IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SEETAL DODIYA, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. MICHAEL E. FRANKLIN, MARTIN E. FRANKLIN, IRWIN D. SIMON, MICHAEL F. GOSS, DENISE M. FALTISCHEK, IRA J. LAMEL, ANURAAG AGARWAL, STEVEN M. COHEN, WHOLE EARTH BRANDS, INC., OZARK HOLDINGS LLC, SWEET OAK MERGER SUB, LLC, and SABABA HOLDINGS FREE, LLC, Defendants.	)	C.A. No. 2025-0932-LWW

OPINION

Date Submitted: May 4, 2026
Date Decided: August 26, 2026

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WILL, Vice Chancellor

Section 144 of the Delaware General Corporation Law provides powerful protection for conflicted transactions. The General Assembly recently amended the statute to give corporations and their boards a predictable path to safe harbor. When the statutory requirements are met, Section 144 delivers the certainty its terms promise, precluding equitable relief and damages against directors, officers, and controlling stockholders.

The transaction presented in this case strayed from that path.

The complaint details a striking breakdown in corporate governance. A conflicted CEO leaked material, nonpublic information to his father's company, which then submitted a merger proposal. Upon discovering the leak, the board demanded that the CEO sign a confidentiality undertaking. When he refused, he was placed on a leave of absence. Yet the board restored his access to sensitive and process-related information amid negotiations with his father's company. The proxy then assured stockholders that he had been entirely walled off from the process—an assertion the pleaded facts belie.

These are not the ordinary imperfections of a sale process. The complaint describes an extreme scenario where a board acted with reckless indifference to its own safeguards against a known leak, putting the integrity of the process at risk. It is reasonably conceivable that the board's authorization of the merger was grossly negligent, and that the ensuing stockholder vote was materially misinformed. The safe harbors of Sections 144(a)(1) and (a)(2) are therefore unavailable at this stage.

This conclusion does not establish fiduciary liability. The director defendants retain the robust protections available under Delaware common law and the company's exculpatory charter provision. Only two—the conflicted CEO and a director who secretly negotiated a lucrative consulting arrangement—face reasonably conceivable, non-exculpated claims. The remaining directors are disinterested and are not alleged to have acted in bad faith. They are dismissed.

The plaintiff also brings claims under 8 *Del. C.* § 203 and for conversion. Both are meritless. The plaintiff's theory that an uninformed vote violated Section 203 is defeated by the plain text of the statute. Without a statutory violation, the merger stands and the conversion claim falls.

I. FACTUAL BACKGROUND

Unless otherwise noted, the following facts are drawn from the plaintiff's Verified Class Action Complaint and the documents it incorporates by reference.[1]

[1] Verified Class Action Compl. (Dkt. 1) ("Compl."); *see Freedman v. Adams*, 2012 WL 1345638, at *5 (Del. Ch. Mar. 30, 2012) ("When a plaintiff expressly refers to and heavily relies upon documents in her complaint, these documents are considered to be incorporated by reference into the complaint . . . ."); *In re Books-A-Million, Inc. S'holders Litig.*, 2016 WL 5874974, at *1 (Del. Ch. Oct. 10, 2016) (explaining that the court may take judicial notice of "facts that are not subject to reasonable dispute"); *Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1167 n.3 (Del. Ch. 2002) ("The court may take judicial notice of facts publicly available in filings with the SEC.").

A. Whole Earth and the Franklins

Whole Earth Brands ("Whole Earth" or the "Company") manufactures and sells plant-based sweeteners and flavorings.[2] In 2020, it became a publicly traded Delaware corporation through a business combination with a special purpose acquisition company (SPAC).[3] Defendant Irwin Simon and another former executive at Hain Celestial Group—a company Simon founded and led—sponsored the SPAC.[4]

Entrepreneur Sir Martin Franklin is the founder and Chief Executive Officer of Mariposa Capital, LLC, a family investment firm, and the controlling stockholder and chairman of Royal Oak Enterprises, LLC.[5] He has also founded and invested in several successful SPACs.[6] Martin Franklin and Simon share a long-standing

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Citations to "Defs.' Ex. __" refer to exhibits to the Transmittal Affidavit of Jialu Zou in Support of Defendants' Opening Brief in Support of Their Motion to Dismiss and to the Transmittal Affidavit of Jialu Zou in Support of Defendants' Reply Brief in Further Support of Motion to Dismiss. Dkts. 31, 42. These exhibits include documents produced to the plaintiff under 8 *Del. C.* § 220, which are deemed incorporated by reference into the Complaint by agreement of the parties. *See* 8 *Del. C.* § 220(b)(3); Defs.' Ex. E ¶ 12 (confidentiality and non-disclosure agreement).

[2] Compl. ¶ 16.

[3] *Id.* ¶¶ 16, 29.

[4] *Id.* ¶¶ 18 n.3, 29.

[5] *Id.* ¶ 24. Martin Franklin was knighted as a Knight Grand Cross by Antigua and Barbuda. *See Martin E. Franklin*, WIKIPEDIA, en.wikipedia.org/wiki/Martin_E._Franklin (last visited Aug. 10, 2026). Because two of the defendants in this litigation are father and son and share the same surname, I use their full names for clarity.

[6] Compl. ¶ 101.

professional relationship that began in 2002 when Martin Franklin "appointed" Simon to the board of Jarden Corporation—a company Franklin co-founded and led.[7] They both served on Jarden's board until 2016.[8]

In April 2022, Martin Franklin began disclosing stock ownership in Whole Earth.[9] One month later, he formed defendant Sababa Holdings FREE LLC ("Sababa") and disclosed both that he had increased his ownership to 13.76% of the Company's then-outstanding shares and that Sababa beneficially owned Whole Earth stock.[10]

That August, at Simon's recommendation, the Whole Earth Board of Directors (the "Board") appointed Martin Franklin's son, Michael E. Franklin, as a director.[11] Michael Franklin—then a partner at Mariposa Capital—had never served on a public company board.[12] After Whole Earth's CEO resigned in December 2022, the Board

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[7] *Id.* ¶¶ 31, 103.

[8] *Id.*; *see also* Defs.' Ex. A (Schedule 14A Proxy Statement, Whole Earth Brands, Inc., filed with the Securities and Exchange Commission (SEC) June 24, 2024) ("Proxy") 25. The Proxy is incorporated by reference into the Complaint. *See* Compl. ¶ 31; *see also infra* note 222 (discussing the limitations of the incorporation by reference doctrine).

[9] Compl. ¶ 30.

[10] *Id.*

[11] *Id.* ¶ 33; Proxy 25.

[12] Compl. ¶ 32; Proxy 112.

appointed Michael Franklin as interim CEO—again upon Simon's recommendation.[13] He became the permanent CEO in May 2023.[14]

B. The Information Leak

On January 11, 2023—ten days after becoming interim CEO—Michael Franklin sent to Mariposa Capital the results of a 54-page goodwill impairment test that Kroll LLC prepared for Whole Earth (the "Kroll Report").[15] The Kroll Report contained material nonpublic information, including financial results, confidential projections, and discounted cash flow and comparable company analyses.[16] It estimated Whole Earth's fair value at $9.73 per share—well above its then-current stock price of $3.84 per share.[17] He shared this document in secret, without any confidentiality protections in place. On March 2, 8, and 9, Michael Franklin shared additional confidential information with Mariposa Capital.[18] He did so personally and by directing the Company's Chief Financial Officer to do the same.[19] This information, shared with his father's companies and employees, included Whole

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[13] Compl. ¶ 34; *see also* Defs.' Ex. B (press release announcing Michael Franklin's interim appointment "effective January 1, 2023").

[14] Compl. ¶ 34.

[15] *Id.* ¶ 36.

[16] *Id.* ¶ 37.

[17] *Id.* ¶ 38.

[18] *Id.* ¶ 39.

[19] *Id.* ¶ 35.

Earth's draft 2022 Form 10-K, the status of draft amended credit agreement negotiations, and a draft press release detailing 2022 full-year results and 2023 guidance.[20]

Between March 13 and 15, Sababa amassed millions of shares of Whole Earth common stock on the open market at prices ranging from $2.67 to $3.10 per share.[21] By June 2023, Sababa had accumulated a 19.8% ownership stake in Whole Earth.[22]

C. The Initial Offer and Recusal

On June 23, 2023, Martin Franklin met with Simon to explain that he planned to submit a proposal to take Whole Earth private at $4.00 per share.[23]

Sababa sent an initial proposal to Simon two days later, on June 25.[24] It proposed acquiring all the outstanding Whole Earth shares it did not already own for $4.00 per share, with the goal of combining Whole Earth with Royal Oak.[25] It stated that the offer represented a 28.2% premium on the Company's then-current stock price.[26]

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[20] *Id.* ¶¶ 35, 39.

[21] *Id.* ¶¶ 40-41.

[22] *Id.* ¶¶ 5, 40.

[23] *Id.* ¶ 43.

[24] *Id.*

[25] *Id.*; Defs.' Ex. C ("Our proposal is to acquire all of the outstanding shares of the Company's common stock not already owned by us for $4.00 per share in cash . . . .").

[26] Defs.' Ex. C at 1.

The Board's seven directors met to discuss the initial proposal the next day, June 26.[27] Five were non-employee directors: Michael F. Goss, Ira J. Lamel, Anuraag Agarwal, Denise M. Faltischek, and Steven M. Cohen.[28] The remaining directors were Executive Chairman Simon and CEO Michael Franklin.[29]

During the meeting, Cohen "raised questions" about Michael Franklin's relationship with Sababa and Royal Oak.[30] Michael Franklin confirmed that he was on the board of Royal Oak but "did not comment on his relationship with Sababa."[31] He recused himself from future discussions of Sababa's proposal and left the meeting.[32]

To address any conflict of interest posed by Michael Franklin, the Board "discussed the need" to "rescind and cancel" an equity grant that had been made to him three days earlier.[33] The directors also discussed asking Michael Franklin to resign as a director of Royal Oak and to "sign an undertaking to the Company."[34] The undertaking would have prohibited Michael Franklin from (1) participating in

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[27] Defs.' Ex. D.

[28] Compl. ¶¶ 19-23.

[29] *Id.* ¶¶ 17-18.

[30] Defs.' Ex. D at 10.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 11; *see* Compl. ¶ 46.

sale discussions, (2) seeking to access, receive, or use confidential information relating to the sale process, or (3) sharing confidential information with his father or any Sababa-affiliated entities.[35]

D. The Special Committee and Its Advisors

Also during the June 26 meeting, the Board formed a transaction committee to "review and consider the [p]roposal and any other strategic alternative, and to deliver a recommendation from the Board."[36] The committee consisted of Simon, Faltischek, and Cohen (the "Special Committee"), with Cohen serving as Chair.[37] The Board concluded that these three directors did "not have any material interests in connection with the [p]roposal."[38]

On June 30, 2023, the Board authorized the Special Committee to engage a financial advisor.[39] Simon told the Board he had been discussing the matter with Jefferies Group LLC.[40] Jefferies had previously advised Martin Franklin. A month earlier, it coordinated the $550 million initial public offering of Martin Franklin's

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[35] Compl. ¶ 46; *see* Defs.' Ex. D at Ex. C.

[36] Defs.' Ex. D at 10.

[37] Compl. ¶¶ 47-48; Defs.' Ex. D at 11.

[38] Defs.' Ex. D at 11.

[39] Compl. ¶ 51; *see* Proxy 27.

[40] Compl. ¶ 51.

SPAC, Admiral Acquisition Ltd.[41] It was also advising Martin Franklin on the SPAC's $1.85 billion acquisition of ASP Acuren Holdings Inc.[42]

On July 4, Jefferies provided the Board with a memorandum describing its previous engagements with Martin Franklin-affiliated entities.[43] The memorandum did not include the Acuren transaction.[44] Six days later, the Special Committee selected Jefferies as its financial advisor.[45]

E. The Investigation

Meanwhile, on June 29, Whole Earth received an inquiry from the Financial Industry Regulatory Authority (FINRA) regarding Martin Franklin's initial proposal.[46] FINRA issued a second request two weeks later, indicating it was investigating potential misconduct at the Company.[47]

On July 14, after receiving the second FINRA inquiry, Company counsel told the Board that the undertaking delivered to Michael Franklin on June 27 had been returned "unsigned and significantly modified."[48] The Board set a deadline of 5:00

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[41] *Id.* ¶ 52.

[42] *Id.*

[43] *Id.* ¶ 53; *see* Proxy 27.

[44] Compl. ¶ 53.

[45] *Id.* ¶ 51.

[46] *Id.* ¶ 54.

[47] *Id.*

[48] *Id.* ¶ 55.

p.m. that day for Michael Franklin to sign the undertaking. When he refused, he was placed on a paid leave of absence from his CEO position.[49]

Also on July 14, the Audit Committee engaged Friedman Kaplan Seiler Adelman & Robbins LLP to investigate the circumstances surrounding Martin Franklin's proposal, including whether Michael Franklin had shared material nonpublic information with Sababa.[50] The investigation was completed without interviewing Michael Franklin or collecting his documents.[51] Although no written report was prepared, Friedman Kaplan orally presented its preliminary findings to the Board on October 6, noting Michael Franklin's non-cooperation.[52] That same day, Michael Franklin resigned as CEO.[53]

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[49] Compl. ¶ 56.

[50] *Id.* ¶¶ 55-56; Defs.' Reply Br. Ex. O at WEB_B&R_0002651-_02652.

[51] Compl. ¶¶ 59, 61.

[52] *Id.* ¶ 61.

[53] *Id.* ¶ 60.

F. The Broken Wall

After his resignation as CEO, Michael Franklin remained on the Board.[54] And despite his recusal and refusal to sign an undertaking, he continued to receive updates on the merger process.

On October 24, 2023, he was sent a packet of minutes and materials for Board meetings held during his suspension.[55] The materials included nonpublic financial results, the Special Committee's charter and mandate, and an update on the Audit Committee's investigation into his own misconduct.[56]

Michael Franklin also attended an October 31 Board meeting. He was present for updates on the Audit Committee's investigation, Company financial results, and a Special Committee update on Sababa's proposal.[57]

G. The Sale Process and Merger Approval

On September 19, 2023, Jefferies distributed a confidential information memorandum to eleven prospective bidders (including Sababa) and offered them access to a data room.[58] Jefferies shared recently updated projections with the

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[54] *Id.* ¶ 69.

[55] *Id.*

[56] *Id.*

[57] *Id.* ¶ 70.

[58] *Id.* ¶ 73; *see* Proxy 30.

prospective bidders, but did not share the Kroll Report.[59] Jefferies asked seven interested parties (other than Sababa) to submit indications of interest by October 23.[60] None did.[61]

On November 15, Martin Franklin suggested that he could increase Sababa's purchase price to $4.50, which prompted the Board to grant Sababa exclusivity until December 30.[62]

On December 1, Company management presented updated projections to the Special Committee that lowered projected revenue by $11 to $14 million per year and EBITDA by $2 to $4 million per year.[63] The Special Committee then provided these projections to Martin Franklin.[64]

On January 16, 2024, Sababa increased its offer to $4.50 per share, noting that the Company had yet to receive any other publicly announced offers despite an "extensive strategic alternatives process."[65]

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[59] Compl. ¶¶ 73-74.

[60] *Id.* ¶ 75.

[61] *Id.* ¶ 76; Proxy 31.

[62] Compl. ¶ 78; Defs.' Ex. F (exclusivity agreement).

[63] Compl. ¶ 79.

[64] *Id.*

[65] Defs.' Ex. G at WEB_B&R_0003054.

Three days later, Simon, Cohen, and Jefferies told Sababa that the Special Committee would not support a price of $4.75 per share.[66] Martin Franklin told Simon that Sababa was willing to raise its offer to $4.875 per share, which would be its best and final offer.[67]

After Martin Franklin delivered a written proposal of $4.875 per share on January 24, the Special Committee met and decided to proceed with a transaction at that price.[68] The committee kept no minutes for this meeting. In fact, it recorded minutes for only two of its twenty meetings.[69]

On January 31, Whole Earth management gave the Special Committee projections that further lowered projected revenue by $5 to $8 million per year and EBITDA by $2 to $3 million per year.[70] Jefferies based its final fairness presentation on these updated projections, which reflected an implied midpoint share price of $7.80 based on a discounted cash flow analysis.[71]

On February 12, the Special Committee voted to recommend approving the merger with Sababa.[72] The Board then met to discuss the merger. Though Michael

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[66] Defs.' Ex. H at WEB_B&R_0002336.

[67] *Id.*; Compl. ¶ 81.

[68] Compl. ¶ 81.

[69] *See id.* ¶ 13.

[70] *Id.* ¶ 82.

[71] *Id.* ¶ 114.

[72] *Id.* ¶ 84.

Franklin attended, he recused himself at the start of the meeting.[73] After Simon delivered the Special Committee's recommendation, the Board voted to approve the merger.[74]

H. The Bonuses and Consulting Agreement

The Special Committee's charter granted its members a fee of $1,500 per meeting.[75] At a January 23, 2024 meeting, the Board approved $35,000 bonuses for Cohen and Faltischek.[76] It also awarded $35,000 to Lamel and $25,000 to Agarwal to recognize their Audit Committee work, alongside $25,000 to Goss regarding compensation-related matters from Sababa's proposal.[77]

At the February 12, 2024 meeting where it approved the merger, the Board also resolved to award additional bonuses to the Special Committee members. Simon received $100,000, Faltischek $120,000, and Cohen $130,000.[78]

Also on February 12, Simon executed a consulting agreement with Whole Earth and Sababa's acquisition vehicle, Ozark Holdings LLC.[79] Under that agreement, Simon would receive a $1,400,000 payment at closing in exchange for

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[73] *Id.*

[74] *Id.*

[75] *Id.* ¶ 85.

[76] *Id.* ¶ 86.

[77] *Id.* ¶ 87.

[78] *Id.* ¶ 89.

[79] *Id.* ¶ 94.

"providing certain transactional services with respect to the business of the Company" for a six-month period.[80]

I. The Proxy and Stockholder Vote

On June 24, 2024, Whole Earth filed a definitive proxy statement (the "Proxy") with the SEC.[81]

The Proxy stated that Michael Franklin had "disclosed to representatives of Sababa material nonpublic information belonging to the Company without a non-disclosure agreement and in violation of the Company's internal policies."[82] It explained that the information was "not relat[ed] to the [p]rocess," but did not identify what Michael Franklin had shared.

Stockholders were also told that Michael Franklin "did not participate in any activities, meetings, or communications with respect to the [p]rocess on behalf of, or as a representative of, the Company, and as a result did not receive from the Company information with respect thereto."[83]

On July 31, 2024, 81.16% of eligible Whole Earth stockholders voted to approve the merger.[84] Through the transaction—structured as a merger with Sweet

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[80] *Id.*

[81] *Id.* ¶ 11; *see generally* Proxy.

[82] Proxy 29.

[83] *Id.*

[84] Defs.' Ex. I (Form 8-K, filed with the SEC on July 31, 2024).

Oak Merger Sub, LLC (an affiliate of Ozark Holdings and Sababa)—Sababa acquired Whole Earth for $4.875 per share.[85] This price represented a 56% premium over the unaffected closing price of the Company's common stock on June 23, 2023 (the last full trading day before Sababa's initial bid).[86] It returned Whole Earth to private ownership under Martin Franklin's control. The Proxy announced that Whole Earth had been "advised by [Sababa] that, following the consummation of the [m]erger, [Michael] Franklin [wa]s expected to be appointed as Chief Executive Officer" of the combined entity.[87]

J. The Litigation

On July 17, 2024, Seetal Dodiya—a Whole Earth stockholder through the close of the merger—served a demand for books and records under 8 *Del. C.* § 220.[88] Dodiya subsequently filed a books and records lawsuit in this court.[89] On January 29, 2025, after a trial, I ordered Whole Earth to produce documents including informal Board and officer-level materials for the 18 Special Committee meetings

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[85] Proxy 8, 38.

[86] *Id.* at 55.

[87] *Id.* at 70-71.

[88] *See* Compl., *Dodiya v. Whole Earth Brands, Inc.*, C.A. No. 2024-1033-LWW (Del. Ch. Oct. 7, 2024).

[89] *Id.*

for which no minutes existed and the Audit Committee's investigation into Michael Franklin's unauthorized sharing of confidential information with Sababa.[90]

On August 18, 2025, Dodiya filed this putative class action.[91] The parties agreed that the Section 220 production would be incorporated by reference into the Complaint.[92] Dodiya's Complaint advances three counts: violation of 8 *Del. C.* § 203 against Whole Earth and the "Sababa Defendants" (Count I); conversion against Whole Earth and the "Sababa Entities" (Count II); and breach of fiduciary duty against the "Director Defendants" (Count III).[93]

On October 30, 2025, the defendants moved to dismiss the Complaint.[94] The plaintiff opposed the motion on January 13, 2026, and the defendants filed a reply brief on February 19.[95] I heard oral argument on May 4 and took the matter under advisement.[96]

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[90] *See Dodiya v. Whole Earth Brands Inc.*, C.A. No. 2024-1033-LWW (Del. Ch. Feb. 10, 2025) (TRANSCRIPT).

[91] Verified Class Action Compl. (Dkt. 1).

[92] *See supra* note 1.

[93] Compl. ¶¶ 141-54; *see id.* ¶ 28 (defining the "Sababa Defendants" as Martin Franklin, Sababa, Ozark Holdings, and Sweet Oak Merger Sub, and the "Director Defendants" as Michael Franklin, Simon, Cohen, Faltischek, Agarwal, Goss, and Lamel). The Complaint does not define "Sababa Entities," but I assume the term refers to Ozark Holdings, Sweet Oak Merger Sub, and Sababa.

[94] *See* Defs.' Opening Br. in Supp. of Mot. to Dismiss (Dkt. 31) ("Defs.' Opening Br.").

[95] Pl.'s Answering Br. in Opp'n to Defs.' Mot. to Dismiss (Dkt. 37) ("Pl.'s Answering Br."); Defs.' Reply Br. in Further Supp. of Mot. to Dismiss (Dkt. 42) ("Defs.' Reply Br.").

[96] *See* Tr. of Hr'g on Defs.' Mot. to Dismiss (Dkt. 52).

II. ANALYSIS

The defendants moved to dismiss the Complaint under Court of Chancery Rule 12(b)(6). In resolving the motion, I must "(1) accept all well pleaded factual allegations as true, (2) accept even vague allegations as 'well pleaded' if they give the opposing party notice of the claim, [and] (3) draw all reasonable inferences in favor of the non-moving party."[97] I need not "accept conclusory allegations unsupported by specific facts or [] draw unreasonable inferences" in the plaintiff's favor.[98] Dismissal is appropriate only if the plaintiff cannot recover "under any reasonably conceivable set of circumstances susceptible of proof."[99]

I begin my analysis with the breach of fiduciary duty claim in Count III. I first consider whether the statutory safe harbors of 8 *Del. C.* § 144(a) insulate the defendants from liability. Because the plaintiff pleaded facts making it reasonably conceivable that the Board acted with gross negligence and that the stockholder vote was uninformed, these safe harbors are unavailable at the pleading stage. I then evaluate whether the plaintiff pleaded non-exculpated claims against the individual defendants. I conclude that the claims against Michael Franklin and Simon survive,

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[97] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 535 (Del. 2011) (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002)).

[98] *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011), *overruled in part on other grounds by Ramsey v. Ga. S. Univ. Advanced Dev. Ctr.*, 189 A.3d 1255 (Del. 2018).

[99] *Savor*, 812 A.2d at 897 (citation omitted).

but dismiss the remaining directors. Finally, I address Counts I and II, which turn on whether the merger violated 8 *Del. C.* § 203. The Section 203 claim fails on the merits, which warrants dismissal of the conversion claim.

A. Breach of Fiduciary Duty Against the Board

In Count III of the Complaint, the plaintiff claims that the Board and Michael Franklin as CEO breached their fiduciary duties in connection with the Sababa merger.[100] The defendants assert that dismissal is required because the safe harbors of 8 *Del. C.* § 144(a) eliminate liability and because the plaintiff has not pleaded a non-exculpated claim. I consider each argument in turn.

1. Whether Section 144(a) Forecloses Liability

Section 144(a) of the Delaware General Corporation Law (DGCL) applies to all transactions between a corporation, on the one hand, and either (1) one or more of the corporation's directors or officers, or (2) any entity where the corporation's directors or officers are directors, stockholders, partners, managers, members or officers, or have a financial interest, on the other hand.[101] The plaintiff contends that Michael Franklin served as a director of Whole Earth and Royal Oak—a Martin Franklin-affiliated entity—and had a financial interest in Sababa.[102] Thus, Section

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[100] Compl. ¶¶ 150-54.

[101] 8 *Del. C.* § 144(a).

[102] Compl. ¶ 17.

144(a) applies to the merger. If the safe harbor in Sections 144(a)(1) or (a)(2) is satisfied, the director and officer defendants cannot be held liable for equitable relief or damages based on a breach of fiduciary duty in authorizing the merger.[103]

Delaware courts have only begun to interpret Section 144(a).[104] To do so, the court applies well-settled "rules of statutory construction."[105] The court must "ascertain and give effect to the intent of the legislature."[106] "If the statute is found to be clear and unambiguous, then the plain meaning of the statutory language controls."[107] "Each part or section of a statute should be construed in connection with every other part or section to produce a harmonious whole."[108] The court must also "construe statutes to avoid surplusage if reasonably possible."[109]

The defendants argue that the merger falls within both the Section 144(a)(1) and (a)(2) safe harbors. The plaintiff bears the burden at the pleading stage to show

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[103] *See* 8 *Del. C.* § 144(a)(1), (a)(2).

[104] *See generally Ayers v. Foley*, -- A.3d --, 2026 WL 1723538, at *8-14 (Del. Ch. June 15, 2026); *cf. Rutledge v. Clearway Energy Gp. LLC*, -- A.3d --, 2026 WL 548504, at *1 (Del. Feb. 27, 2026) (upholding the constitutionality of the Section 144 safe harbor provisions and holding that they do not impermissibly divest the Court of Chancery of its equity jurisdiction).

[105] *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011).

[106] *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000).

[107] *Ins. Comm'r of the State Del. v. Sun Life Assurance Co. of Can. (U.S.)*, 21 A.3d 15, 20 (Del. 2011); *see also CML V, LLC v. Bax*, 28 A.3d 1037, 1041 (Del. 2011).

[108] *Salzberg v. Sciabacucchi*, 227 A.3d 102, 117 (Del. 2020) (citation omitted).

[109] *Id.*

that one or more of the statutory requirements was not met.[110] On a Rule 12(b)(6) motion, the plaintiff must plead facts supporting a reasonable inference that the safe harbor was not satisfied.

a. Section 144(a)(1)

Section 144(a)(1) provides that a safe harbor applies if:

> (1) The material facts as to the director's or officer's relationship or interest and as to the act or transaction, including any involvement in the initiation, negotiation, or approval of the act or transaction, are disclosed or are known to all members of the board of directors or a committee of the board of directors, and the board or committee in good faith and without gross negligence authorizes the act or transaction by the affirmative votes of a majority of the disinterested directors then serving on the board of directors or such committee (as applicable), even though the disinterested directors be less than a quorum; provided that if a majority of the directors are not disinterested directors with respect to the act or transaction, such act or transaction shall be approved (or recommended for approval) by a committee of the board of directors that consists of 2 or more directors, each of whom the board of directors has determined to be a disinterested director with respect to the act or transaction[.][111]

The statute establishes three distinct requirements. First, the material facts concerning the director or officer's "relationship or interest" and the act or

[110] *See Ayers*, 2026 WL 1723538, at *14 (explaining, in the Rule 23.1 context, that "[t]o bypass the safe harbor," a plaintiff must plead particularized facts supporting a reasonable inference that the statutory requirements were unmet).

[111] 8 *Del. C.* § 144(a)(1).

transaction must be "disclosed" or "known" to the board or committee.[112] Second, the board or committee must act "in good faith and without gross negligence" to authorize the transaction.[113] And third, the board or committee must authorize the transaction "by the affirmative votes of a majority of the disinterested directors then serving."[114]

The knowledge requirement is satisfied. Michael Franklin's familial relationship with Martin Franklin was known to the Board well before Sababa made its initial bid.[115] During the June 26, 2023 Board meeting, Cohen questioned Michael Franklin's ties to Sababa, and Michael Franklin disclosed his board seat at Royal Oak (a Sababa affiliate) and recused himself from the sale process.[116]

The plaintiff contends that the remaining requirements of the safe harbor are unmet, arguing that the Board and Special Committee consisted of conflicted directors who failed to authorize the merger in good faith and without gross negligence. The plaintiff failed to plead facts supporting a reasonable inference that

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[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *E.g.*, Compl. ¶ 33 (quoting the Company's August 2022 announcement that Michael Franklin had been appointed to the board, which stated "Mr. Franklin is the son of Sir Martin E. Franklin.").

[116] *Id.* ¶ 45.

the Board lacked a disinterested majority. It is reasonably conceivable, however, that the Board was grossly negligent in its approval of the merger.

i. *Disinterestedness*

Section 144(e)(4) defines a "disinterested director" as one "who is not a party to the act or transaction and does not have a material interest in the act or transaction or a material relationship with a person that has a material interest in the act or transaction."[117] This provision largely codifies the common law concept of disinterestedness, while providing a more specific statutory definition.[118]

To satisfy the safe harbor's voting requirement, the transaction must be authorized by "the affirmative votes of a majority of the disinterested directors then serving on the board of directors or such committee."[119] But the legislature attached a proviso:

> provided that if a majority of the directors are not disinterested directors with respect to the act or transaction, such act or

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[117] 8 *Del. C.* § 144(e)(4); *see also* 8 *Del. C.* § 144(e)(7) (defining "Material Interest"); *id.* § 144(e)(8) (defining "Material Relationship").

[118] *See*, *e.g.*, *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1169 (Del. Ch. 1995) ("To be disqualifying, the nature of the director interest must be substantial."); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (explaining that an interested director is one who "appear[s] on both sides of a transaction [or] expect[s] to derive any personal benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally"), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *Dent v. Ramtron Int'l Corp.*, 2014 WL 2931180, at *6 (Del. Ch. June 30, 2014) ("[T]he disqualifying self-interest or lack of independence must be material, i.e., 'reasonably likely to affect the decision-making process of a reasonable person.'" (quoting *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 363 (Del. 1993))).

[119] 8 *Del. C.* § 144(a)(1).

> transaction shall be approved (or recommended for approval) by a committee of the board of directors that consists of 2 or more directors, each of whom the board of directors has determined to be a disinterested director.[120]

Under this structure, if a board is composed of a majority of disinterested directors, the proviso is not triggered; the safe harbor may be satisfied if the transaction is authorized by a majority of the disinterested directors serving on the board. If a majority of the directors are not disinterested, then the proviso requires that the transaction be approved (or recommended for approval) by a committee of at least two directors whom the board determined to be disinterested.

Here, the Special Committee voted to recommend the approval of the merger, but the full Board voted to authorize it. The Board's composition is therefore relevant to whether the voting requirement of Section 144(a)(1) was satisfied. Treating the Special Committee's recommendation as sufficient without first evaluating the Board's composition would bypass the proviso's requirement that a committee be used when a board lacks a disinterested majority.[121]

The defendants assert that six of the seven Board members who voted to authorize the merger were disinterested.[122] The plaintiff does not contest that

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[120] *Id.*

[121] *See Salzberg*, 227 A.3d at 117-18 ("It is presumed that 'the General Assembly purposefully chose particular language . . . .'").

[122] *See* Defs.' Opening Br. 15.

Agarwal and Cohen were disinterested.[123] And the defendants concede that Michael Franklin was not.[124] That leaves four directors in dispute: Simon, Faltischek, Lamel, and Goss.

Each of these directors is "presumed to be independent."[125] Section 144 strengthens that presumption as to Faltischek, Lamel, and Goss (but not Simon, the Executive Chair) because the Board determined they were independent under Nasdaq listing standards.[126] Under Section 144(d)(2), these three directors—none of whom are parties to the merger—are entitled to a "heightened" presumption of disinterestedness.[127] The heightened presumption "may only be rebutted by substantial and particularized facts" showing that the director "has a material

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[123] Pl.'s Answering Br. 4; *see* Compl. ¶ 96.

[124] Defs.' Opening Br. 15.

[125] *Beam v. Stewart*, 845 A.2d 1040, 1055 (Del. 2004).

[126] *See Ayers*, 2026 WL 1723538, at *9 ("Recent amendments to 8 *Del. C.* § 144 strengthen the presumption of independence and disinterestedness when a corporation has a class of stock listed on a national securities exchange and the board determines that the challenged director satisfies the exchange's independence criteria." (citing 8 *Del. C.* § 144(d)(2))); Form 10-K, Whole Earth Brands, Inc. (filed with the SEC on April 29, 2024) 4 ("Our Board has determined that each of Anuraag Agarwal, Steven M. Cohen, Denise M. Faltischek, Michael F. Goss and Ira J. Lamel qualifies as 'independent' as defined under the applicable Nasdaq rules."). This Form 10-K is incorporated by reference into the Complaint. Compl. ¶ 106.

[127] *See* 8 *Del. C.* § 144(d)(2) ("Any director of a corporation that has a class of stock listed on a national securities exchange shall be presumed to be a disinterested director with respect to an act or transaction to which such director is not a party if the board of directors shall have determined that such director satisfies the applicable criteria for determining director independence from the corporation . . . .").

interest" in the merger or "a material relationship with a person with a material interest" in the merger.[128] As *Ayers v. Foley* explains, this standard requires a plaintiff to plead "specific, non-conclusory facts of sufficient qualitative significance to support a reasonable inference of a material interest or relationship that would impair the director's objective judgment."[129]

(a) Lamel

According to the Complaint, Lamel is not a disinterested director because he has a material relationship with Simon, who has a material interest in the merger.[130] Section 144(e) defines a "[m]aterial relationship" as a familial, financial, professional, employment, or other relationship that "would reasonably be expected to impair the objectivity of the director's judgment when participating in the negotiation, authorization, or approval of the act or transaction at issue."[131] The statute also defines a "[m]aterial interest" as an actual or potential benefit not shared by the corporation or stockholders that "would reasonably be expected to impair the

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[128] *Id.*

[129] *Ayers*, 2026 WL 1723538, at *11 (interpreting "substantial and particularized facts").

[130] *See* Pl.'s Answering Br. 46.

[131] 8 *Del. C.* § 144(e)(8).

objectivity of the director's judgment when participating in the negotiation, authorization, or approval of the act or transaction at issue."[132]

Because the allegations about Lamel's interestedness hinge on his ties to Simon, I assume for the sake of analysis that Simon had a material interest in the merger due to the $1.4 million consulting agreement he secured.[133] The question, then, is whether the plaintiff pleaded substantial and particularized facts supporting a reasonable inference that Lamel has a material relationship with Simon. The Complaint lacks such facts.

According to the plaintiff, Lamel is not independent of Simon due to their "close personal and professional relationship."[134] Simon allegedly hired Lamel in 2001 to serve as the Executive Vice President and Chief Financial Officer of Simon's company, Hain Celestial.[135] Lamel retired from those roles in 2013, but remained a

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[132] *Id.* § 144(e)(7).

[133] *See* Compl. ¶ 105. As discussed below, I need not definitively resolve whether the plaintiff has adequately pleaded Simon's interestedness for purposes of Section 144(a) because the plaintiff has not met its pleading burden for four of the seven Board members.

[134] *Id.* ¶ 110.

[135] *Id.*; *see id*. ¶ 107 (describing Hain Celestial as "Simon's company").

"Senior Advisor to the CEO (Simon)" until 2014.[136] During his tenure, Lamel received "at least $12,088,345 in cash and stock awards" as compensation.[137]

These facts are particularized, but insubstantial. By the time of the merger, the two shared only a long-past business relationship and continued "mutual respect."[138] Even without Section 144(d)(2)'s heightened presumption, Delaware courts have consistently held that "[t]he naked assertion of a previous business relationship is not enough to overcome the presumption of a director's independence."[139] I cannot reasonably infer that a business relationship ending in 2014 would compromise Lamel's objectivity when approving a merger a decade later.

(b) Goss

The plaintiff's challenge to Goss's disinterestedness rests on his ties to Martin Franklin, who has a material interest in the merger. According to the Complaint,

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136 *Id.* ¶ 110; *see* Proxy 112 ("Mr. Lamel was Senior Advisor to the Chief Executive Officer of Hain Celestial from 2013 to 2014 and Executive Vice President and Chief Financial Officer of Hain Celestial from 2001 to 2013.").

137 Compl. ¶ 110.

138 Pl.'s Answering Br. 46 (quoting *In re Match Grp., Inc. Deriv. Litig.*, 315 A.3d 446 (Del. 2024)).

139 *Orman v. Cullman*, 794 A.2d 5, 27 (Del. Ch. 2002) (citing *Crescent/Mach I P'rs, L.P. v. Turner*, 2000 WL 1481002 (Del. Ch. Sept. 29, 2000)); *In re KKR Fin. Hldgs. LLC S'holder Litig.*, 101 A.3d 980, 997-98 (Del. Ch. 2014) (concluding that a past business relationship that ended 12 years before the transaction at issue failed to "support a reasonably conceivable inference" that a director was beholden to an allegedly conflicted party).

"Martin has repeatedly selected Goss as a director and/or partner in his business ventures in exchange for millions of dollars in compensation."[140] Martin appointed Goss to the board of a SPAC (now Element Solutions) in 2013—a role for which Goss has received over $2 million in cash and stock awards as compensation.[141] Martin and Goss also launched a failed SPAC venture in 2021.[142] Beyond that, the plaintiff submits it is "reasonably conceivable" that Martin Franklin is the "unnamed 'Company stockholder'" who recommended Goss to the Board.[143]

These allegations do not meet the exacting standard of Section 144(d)(2).

First, Goss's overlapping directorship and failed SPAC venture with Martin Franklin are insubstantial.[144] Although the plaintiff attempts to analogize this case to ones where serial SPAC founders reappointed the same directors to multiple boards, the Complaint identifies a single board: Element Solutions.[145] The Element

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[140] Compl. ¶ 126.

[141] *Id.* ¶ 100.

[142] *Id.* ¶ 101 (explaining that the SPAC "abandoned" its IPO).

[143] *Id.* ¶ 102.

[144] *See, e.g.*, *In re NetSmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 206 n.112 (Del. Ch. Mar. 14, 2007) ("Without more, directors are not deemed to lose their independence merely because they move in the same social circles or hold seats on the same corporate boards." (citing *Beam*, 845 A.2d at 1051-52)); *DiRienzo v. Lichtenstein*, 2013 WL 5503034, at *13 (Del. Ch. Sept. 30, 2013) (holding that "[w]ithout any allegations pertaining to materiality," it was not reasonably conceivable that a prior co-investment and overlapping board service impugned a director's independence).

[145] *See* Pl.'s Answering Br. 48; Compl. ¶ 101 (detailing the SPACs launched by Martin Franklin); *see, e.g.*, *In re MultiPlan Corp. S'holders Litig.*, 268 A.3d 784, 814 (Del. Ch. 2022) (finding it reasonably conceivable that directors who were appointed to at least five

Solutions board compensation described in the Complaint averages approximately $169,000 per year.[146] Under Delaware law, "the receipt of customary directors' fees does not suggest a conflict of interest."[147] The plaintiff also pleads no particularized facts explaining why these customary fees are personally material to Goss.[148]

Second, the plaintiff's speculation that Martin Franklin may have appointed Goss to the Whole Earth Board lacks particularity. It falls short of the statutory standard for that reason alone. But even if it were true, a director's appointment by a conflicted party does not, by itself, negate the presumption of independence.[149]

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other Klein-sponsored SPAC boards would "'expect to be considered for directorships' in future Klein-sponsored SPACs" (citation omitted)).

[146] *See* Compl. ¶ 100.

[147] *In re Nat'l Auto Credit, Inc. S'holders Litig*., 2003 WL 139768, at *10 (Del. Ch. Jan. 10, 2003) (explaining that if customary director fees suggested a conflict of interest, "every director who receives a director's fee would be deemed biased").

[148] *See Ayers*, 2026 WL 1723538, at *12 (holding that allegations of overlapping board service were insufficient to rebut Section 144(d)(2)'s heightened presumption where the plaintiff "neglected . . . to plead particularized facts explaining why [the fees] are personally material to the directors").

[149] *See* 8 *Del. C.* § 144(d)(3) ("The designation, nomination, or vote in the election of the director to the board of directors by any person that has a material interest in an act or transaction shall not, of itself, be evidence that a director is not a disinterested director with respect to an act or transaction to which such director is not a party."); *see also Aronson*, 473 A.2d at 816 ("[I]t is not enough to charge that a director was nominated by or elected at the behest of those controlling the outcome of a corporate election. That is the usual way a person becomes a corporate director.").

Viewing these allegations collectively with those about the Element Solutions board, the plaintiff has failed to plead "substantial and particularized facts" supporting a reasonable inference that Goss has a "material relationship" with Martin Franklin.[150]

The plaintiff insists otherwise, citing the observation in *Goldstein v. Denner* that "gaining or losing a directorship is generally material to an individual director."[151] This isolated statement ignores established law and the broader context of that case. Consistent with Section 144, Delaware law has long required a plaintiff to plead the materiality of an interest or relationship to the specific director.[152] Section 144(d)(3) further provides that the designation, nomination, or vote in the election of a director by a person with a material interest in the transaction is not,

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[150] 8 *Del. C.* § 144(d)(2); *see also id.* § 144(e)(8).

[151] *Goldstein v. Denner*, 2022 WL 1671006, at *47 (Del. Ch. May 26, 2022) ("It follows that when an influential party has bestowed a directorship on an individual in the past or has the power to reward an individual with directorships in the future, then the individual may seek to serve the interests of that influential party.").

[152] *See, e.g.*, *Cede & Co.*, 634 A.2d at 363 (affirming Court of Chancery's requirement that "a shareholder show . . . the materiality of a director's self-interest to the given director's independence" as a "restatement of established Delaware law"); *In re MFW S'holders Litig.*, 67 A.3d 496, 509 (Del. Ch. 2013) ("[T]he Supreme Court has made clear that a plaintiff seeking to show that a director was not independent must meet a materiality standard, under which the court must conclude that the director in question's material ties to the person whose proposal or actions she is evaluating are sufficiently substantial that she cannot objectively fulfill her fiduciary duties."), *aff'd sub nom. Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014); *Solomon v. Armstrong*, 747 A.2d 1098, 1118 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000) ("[I]t is well established that when a party challenges a director's action based on a claim of the director's debilitating pecuniary self-interest, that party must allege that the director's interest is material to that director.").

"of itself," evidence that the director is conflicted.[153] And where, as here, the director satisfies national exchange independence standards, Section 144(d)(2) heightens the pleading burden to require substantial and particularized facts. In *Goldstein*, the plaintiff alleged "in detail" how a director supported the controlling stockholder "in achieving the [transaction]" and received "$1.8 million for her unvested options and RSUs that accelerated as a result of the [t]ransaction."[154] The Complaint here lacks similar allegations of materiality.

* * *

The plaintiff has not overcome the presumption of disinterestedness afforded Lamel and Goss. Together with Agarwal and Cohen, these four directors make up a majority of the seven-member Board, which voted to authorize the merger. As such, I need not address the allegations concerning Faltischek and Simon. Nor must I consider the composition of the Special Committee. Instead, I go on to address whether the plaintiff has adequately pleaded that the Board failed to authorize the merger in good faith and without gross negligence.

ii. *In Good Faith and Without Gross Negligence*

An affirmative vote by a majority of the disinterested directors then serving on the board or committee is necessary for Section 144(a)(1)'s safe harbor to apply.

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[153] 8 *Del. C.* § 144(d)(3).

[154] *Goldstein*, 2022 WL 1671006, at *49.

But it is not sufficient. The statute also mandates that the transaction be authorized by the board or committee "in good faith and without gross negligence."[155]

Unlike the voting requirement, which focuses on the headcount of disinterested directors, the process requirement concerns the collective conduct of the board or committee that authorized the transaction. Section 144(a)(1) states that the safe harbor applies if "*the board or committee* in good faith and without gross negligence authorizes the transaction."[156] The distinct statutory formulation of Section 144(b)(1), which focuses on the conduct of the disinterested directors, confirms this reading.[157] The mere fact of an interested director's participation does not defeat the safe harbor.[158] But such participation may bear on whether the board or committee authorized the transaction in good faith and without gross negligence.[159]

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[155] 8 *Del. C.* § 144(a)(1).

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

[157] *Compare id.*, *with id.* § 144(b)(1) (requiring that a controlling stockholder transaction be approved "in good faith and without gross negligence by a majority of the disinterested directors" serving on a committee).

[158] *See id.* § 144(a) (explaining that a transaction will not be subject to equitable relief solely "because the director or officer is present at or participates in the meeting . . . or was involved in the initiation, negotiation, or approval of the act or transaction").

[159] For example, the mere fact that an interested director participated in the negotiations would not defeat the safe harbor if the board otherwise authorized the transaction in good faith and without gross negligence. But if an interested director exploited his participation to funnel confidential information to a preferred bidder and the board failed to prevent the corruption of the process, the interested director's participation could render the board's authorization grossly negligent or in bad faith and defeat the safe harbor.

The "good faith and without gross negligence" requirement is not confined to the act of authorization. The legislative synopsis to Senate Bill 21 explains "that the statute does not displace the common law requirements regarding core fiduciary conduct as contemplated by cases such as *Flood v. Synutra International, Inc*., . . . and *In re MFW Shareholders Litigation*[.]"[160] Thus, the requirement extends beyond the formal vote to the fiduciary conduct through which the board or committee informed itself, deliberated, negotiated, and reached its decision.[161]

Having identified the authorizing body and the scope of conduct bearing on its authorization, the remaining question is the standard by which I must review that conduct. The plaintiff posits that I should evaluate the Board's actions under an equitable standard of review for purposes of Section 144(a).[162] Given that the merger was an all-cash, change-of-control transaction, the plaintiff invokes *Revlon* enhanced scrutiny as the appropriate standard.[163]

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[160] *See* Del. S.B. 21 syn., 153d Gen. Assem. (2025).

[161] *See Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 756-57 (Del. 2018) (holding that a special committee must engage in a deliberative process that cannot rationally be characterized as grossly negligent); *MFW*, 67 A.3d at 528-29, 534 (examining whether a special committee was adequately empowered to inform itself and negotiate and whether it fulfilled its duty of care).

[162] *See* Pl.'s Answering Br. 24-26.

[163] *Id.* Alternatively, the plaintiff argues that entire fairness applies due to a conflicted Board majority. *Id.* at 24, 50.

The plaintiff conflates the equitable standard of review for the transaction with the statutory standard for the safe harbor. The General Assembly designed Section 144 to provide safe harbors from liability for specified acts and transactions when its requirements are met.[164] To that end, the statute prescribes its own requirements for the safe harbor, including that disinterested directors authorize the transaction "in good faith and without gross negligence."[165] *Revlon* cannot serve as the standard of review for determining whether the requirements of Section 144(a)(1) are satisfied.[166]

Revlon is not entirely absent from this analysis, however. In a change of control transaction, a board must perform its fiduciary duties "in the service of a specific objective: maximizing the sale price of the enterprise."[167] *Lyondell Chemical Company v. Ryan* confirms that *Revlon* does not prescribe a particular

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[164] *See* Del. S.B. 21 syn., 153d Gen. Assem. (2025) (stating that "Section 144 is intended to provide a comprehensive liability exculpation scheme"); *see also Clearway*, 2026 WL 548504, at *10-11 (confirming the General Assembly's constitutional authority to enact DGCL provisions that shape the contours of equitable claims and affect the relief available in intra-corporate litigation).

[165] 8 *Del. C.* § 144(a)(1).

[166] *Cf. Drakes Landing Assocs., L.P. v. Tilden Park Cap. Mgmt., L.P.*, 2026 WL 2185439, at *8 n.78 (Del. Ch. July 29, 2026) (observing that "Section 144(a)(1) supplies the information that must be disclosed to or known by the decision-making directors, and it provides the standard of review . . . by requiring that the approval be 'in good faith and without gross negligence'").

[167] *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 239 (Del. 2009) (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001)).

process for achieving that objective. As such, *Revlon* informs the substantive fiduciary objective against which the directors' conduct is evaluated, and Section 144(a)(1) supplies the statutory conditions for obtaining the safe harbor. To defeat the safe harbor in this context, the plaintiff must show that the directors were grossly negligent in discharging their fiduciary responsibilities to pursue the best price reasonably available or acted in bad faith by "knowingly and completely fail[ing] to undertake their responsibilities."[168]

(a) The Statutory Standard

Although the terms "good faith" and "gross negligence" are not defined in Section 144(a)(1), a substantial body of Delaware law gives meaning to these concepts for purposes of fiduciary conduct.[169] The legislative synopsis confirms the General Assembly's intent that Section 144 not displace common law fiduciary requirements.[170]

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[168] *Id.* at 243-44.

[169] *See Porter v. Delmarva Power & Light Co*., 547 A.2d 124, 128 (Del. 1988) (holding that "when the statute under construction does not define its terms[,] it is proper to refer to the common law for the meaning of disputed language"); *see also Speiser v. Baker*, 525 A.2d 1001, 1008 (Del. Ch. 1987) ("When the task is to construe the meaning of reasonably precise words contained in our corporation statute, such as "entitled to vote," our preference, generally, must be to accord them their usual and customary meaning to persons familiar with this particular body of law."); *Gregory v. State*, 293 A.3d 994, 998 n.22 (Del. 2023) ("There are situations when the trial court should use available common law definitions to define statutory terms.").

[170] *See* Del. S.B. 21 syn., 153d Gen. Assem. (2025).

"Good faith" is a subsidiary element of the duty of loyalty.[171] Bad faith occurs where a "fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties."[172] Delaware courts have likewise recognized bad faith where a fiduciary acts with a purpose contrary to the corporation's interests or with the intent to violate positive law.[173]

The gross negligence inquiry concerns the directors' exercise of care.[174] It is not a means to second-guess the directors' strategy or the result of their decision-making.[175] Rather, "gross negligence means reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are 'without the bounds of reason.'"[176]

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[171] *See Stone v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006).

[172] *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006); *Lyondell*, 970 A.2d at 240 n.8 ("Our corporate decisions tend to use the terms 'bad faith' and 'failure to act in good faith' interchangeably[.]").

[173] *See Disney*, 906 A.2d at 67; *Stone*, 911 A.2d at 369; *In re Massey Energy Co.*, 2011 WL 2176479, at *20 (Del. Ch. May 31, 2011).

[174] *See McMullin v. Beran*, 765 A.2d 910, 921 (Del. 2000).

[175] *See Synutra*, 195 A.3d at 768 ("[T]he '[d]uty of care is measured by a gross negligence standard,' and 'disagree[ing] with the [special] committee's strategy' is not a duty of care violation."); *see also id.* ("[A] plaintiff can plead a duty of care violation only by showing that the Special Committee acted with gross negligence, not by questioning the sufficiency of the price."); *cf. MFW*, 67 A.3d at 516 (concluding that there was "no triable issue of fact as to [a committee's] duty of care" where it "met frequently and was presented with a rich body of financial information relevant to whether and at what price a going private transaction was advisable").

[176] *Tomczak v. Morton Thiokol, Inc.*, 1990 WL 42607, at *12 (Del. Ch. Apr. 5, 1990) (citation omitted); *see also In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 652, n.45 (Del. Ch. 2008) (explaining that "[t]he definition of gross negligence used in our corporate law

These are distinct but complementary standards. Bad faith is a culpable failure of loyalty; gross negligence is an extreme failure of care.[177] Together, they require that the board's authorization be both properly motivated and carefully considered. A board may act with gross negligence by employing a process so inadequate as to constitute reckless indifference, even if it believes it is serving the corporation. Conversely, a board might exercise due care but act in bad faith by consciously advancing interests other than those of the corporation.

The conjunctive phrase "in good faith and without gross negligence" requires that both conditions be satisfied.[178] If the good faith requirement only entailed the absence of gross negligence, the phrase "without gross negligence" would be surplusage.[179]

(b) Application

I need not determine whether every alleged flaw in the Board's process amounts to bad faith or gross negligence. A process deficiency defeats the safe

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jurisprudence is extremely stringent" and "imports the concept of recklessness into the gross negligence standard").

[177] *See Disney*, 906 A.2d at 65 (explaining that "grossly negligent conduct, without more, does not and cannot constitute a breach of the fiduciary duty to act in good faith").

[178] *See Williams v. State*, 818 A.2d 906, 912 (Del. 2002) ("In its commonly accepted meaning 'and' is a connective, and is not generally used to express an alternative—unless it is followed by words which clearly indicate that intent.").

[179] *See Salzberg*, 227 A.3d at 118 (explaining that the court must read the statute in way that avoids surplusage "if reasonably possible").

harbor only if it renders the board or committee's authorization grossly negligent or in bad faith. Here, the allegations concerning Michael Franklin's leak and the failure to protect confidential information are so extreme that it is reasonably conceivable the Board's authorization of the merger was grossly negligent.

In early 2023, Michael Franklin transmitted the 54-page Kroll Report, which implied a value of $9.73 per share based on a $454.8 million Company equity value, to his father's investment firm.[180] Whole Earth stock was trading at $3.84 per share at the time of this analysis.[181] The Kroll Report was not an isolated leak. Michael Franklin also sent Sababa other material nonpublic information through March 2023, including a draft Form 10-K, the confidential status of amended credit agreement negotiations, and a draft press release detailing 2022 full year results and 2023 guidance.[182] Martin Franklin and Sababa subsequently bought nearly $10 million of Whole Earth stock.[183]

When Sababa made its initial proposal in June 2023, the Board knew Michael Franklin was conflicted and asked him to sign an undertaking confirming that he would not participate in the sale process or share confidential information with his

[180] Compl. ¶ 36.

[181] *Id.* ¶ 38.

[182] *Id.* ¶ 39.

[183] *Id.* ¶ 40.

father or Sababa-affiliated entities.[184] He refused, and was eventually placed on leave.[185] The Audit Committee investigated and uncovered misconduct—despite never interviewing Michael Franklin or collecting his documents.[186] By early October 2023, the full Board learned that Michael Franklin had previously provided non-public information to his father's company.[187]

Despite that knowledge, the Board brought Michael Franklin back into meetings about the merger process and provided him with confidential information. On October 24, 2023, he was sent a packet of Board materials covering the period of his suspension, including nonpublic financial results, Special Committee materials, and information about the investigation into his own misconduct.[188] On October 31, he attended a Board meeting, sitting in on a "Special Committee Report Regarding the Sababa Proposal" and an update on the Audit Committee investigation.[189]

A failure to maintain adequate information controls, standing alone, would ordinarily sound in simple negligence. To cross the exacting threshold to gross

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[184] *Id.* ¶¶ 6, 54, 46; *see* Defs.' Ex. D.

[185] Compl. ¶ 56.

[186] *Id.* ¶ 63.

[187] *Id.* ¶¶ 61-62; *see* Proxy 29.

[188] *Id.* ¶ 69.

[189] *Id.* ¶ 70.

negligence, the directors' conduct must reflect "reckless indifference" or "actions that are without the bounds of reason."[190] At the motion to dismiss stage, pleading gross negligence requires facts suggesting "a *wide* disparity between the process the directors used . . . and [the process] which would have been rational."[191]

The pleaded facts, taken as true, meet that threshold. According to the Complaint, the Board knew that Michael Franklin had transmitted detailed financial information to his father's company before Sababa made its initial bid. It knew that Michael Franklin refused to commit to an undertaking promising not to share additional information. It also knew that the Audit Committee had an incomplete understanding of Michael Franklin's misconduct, since it had not interviewed him or collected his documents. Yet, with no apparent safeguards against further leaks, the Board allegedly restored Michael Franklin's access to confidential material and allowed him to attend a meeting where the Special Committee's sale process was discussed.

A rational process would not have restored Michael Franklin's access to confidential briefings about a transaction involving his father's company, given the Board's knowledge of his prior disclosures and his refusal to promise that he would not do so again. Even if the directors were otherwise engaged and advised, their

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[190] *Franchi v. Firestone*, 2021 WL 5991886, at *6 (Del. Ch. May 10, 2021).

[191] *Guttman v. Huang*, 823 A.2d 492, 508 n.39 (Del. Ch. 2003).

failure to protect the Company's confidential information while knowing of the risk Michael Franklin posed reveals a profound deficiency in their process. By permitting a deeply conflicted fiduciary to access sensitive process-related materials without any mechanism to prevent or detect further disclosures, the Board was recklessly indifferent to the risk that confidential information would reach the buyer. It is therefore reasonably conceivable that this reckless indifference compromised the integrity of the sale process, making the Board's authorization of the merger grossly negligent.[192] Accordingly, the Section 144(a)(1) safe harbor is unavailable at the pleading stage.

b. Section 144(a)(2)

Section 144(a)(2)'s safe harbor applies if "[t]he act or transaction is approved or ratified by an informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested stockholders."[193]

The Whole Earth stockholder vote approving the merger easily cleared the "majority of the votes cast" threshold. The merger required approval of a two-thirds majority of the outstanding shares held by unaffiliated stockholders.[194] It received

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[192] *See In re TIBCO Software Inc. S'holders Litig*., 2015 WL 6155894, at *23-24 (Del. Ch. Oct. 20, 2015) (holding that allegations about a board's failure to inquire into and assess a known defect in the sale process would sustain a duty of care claim).

[193] 8 *Del. C.* § 144(a)(2).

[194] Defs.' Ex. I (July 31, 2024 Form 8-K).

35,176,001 votes for the merger (26,270,978 of which were unaffiliated votes), compared to only 180,035 against and 19,040 abstentions.[195]

The remaining question is whether that vote was informed.[196] Section 144 does not define "informed," but Delaware common law does.[197] As discussed, the legislative synopsis to Senate Bill 21 confirms that the amendments "do[] not displace the common law requirements regarding core fiduciary conduct as contemplated by" cases such as *MFW*.[198] In *MFW*, the court emphasized that an "informed, uncoerced" stockholder vote gives stockholders a free and voluntary opportunity to decide what is fair "on a full information base and without coercion."[199]

A vote is informed when a corporation's "disclosures apprised stockholders of all material information and did not materially mislead them."[200] Information is

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[195] *Id.*

[196] The plaintiff does not contend that the vote was coerced.

[197] *See supra* note 169 and accompanying text.

[198] Del. S.B. 21 syn., 153d Gen. Assem. (2025).

[199] *MFW*, 67 A.3d at 523, 530.

[200] *Morrison v. Berry*, 191 A.3d 268, 282 (Del. 2018). Case law also uses the term "fully informed." *See id.* (asking whether the stockholder vote was "fully informed"). Section 144(a)(2) does not suggest a lesser disclosure standard because "fully" does not modify "informed." Delaware decisions describing cleansing votes have used both formulations. *See, e.g.*, *MFW*, 67 A.3d at 502, 523 (discussing the standard of review for a going private merger conditioned on, among other things, "an informed, uncoerced" vote and elsewhere describing the need for "approval by an uncoerced, fully informed vote" for business judgment review to apply); *Corwin v. KKR Fin. Hldgs LLC*, 125 A.3d 304, 311-12 (Del. 2015) (discussing both the "question of what standard of review applies if a transaction not

material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[201] This materiality standard does not "require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote."[202]

The plaintiff has adequately pleaded facts making it reasonably conceivable that the Proxy contained a material misstatement about Michael Franklin's access to the sale process.[203] The Proxy assured stockholders that, after his June 26, 2023 recusal, Michael Franklin "did not participate in any activities, meetings or communications with respect to the Process . . . and as a result did not receive from

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subject to the entire fairness standard is approved by an informed, voluntary vote of disinterested stockholders" and that the doctrine applies "to fully informed, uncoerced stockholder votes"); *see also Appel v. Berkman*, 180 A.3d 1055, 1057 (Del. 2018) ("Precisely because Delaware law gives important effect to an informed stockholder decision, Delaware law also requires that the disclosures the board makes to stockholders contain the material facts and not describe events in a materially misleading way."); *Lear*, 926 A.2d at 114-15 ("Delaware corporation law gives great weight to informed decisions made by an uncoerced electorate. When disinterested stockholders make a mature decision about their economic self-interest, judicial second-guessing is almost completely circumscribed by the doctrine of ratification.").

[201] *Rosenblatt v. Getty Oil Co*., 493 A.2d 929, 944 (Del. 1985) (explaining that an omitted fact is material if there is a "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available" (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976))).

[202] *Id.*

[203] *See* Pl.'s Answering Br. 52-54; Compl. ¶ 69. The plaintiff also raises several alleged material omissions. Because a single material misstatement or omission is sufficient to defeat the safe harbor, I need not address the remaining disclosure theories.

the Company any information with respect thereto."[204] This statement is inconsistent with the facts pleaded in the Complaint and Board materials incorporated into it. On October 24, 2023, Michael Franklin received a packet of Board materials that contained non-public Special Committee materials and, one week later, he attended a Board meeting where a Special Committee report on Sababa's proposal was relayed.[205]

It is reasonably conceivable that a Whole Earth stockholder would consider this information important in deciding how to vote on the merger. The core conflict in this transaction involved the father-son relationship between the target's CEO and the acquiror's sole owner and manager. The Proxy revealed that the Audit Committee's investigation uncovered that Michael Franklin had "disclosed to representatives of Sababa material non-public information belonging to the Company."[206] A reasonable stockholder would want to know whether the former CEO and son of the acquirer continued to receive confidential updates about the transaction process after his leak was uncovered.

The stockholder vote was not informed for purposes of this motion to dismiss, as the Proxy affirmatively misstated Michael Franklin's lack of participation. The

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[204] Proxy 29; *see* Compl. ¶ 118.

[205] Compl. ¶¶ 69-70.

[206] Proxy 29; *see* Compl. ¶ 118.

defendants therefore cannot invoke the Section 144(a)(2) safe harbor at the pleading stage.

2. Whether the Plaintiff Has Pleaded Non-Exculpated Claims

The unavailability of the Section 144(a)(1) and (a)(2) safe harbors does not conclude my analysis. As the legislative synopsis to Senate Bill 21 explains, the defendants retain the protections available to them at common law.[207] Whole Earth's certificate of incorporation exculpates its directors from personal liability, other than for: (1) breaches of the duty of loyalty; (2) acts or omissions made not in good faith; (3) acts under Section 174 of the Delaware General Corporation Law; and (4) transactions from which the director received an improper personal benefit.[208]

Delaware law affords directors "presumptions of independence, and that their acts have been taken in good faith and in the best interests of the corporation."[209] As such, "plaintiffs must plead a non-exculpated claim for breach of fiduciary duty against an independent director protected by an exculpatory charter provision, or that

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[207] *See* Del. S.B. 21 syn., 153d Gen. Assem. (2025) ("The amendments do not displace any safe harbor procedures or other protections available at common law, including processes and procedures that comply with the pre-amendment common law but do not conform to the § 144 safe harbors.").

[208] Defs.' Ex. J; *see* 8 *Del. C.* § 102(b)(7).

[209] *Aronson*, 473 A.2d at 815.

director will be entitled to be dismissed from the suit."[210] This requirement applies "regardless of the underlying standard of review from the transaction."[211]

"When a stockholder challenges a change-of-control transaction, such as the all-cash merger in this case, enhanced scrutiny under *Revlon* is the presumptive standard of review."[212] "*Revlon* neither creates a new type of fiduciary duty in the sale-of-control context nor alters the nature of the fiduciary duties that generally apply."[213] The court need only determine "whether the directors have undertaken reasonable efforts to fulfill their obligation to secure the best available price, and not to determine whether the directors have performed flawlessly."[214] Directors "are entitled to dismissal unless the plaintiff[] ha[s] pled facts that, if true, support the conclusion that the defendant directors failed to secure the highest attainable value as a result of their own bad faith or otherwise disloyal conduct."[215]

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[210] *In re Cornerstone Therapeutics Inc., S'holder Litig.*, 115 A.3d 1173, 1179 (Del. 2015).

[211] *Id.*

[212] *In re Mindbody, Inc. S'holder Litig.*, 332 A.3d 349, 382 (Del. 2024) (citing *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986)).

[213] *Malpiede*, 780 A.2d at 1083; *see Kahn v. Stern*, 183 A.3d 715, 2018 WL 1341719, at *1 n.3 (Del. Mar. 15, 2018) (TABLE) (explaining that *Revlon* is a "context-specific articulation" of the directors' duties of loyalty and care).

[214] *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1001 (Del. Ch. 2005); *see also In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 595-96 (Del. Ch. 2010) ("[A]t bottom *Revlon* is a test of reasonableness; directors are generally free to select the path to value maximization, so long as they choose a reasonable route to get there.").

[215] *In re Morton's Rest. Grp. Inc. S'holder Litig.*, 74 A.3d 656, 664 (Del. Ch. July 23, 2013) (citation omitted); *see Rudd v. Brown*, 2020 WL 5494526, at *7 (Del. Ch. Sept. 11, 2020) ("[A]n exculpatory charter provision shields defendant directors from monetary liability

To state a non-exculpated claim, the plaintiff must plead "facts supporting a rational inference that the director harbored self-interest adverse to the stockholders' interests, acted to advance the self-interest of an interested party from whom they could not be presumed to act independently, or acted in bad faith."[216] It is reasonably conceivable that Michael Franklin and Simon breached their duties of loyalty. The Complaint does not, however, establish that Faltischek had a disabling conflict. Nor does it support a reasonable inference that Faltischek and the four other disinterested directors acted in bad faith.

a. Michael Franklin

The defendants argue that the Complaint fails to plead a non-exculpated claim against Michael Franklin. They highlight that he recused himself from the process at the first Board meeting after Sababa delivered its initial proposal and played no role in the Special Committee's negotiations with Sababa or the approval of the merger.[217] Their argument fails for two primary reasons.

First, the pleaded facts support a reasonable inference that Michael Franklin "harbored self-interest adverse to the stockholders' interest."[218] He allegedly held a

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where 'the underlying claims for a breach of fiduciary duties in conducting the sale' are based only on duty of care violations." (quoting *Malpiede*, 780 A.2d at 1084, 1094-95)).

[216] *Cornerstone*, 115 A.3d at 1179-80.

[217] *See* Defs.' Opening Br. 38-43.

[218] *Cornerstone*, 115 A.3d at 1179-80.

profit interest entitling him to 10% of the appreciation in Sababa's assets.[219] As a result, he "stood on both sides of the [m]erger and stood to personally gain from any undervalued purchase of [Whole Earth] by Sababa."[220]

The defendants counter that the Proxy disclosed Michael Franklin's profit interest had "no economic value."[221] That may be. But I cannot resolve factual disputes at the pleading stage.[222]

Second, it is reasonably conceivable that Michael Franklin "acted to advance the self-interest of an interested party from whom [he] could not be presumed to act independently."[223] Sababa was controlled by Martin Franklin—Michael Franklin's father, from whom he plainly lacks independence.[224] Despite Michael Franklin's

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[219] Compl. ¶ 17.

[220] *Id.* ¶ 98.

[221] Defs.' Opening Br. 4 n.3 (quoting Proxy 70-71).

[222] *In re CBS Corp. S'holder Class Action & Deriv. Litig.*, 2021 WL 268779, at *18 (Del. Ch. Jan. 27, 2021) (explaining that "[t]he incorporation-by-reference doctrine does not enable a court to weigh evidence on a motion to dismiss" (citation omitted)). The plaintiff cited the Proxy only for the purpose of making disclosure-related allegations. Compl. ¶ 14 n.2; *see Santa Fe Pacific Corp. S'holder Litig.* 669 A.2d 59 (Del. 1995) (stating that public filings are used to establish "formal, uncontested matters" if the "proxy statement is merely appended to the complaint and relied upon for the disclosure claims"); *see also In re New Valley Corp. Deriv. Litig.*, 2001 WL 50212, at *5 (Del. Ch. Jan. 11, 2001) ("[T]he document is used not to establish the truth of the statements therein, but to examine only what is disclosed.").

[223] *Cornerstone*, 115 A.3d at 1179-80.

[224] *See* Compl. ¶¶ 97, 99; *see also Sandys v. Pincus*, 152 A.3d 124, 130 (Del. 2016) (observing that a director's independence may be put in doubt where a relationship is "suggestive of the type of very close personal relationship that, like family ties" would "heavily influence a human's ability to exercise impartial judgment").

purported abstention from the sale process after June 26, 2023, the Complaint details disloyal conduct before his recusal.[225] He allegedly advanced Martin Franklin's buy-side interests by forwarding confidential information to Mariposa Capital between January and March 2023.[226] The plaintiff contends that, by doing so, Michael Franklin gave Sababa an early informational advantage, allowing it to acquire a 19.8% stake at distressed prices and anchor its initial offer at an artificially low $4.00 per share.[227] Affording the plaintiff all reasonable inferences, a formal recusal does not cure this purported disloyalty.[228]

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[225] *See In re Carvana Co. S'holders Litig.*, 2022 WL 2352457, at *17 (Del. Ch. June 30, 2022) (describing a "non-exhaustive list of scenarios that preclude the application of the abstention doctrine" including where the transaction is "rendered unfair based, in large part, on the director's involvement" (citation omitted)); *see also In re Coty Inc. S'holder Litig.*, 2020 WL 4743515, at *9 (Del. Ch. Aug. 17, 2020) (observing that the abstention doctrine "is not absolute and often implicates factual questions that cannot be resolved on the pleadings").

[226] Compl. ¶¶ 36-40.

[227] *See id.* ¶¶ 38-40, 43.

[228] *See Mills Acq. Co. v. Macmillan, Inc*., 559 A.2d 1261, 1283 (Del. 1989) (holding that tipping material, nonpublic information to a favored bidder violated the duty of loyalty); *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1061-62 (Del. Ch. 2004) (holding that a director breached the duty of loyalty by improperly using confidential information to advance personal interests and diverting corporate opportunities to an affiliate); *see also Shocking Techs., Inc. v. Michael*, 2012 WL 4482838, at *10 (Del. Ch. Oct. 1, 2012) ("The disclosure of confidential information to a potential investor . . . especially when the director knows (and hopes) that the disclosure would benefit the potential investor to the substantial detriment of the Company, is conduct which, in and of itself, is a breach of the duty of loyalty.").

b. Simon

The Complaint pleads facts supporting a reasonable inference that Simon harbored a material self-interest adverse to the stockholders due to his $1.4 million consulting agreement.[229] "[T]here is no bright-line dollar amount at which consulting fees received by a director become material[.]"[230] At the pleading stage, the Court of Chancery has held that consulting fees well below $1 million are sufficient to put a director's disinterestedness in doubt.[231]

The consulting agreement promised Simon a $1.4 million lump-sum payment—a meaningful amount, even to a wealthy individual.[232] The consulting agreement netted Simon over $170,000 per month more than the salary he received as Whole Earth's Executive Chairman in exchange for "few, if any, actual

[229] *See* Compl. ¶¶ 103-06.

[230] *Orman*, 794 A.2d at 30.

[231] *See id.* at 30-31 ("[A]ccepting as true all the well-pled allegations and the inferences reasonably drawn therefrom in this case, I believe it is reasonable to question the objectivity of a director who has a [$75,000] consulting contract with his company and will continue to have a consulting contract with the surviving company."); *Klein v. H.I.G. Cap., L.L.C.*, 2018 WL 6719717, at *11-12 (Del. Ch. Dec. 19, 2018) (holding that a six-month, $275,000 consulting contract was material); *In re HomeFed Corp. S'holder Litig.*, 2020 WL 3960335, at *13 (Del. Ch. July 13, 2020) (holding that a director who received consulting fees as his "sole employment" between $10,000 and $155,000 over four years was not disinterested).

[232] *See MultiPlan*, 268 A.3d at 813 (holding that a "greater than half-million-dollar payout is presumptively material at the motion to dismiss stage"); *see also Frank v. Elgamal*, 2012 WL 1096090, at *11 (Del. Ch. Mar. 30, 2012).

responsibilities."[233] And because the agreement was renewable, he stood to earn millions more at the time of the merger.[234]

These facts support a reasonable inference that Simon's judgment concerning the merger was compromised.[235] The plaintiff asserts that rather than striving to negotiate a fair transaction price for stockholders, the $1.4 million payment—negotiated in secret—incentivized Simon to steer the transaction to Sababa at any price.[236] Accordingly, the plaintiff has pleaded a reasonably conceivable, non-exculpated claim against Simon.

c. Faltischek

The plaintiff advances a different theory about Faltischek, arguing that she cannot be dismissed because she acted to advance the interests of Simon, from whom she lacks independence.[237] Faltischek was deemed by the Board to be independent under Nasdaq listing requirements.[238] Accordingly, she is presumed to be

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[233] Compl. ¶ 9; *see id.* ¶ 105; *see also Klein*, 2018 WL 6719717, at *11 (concluding that it was "reasonable to infer" that a director was conflicted where the "consulting agreement at issue paid [him] more on a monthly basis than his former salary as CEO").

[234] Compl. ¶¶ 94-95; *see Klein*, 2018 WL 6719717, at *12.

[235] *See* Compl. ¶¶ 94-95, 105.

[236] *See id.* ¶¶ 95, 105, 152; *see also id.* ¶ 50.

[237] *See id.* ¶¶ 107-09. As discussed below, Faltischek did not have a material interest in the transaction due to the $120,000 special fee she received for her work on the Special Committee. *See infra* Section II.A.2.d.iii.

[238] *See supra* note 126 and accompanying text.

disinterested with respect to the merger unless the plaintiff pleads "substantial and particularized facts" that she has a "material interest" in the merger or a "material relationship with a person with a material interest" in it.[239]

The plaintiff has pleaded substantial and particularized facts that Faltischek has a material relationship with Simon.[240] She has worked for Simon at various companies for over two decades, receiving over $20 million in compensation from those roles.[241] Most critically, she remains employed under Simon at Tilray as its Chief Strategy Officer and Head of International, while Simon serves as Tilray's Chairman, President, and CEO.[242] A director generally lacks independence from a

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[239] 8 *Del. C.* § 144(d)(2); *see Ayers*, 2026 WL 1723538, at *10 (holding that Section 144(d)(2) applies outside the context of the safe harbors of Sections 144(a), (b), and (c)); *see also* 8 *Del. C.* § 144(e)(7), (8) (defining "[m]aterial interest" and "[m]aterial relationship"). Although Section 144(e) puts forth definitions "for purposes of this section," they are relevant to my *Cornerstone* analysis because it involves Section 144(d)(2).

[240] *See* 8 *Del. C.* § 144(e)(8) (defining "[m]aterial relationship" to include a "professional" or "employment" relationship); *Ayers*, 2026 WL 1723538, at *11 (defining "substantial and particularized"). Section 144(e) states that its definitions are "[f]or purposes of this section," meaning all of Section 144. 8 *Del. C.* § 144(e). Section 144(d)(2) is, of course, a provision within Section 144, meaning that the definitions of subsection (e) are pertinent to my analysis. The heightened presumption of Section 144(d)(2) applies outside the scope of the safe harbor. *See Ayers*, 2026 WL 1723538, at *10 (explaining that Section 144(d)(2) lacks limiting language confining its use to the safe harbors of Sections 144(a), (b), and (c)).

[241] *See* Compl. ¶ 109.

[242] *See id.* ¶ 108.

conflicted fiduciary who wields control over her primary employment and principal livelihood.[243]

The plaintiff has not adequately pleaded that Faltischek acted to advance Simon's self-interest in the merger.[244] Though the plaintiff asserts that Simon and Martin Franklin had historical business ties, those ties are not a "material interest" in the merger itself.[245] Simon's only alleged material interest in the merger was his $1.4 million consulting agreement.

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[243] *See Del. Cnty. Emp. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1021 (Del. 2015) (holding that a director could not act independently of the company's chairman, who was interested in the transaction at issue, because he was "[the chairman's] close friend of a half century" and "derives his primary employment from a company over which [the chairman] has substantial control"); *see also In re The Student Loan Corp. Deriv. Litig.*, 2002 WL 75479, at *3 n.3 (Del. Ch. Jan. 8, 2002) ("[T]he remuneration a person receives from her full-time job is typically of great consequence to her. It is usually the method by which bills get paid, health insurance is affordably procured, children's educations are funded, and retirement savings are accumulated.").

[244] *See In re Oracle Corp. Deriv. Litig.*, 2021 WL 2530961, at *7, *9 (Del. Ch. June 21, 2021) (describing the second *Cornerstone* inquiry as a "two-prong test"); *In re BGC P'rs, Inc. Deriv. Litig.*, 2021 WL 4271788, at *10, *12 (Del. Ch. Sept. 20, 2021) (explaining that a plaintiff asserting a claim under *Cornerstone*'s second inquiry must demonstrate that the director's conduct "comport[ed] with the wishes or interests of the corporation (or persons) doing the controlling" and that the director "acted to advance" those self-interests).

[245] Notably, Section 144(d)(2) provides that the heightened presumption of disinterestedness "may only be rebutted" by "substantial and particularized facts" that the director has a "material interest in [the] act or transaction" or has a "material relationship with a person with a *material interest in [the] act or transaction*." 8 *Del. C.* § 144(d)(2) (emphasis added). It does not say that the presumption can be rebutted by showing a material relationship with a person with a material relationship. Faltischek's presumption of disinterestedness therefore cannot be rebutted because she has a material relationship with Simon, who, in turn, allegedly has a material relationship with Martin Franklin.

The Complaint states that "Simon alone negotiated this agreement with Martin," outside the purview of the Board and the Special Committee.[246] It lacks any well-pleaded allegation that Faltischek knew of Simon's arrangement during the Special Committee's process.[247] Faltischek could not act to advance an interest she did not know existed, making it inconceivable that she breached her duty of loyalty to advantage Simon.[248] Her liability turns solely on whether she acted in bad faith alongside the other disinterested directors.

d. The Disinterested Directors

As discussed above, Lamel, Goss, Agarwal, and Cohen are disinterested and independent directors.[249] To state a non-exculpated claim against them, along with Faltischek, the plaintiff must plead facts demonstrating bad faith.[250]

The plaintiff alleges that the directors acted in bad faith by running a "tilted" sale process that prioritized the interests of conflicted insiders and Martin Franklin

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[246] *See* Compl. ¶ 95.

[247] *Id.* ("No contemporaneous Company records indicate that the Special Committee or Board discussed or were even aware of the Simon Consulting Agreement before February 12, 2024 . . . .").

[248] *Cf. BGC P'rs*, 2021 WL 4271788, at *11 (observing that if a director were the lifelong friend of a controlling stockholder "but acted only to advance the interests of the company and its minority stockholders . . . the director could hardly be accused of breaching her duty of loyalty").

[249] *See supra* Section II.A.1.a.i.

[250] *Cornerstone*, 115 A.3d at 1179-80.

at the expense of public stockholders.[251] Rather than "cabin" conflicts of interest, the Board allegedly appointed Faltischek and Simon to the Special Committee despite having knowledge of Simon's ties to Martin Franklin and Faltischek's ties to Simon.[252] The Special Committee then hired Jefferies LLC—a financial advisor that also did work for Martin Franklin.[253] To solidify Martin Franklin's alleged informational advantage and block competitive bidding, the Special Committee did not provide the Kroll Report to other prospective bidders during a "truncated" two-week bidding process.[254] At the completion of the process, the directors awarded themselves bonuses while agreeing to a merger price that was below certain of Jefferies' valuation ranges.[255] The directors also allegedly filed a "materially misleading, incomplete" Proxy that deprived stockholders of "their right to cast a fully-informed vote on the [m]erger."[256]

"In the transactional context, [an] extreme set of facts [is] required to sustain a disloyalty claim premised on the notion that disinterested directors were intentionally disregarding their duties."[257] Where *Revlon* applies, a plaintiff must

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[251] Compl. ¶¶ 117-33.

[252] *See id.* ¶ 47.

[253] *See id.* ¶¶ 51-53.

[254] *Id.* ¶ 78; *see id.* ¶¶ 74-76.

[255] *See id.* ¶¶ 85-90, 111-14.

[256] *Id.* ¶¶ 152-54.

[257] *Lyondell*, 970 A.2d at 243.

show that the directors "knowingly and completely failed to undertake their responsibilities."[258] The inquiry is not whether "disinterested, independent directors did everything that they (arguably) should have done to obtain the best sale price," but whether they "utterly failed to attempt to obtain the best sale price."[259] The plaintiff's allegations do not meet this high bar.

i. *Conflicts*

First, rather than supporting an inference of bad faith, the Complaint demonstrates that the directors took affirmative steps to manage conflicts and oversee the sale process. After receiving the Sababa bid, the Board discussed Michael Franklin's conflict, attempted to exclude him from "all future discussions of the [p]roposal," and demanded he sign a confidentiality undertaking.[260] Concurrently, the Board formed a Special Committee of Cohen, Faltischek, and Simon after determining they "did not have any material interests in connection with the [p]roposal."[261] These measures ultimately proved inadequate, but such inadequacy points to a breach of the duty of care—not bad faith.[262] The Complaint

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[258] *Id.* at 243-44.

[259] *Id.*

[260] Defs.' Ex. D at 10-11; *see* Compl. ¶ 45.

[261] Defs.' Ex. D at 11.

[262] *See supra* Section II.A.1.a.ii (discussing the reasonably conceivable inference of gross negligence).

lacks well-pleaded facts suggesting that the Board's failure to fully remediate Michael Franklin's conflict and misconduct was a product of complicity, rather than a severe procedural oversight.[263]

Second, the appointment of Simon and Faltischek to the Special Committee does not support a reasonable inference of bad faith. Regarding Faltischek, the plaintiff alleges no direct conflict with the Franklins; her purported conflict is exclusively derivative of her relationship with Simon.[264] As for Simon, the Board could not have acted in bad faith by appointing him based on his $1.4 million consulting agreement. Simon had not yet negotiated that arrangement when he was appointed, and his fellow directors did not learn of it until February 12, 2024—the same day they approved the merger.[265]

Though the Board was unaware of the consulting agreement, the directors may have known of Simon's historical ties to Martin Franklin when they appointed him to the Special Committee. They likely knew that Simon and Martin Franklin

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[263] *See TIBCO*, 2015 WL 6155894, at *23 (holding that where the board took inadequate steps to assess a severe process error, "it [wa]s not reasonably conceivable . . . that the disinterested and independent members of the Board could be found to have entirely disregarded their fiduciary duties thereby acting in bad faith," even though the "allegations [we]re sufficient . . . to state a claim for a breach of the Director Defendants' duty of care").

[264] *See* Compl. ¶¶ 107-09; *see also In re Kraft Heinz Co. Deriv. Litig.*, 2021 WL 6012632, at *9 (Del. Ch. Dec. 15, 2021) (rejecting the idea of a "transitive theory of independence"), *aff'd*, 282 A.3d 1054 (Del. 2022) (TABLE).

[265] *See supra* notes 246-47 and accompanying text; Compl. ¶ 95.

had served together on the Jarden board until 2016 and had worked on a single transaction years later.[266] Even so, allegations of "business relationships, standing alone, are insufficient to raise a reasonable doubt about a director's independence."[267] The sole personal benefit Simon received from these past associations, according to the Complaint, was approximately $2 million in director compensation across a 14-year Jarden directorship.[268] Even if these ties made Simon a suboptimal candidate for the Special Committee, his appointment was not "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."[269]

Finally, the Special Committee's selection of Jefferies as its financial advisor does not indicate bad faith. The Complaint acknowledges that Jefferies provided the

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[266] *See* Compl. ¶ 103 (discussing Simon's appointment to the Jarden board in 2002); *see id.* ¶ 104 (discussing Tilray's $102.9 million acquisition of Breckenridge Distillery).

[267] *Beam*, 845 A.2d at 1050; *see also Orman*, 794 A.2d at 27 ("The naked assertion of a previous business relationship is not enough to overcome the presumption of a director's independence."); *In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL 396202, at *6 n.63 (Del. Ch. Jan. 31, 2013) (explaining that allegations of "nearly twenty years of Board service alongside [one director] and a long-term relationship with [another director]" did not "raise a reasonable doubt as to the independence of a director under Delaware law" (citation omitted)).

[268] Compl. ¶ 103. That averages out to $142,857 per year, which is hardly remarkable. *See In re Limited, Inc.*, 2002 WL 537692, at *5 (Del. Ch. Mar. 27, 2002) (holding that a director's "compensation from his role as a director of The Limited, alone, does not create a reasonable doubt as to that director's independence"). There is no allegation that Simon received a personal benefit from Tilray's acquisition of Breckenridge Distillery, which was owned by Martin Franklin. Compl. ¶ 104.

[269] *In re Alloy, Inc.*, 2011 WL 4863716, at *7 (Del. Ch. Oct. 13, 2011).

Special Committee with a memorandum in July 2023 describing its previous engagements with "entities affiliated with Martin and the fees it received," and provided an updated disclosure in January 2024.[270] In the plaintiff's view, these disclosed ties required the Special Committee to actively "cabin" Jefferies' involvement.[271] Under Delaware law, however, a financial advisor's prior dealings with a transaction counterparty do not, standing alone, create a disabling conflict of interest that a board is duty-bound to quarantine.[272] Though the plaintiff alleges that Jefferies failed to disclose its work for Martin Franklin on the Acuren transaction,[273] there is no well-pleaded allegation that the Special Committee knew of this omission and intentionally ignored it.[274]

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[270] Compl. ¶ 53.

[271] *Id.* ¶ 133.

[272] *See In re Martha Stewart Living Omnimedia, Inc. S'holders Litig.*, 2017 WL 3568089, at *22 n.104 (Del. Ch. 2017) (explaining that the Court of Chancery has held, "in a variety of circumstances, that a financial advisor's prior dealings with a counterparty to a transaction, standing alone, will not be adequate to plead a conflict of interest"); *In re Inergy LP*, 2010 WL 4273197, at *14 (Del. Ch. Oct. 29, 2010) (holding that a financial advisor's "prior dealings" with the transaction counterparty "d[id] not show that [the transaction committee's] decision to retain [that advisor] . . . was unreasonable").

[273] Compl. ¶¶ 52-53.

[274] *See RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 845, 865 (Del. 2015) (affirming that a board's failure to uncover and mitigate a financial advisor's concealed conflict of interest breached the duty of care).

ii. *Process*

The plaintiff's allegations concerning the process itself fare no better.[275] The Special Committee hired a professional financial advisor, ran a market check, met numerous times, and negotiated the price upward from an initial bid of $4.00 per share to the final $4.875 per share price.[276] Although the plaintiff complains of a two-week bidding window, that fact does not support an inference of disloyalty.[277] The Special Committee's failure to keep minutes for the vast majority of its meetings is more indicative of carelessness than bad faith.

The plaintiff places heavy emphasis on the Special Committee's decision to withhold the Kroll Report from prospective bidders, arguing that this cemented Sababa's "informational advantage."[278] The Complaint explains that, in September 2023, Jefferies provided prospective bidders with updated financial projections prepared that month.[279] Determining whether the Special Committee acted in bad

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[275] *See* Compl. ¶¶ 71-84.

[276] *See id.* ¶¶ 51, 71, 85; *see Lear*, 967 A.2d at 649 (holding that a plaintiff failed to plead bad faith where the complaint did not "allege that the Special Committee and board were proceeding without the advice of professional advisors"); *In re Answers Corp. S'holders Litig*., 2014 WL 463163, at *12 (Del. Ch. Feb. 3, 2014) (holding that, where a board conducted market tests through a financial advisor, "it is clear that those efforts were attempts to comply with the Board's fiduciary duties").

[277] *See In re Micromet, Inc. S'holders Litig*., 2012 WL 681785, at *7-8 (Del. Ch. Feb. 29, 2012) (holding that a one-week deadline was sufficient to conduct meaningful diligence and make a competing bid).

[278] Pl.'s Answering Br. 31-32.

[279] Compl. ¶¶ 72-74.

faith does not require me to weigh the relative accuracy of a January 2023 accounting valuation against September 2023 financial projections. Even if the Kroll Report contained highly material information, the decision to supply bidders with contemporaneous financial projections rather than an accounting impairment report generated half a year earlier is not one that "'lacked any rationally conceivable basis' associated with maximizing stockholder value."[280]

iii. *Awards*

The directors' receipt of additional compensation at the completion of the transaction process is also not indicative of bad faith. The Complaint acknowledges that the special director fees were only finalized and approved on February 12, 2024, after the transaction terms and price negotiations had concluded.[281] That timing

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[280] *In re Essendant, Inc. S'holder Litig.*, 2019 WL 7290944, at *13 (Del. Ch. Dec. 30, 2019) (quoting *Chen v. Howard-Anderson*, 87 A.3d 648, 684 (Del. Ch. 2014)).

[281] *See* Compl. ¶¶ 88-89.

undercuts any reasonable inference that the fees were an improper incentive to push the merger through.[282]

Moreover, the fees are modest, ranging from $25,000 for Audit Committee investigatory work to $130,000 for Cohen, the Special Committee's Chair.[283] There is no basis from which to infer that these fees are so material to the directors that they could incite disloyalty. The fact that the final awards exceeded the initial per-meeting mandate or a compensation consultant's recommendation does not transform the payment of director fees into a conscious disregard of fiduciary duties.[284]

iv. *Disclosures*

Finally, the Complaint does not support a reasonable inference that the directors' disclosures about the merger were disloyal. To state a non-exculpated claim based on a disclosure violation, the plaintiff "cannot simply point to erroneous judgment in the failure to make a disclosure, implicating the duty of care, but rather

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[282] *Cf. In re Tele-Commc'ns, Inc. S'holders Litig.*, 2005 WL 3642727, at *5 (Del. Ch. Dec. 21, 2005) (questioning a "plan" to compensate Special Committee members where it was approved "before the Special Committee's deliberations and negotiations"); *In re Nat'l Auto Credit*, 2003 WL 139768, at *10 ("[T]he receipt of customary directors' fees does not suggest a conflict of interest[.]"); *Simons v. Brookfield Asset Mgmt. Inc.*, 2022 WL 223464, at *15 (Del. Ch. Jan. 21, 2022) ("[W]hen director fees are not excessive, mere allegations of payment of director fees are insufficient to create a reasonable doubt as to the director's independence." (citing *In re Walt Disney Co. Deriv. Litig.*, 731 A.2d 342, 360 (Del. Ch. 1998))).

[283] *See* Compl. ¶ 89.

[284] *See id.* ¶¶ 85-86.

must point to facts in the Complaint supporting an inference that the Board acted in bad faith in issuing the disclosure, implicating the duty of loyalty."[285] As discussed above, it is reasonably conceivable that the Proxy materially misstated Michael Franklin's lack of participation in "any activities, meetings, or communications" and non-receipt of "any information with respect thereto" after he ostensibly recused himself.[286] But a deficient proxy is not synonymous with a disloyal one.

Vice Chancellor Glasscock's analysis in *Morrison v. Berry* is instructive.[287] On remand, the court found that although a proxy statement presented a "distorted narrative" by omitting material facts about a founder's conflicts, the omissions did not support an inference of "knowingly-crafted deceit" because the proxy also disclosed other damaging facts about the founder's actions.[288] As the court reasoned, if the directors were attempting a bad-faith cover-up to mislead stockholders, "they did a poor job, indeed."[289]

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[285] *Kahn v. Stern*, 2017 WL 3701611, at *14 (Del. Ch. Aug. 28, 2017), *aff'd,* 183 A.3d 715 (Del. 2018) (TABLE); *see also McMillan v. Intercargo Corp.*, 768 A.2d 492, 507 (Del. Ch. 2000) ("[E]ven if the complaint states a claim that there were material omissions from the proxy statement, it does not allege facts from which one can reasonably infer that any such omission resulted from more than a mistake about what should have been disclosed."); *Lenois v. Lawal*, 2017 WL 5289611, at *19 (Del. Ch. Nov. 7, 2017) ("Even assuming that these additional disclosures would be material to an investor, Plaintiff also does not explain why these omissions would give rise to bad faith claims against Director Defendants.").

[286] *See supra* Section II.A.1.b (quoting Proxy 29).

[287] *See Morrison v. Berry*, 2019 WL 7369431 (Del. Ch. Dec. 31, 2019).

[288] *Id.* at *19.

[289] *Id.* at *20.

The same logic applies here. It is reasonably conceivable that the Proxy contained a material misrepresentation about Michael Franklin's access to the merger process. The materiality standard is distinct from the standard to plead bad faith, which "requires a pleading of facts with respect to the [maldisclosures] from which I may reasonably infer breach of the duty of loyalty."[290] Where, as here, the directors are independent and not interested in the merger, the plaintiff must plead facts supporting a reasonable inference of "bad faith 'in the disclosures themselves.'"[291]

The surrounding disclosures negate any such inference. The Proxy disclosed Michael Franklin's most egregious act: transmitting "to representatives of Sababa material non-public information belonging to the Company without a non-disclosure agreement and in violation of the Company's internal policies."[292] It revealed that the Board instructed Michael Franklin to execute an undertaking promising not to

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[290] *In re USG Corp. S'holder Litig.*, 2020 WL 5126671, at *26 (Del. Ch. Aug. 31, 2020) (citation omitted), *aff'd sub nom. Anderson v. Leer*, 265 A.3d 995 (Del. 2021) (TABLE).

[291] *Id.* at *27 (quoting *Morrison*, 2019 WL 7369431, at *18).

[292] Proxy 29. The plaintiff also asserts that the Proxy was deficient because it did not reveal the specific materials Michael Franklin disclosed to Sababa, alongside other alleged omissions about the Audit Committee's investigation, self-interested director and officer payouts, potential conflicts of interest, and the Special Committee's process. *See* Compl. ¶¶ 119-33; Pls.' Answering Br. 53. Even assuming that these were material omissions, the Complaint lacks well-pleaded facts from which to reasonably infer that they were omitted by the disinterested directors in bad faith. *See Nguyen v. Barrett*, 2016 WL 5404095, at *5 (Del. Ch. Sept. 28, 2016) (dismissing claims where the plaintiff "failed to plead facts such that it is reasonably conceivable that the allegedly incomplete disclosure was made by the board disloyally or in bad faith, as is required to sustain th[e] claim post-close").

"participate in any discussions regarding the [p]rocess" or to receive or share confidential information with Sababa, but that he declined to sign the undertaking.[293] The Proxy also described how the Audit Committee initiated an internal investigation with independent counsel to probe his leaks, and revealed that he resigned amid an unresolved legal dispute with the Board over his claim of "Good Reason."[294] It further warned stockholders that Michael Franklin was expected to be appointed CEO of the newly private parent company immediately after the merger.[295]

If the directors were intentionally hiding Michael Franklin's continued access to confidential process-related information to create a false narrative of an unblemished sale process, acknowledging these damaging facts would undercut that purpose.[296] Given the disclosures the directors did make, the only reasonable inference is that the disinterested directors' misstatement about Michael Franklin's

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[293] Proxy 26-27.

[294] *Id.* at 11.

[295] *Id.* at 7-8, 70-71.

[296] *See USG*, 2020 WL 5126671, at *27 (concluding that the disclosure of the board's approval of a higher transaction price range than it achieved "belie[d] any bad faith attempt to conceal 'intrinsic value,'" and that the allegations only supported an inference of negligent misstatements).

continued involvement resulted from extreme carelessness rather than a disloyal lie.[297]

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The sale process was undoubtedly flawed. It is reasonably conceivable that the Board was grossly negligent by failing to maintain an information wall against a known leaker, and then stating otherwise in the Proxy. Still, "there is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties."[298] It cannot reasonably be inferred that the process failures described in the Complaint—a porous information wall, a truncated bidding window, the withholding of a stale accounting report, the delegation of authority to a committee member harboring an unknown conflict, and even materially deficient disclosures—amount to bad faith.[299]

The plaintiff has not stated a viable, non-exculpated claim against Lamel, Goss, Agarwal, Cohen, or Faltischek; they are dismissed from this action. Count III survives only as to Michael Franklin and Simon.

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[297] *See Nguyen*, 2016 WL 5404095, at *5 ("While a plaintiff need not know and articulate the exact motive of directors in order to sustain a claim, the Plaintiff does bear the burden to allege facts that rebut the presumption afforded to directors—that is, to demonstrate that it is reasonably conceivable that the board acted in bad faith or disloyally.").

[298] *Lyondell*, 970 A.2d at 243.

[299] *See Cornerstone*, 115 A.3d at 1179 (noting that Section 102(b)(7) provisions protect independent directors from claims based merely on a "failure of care").

B. Whether Section 203 Was Violated

Count I is a claim against Whole Earth and the Sababa Defendants for violating 8 *Del. C.* § 203.[300] The plaintiff submits that this statutory violation renders the merger invalid and void ab initio.[301] On that basis, the plaintiff advances a claim for conversion against Whole Earth and the Sababa Entities in Count II, claiming that those defendants "exercised wrongful dominion" over the putative class's Company stock.[302]

The plaintiff's Section 203 theory is contrary to both the statute's plain text and Delaware Supreme Court precedent. Without a meritorious argument that the merger is invalid, the plaintiff's conversion claim likewise fails.

1. The Statutory Text

Section 203 of the DGCL concerns business combinations with interested stockholders. Section 203(a) provides that, subject to certain exceptions not relevant here:

> a corporation shall not engage in any business combination with any interested stockholder for a period of 3 years following the time that such stockholder became an interested stockholder. . . unless . . . (3) . . . the business combination is approved by the board of directors and authorized … by the affirmative vote of at

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[300] Compl. ¶¶ 141-47; *see supra* note 93 (defining "Sababa Defendants").

[301] Compl. ¶¶ 146, 149.

[302] *Id.* ¶¶ 148-49; *supra* note 93 (defining "Sababa Entities").

> least 66 2/3% of the outstanding voting stock which is not owned by the interested stockholder.[303]

A supermajority of Whole Earth's non-interested stockholders voted to approve the merger.[304] Despite that approval, the plaintiff contends that the vote did not comply with Section 203(a)(3) because it was uninformed.[305]

The plain and unambiguous text of Section 203(a)(3) does not require that a stockholder vote be "informed" or that stockholders receive any particular information before the vote.[306] Courts may not "engraft upon a statute language which has been clearly excluded therefrom by the Legislature."[307] When the General Assembly has intended to impose a statutory requirement that stockholders receive information in connection with a vote, it has said so explicitly in legislation pre- and post-dating the adoption of Section 203.

For example, Section 144(a)(2), which provides a safe harbor for certain interested transactions, was amended in March 2025 to require "an informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested

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[303] 8 *Del. C.* § 203.

[304] *See* Defs.' Ex. I.

[305] *See* Pls.' Answering Br. 61-63.

[306] *See Salzberg*, 227 A.3d at 113 (explaining that statutory interpretation "must begin with the text" of statute).

[307] *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982).

stockholders."[308] When Section 203 was adopted in 1988, Section 144(a)(2) stated that a corporate transaction would not be void or voidable solely due to a director or officer's interest if the "material facts as to the director's or officer's relationship or interest and as to the contract or transaction [we]re disclosed or [we]re known" to the approving stockholders.[309] Section 203 has been amended several times since its 1988 adoption, including most recently in 2017.[310] Yet the General Assembly has not amended Section 203(a)(3) to incorporate any of the disclosure or informational requirements it has adopted elsewhere in the DGCL.[311]

The plaintiff insists that, despite Section 203's plain language, the court must read Section 203 *in pari materia* with other statutes that include an informed vote requirement.[312] The doctrine of *in pari materia* is a "rule of statutory construction"

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[308] 8 *Del. C.* § 144(a)(2).

[309] 57 Del. Laws ch. 148, § 7 (1969); 8 *Del. C.* § 144(a)(2) (1988); *see* 1 Rodman Ward, Jr., Edward P. Welch, Andrew J. Turezyn, *Folk on the Delaware General Corporation Law* § 144.1 (4th ed. 2006). In addition, Section 262(d) required that a notice of appraisal rights notify its stockholders entitled to appraisal that appraisal rights were available and include a copy of Section 262; Section 251(c) required that the notice seeking approval of a merger agreement contain a copy or brief summary of the agreement; and Section 242(b) required that the notice seeking approval of a charter amendment set forth the amendment or a brief summary of the changes it would effect. *See* 8 *Del. C.* §§ 242(b)(1), 251(c), 262(d)(1) (1987).

[310] *See* 81 Del. Laws ch. 86, §§ 3-4 (2017).

[311] *See Giuricich*, 449 A.2d at 238 ("When a legislative body . . . amends its prior enactment by a material change of language, the rule of statutory construction presumes that a change in meaning was intended.").

[312] Pls.' Answering Br. 62-63.

under which "related statutes" are "read together rather than in isolation, particularly when there is an express reference in one statute to another statute."[313] "Statutes are *in pari materia*—pertain to the same subject matter—when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object."[314]

The statutes cited by the plaintiff—8 *Del. C.* §§ 144, 204, 242, 251, and 262—are not related to Section 203.[315] None of these statutes references Section 203, and Section 203 does not reference any of these statutes. They concern different subjects, ranging from appraisal rights to approving charter amendments to approving business combinations with an interested stockholder.[316] The other statutes also have purposes distinct from Section 203's anti-takeover objectives.[317]

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[313] *Richardson v. Bd. of Cosmetology and Barbering of State*, 69 A.3d 353, 357 (Del. 2013).

[314] 2B Norman J. Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 51:3 (7th ed. Nov. 2025); *see also Tabas v. Crosby*, 444 A.2d 250, 255 (Del. Ch. 1982) (relying on *Sutherland Statutory Construction* to conclude statutes were not *in pari materia*).

[315] Pls.' Answering Br. 62.

[316] Section 144 is codified in DGCL Subchapter IV, governing corporate directors and officers. 8 *Del. C.* §§ 141-147. Sections 203 and 204 are in Subchapter VI, governing stock transfers. *Id.* §§ 201-05. Section 242 falls under Subchapter VIII, governing amendments of a corporation's certificate of incorporation and changes in capital and capital stock. *Id.* §§ 241-46. And Sections 251 and 262 are within Subchapter IX, pertaining to mergers, consolidations, or conversions. *Id.* §§ 251-68.

[317] Section 203 "strike[s] a balance between the benefits of an unfettered market for corporate shares and the well-documented and judicially recognized need to limit abusive takeover tactics." *Flannery v. Genomic Health, Inc.*, 2021 WL 3615540, at *10 (Del. Ch. Aug. 16, 2021) (citation omitted). Section 144 "protects against invalidation of a transaction 'solely' because it is an interested one." *Benihana of Tokyo, Inc. v. Benihana,*

That other DGCL provisions require the disclosure of certain information does not mean Section 203 must be read to include the same requirement.[318]

2. Precedent

The defendants' reading of Section 203 is also consistent with Delaware Supreme Court precedent.[319] In *Arnold v. Society for Savings Bancorp, Inc.*, the court instructed that, absent statutory language to the contrary, the failure to inform stockholders of all material facts before a statutorily required vote does not invalidate the vote under the statute.[320] There, a plaintiff stockholder argued that because the company's stockholders voted for a merger based on a proxy that contained material omissions and misleading information, the merger did not satisfy 8 *Del. C.* §§ 251-52, which govern mergers of domestic corporations.[321] The court

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Inc. 891 A.2d 180, 185 (Del. Ch. 2005). Section 242 outlines the procedure for approving amendments to a certificate of incorporation. *See Williams v. Geier*, 671 A.2d 1368, 1379 (Del. 1996). Section 251(c) requires the submission of a merger agreement to shareholders for review "for the purpose of acting on the agreement." 8 *Del. C.* § 251(c). "Section 262's purpose is to allow for an expedient and certain appraisal of stock." *Encompass Servs. Hldg. Corp. v. Prosero Inc.*, 2005 WL 332810, at *2 (Del. Ch. Feb. 3, 2005) (citation omitted). And Section 204 "permits validation of otherwise defective corporate acts through board ratification and stockholder approval." *Espinoza v. Zuckerberg*, 124 A.3d 47, 57 n.54 (Del. Ch. 2015).

[318] *See Tabas*, 444 A.2d at 255 (statutes that "are dissimilar, serve a different function and purpose, and were adopted at different times ... cannot be *in pari materia*"); *cf. Richardson*, 69 A.3d at 356-57 (concluding that statutes were *in pari materia* where they were either subsections of the same statutory section or were expressly referenced in that section).

[319] *See* Defs.' Opening Br. 47-50; Defs.' Reply Br. 31-32.

[320] *Arnold v. Soc'y for Sav. Bancorp Inc.*, 678 A.2d 533, 536-37 (Del. 1996).

[321] *Id.* at 536.

rejected this argument, holding that "[t]he merger statutes do not explicitly require the company to inform stockholders of all material facts."[322] It further explained that "[t]he duty of disclosure is a judicially imposed fiduciary duty which applies as a corollary to the statutory requirements."[323] Similarly here, deficient disclosures can be addressed through a common law claim for breach of fiduciary duty, obviating the need to graft an "informed" vote requirement onto Section 203.

The plaintiff asserts that *Arnold*'s holding is narrow. Citing *Williams v. Geier*, the plaintiff insists *Arnold* merely explains that "invalidating every merger under mechanical merger statutes, such as Sections 251 and 252, because of a fiduciary breach would lead to unworkable results."[324] *Williams* addressed whether the business judgment rule applied to a board's recommendation of an amendment to a certificate of incorporation under Section 242(b)(1) and whether a fully informed stockholder vote ratified that action.[325] Unlike *Arnold* and this case, *Williams* did not take up whether the defendants violated the pertinent statutory provision.[326]

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322 *Id.* at 536-37.

323 *Id.* at 537.

324 Pls.' Answering Br. 63 (citing *Williams*, 671 A.2d 1368).

325 *Williams*, 671 A.2d at 1371, 1378.

326 In *Williams*, the court held that "since a fully informed majority of the stockholders voted in favor of [an amendment to the company's certificate of incorporation] pursuant to the statutory authority of [Section 242] . . . the stockholder vote [wa]s dispositive." *Id.* at 1371. And in *Arnold*, the court cited *Williams* for the proposition that "[a] good faith violation of the common law duty of disclosure may give rise . . . to equitable relief or to directorial liability," but noted that "if the statutory procedure is followed, the organic

The sole authority on point offered by the plaintiff is *Arkansas Teachers Retirement System v. Alon USA Energy, Inc.*[327] In *Alon*, a plaintiff claimed that the defendants violated Section 203 because a breach of a stockholder agreement vitiated the board's prior Section 203 approval.[328] The defendants sought dismissal of the claim by raising Section 203(a)(3) as a defense, arguing that a supermajority of the company's stockholders had approved the merger. The court rejected this argument because the plaintiff "adequately alleged that the stockholder vote was not fully informed."[329] This holding was based on the observation that "[f]or stockholder approval of any corporate action to be valid, the vote of the stockholders must be fully informed."[330]

I respectfully decline to adopt the plaintiff's reading of *Alon* as categorically importing an informed vote requirement into Section 203(a)(3). The court in *Alon* did not address the fact that the statute's plain text lacks an informed vote

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change is authorized and effective." *Arnold*, 678 A.2d at 537 & n.9 (explaining that "a violation [of the common law duty of disclosure] does not render void ab initio a merger which complies with the statutory requirements").

[327] *Ark. Tchrs. Ret. Sys. v. Alon USA Energy, Inc.*, 2019 WL 2714331 (Del. Ch. June 28, 2019); *see* Pl.'s Answering Br. 61.

[328] 2019 WL 2714331, at *16.

[329] *Id.*

[330] *Id.* (citing *KKR*, 101 A.3d at 999). *KKR* evaluated whether a statutorily required stockholder vote was "fully informed" for the equitable purpose of invoking the business judgment rule under *Corwin*. It did not address whether an uninformed vote rendered the transaction void ab initio for lack of statutory authorization.

requirement.[331] The court relied entirely on common law precedent concerning the validity and effect of stockholder approval.[332] The common law duty of disclosure does not dictate statutory compliance; rather, I am bound by the statute's text. The plaintiff cites no other case that has taken the approach it advocates for.[333]

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Section 203(a)(3) does not condition stockholder authorization on an informed vote. As a result, the plaintiff has failed to state a claim that the merger violated Section 203 based on deficiencies in the Proxy. The plaintiff therefore lacks a viable claim that the merger is invalid, and its conversion claim likewise fails.[334]

III. CONCLUSION

The defendants' motion to dismiss under Rule 12(b)(6) is granted in part and denied in part. The motion is granted as to Counts I and II. Defendants Martin E. Franklin, Sababa Holdings FREE, LLC, Ozark Holdings LLC, Sweet Oak Merger

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[331] *See supra* Section II.B.1; 8 *Del. C.* § 203(a)(3).

[332] *See supra* note 330.

[333] The authoring court subsequently observed that the failure to fully inform stockholders before a statutorily required vote does not necessarily invalidate that vote. *See Tornetta v. Musk*, 310 A.3d 430, 545 (Del. Ch. 2024) ("[E]ven when a Delaware statute requires a vote, this court does not necessarily void the transaction when that vote was uninformed."), *rev'd on other grounds by In re Tesla, Inc. Deriv. Litig.*, 2025 WL 3689114, 351 A.3d 1005 (Del. Dec. 19, 2025) (TABLE).

[334] *McGowan v. Ferro*, 859 A.2d 1012, 1040 (Del. Ch. 2004) ("To prove conversion of an equity interest in an entity, a claimant must show cancellation or transfer of the shares in question in a statutorily invalid acquisition.").

Sub, LLC, and Whole Earth Brands, Inc. are therefore dismissed from this litigation. The motion is also granted as to Count III against defendants Ira J. Lamel, Michael F. Goss, Anuraag Agarwal, Steven M. Cohen, and Denise M. Faltischek, who are dismissed from this litigation. The motion to dismiss Count III is denied as to Michael E. Franklin and Irwin D. Simon—the sole remaining defendants.

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