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Sound and Fury, Signifying Nothing: Why Shareholder Suits Are Ineffective to Promote Corporate Response to Climate Change

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SOUND AND FURY, SIGNIFYING NOTHING: WHY SHAREHOLDER SUITS ARE INEFFECTIVE TO PROMOTE CORPORATE RESPONSE TO CLIMATE CHANGE

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Abstract: Climate change has already impacted the planet in a number of ways. Perhaps most apparent, however, is climate change's effects on the frequency and intensity of storms, droughts, and other major geologic and weather-related events. Such catastrophic events have also lead to significant loses by individuals and businesses alike. In particular, many corporations in areas most vulnerable to these sorts of catastrophes must adjust their corporate strategies to account and to prepare for the possibility of significant losses of property or business resulting from the effects of climate change. Some corporate boards, however, might be reluctant to take every step possible to protect the corporation against climate change related catastrophes due to the significant cost of doing so. As such, some shareholders might be unnerved by a board's inaction on this matter, perhaps resorting to litigation against the board. This Note analyzes the potential success of such a shareholder claim, as well as the alternatives available to a climate-conscious shareholder.

INTRODUCTION

It is a mistake to say that the effects of climate change are negligible.[1] Oceanic temperatures are of chief concern because climate scientists estimate that oceans have absorbed approximately ninety percent of the total heat added to the climate system over the past five decades.[2] These warming waters have particular implications for coastal areas.[3] As ocean temperatures increase, arctic ice melts, thereby raising sea levels.[4] An additional problem for

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[1] *See* J.B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, 40 ENVTL. L. 363, 379 (2010).

[2] Magdalena A. Balmaseda et al., *Distinctive Climate Signals in Reanalysis of Global Ocean Heat Content*, 40 GEOPHYSICAL RES. LETTERS 1754, 1754 (2013) (noting that the remaining ten percent of heat absorbed by the climate system contributes to melting sea and land ice and increasing land and surface temperatures).

[3] *Climate Impacts on Coastal Areas*, U.S. ENVT'L PROT. AGENCY (Feb. 23, 2016), https://www3.epa.gov/climatechange/impacts/coasts.html [https://perma.cc/298Y-979Z].

[4] Balmaseda et al, *supra* note 2, at 1754; Ruhl, *supra* note 1, at 379; *Climate Impacts on Coastal Areas*, *supra* note 3.

these coastal and low-lying waterfront lands is the risk posed by storm surges.[5] This risk is best exemplified by the surges afflicting New Orleans and the eastern cost of the United States following Hurricane Katrina in 2005 and Hurricane Sandy in 2012.[6] After Katrina struck, as much as eighty percent of the city was flooded by storm surges from the Gulf of Mexico and Lake Pontchartrain when the city's system of levees failed.[7] Claiming nearly one thousand lives, the storm and subsequent flooding caused a staggering 135 billion dollars in damage to the city.[8] In addition to its effect on the city of New Orleans itself, the storm had a tremendous negative impact on the economy of the region, crippling oil production in the Gulf of Mexico and leading to the bankruptcy of Entergy New Orleans, the main utilities subsidiary serving the city and surrounding region.[9] Hurricane Sandy wreaked similar havoc on the United States' eastern coast in 2012, causing 71.4 billion dollars in damage.[10]

The impact of climate change related weather patterns is also felt by the insurance industry.[11] Hurricane Sandy caused 18.75 billion dollars in insured property losses alone, affecting at least twelve states.[12] The insured losses resulting from Hurricane Sandy in New York were enough to make the state third in the nation in insured catastrophe losses.[13]

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[5] Ruhl, *supra* note 1, at 379.

[6] *Id.*

[7] *New Orleans People, Pets Flee Flood*, NAT'L GEOGRAPHIC (Oct. 28, 2010), http://news.nationalgeographic.com/news/2005/08/photogalleries/New_Orleans_flood/ [https://perma.cc/AY8C-XNPU].

[8] Allison Plyer, *Facts for Features*, THE DATA CTR. (Aug. 28, 2015), http://www.datacenterresearch.org/data-resources/katrina/facts-for-impact/ [https://perma.cc/TJQ9-KWFN].

[9] *See* Erin Marie Daly, *Entergy Rises out of Bankruptcy*, LAW360 (May 9, 2007), http://www.law360.com/articles/24337/entergy-rises-out-of-bankruptcy [https://perma.cc/J5DT-87K9]; Esther Pan & Richard Karp, *Katrina and Oil Prices*, COUNCIL ON FOREIGN RELATIONS (Sept. 7, 2005), http://www.cfr.org/world/katrina-oil-prices/p8834 [https://perma.cc/G2M5-A9TZ].

[10] *The Thirty Costliest Mainland United States Tropical Cyclones 1900–2013*, NAT'L OCEANIC & ATMOSPHERIC ADMIN.: HURRICANE RESEARCH DIV., http://www.aoml.noaa.gov/hrd/tcfaq/costliesttable.html [https://perma.cc/746W-ZW7D]. Hurricane Sandy is second only to Hurricane Katrina in terms of total costliness, and is the third costliest hurricane for insurance losses when adjusted for inflation. *Hurricanes*, INS. INFO. INST., http://www.iii.org/fact-statistic/hurricanes [https://perma.cc/6Q84-KQUP]; *The Thirty Costliest Mainland United States Tropical Cyclones 1900–2013*, *supra*. Hurricanes Sandy and Andrew are the first and second costliest hurricanes for inflation-adjusted insurance losses, respectively. *The Thirty Costliest Mainland United States Tropical Cyclones 1900–2013*, *supra*.

[11] TOWERS WATSON, PERSPECTIVES: HURRICANE KATRINA—ANALYSIS OF THE IMPACT ON THE INSURANCE INDUSTRY 2 (2005) [hereinafter PERSPECTIVES: HURRICANE KATRINA].

[12] *Hurricanes*, *supra* note 10. This figure excludes flood insurance claims covered by the federal flood insurance program. *Id.* According to a study conducted by Property Claim Services, New York and New Jersey suffered the largest share of private insurance losses related to Hurricane Sandy. *Id.*

[13] *Id.* Between 1985 and 2015, policyholders in New York sustained forty-four billion dollars in insured losses, behind Texas and Florida, with fifty-five billion dollars and sixty-eight billion

Recently, as the negative impacts of climate change have become more apparent, a debate has emerged as to whether corporations should take steps to minimize the risk of loss from such climate change-related catastrophic events, including insurance.[14] Boards may be hesitant to dig deeply into insuring the corporation against the risks posed by climate change because of the potentially great cost.[15] Therefore, a firm pursuing a cost leadership strategy might be particularly sensitive to incurring the potentially large costs of climate-related insurance.[16]

In the event that a board of directors elects not to obtain insurance against risks related to climate change, some commentators have wondered aloud whether the failure or decision not to mitigate the ever-growing risk of loss from climate change-related catastrophic events amounts to a breach of a director's fiduciary duties to the corporation.[17] In that light, some of those same commentators have posited that failure on the part of a board to consider the effects of climate change on the corporation may lead shareholders to employ litigation as a means to compel the board of directors to mitigate such risks.[18]

This Note will analyze the use of litigation as a weapon for shareholders to ensure corporations take measures to mitigate the risks borne by climate change.[19] Part I will describe the risks that climate change may pose to businesses and some of the options available to protect corporate assets.[20] Part II will lay out the relevant law for shareholder litigation claims.[21] Part III will consider the likelihood of success of a claim to compel a board of directors to insure the corporation against losses stemming from catastrophic weather and

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dollars, respectively. *Id.* During that same time period, policyholders in the other forty-seven states and Washington, D.C. collectively sustained $498.6 billion in catastrophic insured losses. *Id.*

[14] *See* Christina Ross et al., *Limiting Liability in the Greenhouse: Insurance Risk-Management Strategies in the Context of Global Climate Change*, 26A STAN. ENVTL. L.J. 251, 270 (2007).

[15] *See* Peter Molk, *The Government's Role in Climate Change Insurance*, 43 B.C. ENVTL. AFF. L. REV. 411, 414 (2016). Especially as the risk of loss from climate change-related catastrophes increases as storms become more intense, insurers may charge ever-higher premiums to account for the increased risks of loss. *See id.*

[16] *See* Erika Stankevičiūtė et al., *Pursuing a Cost Leadership Strategy and Business Sustainability Objectives: Walmart Case Study*, 17 ECON. & MGMT. 1200, 1201 (2012). A cost leadership strategy involves a firm obtaining a larger profit margin than its competitors by reducing the costs of producing its goods or services. *Id.* Cost leadership does not necessarily mean that a firm is offering its products or services at a price lower than its competitors. *Id.*

[17] Ross et al., *supra* note 14.

[18] *See* Perry E. Wallace, *Climate Change, Fiduciary Duty, and Corporate Disclosure: Are Things Heating up in the Boardroom?*, 26 VA. ENVTL. L.J. 293, 323 (2008).

[19] *See infra* notes 173–269 and accompanying text.

[20] *See infra* notes 25–69 and accompanying text.

[21] *See infra* notes 70–172 and accompanying text.

climate change-related events.[22] Part IV will analyze potential changes to any legal barriers of the success of such a lawsuit.[23] Finally, Part V will explain a concerned shareholder's alternatives to litigation as a means of compelling a corporation to prepare a corporation against the effects of climate change.[24]

I. A Rising Tide Could Sink Some Ships: Corporate Risks Posed by Climate Change and Insurance Options

A. Snowpocalypse Now? The Risks Posed by Climate Change

Catastrophic weather events and growing concerns about the effects of climate change have generated a renewed focus on efforts to mitigate their associated risks.[25] Recent studies suggest that it is likely that, as climate change continues, there will be an increase in the lifetime and intensity of hurricanes.[26] Additionally, a number of studies have shown that hurricane frequency will increase as sea surface temperatures rise.[27] Meanwhile, other studies suggest the opposite—that hurricane frequency will diminish or remain relatively unchanged—but most studies are in agreement that hurricane wind speed is likely to become more intense.[28] Further, warming seas may also cause shifts in the locations of hurricane formation to allow the storms to develop over larger tracts of warm water, which would increase not just the severity of hurricanes, but also the length of their lifespans.[29]

The effects of climate change are not limited solely to hurricanes.[30] In addition to the effects that climate change has on hurricane patterns, warming temperatures also increase the atmosphere's ability to retain moisture, leading to more extreme precipitation events.[31] The net effect of this trend is that regions will be pushed even further to the extremes of their climates—wet regions of the world will generally become more saturated, and dry regions will become even more arid.[32] A major recent example of this phenomenon is the

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[22] *See infra* notes 173–214 and accompanying text.
[23] *See infra* notes 215–244 and accompanying text.
[24] *See infra* notes 245–269 and accompanying text.
[25] *See* Ruhl, *supra* note 1, at 381.
[26] Frank Ackerman & Elizabeth A. Stanton, Climate Economics: The State of the Art 20 (2013).
[27] *Id.*
[28] *Id.*
[29] *Id.* at 21.
[30] *See* Celeste M. Hammond, *The Evolving Role for Transactional Attorneys Responding to Client Needs in Adapting to Climate Change*, 47 J. Marshall L. Rev. 543, 554 (2013).
[31] Ackerman & Stanton, *supra* note 26, at 21.
[32] *Id.*

unprecedented snowfall that blanketed Massachusetts during the early months of 2015.[33]

Storm surges also represent a danger exacerbated by climate change.[34] Although storm surges are certainly not a new concept in disaster preparation, sea level rise has created concern about the potentially disastrous impact on coastal communities.[35] A large portion of rising sea levels across the globe can be attributed to warming temperatures, which cause sea ice to melt.[36] Further, the loss of sea ice accelerates warming temperatures.[37] Scientists have identified a number of regions that could be left vulnerable to larger surges due to sea level rise, regardless of the increased intensity of storms.[38] These vulnerable regions include, among others, cities along the Gulf of Mexico and the San Francisco Bay area.[39] The San Francisco Bay Area is particularly vulnerable to higher storm surges, as the region is inexperienced in dealing with the magnitude of flooding and severe storms like more hurricane-prone areas.[40]

B. Insurers and Potential Corporate Responses to Climate Risks

These potential impacts have led to a growing number of insurers acknowledging that the effects of climate change will likely have a significant impact on insured losses in the future.[41] The profundity of such losses has caused insurers to evaluate different responses to mitigate climate change-related losses and to craft new approaches to inspire action against climate change.[42] In order to prevent massive losses to property insurance, insurers are making efforts to raise awareness of climate change to policyholders by showing how damages may be avoided through wiser land use, stronger

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[33] *See* David Appell, *Boston Snow Storms and Climate Change*, YALE CLIMATE CONNECTIONS (Mar. 30, 2015), http://www.yaleclimateconnections.org/2015/03/boston-snow-storms-and-climate-change/ [https://perma.cc/887F-XCXS].

[34] *See* Sean B. Hecht, *Climate Change and the Transformation of Risk: Insurance Matters*, 55 UCLA L. REV. 1559, 1572 (2008).

[35] *See id.* at 1574.

[36] ACKERMAN & STANTON, *supra* note 26, at 24.

[37] *Id*. ("The loss of sea ice due to warming is a critical positive feedback mechanism in climate dynamics; as light-colored, reflective ice is replaced by darker, radiation-absorbing waters, surface albedo decreases and radiative forcing is enhanced.").

[38] *See Evaluating the Effects of Future Sea Level Rise and Storm Surges Along U.S. Coastlines*, NAT'L. CTR. ATMOSPHERIC RESEARCH (2016), https://ncar.ucar.edu/press/evaluating-the-effects-of-future-sea-level-rise-and-storm-surges-along-us-coastlines [https://perma.cc/57F4-6LPK].

[39] *Id.*

[40] *Id.*

[41] Evan Mills, *Responding to Climate Change—The Insurance Industry Perspective*, CLIMATE ACTION, Dec. 2007, at 100, 100, http://evanmills.lbl.gov/pubs/pdf/climate-action-insurance.pdf [https://perma.cc/2X94-CKZC].

[42] *See Climate Change: Insurance Issues*, INS. INFO. INST. (Sept. 2014), http://www.iii.org/issue-update/climate-change-insurance-issues [https://perma.cc/2QCJ-RBG8].

building codes, and better planning.[43] To that end, some large companies have embarked on efforts to help developing countries adapt to climate change or invest in renewable energy.[44]

Such developments come in addition to the typical types of insurance against catastrophes that an average business might maintain.[45] These typical types of policies—similar to homeowner policies—cover fire, windstorms, hail, riots, and explosions.[46] Separate policies covering flood and earthquake damage are also available.[47] Other types of property-casualty insurance that a business might take advantage of cover theft, automobile accident injuries, being sued for liability for by another person, and further financial losses.[48] These more traditional policies do not necessarily cover climate change specifically, rather they cover individual extreme weather events.[49] Naturally, the threats posed by catastrophic losses have led to a renewed focus on the role of catastrophic insurance in protecting business assets against the potential effects of climate change.[50] Using Hurricane Katrina as an example, other types of insurance impacted by this catastrophic storm included commercial property, business interruption, professional liability, and marine and energy insurance.[51]

In the immediate period after Hurricane Katrina, commercial property insurance claims along the Gulf Coast totaled an estimated 13.5 to 16 billion dollars.[52] Destruction on the Mississippi Gulf Coast accounted for a significant portion of these claims, which included damage to nine casinos, many hotels, and other businesses critical to the region's tourism industry.[53] The implications of the storm served only to raise prices on property loss insurance policies, especially as policy renewal season immediately followed a historically bad hurricane season.[54]

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[43] *Id.*

[44] *Id.* Although some of this may be motivated by humanitarian concerns, it may also be driven by businesses protecting assets in developed countries. *See id.*

[45] *See id.*

[46] *Id.* Over the twenty-year period from 1993 to 2012, tornadoes, hurricanes and tropical storms, and winter storms comprised 83.5 percent of all catastrophe losses. *See id.*

[47] *See id.*

[48] Edward P. Richards, *Applying Life Insurance Principles to Coastal Property Insurance to Incentivize Adaptation to Climate Change*, 43 B.C. ENVTL. AFF. L. REV. 427, 430 (2016). Many of these coverage options only have one-year terms, and would therefore need to be revisited or renegotiated frequently. *Id.* at 431. One-year terms are used in this context to account for changing risk probabilities. *Id.*

[49] *Id.* at 432.

[50] *See* Wallace, *supra* note 18, at 312.

[51] PERSPECTIVES: HURRICANE KATRINA, *supra* note 11, at 11–13.

[52] *Id.* at 12.

[53] *Id.*

[54] *Id.* at 13.

On a similar note, the estimated insured losses for business interruptions resulting from Hurricane Katrina were between five and nine billion dollars.[55] That figure takes into account losses that were or may have been indirectly affected by the hurricane.[56] It should be noted, however, that very few businesses take up this type of policy, and it is estimated that less than half of the business interruption losses suffered from the hurricane were insured.[57] Professional liabilities were also estimated to be between one and three billion dollars, but the largest portion of those estimates stemmed from liabilities incurred by hospitals and nursing homes to patients and residents, respectively.[58]

Hurricane Katrina represents a particularly poignant historical example of a developing climate trend with implications for both the environment and insurers alike.[59] Moreover, there is clear evidence that climate change-related occurrences, such as rising sea levels, larger storm surges, and more frequent large forest fires have given rise to increasing trends of insurance claims.[60] Although the extent to which climate change impacts extreme weather trends is not universally agreed upon, climate scientists are largely in agreement that climate change is indeed driving the increased frequency of heat waves, droughts, and floods—all of which could lead to disastrous events that could threaten a corporation's property, plants, equipment, employees, or other financial assets.[61]

Given the potential for massive financial losses, even in the face of higher regular costs, it would make sense for boards of directors to take all steps possible to diminish the potential for such losses in the event of an environmental catastrophe like Hurricane Katrina.[62] Moreover, the frequency of extreme weather events will only increase as climate change progresses.[63] These types of events include wildfires, hurricanes, tornadoes, as well as heavy precipitation and floods.[64] With such a diverse portfolio of potential threats to a corporation's economic well-being, the risks posed by climate change-related incidents pose a critical long-term threat to the preservation of a corporation's investment value.[65]

In that vein, because of the nature of the potential business risks posed by climate change, such environmental considerations may naturally be con-

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[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 15.
[59] *See* Hecht, *supra* note 34, at 1572.
[60] *See id.*
[61] *See id.* at 1570–71.
[62] *See* Ross et al., *supra* note 14, at 270.
[63] *See* Hammond, *supra* note 30, at 554.
[64] *Id.*
[65] Ross et al., *supra* note 14, at 270.

nected to a board's fiduciary responsibilities.[66] The failure of a board to provide for protection of the corporation in the face of dangers posed by climate change may only erode financial returns in the long run and possibly even subject corporations to massive financial losses.[67] Financial implications aside, the claim that environmental concerns fall within the purview of fiduciary duties carries legal significance as well.[68] At the very least, a board member's breach of a fiduciary duty may result in a shareholder cause of action, thereby opening the door for a shareholder to see that the corporation is protected from all harm.[69]

II. The Legal Landscape of a Hypothetical Shareholder Suit, and Why the Board Has the High Ground

A. Setting the Stage: A Hypothetical Shareholder Suit Over Protecting the Corporation Against Climate Change

Given the potentially large risks posed by climate change-driven catastrophes, the decision to insure against climate change rests with the highest levels of a corporation—namely, the board of directors.[70] In the event that a board does not take action in the face of the risks such as obtaining and maintaining some form of insurance, it is not inconceivable that a shareholder would be greatly concerned by such risks.[71] If a board proves particularly obstinate or if the shareholder is something of an activist, the shareholder may resort to litigation to compel the board to take some action to protect the corporation against the risks posed by climate change.[72] The remainder of this Part will consider the legal backdrop that a claim would play out against.[73] Part III will then analyze this hypothetical against that legal backdrop.[74] Because many major corporations are incorporated in Delaware, our hypothetical will proceed assuming the corporation is incorporated in Delaware.[75]

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[66] *Id.*

[67] *See id.*

[68] *See id.* at 272.

[69] *See id.*

[70] *See* Hammond, *supra* note 30, at 554; Ross et al., *supra* note 14, at 270.

[71] *See* Hammond, *supra* note 30, at 554; Ross et al., *supra* note 14, at 270.

[72] *See* Ross et al., *supra* note 14, at 272.

[73] *See infra* notes 75–170 and accompanying text.

[74] *About Agency,* STATE OF DEL. DIV. OF CORPS., http://www.corp.delaware.gov/aboutagency.shtml [https://perma.cc/9FYF-MJRQ] (noting that sixty-six percent of all publically-traded companies in the United States, as well as two-thirds of the Fortune 500 companies, are incorporated in Delaware); *see infra* notes 171–213 and accompanying text.

[75] Renee M. Jones & Michelle Welsh, *Toward a Public Enforcement Model for Directors' Duty of Oversight*, 45 VAND. J. TRANSNAT'L L. 343, 346 (2012).

B. Them's The Rules: Corporate Formation, the Business Judgment Presumption, and the Protection They Afford to Boards

Section 102(a) of the Delaware General Corporation Law ("DGCL") spells out the information that must be included in each certificate of incorporation.[76] In addition to the § 102(a) requirements, § 102(b) contains a number of optional provisions that may be included in a corporation's certificate of incorporation.[77] Particularly, a corporation may include "any provision for the management of the business and for the conduct of the affairs of the corporation."[78] Moreover, a corporation may include in its certificate of incorporation a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for certain breaches of fiduciary duties.[79] The liabilities that can be waived through a § 102(b)(7) provision include breaches of the director's fiduciary duty of care to the corporation, liability for acts or omissions not taken in good faith, involving intentional misconduct, or knowing violation of the law, or liability for any transaction from which the director derived an improper personal benefit.[80] A corporation also need not be bound by the contents of its initial certificate of incorporation, as § 242 permits corporations to amend their certificates of incorporation.[81]

Corporations are also free to set additional governance rules in their bylaws, so long as those bylaws are not inconsistent with the certificate of incorporation or existing law.[82] Once a corporation has received payment for

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[76] DEL. CODE ANN. tit. 8, § 102(a) (2016). A certificate of incorporation filed in Delaware must include the name of the organization, the Delaware address of the organization, a stated business purpose of the organization, identification of the classes of stock and the authorized number of shares, the name and mailing address of the incorporator, and if the powers of the incorporator terminate upon the filing of the certificate of incorporation, and the names and addresses of the people who will serve as directors until the first annual meeting of stockholders. *Id.*

[77] *Id.* § 102(b). A certificate of incorporation filed in Delaware may include any provision for the management of the business and affairs of the corporation, a provision for preemptive rights for existing shareholders to subscribe to additional stock offerings, provisions for special voting rights, a provision limiting the temporal existence of the corporation, or a provision limiting personal liability for violations of the duty of care. *Id.*

[78] *Id.* § 102(b)(1).

[79] *Id.* § 102(b)(7). The provision may eliminate a director's personal liability for violations of the director's fiduciary duty of care to the corporation. *See id.* The provision may not, however, eliminate a director's personal liability for breaches of the director's duty of loyalty, for "acts or omissions not in good faith," for knowing violations of the law, for liability arising under § 8 of the Delaware General Corporation Law ("DGCL"), or for liability arising from any transaction in which the director obtain an "improper personal benefit." *Id.*

[80] *Id.*

[81] *Id.* § 242.

[82] *Id.* § 109.

any of its stock, the any to adopt, amend, or repeal bylaws must be ratified by a shareholder vote.[83]

C. A Modest Proposal: Shareholder Proposals as a Means of Shaping Corporate Policy

Short of amending any of the corporation's core documents, eligible shareholders may submit proxy proposals to the board of directors.[84] Generally speaking, shareholders use proxy proposals to introduce matters such as bylaw amendments or recommendations that directors take specified action.[85] To be eligible to do so, a shareholder on record must have either continuously held at least two thousand dollars in market value or at least one percent of the corporation's voting securities for at least one year.[86] A shareholder may only submit one proxy proposal per shareholder meeting, and the proposals must be no more than five hundred words.[87] If the company publishes the shareholder proposal in its proxy card, the board may include reasons why the shareholders should vote against the proposal.[88] Unlike the word limit imposed on shareholder proposals, the board may argue against a shareholder proposal without word limits.[89]

Even if a shareholder complies with the formal proposal requirements, the board of directors has the right under federal law to exclude proposals on certain grounds.[90] The board can refuse a shareholder proposal if it is improper or would otherwise violate state law, if it is in violation of federal proxy rules administered by the Securities and Exchange Commission (SEC), or if it relates to a personal grievance or special interest.[91] A shareholder proposal is improper under Delaware law if the language of the proposal requires the

[83] *Id.* §§ 109, 242. Corporations are free to require a higher threshold than this statutorily prescribed majority of the outstanding shares entitled to vote. *See id.* § 242. The only exception to this comes at times of catastrophe or similar emergent condition; in such times the board of directors may adopt emergency bylaws. *Id.* § 110.

[84] *Id.* § 112. A proxy proposal is change in corporate policy submitted by a shareholder and placed on the corporation's proxy statement. 17 C.F.R. § 240.14a-8(a) (2016). A proxy statement is an annual report of all matters to be voted upon by the shareholders at the company's annual meeting. *Id.* § 240.14a-16(a). A shareholder is eligible to submit a proxy proposal if the shareholder has continuously held at least two thousand dollars in market value or at least one percent of the corporation's voting securities. *Id.* § 240.14a-8(b).

[85] *See id.* § 240.14a-8 (detailing the federal regulations governing shareholder proxy access).

[86] *Id.* § 240.14a-8(b).

[87] *Id.* §§ 240.14a-8(c)–(d).

[88] *Id.* § 240.14a-8(f).

[89] *See id.* § 240.14a-8(j) (2016) (failing to impose a word limit on the board's response for excluding a shareholder proposal).

[90] *Id.* § 240.14a-8(i).

[91] *Id.* §§ 240.14a-8(i)(1)–(4).

board to undertake specific action.[92] Additionally, the board may exclude a proposal if it does not affect at least five percent of the corporation's total assets, net earnings, and/or gross sales or is otherwise not significantly related to the business.[93] A board may also exclude a proposal if it relates to the election of directors, a management function relating to ordinary business matters, or to a specific dividend amount.[94] Finally, a board may also set aside proposals that conflict with a management proposal that the board has already put forth or substantially implemented, duplicates another proposal that was previously submitted, or resubmits a proposal submitted within the preceding five years and received no substantial support.[95] If a board wishes to exclude a proposal from its proxy materials, the board must submit its reasons for doing so in writing, called a no-action letter, to the SEC at least eighty days before it files its final proxy statement with the SEC.[96] SEC staff then issue a letter to the company approving or not the company's request to exclude the shareholder proposal from the proxy materials.[97]

D. O Captain! My Captain! § 141(a) and the Board's Broad Management Powers

A fundamental principle of the DGCL is that a corporation's board of directors functions to manage the business and affairs of the corporation.[98] Section 141(a) of the DGCL enables the board, rather than shareholders, to make business judgments relevant to management of the business, including the decision to go forward with litigation on behalf of the corporation. [99]

It is also understood that § 141(a) of the DGCL, which gives rise to the board's far-reaching power to manage the corporation, forms the basis of the

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[92] *Id.* § 240.14a-8(i)(1). As a result, shareholder proposals must be worded as recommendations, rather than commandments on the board of directors. *See id.* If a proposal is designed to be binding on the corporation if approved, the proposal will conflict with title 8, § 141 of the Delaware Code's provision granting the board of directors the power to manage the business and affairs of the corporation. *See* DEL. CODE ANN. tit. 8, § 141(a) (2016); 17 C.F.R. § 240.14a-8(i)(1).

[93] 17 C.F.R. § 240.14a-8(i)(5).

[94] *Id.* § 240.14a-8(i)(6)–(8), (10).

[95] *Id.* § 240.14a-8(i)(9)–(12).

[96] 12 C.F.R. § 335.401 (2016); 17 C.F.R. § 240.14a-8(j)(1). The shareholder proposing the matter to the board must also receive a copy of the company's submission to the Securities and Exchange Commission ("SEC"). 17 C.F.R. § 240.14a-8(j). Although it is not required, the propositioning shareholder may file responses to the board's arguments with the SEC. 12 C.F.R. § 335.401; 17 C.F.R. § 240.14a-8(k).

[97] Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 924 (1998). Even though the legal status of such letters is not exactly clear, SEC no-action letters carry a significant amount of influence on corporate decision making. *Id.*

[98] DEL. CODE ANN. tit. 8, § 141(a) (2016); Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984).

[99] Spiegel v. Buntrock, 571 A.2d 767, 773 (Del. 1990).

"business judgment" rule, or business judgment presumption.[100] Emanating from concerns about an overly restrictive judicial standard of review for evaluating board actions, the business judgment presumption favors deference to board decision making in business matters.[101] Thus, under circumstances where a board action can be attributed to a rational business purpose, a court will refrain from substituting its own notions of what is or is not sound business judgment.[102]

Courts prefer this deferential standard for several reasons.[103] First and foremost, the rationale behind the rule is to ensure that directors can exercise the broad range of managerial power statutorily granted by the DGCL.[104] Second, the vast majority of such actions involve value judgments, such as what ventures the business should pursue, the level and appropriateness of the risks of such ventures, and the long-term goals of the corporation.[105] These judgments typically involve sophisticated and conflicting methods and goals, which boards, rather than courts, are more equipped to deal with.[106] Third, because shareholders choose the board of directors through elections, it could be said that such election is a shareholder endorsement of the director's business judgment; in turn, the shareholders assume the risk that the director may make decisions that the shareholder otherwise would not have made.[107] Ultimately, both courts and legislators acknowledge that one entity—the board—must be the final arbiter of corporate decision making.[108]

In that regard, the business judgment presumption serves a dual function, operating as both a substantive rule of law and as a procedural guide for litigants.[109] As a substantive rule, a board's decision will be upheld if the plaintiff is unable to establish that the board's action was a product of some abuse of discretion by the board.[110] From a procedural standpoint, the standard operates as a rule of evidence by creating a presumption that the board made its decision on an informed basis, in good faith, and in an honest belief

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[100] *See* Zapata Corp. v. Maldonado, 430 A.2d 779, 782 (Del. 1981).

[101] Craig W. Palm & Mark A. Kearney, *A Primer on the Basics of Directors' Duties in Delaware: The Rules of the Game (Part I)*, 40 VILL. L. REV. 1297, 1302–03 (1995).

[102] *See* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) (highlighting that courts generally lack sufficient business expertise to completely evaluate the soundness of a business decision).

[103] *See* Palm & Kearney, *supra* note 101, at 1303 n.13 (explaining that judicial restraint in scrutinizing board business judgments encourages directors to employ the full ranges of their particular business expertise).

[104] Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985).

[105] Palm & Kearney, *supra* note 101, at 1302 n.13.

[106] *Id.*; *see Sinclair*, 280 A.2d at 720.

[107] Palm & Kearney, *supra* note 101, at 1302 n.13.

[108] *Id.*

[109] Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 64 (Del. 1989).

[110] *Aronson*, 473 A.2d at 812; Palm & Kearney, *supra* note 101, at 1304.

that the board's chosen action was in furtherance of the company's best interests.[111] Therefore, in litigation, the proponent of the claim must rebut this presumption by presenting evidence that demonstrates, in reaching the chosen action, the board violated its fiduciary duties to the corporation.[112]

E. Sharing Is Caring: The Board's Duty of Care

Nonetheless, it would be a mistake to say that the board enjoys unfettered discretion.[113] With the great power of managing the business and affairs of the corporation comes the great responsibility of protecting the corporation and acting in the corporation's best interests.[114] The great authority exercised by a board is tempered by the directors' fiduciary duties owed to the corporation.[115] Broadly stated, there are three core fiduciary duties that directors owe to the corporation: care, loyalty, and good faith.[116]

The director's duty of care focuses primarily on the manner in which the board reaches its decision.[117] In making any decision, the board must obtain all material information reasonably available before proceeding.[118] Delaware courts have agreed, however, that mere negligence by the board is not enough to give rise to a duty of care violation; rather, a board must act with gross negligence to trigger a violation of due care.[119] Generally speaking, Delaware courts have construed gross negligence to mean that the board failed to obtain, or adequately consider, all material information reasonably available regarding the decision.[120]

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[111] *Citron*, 569 A.2d at 64 (quoting *Aronson*, 473 A.2d at 812).

[112] Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993).

[113] *See Spiegel*, 571 A.2d at 773.

[114] *See* Palm & Kearney, *supra* note 101, at 1300–02. Because the board has broad managerial powers, any inquiry into the validity of a decision by the board begins with the presumption that the board undertook the action with the best interests of the corporation and its shareholders in mind. *See id*. These interests could include, but are not limited to, short-term profitability or long-term stability. *See id.* In litigation, therefore, to assert that the board did not act in the best interests of the corporation is to assert that the board violated one of its fiduciary duties. *See id.*

[115] *See Spiegel*, 571 A.2d at 773 (quoting Kaplan v. Peat, Marwick, Mitchell & Co., 540 A.2d 726, 729 (Del. 1988)).

[116] Palm & Kearney, *supra* note 101, at 1301–02.

[117] *Id.* at 1307.

[118] *Id.*

[119] Malpiede v. Townson, 780 A.2d 1075, 1089 (Del. 2001); *Aronson*, 473 A.2d at 812; Palm & Kearney, *supra* note 101, at 1307.

[120] *Aronson*, 473 A.2d at 812 ("Second, to invoke the rule's protection directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them. Having become so informed, they must then act with requisite care in the discharge of their duties.").

Even if a plaintiff is able to prove that the board acted with gross negligence, the possible presence of a § 102(b)(7) waiver in the corporation's certificate of incorporation creates another hurdle for duty of care claims.[121]

The power of the § 102(b)(7) provision was on display in *Malpiede v. Townson*, wherein a stockholder challenged the company's merger, alleging that the directors violated their duties of loyalty and care in the transaction.[122] There, the Delaware Supreme Court held that, when the plaintiff only alleges a duty of care claim against a corporation's board, and the corporation's certificate of incorporation contains a proper § 102(b)(7) provision, the plaintiff's claim must be dismissed as a matter of law.[123] It is nearly impossible for plaintiffs to recover monetary damages on claims alleging only duty of care violations, even if a care violation would be enough to rebut the business judgment presumption, because of the *Malpiede* holding and the prevalence of § 102(b)(7) exculpation provisions.[124] For that reason, most litigation focuses on duty of loyalty or good faith violations.[125]

Another avenue for attacking the business judgment presumption is that shareholders may demonstrate the board violated its duty of loyalty to the shareholders.[126] The duty of loyalty focuses on the motivations behind the board's decision.[127] Rather than focusing on how the board arrived at the decision, as the duty of care does, the duty of loyalty seeks to ensure that the board members acting on behalf of the corporation have no conflict that would affect their abilities to make a decision in the best interest of the corporation.[128]

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[121] *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2016); Palm & Kearney, *supra* note 101, at 1307. Section 102(b)(7) of the DGCL allows for the inclusion of a provision that waives directors' liability for breaches of the duty of care. DEL. CODE ANN. tit. 8, § 102(b)(7). Such provisions cannot waive director liability for breach of the duty of loyalty, intentional illegal acts, acts or omissions not made in good faith, or transactions from which a director obtains an "improper personal benefit." *Id.*

[122] *Malpiede*, 780 A.2d at 1079.

[123] *Id.* at 1094. The shareholder plaintiff in *Malpeide* also asserted other claims against the board, but those claims were dismissed before the suit reached the Delaware Supreme Court. *Id.* In turn, the only issue that the shareholder plaintiff could argue when the case reached the Delaware Supreme Court centered on the directors' alleged violation of the duty of care. *Id.*

[124] Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PA. J. BUS. L. 675, 692 (2009) ("Since almost all Delaware corporations have adopted 102(b)(7) provisions, monetary damages cannot be recovered even if a violation of the duty of care is established.").

[125] *Id.* at 693.

[126] Palm & Kearney, *supra* note 101, at 1308–09.

[127] *Id.*

[128] *Id.* at 1309.

F. For Better, for Worse, for Richer, for Poorer, in Sickness and in Health: The Board's Duty of Loyalty and Good Faith

Delaware courts will find a duty of loyalty violation in situations where a majority of the board of directors has an interest in the matter before the board or is otherwise not able to exercise an independent judgment on the matter before the board.[129] In this context, director independence means that the director's decision is based upon the corporate merits of the subject at issue, rather than other outside influences or considerations.[130] Similarly, directors are said to be interested when they receive some type of personal benefit from the transaction or issue not available to the shareholders generally—the clearest example is a director appearing on both sides of a transaction.[131] If a plaintiff can prove that a majority of the board was interested or otherwise not independent in choosing the questioned course of action, the board will lose the business judgment presumption.[132] The defendant board has two more weapons in its proverbial arsenal if the business judgment presumption is lost—first, the challenged decision can be upheld if the board can demonstrate that the decision was nonetheless fair to the corporation.[133] This "entire fairness" test contains two components: fair dealing and fair price.[134]

Finally, plaintiff shareholders may attack the board's decision by asserting that the action taken by the board was not taken in good faith.[135] A director's duty of good faith is primarily considered a subset of the director's duty of loyalty.[136] Due to its overlap with the duties of loyalty, good faith is less defined as a concept than the other fiduciary duties.[137] Generally speaking, a board's decision was made in good faith if it was made "in the honest belief

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[129] *Id.*

[130] Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1375 (Del. 1995) (quoting *Aronson*, 473 A.2d at 816).

[131] *Cede & Co.*, 634 A.2d at 362.

[132] Palm & Kearney, *supra* note 101, at 1310–11.

[133] Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1162 (Del. 1995).

[134] *Cinerama*, 663 A.2d at 1162 (quoting Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983)). In *Weinberger v. UOP, Inc.*, the Delaware Supreme Court stated:

> The concept of fairness has two basic aspects: fair dealing and fair price. . . . However, the test for fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness.

457 A.2d at 711. Using this precedent, Delaware courts can consider the timing, structure, initiation, negotiation, disclosure, and director and shareholder approval in deciding whether a transaction was based on fair dealing. *See id.*

[135] Palm & Kearney, *supra* note 101, at 1313.

[136] Anne Tucker Nees, *Who's the Boss? Unmasking Oversight Liability Within the Corporate Power Puzzle*, 35 DEL. J. CORP. L. 199, 209 (2010).

[137] Palm & Kearney, *supra* note 101, at 1313.

the action was taken in the best interests of the company."[138] This loose definition has been developed more so by Delaware courts attempting to define what good faith *is not*—namely, by defining bad faith.[139]

One example of the good faith fiduciary duty focuses on the board's oversight of the corporation.[140] As a concept, oversight liability grew out of the holding of *In re Caremark International Inc. Derivative Litigation*.[141] In *Caremark*, the Delaware Court of Chancery considered whether a board breached its fiduciary duties in the context of a settlement negotiation.[142] In doing so, the court also announced that it is theoretically possible for a shareholder plaintiff to establish a breach of fiduciary duty in situations where the directors violate their duties to monitor corporate performance by enabling a situation that exposes the corporation to enormous legal liability to develop and persist.[143]

The *Caremark* court further posited that oversight liability to the corporation might arise where a board's inattention to a subsequent inaction on an issue leads to a significant loss of corporate assets.[144] At the same time, the *Caremark* court explained that a rule enabling courts and juries to review the substance of board business would be inappropriate, as it would expose directors to an ill-advised form of second-guessing, which could very easily harm shareholder interests.[145] In turn, any evaluation of a board's business decision is more or less a process-oriented inquiry.[146]

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138 *Id.* (quoting *Aronson*, 473 A.2d at 812).

139 Palm & Kearney, *supra* note 101, at 1313–14. Delaware courts have found bad faith "where the decision is so beyond the bounds of reasonable judgment that it seems essentially inexplicable on [any] other ground." *Id.* This has led Delaware courts to find bad faith in circumstances involving fraudulent conduct, misconduct, abuse of discretion, or gross negligence by the board. Guth v. Loft, 5 A.2d 503, 510 (Del. 1939) (holding that a board's manifestation of self-interest violates the duty of good faith); Palm & Kearney, *supra* note 101, at 1313–14. In addition, Delaware courts posit that a board having an improper mental state or improper motive might also constitute bad faith. *See* Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, 642 A.2d 1199, 1208 (Del. 1993) (characterizing bad faith as a "party's tortious state of mind"); Cheff v. Mathes 199 A.2d 548, 556 (Del. 1964) (explaining that a demonstration of the board's improper motive to maintain control negates the presumption of good faith).

140 *See* Nees, *supra* note 136, at 205.

141 *Id.*

142 *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 961 (Del. Ch. 1996).

143 *Id.* at 967.

144 *Id.*

145 *Id.* ("whether a judge or jury considering the matter after the fact, believes a decision substantively wrong, or degrees of wrong extending through 'stupid' to 'egregious' or 'irrational', provides no ground for director liability"). Creating an objective standard for director liability would create a system of after-the-fact review of complex business decisions by judges or juries that generally do not have the expertise to evaluate such business considerations. *Id.* In turn, such a standard would likely harm long-term investor interests. *Id.*

146 *Id.* at 967–68.

Caremark's notion of oversight liability was revisited in *Stone v. Ritter*.[147] *Stone* refined *Caremark*'s theory of oversight liability but interpreted the *Caremark* holding as giving rise to two primary circumstances of oversight liability.[148] Setting the standard for oversight liability, *Stone* established that it arises when (1) the board of directors either utterly fails to implement any reporting or information system or controls, or (2), having implemented such a system or controls, consciously disregards or fails to monitor its systems, causing the board to be uninformed of risks or problems that would otherwise require attention.[149] After *Stone*, the plaintiff must ultimately show that the directors knowingly disregarded their fiduciary duties to the corporation, and thereby breached these duties.[150]

The threshold between a plausible *Caremark* claim and a challenge to a business decision has been a difficult one to cross for shareholder plaintiffs.[151] *In re Citigroup Inc. Shareholder Derivative Litigation* represents a recent example, where shareholders of Citigroup brought suit against the board of directors for investing heavily in the subprime mortgage market, a move that ultimately led to significant financial losses.[152] In *Citigroup*, the plaintiffs alleged that the board failed to manage and oversee Citigroup's exposure to risks in the subprime mortgage market, even in the face of warning signs that the subprime mortgage market was in danger of collapse.[153] The *Citigroup* court found that extending *Caremark* oversight liability in this way tread too closely on underlying policy concerns and risked violating the business judgment presumption.[154] Ultimately, the *Citigroup* court declined to hold the board of directors liable, noting that the type of "red flag" liability

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[147] Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006); *Caremark*, 698 A.2d at 967.

[148] *Stone*, 911 A.2d at 370; *Caremark*, 698 A.2d at 967.

[149] 911 A.2d at 370.

[150] *Id.*

[151] *See* Nees, *supra* note 136, at 205.

[152] 964 A.2d 106, 111 (Del. Ch. 2009).

[153] *Id.* at 114–15 ("the 'red flags' alleged in the eighty-six page Complaint are generally statements from public documents that reflect worsening conditions in the financial markets, including the subprime and credit markets, and the effects those worsening conditions had on market participants").

[154] *Id.* at 126 (noting that the business judgment presumption is built on the fact that managers and directors must make business decisions by evaluating the tradeoffs between risk and return); *see Stone*, 911 A.2d at 369; *Caremark*, 698 A.2d at 967–68. Even if managers have fully evaluated a business decision correctly, it is entirely possible that the return on that decision differs from the expected return. *In re Citigroup*, 964 A.2d at 126. In such situations, it is nearly "impossible for a court, in hindsight, to determine whether the directors of a company properly evaluated risk." *Id.*

sought by the *Citigroup* plaintiffs would lead to the very sort of second-guessing that the business judgment presumption is intended to prevent.[155]

G. Dude, Where's My Lawsuit? The Procedural Elements and Hurdles of Shareholder Litigation

A threshold question arising in shareholder litigation is whether the claim proceeds as a direct or derivative claim.[156] In derivative claims, the alleged harm from not protecting the corporation against climate change-related losses has been suffered by the corporation, and any remedy arising from the suit would flow to the corporation itself, rather than the shareholders personally.[157] This Note will proceed only with a discussion of derivative claims, as an action relating to the board's decision making is not an attempt by a shareholder to vindicate his or her own rights.[158]

Because the board has the authority to manage the business and affairs of the corporation, the board also has a role to play in derivative litigation other than its role as the defendant.[159] Delaware Court of Chancery Rule 23.1 provides this role for the board, requiring plaintiffs to plead in their complaints the efforts taken by the plaintiff to obtain the desired action from the board, or the plaintiff's reasons for not taking such actions.[160] The "efforts" required by Rule 23.1 are generally referred to as making a "demand" on the board.[161] The board has the option to accept or refuse the demand.[162] If the board accepts the demand, changes are made, and the lawsuit ends.[163] The same result occurs, however, if the board, after considering the demand, decides to refuse it, unless the shareholder plaintiff can prove that the demand was wrongfully refused.[164]

The shareholder plaintiff may elect instead to argue that making a demand on the board would be futile because the board could not impartially respond to a demand.[165] If the shareholder is challenging a particular transac-

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[155] *In re Citigroup*, 964 A.2d at 126. ("To impose liability on directors for making a 'wrong' business decision would cripple their ability to earn returns for investors by taking business risks.")

[156] *See* Tooley v. Donaldson, Lufkin, & Jenrette, Inc., 845 A.2d 1031, 1035 (Del. 2004).

[157] *Id.* at 1036.

[158] *See id.* at 1038–39; *infra* notes 158–269 and accompanying text.

[159] *See* DEL. CODE ANN. tit. 8, § 141(a) (2016); DEL. CH. CT. R. 23.1.

[160] DEL. CH. CT. R. 23.1(a).

[161] Palm & Kearney, *supra* note 101, at 1336.

[162] *Id.* at 1333.

[163] *See id.*

[164] *Id.* ("a shareholder will have standing in a demand refused case if: (a) the shareholder makes a demand on the board; (b) the board chooses not to sue; and (c) the shareholder's complaint establishes that the board's decision not to sue is not protected by the business judgment rule").

[165] *Id.*

tion and arguing demand futility, the shareholder must plead, with particularity, facts that suggest that either a majority of the board is interested in the transaction or dominated by an interested person and thus not independent, or that the board's decision to go forward with the transaction is not the product of a rational business judgment.[166] A shareholder plaintiff may still argue demand futility if the derivative suit does not specifically challenge a particular transaction.[167] A plaintiff asserting a claim related to climate change would likely bring this type of derivative claim.[168] When arguing demand futility without reference to a specific transaction, the shareholder must plead, again with particular facts, that the board could not have exercised its independent and disinterested business judgment in responding to a demand.[169] For Delaware courts, a director lacks independence when his or her relationship to the interested board member is of a "bias-producing nature."[170] Even if the plaintiff establishes demand futility, the board of directors may convene a special litigation committee, which, after establishing to the court that committee is disinterested, would consider the litigation without the input of interested directors.[171] In most cases, the establishment of the special litigation committee effectively restores the business judgment presumption to the board's decision.[172]

III. The Likelihood—or Lack Thereof—of the Hypothetical Shareholder Suit's Success

A. Who's in Charge? Applying the Procedural Requirements of a Shareholder Claim to a Climate Change Oversight Claim

Stemming from Delaware Court of Chancery Rule 23.1, a threshold issue in derivative suits centers upon whether the plaintiff shareholder(s) or the board of directors controls the suit.[173] Here, the shareholder plaintiff of this hypothetical red flags claim faces two choices: make a demand on the board, or argue that making such a demand would be futile.[174]

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

[167] Palm & Kearney, *supra* note 101, at 1341.

[168] *Id.*

[169] Rales v. Blasband, 634 A.2d 927, 934 (Del. 1993) ("Instead, it is appropriate in these situations to examine whether the board that would be addressing the demand can impartially consider its merits without being influenced by improper considerations.").

[170] Beam v. Stewart, 845 A.2d 1040, 1050 (Del. 2004) ("Allegations of mere personal friendship or a mere outside business relationship, standing alone, are insufficient to raise a reasonable doubt about a director's independence.").

[171] *Zapata Corp.*, 430 A.2d at 786.

[172] *See* Jones & Welsh, *supra* note 75, at 354.

[173] *See* Tooley v. Donaldson, Lufkin, & Jenrette, Inc., 845 A.2d 1031, 1036–39 (Del. 2004)

[174] *See id.*

Making a demand on the board is likely to be unhelpful to the shareholder's cause for several reasons.[175] First, if the shareholder has already resorted to litigation, it is unlikely that the board will suddenly accept the demand, even in the face of litigation.[176] Additionally because of the business judgment rule a suit will be dismissed if the board refuses the demand.[177] The shareholder may also argue that the board's refusal of demand was wrongful, but doing so requires the shareholder to plead particular facts that cast doubt on the matter of whether the board's refusal was the product of a rational business judgment—a difficult standard to meet.[178] Making a demand on the board also waives the ability of the plaintiff to argue demand futility, leaving one less procedural option available to shareholders.[179] The incentive for shareholders, therefore, is to argue demand futility before making a demand on the board of directors.[180]

That is not to say that arguing demand futility is a sure-fire way for shareholders to control the suit—indeed, the opposite is true.[181] Arguing demand futility in an oversight claim also involves pleading particular facts that cast doubt about the board's ability to act independently when responding to a demand.[182] The standard that Delaware courts use, however, is indeed a high bar: even facts suggesting that certain board members are close personal friends are not enough to establish demand futility.[183] The prevalence of § 102(b)(7) director liability waivers make arguing director interestedness in the outcome of litigation alleging duty of care violations impossible, because § 102(b)(7) waivers exculpate director liability for duty of care violations.[184]

Much to plaintiffs' relief, § 102(b)(7) provisions do not exculpate liability for breaches of the directors' duty of loyalty.[185] As such, shareholders in this type of *Caremark* claim must plead particular facts establishing that the

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[175] *See id.*

[176] *See* Reinier Kraakman et al., *When Are Shareholder Suits in Shareholder Interests*?, 82 GEO. L.J. 1733, 1753 (1994).

[177] *See* Palm & Kearney, *supra* note 101, at 1333.

[178] *See id.*

[179] *See* Spiegel v. Buntrock, 571 A.2d 767, 775 (Del. 1990) ("By making a demand, a stockholder tacitly acknowledges the absence of facts to support a finding of futility. Thus, when a demand is made, the question of whether demand was excused is moot.").

[180] *See* Palm & Kearney, *supra* note 101, at 1333.

[181] *See* Kraakman et al., *supra* note 176, at 1752.

[182] *Beam*, 845 A.2d at 1049; *see* Palm & Kearney, *supra* note 101, at 1335–36 (noting that discovery is not allowed in a typical demand futility pleading, and that shareholders must therefore rely on publicly known facts or information obtained from the media or public records).

[183] *Beam*, 845 A.2d at 1050 (quoting Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 833 A.2d 961, 979 (Del. Ch. 2003)) (noting that in order for facts regarding personal friendship to influence the demand futility analysis, the shareholder plaintiff must show that the relationships are of a "bias-producing nature").

[184] *See In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 124 (Del. Ch. 2009).

[185] Stone v. Ritter, 911 A.2d 362, 367 (Del. 2006).

board is interested and thus not capable of rationally responding to a demand—the fact that directors might be personally liable for duty of loyalty violations would be relevant, but not dispositive to establishing demand futility in this way.[186] Shareholders must be careful to assert that it was the indiscretion of the directors themselves, rather than of employees or individuals within the company to whom the board delegated authority, that led to the breach of the duty of loyalty.[187] Failure to do so will lead the court to dismiss for lack of a sufficient cause to excuse demand as futile.[188]

If there are facts that implicate the board itself as the entity whose lack of oversight gives rise to the claim, shareholders could, *in theory*, build a pleading of demand futility upon the likelihood of directors being held personally liable in a derivative suit.[189] To do so, however, would be to go against the run of cases that attempt to allege futility on these grounds.[190] The chief difficulty that plaintiffs face—including the plaintiffs of this hypothetical suit—is that it is quite simple for boards to delegate such decision making away from the board.[191] The effect of delegating this type of decision is to shield the board from liability for the decision because directors currently do not have a duty to monitor the activities of a board committee.[192] Moreover, delegating this decision-making responsibility to an individual or group other than the board of directors brings the focus of the demand futility argument back within the ambit of the *Stone* holding, because the plaintiff would be challenging the decision of employees of the corporation.[193] The liability-reducing incentive for boards, therefore, is to delegate the decision to address climate change-related risks to a committee.[194]

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[186] *See Stone*, 911 A.2d at 372 ("'only a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability'") (quoting *In re* Caremark Int'l. Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996)).

[187] *See id* at 368–69.

[188] *See id.* (declining to extend oversight liability to directors in a case of certain employees' failures to communicate corporate deficiencies to the board).

[189] *See* Andrew C.W. Lund, *Rethinking* Aronson*: Board Authority and Overdelegation*, 11 U. PA. J. BUS. L. 703, 739 (2009).

[190] *See id.*; *see e.g.,* Rales v. Blasband, 634 A.2d 927, 936 (Del. 1993) (explaining that the mere threat of personal liability for directors will not be enough to excuse the demand requirement); *Aronson*, 473 A.2d at 815 (stating that the fact of potential personal liability is not sufficient to support a claim that the directors are either interested or otherwise not independent).

[191] *See* Lund, *supra* note189, at 739.

[192] *See id.*

[193] *See Stone*, 911 A.2d at 372 ("Consequently, a claim that directors are subject to personal liability for employee failures is 'possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.'").

[194] *See id.*

Additionally, the preceding analysis assumes that plaintiffs would have the facts necessary to plead demand futility with particularity.[195] Obtaining these facts is itself an arduous task, even with the statutory right of shareholders to inspect the books and record of the corporation.[196]

Like most derivative suits, the plaintiffs of a hypothetical climate change oversight claim would face significant, if not long odds in retaining control over the suit, owing largely to the inherent difficulties of establishing demand futility.[197] Assuming shareholders clear the first hurdle of this hypothetical derivative claim, another critical one follows immediately after.[198]

B. Substantive Analysis of a Climate Change Risk Oversight Claim

If demand is excused as futile in this hypothetical derivative suit, shareholders would still face an uphill battle on the substantive merits of the claim.[199] Given the prevalence of § 102(b)(7) exculpatory provisions, shareholders will likely be unable to proceed if their claim is based upon a duty of care violation.[200] In the rare instance that a corporation's certificate of incorporation does not contain a § 102(b)(7) exculpatory provision, the likelihood of a care violation succeeding on the merits is still dubious because of the business judgment presumption attached to board decisions.[201] Even if the decision leads to ultimately catastrophic effects for the corporation, absent evidence of bad faith or some type of fraud, courts will not impute liability on the board, primarily to prevent judicial "second-guessing" of corporate decision making.[202] The board need not even consider the issue of climate change risks in depth—so long as the board reviews the issue honestly with reasonable reliance on some substantive information, the board is free to decide that taking steps to mitigate the risks posed by climate change-related catastrophes is not in the best interests of the corporation.[203]

Although the standard for breach of the duty of good faith—a subset of the duty of loyalty—is different than duty of care analysis, the result is likely to be the same.[204] Again, the business judgment presumption presents a large hurdle for plaintiffs to overcome—the board's challenged inaction is also sub-

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[195] *See Aronson*, 473 A.2d at 815; *supra* notes 172–192 and accompanying text.

[196] *See* DEL. CODE ANN. tit. 8, § 220(b) (2016); Palm & Kearney, *supra* note 101, at 1335–36.

[197] *See* Lund, *supra* note 189, at 739–40.

[198] *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2016); Nees, *supra* note 136, at 215–16; *infra* notes 199–212 and accompanying text.

[199] *See* Nees, *supra* note 136, at 215–16.

[200] *See* § 102(b)(7) (2016); Malpiede v. Townson, 780 A.2d 1075, 1089 (Del. 2001).

[201] *See* DEL. CODE ANN. tit. 8, § 141(a) (2016); *Aronson* 473 A.2d at 811.

[202] *See In re Citigroup.*, 964 A.2d at 124.

[203] *See id.*

[204] *See In re Caremark*, 698 A.2d at 961

ject to the business judgment presumption.[205] In the context of litigation, if the board presents evidence that opting for inaction on the matter of risks posed by climate change is in the best interests of the corporation, and the board reached that decision in the absence of any sort of fraud or breach of other fiduciary duties, the inaction will receive the protection of the business judgment presumption.[206] The difficulty that derivative plaintiffs face is that it is the board itself that determines the best interest of the corporation.[207] Maintaining insurance and other measures to mitigate risks posed by climate change are certainly not without potentially large costs, and a board may easily find that such costs outweigh the potential benefits for the corporation—the very definition of the corporation's best interest.[208] In that regard, the decision to prepare the corporation for potential losses, regardless of cause, is a quintessential business decision, and it follows that the decision of taking action to curb losses in the event of a climate change-related catastrophe is also a quintessential business decision.[209] Unless the board reaches such a decision by means other than its collective business judgment, shareholder plaintiffs will not be able to do away with the deference generally afforded by the business judgment presumption.[210]

Moreover, the line of cases considering this type of liability does not suggest that oversight claims are simple cases to prevail on.[211] Delaware courts have refused to extend liability even in cases where the alleged discharge of oversight duties resulted in the legal fines, as was the case in *Stone*.[212] Thus it is difficult to imagine courts applying oversight liability in cases of director inaction that result in massive losses to the corporation, absent some facts that suggest the inaction was motivated by something other than the corporation's well-being.[213] Establishing liability for failure to ensure that the corporation is protected from climate change-related risks would like-

[205] *See id.*

[206] *See* Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 64 (Del. 1989).

[207] *See* Lund, *supra* note 189, at 727.

[208] *See* Porcher L. Taylor, III & Harris L. Kay, *A Green Board as a Climate-Change Imperative: Appointing a Climate-Change Expert to the Audit Committee*, 18 U. BALT. J. ENVTL. L. 215, 244 (2011).

[209] *See Stone*, 911 A.2d at 369–70.

[210] *See id.*

[211] *See id.* at 369–73 (declining to extend oversight liability even when the directors' conduct resulted in significant legal fines to the corporation); *In re Citigroup*, 964 A.2d at 123 (emphasizing that, to successfully establish oversight liability, shareholders must prove that the directors knew that they were ignoring their fiduciary duties).

[212] *See Stone,* 911 A.2d at 372–73.

[213] *See id.*

ly be even further complicated if the suit precedes any harm or loss suffered by the corporation.[214]

IV. KEEPING THE GOALPOST WHERE IT IS: WHY A NEW STANDARD FOR RED FLAGS LIABILITY WOULD DO MORE HARM THAN GOOD

The analysis from a climate-concerned perspective underscores the inherent practical and substantive difficulties that director oversight liability claims face, which derive significantly from the underlying tension between breach of fiduciary duties and imposing liability for otherwise ill-advised business decisions.[215] Although shareholders may certainly be dissatisfied at the disastrous results of a particular business decision, especially in the wake of a climate-change related disaster, mere dissatisfaction will never be enough to hold directors personally liable for that decision.[216] In that regard, the current scheme of fiduciary duties—and more specifically, the duty of good faith—separates legal and market expectations by establishing legal liability only for director abuse of the *process* by which it reaches business decisions.[217]

A. Not in My Back Yard: Why Australia's Version of Oversight Liability Is a Bad Fit Here at Home

In light of the difficulties shareholder plaintiffs face in establishing breach of the duty of loyalty in connection with a failure to oversee the corporation, some scholars have opined on the need to redefine the standard by which such claims are evaluated and litigated.[218] One proposed method draws upon Australian jurisprudence relating to oversight of corporate boards.[219] The key difference between the Australian and United States approaches to oversight liability focuses on the role of the public in board oversight: unlike the United States, Australian corporate law allows for both public and private enforcement of directors' duties.[220] This model of public enforcement enables a regulatory body to cite the public's interest as cause for initiating enforce-

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[214] *See In re Citigroup*, 964 A.2d at 126 (noting that the analysis in oversight claims is essentially a hindsight evaluation of business decisions.).

[215] *See* Andrew A. Lundgren, *Sarbanes-Oxley, Then Disney: The Post-Scandal Corporate-Governance Plot Thickens*, 8 DEL. L. REV. 195, 210 (2006); *supra* notes 171–212 and accompanying text.

[216] *See* Lundgren, *supra* note 215, at 210.

[217] *See id.*

[218] *See* Jones & Welsh, *supra* note 75, at 348; Nees, *supra* note 136, at 207.

[219] *See* Jones & Welsh, *supra* note 75, at 348.

[220] *See id.* at 377.

ment action, coupled with the ability of the regulator to select from a wide range of possible remedies in enforcing statutorily defined director duties.[221]

The issue with a public enforcement model of enforcing director duties is that it undercuts the policy basis behind the traditional model of deference to the board's business judgment.[222] At stake in any sort of derivative shareholder litigation is whether the board's actions were taken with the best interests of the corporation in mind.[223] Vesting the power of determining what those best interests are in the board of directors, rather than in some other body or even through judicial review, serves to encourage boards to exercise their business judgments without fear of later being overturned or mitigated in some way.[224] The underlying principle at work, therefore, is that a scheme that allows for some other entity, which may be less qualified or equipped to evaluate complex business decisions, to substitute its business judgment for that of the board would only chill the sort of calculated risk-taking that corporations regularly engage in.[225] The end product, and perhaps unintended consequence, of a regime enabling public enforcement of fiduciary duties is an overly broad stifling of the short and long-term benefits that accompany entrepreneurism.[226] Thus, although public enforcement of fiduciary duties may curtail some particularly callous corporate risk taking, it might also accidentally take a bite out of the next Apple.[227]

B. Articulation but Not Clarity: How a Particular Definition of "Red Flags" Undermines the Business Judgment Presumption

Other proposed methods of redefining oversight liability as a tool for shareholders in litigation involves crafting a more clearly articulated standard for oversight liability.[228] Critiquing the current standard for oversight liability as a "toothless tiger," one particular suggestion proposes five factors to establish liability.[229] These five factors are proposed by scholars as a tool for discerning a director's conscious disregard; the factors are (1) the courts weighing the potential harm to the company, (2) the time the directors had to react,

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[221] *See id.* at 403.
[222] *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967–68 (Del. Ch. 1996).
[223] *See id.*
[224] *See* Palm & Kearney, *supra* note 101, at 1303 n.13.
[225] *See* Kenneth R. Davis, *Cash of the Titans: Arbitrating Challenges to Executive Compensation*, 86 TEMP. L. REV. 245, 262–63 (2014).
[226] *See id.* at 263–64.
[227] *See id.*
[228] *See* Nees, *supra* note 136, at 207.
[229] *Id.* at 207, 215 (characterizing the existing oversight liability standard as a "toothless tiger" and proposing a new five-factor test for director oversight liability).

(3) the particular source of the red flag, (4) the frequency of the red flag, and (5) the availability of relevant information to the directors.[230]

The usefulness of this test is that it would provide a means by which courts could evaluate the magnitude of an alleged red flag or whether a red flag exists at all.[231] The test, however, focuses more on determining the specific nature of the threat posed to the corporation, rather than analyzing whether the director intentionally breached a known duty to the shareholders.[232] Therefore, it is difficult to say that such a five-factor test could stand on its own as a new standard for determining oversight liability.[233] That is not to say that there is no value to the five factors proposed.[234] Courts have thus far struggled to identify circumstances in which shareholders may establish oversight liability, and these factors could bring clarity to the otherwise murky question of what a red flag for directors looks like.[235]

If the goal of these five factors is greater balance between shareholder and director authority then these factors will likely do little to advance that aim.[236] Redefining what constitutes a red flag for the purposes of determining whether or not a director has breached his or her fiduciary duty does not address the primary reason that oversight cases have proven so difficult for plaintiffs to prevail on—namely, the policies of deference to boards and their business judgments.[237] Here, these proposed factors are not to be weighed by the board; instead, courts are intended to make use of the factors to, in essence, determine what sort of problems are too great for boards to take no action against.[238] The inescapable conclusion from this attempt at greater shareholder authority is that it is the very sort of judicial second-guessing that the business judgment presumption and all of its underlying policy considerations seek to do away with.[239]

Rather than simply require boards to consider red flag issues, the goal of these factors is to establish a duty for boards to *act* on red flag issues, rather than *consider* whether it is in the best interests of the corporation to act on them.[240] Courts have generally been reluctant to displace the board as the final arbiter of a corporation's best interests, and it is therefore difficult to im-

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[230] *See id.* at 207.
[231] *See In re Citigroup*, 964 A.2d at 111.
[232] *See id.*
[233] *See id.*
[234] *See* Nees, *supra* note 136, at 246.
[235] *See id.*
[236] *See id.* at 235.
[237] *See* Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985); *In re Citigroup*, 964 A.2d at 122 (quoting *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d at 967–68 (Del. Ch. 1996)).
[238] *See* Nees, *supra* note 136, at 235.
[239] *See* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).
[240] *See id*; Nees, *supra* note 136, at 235.

agine that a court would be persuaded by a standard that seeks to displace that very balance.[241] The goal of greater shareholder authority is further undermined by the fact that shareholders already have other statutorily prescribed methods of asserting authority within the corporation, which climate change-concerned shareholders could wield with possibly great effect.[242] As a result, attempting to significantly change the way in which a director's duties are presently defined could have the unintended effect of significantly impairing the board's equally important freedom from judicial second-guessing.[243] It is this freedom from second-guessing that allows boards to consider and pursue business strategies that bear significant risk, but also might produce substantial reward.[244]

V. THE SHAREHOLDERS' LAST, BEST HOPE: ALTERNATIVES TO LITIGATION

Given the low probability of success of this type of litigation and compelling policy reasons for not adjusting the standard for red flags liability, shareholders would be wise to look to other means of compelling corporate action.[245] Naturally, these other means center on the involvement of the shareholders in the decision-making process.[246]

One chief method available to shareholders seeking to affect corporate policy is amending the bylaws of the corporation.[247] Once the corporation has received payment for any of its stock, shareholders are entitled to vote on any adoption, amendment or repeal of bylaw provisions[248] Shareholders concerned about ensuring that the corporation is protected against massive losses in the wake of a climate change-related catastrophe could propose a bylaw amendment requiring the board to obtain insurance against such financial losses.[249] This tactic would be especially viable if one shareholder controlled

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[241] *See Sinclair*, 280 A.2d at 720; Nees, *supra* note 136, at 235.

[242] *See* DEL. CODE ANN. tit. 8, § 109 (2016)*; infra* notes 243–268 and accompanying text.

[243] *See Sinclair*, 280 A.2d at 720.

[244] *See id.*

[245] *See* Stone v. Ritter, 911 A.2d 362, 369–73 (Del. 2006) (declining to extend oversight liability even when the directors' conduct resulted in significant legal fines to the corporation); *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 123 (Del. Ch. 2009) (emphasizing that to successfully establish oversight liability, shareholders must prove that the directors knew that they were ignoring their fiduciary duties).

[246] *See infra* notes 245–268 and accompanying text.

[247] DEL. CODE ANN. tit. 8, § 109. Similarly, shareholders could also propose an amendment to the corporation's certificate of incorporation to include this type of provision. *Id.* § 242. Certificate of incorporation amendments bind the corporation even more strictly than bylaw amendments, since provisions in the certificate of incorporation supersede any of the bylaws. *See id.* § 109(b). Therefore, certificate of incorporation amendments would create an even higher-level mandate than the bylaws for director activity, which might open the door to *ultra vires* litigation if directors fail to observe the requirements contained therein. *Id.* §§ 109, 124.

[248] *Id.* § 109.

[249] *See id.*

a majority of the outstanding shares entitled to vote, as a bylaw amendment would effectively need only his or her approval to become effective.[250] In the event of a more diffused shareholder voting power bloc, shareholders seeking a bylaw amendment of this type could lobby other shareholders prior to the vote through the proxy rights afforded to shareholders.[251]

Concerned shareholders may elect to pursue a more informal path to achieving their policy goals by issuing a shareholder proxy proposal recommending the board of directors to insure the corporation in the event of catastrophic losses related to climate change.[252] So long as the shareholder proposal complies with the applicable guidelines and cannot be excluded by the board, shareholders can put forth proposals that touch on a wide range of issues.[253] Although a properly drafted and submitted shareholder proposal, if approved, would not be binding on the board of directors, its mere passage could pressure the board of directors to act on the proposal's aims, especially because the board is ultimately accountable to the shareholders by way of director elections.[254]

Even still, shareholders should beware of the broad manner in which courts read the board's power to exclude proposals that affect the ordinary business operations of the corporation.[255] In *Trinity Wall Street v. Wal-Mart Stores, Inc.*, shareholders sought to include a proposal urging the board to consider the public policy implications of selling certain products.[256] The United States Court of Appeals for the Third Circuit held the board could exclude the proposal as affecting the ordinary business operation of the corporation under Rule 14a-8(i)(7).[257] The implications of that decision are far reaching, as a board could conceivably exclude a policy-based proposal if the proposal's policy aim relates to the company's ordinary business.[258] In order for a policy-focused shareholder proposal to survive such exclusion, the policy

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[250] *See id.*

[251] *See* 17 C.F.R. § 240.14a-8 (2016).

[252] *See id.*

[253] *See* Lee Harris, *The Politics of Shareholder Voting*, 86 N.Y.U. L. REV. 1761, 1770 (2011); *supra* notes 83–96 and accompanying text.

[254] *See* 17 C.F.R. § 240.14a-8(i)(1) (2016); Palm & Kearney, *supra* note 101, at 1302 n.13.

[255] *See* Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323, 351 (3d Cir. 2015).

[256] *See id.* at 329–30. Specifically, the proposal sought an amendment to the charter of the company's Compensation, Nominating and Governance Committee that would have required the committee to weigh, in deciding whether to sell a product, whether the product would potentially endanger public safety, substantially harm the company's reputation, or would be viewed as "offensive to the family and community values" that were critical to Walmart's brand. *Id.* The shareholder proposal specifically mentioned Walmart's sale of firearms with high-capacity magazines. *Id.* at 330.

[257] *Id.* at 351.

[258] *See id.* at 346.

issue of the proposal must "transcend" the ordinary business of the company.[259]

For a climate-concerned shareholder seeking proxy access, the success of a climate-conscious proposal withstanding exclusion by the board would be tied closely to the specific business of the corporation.[260] At the same time, a shareholder utilizing this method of compelling corporate action to prepare against climate change-related losses faces substantial risk of rejections.[261] Even if a proposal survives an exclusionary challenge, shareholders also run the risk of having the subject matter barred from consideration for five years if the matter goes to a vote but receives no substantial support.[262] Despite the risks, however, shareholder proxies remain a tool to ensure that shareholders have at least some role in high-level corporate decision-making.[263]

One final frontier of shareholder influence on corporate policy is the process by which the corporation elects the members of the board of directors.[264] Every corporation must provide for some process by which the shareholders elect directors.[265] In that light, directors indirectly represent the will and goals of the shareholders that elect them.[266] A shareholder concerned with catastrophes related to climate change could use this process to further his or her aims by nominating similarly concerned directors, who would presumably incorporate those concerns into a policy during their tenure on the board.[267] A concerned shareholder may also lobby other shareholders to support their own nominees or other nominees that share similar concerns and outlooks for corporate policy.[268] Even if ultimately unsuccessful in seeing a candidate through from nomination to election, advocacy of this type flags the issue for the board to consider during their term, which might ultimately manifest in director action consistent with these particular shareholder concerns.[269]

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[259] *Id.* at 346–47 ("to shield its proposal from the ordinary business exclusion, a shareholder must do more than focus its proposal on a significant policy issue; the subject matter of its proposal must 'transcend' the company's ordinary business").

[260] *See id.*

[261] *See id.*

[262] *See* 17 C.F.R. § 240.14a-8(i)(12) (2016).

[263] *See* Joseph Evan Calio & Xavier Zahralddin, *The Securities and Exchange Commission's 1992 Proxy Amendments: Questions of Accountability,* 14 PACE L. REV. 459, 464 (1994).

[264] *See* Palm & Kearney, *supra* note 101, at 1302 n.13.

[265] *See* DEL. CODE ANN. tit. 8, § 211 (2016).

[266] *See* Palm & Kearney, *supra* note 101, at 1302 n.13.

[267] *See id.*

[268] *See* 17 C.F.R. § 240.14a-8; Palm & Kearney, *supra* note 101, at 1302 n.13.

[269] *See* 17 C.F.R. § 240.14a-8.

CONCLUSION

There is little doubt that as climates continue to change, the risks of catastrophic weather or other natural events climb as well. By the same token, corporations could stand to suffer massive losses to their assets, bottom lines, and everything in between if they find themselves embroiled in one of these catastrophes. Therefore, it is difficult to imagine a scenario where, if a corporation has the resources to ensure that its future is at least somewhat protected in the face of climate change, it would elect not to do so.

Thus it could be understandable if shareholders, aware of such a potential threat to the corporate future, find themselves on the outside looking in following a board's decision not to protect the corporation from a foreseeable risk. The focus of this Note, however, has been largely to dispel the notion that shareholder litigation could be a way to force the board's hand on a matter like contingency planning in the event of a climate change-related catastrophe. The procedural, evidentiary, and substantive challenges to a lawsuit of that type simply outweigh any real chances of success that would go with that type of suit. It would be hard, therefore, to imagine a more inefficient way of affecting corporate policy than a derivative suit alleging a breach of the duty of loyalty for failure to account for red flags. Even in the wake of oversight suits stemming from the 2008 financial crisis, oversight claims have largely only existed in theory.

Fortunately for such concerned shareholders, all is not lost. There are still avenues through which shareholders may exert influence over corporate policy. If anything, the alternative means discussed in this Note are far more efficient means of ensuring that a corporation is prepared to face the effects of climate change simply because they have a real chance at success. With that backdrop, for shareholders concerned with climate change the choice between war and peace to bring about corporate action could hardly be more clear.