UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

OHIO PUBLIC EMPLOYEES RETIREMENT SYSTEM, STATE TEACHERS RETIREMENT SYSTEM OF OHIO, and OKLAHOMA FIREFIGHTERS PENSION AND RETIREMENT SYSTEM, Derivatively on Behalf of Nominal Defendant THE BOEING COMPANY, Plaintiffs, v. DAVID L. CALHOUN, STEVEN M. MOLLENKOPF, LAWRENCE W. KELLNER, ROBERT A. BRADWAY, LYNNE M. DOUGHTIE, LYNN J. GOOD, DAVID L. GITLIN, STAYCE D. HARRIS, AKHIL JOHRI, DAVID L. JOYCE, JOHN M. RICHARDSON, SABRINA SOUSSAN, RONALD A. WILLIAMS, STANLEY DEAL, STEPHANIE POPE, HOWARD MCKENZIE, MICHAEL DELANEY, MIKE FLEMING, ELIZABETH LUND, DARRIN A. HOSTETLER, UMA M. AMULURU, MARK C. FAVA, ELISABETH C. MARTIN, THOMAS GALANTOWICZ, MICHAEL D'AMBROSE, KIMBERLY S. PASTEGA, EDWIN J. CLARK, SCOTT A. STOCKER, and DAVID LOFFING, Defendants, - and - THE BOEING COMPANY, Nominal Defendant.	Civil Action No. 1:24-cv-1200 (LMB/WEF) **JURY TRIAL DEMANDED**

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PRELIMINARY STATEMENT[1]

This derivative action—which arises from one of the worst governance failures in U.S. history—is singular in the recidivist and serious nature of its corporate misconduct. After the MAX Crashes killed 346 people, Boeing faced intense government, regulatory, and public pressure to resolve mission-critical safety and compliance issues. The Board-approved DPA, *see* Ex. A, was a massive red flag alerting Boeing that it needed an *effective* safety and compliance program. As fiduciaries of a heavily regulated company under DOJ scrutiny—with a paramount mission of building safe airplanes—the Individual Defendants had to take meaningful steps to prevent such disasters in the future. But rather than fix Boeing's toxic, profits-over-safety culture, the Individual Defendants ignored the DPA—and other mounting red flags including and post-dating *Boeing I*—and continued to cause Boeing to make unsafe planes. This culminated in the Door Plug Blowout, a criminal guilty plea, and the payment of more than half a billion dollars in fines and remedial measures. Boeing's felony plea—an extraordinary event for any company, much less one of Boeing's size and stature—is a binding admission by the Board and its senior executives that Boeing ignored the reddest of red flags—the DPA—compromising safety in its thirst for profits.

By disregarding clear red flags, the Board breached its fiduciary duties under *Caremark*'s second prong. A plethora of particularized facts based on more than 1,000 internal Boeing documents demonstrate that a majority of the Board faces a substantial likelihood of liability under the second prong of the "*Caremark*" test, rendering demand futile.

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[1] Undefined capitalized terms have the meanings ascribed to them in Plaintiffs' operative complaint (the "Complaint"). ECF No. 110. Citations to "¶__" and "¶¶__" are to the Complaint. "MTD" refers to Defendants' memorandum of law in support of their motion to dismiss the Complaint. ECF No. 116. Unless indicated, emphasis and alterations are added, and internal quotation marks, citations, footnotes, and original emphases are omitted. In Delaware, unpublished opinions have precedential value. *See, e.g.*, *Case Fin., Inc. v. Alden*, 2009 WL 2581873, at *6 n.39 (Del. Ch. Aug. 21, 2009); *First Marblehead Corp. v. House*, 473 F.3d 1, 8 n.7 (1st Cir. 2006).

Rather than confront these facts, the MTD *ignores Boeing's guilty plea entirely* and attempts to distract this Court from the Individual Defendants' bad faith with 30 pages of appendices and 153 exhibits. None of these proffers—singly or collectively—excuses the Individual Defendants' bad faith disregard of the red flags calling on Boeing to implement an effective compliance program and put only safe planes in the air. Setting aside Defendants' improper use of these materials, all that they accomplish is to affirm the Board's bad faith. Fundamentally, as Defendants' exhibits concede, the Board received management reports but did nothing in response. For example, they received reports showing that Boeing's illegal conduct was not improving and, in important respects, was *getting worse*; indeed, despite purported plans and policies to address the issue, management reported a 33–40% *increase* in monthly instances of potential fraud reported to the DOJ under the DPA. MTD Ex. 120 at -3275. Likewise, management reports throughout 2022 showed an alarming increase in "Falsification of Records." MTD Ex. 64 at -2486. But instead of stopping the illegal practice, management simply *stopped reporting this metric*. On these facts, Defendants are wrong that merely receiving reports and updates in the face of numerous red flags fully discharged the Board's fiduciary duties.

As to the federal securities claims, Plaintiffs have stated derivative claims based on violations of Sections 10(b) and 14(a) of the Securities and Exchange Act. The Individual Defendants represented that they had established programs that ensured the safety, quality, and compliance of Boeing's products, created a positive safety culture, and fostered an environment where employees spoke up without fear of retaliation. In reality, they fostered a culture that (i) pursued profits over safety and compliance and (ii) retaliated against anyone whose concerns threatened to disrupt production schedules. The Individual Defendants knew about the Company's speed-and-profits-first culture and approved the false disclosures anyway.

Unable to defeat the Complaint on its merits, Defendants attempt to escape this Court's jurisdiction by falsely asserting that Boeing's forum bylaw "require[s]" this Court to shift certain claims to state court. MTD 2. But Boeing's recently adopted bylaw is clear that Plaintiffs' "action" is properly brought in federal court because no state court has jurisdiction over Plaintiffs' derivative federal securities claims. That ends the matter.

FACTUAL BACKGROUND

I. DEFENDANTS CONTINUED TO PRIORITIZE PROFITS OVER SAFETY AND COMPLIANCE NOTWITHSTANDING THE DPA, 2021 BREACH FINDING, *BOEING I*, AND DELAWARE SETTLEMENT.

On January 7, 2021, Boeing and the DOJ entered into the DPA. ¶138. The DPA—along with the MAX Crashes, resulting regulatory investigations, shareholder derivative litigation, and director-level personnel changes—put Defendants on notice of the need to put safety over profits. ¶¶132, 150, 570–71, 573, 575, 578. The DPA required Boeing to pay *$2.5 billion*, ¶140, and establish "an *effective* compliance program that is designed, implemented, and enforced to effectively deter and detect violations of U.S. fraud laws." ¶142. Less than two months later, the FAA announced that Boeing had breached a December 2015 settlement between Boeing and the FAA. ¶¶103–07. The FAA administrator personally "reiterated to Boeing's leadership time and again that the company must prioritize safety and regulatory compliance[.]" ¶107.

In September 2021, the Court of Chancery issued an opinion explaining the Board's oversight duties at length and identifying numerous, specific deficiencies. ¶¶12, 150–56. In March 2022, the Court of Chancery approved the settlement of *Boeing I*, which required a $237.5 million payment and numerous corporate governance reforms. ¶¶158–59.

A majority of the Demand Board members approved the DPA and the Delaware Settlement as directors and served on the Board both when the FAA announced Boeing's 2021 breach and when the Court of Chancery issued the *Boeing I* opinion. ¶¶31–33, 35–40, 42–43, 147 (citing

Ex. A at 44), 163.

Although the Individual Defendants knew that they needed to change Boeing's toxic "profits over safety and compliance" culture, they encouraged unsafe and noncompliant behaviors by approving production schedules that Boeing could not safely meet. *See infra* Argument § II.A.3. They also personally ignored a parade of red flags showing Boeing's unsafe and non-compliant practices. *See infra* Argument § II.A.4. Despite their knowledge, the Individual Defendants failed to take good faith efforts to stop the unsafe and noncompliant practices. *See id.*

II. BOEING'S UNSAFE AND ILLEGAL PRACTICES LED TO THE DOOR PLUG BLOWOUT AND GUILTY PLEA FOR VIOLATING THE DPA.

The Individual Defendants' bad-faith failure to change Boeing's toxic culture led to corporate trauma. The Door Plug Blowout was a direct result of Boeing's unsafe and noncompliant manufacturing practices, including traveled work from Boeing and Spirit, a supplier with a multi-year track record of manufacturing non-conforming parts. ¶¶338–41; *see* ¶¶206–23.

The Door Plug Blowout proved that Boeing breached the DPA. ¶449. As a result, in July 2024, Boeing agreed to admit to violating the DPA, plead guilty to a felony, pay another $243.6 million criminal fine, and invest an additional $455 million in its compliance program. ¶¶233, 456. In the Plea Agreement, *see* Ex. B, Boeing admitted that it failed to, among other things: (i) create and foster a culture of ethics; (ii) implement compliance policies and procedures designed to reduce the risk of violating U.S. fraud laws and the Company's compliance code; and (iii) extend anti-fraud oversight to quality and safety processes including out-of-sequence work, completeness of records, and stamping issues in build records. ¶¶450–53.

These admissions confirmed that, despite the Individual Defendants' knowledge that Boeing had not created the effective compliance program the DPA required, they knowingly ignored red flags and allowed Boeing to prioritize profits over safety and the law. ¶453. In

addition to the direct monetary costs of the Plea Agreement, the revelation of the ongoing noncompliance cost Boeing billions and inflicted massive corporate trauma. ¶¶516–29.[2]

ARGUMENT

I. THIS COURT HAS EXCLUSIVE JURISDICTION OVER THIS ACTION.

On August 29, 2023, a Board made up of virtually all the Director Defendants amended and restated Article VII, Section 4 of Boeing's bylaws (the "Forum Bylaw") to read in relevant part:

> [T]he Court of Chancery of the State of Delaware (or, if the Court of Chancery does not have jurisdiction, another state court located within the State of Delaware or, *if no state court located within the State of Delaware has jurisdiction*, the federal district court for the District of Delaware or *the federal district court for the Eastern District of Virginia*) shall be the sole and exclusive forum for: (i) any derivative *action* or proceeding brought on behalf of the Corporation, [or] (ii) any *action* asserting a claim of breach of a fiduciary duty[.]

MTD Ex. 5 at 24. The Forum Bylaw unambiguously operates on an action-by-action basis. This "action" alleges violations of both state and federal law. The Delaware state courts lack jurisdiction because, as even Defendants concede, "federal courts have exclusive jurisdiction over Exchange Act claims." MTD 12; *see Seafarers Pension Plan ex rel. Boeing Co. v. Bradway*, 23 F.4th 714, 728 (7th Cir. 2022). Thus, the Forum Bylaw provision plainly gives this Court sole and exclusive jurisdiction over this "action."

Unable to use this language to force a transfer of this "action" to Delaware state courts, Defendants try to rewrite the Forum Bylaw to operate on a *claim-by-claim* basis.[3] They insist the

[2] On December 5, 2024, the federal judge in Boeing's criminal case rejected the current version of the proposed guilty plea because "the plea agreement requires the parties to consider race when hiring the independent monitor [and] . . . marginalizes the Court in the selection and monitoring of the independent monitor." Order at 1, *United States v. The Boeing Company*, No. 4:21-CR-5-0 (N.D. Tex. Dec. 5, 2024).

[3] An actual claim-by-claim bylaw appears at Section 49 of the attached bylaws of Janux Therapeutics, Inc. Ex. C.

Court should exercise its discretion to sever the state law claims from the federal claims. MTD 12. Defendants' sole basis for doing so is that the Court of Chancery "has a well-recognized expertise in the field of state corporation law." *Id.* In other words, Defendants ask this Court to step aside because they think Delaware will do a better job.[4]

Although Defendants ask this Court to exercise its discretion to sever Plaintiffs' state law claims, they do not cite Federal Rule of Civil Procedure 21 or the four-factor test this district applies in exercising its "Rule 21 discretion . . . sparingly." *Carmine v. Poffenbarger*, 154 F. Supp. 3d 309, 320 (E.D. Va. 2015); *see Moulvi v. Safety Holdings, Inc.*, 2021 WL 4494191, at *6 (E.D. Va. Sept. 30, 2021) (explaining factors). This test counsels this Court to retain jurisdiction. *First*, all of Plaintiffs' claims are based on the same facts, and they overlap with the securities claims already pending in this Court. *Second*, severance would create obvious inefficiencies, including witnesses being deposed twice, in different jurisdictions, to answer questions about the same facts. *Third*, severance would prejudice Plaintiffs and Boeing by delaying the adjudication of claims on Boeing's behalf and by permitting the Director Defendants to rewrite the unambiguous bylaw they themselves approved less than eighteen months ago. *See Green v. Paz*, 2020 WL 555052, at *3 (E.D. Mo. Feb. 4, 2020) ("Cigna somehow overlooks the bylaw's additional mandate that such an action must be heard in federal court . . . in the event Delaware state courts do not have jurisdiction over the action."). *Fourth*, denying severance would not prejudice Defendants. "Federal courts have proven time and again their ability to apply and even extend Delaware law in appropriate

[4] On October 22, 2024, this Court denied the request of other Boeing shareholders to intervene in this action. ECF No. 99. Those shareholders recently filed substantially identical claims in Delaware. *See Constr. & Gen. Building Laborers' Local Union No. 79 Gen. Fund v. Amuluru*, C.A. No. 2024-1210-MTZ (Del. Ch.). The filings indicate Defendants might assist the Delaware plaintiffs by agreeing to expedition. *See* Ex. D (stipulated schedule referring to Defendants' "response" to the motion to expedite rather than their "opposition").

ways." *Corwin v. Silverman*, 1999 WL 499456, at *6 (Del. Ch. June 30, 1999).

II. DEFENDANTS IGNORE BASIC LEGAL STANDARDS.

On a motion to dismiss, the record before the court is limited to: (i) the complaint's allegations; (ii) documents attached to the complaint; and (iii) documents integral to the complaint, if their authenticity is undisputed. *See Garnitschnig v. Horovitz*, 48 F. Supp. 3d 820, 828 (D. Md. 2014). Courts deciding the sufficiency of a complaint must "accept as true all of the factual allegations contained in the complaint and draw all reasonable inferences in favor of the plaintiff." *King v. Rubenstein*, 825 F.3d 206, 212 (4th Cir. 2016). "'[I]t is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint.'" *Kumar v. Republic of Sudan*, 2019 WL 13251350, at *10 (E.D. Va. July 31, 2019).

Here, the Complaint spans 214 pages, has 616 detailed paragraphs, and sets forth non-conclusory, particularized allegations based on Company documents that thoroughly illustrate how Defendants harmed Boeing. Unable to show a legal deficiency in the Complaint, Defendants seek to rewrite it with their own version of events. Defendants' approach, inserting 30-page appendices and more than 150 exhibits, is part of a "troubling trend" that "improperly and extensively uses Section 220 Documents in support of" a motion to dismiss. *In re CBS Corp. S'holder Class Action & Derivative Litig.*, 2021 WL 268779, at *18–19 (Del. Ch. Jan. 27, 2021), as corrected (Feb. 4, 2021). Where, as here, the "declarations and appendices supporting motions to dismiss . . . substantially dwarf the . . . briefs supporting the motions themselves, an alarm should sound that perhaps the defendants are bringing their motions under the wrong rule." *Id.* at *18 n.260.

Defendants wrongfully rely on an incorporation-by-reference provision in the Section 220 Production confidentiality agreement. That provision only "permits a court to review [cited documents] to ensure that the plaintiff has not misrepresented their contents[;]" it *does not* permit this Court to "weigh evidence on a motion to dismiss[;]" Defendants may not "rewrite [Plaintiffs']

well-pled complaint in favor of their own version of events[.]" *Id.* at *18 (alteration in original); *see also id.* at *19 n.266 (citing cases). "Defendants cannot ask the court to accept their Section 220 documents as definitive fact and thereby turn pleading stage inferences on their head." *In re Clovis Oncology, Inc. Derivative Litig.*, 2019 WL 4850188, at *14 n.216 (Del. Ch. Oct. 1, 2019). "If there are factual conflicts in the documents or the circumstances support competing interpretations, and if the plaintiff had made a well-pled factual allegation, then the allegation will be credited." *Voigt v. Metcalf*, 2020 WL 614999, at *9 (Del. Ch. Feb. 10, 2020).

Defendants ignore that rule and request that this Court accept as true their self-serving factual claims that contradict Plaintiffs' well-pled allegations. For example:

- Defendants claim there was "significant and sustained Board engagement," MTD 1, and that "the Board kept on top of management's efforts," MTD 20. Those assertions conflict with Plaintiffs' well-pled allegations and the Section 220 Production documents showing no Board action other than receiving reports at meetings.
- Defendants point to a statement that was repeated in a series of presentations as "indicat[ing] that management's efforts were on course." MTD 23–24. That is not a reasonable inference. The same presentations disclosed that, for almost three years, Boeing reported an average of more than two instances of potential fraud per day to the DOJ, and that the instances of reported fraud were *increasing* over the term of the DPA. ¶265 (citing MTD Ex. 120 at -3275). But the Board took no action in response and did not receive *any* of the fraud reports sent to DOJ.
- Defendants claim that a survey of Boeing employees who performed inspections for the FAA as part of an Organization Designation Authorization ("ODA") showed that Boeing's culture around retaliation was improving. MTD 23. Not so. No prior survey permitted an apples-to-apples comparison, and the participation level in the survey and the gaps in the reported data prevent any inference at this stage that the retaliation environment was improving. ¶¶319–20.

Here the Court must credit only Plaintiffs' well-pled allegations and disregard Defendants' efforts to convert this pleading-stage motion into a full-fledged evidentiary trial before depositions and full discovery. *Rubenstein*, 825 F.3d at 212; *CBS*, 2021 WL 268779, at *18–19; *Voigt*, 2020 WL 614999, at *9.

III. THE DEFENDANTS FACE A SUBSTANTIAL LIKELIHOOD OF LIABILTY ON EACH OF PLAINTIFFS' CLAIMS.

Defendants move to dismiss the Complaint and each of its counts under Rules 23.1 (arguing

that a pre-suit litigation demand was required) and 12(b)(6) (arguing that Plaintiffs failed to state any claims). For the reasons set forth below, Defendants' motion fails.

To state a claim under federal law, Plaintiffs must allege facts supporting a claim that is "plausible on its face," meaning facts that create a "reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Because Plaintiffs are asserting derivative claims, state law determines the circumstances under which demand on the board is excused as futile, but Federal Rule of Civil Procedure 23.1 "governs the degree of detail that the plaintiff must furnish" to allege "with particularity" that those circumstances exist. *Westmoreland Cnty. Emp. Ret. Sys. v. Parkinson*, 727 F.3d 719, 722, 724 (7th Cir. 2013). Since Boeing is a Delaware corporation, Delaware's demand futility standard applies. In Delaware, demand is excused as futile if at least half the members of the board of directors at the time plaintiff files the lawsuit "faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand." *United Food & Com. Workers v. Zuckerberg*, 262 A.3d 1034, 1059 (Del. 2021). If "the factual allegations underlying [different Counts] are congruous, demand is excused as to all of those counts under [the] substantial likelihood of liability prong." *CBS*, 2021 WL 268779, at *47 (first alteration in original).

To allege a substantial likelihood of liability, "a plaintiff need not demonstrate 'a reasonable probability of success' on the claim, as that would be 'unduly onerous.'" *Id.* at *31. Rather, the "substantial likelihood of liability" standard "only requires that plaintiffs make a threshold showing, through the allegation of particularized facts, that their claims have some merit." *Id.*; *see Grabski ex rel. Coinbase Glob., Inc. v. Andreessen*, 2024 WL 390890, at *9 (Del. Ch. Feb. 1, 2024) (same).

Here, the Demand Board consists of the eleven directors on the Board when this Action

was filed—Bradway, Calhoun, Doughtie, Gitlin, Good, Harris, Johri, Joyce, Mollenkopf, Richardson, and Soussan (each, a "Demand Defendant"). ¶¶30–41; MTD 13. Demand is excused because each Demand Defendant received similar red flags and ignored them in bad faith, making at least half the Demand Board substantially likely to face liability on each claim.

A. Count I: The Director Defendants Breached Their Oversight Duties.

1. *Caremark* Legal Standards

"[A] director must make a good faith effort to oversee the company's operations." *Lebanon Cnty. Emps.' Ret. Fund v. Collis*, 311 A.3d 773, 795 (Del. 2023). "[D]irectors fall short of this duty when they (a) utterly fail to implement any reporting or information systems or controls; or (b) having implemented such a system or controls, consciously fail to monitor or oversee its operation[.]" *Id.* Plaintiffs' state law claims are based on the second *Caremark* prong. *Contra* MTD 15–19. Under that prong, red flags of potential wrongdoing support liability "when they are either waived in one's face or displayed so that they are visible to the 'careful observer.' The 'careful observer' in this regard is one whose gaze is fixed on the company's mission critical regulatory issues." *Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou*, 2020 WL 5028065, at *17 (Del. Ch. Aug. 24, 2020). Where, as here, "externally imposed regulations govern [the company's] 'mission critical' operations, the board's oversight function must be more rigorously exercised." *Clovis*, 2019 WL 4850188, at *13; ¶¶87–89. Rigorous oversight is especially necessary at "recidivist" companies like Boeing that have a history of illegal conduct. *See In re Massey Energy Co.*, 2011 WL 2176479, at *21 (Del. Ch. May 31, 2011); ¶¶514, 551–52.

Meritorious oversight claims require "a breach of the duty of loyalty grounded on bad faith action." *Ontario Provincial Council of Carpenters' Pension Tr. Fund v. Walton*, 2023 WL 3093500, at *31 (Del. Ch. Apr. 26, 2023). "Bad faith is a state of mind." *IBEW Loc. Union 481 Defined Contribution Plan & Tr. ex rel. GoDaddy, Inc. v. Winborne*, 301 A.3d 596, 619 (Del. Ch.

2023). "The necessary mental state can range from . . . a conscious disregard for one's responsibilities[,] to an intent to act with a purpose other than that of advancing the best interests of the corporation, to an actual intent to do harm to the corporation or its stockholders." *Id.* at 622-23. "Sophisticated and well-advised individuals do not formally document bad faith decisions, so . . . the court looks at a series of fiduciary inactions and actions, made over time, to determine whether they support an inference that the corporate fiduciaries were operating in bad faith." *Walton*, 2023 WL 3093500, at *32.

> At the pleading stage, the test is whether the complaint alleges a constellation of particularized facts which, when viewed holistically, support a reasonably conceivable inference that an improper purpose sufficiently infected a director's decision to such a degree that the director could be found to have acted in bad faith. Everything goes into that mulligan stew. The court must sample the concoction, and if the pleading-stage flavor is foul, then the complaint survives dismissal, and the case proceeds to discovery.

GoDaddy, 301 A.3d at 623.[5]

2. The Magnitude and Duration of Boeing's Illegal Conduct Support a Plausible Inference of Bad Faith.

Federal courts consistently find a pleading-stage inference of bad faith oversight when the "alleged wrongdoing is of substantial magnitude and duration." *In re Pfizer Inc. S'holder*

[5] Defendants' reliance on an exculpation provision in Boeing's charter, MTD 15 n.4, is misplaced. Delaware law permits exculpation only for breaches of the duty of care; by contrast, breaches of the duty of loyalty—which include bad faith actions—cannot be exculpated. *See* 8 *Del. C.* § 102(b)(7); *In re China Agritech, Inc. S'holder Derivative Litig.*, 2013 WL 2181514, at *25–26 (Del. Ch. May 21, 2013). Here, the exculpation provision does not apply because a *Caremark* claim is based on bad faith. In other words, a meritorious *Caremark* claim cannot be exculpated. Similarly, Defendants incorrectly assert that bad faith requires "intentional misconduct." MTD 15 n.4. What Plaintiffs must—and do—plead is "a constellation of particularized facts which, when viewed holistically, support a [plausible] inference that" the Director Defendants exhibited "a conscious disregard for [their] responsibilities [or] an intent to act with a purpose other than that of advancing the best interests of the corporation." *GoDaddy*, 301 A.3d at 622–23. Nothing more is required.

Derivative Litig., 722 F. Supp. 2d 453, 460 (S.D.N.Y. 2010).[6] The inference of bad faith is even stronger where, as here, compliance-related agreements are in force between the company and regulators. *See Pfizer*, 722 F. Supp. 2d at 460–62; *see also Collis*, 311 A.3d at 803 ("[A] settlement of litigation or a warning from a regulatory authority—irrespective of any admission or finding of liability—may demonstrate that a corporation's directors knew or should have known that the corporation was violating the law.").

Here, the DPA obligated Boeing to create an effective compliance program. *Boeing I* and the Delaware Settlement reinforced the Board's responsibility to oversee compliance with the DPA and federal regulations. The Board willfully failed to do so over a three-year period. At the end of this period, Boeing *admitted* that its failure to implement the compliance program the DPA required constituted criminal conduct. ¶451. Boeing's DPA violations led Boeing to: (i) plead guilty to a felony; (ii) pay another $243.6 million criminal fine; (iii) subject itself to an independent compliance monitor for three years; and (iv) increase its compliance expenditures by 75%—to $455 million over three years. ¶456. These facts—standing alone—are enough to meet Rule 23.1's requirements.[7]

3. The Board Knowingly Approved Production Schedules That Required Unsafe and Illegal Conduct.

A key aspect of the Director Defendants' bad faith was their knowing approval of unsafe production schedules. ¶¶6, 14–15, 175–77, 198–247. Before the MAX Crashes, the 737 MAX

[6] *Accord McCall ex rel. Columbia/HCA Healthcare Corp. v. Scott*, 239 F.3d 808, 822 (6th Cir. 2001), *amended on denial of reh'g*, 250 F.3d 997 (6th Cir. 2001); *In re SCANA Corp. Derivative Litig.*, 2018 WL 3141813, at *4 (D.S.C. June 27, 2018); *In re Veeco Instruments, Inc. Sec. Litig.*, 434 F. Supp. 2d 267, 275 (S.D.N.Y. 2000); *In re Oxford Health Plans, Inc.*, 192 F.R.D. 111, 117 (S.D.N.Y. 2000).

[7] *See Pfizer*, 722 F. Supp. 2d at 460–62; *McCall*, 239 F.3d at 823; *SCANA*, 2018 WL 3141813, at *4; *Veeco*, 434 F. Supp. 2d at 275; *Oxford Health*, 192 F.R.D. at 117.

factory was "in chaos" delivering thirty-nine airplanes a month. ¶127. The FAA's decision to ground the 737 MAX and the COVID-19 pandemic slowed production to sixteen planes in July 2021. ¶199. In April 2022, management gave the Board a new production schedule with a major ramp-up in production—from 31.5 planes a month by the end of 1Q '22 to 57 planes a month by early 2025. *Id.* The Board approved this schedule, which required Boeing to double its monthly 737 MAX production in twelve months and contemplated an early 2025 production level 46% higher than the chaotic pre-crash level. In December 2022 and December 2023, the Board approved updated production schedules, both of which required major production increases. ¶201.

Any director acting in good faith would know that Boeing could not meet its production schedule safely and in compliance with federal regulations. The Board knew Boeing had a "[n]ew and inexperienced workforce" after the COVID-19 pandemic. ¶198. The Board also knew Spirit had a history of quality problems and that the pandemic-constrained supply chain made matters worse. *See* ¶¶71–72, 77, 80, 206–16, 230. The Board further knew about unsafe and noncompliant practices at Boeing, including traveled work, shadow factories, improper use of tools and parts, fraudulent stamping and record-keeping, and retaliation against employees who delayed production schedules. *Infra* Argument § II.A.4. The Director Defendants face a substantial likelihood of liability for knowingly approving and maintaining production schedules that Boeing could not safely and legally meet. *See Rosenbloom v. Pyott*, 765 F.3d 1137, 1157–59 (9th Cir. 2014) (demand excused where board approved business plan premised on illegal conduct); *McCall*, 239 F.3d at 820 (demand excused where the "directors knew that such a rate of growth was not realistically attainable absent fraud").

4. The Board Failed To Stop Illegal Conduct, Notwithstanding Numerous Red Flags Revealing the Conduct.

The Complaint details the various ways in which the Board learned Boeing utilized unsafe

and non-compliant practices. And Defendants *admit* that they knew. *Compare* ¶¶217, 219, *with* MTD 19, 21–22 (Board knowledge of Spirit's problems); ¶¶234–40, *with* MTD 20 (Board knowledge of rework and traveled work); ¶¶255, 260–62, 265–67, *with* MTD 21 (Board knowledge of stamping problems); ¶282, *with* MTD 20–21 (Board knowledge of unauthorized parts issues); ¶¶297–98, *with* MTD 20–21 (Board knowledge of tool control issues); ¶¶318–20, *with* MTD 22–23 (Board knowledge of retaliation).

When directors know of illegal activity, they have a duty to act in good faith to *stop* it.[8] The Board here did not. Rather, as they admit, at *most* the Director Defendants (i) received reports from management at regular meetings and (ii) possibly asked questions during the reports. MTD 20–21.[9] That was not enough, and the Board knew it.

Boeing I called out management's biased presentations to the Board and explained that complying with the Board's fiduciary duties required balanced, *mandatory* Board-level reporting on mission-critical issues. ¶¶155, 161. Yet the Board continued to permit biased management reporting, and management continued to provide slanted presentations. ¶¶182–85. Defendants concede the lack of mandatory reporting regarding manufacturing issues. MTD 17–18. Given *Boeing I*'s clear mandate, their unabated failure supports a plausible inference of bad faith.

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[8] *China Agritech*, 2013 WL 2181514, at *24 (bad faith adequately pled where it was "reasonable to infer that [Defendants] knew about the oversight problems and failed to stop them"); *In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 778, 799 (Del. Ch. 2009) (bad faith adequately pled where court could infer fiduciaries had knowledge of fraudulent activities and "fail[ed] to stop them"), *aff'd sub nom. Teachers' Ret. Sys. of La. v. PricewaterhouseCoopers LLP*, 11 A.3d 228 (Del. 2011); *Westmoreland*, 727 F.3d at 729 (demand futile where defendants "chose not to bring a prompt halt to the improper conduct causing the noncompliance"); *cf. Rich ex rel. Fuqi Int'l, Inc. v. Chong*, 66 A.3d 963, 984 (Del. Ch. 2013) ("When faced with knowledge that the company controls are inadequate, the directors must act, i.e., *they must prevent further wrongdoing from occurring*.").

[9] Even without the admission, the absence of evidence of director action in the Section 220 Production leads to the same result. *See China Agritech*, 2013 WL 2181514, at *20 ("[T]his Court can reasonably draw [inferences] from the absence of books and records that the Company could be expected to produce.").

Defendants try to defend the Board's failure to establish mandatory reporting criteria, arguing that management elevated certain Speak Up reports to the Board. MTD 19. But reliance on management discretion in the absence of objective criteria is the very practice the Court of Chancery rejected in *Boeing I*. To the extent Defendants argue that management presented a fair cross-section of the Speak Up reports to the Board, *cf.* MTD 19, that argument improperly creates a factual dispute that only full discovery can resolve.

Here, management's reports put the directors on notice that Boeing's unsafe and criminal conduct was continuing, and even getting worse, but the Board took no action in response. For example:

- The Audit Committee saw a 33–40% *increase* in monthly instances of potential fraud reported to the DOJ under the DPA, but passively accepted management's assurances "that there were no substantiated instances of significant fraud related to disclosed matters," without reviewing any of the disclosure letters management provided to the DOJ or otherwise following up. ¶¶265–67; *see also* ¶¶264, 268–69.
- Audit Committee reports throughout 2022 showed an alarming increase in "Falsification of Records." When the numbers failed to improve, management simply stopped reporting this metric and dropped "Falsification of Records" from its 2023 reports. The Audit Committee passively accepted the 2022 reports and ignored management *dropping* this metric from its reports in 2023. ¶¶260–63.
- Board and Aerospace Safety Committee reports and draft public filings over a multi-year period showed that traveled work persisted. ¶¶236–37. The Board and its committees also received red flags over a multi-year period regarding 787 altimeter flaws, 787 and 737 MAX aft dome problems, and additional defects requiring rework. ¶¶238–40.
- The Board knew Boeing needed to shut down its "shadow factories," large outdoor manufacturing areas outside of the Company's Washington plants that required Boeing employees to take equipment and parts into the elements, resulting in damage to tools, equipment, and other parts in order to accommodate the out-of-sequence work. ¶¶244–46.
- Audit and Aerospace Safety Committee reports showed that stamping fraud represented a "High Risk" to the Company and that instances of stamping fraud were not decreasing. ¶255.
- A May 2022 survey of ODA representatives showed a serious culture of retaliation against Boeing employees who performed inspections under delegated authority from the FAA. Of those who responded, 24.1% were concerned about retaliation, 13.9% perceived management interference with their FAA duties, and 5.6% believed retaliation was getting worse. ¶¶318–21. The Aerospace Safety Committee permitted management to selectively report the results of the survey in the 2023 Chief Aerospace Safety Officer Report. The Board did not commission another ODA survey until after the Door Plug Blowout.

Instead of addressing the root cause of these unsafe practices—a production schedule that Boeing could not safely and legally meet—the Director Defendants passively listened to the Officer Defendants report on the problems and did nothing. ¶¶241, 243, 246, 263–64, 267, 282, 298, 548–49. Boeing executives even proudly announced on public earnings calls that they were "keeping our suppliers hot according to the master schedule." ¶217.

Defendants dedicate much of the MTD—and appendices doubling their page count without leave of this Court—to detailing the reports the Board received. *See* MTD 16–24; MTD Apps. 1–2. But the receipt of those reports is damning—not exculpatory. "[I]t was not the number of occasions when the board or one of its committees reviewed the issue; rather, it was the content of the reports[,] . . . in response to which the defendants did nothing." *Collis*, 311 A.3d at 804. At best, Defendants' 30-page appendices merely show the Director Defendants passively attending meetings and receiving materials.

Having conceded the Director Defendants knew of the illegal conduct and that the illegal conduct was continuing, Defendants' only response is to assert that forming committees, receiving management reports, and occasionally asking questions are sufficient to satisfy *Caremark*'s requirement of good faith efforts. MTD 19; *see also* MTD 1–3 (painting requirement as minimal). But courts routinely sustain *Caremark* claims despite directors attending meetings, forming committees, receiving presentations, and learning about plans and policies. For example:

- In *Collis*, the Delaware Supreme Court rejected as a defense to potential *Caremark* liability that the board and its audit committee met and discussed the company's controls intended to prevent the challenged misconduct. *See* 311 A.3d at 804.
- In *Walton*, the Court of Chancery found a well-pled *Caremark* claim despite the board receiving "a series of reports about Walmart's compliance with [the DEA Settlement's] requirements" and despite the existence of a "nice-sounding compliance program." 2023 WL 3093500, at *35.
- In *Rosenbloom*, the Ninth Circuit reversed the trial court's dismissal ruling, despite the existence of "formal policies prohibiting" the challenged conduct. 765 F.3d at 1157.

- In *Boeing I*, the Court of Chancery explained in the context of *Boeing's* directors that "passive invocations of quality and safety, and use of safety taglines, fall short of the rigorous oversight [Delaware law] contemplates." 2021 WL 4059934, at *28.

These authorities confirm that *Caremark* requires more than just "go[ing] through the motions." *Massey*, 2011 WL 2176479, at *19 (plaintiffs raise "a plausible inference that the independent directors of Massey did just that—go through the motions—rather than make good faith efforts to ensure that Massey cleaned up its act"). Moreover, directors cannot simply accept management's assurances about remedial efforts while ignoring their track record of noncompliance and unreliable, spurious presentations. *See Hughes ex rel. Kandi Techs. Grp., Inc. v. Hu*, 2020 WL 1987029, at *16 (Del. Ch. Apr. 27, 2020). Far from representing a "sweeping expansion of director liability under Delaware law," MTD 4, denying the motion to dismiss is perfectly consistent with well-established *Caremark* jurisprudence.

Further, the Director Defendants fostered Boeing's toxic culture by tacitly condoning retaliation against employees who raised compliance and safety issues. Retaliation was an open secret at Boeing and remains a serious issue to this day. ¶¶68–80, 210–13, 303–23, 369, 391, 417, 444–47. The Company's main reporting program—Speak Up—does not include a mandatory Board reporting mechanism and often sends complaints to the very managers about whom the reports complain. *Cf.* ¶¶76, 181, 322. As referenced above, a May 2022 ODA survey showed that retaliation even extends to the Boeing employees inspecting safety on behalf of the FAA. ¶¶292–93, 318–20, 369. But when the Aerospace Safety Committee Chair summarized the survey for the Board, he focused on the purported "improvement in survey results" rather than fixing Boeing's retaliation problem. ¶321.

The Board's knowing failure to stop these unsafe and noncompliant practices led directly to the Door Plug Blowout and the resulting corporate trauma. In the Plea Agreement, Boeing *admitted* that it failed to extend anti-fraud oversight to address: (i) out-of-sequence work;

(ii) completeness of records; and (iii) stamping issues in build records. ¶¶451–55. An FAA expert panel formed under the 2020 Aircraft Certification, Safety, and Accountability Act found numerous, serious problems with Boeing's compliance and reporting structures. ¶¶367–82. In one panel member's written testimony to Congress, he explained that Boeing workers: "Hear safety is our number one priority, but they see that that is only true as long as you meet your production milestones." ¶393. A Senate staff memorandum detailed an "alarming mismanagement of nonconforming parts" at Boeing. ¶418. These issues—and others publicly exposed in 2024—are the very issues regarding which the Board saw repeated red flags. After admitting to serious criminal wrongdoing earlier this year, Defendants cannot credibly claim ignorance now.

* * *

The Demand Defendants face a substantial likelihood of liability for breaching their oversight duties disloyally, in bad faith. Therefore, demand is excused as futile.

B. Count II: The Officer Defendants Breached Their Oversight Duties.

The officers of Delaware corporations "owe a fiduciary duty of oversight as to matters within their areas of responsibility." *In re McDonald's Corp. S'holder Derivative Litig.*, 289 A.3d 343, 358 (Del. Ch. 2023). Officers must look for red flags within their areas of oversight and put a stop to them. *Id.* at 370; *Walton*, 2023 WL 3093500, at *51.

Here, the wrongdoing underlying Plaintiffs' claim occurred within the Officer Defendants' areas of oversight. ¶47.

- As CEO and COO, Calhoun and Pope, respectively, had Company-wide responsibility for safety, compliance, and non-retaliation and presented to the Board and its committees on these issues. *E.g.*, ¶¶47, 61, 236.
- As Boeing's Chief Compliance Officer, Amuluru and Hostetler had Company-wide responsibility for compliance and non-retaliation and presented to the Board and its

committees on these issues. ¶¶46, 55; *see McDonald's*, 289 A.3d at 369 ("[T]he CEO and Chief Compliance Officer likely will have company-wide oversight portfolios[.]").

- As Boeing's Chief Aerospace Safety Officer, Delaney had Company-wide responsibility for safety and presented to the Board and its committees on this issue. ¶51. He was responsible for the annual Chief Aerospace Safety Officer Report.
- As Boeing's Chief Human Resources Officer, D'Ambrose had Company-wide responsibility for employment-related compliance and non-retaliation and presented to the Board on hiring and employee issues. ¶49.
- As Boeing's Ombudsperson, Fava had Company-wide responsibility for compliance and non-retaliation against ODA representatives and met with the Board and the Aerospace Safety Committee to discuss these issues. ¶52.
- As Boeing's Product and Services Safety Executive, Galantowicz had Company-wide responsibility for safety and compliance and presented to the Board and its committees on these issues. ¶54.
- In their engineering roles, McKenzie and Loffing had responsibility for safety and compliance at Boeing and BCA, respectively, and presented to the Board and/or the Aerospace Safety Committee on these issues. ¶¶ 56, 59.
- As Boeing's Vice President, Enterprise Safety & Mission Assurance, Martin had Company-wide responsibility for safety and compliance and presented to the Aerospace Safety Committee on these issues. ¶58.
- As BCA's CEO, Deal and Pope had BCA-wide responsibility for safety, compliance, and non-retaliation and presented to the Board and its committees concerning BCA business. ¶¶50, 61.
- As BCA's Senior Vice President of Quality, Lund had BCA-wide responsibility for safety and compliance and presented to the Board and its committees on these issues. ¶57.
- As BCA's Vice President of Manufacturing and Safety, Pastega had BCA-wide responsibility for safety and compliance. ¶60.
- As program directors, Clark, Fleming, and Stocker had responsibility for safety, compliance, and non-retaliation within their respective programs and attended and/or presented at several Aerospace Safety Committee meetings. ¶¶48, 53, 62.

Given the Officer Defendants' roles—and the pervasiveness of the alleged misconduct—it is reasonable to infer that the Officer Defendants knew about it. *See Am. Int'l. Grp.*, 965 A.2d 763 at 782 ("Even the transactions that cannot be tied to specific defendants support the inference that, given the pervasiveness of the fraud, [the officer defendants] knew that AIG was engaging in illegal conduct."). The allegations in the Complaint, including the admissions in the Plea Agreement, demonstrate that the Officer Defendants did not stop the illegal conduct at Boeing. The Officer Defendants' knowledge of illegal conduct—coupled with their admitted failure to stop

it—supports a pleading-stage inference of bad faith. *See supra* n.8 & accompanying text.

C. Count III: The 10(b) Defendants Violated Section 10(b) in Bad Faith.

The 10(b) Defendants' attempt to paint their false and misleading disclosures as outside the reach of Section 10(b) fails. Boeing purchased more than $440 million of its common stock at prices inflated by the 10(b) Defendants' misstatements, including over $413 million in purchases in 2023 alone. ¶¶502–03. Defendants do not contest falsity, materiality, loss causation, or damages. Instead, they challenge only (i) whether Defendants made misstatements "in connection with the purchase" of securities; (ii) reliance; and (iii) scienter. Each challenge fails.

1. "In Connection with the Purchase or Sale of any Security"

The 10(b) Defendants made misstatements "in connection with the purchase" of securities. 15 U.S.C. § 78j(b). The Supreme Court gives "in connection with" a "broad interpretation," *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006), and made clear long ago that "Section 10(b) must be read flexibly, not technically and restrictively." *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971).

The Exchange Act broadly defines "purchase" to "include any contract to buy, purchase, or *otherwise acquire*." 15 U.S.C. § 78c(a)(13). Further, "to effectuate the remedial purposes of § 10(b), courts have construed the terms 'purchase' and 'sale' broadly, regardless of what these or similar words might mean in the common law or other contexts, and as going beyond the garden-variety cash-for-stock transactions." *Seolas v. Bilzerian*, 951 F. Supp. 978, 987 (D. Utah 1997) (collecting authority); *see also SEC v. Nat'l Sec.*, 393 U.S. 453, 467 (1969) (under Section 10(b), "shareholders 'purchased' shares in the new company by exchanging them for their old stock"). Here, Defendants made misstatements "in connection with the purchase" of Boeing stock for two reasons. Either is independently sufficient to sustain the Section 10(b) claim.

First, when Boeing obtained common stock from its employees as their RSUs vested,

Boeing reduced the employees' ownership—and correspondingly increased Boeing's ownership—of outstanding shares.[10] The Complaint details the specific quantities of shares—and the dollars Boeing spent to purchase them—from January 2022 to December 2023. ¶¶501–02.

The 10(b) Defendants ask this Court to ignore the facts, claiming that "[t]here was no buying or selling of stock" because "Boeing simply never gave part of the award to the recipient." MTD 28. But Boeing's own SEC filings wholly undermine that claim. Under "Issuer *Purchases* of Equity Securities," the filings state that the shares "*were transferred to us from employees* in satisfaction of minimum tax withholding obligations associated with the vesting of restricted stock units." *See* Ex. E (SEC filings cited in ¶501 n.29 & ¶502 n.30). Leaving no doubt that Boeing purchased the stock, its filings include an "Average Price *Paid* per Share" and "Total Number of Shares *Purchased*." *See id.*[11] Boeing made these disclosures pursuant to Item 703 of SEC Regulation S-K, which requires disclosure of Boeing's "purchase[s]" of its stock. 17 C.F.R. § 229.703.[12]

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[10] In *Drachman v. Harvey*, 453 F.2d 722, 737 n.2 (2d Cir. 1971), the court found a corporation's redemption of convertible debentures actionable under Section 10(b) because the corporation "was acquiring the bondholders' rights to obtain common stock by conversion and thereby reducing the outstanding rights to interests in the equity securities of the corporation to the same extent as though it had purchased common shares on the open market." Here, Boeing's purchases likewise reduced "the outstanding rights to interests in" its "equity securities."

[11] The filings' statement that "[w]e did not purchase any shares of our common stock in the open market pursuant to a repurchase program," Ex. E, does not change the result: the Complaint does not allege open market repurchases, but that "Boeing purchased shares from its employees." ¶501. Those transactions are "purchases" under Section 10(b).

[12] Notably, other companies and the SEC have indicated that withholding shares for tax purposes constituted "purchases" and "acquisition[s]" of those shares. *See In the Matter of Mcg Cap. Corp.*, Release No. 29191 (Mar. 25, 2010) (Ex. F-1) (application: "Applicant states that the withholding of the Applicant's common stock or purchase of shares of Applicant's common stock to satisfy tax withholding obligations related to the vesting of Restricted Stock might be deemed to be purchases by the Applicant of its own securities within the meaning of section 23(c) . . . ."), Release No. 29210 (Apr. 20, 2010) (Ex. F-2) (granting exemption from Investment Company Act); *see also Consol. Nat. Gas Co.*, Release No. 25425 (Dec. 11, 1991) (Ex. F-3) (SEC referred to company's withholding of shares from grants for tax purposes as "acquisition" of shares).

The 10(b) Defendants' remaining responses also fail. Being "automatic" does not change the fact that these were "purchases." *Carter v. Signode Industries, Inc.*, 694 F. Supp. 493, 496–97 (N.D. Ill. 1988) is inapposite, as that court *sustained* a Section 10(b) claim where the plaintiffs "provided something of appraisable value" by "relinquishing their general investment fund accounts" in exchange for guaranteed income contracts, which constituted a "purchase" under Section 10(b). Boeing likewise provided "something of appraisable value" (money for tax payments) for shares. And the 10(b) Defendants' strained analogy to "a company that withholds a portion of an employee's paycheck" is fatally flawed because that did not happen; rather, employees received shares, not cash, and admittedly transferred a portion of those shares to Boeing.[13] Boeing plainly "purchased" the shares under Section 10(b).

Second, based on the stock's inflated value, Boeing paid cash in respect of the employees' tax obligations. These cash payments independently establish a Section 10(b) claim because, for purposes of Section 10(b), "it is enough that the fraud alleged 'coincide' with a securities transaction." *Dabit*, 547 U.S. at 85. Simply put, the false disclosures caused Boeing to pay more money by inflating its stock price—a classic fraud that "coincide[s]" with securities transactions. *Id.* For example, in *SEC v. Zandford*, 535 U.S. 813, 825 (2002), the Supreme Court sustained a Section 10(b) claim against a broker who sold customers' securities and stole the cash for personal benefit. That conduct was "a fraudulent scheme in which the securities transactions and breaches of fiduciary duty coincide. Those breaches were therefore 'in connection with' securities sales within the meaning of § 10(b)." *Id.* The same holds true here.

[13] *In re Enron Corp. Sec. Derivative & ERISA Litig.*, 238 F. Supp. 3d 799, 835–37 (S.D. Tex. 2017), *aff'd*, *Lampkin v. UBS Fin. Servs., Inc.*, 925 F.3d 727 (5th Cir. 2019), is irrelevant because it solely addressed the grant of options. Plaintiffs' claims involve actual shares of stock issued to employees and transferred to Boeing.

2. Reliance

Defendants advance two reliance arguments: (i) that no derivative Section 10(b) claim can ever assert reliance because the Board's knowledge is "imputed" to the corporation; and (ii) that the "automated" nature of the repurchases renders reliance impossible. MTD 27. Both fail.

First, the courts have roundly rejected Defendants' "imputation" argument. The notion that Defendants:

> are [Boeing] and therefore cannot be misled by their own false statements extends the legal fiction of the corporation too far. In this derivative lawsuit, [Boeing] is the legal entity standing in for the rights of the shareholders. To bar those shareholders from suing the directors for allegedly deceiving the company is contrary to the purpose of federal securities laws.

In re Abbott Lab'ys Infant Formula S'holder Derivative Litig., 2024 WL 3694533, at *12 (N.D. Ill. Aug. 7, 2024); *see Ruckle v. Roto Am. Corp.*, 339 F.2d 24, 29 (2d Cir. 1964) ("[C]ourts have experienced no difficulty in rejecting such cliches as the directors constitute the corporation and a corporation, like any other person, cannot defraud itself."); *Am. Int'l Grp.*, 965 A.2d at 778 (same).[14]

Instead, the critical inquiry is whether the directors who approved the stock repurchases benefited from, or knew of, the fraudulent scheme. *Abbott*, 2024 WL 3694533, at *10. "If a director participated in the alleged scheme or had a stake in the outcome of the transaction, then they are interested." *Id.* If the entire board is interested, the corporation is deemed to know of the scheme only upon full disclosure to shareholders. *Id*. ("Full disclosure requires that shareholders

[14] Defendants' reliance on *In re Verisign, Inc. Derivative Litigation*, 531 F. Supp. 2d 1173 (N.D. Cal. 2007) is misplaced. Courts in the Ninth Circuit and beyond have repeatedly "rejected *VeriSign*'s reasoning as flawed, and have accordingly declined to follow it." *Shaev v. Baker*, 2017 WL 1735573, at *17 (N.D. Cal. May 4, 2017) (citing *In re Finisar Corp. Derivative Litig.*, 2012 WL 2873844, at *17 (N.D. Cal. July 12, 2012); *see also In re Fossil, Inc.*, 713 F. Supp. 2d 644, 654 (N.D. Tex. 2010); *In re Countrywide Fin. Corp. Derivative Litig.*, 554 F. Supp. 2d 1044, 1073 (C.D. Cal. 2008)); *Abbott*, 2024 WL 3694533, at *11–12.

are made aware of all relevant material facts such that they can intelligently evaluate the transaction.").

Here, Plaintiffs allege that the 10(b) Defendants (i) made numerous false statements about Boeing's safety and compliance that inflated Boeing's stock price during their tenures as officers and directors of the Company, ¶¶363–82, 468–513, 586, and (ii) caused Boeing to repurchase stock from employees, including certain of the 10(b) Defendants, at artificially inflated prices. ¶¶30–45, 65, 468–513, 586, 608–10. Because the same 10(b) Defendants involved in the fraudulent scheme approved the repurchases (and in some cases sold their own shares to Boeing at inflated prices), each 10(b) Defendant is interested, and Boeing would only be deemed to know of the scheme if it were fully disclosed to all shareholders. *Abbott*, 2024 WL 3694533, at *10. Of course, that did not happen. Consequently, Boeing's reliance is presumed at the pleading stage.

Second, the purportedly "automatic nature" of the repurchase transactions is not dispositive. Contrary to Defendants' implication, Section 10(b) does not contain an exception that allows securities fraud for supposedly "automatic" transactions. Courts regularly reject the argument that Section 10(b) liability cannot be imposed for "automatic" purchases. *See, e.g.*, *In re Smith Barney Transfer Agent Litig.*, 290 F.R.D. 42, 46 (S.D.N.Y. 2013) ("[I]t is inconsequential that some named plaintiffs made their class-period purchases through automatic payroll deductions or dividend and capital gains reinvestments. Because these plaintiffs continued purchasing shares—albeit automatically—during the class period, they made their investment decisions in connection with the challenged omissions." (citing *Dabit*, 547 U.S. at 85)). What matters is that

Boeing continued to purchase the shares, after the misstatements, at inflated prices.[15]

3. Scienter

Scienter follows from the robust allegations of bad faith detailed above and this Court's motion-to-dismiss ruling in the Securities Action regarding Calhoun that there was "a strong inference of scienter here." *In re Boeing Co. Sec. Litig.*, No. 1:24-cv-151-LMB, at 28:8–9 (E.D. Va. Sept. 6, 2024) (Transcript). Unable to contest Calhoun's scienter given this Court's ruling in the Securities Action, the 10(b) Defendants pivot to disputing scienter for the misstatement "attributed to any director other than Calhoun." MTD 29. These arguments lack merit. "This Court has found that the following factors, taken together, are sufficiently probative of scienter: (1) that a defendant's allegedly fraudulent conduct involved 'core operations' of the business; (2) defendants' positions and level of personal involvement within the company; (3) statements regarding compliance; and (4) motive and opportunity of corporate officers." *Kiken v. Lumber Liquidators Holdings, Inc.*, 155 F. Supp. 3d 593, 606 (E.D. Va. 2015).

Applying these factors, the 10(b) Defendants' fraudulent conduct involved Boeing's core operation—manufacturing safe airplanes. Each 10(b) Defendant had direct oversight and involvement in the Company's operations and had personal knowledge of serious previous safety issues based on the MAX Crashes, government investigations, *Boeing I*, the Delaware Settlement, and the DPA. ¶¶132–63, 493–99. And despite personally seeing repeated red flags of *continuing* manufacturing problems, falsified records, retaliation against whistleblowers, and DPA noncompliance—and failing to remediate those mission-critical issues, as detailed above—the

[15] Defendants' sole citation is inapposite. In *In re Overstock Securities Litigation*, 119 F.4th 787, 800 (10th Cir. 2024), the *Basic* presumption of reliance was rebutted because the plaintiff would have purchased the stock "no matter the price" in order "to avoid breaching its lending contracts." Here, Boeing was not required to purchase shares at fraud-tainted prices; indeed, Defendants' Exhibit 11 refers to a "Clawback Policy" whereby employees could lose awards—or be forced to return previously distributed awards—if they engaged in fraud or other misconduct.

10(b) Defendants made public misstatements assuring compliance and safety, which directly contradict internal findings. ¶¶235–43, 260–69, 303–23, 470, 485, 496–97. Moreover, the 10(b) Defendants had the motive and opportunity to commit fraud—both to conceal their wrongdoing and to cause the Company to repurchase their stock at higher prices to pay taxes. ¶¶500–13, 610.

Courts find similar allegations sufficient to raise a strong inference of scienter, especially when the misconduct at issue involves "core operations" of the company and defendants have "intimate involvement" with the subject of the fraud. *See In re James River Grp. Holdings, Ltd. Sec. Litig.*, 2023 WL 5538218, at *19–21 (E.D. Va. Aug. 28, 2023) (personal involvement in core operations subject to fraud and magnitude of losses support scienter); *Kiken*, 155 F. Supp. 3d at 606–07 (inferring scienter from executives' positions, direct involvement in core operations, financial incentives, and magnitude of fraud).[16] Here, the strong inference of scienter applies to both the Director Defendants and the Officer Defendants because both groups were involved in the conduct that made the statements false in the first place. *See Jeld-Wen*, 496 F. Supp. 3d at 967 ("The plaintiffs allege that the Individual Defendants knew about these statements' false or misleading nature because of their positions at JELD-WEN *and* because they implemented and oversaw the anticompetitive scheme." (emphasis in original)). The scienter inference "need not be irrefutable, i.e., of the 'smoking-gun' genre, or even the 'most plausible of competing

[16] *See also Singer v. Reali*, 883 F.3d 425, 443–44 (4th Cir. 2018) (executives' statements about core pricing practices supported strong inference of scienter where company engaged in fraudulent scheme); *SS Richmond LLC v. Harrison*, 640 F. Supp. 3d 453, 477–78 (E.D. Va. 2022) (false statements during key project negotiations and subsequent actions to cover up delays and funding requests support scienter); *Cambridge Ret. Sys. v. Jeld-Wen Holding, Inc.*, 496 F. Supp. 3d 952, 966–67 (E.D. Va. 2020) (misstatements concealing anticompetitive scheme support scienter); *In re Genworth Fin. Inc. Sec. Litig.*, 103 F. Supp. 3d 759, 784–86 (E.D. Va. 2015) (executives' senior roles, repeated misrepresentations, personal financial incentives, and magnitude of required charge support scienter).

inferences,'" but only "cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314, 324 (2007).

When evaluated holistically, the Complaint's allegations—including the 10(b) Defendants' roles, the critical importance of safety to Boeing, the magnitude and duration of the Company's pervasive core operations failures, the 10(b) Defendants' knowledge of the truth, and their stock sales at fraudulently inflated prices—are easily "at least as compelling as any opposing inference of nonfraudulent intent." *Id*. This is all that is required at the pleading stage.

D. Count IV: The Proxy Defendants Violated Section 14(a) in Bad Faith.

The 2023 and 2024 proxy statements' false and misleading statements about Boeing's supposed safety and compliance efforts—and omissions of the truth about Boeing's actual culture and the Individual Defendants' bad-faith failure of oversight—induced shareholders to elect and reelect Boeing directors, approve director compensation, and vote on additional proposals at annual shareholder meetings based on false information. ¶¶458–66, 583–87. These misled votes harmed *the Company* by subjecting it to the continued control of faithless fiduciaries who acted in bad faith, received unjustified compensation, and harmed Boeing. Each dismissal argument fails.

First, the Supreme Court has expressly held that Section 14(a) provides a private right of action for *both* direct *and* derivative claims, noting that "[t]he injury which a stockholder suffers from corporate action pursuant to a deceptive proxy solicitation ordinarily flows from the damage done [to] the corporation, rather than from the damage inflicted directly upon the stockholder." *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964). The Court reaffirmed this holding in *Virginia Bankshares, Inc. v. Sandberg*, explicitly stating it did not "question [*Borak*'s] holding" that a plaintiff could bring a Section 14(a) claim derivatively, explaining that "[t]o hold that derivative actions are not within the sweep of [Section 14(a)] would therefore be tantamount to a denial of private relief." 501 U.S. 1083, 1104 n.11 (1991) (quoting *Borak*, 377 U.S. at 432).

Consistent with this binding precedent, the Seventh Circuit recently rejected the very argument the Proxy Defendants advance. In *Seafarers Pension Plan v. Bradway*, a shareholder asserted a derivative Section 14(a) claim arising out of the MAX Crashes against certain *Boeing* fiduciaries. 23 F.4th at 719. In response to the defendants' argument that Section 14(a) claims are only direct, the Seventh Circuit correctly held that "Section 14(a) may be enforced . . . in derivative actions asserting rights of a corporation harmed by a violation." *Id.* (citing *Kamen*, 500 U.S. at 95).[17] Relevant here, the Seventh Circuit further held that a forum bylaw could not be used to foreclose a derivative Section 14(a) claim. *Seafarers*, 23 F.4th at 720–24.

Delaware law is in accord, as shown by *In re J.P. Morgan Chase & Co. Shareholder Litigation*—the *sole* Delaware case the Proxy Defendants cite.[18] There, the Delaware Supreme Court explained that disclosure claims can be either direct or derivative—depending on the harm that results from the uninformed vote—and explicitly held that the claim under review was "derivative, not direct. Even if it were assumed that improper proxy disclosures induced [company] shareholders to approve the [transaction] . . . the harm resulting from the overpayment was to [the company]. Therefore, any damages recovery would flow only to [the company]." 906 A.2d 766, 772 (Del. 2006). The same reasoning applies here. Plaintiffs seek redress on *Boeing's* behalf for the corporate trauma that resulted from the uninformed shareholder votes.

[17] Other courts have reached the same (correct) conclusion that false proxy statements harming the corporation give rise to derivative Section 14(a) claims. *See, e.g.*, *Gera v. Palihapitiya*, 2024 WL 3818602, at *4 (D. Ariz. Aug. 14, 2024) (sustaining derivative Section 14(a) claim); *Anastasio v. Internap Network Servs. Corp.*, 2010 WL 11459838, at *13 (N.D. Ga. Sept. 15, 2010).

[18] Some federal courts view the classification of claims as direct or derivative as a matter of federal law, while others look to state law as binding or persuasive precedent. Plaintiffs identified no Fourth Circuit authority deciding this issue. Given the alignment of federal and Delaware law on this issue, this Court need not take a position.

The dicta in *Lee v. Fisher*, 70 F.4th 1129 (9th Cir. 2023)—based on the same misreading of Delaware law the Proxy Defendants now adopt—cannot overrule this binding precedent.

Second, Plaintiffs sufficiently allege an "essential link" between the false and misleading Proxy Statements and the harm to Boeing. Boeing's false and misleading disclosures about airplane safety, quality control, legal compliance, and the oversight of these issues were material because the issues are mission-critical to Boeing. ¶604. Those disclosures led directly to the wrongful election of faithless fiduciaries who harmed the Company by awarding themselves significant and unwarranted executive compensation and taking bad-faith actions that caused significant stock price declines and billions in losses as the Company's broken safety culture became public. ¶¶132–323, 503–29, 583–85, 602–04. This provides the "essential link." *See Emps. Ret. Sys. of City of St. Louis v. Jones*, 2021 WL 1890490, at *16–17 (S.D. Ohio May 11, 2021) (finding essential link where defendants' false statements led to their reelection).[19]

Defendants incorrectly assert that every Section 14(a) claim intersecting with fiduciary misconduct must be rejected as a matter of law. MTD 26. The Proxy Defendants' cases—*In re Marriott International Inc., Customer Data Security Breach Litigation.*, 2021 WL 2401641 (D. Md. June 11, 2021), *Hastey ex rel. YRC Worldwide, Inc. v. Welch*, 449 F. Supp. 3d 1053 (D. Kan. 2020), *In re AGNC Inv. Corp.*, 2019 WL 464134 (D. Md. Feb. 6, 2019), and *In re AGNC Inv.*

[19] *See also In re Zoran Corp. Derivative Litig.*, 511 F. Supp. 2d 986, 1016–17 (N.D. Cal. 2007) (finding essential link in derivative action because wrongfully elected directors backdated stock options and "exposed Zoran to liability from regulators"); *In re Wells Fargo & Co. S'holder Derivative Litig.*, 282 F. Supp. 3d 1074, 1105 (N.D. Cal. 2017) (finding essential link regarding "vote to re-elect Board members based on false or misleading information in the Proxy Statements"); *Fossil*, 713 F. Supp. 2d at 655 (finding essential link because "election of the directors by the false proxies" led to backdated stock options); *Countrywide*, 554 F. Supp. 2d at 1077 (Section 14(a) claim well-pled regarding director election and incentive compensation plan because "true operational and financial state of Countrywide would have been material to shareholders during a proxy vote").

Corp., 2018 WL 3239476 (D. Md. July 3, 2018)—did not adopt such a sweeping rule but, rather, limited Section 14(a) liability to the specific transaction the shareholders approved (e.g., invalidating an uninformed director election or merger vote). Plaintiffs' allegations meet even this overly restrictive standard because the Director Defendants wrongfully elected in 2024 still serve on the Board and this Court has the equitable power to remove them. In any event, the better approach is to permit Section 14(a) to hold directors accountable when they obtain their directorships through lies and then continue concealing and engaging in precisely the same wrongdoing that made the proxy statements false in the first place. *See supra* n.19.

Third, Plaintiffs have adequately alleged the Proxy Defendants' mental state in making the false and misleading statements. The Proxy Defendants assert Plaintiffs must allege actual knowledge due to the exculpation provision in Boeing's certificate of incorporation. MTD 26. The Supreme Court and the Fourth Circuit have declined to determine whether negligence, recklessness, or another state of mind is required for a Section 14(a) claim. *In re Willis Towers Watson plc Proxy Litig.*, 937 F.3d 297, 308 (4th Cir. 2019); *see In re Willis Towers Watson Plc Proxy Litig.*, 439 F. Supp. 3d 704, 715 (E.D. Va. 2020) (adopting negligence standard on remand). This Court need not decide that open issue. Because the Proxy Defendants were personally involved in the oversight failures that caused the Proxy Statements to be false and misleading, it is reasonable to infer that they knew the disclosures were false, which meets any applicable standard under federal or Delaware law. *See, e.g.*, *SEC v. Welliver*, 2013 WL 12149244, at *14 (D. Minn. Apr. 30, 2013) (explaining scienter standard for disclosures); *In re GGP, Inc. S'holder Litig.*, 282 A.3d 37, 64 (Del. 2022) (explaining loyalty standard for disclosures); *Johnson v. Shapiro*, 2002 WL 31438477, at *8 (Del. Ch. Oct. 18, 2002) (same).

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' motion to dismiss.

Dated: December 5, 2024

Respectfully submitted,

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