–70; see *Stone*, 911 A.2d at 367 (analyzing *In re Caremark* to compare the Delaware Court of Chancery's narrow interpretation of *Graham* to the Delaware Supreme Court's broad interpretation).

¹⁰⁰ Compare *Graham*, 188 A.2d at 129 (describing the plaintiffs' assertion that directors have a duty to actively oversee the corporation, such that they should have known about the employees violating antitrust laws), with *In re Caremark*, 698 A.2d at 967 (describing the complaint's allegations of the directors' breach of their duty of oversight for unawareness of illegal referral payments). The Delaware Court of Chancery in *In re Caremark* considered the proposed settlement of the derivative action to determine whether it was fair and reasonable. 698 A.2d at 960, 966 (describing the settlement terms, such as the settlement to include the company's assertion that employees will not conduct illegal referrals, board review of relevant regulations, and the creation of a committee dealing with ethics and compliance). The derivative action arose after employees allegedly violated federal law and

The court considered whether the board had an affirmative responsibility to oversee the corporation to ensure it operated lawfully.¹⁰² The court explained that interpreting *Graham* to limit directors' duty to when they have a reason for suspicion would be inconsistent with Delaware corporate law's policy interests.¹⁰³ Recalling directors' responsibility to be reasonably informed in accordance with the duty of care, the court explained that the board must establish reporting mechanisms for the corporation.¹⁰⁴ The court acknowledged that it is up to the board to exercise its business judgment in determining the extent of information directors must obtain to satisfy their oversight obligations.¹⁰⁵ This duty required directors to make a good faith attempt to implement a monitoring system for the corporation.¹⁰⁶ Moreover, the court determined that the directors' duty continues beyond implementation because directors must monitor the adequacy of the established reporting process.¹⁰⁷ Ultimately, the duty established by the court in *In re Caremark* provided future plaintiffs with an additional avenue to hold directors liable for a corporation's losses.¹⁰⁸

regulations concerning health care providers. *Id.* The Anti-Referral Payments Law governed Caremark's relationship with Medicare and Medicaid reimbursement programs. *Id.* at 961–62; see 42 U.S.C. § 1320a-7b(a)–(b) (criminalizing giving false material information to a federal health program); *Id.* § 1395nn (restricting referrals from physicians in specific circumstances, such as where the entity benefitting from the referral compensates the referring physician); see also *A Roadmap for New Physicians: Fraud & Abuse Laws*, OFF. OF INSPECTOR GEN.: U.S. DEP'T OF HEALTH & HUM. SERVS., <https://oig.hhs.gov/compliance/physician-education/01laws.asp> [<https://perma.cc/yZ9U-CDVY>] (describing fraud and abuse laws governing kickbacks for referrals, such as the illegality of submitting false claims or paying for referrals). As a result of the alleged violations, the plaintiffs brought a derivative action arguing that the Caremark board violated its duty to oversee the corporation, which exposed the company to liability. *In re Caremark*, 698 A.2d at 971.

¹⁰¹ *In re Caremark*, 698 A.2d at 967 (noting that the plaintiffs' theory was one of the most difficult claims to advance because it fell outside the duties of care and loyalty).

¹⁰² *Id.* Five derivative actions comprised the consolidated action in *In re Caremark*. 698 A.2d at 964. Originally, the complaint alleged that the board's failure to monitor the employees' conduct and implement remedial measures constituted a violation of their duty of care. *Id.* The complaint evolved through several amendments. *Id.* (adding additional allegations regarding indictments and the significant cost of legal fees incurred by Caremark). The defendants, Caremark's board of directors, sought to dismiss each iteration of the complaint for failing to show demand futility and stating an inadequate claim because the company's certificate of incorporation exculpated directors' liability for care claims. *Id.* at 964–65.

¹⁰³ *Id.* at 969–70.

¹⁰⁴ *Id.* at 970.

¹⁰⁵ Compare *Graham*, 188 A.2d at 130 (explaining that directors do not have to “operate a corporate system of espionage to ferret out wrongdoing” without suspicion prompting them), with *In re Caremark*, 698 A.2d at 970 (holding that directors have an obligation to make a good faith attempt to establish a reporting mechanism to ensure that they are informed of employee conduct).

¹⁰⁶ *In re Caremark*, 698 A.2d at 970.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (explaining that a failure to meet the oversight obligations described in *In re Caremark* may “in theory” result in director liability); see *Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006) (en banc) (attempting to use the oversight liability established in *In re Caremark* to hold directors liable). In *In re Caremark*, the Delaware Court of Chancery evaluated the proposed settlement's fairness and

The Delaware Supreme Court in *Stone* acknowledged that acting in good faith is an integral part of fulfilling the oversight duty established in *In re Caremark*.¹⁰⁹ The characterization of a *Caremark* claim as a breach of good faith and a condition for asserting a loyalty claim highlighted the analytical gymnastics the court used to convert a care claim into a non-exculpable loyalty claim.¹¹⁰ The duty of good faith invoked both a duty of care and a duty of loyalty analysis.¹¹¹ The cases below seek to clarify this entanglement by showing how bad faith conduct relates to the duty of care and how establishing a violation of good faith invokes a breach of the duty of loyalty.¹¹²

3. Defining Bad Faith Conduct Via the Duty of Care

In 2006, in *In re the Walt Disney Co. Derivative Litigation*, the Delaware Supreme Court relied on the duty of care to describe how to identify conduct not exercised in good faith.¹¹³ The plaintiffs had alleged that the board had violated the duties of care and good faith by approving both the original employment agreement, which hired Michael Ovitz as president, and the subsequent severance package valued at approximately \$130 million.¹¹⁴ The court held that a failure to act in good faith is conduct beyond a duty of care violation.¹¹⁵ The court differentiated bad faith conduct from care violations protected by exculpation provisions by establishing that conduct not made in good faith is more blameworthy than a duty of care violation because it requires some level of intent.¹¹⁶ This analysis supports that some conduct even if arising from a duty of care analysis, can be so egregious as to render it a violation of the directors' fi-

reasonableness. 698 A.2d at 959. After articulating directors' oversight obligations, the court noted that the settlement appeared adequate because the record did not have enough evidence to support the plaintiffs' oversight claims. *Id.* at 970–71. The court explained that the existence of a corporate compliance committee within *Caremark* made the motion to dismiss likely to succeed. *Id.*

¹⁰⁹ *Stone*, 911 A.2d at 368.

¹¹⁰ See Eisenberg, *supra* note 32, at 62 (explaining how the duty of good faith applies when directors substantially disregard their duties); Sale, *supra* note 57, at 720 (exploring the role of good faith in *In re Caremark*). Although *Stone* expressly designates the good faith component of a *Caremark* claim as a condition for a duty of loyalty violation, *Marchand* and *In re Clovis Oncology, Inc. Derivative Litigation* soften this language. See *Marchand v. Barnhill*, 212 A.3d 805, 820 (Del. 2019) (en banc) (describing the duty of oversight as requiring a good faith effort); *Stone*, 911 A.2d at 368 (same); *In re Clovis Oncology, Inc. Derivative Litig.*, C.A. No. 2017-0222, 2019 WL 4850188, at *13 (Del. Ch. Oct. 1, 2019) (same).

¹¹¹ Griffith, *supra* note 32, at 3.

¹¹² See *infra* notes 113–126 and accompanying text.

¹¹³ *In re the Walt Disney Co. Derivative Litig. (Disney II)*, 906 A.2d 27, 66 (Del. 2006); see *supra* notes 41–47 and accompanying text.

¹¹⁴ *Disney II*, 906 A.2d at 67; see *supra* note 60 and accompanying text.

¹¹⁵ See *Disney II*, 906 A.2d at 67 (describing misconduct outside of self-dealing and being uninformed as acting not in good faith).

¹¹⁶ *Id.*; see *supra* note 60 and accompanying text (explaining the facts of the Delaware Supreme Court 2006 case *In re the Walt Disney Co.*).

duciary responsibility to stockholders and thus the director should face liability.¹¹⁷ The duty to act in good faith is the vehicle to capture such liability.¹¹⁸

4. Bad Faith as a Condition for Oversight Liability

The example set in *In re the Walt Disney Co.*, where a director knowingly ignores their duties, most closely aligns with the test for a violation of the duty of oversight articulated in *In re Caremark*.¹¹⁹ Failing to implement any reporting mechanism constitutes a knowing disregard of the directors' required oversight responsibility—especially when choosing to disregard warning signs of non-compliance.¹²⁰ In *Stone v. Ritter*, the Delaware Supreme Court agreed with the classification of this conduct as an omission made in bad faith and reiterated that such a violation of the duty of good faith operates as a required element for oversight liability.¹²¹

The framework described in *Stone* restructured the dynamic of the duty of good faith by interpreting it as an element of the duty of loyalty rather than a different basis of liability altogether.¹²² The court used the duty of good faith to construe a violation of the duty of oversight as a violation of the duty of loyalty.¹²³ If violating good faith is necessary to show a breach of the duty of oversight and that violation of good faith still serves as a subsidiary element of

¹¹⁷ See *Disney II*, 906 A.2d at 66 (describing bad faith as “more culpable,” suggesting that bad faith conduct is worse than a duty of care violation); Eisenberg, *supra* note 32, at 20 (describing the baseline definition of good faith); Nowicki, *supra* note 59, at 454 (explaining common understandings of good faith to include “honesty, lack of ill-intentions, fairness, full disclosure, and sincere attempts to honor an obligation”).

¹¹⁸ *Disney II*, 906 A.2d at 66.

¹¹⁹ See *id.* at 67 (describing bad faith conduct); *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 969–70 (Del. Ch. 1996) (holding that directors are required to make a “a good faith attempt” to establish reporting mechanisms to ensure they are informed).

¹²⁰ See *In re Caremark*, 698 A.2d at 970 (interpreting the emphasis on suspicion in *Graham* as only one aspect of directors' oversight responsibility); see also *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (en banc) (defining “red flags” as facts demonstrating the board's awareness of inadequate internal monitoring mechanisms (quoting *Stone v. Ritter*, C.A. No. 1570-N, 2006 WL 302558, at *2 (Del. Ch. Jan. 26, 2006), *aff'd*, 911 A.2d 362 (Del.)); *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 129 (Del. 1963) (concluding there was no evidence to support the inference that directors knew of the employees' illegal activities, but noting two reports from the Federal Trade Commission that employees had taken part in illegal antitrust activity previously); *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 111, 115 (Del. Ch. 2009) (holding that the plaintiffs' reliance on the general health of the financial market as a warning sign was conclusory and an attempt to attach liability to directors for a decision that resulted poorly in hindsight).

¹²¹ 911 A.3d at 369.

¹²² Compare *Disney II*, 906 A.2d at 67 (describing a violation of the duty to act in good faith as fundamentally different from the duties of care and loyalty), with *Stone*, 911 A.3d at 369 (noting that the duty of good faith is an element capable of proving a breach of the duty of loyalty because “a failure to act in good faith requires conduct that is qualitatively different from, and more culpable than, the conduct giving rise to a violation of the fiduciary duty of care”).

¹²³ *Stone*, 911 A.3d at 369.

proving a breach of the duty of loyalty, then establishing oversight liability is a manifestation of conduct violating the duty of loyalty.¹²⁴

The court's analysis in *Stone* illustrated that the *Caremark* claim is another avenue of proving a breach of the duty of loyalty without needing to show self-dealing.¹²⁵ Although this framework set the legal foundation for using good faith as a vehicle to transform otherwise exculpable conduct as a care violation into a non-exculpable loyalty violation, *Caremark* claims consistently failed until *Marchand v. Barnhill*.¹²⁶

II. MARCHAND V. BARNHILL SHARPENED THE REALITY OF OVERSIGHT RESPONSIBILITIES

On June 20, 2019, in *Marchand v. Barnhill*, the Delaware Supreme Court held that Blue Bell's directors breached a fiduciary duty by failing to fulfill their oversight responsibilities.¹²⁷ In 2015, Blue Bell's failure to contain the *Listeria* outbreak in its plants led to *Listeria*'s presence in products available to the public.¹²⁸ Blue Bell recalled all products, closed production, and laid off

¹²⁴ *Id.*

¹²⁵ *Id.*; Eisenberg, *supra* note 32, at 72.

¹²⁶ See *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 966 (Del. Ch. 1996) (describing a claim for a breach of the duty of oversight as one of the most difficult claims that a plaintiff can allege); QUINN, *supra* note 31 at 411 (noting how difficult it is to claim a breach of the duty of oversight under a *Caremark* claim); see also Claudia A. Restrepo, Note, *The Need for Increased Possibility of Director Liability: Refusal to Dismiss In re Wells Fargo & Co. Shareholder Derivative Litigation, a Step in the Right Direction*, 60 B.C. L. REV. 1689, 1693–94 (2019).

¹²⁷ 212 A.3d 805, 824 (Del. 2019) (en banc) (holding that the plaintiff pled enough facts to support an inference that the board failed to establish a reasonable oversight system to manage the “most central consumer safety and legal compliance issue facing the company”). In 2019, in *Marchand v. Barnhill*, the Delaware Supreme Court explained that the plaintiff, Jack L. Marchand II, was a stockholder suing defendant, John W. Barnhill, a director of Blue Bell, and other directors. Complaint at 4–5, *Marchand*, 212 A.3d 805 (No. 2017-0586). Blue Bell, a Delaware corporation, was the nominal defendant. *Id.* As nominal defendant, Blue Bell was a party to the suit because of its connection to the lawsuit, despite its lack of responsibility in the suit. *Marchand*, 212 A.3d at 807 (identifying Blue Bell and directors as defendants); see *Nominal Party*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/nominal_party [<https://perma.cc/VX6F-XFUS>]. This Note focuses on the complaint's allegation that the company's directors breached the duty of oversight as established in *In re Caremark International Inc. Derivative Litigation. Marchand*, 212 A.3d at 807 (describing the *Caremark* claim duty as a “duty of loyalty”). The complaint also alleged that Paul Kruse, the president and CEO, and Greg Bridges, a vice president, violated their duties of care and loyalty. *Id.* All the defendants sought to dismiss the complaint for insufficiently pleading demand futility, which required the plaintiff to show that most of the board could not consider the demand to sue Kruse and Bridges without bias. *Id.* at 807–08. The Delaware Court of Chancery granted the dismissal of the claims against Kruse and Bridges, holding that the plaintiff needed to show one more director's bias to plead demand futility. *Id.* at 808. The Chancery Court also dismissed the *Caremark* claim, holding that the plaintiff sought to challenge the effectiveness of the oversight controls instead of meeting the *Caremark* standard. *Id.* The Delaware Supreme Court reversed the Chancery Court's holdings. *Id.*

¹²⁸ *Id.* at 807; see *supra* note 2 and accompanying text (describing what the *Listeria* outbreak entailed).

employees.¹²⁹ Tragically, three people died from the *Listeria* present in the company's products.¹³⁰

The costs of the recall and the manufacturing shutdown ultimately created liquidity problems, which required a private equity investment that diluted stockholders' share value and resulted in derivative litigation.¹³¹ The Delaware Supreme Court held that the plaintiff alleged sufficient facts to demonstrate a reasonable inference that Blue Bell's board did not administer any monitoring system for the corporation's compliance with food safety regulations, reversing the Chancery Court's holding.¹³² This holding was the first instance in which the court did not dismiss the breach of a duty of oversight claim.¹³³

Signs of a potential food safety crisis began in 2009 when the U.S. Food and Drug Administration (FDA), Alabama Department of Health, and internal inspections conducted by Blue Bell reported several sources of contamination to management.¹³⁴ Then, in 2013 and 2014, Blue Bell's plant received positive

¹²⁹ See *Marchand*, 212 A.3d at 807 (noting that Blue Bell laid off a third of its employees); Dan Flynn, *Blue Bell Reports on Root Causes of Five-Year Listeria Outbreak*, FOOD SAFETY NEWS (Mar. 27, 2016), <https://www.foodsafetynews.com/2016/03/blue-bell-reports-on-root-causes-of-five-year-listeria-outbreak/> [<https://perma.cc/EV2W-SK6L>] (describing the Blue Bell product recall and production shutdown).

¹³⁰ *Marchand*, 212 A.3d at 807; Elahe Izadi, *Three Dead in Listeria Outbreak Linked to Blue Bell Ice Cream*, WASH. POST (Mar. 13, 2015), <https://www.washingtonpost.com/news/to-your-health/wp/2015/03/13/three-dead-in-listeria-outbreak-linked-to-blue-bell-ice-cream/> [<https://perma.cc/K88G-7WAW>].

¹³¹ *Marchand*, 212 A.3d at 807; Spivey et al., *supra* note 3.

¹³² *Marchand*, 212 A.3d at 809; see also *In re Clovis Oncology, Inc. Derivative Litig.*, C.A. No. 2017-0222, 2019 WL 4850188, at *13 (Del. Ch. Oct. 1, 2019) (emphasizing the influence of *Marchand* when regulations govern a company's central operations).

¹³³ *Marchand*, 212 A.3d at 809.

¹³⁴ *Id.* at 811. In July 2009, a U.S. Food and Drug Administration (FDA) inspection of Blue Bell's Texas facility uncovered condensation from pipes dripping into ice cream cartons and reported it to Kruse. *Id.* The FDA visited the Texas facility again in May 2010 and observed ten violations, including the same condensation drip. *Id.* Also, in March 2010, the Alabama Department of Health found improperly placed equipment and a damaged ceiling in the Alabama facility. *Id.* Another inspection in Alabama in July 2011 found additional health risks in the same location. *Id.* Finally, an inspection of the Oklahoma facility discovered inadequate controls against contamination. *Id.* Although this Note does not explore why the FDA did not intervene earlier to prevent the outbreak, it is noteworthy that the Food Safety Modernization Act (FSMA) had not been implemented at the time of the outbreak. Dianna Wray, *Blue Bell's Listeria Problem Is a Sticky Mess*, DALL. OBSERVER (July 1, 2015), <https://www.dallasobserver.com/news/blue-bells-listeria-problem-is-a-sticky-mess-7359432> [<https://web.archive.org/web/20210516151634/https://www.dallasobserver.com/news/blue-bells-listeria-problem-is-a-sticky-mess-7359432>] (observing that Congress passed the FSMA in 2010); see also 21 U.S.C. §§ 2201–2206 (entitling this subchapter as “Improving Capacity to Prevent Food Safety Problems”); *Food Safety Modernization Act (FSMA)*, FDA, <https://www.fda.gov/food/guidance-regulation-food-and-dietary-supplements/food-safety-modernization-act-fsma> [<https://perma.cc/8UBZ-MJEV>] (Jan. 4, 2021) (explaining the FSMA's purpose to emphasize prevention of foodborne illness rather than reacting to such illnesses). The FDA introduced the FSMA to address the mostly preventable public health risk stemming from foodborne diseases, which impacts approximately forty-eight million people in the United States per year. *Food Safety Modernization Act (FSMA)*, *supra*.

tests for *Listeria*.¹³⁵ By February 2015, the *Listeria* problem extended to Blue Bell's products.¹³⁶ By March 2015, the *Listeria* infection reached consumers, causing illness in five people in Kansas and three in Texas.¹³⁷ By the end of April, there were ten cases of the infection.¹³⁸ After the complete recall, the FDA found significant food safety deficiencies in Blue Bell's three manufacturing plants.¹³⁹

Section A of this Part explains the facts the plaintiff relied upon to sufficiently allege that the Blue Bell board breached its duty of oversight.¹⁴⁰ Section B explores the importance the court in *Marchand* placed on the monoline nature of Blue Bell's business and how this analysis informed subsequent court decisions regarding *Caremark* claims, such as the Delaware Court of Chancery's 2019 decision in *In re Clovis Oncology, Inc. Derivative Litigation*.¹⁴¹

¹³⁵ *Marchand*, 212 A.3d at 811–12. These tests confirmed *Listeria*'s presence in Blue Bell's plant in Broken Arrow, Oklahoma. Jesse Newman, *FDA: Blue Bell Had Evidence of Listeria in March 2013*, WALL ST. J., <https://www.wsj.com/articles/fda-blue-bell-had-evidence-of-listeria-in-march-2013-1431028954> [<https://perma.cc/WK4J-KG7A>] (May 7, 2015). In 2014, a laboratory dedicated to analyzing samples from the Oklahoma facility found that the samples tested positive for *Listeria*. *Marchand*, 212 A.3d at 812.

¹³⁶ *Marchand*, 212 A.3d at 813. See generally DEP'T OF HEALTH & HUM. SERVS: U.S. FOOD & DRUG ADMIN., INSPECTION OBSERVATIONS OF BLUE BELL CREAMERIES, L.P. (2015) (explaining findings from inspections performed from March 16, 2015 to May 1, 2015 of Blue Bell production facilities); Mark Collette, *FDA: Blue Bell Knew of Listeria, Didn't Correct Problems*, HOUS. CHRON., <https://www.houstonchronicle.com/news/houston-texas/houston/article/FDA-Blue-Bell-didn-t-correct-problems-after-6249881.php> [<https://perma.cc/NUC3-EG7Z>] (May 7, 2015) (explaining the FDA's inspection reports); *Multistate Outbreak of Listeriosis Linked to Blue Bell Creameries Products (Final Update)*, CDC (June 10, 2015), <https://www.cdc.gov/listeria/outbreaks/ice-cream-03-15/index.html> [<https://perma.cc/Q8MV-YHKH>] (detailing the investigation of the outbreak).

¹³⁷ *Marchand*, 212 A.3d at 814; see *Listeria (Listeriosis)*, *supra* note 2 (explaining listeriosis infections). Pregnant women, people over sixty-five years old, and people with diminished immune systems are particularly vulnerable to a *Listeria* infection. *Listeria Infection*, *supra* note 2. There are a wide range of symptoms, varying from fever, nausea, chills, achiness, and diarrhea to symptoms resulting from the infection spreading to the nervous system, such as a headache, confusion, convulsions, a sense of imbalance, and a rigid neck. *Id.* The symptoms become more serious for the vulnerable groups. See *id.* (identifying symptoms for pregnant people and those with weaker immune systems). For example, pregnant women may suffer miscarriages, give birth prematurely, or experience a possibly lethal infection after the baby is born. *Id.*

¹³⁸ *Multistate Outbreak of Listeriosis Linked to Blue Bell Creameries Products (Final Update)*, *supra* note 136.

¹³⁹ *Marchand*, 212 A.3d at 814; see *Multistate Outbreak of Listeriosis Linked to Blue Bell Creameries Products (Final Update)*, *supra* note 136 (explaining the various investigations into the outbreak's cause).

¹⁴⁰ See *infra* notes 145–155 and accompanying text.

¹⁴¹ See *infra* notes 156–190 and accompanying text; see also *Marchand*, 212 A.3d at 809 (recognizing the first successfully alleged breach of duty of oversight); *In re Clovis Oncology, Inc. Derivative Litig.*, C.A. No. 2017-0222, 2019 WL 4850188, at *13 (Del. Ch. Oct. 1, 2019) (relying on *Marchand* to determine that the plaintiffs successfully stated a breach of duty of oversight claim).

A. Marchand v. Barnhill: Facts Supporting a Well-Pled Caremark Claim

Under a *Caremark* claim, a plaintiff alleging a breach of the duty of oversight has two options to demonstrate a board's failure to meet its oversight responsibilities.¹⁴² First, a plaintiff can argue that the directors entirely failed to implement a monitoring system.¹⁴³ Second, a plaintiff can assert that the board failed to observe an existing oversight system.¹⁴⁴ Despite indications of a food safety problem, the Blue Bell board of directors remained unaware of the issue until after the first limited recall—two years after the first reported evidence of *Listeria*.¹⁴⁵ In *Marchand*, the Delaware Supreme Court held that although Blue Bell had an internal sanitation compliance manual, both a failure to implement an oversight mechanism and a conscious disregard of warnings about the ensuing food safety problem satisfied *Caremark* because the claims met both options identified for plaintiffs to allege a failure to fulfill basic oversight responsibilities.¹⁴⁶

The board's failure to institute the following oversight mechanisms made the directors susceptible to a *Caremark* claim: (1) a board committee managing food safety concerns, (2) a regular procedure requiring management to inform the board of food safety operations, (3) a systematic schedule by which the board examined food safety risks, and (4) a consistent discussion of food safety issues in board meeting minutes.¹⁴⁷ These factors indicate the importance of board involvement in establishing and monitoring an oversight mechanism.¹⁴⁸ An internal compliance manual is not enough when the board is not actively overseeing it.¹⁴⁹

Management's knowledge and subsequent disregard of the food safety risks occurring in Blue Bell's facilities extended to the board due to Paul

¹⁴² *In re Clovis*, 2019 WL 4850188, at *13 (stating that the duty of oversight established in *In re Caremark International Inc. Derivative Litigation* provides two identifiable avenues for plaintiffs to plead a breach of the duty); see *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 969 (Del. Ch. 1996) (explaining that the board must in good faith implement a monitoring system, but noting it does not have to monitor it to the extent that the board must "ferret out wrongdoing").

¹⁴³ *In re Clovis*, 2019 WL 4850188, at *13.

¹⁴⁴ *Id.* (describing the two options for pleading a *Caremark* claim).

¹⁴⁵ *Marchand*, 212 A.3d at 812.

¹⁴⁶ See *id.* at 822 (explaining the facts relevant to the court's *Caremark* analysis). In 2018, in *Marchand v. Barnhill*, the Delaware Court of Chancery relied on the existence of a guidance manual prescribing procedures for sanitations to find that the board met the *Caremark* requirements for a monitoring system. C.A. No. 2017-0586, 2018 WL 4657159, at *17, *19 (Del. Ch. Sept. 27, 2018), *rev'd*, 212 A.3d 805 (Del. 2019). The Delaware Supreme Court rejected this analysis after noting that "routine regulatory requirements" are not generally "directed at the board." *Marchand*, 212 A.3d at 823.

¹⁴⁷ *Marchand*, 212 A.3d at 822.

¹⁴⁸ *Id.* at 822–23 (emphasizing that compliance with FDA regulations at some level does not fulfill *Caremark*, which requires board level monitoring); *Stone v. Ritter*, 911 A.2d 362, 368 (Del. 2006) (en banc) (highlighting the board's role in implementing internal controls).

¹⁴⁹ *Marchand*, 212 A.3d at 823; QUINN, *supra* note 31 at 280.

Kruse's position as chairman of the board and Blue Bell's chief executive officer (CEO).¹⁵⁰ The board's meeting minutes showed no disclosure of reports, despite the fact that Kruse, in his capacity as CEO, had received reports of evidence from the FDA foreshadowing the upcoming *Listeria* outbreak.¹⁵¹ Kruse's role on the board and in management placed him in the unique position to correct the gap in the board's oversight mechanisms because he was aware of the risks "intrinsically critical" to Blue Bell's business but did not disclose them to the rest of the board.¹⁵² Despite the obvious importance of food safety to Blue Bell's business as a food producer, however, the board did not have evidence that it regularly discussed food safety concerns.¹⁵³

The combination of these facts provided the court with sufficient evidence to demonstrate that Blue Bell's board did not make a good faith effort to implement a reasonable monitoring and reporting process for the corporation's "central compliance risks."¹⁵⁴ The critical importance of food safety to a corporation producing only ice cream, and the lack of a food safety monitoring system within Blue Bell, allowed the plaintiff to successfully plead a *Caremark* claim.¹⁵⁵

B. The Importance of the Industry Context and Inferring Intent

In *Marchand*, the Delaware Supreme Court emphasized the monoline nature of Blue Bell's business model to infer the scienter required to breach a duty of good faith.¹⁵⁶ Blue Bell's business—the production of food—only has

¹⁵⁰ *Marchand*, 212 A.3d at 811. In his position as CEO, the FDA reported its results directly to Kruse. *Id.*

¹⁵¹ *Id.* at 811, 822 (noting that the FDA reported its results to Kruse, but noting that management had only disclosed favorable food safety information to the board despite the known reports illustrating the growing risk of contamination). The violations that the FDA reported to Kruse included reports of condensation falling into unfilled cartons, open containers of ingredients, and inadequate handwashing. *Id.*

¹⁵² *See id.* at 822 (demonstrating how the monoline nature of Blue Bell informed the *Caremark* oversight expectation).

¹⁵³ *Id.* The essential nature of food safety was critical to the court's analysis. *See id.* at 824 (articulating that the bare minimum requirement of a *Caremark* claim is ensuring that a monitoring system is in place to evaluate "central compliance risks" and that the board oversees such a system). If the board failed to monitor food safety, then any monitoring system in place was not reasonable. *See id.* (suggesting a reasonable and adequate monitoring system requires oversight of critical compliance concerns).

¹⁵⁴ *Id.* at 824.

¹⁵⁵ *Id.* (noting that "[i]n Blue Bell's case, food safety was essential and mission critical").

¹⁵⁶ *See id.* at 809 (explaining that Blue Bell's only product is ice cream, which makes food safety a critical compliance concern); *Our Products*, BLUE BELL CREAMERIES, <https://www.bluebell.com/our-products/> [<https://perma.cc/KHB9-J84V>] (listing Blue Bell's products, which all have an ice cream base). Monoline describes those companies that focus on one product and become specialized in that specific service. Adam Hayes, *Monoline*, INVESTOPEDIA, <https://www.investopedia.com/terms/m/monoline.asp> [<https://perma.cc/UBB2-FZHP>] (Feb. 10, 2021). In contrast, an example of a business that is not monoline is Procter & Gamble, which has a huge number of brands and various types of products. *Brands*, PROCTER & GAMBLE, <https://us.pg.com/brands/> [<https://perma.cc/UB7G-982E>].

one “central compliance” concern, the safety of its food.¹⁵⁷ Blue Bell’s success, therefore, depended on consumers’ baseline confidence in the product’s safety.¹⁵⁸ Emphasizing food safety as Blue Bell’s primary compliance concern, the court expanded upon *In re Caremark International Inc. Derivative Litigation* by further defining what the board must do to assure they receive “appropriate” or “adequate” information.¹⁵⁹ Where there is a central compliance concern, the board must receive reports on that issue to obtain the information required under *In re Caremark*.¹⁶⁰ After identifying the essential compliance requirements that Blue Bell’s board must monitor, the Delaware Supreme Court concluded that the complete absence of a food safety monitoring system sufficiently alleged a *Caremark* claim.¹⁶¹

As a result of food safety’s critical importance to Blue Bell’s business, the court could infer that maintaining food safety compliance was a known oversight duty for the board.¹⁶² The inference that the board knew of its duty allowed the court to conclude that the board did not make a good faith effort to uphold its duty.¹⁶³ Inferring knowledge of the importance of food safety aided the court in finding the board’s *conscious disregard* of its responsibility.¹⁶⁴ This analysis combined the duty of care with good faith by acknowledging that a reasonably prudent director would oversee a compliance issue, particularly where only one central compliance issue exists.¹⁶⁵ Even though this inference of knowledge arguably would meet the difficult gross negligence standard for

Procter & Gamble’s portfolio ranges from laundry products to hair care, with everything in between. *Id.*

¹⁵⁷ *Marchand*, 212 A.3d at 809.

¹⁵⁸ *Id.*

¹⁵⁹ Compare *id.* at 824 (requiring the board to institute a “reasonable system of monitoring and reporting about the corporation’s central compliance risks”), with *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996) (defining the duty of oversight as requiring directors to implement an oversight mechanism that reports “appropriate information”). Analyzing these cases together, the court in *Marchand* identified “central compliance risks” as required for a successful *Caremark* claim. Compare *Marchand*, 212 A.3d at 824 (emphasizing essential compliance concerns), with *In re Caremark*, 698 A.2d at 970 (requiring directors to oversee “appropriate information”).

¹⁶⁰ *In re Caremark*, 698 A.2d at 970 (explaining that directors have a responsibility to monitor certain information).

¹⁶¹ *Marchand*, 212 A.3d at 824.

¹⁶² See *id.* (describing food safety as “mission critical”); see also *id.* at 822 (explaining that an inference that a board did not make any effort to remain informed of compliance concerns “intrinsically critical” to operations supports a conclusion that the board did not try in good faith pursuant to *Caremark*).

¹⁶³ *Id.* at 824; see *supra* notes 56–76 and accompanying texts (describing intentionality and the moral aspects of good faith).

¹⁶⁴ *Id.* at 824; see *supra* notes 56–76 and accompanying texts (explaining the relationship between intentionality and good faith).

¹⁶⁵ See *Marchand*, 212 A.3d at 824 (explaining that the plaintiff met the pleading burden after relying on records from board meetings to support a fair inference that directors failed to implement a system to ascertain Blue Bell’s compliance with the most obvious safety issue for the company—food safety).

duty of care claims, the exculpation provisions prevent monetary liability for duty of care violations.¹⁶⁶ Thus, the court turned its focus to the board's lack of good faith.¹⁶⁷

The court's acknowledgment that *In re Caremark* required the board to exert a good faith effort to act in accordance with the duty of care importantly reclaimed the duty of care as a means for establishing liability.¹⁶⁸ Although the court could not attach liability for the failure to exercise due care, the failure to try to exercise care in *good faith* allowed the care claim to convert into a loyalty claim.¹⁶⁹ The court relied on the fact that Blue Bell made only one product—ice cream—and consequently had only one essential compliance concern—food safety—to marry the duty of care and the duty of loyalty to create a non-exculpable duty of oversight.¹⁷⁰ The good faith requirement made this marriage possible; without using the monoline business model to infer knowledge, the care claim could not transform into a successful *Caremark* claim.¹⁷¹

Shortly after *Marchand*, in October 2019, in *In re Clovis Oncology, Inc. Derivative Litigation*, the Delaware Court of Chancery emphasized the importance of a company's monoline services when it denied the corporation's motion to dismiss a complaint alleging that the directors violated their oversight responsibilities.¹⁷² The derivative cause of action in *In re Clovis* alleged that the directors breached their fiduciary obligations by failing to oversee the

¹⁶⁶ DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2020); see *Marchand*, 212 A.3d at 809, 824 (concluding that the directors "consciously failed" their duty of oversight). In *Marchand*, the Delaware Supreme Court's attribution of consciousness to the directors' breach of a fiduciary duty reflects the conscious omission in the definition of gross negligence. Compare *Marchand*, 212 A.3d at 809 (determining that the directors consciously disregarded their oversight duties, which could theoretically meet the high bar of gross negligence for breach of care claims except for the elimination of damages resulting from an exculpation provision), with *Gross Negligence*, BLACK'S LAW DICTIONARY, *supra* note 38 (describing gross negligence as a "conscious . . . omission"), and *supra* note 38 and accompanying text (defining gross negligence).

¹⁶⁷ *Marchand*, 212 A.3d at 824.

¹⁶⁸ See *id.* (explaining that at a minimum, *In re Caremark* must require corporate directors to fulfill their duty of care with a good faith effort, otherwise the directors would violate their duty of loyalty).

¹⁶⁹ See *id.*

¹⁷⁰ See *id.* at 809, 813 (identifying food safety as Blue Bell's critical compliance issue and describing directors' lack of care to monitor it). The Delaware court highlighted that Blue Bell did not have three key components of an appropriate oversight mechanism: (1) a committee responsible for monitoring food, (2) a regular portion of board meetings dedicated to food safety, and (3) a procedure requiring compliance reports' presentation to the board. *Id.* at 813. These failures have a shared quality with care claims: the board's failure to inform itself. See *id.*; *supra* note 37 and accompanying text (noting the importance of acting on an informed basis when fulfilling the duty of care).

¹⁷¹ See *Marchand*, 212 A.3d at 809 (relying on Blue Bell's monoline business structure to infer directors' consciousness of their disregard of a duty).

¹⁷² *In re Clovis Oncology, Inc. Derivative Litig.*, C.A. No. 2017-0222, 2019 WL 4850188, at *1 (Del. Ch. Oct. 1, 2019) (explaining that the duty of oversight is critical, "especially so when a monoline company operates in a high regulated industry").

clinical trial for the primary drug in development at Clovis Oncology, Inc. (Clovis).¹⁷³ The court concluded that the plaintiffs, stockholders of Clovis, sufficiently pled facts showing that the directors were substantially likely to face liability for a breach of their oversight obligations.¹⁷⁴ Like Blue Bell's business in *Marchand*, Clovis's business as a pharmaceutical company was monoline, and, as a result, the court emphasized that the central compliance concern for the company would be drug safety.¹⁷⁵ The plaintiff demonstrated that Rociletinib (Roci), the drug at the clinical trial stage, was essential to the corporation's success.¹⁷⁶ Using the analysis articulated in *Marchand*, the court in *In re Clovis* inferred that the board knew the oversight responsibilities associated with drug safety, particularly in the context of a clinical trial, and consciously disregarded them.¹⁷⁷ This disregard of a known duty constituted a breach of the duty of good faith, allowing the court to transform a care claim into a breach of loyalty under *Caremark*.¹⁷⁸

Unlike Blue Bell, which did not have a committee dedicated to food safety, Clovis had two subcommittees dedicated to compliance issues.¹⁷⁹ Although the court in *Marchand* relied on the absence of an oversight committee as evidence of Blue Bell's breach of its oversight duties, the court in *In re Clovis* noted that the defendants on the committees affirmatively knew the FDA standards required for drug approval and disregarded them.¹⁸⁰ When the board

¹⁷³ *Id.* In 2019, in *In re Clovis Oncology, Inc. Derivative Litigation*, the Delaware Court of Chancery noted that Clovis Oncology, Inc. (Clovis) had only one drug in development that showed promise—Rociletinib (Roci). *Id.* Roci is a treatment for lung cancer. *Id.*

¹⁷⁴ *Id.* According to the Delaware Supreme Court 1993 case *Rales v. Blasband*, when directors face a substantial likelihood of liability for a breach of the duty of loyalty, plaintiffs can successfully allege the futility of making demand on the board and thus can defeat the business judgment presumption. 634 A.2d 927, 936 (Del. 1993) (describing that a majority of directors must face a substantial likelihood of liability for the court to deem them interested, such that the plaintiff's demand is futile); see *supra* note 47 and accompanying text (describing the *Rales* standard).

¹⁷⁵ *In re Clovis*, 2019 WL 4850188, at *1.

¹⁷⁶ *Id.* (finding that the plaintiffs sufficiently pleaded that Roci was critical to Clovis's operation).

¹⁷⁷ See *id.* (citing *Marchand v. Barnhill*, 212 A.3d 805, 809, 822 (Del. 2019) (en banc)) (noting Clovis's dependence on Roci's success, and then describing the board's ignorance of warning signs as support for a well-pled *Caremark* claim).

¹⁷⁸ *Id.* at *7 (describing the board's failure to respond to warning signs as placing "hands on their ears to muffle the alarms" about the compliance failure).

¹⁷⁹ *Id.* at *2 (highlighting the Nominating and Corporate Governance Committee and the Audit Committee as relevant to Clovis's oversight system). The Nominating and Corporate Governance Committee's responsibility was to advance and monitor Clovis's compliance with regulatory requirements. *Id.* The Audit Committee reviewed Clovis's earnings reports before releasing them to the public. *Id.*

¹⁸⁰ *Id.* at *5 ("Indeed, each of the Board Defendants appreciated the FDA 'could only make its decision . . . to approve Roci based on [] confirmed responses.'" (alternation in original) (quoting Supplemental Consolidated Verified Shareholder Derivative Complaint ¶¶ 99–100, *id.* (No. 2017-0222)). Despite the FDA requirements, Clovis calculated Roci's success rate based partially on unconfirmed responses. *Id.* at *6. Confirmed responses require tumor shrinkage to not show in the first scan

learned that the clinical trial reported unconfirmed responses in defiance of the regulatory requirements, the board did nothing to correct the process.¹⁸¹ In light of these facts, the court in *In re Clovis* held that the board disregarded warning signs that Clovis violated the clinical trial protocol, and denied the board's motion to dismiss.¹⁸²

The opinions in *Marchand* and *In re Clovis* clarified that boards have more onerous oversight responsibilities when the corporations they manage operate in an industry with regulatory requirements for their essential business operations.¹⁸³ This emphasis enhanced the *In re Caremark* standard for alleging the breach of the duty of oversight because directors managing a corporation with a monoline business model have a heightened oversight obligation.¹⁸⁴ The courts even differentiated the traditional *In re Caremark* standard from the standard applied in the monoline context, noting that even in a monoline industry, a *Caremark* claim does not require omniscience.¹⁸⁵ By acknowledging that *In re Caremark* imposes different requirements for monoline corporations, the court expressed a willingness to make *Caremark* claims more feasible for plaintiffs, at least in circumstances similar to that of *Marchand* and *In re Clovis*.¹⁸⁶

In *Marchand* and *In re Clovis*, the courts considered two new factors when evaluating *Caremark* claims: (1) whether the corporation was monoline and (2) whether the corporation's primary industry was heavily regulated.¹⁸⁷ These two factors led the court to deny the motions to dismiss, opening the door to the possibility of Blue Bell and Clovis directors facing liability for

after treatment and in a subsequent scan. *Id.* at *5 n.68. Unconfirmed responses, in contrast, do not require a second scan. *Id.*

¹⁸¹ *Id.* at *6.

¹⁸² *Id.* at *11 (denying the motion to dismiss because the complaint successfully alleged facts that Clovis's board ignored warning signs that Clovis violated the clinical study requirements); *see infra* note 202 and accompanying text (explaining the Response Evaluation Criteria in Solid Tumors (RECIST) protocol).

¹⁸³ *Id.* at *13 (remarking that the *Marchand* decision requires the board to "rigorously exercise[]" its oversight responsibility when external regulatory requirements govern the company's essential operations).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *See* *Marchand v. Barnhill*, 212 A.3d 805, 824 (Del. 2019) (en banc) (concluding that the plaintiff successfully pled a *Caremark* claim because of Blue Bell's monoline structure); *see also* *In re Clovis*, 2019 WL 4850188, at *10 (denying the defendants' motion to dismiss because the court could infer that the directors knowingly breached their oversight duties due to the clear importance of Clovis's adherence to the clinical trial protocols set out by the FDA).

¹⁸⁷ *See* *Marchand*, 212 A.3d at 810, 824 (relying on Blue Bell's monoline business and the significance of complying with FDA regulations as factors in finding a well-pled *Caremark* claim); *In re Clovis*, 2019 WL 4850188, at *1 (explaining the importance of the directors' duty of oversight as "especially so when a monoline company operates in a highly regulated industry").

their failure to oversee their respective corporations.¹⁸⁸ Whether courts will continue to look for circumstances in which directors should have enhanced oversight responsibilities remains an open question.¹⁸⁹ The court's treatment of the plaintiffs' allegations in *In re the Boeing Co. Derivative Litigation* will shed light on the upper and lower boundaries of the *Marchand* factors when a different regulator governs a more multifaceted corporation.¹⁹⁰

III. UNDERSTANDING THE BOUNDARIES OF *MARCHAND V. BARNHILL* THROUGH *IN RE THE BOEING CO. DERIVATIVE LITIGATION*

In 2019, in *Marchand v. Barnhill*, the Delaware Supreme Court explained that Blue Bell made only one product and had one primary regulator, the FDA.¹⁹¹ In 2019, in *In re Clovis Oncology, Inc. Derivative Litigation*, the Delaware Court of Chancery noted that Clovis produced multiple drugs, of which only one showed promise, and also faced the FDA as its primary regulator.¹⁹² Part A of this Section explores the differences between the companies at issue in *Marchand* and *In re Clovis* to highlight the boundaries of the monoline and heavily regulated factors that courts consider when plaintiffs bring a *Caremark* claim.¹⁹³ Part B considers the plaintiffs' allegations in *In re the Boeing Co. Derivative Litigation* as a case study for the application of *Marchand* and ulti-

¹⁸⁸ *Marchand*, 212 A.3d at 820 (acknowledging the difficulty in pleading *Caremark* claims, and reversing the Delaware Court of Chancery's dismissal of the plaintiff's claim); *In re Clovis*, 2019 WL 4850188, at *10 (denying defendants' motion to dismiss the *Caremark* claim).

¹⁸⁹ *See Marchand*, 212 A.3d at 824 (noting that commentators wished the duty of oversight required more from directors). The significant challenges that plaintiffs historically have faced when alleging *Caremark* claims suggests that another expansion of oversight responsibility will not arrive soon. Haugh, *supra* note 6, at 613 (citing *Stone v. Ritter*, 911 A.2d 362, 372 (Del. 2006) (en banc)) (noting in *Stone v. Ritter*, the Delaware Supreme Court first explicitly "endorsed" the *Caremark* claim and recognized it as one of the most difficult claims available to plaintiffs); Mitchell, *supra* note 6, at 248–49 (describing the difficulty of succeeding on a *Caremark* claim, and then attributing it to Delaware courts' concern with "distort[ing] the risk/reward calculus of corporate directors leading to a dearth of qualified candidates willing to serve").

¹⁹⁰ *See generally* Verified Amended Consolidated Complaint, *supra* note 19, at 9 (alleging that the board of directors at Boeing failed to diligently oversee the corporation, thus creating a *Caremark* claim). Notably, the court is only bound by the Delaware Supreme Court's decision in *Marchand*, not the Court of Chancery's decision in *In re Clovis*. *See Vertical Stare Decisis*, BLACK'S LAW DICTIONARY, *supra* note 38 (explaining that lower courts must follow decisions of higher courts in the same jurisdiction). *Compare Marchand*, 212 A.3d at 805 (noting that the plaintiff appealed to the Delaware Supreme Court), with *In re Clovis*, 2019 WL 480188, at *1 (confining the decision to narrow facts).

¹⁹¹ *Marchand*, 212 A.3d at 809; *see also* *Inter-mktg. Grp. USA, Inc. v. Armstrong*, No. 2017-0030, 2020 WL 756965, at *11, *15 (Del. Ch. Jan. 31, 2020) (relying upon the emphasis placed on food safety in *Marchand* as Blue Bell's central compliance concern to find that the defendants faced a substantial likelihood of liability for violating their duty of oversight); *In re LendingClub Corp. Derivative Litig.*, C.A. No. 12984, 2019 WL 5678578, at *9 n.59 (Del. Ch. Oct. 13, 2019) (summarizing *Marchand*, but finding it inapplicable to the plaintiffs claim against directors for violating their oversight duty because the defendants had an oversight mechanism in place).

¹⁹² 2019 WL 4850188, at *1.

¹⁹³ *See infra* notes 197–207 and accompanying text.

mately determines that the plaintiffs' claim should survive a motion to dismiss.¹⁹⁴ Moreover, the analysis seeks to further parse the boundaries of the monoline and heavily regulated factors when courts consider a *Caremark* claim.¹⁹⁵ Finally, Part C identifies when a *Caremark* claim will fall within the boundaries of the monoline and heavily regulated factors of *Marchand* and that claim is more likely to survive a motion to dismiss.¹⁹⁶

A. The Boundaries of *Marchand v. Barnhill*

At the very least, *Marchand* indicated that when a company produces one product governed by one regulator, the compliance concerns imposed by that regulator are mission critical, such that the board must at a minimum ensure it monitors that one compliance issue.¹⁹⁷ When the board failed to ensure that the product met the regulator's requirements, the board breached its duty of oversight.¹⁹⁸ Where a company produces more than one product, the application of the *Marchand* decision is less clear.¹⁹⁹ The *In re Clovis* decision demonstrated

¹⁹⁴ See *infra* notes 208–264 and accompanying text.

¹⁹⁵ See *infra* notes 208–264 and accompanying text.

¹⁹⁶ See *infra* notes 265–274 and accompanying text.

¹⁹⁷ See *Marchand v. Barnhill*, 212 A.3d 805, 809, 810, 811, 822, 824 (Del. 2019) (en banc) (explaining that the board's failure to attend to the critical compliance concern identified by the FDA allows for the inference that directors did not make a good faith effort to fulfill their duty of oversight). In 2019, in *Marchand v. Barnhill*, the food safety regulations imposed by the FDA allowed the Delaware Supreme Court to infer that the board knew of its duty to oversee food safety concerns. See *id.* at 810 (describing the FDA's role in relation to Blue Bell's business). Blue Bell's production of only one product made the board's requisite attention to the FDA compliance measures "obvious," enhancing the court's inference that the directors knew of their responsibility to oversee food safety. See *id.* at 810–11 (explaining how Blue Bell's monoline structure made food safety of noticeable importance).

¹⁹⁸ *Id.* at 822; see also *Inter-mktg. Grp. USA, Inc. v. Armstrong*, No. 2017-0030, 2020 WL 756965, at *11 (Del. Ch. Jan. 31, 2020) (identifying "pipeline integrity and maintenance" as an essential compliance concern for Plains All American Pipeline, L.P. (Plains), which is a dominant pipeline operator in North America). In 2020, in *Inter-marketing Group USA, Inc. v. Armstrong*, the Delaware Court of Chancery explained that the plaintiff alleged that the directors of Plains violated their oversight duty by knowingly failing to monitor an essential compliance concern, the soundness of the pipelines. 2020 WL 756965, at *15. Plains was a partnership that "own[ed]" thousands of miles of pipelines." *Id.* at *1. Consequently, the duty of good faith was contractual in nature rather than based on fiduciary responsibilities. *Id.* at *4. The court relied on *Marchand*, treating the contractual duty as if it were based in fiduciary principles. *Id.* at *15; see also *Marchand*, 212 A.3d at 816, 822 (providing a basis for the court in *Inter-marketing Group*).

¹⁹⁹ Compare *Marchand*, 212 A.3d at 810 (reversing the dismissal of the complaint because after establishing food safety as intrinsically important, the plaintiff pled sufficient facts to allow for the inference that the board failed to adequately observe any oversight or reporting system for food safety issues), with *Inter-mktg. Grp.*, 2020 WL 756965, at *11 (establishing pipeline structure as essential for Plains's operations), and *In re Clovis Oncology, Inc. Derivative Litig.*, No. 2017-0222, 2019 WL 4850188, at *1 (Del. Ch. Oct. 1, 2019) (treating Clovis as a monoline company because Roci showed such promise that it was essential to Clovis's function). The court in *Inter-marketing Group* identified pipeline structure as mission critical for Plains even though the corporation offered services beyond transportation via pipelines. 2020 WL 756965, at *11; see also *What We Do*, PLAINS ALL AM., <https://>

that a corporation does not have to only produce one product for *Marchand* to apply.²⁰⁰ Although Clovis had multiple drugs in production, Roci showed the most promise and was the subject of a clinical trial.²⁰¹ Clovis's dependence on Roci as the only promising drug in its pipeline made compliance with the FDA during the clinical trial mission critical.²⁰² In both *Marchand* and *In re Clovis*, the board attended to only one vital compliance concern.²⁰³

The court's determination that a company is monoline and heavily regulated informs what compliance concerns are mission critical for the board to oversee.²⁰⁴ When the *Marchand* factors lead the court to conclude that more than one mission critical compliance concern exists, the court is not likely to impose the

www.plainsallamerican.com/what-we-do [https://perma.cc/44FF-KC4W] (explaining that its business organization is comprised of three segments, including “[t]ransportation, [f]acilities, [and] [s]upply and [l]ogistics”).

²⁰⁰ *In re Clovis*, 2019 WL 4850188, at *1, *2 (describing Roci as one drug among Clovis's products). *But see Marchand*, 212 A.3d at 810 (emphasizing that Blue Bell made only one product). In August 2020, the Delaware Court of Chancery reiterated that *Marchand* could apply to more “complex” corporations in *Teamsters Local 443 Health Services & Insurance Plan v. Chou*. C.A. No. 2019-0816, 2020 WL 5028065, at *18 (Del. Ch. Aug. 24, 2020). In *Teamsters Local 443 Health Services & Insurance Plan*, the complexity stemmed from the company's structure, including manufacturing, distribution, and packaging of drugs. *Id.* There, the court denied the defendants' motion to dismiss despite the defendants' increased complexity compared to Blue Bell and Clovis. *Id.* The court determined that the plaintiffs' allegation that the defendants' adherence to FDA regulations was the corporation's primary regulatory concern was sufficient to defeat the motion to dismiss. *Id.*

²⁰¹ *In re Clovis*, 2019 WL 4850188, at *2.

²⁰² *Id.* at *1, *4–5 (describing Roci's success as contingent upon FDA approval, and noting that the directors were aware of the FDA's requirement that confirmed responses, not unconfirmed responses, should form the results presented to the FDA for approval consideration). The clinical trial for Roci utilized the RECIST protocol. *Id.* at *4 & n.63; *see also* CTR. FOR INT'L BLOOD & MARROW TRANSPLANT RSCH., RETIRED FORMS MANUAL: RESPONSE EVALUATION CRITERIA IN SOLID TUMORS (RECIST) app. n (2009), <https://www.cibmtr.org/DataManagement/TrainingReference/Manuals/DataManagement/Documents/appendix-n.pdf> [https://perma.cc/26HB-RPS2] (describing criteria to measure the confirmation of a response). Confirming responses requires the performance of multiple assessments to help avoid overestimation of observed response rates. *See generally* NAT'L CANCER INST., CANCER THERAPY EVALUATION PROGRAM, RESPONSE EVALUATION CRITERIA IN SOLID TUMORS (RECIST) QUICK REFERENCE, <http://ctep.cancer.gov/protocolDevelopment/docs/quickrcst.doc> [https://perma.cc/6S6Q-259T].

²⁰³ *Compare Marchand*, 212 A.3d at 822, 824 (considering only food safety as “intrinsically critical” to Blue Bell's business as an ice cream producer), *with In re Clovis*, 2019 WL 4850188, at *14 (explaining that the clinical trial for Roci and its applicable regulations were an essential compliance concern for Clovis even as the company had other compliance concerns). The Delaware Court of Chancery emphasized the importance of a singular compliance concern in *Teamsters Local 443 Health Services & Insurance Plan*, even where the corporation might have other lines of business. *See* 2020 WL 5028065, at *18 (explaining how a dominant compliance concern can be sufficient even in a more complex corporation).

²⁰⁴ *Marchand*, 212 A.3d at 809, 810 (highlighting Blue Bell's monoline structure and the FDA's extensive regulatory requirements); *In re Clovis*, 2019 WL 4850188, at *1 (emphasizing that the directors' duty to institute a monitoring system is particularly important in the context of a “monoline company operat[ing] in a highly regulated industry”).

more onerous oversight burden articulated in *Marchand*.²⁰⁵ There, the existence of a singular mission critical compliance concern allowed the Delaware Supreme Court to deem the oversight responsibility so obvious that the board knew of its duty to monitor it.²⁰⁶ Consequently, where more than one mission critical compliance concern exists, a knowledge inference becomes more attenuated.²⁰⁷

B. *The In re the Boeing Co. Case Study*

The stockholder derivative complaint, filed in Delaware in February 2021, *In re the Boeing Co. Derivative Litigation* alleged that Boeing's board of directors (1) consciously failed to adequately oversee the 737 MAX airplane development and (2) failed to adjust their oversight activity after the first 737 MAX crash.²⁰⁸ The 737 MAX design uses engines placed higher and closer to the front of the plane, which is in contrast with older engine iterations that have engines further to the back of the aircraft.²⁰⁹ This repositioning resulted in a risk of engine stall, which Boeing attempted to remedy with the development of the Maneuvering Characteristics Augmentation System (MCAS).²¹⁰ Boeing

²⁰⁵ *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. 1996) (highlighting that claims for a breach of the duty of oversight are potentially the hardest claims for a plaintiff to win in corporate law); South v. Baker, 62 A.3d 1, 25 (Del. Ch. 2012) ("*Caremark* claims are difficult to plead and harder to prove."); *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 125 (Del. Ch. 2009) (describing *Caremark* claims as difficult, and noting that the requirements to demonstrate bad faith are even more difficult than establishing gross negligence).

²⁰⁶ See *Marchand*, 212 A.3d at 821 (explaining that when the plaintiffs show that the board failed to monitor a mission critical concern, the court can infer that the board did not make a good faith effort to implement a monitoring system).

²⁰⁷ See *id.* 821–22 (noting the deference afforded to boards under a *Caremark* claim because plaintiffs failed to plead bad faith, but finding that the facts supported the inference that the board did not monitor an essential compliance issue, which allowed for the inference that the board made no good faith effort to implement a monitoring system).

²⁰⁸ See generally Verified Amended Consolidated Complaint, *supra* note 19, at 3–5 (providing facts alleging that the board abandoned its oversight responsibilities). There are minimal redactions in the consolidated complaint, which the plaintiffs filed in 2021, two years after the plaintiffs filed original complaints separately. Letter to Counsel at 5, *In re the Boeing Co. Derivative Litig.*, C.A. No. 2019-0907 (Del. Ch. filed Feb. 1, 2021), 2021 WL 392851 (explaining that only employees who reported anonymously must remain redacted). See generally Public Version of the Verified Stockholder Derivative Complaint, *supra* note 17 (showing few redactions). The complaint provides enough facts to compare the allegations against Boeing with the allegations against Blue Bell and Clovis. Compare Public Version of the Verified Stockholder Derivative Complaint, *supra* note 17, at 23–28 (alleging both a lack of an existing oversight system and a failure to observe red flags about non-compliance), with *Marchand*, 212 A.3d at 809 (alleging that Blue Bell had no committee dedicated to overseeing food safety and ignored warning signs indicating *Listeria*), and *In re Clovis*, 2019 WL 4850188, at *1 (alleging that the Clovis board knew the clinical trial was not complying with reporting requirements and ignored such red flags). The defendants include Boeing's board of directors, Boeing nominally, and Boeing officers. Verified Amended Consolidated Complaint, *supra* note 19, at 11, 16.

²⁰⁹ Verified Amended Consolidated Complaint, *supra* note 19, at 57–58; see also Public Version of the Verified Stockholder Derivative Complaint, *supra* note 17, at 3.

²¹⁰ Verified Amended Consolidated Complaint, *supra* note 19, at 58. The new engine position upset the 737 MAX's aerodynamic stability, creating the potential for an engine stall because of the

intended the software to automatically correct the aircraft by adjusting the position of the plane's nose.²¹¹ The complaint alleged that Boeing's oversight failures included absent safety monitoring in board meetings, a pattern of insufficient training manuals, implementation of the MCAS despite concerns, and inadequate pilot training with respect to intervening after the MCAS triggered.²¹² The board made these decisions despite more than two hundred incident reports about the sensors that triggered MCAS were reported to the Federal Aviation Administration (FAA).²¹³ The complaint further alleged that the

resulting interruption in airflow over the plane's wings. Public Version of the Verified Stockholder Derivative Complaint, *supra* note 17, at 12. The Maneuvering Characteristics Augmentation System (MCAS) software usurped control from pilots, who could not manually correct for the issue as they would in prior models of the 737 plane. Verified Amended Consolidated Complaint, *supra* note 19, at 70.

²¹¹ Verified Amended Consolidated Complaint, *supra* note 19, at 58, 61.

²¹² *Id.* at 9, 26, 29, 43, 51, 56, 58–59. Testing the MCAS and training and informing pilots was important for the development of the 737 MAX for a myriad of reasons. *See id.* at 65 (noting that MCAS was not effectively described in the pilots' foremost manual); *see* Public Version of the Verified Stockholder Derivative Complaint, *supra* note 17, at 14, 15 (explaining the significance of not informing pilots of MCAS, and noting Boeing's awareness of the MCAS design flaws). For example, Boeing initially designed the MCAS to rely on two angles of attack (AOA) sensors, but the final iteration relied solely on one AOA sensor with a slower activation speed. Verified Amended Consolidated Complaint, *supra* note 19, at 6, 59; Public Version of the Verified Stockholder Derivative Complaint, *supra* note 17, at 15. The lower activation speed increased the likelihood that the MCAS would engage. Verified Amended Consolidated Complaint, *supra* note 19, at 60; Public Version of the Verified Stockholder Derivative Complaint, *supra* note 17, at 15. The warning system that indicated to the pilots that the MCAS became engaged did not reflect the use of only one AOA sensor; instead, the warning system reflected the earlier design, which had two AOA sensors. *See* Verified Amended Consolidated Complaint, *supra* note 19, at 67–68 (noting that the warning light failed because it was designed to rely on two AOA sensors, and capturing Southwest Airlines' outrage that an operative warning system was offered only as an add-on). The warning would only show pilots when two AOA sensors disagreed. *Id.* Consequently, the MCAS standard reliance on only one AOA sensor would never trigger the warning. *Id.*; *see also* Dominic Gates, *Long Before First 737 MAX Crash, Boeing Knew a Key Sensor Warning Light Wasn't Working, but Told No One*, SEATTLE TIMES, <https://www.seattletimes.com/business/boeing-aerospace/long-before-first-737-max-crash-boeing-knew-a-key-sensor-warning-light-wasnt-working-but-told-no-one/> [<https://perma.cc/2ZCD-XF4R>] (May 5, 2019) (explaining the significance of the warning light problem). The predictable failure of the warning system, coupled with the automatic engagement of the MCAS software, made pilots' unawareness of the changes to the MCAS especially problematic. *See* Verified Amended Consolidated Complaint, *supra* note 19, at 67–68, 81 (explaining the strangeness of "the plane automatically and repeatedly engaging an automated system while in manual flight mode" (emphasis added)); Public Version of the Verified Stockholder Derivative Complaint, *supra* note 17, at 13, 14 (noting that the software's design took control away from the pilots, who could only disable MCAS if they knew of its existence). Regardless of whether there were one or two AOA sensors, the MCAS software did not appear in the 737 MAX's Flight Crew Operations Manual. Verified Amended Consolidated Complaint, *supra* note 19, at 14.

²¹³ Verified Amended Consolidated Complaint, *supra* note 19, at 60 (demonstrating the risk attributed to the sensors because of their frequent failure); *see also* Curt Devine & Drew Griffin, *Boeing Relied on Single Sensor for 737 Max That Had Been Flagged 216 Times to FAA*, CNN, <https://www.cnn.com/2019/04/30/politics/boeing-sensor-737-max-faa/index.html> [<https://perma.cc/MR45-4XCW>] (Apr. 30, 2019). This Note does not extensively address the role of the FAA's oversight failures. Connor Raso, *Boeing Crisis Illustrates Risk of Delegated Regulatory Authority*, BROOKINGS INST. (Dec.

board failed to investigate and monitor the safety risks in the 737 MAX's design after the first crash.²¹⁴ Applying *Marchand* to these facts, the Delaware Court of Chancery is likely to deny a motion to dismiss because Boeing operates as a monoline corporation in an industry that has a single primary regulator imposing regulatory compliance standards.²¹⁵ Subsection 1 of this Section evaluates whether the facts of *In re the Boeing Co.* satisfy the *Marchand* requirement for a heavily regulated industry.²¹⁶ Subsection 2 presents two ways to apply the monoline requirement in *Marchand* to *In re the Boeing Co.*, concluding that one interpretation would likely result in the court denying Boeing's motion to dismiss.²¹⁷ Finally, Subsection 3 completes the *Caremark* claim analysis after concluding that Boeing meets both the monoline and heavily regulated prongs of *Marchand*.²¹⁸

18, 2019), <https://www.brookings.edu/research/boeing-crisis-illustrates-risks-of-delegated-regulatory-authority/> [<https://perma.cc/8GKK-KBSU>] (noting that the FAA certified the plane as safe). Nonetheless, the FAA's delegation of compliance responsibilities could support the allegation that the board *knew* of its oversight responsibilities and consciously disregarded them. *See id.* (explaining that a key aspect of FAA's certification related to the delegation of safety certification responsibility to Boeing); *see also* Andy Pasztor & Andrew Tangel, *Boeing Withheld Information on 737 Model, According to Safety Experts and Others*, WALL ST. J., <https://www.wsj.com/articles/boeing-withheld-information-on-737-model-according-to-safety-experts-and-others-1542082575> [<https://perma.cc/7E63-7GYM>] (Nov. 13, 2018) (reporting that Boeing withheld information about the MCAS from pilots, safety experts, and the FAA); *supra* note 63 and accompanying text (describing the role of the duty of good faith, and enhancing the argument that the board did not make a good faith effort to monitor safety risks). Alternatively, Boeing could use the FAA's delegation of compliance controls to assign culpability to the FAA instead of Boeing. *See* Raso, *supra* (explaining that Congress authorized the FAA to delegate inspections to Boeing if the FAA monitored Boeing's adherence to the inspection requirements).

²¹⁴ Verified Amended Consolidated Complaint, *supra* note 19, at 4–5, 7–8, 31, 79 (noting that the board prioritized the company's public relations before investigating whether the company had safety mechanisms in place). In 2020, the Delaware Chancery Court in *Hughes v. Xiaoming Hu* took issue with a board's failure to address a critical compliance concern with urgency. C.A. No. 2019-0112, 2020 WL 1987029, at *14–15, *18 (Del. Ch. Apr. 27, 2020). There, the court denied the defendants' motion to dismiss, citing the Audit Committee's failure to meet to discuss the issue until two months after the disclosure of the compliance concern. *Id.* at *14. *Compare id.* (denying a motion to dismiss even though a relevant committee existed to oversee compliance with financial reporting), with Verified Amended Consolidated Complaint, *supra* note 19, at 29 (noting that no relevant oversight committee existed until after both 737 MAX crashes).

²¹⁵ *See* *Marchand v. Barnhill*, 212 A.3d 805, 809 (Del. 2019) (en banc) (describing the significance of regulatory compliance to Blue Bell's monoline business); *In re Clovis Oncology, Inc. Derivative Litig.*, No. 2017-0222, 2019 WL 4850188, at *1 (Del. Ch. Oct. 1, 2019) (emphasizing the importance of monoline operations and the extent of regulatory requirements in the relevant industry as important to determining whether a *Caremark* claim can survive a motion to dismiss).

²¹⁶ *See infra* notes 219–231 and accompanying text.

²¹⁷ *See infra* notes 232–254 and accompanying text.

²¹⁸ *See infra* notes 255–264 and accompanying text.

1. Boeing Is Subject to an External Regulator in a Heavily Regulated Industry

Boeing easily satisfies the heavily regulated factor established in *Marchand* because of the requirements imposed by the FAA.²¹⁹ Akin to how consumers relied on the base assumption that Blue Bell ice cream was safe to eat, airlines and passengers relied on the base assumption that the 737 MAX jets were safe to fly.²²⁰ Such assumptions about safety result from confidence that products will not reach the market without adhering to regulatory regimes certifying such safety.²²¹ Boeing needed the FAA's certification to sell the 737 MAX planes.²²² Consequently, the FAA operated as a primary external regulator essential to Boeing's success.²²³ The role of the FAA as Boeing's primary regulator is also apparent in a settlement agreement between Boeing and the FAA in 2015, where Boeing agreed to adjust its oversight mechanisms to more effectively comply with the FAA.²²⁴ A twelve million dollar fine accompanied this settlement agreement, indicating the stakes associated with the FAA's regulation and signaling Boeing's knowledge of its inadequate oversight systems.²²⁵

Boeing's actions when dealing with the FAA during the 737 MAX development and production demonstrate knowledge of oversight obligations and an intentional failure to adhere to them.²²⁶ For example, by Boeing's own admission, the company purposefully hid information regarding the potential for the MCAS to trigger while flying at lower speeds.²²⁷ Instead, Boeing characterized

²¹⁹ *Marchand*, 212 A.3d at 810 (describing the FDA's role in regulating Blue Bell); see also Raso, *supra* note 213 (describing Boeing's FAA compliance requirements).

²²⁰ Compare *Marchand*, 212 A.3d at 809 ("Blue Bell can only thrive if its consumers enjoyed its products and were confident that its products were safe to eat."), with Verified Amended Consolidated Complaint, *supra* note 19, at 24 (describing 737 MAX safety as integral to the product's success).

²²¹ See *Marchand*, 212 A.3d at 809 (explaining the relevance of compliance with the FDA as important to consumer confidence in the product); *Aircraft*, FED. AVIATION ADMIN., <https://www.faa.gov/aircraft/> [<https://perma.cc/9B9F-HAAF>] (noting the purpose of the FAA's certification process).

²²² Raso, *supra* note 213 (discussing the FAA's delegation of certification tasks to Boeing); see *Aviation Safety (AVS)*, FED. AVIATION ADMIN., https://www.faa.gov/about/office_org/headquarters_offices/avs/ [<https://perma.cc/P7K9-2ZDL>] (explaining the FAA's responsibility for certifying "all operational and maintenance enterprises in domestic civil aviation" and "safety oversight").

²²³ *Aircraft*, *supra* note 221.

²²⁴ Press Release, Ian Gregor, Fed. Aviation Admin., Boeing to Pay \$6.6 Million in Penalties to FAA (Feb. 25, 2021), https://www.faa.gov/news/press_releases/news_story.cfm?newsId=25740 [<https://perma.cc/FLG5-RNF9>].

²²⁵ See *id.* The FAA imposed penalties under the 2015 agreement after asserting that the "company managers did not sufficiently prioritize compliance with FAA regulations." *Id.*

²²⁶ Verified Amended Consolidated Complaint, *supra* note 19, at 6 (remarking on Boeing's mischaracterization of how the MCAS operated in the 737 MAX planes).

²²⁷ *Id.* In January 2021, Boeing agreed to pay more than \$2.5 billion dollars to settle the Department of Justice's criminal charge of conspiracy to commit fraud against the FAA during the FAA's evaluation of the 737 MAX aircrafts. Press Release, Dep't of Just., Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay Over \$2.5 Billion (Jan. 7, 2021), <https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion> [<https://perma.cc/2SPF->

the MCAS as similar to an already-existing Boeing commercial plane, seeking expedited FAA approval.²²⁸ The fact that the FAA gave the certification, however, does not make the necessity of ensuring the corporation adhered to FAA regulatory requirements any less obvious.²²⁹ The 2015 settlement agreement, combined with the requisite FAA certification, offer strong evidence that complying with oversight obligations was essential to the success of the 737 MAX planes.²³⁰ Consequently, the court could infer that the directors knew of their oversight obligations.²³¹

2. Whether Boeing Meets the Monoline Prong of *Marchand v. Barnhill*

The court's analysis regarding whether Boeing's organization constitutes a monoline corporation will likely be a closer issue and pivotal to resolving whether the court will dismiss the complaint.²³² The 737 MAX constituted almost 70% of Boeing's backlogged orders worth more than \$400 billion dollars.²³³ The commercial airplanes segment of Boeing depended on the 737

5A2G]. Significant evidence leading to a deferred prosecution agreement included Boeing's admission to mislead and withhold information regarding the MCAS from the FAA. *Id.* A deferred prosecution agreement is when the prosecution charges a company with an offense, but if the subject of the prosecution complies with the agreement's terms, then the prosecution agrees to drop the charges in the future. LOUIS M. BROWN ET AL., *THE LEGAL AUDIT: CORPORATE INTERNAL INVESTIGATION* § 2:25.50 (2020).

²²⁸ Verified Amended Consolidated Complaint, *supra* note 19, at 7.

²²⁹ See *Marchand v. Barnhill*, 212 A.3d 805, 811, 824 (Del. 2019) (en banc) (explaining that the FDA reported food safety concerns to Blue Bell, but not factoring the FDA's awareness of the problem into the inference that directors breached their oversight duty). The Delaware Supreme Court in *Marchand* emphasized that complying with some regulations imposed by the regulator does not preclude successful pleadings of a *Caremark* claim. *Id.* at 823.

²³⁰ See Settlement Agreement Between the Federal Aviation Administration and the Boeing Company at 2, *In re the Boeing Co.* (Fed. Aviation Admin. Dec. 17, 2015) (affirming the importance of regulatory compliance); *Aircraft*, *supra* note 221 (explaining the FAA's role in certifying airplane safety).

²³¹ See Verified Amended Consolidated Complaint, *supra* note 19, at 57 (explaining Boeing's reliance on the 737 MAX planes to complete just under 70% of \$400 billion orders); see also *Marchand*, 212 A.3d at 822, 824 (describing food safety as so central that any oversight system made in good faith would monitor it as an essential compliance concern).

²³² See *General Information*, BOEING, <https://www.boeing.com/company/> [<https://perma.cc/B5RF-3Z8M>] (describing itself as an aerospace company providing different services, including "commercial and military aircraft, satellites, weapons, electronic, and defense systems, launch systems, advanced information and communication systems, and performance-based logistics and training"). Arguably, this description could mean that Boeing *is* monoline because it only provides aerospace products, or in the alternative, Boeing is arguably *not* monoline due to the differentiation of services. See *id.*; *infra* note 233 and accompanying text (explaining the four segments of Boeing).

²³³ Verified Amended Consolidated Complaint, *supra* note 19, at 57 (explaining that the 737 MAX comprised 4,000 of the 5,900 Boeing commercial planes ordered and awaiting production). Although Boeing's organization has four lines of business (i.e., commercial airplanes, defense, space, and security, global services, and capital financing solutions), the court will likely still deem Boeing a monoline corporation because Boeing almost exclusively produces aerospace equipment, including

MAX's success without question.²³⁴ The monoline nature of Blue Bell allowed the court in *Marchand* to conclude that compliance with the regulator was sufficiently mission critical to infer the board's knowledge of its obligation to monitor it.²³⁵ There are two ways to apply the monoline analysis in *Marchand* to Boeing.²³⁶ The first interpretation assumes that whenever a segment of a corporation's business *itself* is monoline, such that it focuses exclusively on one type of product, plaintiffs will more easily bring a *Caremark* claim against directors for failing to monitor compliance issues associated with that product.²³⁷ The second ignores the presence of multiple segments or products and instead considers whether a *particular product* Boeing offers is so essential to the business that compliance issues with respect to that product become mission critical for the corporation, regardless of its other lines of business.²³⁸ The Delaware courts' previous hesitation to find sufficiently alleged *Caremark* claims can offer insight into which of these interpretations will most likely apply.²³⁹

The first interpretation would transform the historically difficult *Caremark* claim because it could apply whenever one product or type of product constitutes a large percentage of a segment of a corporation's business.²⁴⁰ Although this interpretation is credible based on the language of *Marchand*, it is

commercial and military aircraft and other related services. *See id.* at 11; *General Information*, *supra* note 232.

²³⁴ Verified Amended Consolidated Complaint, *supra* note 19, at 56–57; *see* Public Version of the Verified Stockholder Derivative Complaint, *supra* note 17, at 11 (“[T]he 737 MAX series of aircraft is the primary profit-driver of Boeing’s Commercial Aircraft segment for the foreseeable future”); *supra* note 233 and accompanying text (explaining that when a company has one significant product, it supports an inference of the board’s knowledge).

²³⁵ *See Marchand*, 212 A.3d at 809 (defining Blue Bell as monoline because it makes a *single product*); *Inter-mktg. Grp. USA, Inc. v. Armstrong*, No. 2017-0030, 2020 WL 756965, at *11, *15 (Del. Ch. Jan. 31, 2020) (holding that pipeline integrity constituted a “mission-critical objective” even though the company operated three lines of business); *In re Clovis Oncology, Inc. Derivative Litig.*, No. 2017-0222, 2019 WL 4850188, at *1 (Del. Ch. Oct. 1, 2019) (describing Roci as the most promising drug “among [Clovis’s] drugs under development”).

²³⁶ *See Marchand*, 212 A.3d at 809 (describing Blue Bell as monoline).

²³⁷ *See id.* (relying on the role of one product within a corporation’s business to infer a critical compliance concern).

²³⁸ *See Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou*, C.A. No. 2019-0816, 2020 WL 5028065, at *18 (Del. Ch. Aug. 24, 2020) (denying the defendants’ motion to dismiss pursuant to *Marchand* despite the corporation’s increased complexity compared to Blue Bell and Clovis); *In re Clovis*, 2019 WL 4850188, at *1 (applying the monoline descriptor because one drug showed the most promise for the corporation even though the company was also developing other drugs).

²³⁹ *See Haugh*, *supra* note 6, at 613 (explaining the Delaware Supreme Court’s recognition of *Caremark* claims as one of the most difficult claims for an allegation of a breach of a fiduciary duty); Mitchell, *supra* note 6, at 248–49 (describing the challenges of asserting a *Caremark* claim).

²⁴⁰ *See Marchand*, 212 A.3d at 809 (inferring knowledge of a duty from Blue Bell’s monoline structure); Verified Amended Consolidated Complaint, *supra* note 19, at 56–57 (noting the significance of the 737 MAX for Boeing’s Commercial Aircraft segment and overall revenue).

unlikely.²⁴¹ The court readily inferred intent in *Marchand* because Blue Bell's singular product focus—ice cream—meant that food safety was so obvious that the board should have known to monitor it.²⁴² Corporations often organize based on different product lines.²⁴³ For example, Boeing describes itself as an aerospace company providing different services, including planes for commercial and military purposes, satellites, and defense services.²⁴⁴ With this organization, each segment inherently becomes monoline.²⁴⁵ If these segments were sufficiently monoline to satisfy *Marchand*, then plaintiffs may successfully allege a *Caremark* claim wherever a corporation organizes itself by product lines.²⁴⁶

The monoline descriptor in the second interpretation considers the significance of one product to the corporation generally, despite the corporation's other segments.²⁴⁷ Although this interpretation makes pleading *Caremark* claims more difficult when suing multi-faceted corporations, limiting *Marchand* in this manner is more consistent with courts' typical dismissal of *Caremark* claims.²⁴⁸

²⁴¹ See *Marchand*, 212 A.3d at 809 (emphasizing the court's identification of food safety as Blue Bell's essential compliance concerns). Relying on the presence of essential compliance concerns rather than the fact that Blue Bell sells one type of product would allow the court in *Boeing* to interpret *Marchand* to allow a knowledge inference wherever a corporation has an essential compliance concern. *Id.* The *Boeing* Complaint specifically pleads that plane safety is "mission critical" to Boeing. Verified Amended Consolidated Complaint, *supra* note 19, at 24, 79–80.

²⁴² *Marchand*, 212 A.3d at 809.

²⁴³ *Corporate Structure*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/knowledge/finance/corporate-structure/> [<https://perma.cc/6LHS-E3ZD>]; Arthur H. Walker & Jay W. Lorsch, *Organizational Choice: Product v. Function*, HARV. BUS. REV. (Nov. 1968), <https://hbr.org/1968/11/organizational-choice-product-vs-function> [<https://perma.cc/5NBK-6D4X>].

²⁴⁴ See *General Information*, *supra* note 232 (listing the services Boeing provides).

²⁴⁵ See *supra* note 156 and accompanying text (defining monoline).

²⁴⁶ See *Marchand*, 212 A.3d at 809 (explaining that food safety was Blue Bell's primary compliance concern because Blue Bell only produced a food product).

²⁴⁷ See *Inter-mktg. Grp. USA, Inc. v. Armstrong*, No. 2017-0030, 2020 WL 756965, at *15 (Del. Ch. Jan. 31, 2020) (demonstrating an interpretation of monoline that focuses on the importance of one product within a corporation by identifying pipeline integrity as an essential compliance concern despite a more complex corporate structure); *In re Clovis Oncology, Inc. Derivative Litig.*, No. 2017-0222, 2019 WL 4850188, at *1 (Del. Ch. Oct. 1, 2019) (noting that the potential of one drug was enough to create an essential compliance concern despite the ongoing development of other drugs).

²⁴⁸ See *Marchand*, 212 A.3d at 809 (describing Blue Bell as monoline because it sells only one product—custard-based foods); *In re Clovis*, 2019 WL 4850188, at *1 (explaining that Roci is the drug that showed the most promise out of all Clovis products). *But see* Public Version of the Verified Stockholder Derivative Complaint, *supra* note 17, at 11 (describing the 737 MAX as critical to the success of Boeing's commercial airlines segment, but not addressing its importance across Boeing more generally). After the benefit of records requests, the *Boeing* Complaint more effectively captured the importance of the 737 MAX to Boeing overall by explaining the significance of the commercial airplanes segment. See Verified Amended Consolidated Complaint, *supra* note 19, at 56–57 (emphasizing that "80% of [Boeing's] annual net earnings" stemmed from commercial airplanes, and noting that the 737 MAX contributed to a huge percent of the commercial airplanes segment earnings); see also *Marchand*, 212 A.3d at 824 (acknowledging commentators' desire to broaden a *Caremark* claim's reach).

Due to the significance of the 737 MAX to Boeing, generally, a court applying the second interpretation will likely find that Boeing is monoline, despite the corporation's other segments.²⁴⁹ Although ice cream was the basis of all of Blue Bell's products in *Marchand*, the 737 MAX comprised 4,000 of the 5,900 backlogged jetliner orders.²⁵⁰ Additionally, the application of *Marchand* in *In re Clovis* supports the interpretation of the monoline qualifier to not preclude corporations with other products in development.²⁵¹ The lung cancer drug in *In re Clovis* showed the most promise of all drugs in Clovis's pipeline, and the ongoing clinical trial actively elevated the importance of compliance with FDA regulations for the product to move forward.²⁵² Similarly, Boeing's commercial airplanes division comprised approximately 80% of the company's annual net earnings, such that the 737 MAX's projected contribution of 70% of the backlogged orders within this division made the 737 MAX an extremely promising product for Boeing.²⁵³ The importance of the 737 MAX to Boeing coupled with the obvious necessity of complying with Boeing's primary regulator—the FAA—suggest that the 737 MAX's safety was so essential to Boeing's overall success that the court should find that the board knew of its duty to oversee its safety compliance.²⁵⁴

3. Conclusions After Determining That Boeing Meets Both *Marchand v. Barnhill* Prongs

Finding that Boeing satisfies the monoline requirement articulated in *Marchand* would empower the court to acknowledge that the board not only

²⁴⁹ See Verified Amended Consolidated Complaint, *supra* note 19, at 56–57 (explaining the role of the Commercial Airplanes segment within Boeing's business structure); see also *Inter-mktg. Grp.*, 2020 WL 756965, at *15 (reasoning that pipeline integrity was an essential compliance concern).

²⁵⁰ Compare *Marchand*, 212 A.3d at 809 (emphasizing that Blue Bell sold one type of product), with Verified Amended Consolidated Complaint, *supra* note 19, at 56–57 (noting that the 737 MAX orders increased to 5,000 after its launch, comprising the majority of Boeing aircraft orders).

²⁵¹ *In re Clovis*, 2019 WL 4850188, at *1 (noting the existence of other drugs in development at Clovis, but identifying Roci as the drug showing the most promise). The *In re Clovis* opinion does not provide information regarding the position of other Clovis drugs within the drug development pipeline, but the court focused on Roci because it showed that the corporation's success depended on it. *Id.*; see also *Pipeline Overview*, CLOVIS ONCOLOGY, <https://clovisoncology.com/pipeline/pipeline-overview/> [<https://perma.cc/8H9S-CEGY>] (listing multiple Clovis products).

²⁵² *In re Clovis*, 2019 WL 4850188, at *1, *12–13 (emphasizing the importance of directors' oversight of "regulatory compliance risk" in addition to business risk, especially where the corporation operates in an industry with regulations governing "'mission critical' operations" (quoting *Marchand*, 212 A3d at 824)).

²⁵³ Verified Amended Consolidated Complaint, *supra* note 19, at 56–57; *supra* note 248 and accompanying text (explaining how a corporation with multiple segments can still satisfy the monoline requirement).

²⁵⁴ See Verified Amended Consolidated Complaint, *supra* note 19, at 56–57 (describing the importance of the 737 MAX to Boeing's commercial aircraft line of business); *Aviation Safety*, *supra* note 222 (articulating the FAA's safety requirements).

must meet the oversight requirements established in *In re Caremark* but also must meet the more onerous burden of being aware of compliance risks.²⁵⁵ After meeting the monoline requirement, the plaintiffs in *In re the Boeing Co.* can more easily prove that the board failed to pay the special attention to safety compliance that the corporation's monoline business requires.²⁵⁶ For example, the complaint detailed that the board's records showed no evidence of an emergency meeting concerning the first crash, a substantive safety discussion, or a committee tasked with specific oversight concerns.²⁵⁷ The complaint further alleged that Boeing's board created its first committee dedicated to overseeing the safe design, production, and maintenance of commercial aircraft after the two 737 MAX crashes.²⁵⁸

When considering *In re the Boeing Co.* in the context of *Marchand* and *In re Clovis*, the Boeing board will likely have difficulty defending its alleged oversight failures.²⁵⁹ In *Marchand*, the FDA reports of food safety issues sufficiently constituted warning signs that the board should pay special attention to a compliance issue central to its products' success.²⁶⁰ Similarly, in *In re Clovis*, the court concluded that the clinical trial's reliance on unconfirmed responses, despite the FDA requirement to rely exclusively on confirmed responses, sufficiently demonstrated the board's ignorance of red flags.²⁶¹ Boeing not only had more than two hundred incident reports concerning the MCAS software, but it also had a plane crash in which 189 people died.²⁶² It is difficult to imagine a

²⁵⁵ See *In re Clovis*, 2019 WL 4850188, at *13 (analyzing *Marchand* to mean directors' good faith effort to institute a monitoring system must include being "sensitiv[e]" to critical compliance concerns).

²⁵⁶ See Verified Amended Consolidated Complaint, *supra* note 19, at 50, 88 (alleging that Boeing's board considered profitability of the 737 MAX only during development and after the first crash); see also *In re Clovis*, 2019 WL 4850188, at *12–13 (describing the more onerous oversight requirements corporations must follow after *Marchand*).

²⁵⁷ Verified Amended Consolidated Complaint, *supra* note 19, at 29–31, 50, 88, 102.

²⁵⁸ *Id.* at 29–31; Phil LeBeau, *Boeing Adds Safety Committee, Considers Changes to Airplane Development*, CNBC, <https://www.cnbc.com/2019/09/25/boeing-adds-safety-committee-considers-changes-to-plane-development.html> [<https://perma.cc/RA4R-89WZ>] (Sept. 25, 2019).

²⁵⁹ See *Marchand v. Barnhill*, 212 A.3d 805, 809 (Del. 2019) (en banc) (holding that directors knowingly disregarded a duty when the oversight responsibility entailed essential compliance requirements); *In re Clovis*, 2019 WL 4850188, at *1 (categorizing *Clovis* as similar to *Blue Bell*, such that the directors' disregard of their oversight duty was conscious); Verified Amended Consolidated Complaint, *supra* note 19, at 56–57 (alleging that the 737 MAX is significant to Boeing's success).

²⁶⁰ 212 A.3d at 809 (explaining that management knew of "yellow and red flags about food safety").

²⁶¹ 2019 WL 4850188, at *5 (acknowledging that *Clovis*'s board knew that the FDA would not accept unconfirmed responses).

²⁶² Verified Amended Consolidated Complaint, *supra* note 19, at 43, 60; Public Version of the Verified Stockholder Derivative Complaint, *supra* note 17, at 2 (describing the first plane crash as "the biggest red flag an airline manufacturer can face"); see *Gates*, *supra* note 212 (revealing that Boeing knew a sensor warning light was not working); *supra* note 212 and accompanying text (describing the importance of the AOA sensors in relation to the MCAS and the safety of the 737 MAX).

more obvious red flag signaling a safety problem.²⁶³ Consequently, assuming that the court determines Boeing fits the monoline descriptor identified in *Marchand*, the court will likely find that the directors face substantial likelihood of liability for a breach of their oversight responsibility and deny the company's motion to dismiss.²⁶⁴

C. Assessing the Strength of a Caremark Claim Post-Marchand v. Barnhill

Two stages of analysis are important to assessing the likelihood of a *Caremark* claim's success.²⁶⁵ The corporation must first meet the two threshold requirements established in *Marchand*: (1) a monoline business, that is (2) subject to a primary regulator in a heavily regulated industry.²⁶⁶ If the company fits within these parameters, the court can then infer that the board knew of its oversight obligations because such obligations are essential for the business to succeed.²⁶⁷ This inference then facilitates plaintiffs' survival of a motion to dismiss where directors do not react to red flags indicating potential failure of

²⁶³ See Verified Amended Consolidated Complaint, *supra* note 19, at 113 (remarking on the directors' failure to explore safety concerns after the first 737 MAX crash); see Patricia DiCarlo et al., *Boeing Knew About Problems with the 737 Max the Year Before Lion Air Crash and Did Nothing About Them*, CNN, <https://www.cnn.com/2019/05/05/us/boeing-737-max-disagree-alert/index.html> [<https://perma.cc/R4AB-2HYE>] (May 7, 2019) (highlighting Boeing's knowledge of the alert system failure); David Gelles & Natalie Kitroeff, *Before Ethiopian Crash, Boeing Resisted Pilots' Calls for Aggressive Steps on 737 Max*, N.Y. TIMES (May 14, 2019), <https://www.nytimes.com/2019/05/14/business/boeing-737-max-ethiopian-plane-crash.html> [<https://perma.cc/B84E-L9EL>]; Andrew Tangel & Andy Pasztor, *Regulators Found High Risk of Emergency After First Boeing MAX Crash*, WALL ST. J., <https://www.wsj.com/articles/regulators-found-high-risk-of-emergency-after-first-boeing-max-crash-11564565521> [<https://perma.cc/FB7Q-ZBUA>] (July 31, 2019) (showing that the FAA considered the first crash a strong warning sign).

²⁶⁴ *Marchand*, 212 A.3d at 809 (relying on Blue Bell's monoline nature to find consciousness of the duty of oversight). In 1993, the Delaware Supreme Court in *Rales v. Blasband* explained that if a majority of the board faces substantial likelihood of liability for a breach of duty of fiduciary duty, including the duty of oversight, a plaintiff can defeat a motion to dismiss pursuant to the Delaware Court of Chancery Rule 23.1. DEL. CH. CT. R. 23.1; *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993); see *supra* note 47 and accompanying text (explaining defendants' ability to seek dismissal of the derivative action for the plaintiff's failure to make a demand on the board).

²⁶⁵ See *Marchand*, 212 A.3d at 810, 824 (explaining that Blue Bell's monoline business combined with the FDA's presence as a regulator led to a well-pled *Caremark* claim); *In re Clovis*, 2019 WL 4850188, at *1 (noting that directors' oversight responsibility is extremely relevant where a monoline business must comply with the industry's regulators). See generally *supra* notes 156–190 and accompanying text (explaining the significance of a monoline business model and government regulators in *Marchand*); *supra* notes 197–207 and accompanying text (discussing the limits of *Marchand*).

²⁶⁶ See *Marchand*, 212 A.3d at 810, 824 (inferring intent because Blue Bell only produced ice cream and the FDA regulated Blue Bell). See generally *supra* notes 156–190 and accompanying text (emphasizing Blue Bell's focus on one product and the external regulators overseeing its business).

²⁶⁷ See generally *supra* notes 156–190 and accompanying text (arguing that without Blue Bell's monoline business structure and relationship with the FDA, the court in *Marchand* may have been less willing to infer the intent necessary to establish a breach of good faith).

regulatory compliance.²⁶⁸ As a result of this inference, the court can assume the board consciously acted with such disregard.²⁶⁹ After analyzing *Marchand* as it applied in *In re Clovis* and will likely apply in *In re the Boeing Co.*, the following factors are critical in determining whether a claim has the criteria to allege a (1) monoline corporation, (2) in a heavily regulated industry, and (3) directors' failure of oversight.²⁷⁰

First, a corporation will likely meet the monoline parameters outlined in *Marchand* if it produces one type of product.²⁷¹ Additionally, where one product's success is so critical for the corporation's business model that the court can infer that the board *knew* meeting the product's regulatory requirements was necessary for the business's future, the corporation will likely meet monoline as described in *Marchand*.²⁷² Second, when one, primary, external regulator imposes those regulatory requirements, the court will likely find that the corporation is in a heavily regulated industry.²⁷³ Finally, assuming the corporation meets both the monoline and heavily regulated prongs, if the plaintiffs allege that the board ignored warning signs about the product's failure to meet regulatory requirements, then the complaint will likely survive a motion to dismiss.²⁷⁴

CONCLUSION

Through emphasizing Blue Bell Creameries USA, Inc.'s (Blue Bell) monoline business model, the Delaware Supreme Court found a way to infer intent and find a breach of the directors' duty to exercise oversight responsibilities in good faith. The good faith requirement was necessary for the *Marchand v. Barnhill* 2019 decision despite the Delaware courts' explicit treatment of good faith as a subsidiary element of the duty of loyalty. Good faith allowed the court to factor in egregiousness of conduct—conduct so obviously opposed to the stockholders' interest that exculpation of directors can-

²⁶⁸ See *Marchand*, 212 A.3d at 824 (identifying food safety as essential to Blue Bell's business); see also *id.* at 822 (suggesting that as long as the court can infer that a board made no effort to inform themselves of essential compliance concerns, the court can allow an allegation that a board did not act in good faith to survive a motion to dismiss); see *supra* note 56–76 and accompanying text (describing good faith).

²⁶⁹ See *Marchand*, 212 A.3d at 822 (explaining that a monoline business subject to an external regulator implies the board's knowledge of the regulatory requirements, specifically that the board consciously disregarded warning signs about compliance failures).

²⁷⁰ See *supra* notes 156–190 and accompanying text (establishing the requirements for a well-pled failure of oversight claim); *supra* notes 219–264 and accompanying text (same).

²⁷¹ See *Marchand*, 212 A.3d at 809 (establishing Blue Bell as a monoline company because it makes one product).

²⁷² See *supra* notes 232–254 and accompanying text (discussing monoline as applied to Boeing).

²⁷³ See *Marchand*, 212 A.3d at 810 (discussing the relevance of the FDA's regulation of Blue Bell).

²⁷⁴ See *id.* at 810, 824 (finding a well-pled *Caremark* claim because Blue Bell is monoline and heavily regulated by the FDA).

not stand. The Delaware court in *Marchand* imputed this culpability by emphasizing Blue Bell's monoline structure, concluding that the board implicitly knew the essential role food safety played in the corporation's success. Both *Marchand* and *In re Clovis Oncology, Inc. Derivative Litigation* involved industries capable of causing irreparable harm if not properly regulated by the U.S. Food and Drug Administration. Whether a corporation is monoline and heavily regulated informs how a court identifies mission critical compliance concerns and can in turn infer the board's conscious disregard of a known duty. The court's willingness to provide more access to successful *Caremark* claims in these circumstances served to enforce directors' duty of oversight more effectively without risking the protection of corporate innovation the business judgment presumption affords.

Blue Bell's *Listeria* crisis resulted in fatalities that undoubtedly devastated families. *Marchand* cannot bring those individuals back, but these losses led to a change in Delaware courts' understanding of directors' fiduciary duty of oversight that will hopefully save lives in the future. Through *Marchand*, the Delaware Supreme Court recognized that some corporations should be more sensitive to overseeing their compliance obligations. The tragic death of 346 people in a six-month period made the importance of effective oversight of the safety of The Boeing Company's aircraft clear. Texans can be proud of Blue Bell again because *Marchand* not only laid a foundation for the derivative action in *In re the Boeing Co. Derivative Litigation* to survive pre-trial dismissal, but it also identified factors essential to a strong *Caremark* claim. Where a corporation is monoline and subject to one primary external regulator, directors are on notice that their shareholders, and consumers more generally, rely on their oversight of essential compliance concerns.

KATHERINE M. KING