Tulsa Law Review

Volume 59 | Number 1

Winter 2024

Garfield v. Allen: The Cat is Out of the Bag

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Recommended Citation
K. M. Wilson Corley, *Garfield v. Allen: The Cat is Out of the Bag*, 59 Tulsa L. Rev. 169 (2024).

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I. INTRODUCTION

"I want to break free/ I want to break free/ I want to break free from your lies/ You're so self-satisfied/ I don't need you/ I've got to break free."[1] Released in 1984, Queen's song "I Want to Break Free" captures the frustrated feelings of today's public corporations regarding their least favorite corporate actor—professional plaintiffs. Professional plaintiffs "own a nominal number of shares in a wide array of public companies[,] permit[ting] lawyers [to] readily . . . file abusive securities . . . lawsuits."[2] In this manner, professional plaintiffs constitute both the clients, who own the corporation's shares, and their lawyers, who facilitate these suits in an effort to win substantial attorney's fees.[3] While some argue that professional plaintiffs represent the unsung heroes of corporate regulatory enforcement, the judiciary generally regards professional plaintiffs as nuisances or, in the words of one federal district court judge, "rapacious jackals whose declared concern for the corporate well-being camouflages their unwholesome appetite for corporate dollars."[4]

Unlike children, who eagerly anticipate the day when they free themselves of parental oversight to enjoy wild success (and at least some failure), public corporations will never fully "break free" of professional plaintiffs' oversight.[5] Rather, while public corporations may look forward to the day that professional plaintiffs cannot *so easily* reap benefits from their misuse of the judiciary, that day has not yet arrived.[6] In fact, a May 2022 Delaware Court of Chancery decision further opens the door for professional plaintiffs.[7] In *Garfield v. Allen*, the court held that a plaintiff could proceed on a novel breach of fiduciary duty theory that may encourage professional plaintiffs to file unnecessary derivative actions, impair the ability of public company board of directors to perform their fiduciary duties, and threaten Delaware's status as corporate America's favorite state of incorporation.[8]

In this Note, Part II explores how shareholders—particularly professional plaintiffs—bring derivative claims on behalf of the corporations in which they nominally invest.[9] This part discusses the similarities and differences between Federal Rule Civil Procedure 23.1 and Delaware Court of Chancery Rule 23.1.[10] It then highlights the impact of *Griffith v. Stein's* holding on the Delaware Court of Chancery's interpretation of Delaware Court of Chancery Rule 23.1, including the newly abrogated adequacy requirement for derivative shareholder actions.[11] Although this recent holding, paired with the holding in *Garfield*, may suggest a general trend of shareholder derivative actions decided in favor of the plaintiff, *In re Trulia* demonstrates a willingness by the Delaware Court of Chancery

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1. Queen, *I Want to Break Free*, GENIUS, https://genius.com/Queen-i-want-to-break-free-lyrics (last visited Nov. 17, 2023).
2. H.R. REP. No. 104–369, at 32 (1995).
3. Sean J. Griffith, *Frequent Filer Shareholder Suits in the Wake of Trulia: An Empirical Study*, 2020 WIS. L. REV. 443, 443 (2020).
4. Brandon Murrill, *The Business of Suing: Determining When a Professional Plaintiff Should Have Standing to Bring a Private Enforcement Action*, 52 WM. & MARY L. REV. 261, 263 (2010); Brown v. Hart, 96 F.R.D. 64, 67 (N.D. Ill. 1982).
5. *See* DEL. CT. CH. R. 23.1 (providing the Delaware Court of Chancery Rule for bringing derivative securities actions).
6. *See* Garfield v. Allen, 277 A.3d 296 (Del. Ch. 2022).
7. *See id.*
8. *See id.* at 305.
9. *See infra* Part II.
10. *See infra* Part II; FED. R. CIV. P. 23.1; DEL. CT. CH. R. 23.1.
11. *See infra* Part II; Griffith v. Stein, 283 A.3d 1124, 1138–39 (Del. 2022).

to protect shareholders and corporations from professional plaintiffs.[12] Finally, this part establishes a foundational understanding of the legal relationship between shareholders and board of directors through the lens of *Pfeiffer v. Leedle*.[13]

Part III details the novel holding in *Garfield*.[14] In that case, the court held that a board of directors' decision not to capitulate to a shareholder's demand letter may create an actionable claim for breach of fiduciary duty.[15] Because this new claim is born from the shareholder's demand letter, it provides the basis for its own suit completely separate from the "wrong" alleged in the letter.[16] In reaching this conclusion, the court acknowledged two potential policy implications of its decision.[17] First, the decision creates a statute of limitations loophole.[18] Second, the decision expands the reach of plaintiffs pursuing a claim from only those directors responsible for the violation to all directors sitting on the board at the time the demand letter is received and rejected.[19] The court addressed these concerns by warning other courts that similar holdings should be approached with caution and assuring readers that other judges would be able to discern legitimate plaintiffs from those seeking to abuse this novel claim.[20] However, as with any other novel theory, the cat is out of the bag. Consequently, the *Garfield* holding will likely embolden professional plaintiffs to bring derivative shareholder actions based on a board's failure to make changes detailed in a shareholder's demand letter.

Part IV considers this decision's policy implications as they pertain to the frequency of professional plaintiff claims, the directors' ability to exercise their legally vested discretion in carrying out their fiduciary duties, and the potential impact of a corporate perception that the Delaware courts are becoming overly friendly venues for professional plaintiffs.[21]

II. THE BAG: A DUMMY'S GUIDE TO DERIVATIVE ACTIONS

Delaware Court of Chancery Rule 23.1 ("Delaware Rule 23.1") allows shareholders to bring derivative claims against a corporation's directors on behalf of the corporation.[22] Under the procedure provided in Delaware Rule 23.1, professional plaintiffs, who use their holding in a corporation's stock to earn money through derivative actions based on the benefit they confer to the corporation through the action,[23] file claims on behalf of the corporation and its shareholders.[24] Recognizing the prevalence of professional plaintiffs in the Delaware court system, the Delaware Court of Chancery has previously demonstrated its willingness to restrain professional plaintiffs' profitability in bringing certain breach of fiduciary duty claims where the professional plaintiffs act in their sole interests.[25]

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12. *See In re* Trulia, Inc., 129 A.3d 884 (Del. Ch. 2016).
13. *See infra* Part II; Pfeiffer v. Leedle, C.A. No. 7831–VCP, 2013 WL 5988416, at *3 (Del. Ch. Nov. 8, 2013).
14. *See infra* Part III; Garfield v. Allen, 277 A.3d 296, 336 (Del. Ch. 2022).
15. *See Garfield*, 277 A.3d 296 at 336.
16. *Id.* at 338–39.
17. *Id.*
18. *Id.* at 306, 338.
19. *Id.* at 306, 338–39.
20. *Garfield*, 277 A.3d at 306, 338.
21. *See infra* Part IV.
22. DEL. CT. CH. R. 23.1. *E.g., Pfeiffer*, 2013 WL 5988416, at *3.
23. *See* Griffith v. Stein, 283 A.3d 1124, 1132 (Del. 2022) (providing an example of the court awarding professional plaintiffs fees for the benefit they provided the company in bringing the action).
24. *E.g., id.* at 1127–28.
25. Alison Frankel, *The SEC Is the Most Prolific Securities Plaintiff in the U.S. This Woman Is Second*, WESTLAW TODAY (Apr. 30, 2021), https://today.westlaw.com/Docu-

However, the complex relationship between a corporation's board of directors and its shareholders provides ample ammunition for professional plaintiffs to continue pursuing actions for their benefit, rather than that of the corporations they purport to represent.[26]

A. Delaware Court of Chancery Rule 23.1 Provides an Easier Avenue for Professional Plaintiffs to Bring Derivative Actions Than the Rule's Federal Counterpart

Delaware law entrusts a corporation's board of directors to properly manage the corporation's litigation on the corporation's behalf.[27] However, shareholders may bring derivative actions, effectively overriding the directors' managerial discretion under Delaware Rule 23.1.[28] Under this rule, if a corporation fails to "enforce a right" which it could have properly asserted, "one or more shareholders [may] enforce [that] right of [the] corporation . . ." through a derivative action.[29] In other words, shareholder derivative actions allow shareholders to bring claims on behalf of corporations and against the corporations' directors.[30] Common bases for lucrative shareholder derivative actions include board-level conflicts of interest, mergers and acquisitions diligence, and egregious conduct directed at consumers or employees.[31]

i. Federal Rule of Civil Procedure Rule 23.1

While a derivative shareholder claim may be brought in both the federal and state courts, the federal rule provides greater protections to shareholders and corporations compared to the Delaware Court of Chancery Rules of Court.[32] Under Federal Rule of Civil Procedure ("FRCP") 23.1, a shareholder bringing a derivative claim must "fairly and adequately represent the interests of shareholders . . . who are similarly situated in enforcing the right of the corporation . . . ."[33] FRCP 23.1 seeks to prevent the federal courts from serving as a venue for litigating "purchased grievance[s]" or becoming "a party to speculation in wrongs done to corporations."[34]

To further this policy, the rule places limitations on derivative claims.[35] For example, the rule requires court-approval of any settlements agreed to by the parties.[36] Additionally, the litigating parties must provide notice of the action's resolution to shareholders in the manner the court orders.[37] Finally, FRCP 23.1 requires that the shareholders bringing the derivative action adequately represent their shareholder class.[38]

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ment/I34770150a9f811eb92f58408ad581727/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true.

26. *E.g., Pfeiffer*, 2013 WL 5988416.
27. *Id.* at *3.
28. *Id.* (stating "[a]s derivative stockholder lawsuits abrogate the managerial prerogative of corporate directors, derivative plaintiffs are required to make a demand that the corporation's board of directors initiate the lawsuit on the corporation's behalf before the derivative plaintiffs can proceed with their action.").
29. DEL. CH. CT. R. 23.1(a).
30. *See id.*
31. Priya Cherian Huskins, *Five Types of Derivative Suits with Massive Settlements*, WOODRUFF SAWYER (Oct. 13, 2020), https://woodruffsawyer.com/do-notebook/five-derivative-suits-types-massive-settlements/.
32. *See* FED. R. CIV. P. 23.1; DEL. CH. CT. R. 23.1.
33. FED. R. CIV. P. 23.1 (providing the rule for derivative actions as opposed to FRCP 23, which provides the rule for class actions).
34. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 556 (1949).
35. *See* FED. R. CIV. P. 23.1.
36. FED. R. CIV. P. 23.1(c).
37. *Id.*
38. FED. R. CIV. P. 23.1(a); Griffith v. Stein, 283 A.3d 1124, 1137 (Del. 2022).

The federal adequacy requirement ensures that derivative plaintiffs qualify "to serve in a fiduciary capacity as a representative of a class, whose interest is dependent upon the representative's adequate and fair prosecution."[39] To determine whether a shareholder meets the adequacy requirement, federal courts may consider a variety of factors, including: (1) the plaintiff's status as the actual party in interest; (2) the plaintiff's familiarity and willingness to learn about the litigation; (3) the attorneys' control over the litigation; (4) the other shareholders' support of the plaintiff; and (5) the personal commitment of the representative plaintiff to the litigation.[40]

For example, when applying these factors, the Federal District Court for the District Delaware requires the plaintiff to meet two elements to satisfy the adequacy requirement.[41] First, the unnamed party's interests must be closely related to the representative plaintiff's interests, sharing common issues and interests.[42] Second, the court must determine that the representative plaintiff will '"put up a real fight.'"[43] The court considers this test to be "of crucial importance" because derivative actions may conclusively determine "the rights and interests of absent persons."[44] Yet, despite the clear importance federal courts place on the plaintiff's adequacy in derivative actions, the Supreme Court of Delaware recently abrogated its adequacy requirement.[45]

ii. Delaware Court of Chancery Rule 23.1 and the Abrogated Adequacy Requirement

Delaware Rule 23.1 historically placed generally the same adequacy requirements on derivative plaintiffs as the federal rule.[46] However, the Delaware Court of Chancery recently abrogated the rule's shareholder adequacy requirement in *Griffith v. Stein*.[47] Consequently, professional plaintiffs can now freely bring derivative suits in Delaware without having to prove they fairly represent their fellow shareholders' interests in bringing the suit. [48]

In *Griffith*, the Delaware Supreme Court determined that Delaware Rule 23.1 no longer requires the shareholders bringing derivative actions under the rule to adequately represent their class of shareholders.[49] This case arose out of a derivative, and direct, action brought by Shiva Stein ("Stein"), a "frequent filer" and professional plaintiff.[50] Stein alleged "excessive non-employee director compensation" by Goldman Sachs, the defendant.[51] She argued that Goldman's non-employee director compensation was "substantially more than that of the non-employee directors of the four U.S. peer companies that [Goldman had] identified in their 2015, 2016, and 2017 annual meeting proxy statements."[52]

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39. *Griffith*, 283 A.3d at 1138 (quoting Youngman v. Tahmoush, 457 A.2d 376, 379 (Del. Ch. 1983)).
40. Rothenberg v. Sec. Mgmt. Co., 667 F.2d 958, 961 (11th Cir. 1982).
41. Mayer v. Dev. Corp. of Am., 396 F. Supp. 917, 931 (D. Del. 1975).
42. *Id.*
43. *Id.* (quoting duPont v. Wyly, 61 F.R.D. 615, 622 (D. Del. 1973)).
44. *Id*. at 930.
45. Griffith v. Stein, 283 A.3d 1124, 1137-38 (Del. 2022).
46. *See* DEL. CH. CT. R. 23.1; *Griffith*, 283 A.3d at 1137-38 (explaining that, prior to the current case, the Court of Chancery implied an adequacy requirement under Delaware Rule of 23.1 based on the addition of an adequacy requirement to FRCP 23.1).
47. *Griffith*, 283 A.3d at 1138.
48. *See* DEL. CH. CT. R. 23.1; *Griffith*, 283 A.3d at 1138.
49. *Id.* at 1138-39.
50. *Id.* at 1127, 1137.
51. *Id.* at 1127.
52. *Id.*

Goldman and Stein eventually agreed to a settlement ("2018 Settlement"), which required approval by the court pursuant to Delaware Rule 23.1.[53] Under this settlement, Goldman and Stein agreed that Goldman would: (1) provide a drafted proxy disclosure to Stein's counsel related to the stock incentive plan at issue for review and comment by Stein's counsel prior to Goldman filing the disclosure with the SEC; (2) make a series of disclosures following the release of the proxy statement; and (3) provide assurance that it would continue to disclose certain director compensation practices.[54] These negotiated disclosures included statements that Goldman's non-employee director compensation ranked highest among its national peers and that the Good Faith Standard[55] governed the Goldman board's discretion to make stock incentive plan awards.[56] Further, the agreed-to-disclosures provided the classes of persons and number of persons in those classes eligible to participate in the stock incentive plan and the Tax Cuts and Jobs Act's expected impact on Goldman's named executive compensation plan.[57] In exchange for these disclosures, the 2018 Settlement awarded Stein $575,000.[58]

Unfortunately for Stein, Sean Griffith ("Griffith"), another Goldman shareholder, objected to the 2018 Settlement.[59] Griffith took issue with (1) the lack of monetary compensation awarded under the settlement given the compensation claim against Goldman, if successful, would have been worth eight million dollars, (2) the "intergalactic" release of future unknown, antitrust, and foreign claims against Goldman by shareholders, and (3) Stein's inadequacy to pursue claims on behalf of the corporation.[60] Essentially, Griffith did not believe the 2018 Settlement adequately addressed the wrong Goldman allegedly committed.[61] The Court of Chancery agreed with Griffith, holding that the settlement represented an exchange of Goldman's promise to undertake certain acts of "corporate hygiene" for Stein voiding potentially meritorious claims by other Goldman shareholders.[62]

Ultimately, the Chancery Court accepted a new proposed settlement ("2020 Settlement") between Stein and Goldman, which reduced the compensation for the directors moving forward and changed Goldman's practices, including the review of director compensation.[63] While Stein originally requested an award of $1.5 million, the Court of Chancery awarded Stein $612,500 for the benefit she provided Goldman in bringing the litigation.[64] The Chancery Court additionally awarded Griffith $100,000 for the benefit he provided to Goldman by objecting to the original settlement.[65] Notably, the 2020 Settlement included "forward-looking reforms," releasing Goldman from future claims regarding non-employee director compensation into 2024.[66]

However, on appeal, the Supreme Court of Delaware rejected the 2020 Settlement and remanded the case, recognizing that the settlement represented the interests of

53. *Griffith*, 283 A.3d at 1226–128; DEL. CT. CH. R. 23.1(c).
54. *Griffith*, 283 A.3d at 1128.
55. Fox v. CDX Holdings, Inc., C.A. No. 8031–VCL, 2015 WL 4571398, at *25 (Del. Ch. 2015) (stating that under the Good Faith Standard, "the Administrator must believe subjectively in the Fair Market Value it has selected.").
56. *Griffith*, 283 A.3d at 1128.
57. *Id.*
58. Pl.'s Br. in Supp. of Mot. for Approval of Proposed Settlement and Appl. for an Award of Atty's' Fees & Expenses, Stein v. Blankfein, No. 2017-0354-SG, 2018 WL 2446201, 25 (May 25, 2018).
59. *Griffith*, 283 A.3d at 1128.
60. *Id.*
61. *Id.*
62. *See id.* at 1128–29.
63. *Id.* at 1130–31.
64. *Griffith*, 283 A.3d at 1132.
65. *Id.*
66. *Id.* at 1131, 1137.

Stein, not the Goldman shareholders.[67] Stein had agreed to an overly broad release of future claims.[68] To comply with the Fourteenth Amendment's Due Process protections, a settlement agreement cannot release claims based on "operative facts that will occur in the future."[69] This Due Process requirement arises out of an acknowledgment that the parties' interests in a derivative action often diverge.[70] For example, attorneys representing shareholders may possess "different incentives for settling the litigation rather than litigating claims to the end," and defendants are motivated to reach the broadest possible settlement agreement.[71] Given these divergent interests and the nature of representative litigation, which often includes a release of all other claims related to the action that bind the corporation and its shareholders, courts must ensure that the settlement represents the interests of the derivative class.[72] This Due Process requirement ensures that the settlement is not so overly broad that it violates the absent shareholders' interests.[73] Thus, because the Chancery Court settlement included an overly broad release of future claims, the Delaware Supreme Court rejected the 2020 Settlement.[74]

While the Court rightfully rejected the 2020 Settlement, it simultaneously eliminated a well-recognized protective measure—the adequacy requirement.[75] By removing the adequacy requirement, the Court permitted Stein to proceed on her claim on behalf of Goldman despite finding that she failed to represent all shareholders' interests in settlement negotiations, evidenced by the two rejected settlements which served to compensate Goldman, through an overbroad release of claims, and Stein and her attorneys, through monetary fees, while only providing nominal reforms for the shareholders.[76] Notably, the Court appeared to recognize the potential problems its holding would pose, recommending the Court of Chancery Rules Committee consider amending the rules to add an adequacy requirement.[77] Thus, pursuant to the Delaware Supreme Court's holding in *Griffith*, Delaware Rule 23.1 allows an easier path to bringing shareholder derivative claims than its federal equivalent because the adequacy requirement is no longer recognized.[78]

B. Professional Plaintiffs File Derivative Claims to Earn Income, Rather Than Represent Their Shareholder Class Against Actual Wrongs Done by the Board of Directors, the Corporation's Officers, or Third Parties

Certain professional plaintiffs are considered "frequent filers" in the Delaware Courts.[79] These individuals frequently file derivative actions with the aim of generating revenue, rather than benefiting the corporation which they purport to represent.[80] *Griffith* provides one such example in Shiva Stein ("Stein").[81] According to a study conducted by Lex Machina, Stein ranks as the second-most prolific securities plaintiff in the United

67. *See id.* at 1133-37, 1138–39.
68. *Id.* at 1134–37.
69. *Griffith*, 283 A.3d at 1134 (quoting *In re* Phila. Stock Exch., Inc., 945 A.2d 1123, 1146 (Del. 2008)).
70. *Id.* at 1133–34.
71. *Id.* at 1133.
72. *Id.* at 1134.
73. *Id.* at 1134–37.
74. *Griffith*, 283 A.3d at 1137.
75. *Id.* at 1138–39.
76. *See generally id.*
77. *Id.* at 1139.
78. FED. R. CIV. P. 23.1; DEL. CT. CH. R. 23.1.
79. *E.g.*, *Griffith*, 283 A.3d at 1137.
80. *E.g.*, *id.*
81. *Id.*

States, filing 124 securities suits in federal court over a three-year period.[82] Comparatively, Stein beat the third-place Commodity Futures Trading Commission, which only filed eighty-five cases over the three years.[83] Lex Machina also noted that the frequency of Stein's filings have trended upwards in recent years and have been concentrated in Delaware and Manhattan.[84]

In *Griffith*, the lower court had originally awarded Stein over $600,000 for her efforts in bringing the action.[85] On average, Stein files a little over forty cases per year, though her pace has recently increased.[86] Assuming, for illustration purposes, that the courts on average award $400,000 to Stein, which constitutes over $200,000 less than what the lower court originally awarded Stein in *Griffith*,[87] her efforts could earn $4,000,000 on average per year even if she only wins twenty-five percent of these cases.[88] While Stein's attorneys likely take their share of this bounty, Stein could still enjoy considerable income from these pursuits.[89]

Conversely, Goldman and its shareholders would have suffered an over $700,000 loss between the awards to Stein and Griffith and any attorney's fees Goldman expended in creating the rejected settlements and fighting the litigation.[90] Further, Goldman and its shareholders lost the concentration and efforts of Goldman's board of directors, executives, and employees during the over four-year litigation which continues today.[91] Therefore, while this suit and other suits like it will likely benefit Stein and her attorneys, they will have the opposite effect on the corporations and shareholders Stein supposedly represents.

C. The Delaware Court of Chancery Has Previously Demonstrated Its Willingness to Impair Professional Plaintiffs' Profitability in Bringing Certain Claims

While Delaware has recently trended towards corporation-averse holdings, the Delaware Court of Chancery has demonstrated its willingness to impede needless litigation proliferated by professional plaintiffs.[92] In *In re Trulia*, the Delaware Court of Chancery "cracked down" on one specific form of professional plaintiff litigation—disclosure-only settlement cases.[93] These cases are triggered nearly anytime a corporation announces a

82. Frankel, *supra* note 25.
83. *Id.*
84. *Id.*
85. *Griffith*, 283 A.3d at 1132 (discussing the lower court's award in *Stein v. Blankfein*); *Stein v. Blankfein*, C.A. No. 2017-0354-SG, 2021 WL 2926169, at *2 (Del. Ct. Ch. July 12, 2021) (providing that the court granted "award fees pursuant to the corporate benefit doctrine"); *Garfield v. Boxed*, C.A. No. 2022-0132-MTZ, 2022 WL 17959766 (Del. Ct. Ch. Dec. 27, 2022) (explaining the corporate benefit doctrine, which "allows a party to recover fees and expenses from a corporation where that party conferred a substantial benefit upon the corporate enterprise or its stockholders").
86. Frankel, *supra* note 25 (stating that "Stein filed . . . 48 suits in both 2019 and 2020").
87. *Griffith*, 283 A.3d at 1132.
88. The $4,000,000 estimate is calculated by multiplying $400,000, the estimated average award, by forty, the estimated average number of cases she filed, and by twenty-five percent, the estimated rate of success. This paragraph serves an illustrative function. No available data on Stein exists from which her income could be definitively determined.
89. DEL. CT. CH. R. 23.1(e) (providing that "the [c]ourt may award reasonable attorney's fees and expenses to derivative counsel" and "may authorize derivative counsel to pay a reasonable award to a derivative plaintiff out of any award of attorney's fees"). *See e.g., Griffith,* 283 A.3d at 1132 (explaining that the lower court calculated Stein's award based on the corporate benefit doctrine).
90. *Griffith*, 283 A.3d at 1129, 32.
91. *See generally id.* (having rejected the proposed settlement, the Delaware Supreme Court reversed and remanded the case to proceed in accordance with its opinion).
92. Frankel, *supra* note 25. *See e.g., In re Trulia, Inc.*, 129 A.3d 884.
93. Frankel, *supra* note 25.

merger or acquisition involving a public company.[94] In response to a public deal announcement, a "flurry" of shareholder claims arise, alleging that the target corporation's directors "breached their fiduciary duties by agreeing to sell the corporation for an unfair price."[95] The shareholders identify these potential claims by reviewing the proxy statements released by the corporations.[96]

In these actions, the plaintiff leverages the threat of a court injunction, which would prevent the planned transaction from closing, against the corporation.[97] This leverage incentivizes the defendants, directors of the target corporation, to quickly settle in order to mitigate the substantial expense and distraction of litigation and obtain "broad releases," which effectively act as deal insurance.[98] In settling these actions, supplemental disclosures are the defendant's currency.[99] The theory supporting these disclosures is that shareholders will benefit from having greater information on the deal to aid in deciding whether to vote for or against the deal's approval.[100] However, because the Delaware courts have traditionally approved disclosure settlements even when the supplemental disclosures' information is immaterial, little sacrifice is required on the defendant's part in exchange for a release of liability.[101]

These claims occasionally spur meaningful economic benefits for shareholders if the directors have agreed to sell the corporation at an undervalued price.[102] However, most often this litigation "serves no useful purpose for stockholders."[103] Rather, deal disclosure litigation often only "generate[s] fees for certain lawyers who are regular players in the enterprise of routinely filing hastily drafted complaints . . ." on behalf of shareholders and "settling quickly on terms that yield no monetary compensation to the stockholders they represent."[104] These dynamics have resulted in the "proliferation of disclosure settlements."[105]

In *In re Trulia*, the plaintiffs offered to release the defendant, Trulia, from liability for other shareholder claims in exchange for attorney's fees and additional, unhelpful supplemental disclosures by the company.[106] The plaintiffs took issue with the information provided in Trulia's financial advisor's ten-page, single-spaced opinion.[107] This opinion included supplemental disclosures pertaining to "(1) certain synergy numbers in J.P. Morgan's value creation analysis; (2) selected comparable transaction multiples; (3) selected public trading multiples; and (4) implied terminal EBITDA multiples for a relative discounted case flow analysis."[108] The court found that the litigation pursued by the plaintiffs did not provide any benefit to the company's stockholders as the deal's proxy statement already covered the deficiencies the plaintiffs had alleged led to the settlement.[109]

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94. *In re Trulia, Inc.*, 129 A.3d at 887.
95. *Id.* at 891.
96. *See id.* at 894.
97. *Id.* at 891–92.
98. *Id.* at 892.
99. *In re Trulia, Inc.*, 129 A.3d at 891–92.
100. *Id.* at 892.
101. *Id.* at 892–93.
102. *Id.* at 891.
103. *Id.* at 891–92.
104. *In re Trulia, Inc.*, 129 A.3d at 891–92.
105. *Id.* at 891, 896.
106. *Id.* at 887.
107. *Id.* at 900.
108. *Id.*
109. *In re Trulia, Inc.*, 129 A.3d at 891–901, 907.

The court's impactful holding in *In re Trulia* significantly decreased the filings of deal disclosure litigation.[110] Thus, *In re Trulia* and its effect on the filing of certain shareholder actions demonstrate a willingness by the Delaware Courts of Chancery to effectively dissuade professional plaintiffs from filing needless suits if the courts so desire.[111]

D. Corporations' Directors and Shareholders Have a Complex Relationship Given the Stringent Duties Owed by Directors and the Misalignment of the Two Parties' Interests

A corporation's board of directors owe the corporation and its shareholders fiduciary duties, including a duty of loyalty and care.[112] While directors must advance their shareholders' interests insofar as they align with the long-term interests of the corporation, the interests of the corporation's shareholders do not always align with those of the corporation.[113] Although directors possess managerial authority, shareholders may sue directors for allegedly breaching their fiduciary duties.[114] While this cause of action increases the directors' liability, the Delaware statutes provide some protection to the directors through a short statute of limitations and the requirement of a pre-suit demand or demand futility.[115]

i. Directors Owe the Corporation They Serve and Its Shareholders Fiduciary Duties

Delaware case law establishes a "triad" of duties that Delaware directors owe to their corporation and shareholders.[116] This triad includes a requirement to act in good faith and fiduciary duties of care and loyalty.[117] The good faith requirement is not a standalone fiduciary duty.[118] Thus, unlike the duties of care and loyalty, the failure to act in good faith does not trigger liability on its own.[119] Rather, a failure to act in good faith may only trigger liability as a subsidiary of the fiduciary duties of care and loyalty.[120] The duty of care requires directors to exercise informed business judgment.[121] In contrast, the duty of loyalty, the focus of the *Garfield* case,[122] requires directors to act when faced with a known duty to act.[123] If directors fail to do so, they demonstrate "a conscious disregard for their

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110. *See id.* at 891–901, 907; Frankel, *supra* note 25.
111. *See In re Trulia, Inc.*, 129 A.3d at 891–901, 907; Frankel, *supra* note 25.
112. *See* Didier Cossin & Abraham Hongze Lu, *The Four Tiers of Conflict of Interest Faced by Board Directors*, INT'L INST. FOR MGMT. DEV. (May 2017), https://www.imd.org/research-knowledge/articles/the-four-tiers-of-conflict-of-interest-faced-by-board-directors/; Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 367 (Del. 1993) (stating that the"[d]uty of care and duty of loyalty are the traditional hallmarks of a fiduciary who endeavors to act in the service of a corporation and its stockholders").
113. *Id.*
114. *Id.*; *e.g.,* Pfeiffer v. Leedle, C.A. No. 7831–VCP, 2013 WL 5988416 (Del. Ch. Nov. 8, 2013).
115. *In re* Dean Witter P'ship Litig., No. CIV. A. 14816, 1998 WL 442456, at *4 (Del. Ch. July 17, 1998); *In re* Carvana Co., C.A. No. 2020-0415-KSJM, 2022 WL 2352457, at *7 (Del. Ch. June 30, 2022); Sanders v. Wang, No. 16640, 1999 WL 1044880, at *4 (Del. Ch. Nov. 8, 1999).
116. Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006); *Cede & Co.,* 634 A.2d at 361.
117. *Ritter*, 911 A.2d at 369–70.
118. *Id.*
119. *Id.*
120. *Id.*
121. Smith v. Van Gorkom, 488 A.2d 858, 872–73 (Del. 1985), *overruled in part by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).
122. Garfield ex rel. ODP Corp. v. Allen, 277 A.3d 296, 305–06 (Del Ch. 2022).
123. Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006).

responsibilities," breaching "their duty of loyalty by failing to discharge that fiduciary obligation in good faith."[124]

This duty of loyalty carries with it unique risks given the distinct relationship between shareholders and directors.[125] Delaware law entrusts a company's board of directors with the management of a company's business and affairs.[126] Unlike shareholders, who can enter and exit their interests in corporations with ease and whose investment period naturally limits their interest, directors' interests are long-term and consistent.[127] While shareholders' individual interests may guide them in their relationship with the corporation, the directors of a corporation may not employ "their position of trust and confidence to further their" personal goals.[128] Rather, directors must scrupulously observe their duties.[129] These duties include acting solely in the interests of the corporation, refraining from harming the corporation, and providing the corporation with any advantages the director's skills might offer.[130] Thus, these stringent, demanding duties require directors to act in the long-term interests of the corporation.[131]

ii. Directors' Interests do Not Always Align with the Shareholders' Interests

Historically, directors and shareholders have shared similar interests in the long-term growth of the corporation.[132] However, today, shareholders often act in their own, varied interests.[133] For example, large institutional shareholders—like insurance companies, banks, sovereign wealth funds, pension funds, and hedge funds—have different interests than individual shareholders.[134] Unlike individual shareholders, who most often strive for value creation and preservation through their holdings, institutional investors can wield their scale to capitalize on short-term gains.[135] Additionally, institutional investors possess greater power to accomplish their goals, whether short-term or long-term, as they regularly interact with companies' directors.[136] One such institutional investor, BlackRock, holds significant buying power, surpassing over ten trillion in assets under management.[137] Combined with Vanguard's eight trillion assets under management, these two institutional investors could purchase every London Stock Exchange company at least

124. *Id.*
125. *See id.*; Cossin & Lu, *supra* note 112 and accompanying text.
126. DEL. CODE ANN. tit. 8, § 141(a).
127. Cossin & Lu, *supra* note 112; Shawn Cooper & Sarah Keohane Williamson, *The Board's Impact on Long-term Value*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 25, 2020), https://corpgov.law.harvard.edu/2020/06/25/the-boards-impact-on-long-term-value/.
128 Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) (quoting *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939)); Cossin & Lu, *supra* note 112.
129. *Cede & Co.,* 634 A.2d at 361.
130. *Id.*
131. *See* Cooper & Keohane, *supra* note 127; *Cede & Co.*, 634 A.2d at 261.
132. *See* Cossin & Lu, *supra* note 112 (discussing the misalignment between directors and shareholders' interests as shareholders shift towards short holding periods); Saikat Chatterjee & Thyagaraju Adinarayan, *Buy, Sell, Repeat! No Room for 'Hold' in Whipsawing Markets*, REUTERS (Aug. 3, 2020), https://www.reuters.com/article/us-health-coronavirus-short-termism-anal/buy-sell-repeat-no-room-for-hold-in-whipsawing-markets-idUSKBN24Z0XZ (demonstrating that holding periods have shrunk over the last few decades).
133. Cossin & Lu, *supra* note 112.
134. *Id*.
135. *Id.*
136. *Id.*
137. Adrienne Buller, *With $10 Trillion in Assets, BlackRock Has Set a New Benchmark for Corporate Power*, JACOBIN (Mar. 22, 2022), https://jacobin.com/2022/03/index-funds-blackrock-vanguard-stocks-ownership-democracy-concentration.

three times.[138] Thus, large institutional investors' significant assets under management enjoy much greater power than individual investors, like a teacher or law student.[139] Further, these large institutional investors often garner the attention of a corporation's executives or directors such that the institutional investors' representatives may advocate for their interests to the corporations' representatives.[140] In contrast, an individual investor's smaller holding is unlikely to garner the same attention of any corporations' executives.[141] Thus, the interests of shareholders vary and may suffer from misalignment.[142]

Further, the difference in investment goals does not simply exist between institutional and individual shareholders;[143] rather, each investor's interests, no matter their size, depend on their individual investment horizons,[144] level of diversification,[145] and overarching investment strategy.[146] While directors must make decisions that will benefit the corporation long after they leave their position,[147] the average investor, as of June 2020, only held their position for five-and-a-half-months.[148] Investors may seek these short-term gains as day traders or, instead, work to fund their future retirement through long-term investments.[149] Further, investors, like day traders, may hold their positions for shorter periods when markets are changing swiftly.[150] Thus, the directors' interests, determined by the fiduciary duties they owe to the corporation, may differ from the varying interests of the shareholders.[151]

iii. Shareholders May Sue Directors for Breaching Their Fiduciary Duties

Shareholders possess an actionable claim when a director breaches their fiduciary duties, including the duty of loyalty, in a manner that causes the corporation harm.[152] To pursue a derivative claim for the breach of fiduciary duty, the plaintiff must first comply

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138. *Id.*; Farhad Manjoo, *What BlackRock, Vanguard and State Street Are Doing to the Economy*, N.Y. TIMES (May 12, 2022), https://www.nytimes.com/2022/05/12/opinion/vanguard-power-blackrock-state-street.html (highlighting the fact that if State Street's holdings are also considered, these "Big Three could control as much as 40% of shareholder votes in the S&P within two decades.").
139. Cossin & Lu, *supra* note 112.
140. *See id.*; *see also* Silla Brush & Saijel Kishan, *The Anti-ESG Crusader Who Wants to Pick a Fight With BlackRock*, BLOOMBERG (Sept. 1, 2022, 4:00 AM), https://www.bloomberg.com/news/articles/2022-09-01/woke-inc-author-s-firm-targets-blackrock-esg-investing (discussing BlackRock CEO Larry Fink's active push for corporate bosses to embrace stakeholder capitalism). *See generally* Manjoo, *supra* note 138; Andrew Ross Sorkin, *BlackRock C.E.O. Larry Fink: Climate Crisis Will Reshape Finance*, N.Y. TIMES (Feb. 24, 2020), https://www.nytimes.com/2020/01/14/business/dealbook/larry-fink-blackrock-climate-change.html.
141. *See* Cossin & Lu, *supra* note 112.
142. *Id.*
143. *See generally id.*
144. James Chen, *What Is an Investment Horizon*, INVESTOPEDIA (July 30, 2021), https://www.investopedia.com/terms/t/timehorizon.asp (providing that "[a]n investment time horizon, or just time horizon, is the period of time one expects to hold an investment until they need the money back.").
145. Troy Segal, *What Is Diversification? Definition as Investing Strategy*, INVESTOPEDIA (July 1, 2023), https://www.investopedia.com/terms/d/diversification.asp (providing that diversification constitutes a risk management strategy employed by investment managers to limit a portfolio's exposure to any one asset or risk. This strategy involves investing in a wide variety of assets within a portfolio. When effective, diversification yields higher long-term returns while mitigating any risks posed by a single holding.).
146. Cossin & Lu, *supra* note 112.
147. *See id.*
148. Chatterjee & Adinarayan, *supra* note 132.
149. Bob Haegele, *Individual Investors vs. Institutional Investors: How They Differ*, BANKRATE (July 14, 2022), https://www.bankrate.com/investing/individual-investors-vs-institutional-investors/.
150. *See* Chatterjee & Adinarayan, *supra* note 132.
151. Cossin & Lu, *supra* note 112.
152. *E.g.*, *Pfeiffer*, C.A. No. 7831–VCP, 2013 WL 5988416 (Del. Ch. Nov. 8, 2013).

with Delaware's demand requirement or establish demand futility within its pleadings.[153] After meeting this threshold requirement, the court will consider the plaintiff's claim on the merits.[154] This claim might be that the directors breached their duty of loyalty when they knowingly or deliberately violated a shareholder-approved equity plan.[155]

To pursue a derivative breach of fiduciary duty claim, Delaware law mandates that shareholders first "demand" that the corporation's directors consider the alleged harmful acts and pursue legal action to redress the alleged wrongs.[156] Recognizing the potential for frivolous derivative shareholder actions, Delaware seeks to prevent such needless lawsuits "on behalf of the corporation."[157] Frivolous lawsuits "tie up the corporation's [directors and leadership] in constant litigation and diminish the board's authority to govern" the corporation's affairs.[158] If no barriers existed to limit shareholders' ability to pursue derivative actions, "the role of the board of directors as the shareholders' chosen arbiter of the corporation's interests, legal and otherwise, could be constantly frustrated." [159] The demand requirement seeks to mitigate these concerns.[160]

However, a plaintiff may bypass the demand requirement where demand is considered futile for the majority of directors who would receive the litigation demand.[161] The Delaware Supreme Court determines demand futility by analyzing, on a director-by-director basis, (1) whether a director obtained "a material personal benefit" from the misconduct asserted in the litigation, (2) whether a director "faces a substantial likelihood of liability" regarding any of the claims asserted in the litigation, or (3) whether a director "lacks independence from someone who received a material personal benefit" from the misconduct alleged in the litigation demand or "who would face a substantial likelihood of liability on any of the claims" raised in the litigation demand.[162] If one of these three circumstances exists for more than half the directors, the demand is considered futile, and therefore, unnecessary.[163] Once a plaintiff makes his demand or establishes demand futility, the court may consider the claim on its merits and determine whether the directors breached their duty of loyalty.[164]

A breach may occur based on action or conscious inaction.[165] One manner in which directors may breach their duty of loyalty arises when they knowingly or deliberately violate a shareholder-approved equity plan.[166] Such a breach may occur with incentive stock options, which provide an employee the right to purchase company shares at a discounted price.[167] For example, a board's violation of a clear and unambiguous provision

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153. *Id.* at *3–4.
154. *Id.* at *5, *9.
155. *Id*. at *3.
156. Sanders v. Wang, No. 16640, 1999 WL 1044880, *4 (Del. Ch. Nov. 8, 1999).
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *In re* Carvana Co., C.A. No. 2020-0415-KSJM, 2022 WL 2352457, at *7 (Del. Ch. June 30, 2022).
162. *Id.* (citing United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-state Pension Fund v. Zuckerberg, 262 A.3d 1034, 1059 (Del. 2021)).
163. *Id.*
164. *Id.* at *6.
165. South v. Baker, 62 A.3d 1, 15 (Del. Ch. 2012).
166. *See* Pfeiffer v. Leedle, C.A. No. 7831–VCP, 2013 WL 5988416, at *9 (Del. Ch. Nov. 8, 2013) (considering two plaintiffs' claims that a corporation's board of directors breached their fiduciary duties of loyalty and care based on their separate theories as to how the appropriate award would have been calculated under the shareholder equity plan).
167. Julia Kagan, *Incentive Stock Options (ISO): Definition and Meaning*, INVESTOPEDIA (Aug. 21, 2023), https://www.investopedia.com/terms/i/iso.asp. *See Pfeiffer*, 2013 WL 5988416, at *3.

within a stock incentive plan supports an inference that the board acted knowingly or deliberately.[168] Note, directors may not justify violating a clear, unambiguous provision within a stock incentive plan by citing a separate provision that granted them discretion to administer the plan.[169]

When reviewing alleged violations of an equity plan, courts employ contract interpretation standards as an equity plan constitutes a contract between the corporations' shareholders and board of directors.[170] Disagreement between parties concerning the meaning of a contract's language or construction does not render a contract ambiguous.[171] Rather, a contract is only ambiguous when its controversial opinions are "reasonably or fairly susceptible" to different interpretations or meanings. [172] Thus, directors may breach their duty of loyalty when they interpret equity plans in a manner shareholders and the court find unambiguously inappropriate.[173]

In *Pfeiffer v. Leedle*, the shareholder-plaintiff brought a derivative action under Delaware Rule 23.1 against the corporation's directors.[174] The plaintiff alleged that the corporation's directors breached their fiduciary duties when they approved a plan to award stock options to an executive under the stock incentive plan.[175] The plaintiff asserted that the award constituted a breach of the stock incentive plan, and thus, a breach of the directors' fiduciary duties of loyalty and care.[176] First, the plaintiff alleged that the plan limited awards to stocks, not stock options.[177] The court appropriately dismissed this claim because a stock option is simply a right to later purchase shares of stock.[178] Second, the plaintiff alleged that the directors had attempted to circumvent the plan's restrictions of stock option awards by characterizing the award as a non-plan performance award.[179] Accordingly, based on the court's careful reading of the stock incentive plan, it found that this claim could proceed because the plaintiff adequately alleged the board violated the plan's provision.[180]

Pfeiffer demonstrates the nearly impenetrable nature of corporate directors' liability for breaching their fiduciary duties.[181] Just as directors may not utilize a discretion-granting provision within a stock incentive plan to justify clear, unambiguous violations of the plan,[182] directors also may not contract around their liability for such actions.[183] Rather, Delaware law specifies that no provisions may eliminate or limit the personal liability of a director "for any breach of the director's or officer's duty of loyalty to the corporation or its stockholders" or "for acts or omissions not in good faith or which involve

168. *Pfeiffer*, 2013 WL 5988416, at *6.
169. Sanders v. Wang, No. 16640, 1999 WL 1044880, at *1 (Del. Ch. Nov. 8, 1999).
170. *See id.* at *6.
171. *Id.*
172. *Id.*
173. *See Pfeiffer*, 2013 WL 5988416, at *9.
174. *Id.* at *1.
175. *Id.*
176. *Id.* at *1, *3, *7–8.
177. *Pfeiffer*, 2013 WL 5988416, at *7.
178. *Id.*
179. *Id.*
180. *Id*. at *7.
181. *See generally Pfeiffer*, 2013 WL 5988416.
182. Sanders v. Wang, No. 16640, 1999 WL 1044880, at *1 (Del. Ch. Nov. 8, 1999).
183. *Pfeiffer*, 2013 WL 5988416, at *9.

intentional misconduct or a knowing violation of law."[184] Thus, successful breach of fiduciary duties claims impose personal liability on directors, which directors may not attempt to circumvent through contract or otherwise.[185]

iv. Delaware's Statute of Limitations for Breach of Fiduciary Duty Claims is Short

While breach of fiduciary duty claims broadly reach directors, Delaware law limits the claims' breadth by imposing a brief statute of limitations.[186] Under Delaware law, breach of fiduciary duty claims brought under Delaware Rule 23.1 are subject to a three-year statute of limitations.[187] The statute of limitations begins to run when the alleged wrongful act occurs, regardless of whether the plaintiff is aware that the cause of action exists.[188] This three-year limitation aligns well with the average tenure of U.S. board members—a little over nine years—as it generally assures that plaintiffs bring the derivative actions while the directors who are responsible for the violation are still on the board.[189]

While Delaware Rule 23.1 can provide a genuine check on a board of directors' actions, professional plaintiffs instead use Delaware Rule 23.1 to generate income rather than represent the shareholder interests against actual wrongs done by the corporation's board of directors.[190] Notably, the Delaware Court of Chancery has demonstrated its willingness to impair professional plaintiffs' profitability in bringing certain claims, and it has used requirements, like the demand requirement and the claim's statute of limitations, to limit the breadth of these derivative actions.[191] However, these checks represent narrow measures restraining an otherwise broad claim.[192] Further, these claims are rendered more complex by the misalignment between the duties of directors to work to advance the best interests of the corporation in the long-term and the shareholders' efforts to advance their own varied and changing interests, usually in the short-term.[193]

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184. *Id.* at *4, *9; DEL. CODE ANN. tit. 8, § 102(b)(7).
185. *See* DEL. CODE ANN. tit. 8, § 102(b)(7); *Pfeiffer*, 2013 WL 5988416, at *9; *Sanders*, 1999 WL 1044880, at *1.
186. *In re* Dean Witter P'ship Litig., No. CIV. A. 14816, 1998 WL 442456, at *4 (Del. Ch. 1998).
187. *Id.*; *e.g., In re* Sirius XM S'holder Litig., No. 7800–CS, 2013 WL 5411268, at *4–6 (Del. Ch. Sept. 27, 2013) (holding that a breach of fiduciary duty relating to the defendant's adherence to an Investment Agreement, which prevented the defendant from blocking a specific investor from gaining a majority position in the defendant, was time-barred); Skye Mineral Inv'rs, LLC v. DXS Cap. (U.S.) Ltd., No. 2018-0059-JRS, 2021 WL 3184591, at *21 (Del. Ch. July 28, 2021) (supporting that breach of fiduciary duty claims are Delaware Rule 23.1 claims).
188. *In re Dean Witter*, 1998 WL 442456, at *4.
189. Matteo Tonello, *Corporate Board Practices in the Russell 3000 and S&P 500*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 18, 2020), https://corpgov.law.harvard.edu/2020/10/18/corporate-board-practices-in-the-russell-3000-and-sp-500/.
190. *See* Griffith v. Stein *ex rel.* Goldman Sachs Grp., 283 A.3d 1124, 1137 (Del. 2022); *Skye Mineral Inv'rs*, 2021 WL 3184591, at *21 (supporting that Rule 23.1 can provide a check on a board member's breach of fiduciary duty).
191. Sanders v. Wang, No. 16640, 1999 WL 1044880, at *4 (Del. Ch. Nov. 8, 1999); *In re Witter*, 1998 WL 442456, at *4.
192. *See, e.g.*, *Pfeiffer*, C.A. No. 7831–VCP, 2013 WL 5988416 (suggesting plaintiffs can succeed on breach of duty claims for directors in spite of charter provisions permitting those actions); *Griffith*, 283 A.3d at 1139 (suggesting the Court of Chancery Rules Committee consider amending Rule 23.1 by adding limits on plaintiffs' abilities to bring derivative actions).
193. Cossin, *supra* note 112.

III. GARFIELD THE CAT: *GARFIELD V. ALLEN*

In *Garfield v. Allen*, Robert Garfield ("Garfield"), a shareholder of the ODP Corporation ("ODP"), sued ODP's board of directors derivatively based on their failure to address an issue raised in his demand letter.[194] Garfield claimed the ODP directors' breached their fiduciary duties to the corporation, specifically their duty of loyalty.[195] In the letter, Garfield demanded that the board of directors fix the CEO's performance award so that it no longer violated the board's equity compensation plan.[196] However, the board refused to alter the CEO's award, leading Garfield to sue.[197] Ruling on Garfield's claim, the court held that, despite the "disquieting" nature of the "plaintiff manufacturing a claim against directors by acting as a whistleblower and then suing because the directors did not respond to the whistle," the board's failure to address the plaintiff's demand gave rise to a traditionally unrecognized, independent cause of action.[198]

A. The Players

Just as in *Griffith*, *Garfield* presented a classic battle between a "frequent filer" and a large, public corporation.[199] Garfield, the plaintiff, falls into the "frequent filer" category.[200] The defendant, ODP Corporation, a Fortune 500 company, provides "products and services through an integrated business-to-business[] distribution platform and omnichannel presence[,]" including operating Fortune 500 companies like Office Depot, LLC, among others.[201]

B. The Background

In 2019, the ODP shareholders approved an equity compensation plan, which authorized ODP's board of directors to award performance shares and units, restricted stock and stock units, nonqualified and incentive stock options, stock appreciation rights, and other equity-based awards to ODP officers, non-employee directors, consultants, and employees.[202] A committee of ODP board members administered the equity plan ("2019 Plan"), which limited the awards of performance shares per individual during a fiscal year.[203] In March 2020, this committee awarded the performance shares at issue ("Challenged Awards") to ODP's Chief Executive Officer, Gerry Smith.[204] These awards entitled

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194. Garfield *ex rel.* ODP Corp. v. Allen, 277 A.3d 296, 304, 314 (Del Ch. 2022).
195. *Id.* at 305.
196. *Id.* at 304, 313.
197. *Id.* at 313–14.
198. *Id.* at 305–306.
199. *See* Griffith v. Stein *ex rel.* Goldman Sachs Grp., 283 A.3d 1124, 1137 (Del. 2022); *Garfield*, 277 A.3d 296; Griffith, 283 A.3d at 1137 (defining frequent filers as individuals who frequently file derivative actions to generate revenue, rather than to benefit the corporations they purport to represent).
200. *E.g.,* Garfield v. BlackRock Mortg. Ventures, L.L.C., No. 2018-0917-KSJM, 2019 WL 7168004 (Dec. 20, 2019) (challenging the fairness of a corporate reorganization strategy as it benefited certain stockholders over others); Garfield v. Shutterfly, Inc. 857 Fed. App'x. 71 (3d Cir. 2021) (alleging Shutterfly made a misleading statement in its proxy statement supporting a merger of Shutterfly with certain funds affiliated with Apollo Management IX, LP); Garfield v. NDC Health Corp., 466 F.3d 1255 (11th Cir. 2006) (bringing a securities fraud allegation against the corporation and its accounting firm).
201. *Company Profile*, THE ODP CORP., https://investor.theodpcorp.com (last visited Oct. 28, 2022); *Fortune 500: Office Depot*, CNN MONEY, https://money.cnn.com/magazines/fortune/fortune500/2012/snapshots/10136.html (last visited Nov. 20, 2023).
202. *Garfield*, 277 A.3d at 304.
203. *Id.*
204. *Id.*

Smith to a variable quantity of performance shares based on ODP's performance over a three-year period ending in 2023.[205] However, these awards only exceeded the allotment permitted in the 2019 Plan if ODP performed well.[206]

C. The Claim

In response to these awards, Garfield sued ODP's board of directors under Delaware Rule 23.1.[207] First, Garfield contended that the directors on the committee that administered the 2019 Plan ("the Committee") breached their fiduciary duties by approving the Challenged Awards.[208] Second, Garfield asserted that all of the current ODP directors, including those who did not approve the Challenged Awards, breached their fiduciary duties by failing to fix the Challenged Award after receiving Garfield's demand letter alerting the directors to the violation.[209] This second claim represented a novel theory under Delaware law.[210]

D. The Reasoning

Ultimately, the court held that Garfield could proceed under this novel theory against the ODP directors.[211] In reaching this holding, the court reasoned that, despite the "disquieting" nature of the theory, its underlying logic was sound.[212] Specifically, the court founded its reasoning on (1) Delaware's well-settled law holding that conscious inaction constitutes the equivalent of action, and (2) the now revised tacit-concession doctrine, which traditionally would have barred the novel claim advanced in *Garfield*.[213]

First, the court stated that conscious inaction is the equivalent of action under Delaware law, and that "a decision-maker acts *disloyally* and in bad faith by consciously disregarding a limitation in an equity compensation plan."[214] Combining these two established rules, a board's conscious decision to leave a violative award in place implies that the board acted disloyally and in bad faith when its directors elect not to fix an alleged violation.[215] While lacking direct supportive precedent, the theory's underlying logic mirrors a type of *Caremark* claim, allowing plaintiffs to proceed on a claim that a board breached its duty of loyalty by acting knowingly and in bad faith in failing to address specific "red flags."[216] Thus, the court held that it is "reasonably conceivable that the directors' conscious inaction constitutes a breach of duty" where a plaintiff alerts a board of directors to a *clear* violation, and the directors elect not to act.[217]

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205. *Id.*
206. *Id.*
207. *Garfield*, 277 A.3d at 304.
208. *Id.*
209. *Id.*
210. *Id.* at 305.
211. *Id.* at 305–306.
212. *Garfield*, 277 A.3d at 305.
213. *Id.* at 337–40.
214. *Id.* at 305, 337 (emphasis added).
215. *Id.*
216. *Id.* at 306, 336–37 (discussing *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959 (Del. Ch. 1996)); *see generally* Edward B. Micheletti & Ryan M. Lindsay, *The Risk of Overlooking Oversight: Recent Caremark Decisions From the Court of Chancery Indicate Closer Judicial Scrutiny and Potential Increased Traction for Oversight Claims*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Dec. 15, 2021), https://www.skadden.com/-/media/files/publications/2021/12/insights-the-delaware-edition/theriskofoverlookingoversightrecentcaremarkdecisionsdecisionsfromthecourtofchanceryindicatecloserjud.pdf?rev=75d9e91d9ce14d91858a94b905472614.
217. *Garfield*, 277 A.3d at 305-06 (emphasis added).

Second, the court analyzed the historical development of demand letters' role in shareholder derivative actions.[218] Traditionally, the Delaware Court of Chancery expressly provided that the wrongful refusal of a demand letter did not give rise to an independent cause of action.[219] Rather, if a board rejected a shareholders' demand, the shareholder could claim "wrongful refusal."[220] To prove their claim, the shareholder would have to demonstrate that the board's decision to the reject the claim constituted gross negligence or the directors qualify as interested, conflicted directors.[221] If the shareholder succeeded in his wrongful refusal claim, the shareholder would have the right to pursue the claims alleged in the demand letter.[222]

However, this historical holding originated out of the now revised "tacit-concession" doctrine.[223] Originally, the tacit-concession doctrine, announced in *Spiegel v. Buntrock*,[224] provided that a shareholder, "who makes [a] demand[,] tacitly concedes that the board was disinterested and independent for purposes of responding to the demand."[225] Consequently, the business judgment rule generally protected a board's decision regarding their response to a demand letter.[226] This protection arose out of the business judgment rule's presumption that directors make business decisions "on an informed basis, in good faith, and in the honest belief . . ." that their actions were in the corporation's best interests.[227] Thus, the business judgment rule and the original tacit-concession doctrine worked together to prevent shareholder demand letters from creating separate causes of action; any plaintiff who sent a demand letter to the board had, by that very action, conceded that the business judgment rule protected the current board's response to the letter.[228] As a result, demand letters traditionally served as a mechanism to gain control of a derivative suit, rather than establishing a separate cause of action.[229]

Nevertheless, two Delaware Supreme Court decisions circumscribed the *Spiegel* rule, tailoring the tacit-concession doctrine to simply mean that the plaintiff accepts that "the number of board members necessary to carry a vote . . . lacks conflicts with respect to the demand."[230] Under the current version of this rule, the Delaware Court of Chancery finds that the doctrine does not prevent "a court from considering whether directors acted in good faith when considering a litigation demand."[231] Thus, this updated rule, combined with the well-established Delaware rule that conscious inaction equates to action, paved the way for the court's holding in *Garfield*.[232]

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218. *Id.* at 339.
219. *Id.* (citing Baron v. Siff, No. 15152, 1997 WL 666973, at *1 n.4 (Del. Ch. Oct. 17, 1997)).
220. *Id.* (citing Brehm v. Eisner, 746 A.2d 244, 255 (Del. 2000)); Zapata Corp. v. Maldonado, 430 A.2d 779, 784 (Del. 1981) (explaining that derivative plaintiffs must send a corporation's board of directors a demand letter prior to bringing a derivative action, requesting that the directors pursue the action on behalf of the corporation. If the directors' refuse the demand, the derivative plaintiffs must assert that the directors wrongfully rejected the claim.).
221. *Garfield*, 277 A.3d at 338.
222. *Id.* at 339; *Zapata Corp.*, 430 A.2d at 784.
223. *Garfield*, 277 A.3d at 339.
224. 571 A.2d 767, 775, 777 (Del. 1990).
225. *Garfield*, 277 A.3d at 339 (citing Solak v. Welch, C.A. No. 2018-0810-KSJM, 2019 WL 5588877, at *3 (Del. Ch. Oct. 30, 2019), *aff'd*, 228 A.3d 690 (Del. 2020)).
226. *Id.*
227. *In re* Citigroup Inc., 964 A.2d 106, 124 (Del. Ch. 2009).
228. *Garfield*, 277 A.3d at 339.
229. *Id.*
230. *Garfield*, 277 A.3d at 339 (quoting City of Tamarac Firefighters' Pension Tr. Fund v. Corvi, No. 2017-0341-KSJM, 2019 WL 549938 (Del. Ch. Feb. 12, 2019)); Grimes v. Donald, 673 A.2d 1207 (Del. 1996); Scattered Corp. v. Chi. Stock Exch., Inc., 701 A.2d 70 (Del. 1997).
231. *Garfield*, 277 A.3d at 340.
232. *Id.* at 337, 340.

E. One of The Strongest Possible Factual Scenarios for the Novel Claim

In considering this claim, the court noted that Garfield advanced "one of the strongest possible scenarios" for the novel claim.[233] First, the plaintiff's demand letter placed the directors on notice that the Challenged Awards violated the 2019 Plan's plain and unambiguous language.[234] Second, the directors elected not to address the violation as requested in the letter—a clear error.[235] Third, a fiduciary duty to fix the violation bound both sides of the Challenge Award's contractual parties, ODP and Smith.[236] The court found that the fiduciary duty binding *both* contractual parties required the parties to fix the Challenged Awards, and thus, a readily available solution existed.[237]

Conversely to the situation in *Garfield*, if the award had been granted to a third-party who had no notice of the Performance Share Limitation and was an innocent grant recipient, the board would have no easy solution to remedy the violative award because the third-party would have no fiduciary duty to comply with the board in this effort.[238] Instead, the board would have to decide to either do nothing or search for an alternative like asserting a claim against the innocent third party.[239] The board might even determine that leaving the violative award in place would benefit the company in the long term.[240] If, in this circumstance, a plaintiff like Garfield raised the same novel claim, the business judgment rule would protect the board's decision not to act or to pursue a claim.[241] These three factors—notice, a clear error, and a readily available solution—together provided the favorable foundation to anchor Garfield's novel claim.[242]

F. The Implications

While the court held that Garfield's novel claim was valid, it recognized the "sound policy reasons to resist permitting a stockholder plaintiff to create a new claim by sending a demand letter."[243] Specifically, the court acknowledged two concerning hypotheticals that could result from the decision.[244] First, if a shareholder sends a demand letter to a board, and the board refuses to comply, a stale claim could be revived as the refusal constitutes a separate cause of action from the original wrong.[245] To this issue, the court expressed hope that other members of the Delaware court would view attempts to realize the first hypothetical as merely an artifice when applying the doctrine of laches.[246] Second, if a shareholder sends a demand letter concerning the actions of specific board members to a board, and the board refuses to comply, the shareholder could then sue all of the board members for the violation, rather than simply those responsible, and thus, reach "deeper-pocket[s]."[247] Despite recognizing the negative policy implications, the court nevertheless

233. *Id.* at 306.
234. *Id.* at 305–06, 337.
235. *Id.* at 337.
236. *Garfield*, 277 A.3d at 337.
237. *Id.*
238. *Id.*
239. *Id.* at 337.
240. *Id.* at 337–38.
241. *Garfield*, 277 A.3d at 338.
242. *See id.* at 306.
243. *Id.* at 338.
244. *Id.*
245. *Id.*
246. *Garfield*, 277 A.3d at 339.
247. *Id.*

permitted Garfield's novel claim to proceed, proffering that future cases will provide the court the opportunity to tailor the scope of its holding.[248]

While not articulated by the *Garfield* court, a third hypothetical naturally arises from the first two hypotheticals described by the court. A shareholder may wait for new board members with greater financial resources to accept appointments or for a corporation to adopt gold-standard liability insurance for their directors without fear of the claim expiring. Once the ideal board has formed, the shareholder may then choose to send a demand letter seeking remedial action by the new board. Each of these hypotheticals presents a similar theme—expanded personal liability for directors who did not aid in the determination that caused the original violation.[249]

IV. ONCE THE CAT IS OUT OF BAG . . .

The holding in *Garfield* rightfully gave the court "pause."[250] Only four months after Garfield's "victory" against the ODP directors, Garfield touted his win in a brief he filed in further support of his motion for summary judgment and application for attorney's fees in a derivative action against Boxed, Inc.[251] In this brief, he announced the *Garfield* Court's holding as "a well-publicized victory" that he won "by advancing 'a novel theory' concerning a breach of fiduciary duty in connection with a board's refusal of a litigation demand."[252] While bold, Garfield's description of his victory is supported by the many legal databases and firms which quickly published articles warning directors of the novel holding.[253] While the exact impact of Garfield's victory has yet to be realized, the holding's significance is clear.[254] The holding will likely encourage professional plaintiffs to misuse the courts, impair the ability of public company directors to perform their fiduciary duties, and threaten Delaware's status as Corporate America's favorite state of incorporation.[255]

A. The Garfield Holding May Result in a Proliferation of Professional Plaintiffs

The *Garfield* holding will likely cause a proliferation of professional plaintiff claims while decreasing genuine derivative plaintiffs' willingness to pursue their claims. First, the holding increases the Delaware courts' accessibility to professional plaintiffs by allowing the professional plaintiffs to effectively manufacture claims against directors.[256]

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248. *Id.* at 306, 340.
249. *See id.* at 338–40.
250. *See Garfield*, 277 A.3d at 338.
251. *See generally* Plaintiff's Combined Reply Brief in Further Support of His Motion for Summary Judgment and Application for an Award of Attorney's Fees and Answering Brief in Opposition to Boxed, Inc.'s Cross-motion for Summary Judgment, Garfield v. Boxed, Inc., No. 2022-0132-MTZ, 2022 WL 4547199 (Del. Ch. Sept. 23, 2022).
252. *Id* at 13.
253. Prac. L. Corp. & Sec., *Fiduciary Duties of the Board of Directors*, WESTLAW (last visited Jan. 20, 2023, 7:34 PM), https://1.next.westlaw.com/Document/I1559f7a8eef211e28578f7ccc38dcbee/View/FullText.html; Prac. L. Emp. Benefits & Exec. Comp., *Delaware Chancery Court Refuses to Dismiss Claims Alleging Breach of Contract, Breach of Fiduciary Duty, and Unjust Enrichment Related to Equity Grants*, WESTLAW (May 31, 2022), https://1.next.westlaw.com/Document/I33272173dc4111ec9f24ec7b211d8087/View/FullText.html; Fried Frank M&A/Priv. Equity Briefing, *Court of Chancery Accepts, "with Trepidation," at Motion to Dismiss Stage, a "Novel Theory" of Liability for Directors—Garfield*, FRIED FRANK (June 6, 2022), https://www.friedfrank.com/uploads/siteFiles/Publications/FFMAPEGarfield06062022.pdf.
254. *See* Prac. L. Corp. & Sec., *supra* note 253; Prac. L. Emp. Benefits & Exec. Comp., *supra* note 253; Fried Frank M&A/Priv. Equity Briefing, *supra* note 253.
255. *See Garfield*, 277 A.3d 296.
256. *Id.* at 305, 307.

Further, the holding provides a meaningful loophole around the otherwise short, three-year statute of limitations for breach of fiduciary claims.[257] Second, this novel holding increases the potential profitability of professional plaintiffs.[258] They may bide their time awaiting directors with deeper pockets to accept appointments or for corporations to adopt gold-standard directors and officers insurance.[259]

Admittedly, when legitimate derivative plaintiffs bring claims for the genuine benefit of a corporation, derivative actions serve an important role in protecting investors by holding corporate directors accountable for their actions.[260] However, professional plaintiffs differ from their legitimate counterparts in many ways. For example, unlike their genuine counterparts, professional plaintiffs may have little involvement in their litigation; instead, they simply lend their name to the suit, demonstrating an '"uncanny zeal for litigation"' bordering on bad faith.[261] Further, professional plaintiffs may own a few, strategic shares of corporations as opposed to a genuine long term investor's meaningful holding.[262] Thus, given the difference in character between professional and legitimate plaintiffs, increasing the accessibility and profitability of derivative actions will likely entice money-motivated professional plaintiffs with little impact on legitimate plaintiffs.

Even prior to the plaintiff-friendly rulings discussed above, legal writers expressed concern that abusive professional plaintiffs cast such a negative light on plaintiffs pursuing derivative shareholder actions that the prevalence of professional plaintiffs actually dissuades genuine plaintiffs from pursuing worthy shareholder suits.[263] This dynamic depletes the deterrence value of derivative actions.[264] Thus, as the prevalence of professional plaintiffs results in worsened reputations for derivative plaintiffs generally, an upward trend in derivative action claims will likely further dissuade genuine plaintiffs from performing their necessary and important role of regulatory enforcement.[265]

B. The Threat of Professional Plaintiff Claims After Garfield May Impair Directors' Discretion in Upholding Their Fiduciary Duties

The *Garfield* holding might additionally impair the ability of public company board of directors to perform their fiduciary duties of care and loyalty. The novel theory advanced in *Garfield* presents the greatest utility to professional plaintiffs who wish to act on older claims. Thus, it is likely that plaintiffs will raise this new claim against directors who did not participate in the violative decision and may not even have been appointed to the board at the time of the decision. Unlike the previous directors, who made the decision that triggered the demand letter, these new directors receiving the demand letter have minimal knowledge regarding the underlying factors driving the previous directors' decision-making process. Rather, the demand places these directors in a position to choose to (1) defend a choice they did not make, potentially rendering them personally liable for the

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257. *See id.* at 306, 318.
258. *See id.* at 305–06.
259. Julia Kagan, *Directors and Officers (D&O) Insurance: What Is It, Who Needs It?*, INVESTOPEDIA (July 10, 2022), https://www.investopedia.com/terms/d/directors-and-officers-liability-insurance.asp (stating that directors and officers (D&O) liability protects "individuals from personal losses if they are sued as a result of" their position as an organization's director or officer. D&O "can also cover the legal fees and other costs the organization may incur as a result of such a suit.").
260. Jessica Erickson, *The New Professional Plaintiffs in Shareholder Litigation*, 65 FLA. L. REV. 1089, 1093 (2013).
261. *Id.* at 1108 (citing *In re* Fuqua Indus. Inc. S'holder Litig., 752 A.2d 126, 134 (Del. Ch. 1999)).
262. *Id.*
263. *Id.* at 1093.
264. *Id.*
265. *See* Erickson, *supra* note 260, at 1093.

previous directors' alleged errors, or (2) capitulate to the shareholder's demands: resolving the matter quickly, avoiding personal liability, and potentially saving the corporation money while securing a significant release of claims.[266] While the law technically endows directors with discretion to decide which claims are in the corporation's best interest to pursue, this dynamic effectively overrides the directors' discretion, no matter the claims' staleness.[267]

This "choice" impedes directors' ability to comply with their fiduciary duties of care[268] and loyalty.[269] To comply with their duty of care, directors must work to understand the dynamics of the past so that they may ascertain whether the previous directors correctly interpreted the limits of their power.[270] Further, to make informed business judgments, directors must develop a culture of open dissent.[271] However, this essential culture is difficult to foster in an environment where directors fear personal liability for decisions others made, and constant litigation, which distracts from the day-to-day business of the corporation. Additionally, to comply with their duty of loyalty, directors must ensure that they act only in the interests of the corporation, refrain from harming the corporation, and provide the corporation with any advantages the directors' skills might offer.[272] Further in compliance with their duty of loyalty, the directors must address the plaintiff's demand letter if they believe the shareholder correctly identified a violation.

In this dynamic, the directors must balance the above duties, ignoring their desire to escape the risk of personal liability. Regardless of their ultimate decision and their attempt to comply with their fiduciary duties, the directors' decision to address or ignore the demand will open them up to further allegations of violated fiduciary duties. If directors simply surrender to these professional plaintiffs, the directors may still breach their fiduciary duties by permitting professional plaintiffs to effectively wrestle away the managerial discretion Delaware law vests in the directors, allowing the professional plaintiffs to leverage the corporation for their personal benefit.[273] As demonstrated in *Griffith*, these plaintiffs often do not act in the best interests of the shareholders.[274] Instead, professional plaintiffs enter into settlements benefiting the plaintiffs and the plaintiffs' attorneys while wasting the corporations' and their directors' time and energy.[275] Conceding to this dynamic cannot be in the best interests of all shareholders.[276] Conversely, if the directors, after exercising their informed business judgment, elect to defend against the claim, they must accept that the court might find their actions wrongful. As a result, the corporation will be exposed to further litigation. Consequently, the novel theory advanced in *Garfield* may impair public company boards of directors' ability to perform their fiduciary duties.

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266. *See Garfield*, 277 A.3d at 337–38.
267. *See In re* Carvana Co., C.A. No. 2020-0415-KSJM, 2022 WL 2352457, at *6 (Del. Ch. June 30, 2022).
268. Smith v. Van Gorkom, 488 A.2d 858, 872–73 (Del. 1985).
269. *See Garfield*, 277 A.3d 296.
270. *Van Gorkom*, 488 A.2d 858, 872–73 (Del. 1985).
271. Jeffrey A. Sonnenfeld, *What Makes Great Boards Great*, HARV. BUS. REV. (Sept. 2002), https://hbr.org/2002/09/what-makes-great-boards-great.
272. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993).
273. Pfeiffer v. Leedle, C.A. No. 7831–VCP, 2013 WL 5988416, at *3 (Del. Ch. Nov. 8, 2013).
274. E.g., Griffith v. Stein *ex rel.* Goldman Sachs Grp., 283 A.3d 1124 (Del. 2022); Erickson, *supra* note 260, at 1093.
275. *See* Erickson, *supra* note 260, at 1093.
276. *See id.*

C. The Corporations Incorporated in Delaware May Reconsider Whether Delaware Remains Their Favorite State of Incorporation

Finally, the *Garfield* holding may threaten Delaware's status as corporate America's favorite state of incorporation. Over half of the Fortune 500 corporations call Delaware their jurisdictional home.[277] Delaware attracts these corporations for many reasons, including its favorable tax benefits, a private registered agent process, its expedient and simple business filing processes, and Delaware's special court for corporate lawsuits, the Court of Chancery.[278]

Corporations are especially attracted to the advertised favorable legal environment.[279] The Delaware Court of Chancery holds special appeal to corporations because of its traditionally "well-developed and predictable legal precedents that may benefit corporations."[280] Delaware's state government acknowledges this draw, advertising in its "Why Corporations Choose Delaware" guide the predictability of Delaware law and its "enabling statute," the Delaware General Corporation Law.[281] The publication even explains that this enabling statute provides "corporations and shareholders . . . maximum flexibility in ordering their affairs."[282]

Delaware's open advertisement to corporations is not surprising given that the "Corporate Franchise"—the interplay between Delaware's role as the situs for many corporations and the Delaware's Division of Corporations, Delaware General Corporation Law, and Delaware's Court of Chancery—generated approximately $1.8 billion in the 2018 fiscal year.[283] This sum represents one-third of Delaware's total annual revenue, funding its schools, public safety, and medical care for underserved communities.[284]

However, the *Garfield* holding threatens Delaware's advertised legal predictability and flexibility for corporations. In *Garfield*, the Delaware Court of Chancery announced a novel breach of fiduciary duty claim that unexpectedly expanded director liability in a manner which abrogates the managerial discretion and flexibility of directors and thus, their corporations.[285] Thus, the holding effectively acted in the opposite manner promised by Delaware's government. Paired with other corporation-averse holdings like in *Griffith*,[286] Delaware corporations may consider changing their state of incorporation to other corporation-friendly states like Nevada, Wyoming, or South Dakota.[287] As expressed in a study funded by the Delaware Bar Association, corporations do not haphazardly decide to incorporate in Delaware.[288] Rather, corporations carefully analyze the costs and benefits of incorporating in Delaware, considering Delaware's public officials, judiciary,

277. Chauncey Crail et al., *Why Incorporate in Delaware? Benefits & Considerations*, FORBES ADVISOR (Aug. 7, 2022, 10:45 PM), https://www.forbes.com/advisor/business/incorporating-in-delaware/.
278. *Id.*
279. *Id.*
280. *Id.*
281. Crail, *supra* note 277; Lewis S. Black, Jr., *Why Corporations Choose Delaware*, DEL. DEP'T OF STATE DIV. OF CORPS., 2 (2007), https://corpfiles.delaware.gov/pdfs/whycorporations_english.pdf.
282. Crail, *supra* note 277; Black, *supra* note 281, at 2.
283. Paul Larson et al., *The Contributions of the Legal Industry to the Delaware Economy*, MORRISNICHOLS, 8–9 (June 2019), https://www.morrisnichols.com/media/news/15068_Delaware%20Bar%20Study_Legal%20Industry%20Contributions%20to%20Delaware%20Economy_06-2019.pdf (study sponsored by the Delaware State Bar).
284. *Id.* at 9.
285. *See* Garfield *ex rel.* ODP Corp. v. Allen, 277 A.3d 296 (Del Ch. 2022).
286. Griffith v. Stein *ex rel.* Goldman Sachs Grp., 283 A.3d 1124, 1138–39 (Del. 2022) (abrogating the traditional adequacy requirement for Delaware Rule 23.1 derivative actions).
287. Alyssa Gregory, *Best States to Incorporate In*, THE BALANCE (Sept. 19, 2022), https://www.thebalancemoney.com/best-states-to-incorporate-a-business-4178799.
288. Larson et. al., *supra* note 283, at 54.

and legal community.[289] While the balance of this analysis has traditionally tilted in Delaware's favor, it may quickly shift.[290] Corporations, their executives, and directors have choices, and they may ultimately choose a state that does not so easily open the door to professional plaintiffs.[291]

V. CONCLUSION

In *Garfield v. Allen*, the court held that a plaintiff could proceed on a novel breach of fiduciary duty theory that may encourage professional plaintiffs, impair public company board of directors' ability to perform their fiduciary duties, and threaten Delaware's status as Corporate America's favorite state of incorporation.[292] While the impacts proffered above are uncertain, one impact is nearly guaranteed—professional plaintiffs will reunite with their corporation's directors in conference calls, settlement talks, and court rooms, restarting a familiar dance with new ammunition from *Garfield.*[293]

> You'll be back, soon, you'll see/ You'll remember you belong to me/ You'll be back, time will tell/ You'll remember that I served you well/ Oceans rise, empires fall/ We have seen each other through it all/ And when push comes to shove/ I will send a fully armed battalion [of plaintiff lawyers] to remind you of my love! [294]

*-K. McKenzie Wilson Corley**

289. *Id.*
290. *Id.*
291. *See id.*; *see e.g., Garfield*, 277 A.3d 296; *Griffith*, 283 A.3d 1124.
292. *See Garfield*, 277 A.3d 296.
293. Matt Albaugh et al., *Inaction in Response to a Demand Letter Can Give Rise to a Board's Fiduciary Duty Breach*, TAFT 2 (May 26, 2022), https://www.taftlaw.com/news-events/law-bulletins/inaction-in-response-to-a-demand-letter-can-give-rise-to-a-boards-fiduciary-duty-breach.
294. Jonathan Groff & Original Broadway Cast of "Hamilton," *You'll Be Back*, GENIUS (last visited Nov. 23, 2023), https://genius.com/Jonathan-groff-and-original-broadway-cast-of-hamilton-youll-be-back-lyrics.

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