Caremark Claims for Workers' Rights: Repeated Unfair Labor Practices as a Breach of Fiduciary Duty

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Delaware courts recognize that corporate directors have a duty of good faith, which includes an obligation to avoid knowingly violating the law, even if doing so could increase profits. In re Caremark International Inc. Derivative Litigation *and* Stone v. Ritter *extended liability to situations in which directors fail to oversee apparent legal risks.*

The National Labor Relations Board (NLRB) has repeatedly found unfair labor practices (ULPs) against major corporations such as Amazon and Starbucks during employee unionization efforts, but because of gaps in the enforcement potential of federal labor law, these ULPs largely continue unchecked. This Note argues that a corporation's directors violate their duty of good faith when the NLRB continually finds ULPs against it. Under the Caremark *framework, a history of ULP determinations, ULP settlements, walkouts, or strikes would be red flags that the directors then consciously fail to monitor. While recovery may be insignificant,* Caremark *claims, brought by plaintiff-shareholders who want corporations to comply with their obligations towards unions, may deter future ULPs and spark organizational change supportive of workers' rights.*

Part I documents the prevalence of anti-union ULPs, outlines the duty of good faith in Delaware corporate law, and briefly explains Caremark *claims. Part II describes a* Caremark *claim for repeated ULPs. Part III highlights the benefits of institutional shareholders bringing such claims and offers policy proposals that would increase the power of shareholders to hold corporations accountable for illegal acts.*

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INTRODUCTION

In August 2021, Daequan Smith began commuting from a Bronx homeless shelter to his job sorting in one of Amazon's Staten Island facilities.[1] The trip sometimes took up to three hours.[2] Smith hoped that Amazon's pay and benefits could significantly improve his life.[3] But just over two months later, in October, he was abruptly fired without explanation.[4]

1. *See* Amir Khafagy, *A Homeless Amazon Worker Tried to Organize a Union. Then Amazon Fired Him.*, N.Y. FOCUS (Nov. 23, 2021), https://nysfocus.com/2021/11/23/a-homeless-amazon-worker-tried-to-organize-a-union-then-amazon-fired-him/ [https://perma.cc/QU3X-WWQH].
2. *See id.*
3. *See id.*
4. *See id.*

Two weeks into his new job, he was approached by Amazon Labor Union (ALU) organizers.[5] Although Smith was happy with his job, he noticed that the pace of work and lack of breaks could be improved, and he became active in the ALU organizing drive.[6] He was open about his support of the union, frequently wearing a pro-union shirt and vocally encouraging his co-workers to sign cards.[7] As Smith's participation in the ALU became known at the warehouse, Smith's supervisor became increasingly hostile, often specifically targeting Smith by making him sort items at a faster pace than his coworkers.[8] On October 23, 2021, the supervisor asked Smith to meet about his performance, and Smith responded by invoking his *Weingarten* rights: that is, he refused to meet without a union representative present.[9] The supervisor sent Smith home for the day, but as Smith soon noticed, he was locked out of the app employees used to schedule shifts.[10] On November 4, Smith received an email stating that he had been terminated due to excessive tardiness and clock-in errors.[11] Smith denied that these had ever been issues for him.[12]

More than two years later, on November 21, 2023, a National Labor Relations Board (NLRB) administrative law judge (ALJ) determined that Smith had been unlawfully fired in retaliation for his union activity, in violation of the National Labor Relations Act (NLRA)—among a host of other unfair labor practices (ULPs) by Amazon.[13] The ALJ ordered Amazon to "[m]ake Daequan Smith whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of his unlawful early dismissal."[14]

Smith is just one of many workers around the country who, through unlawful firings, face life-altering harms such as eviction,

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5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *See* NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975); Khafagy, *supra* note 1.
10. *See* Khafagy, *supra* note 1.
11. *See id.*
12. *See id.*
13. *See* Annie Palmer, *Amazon Broke Federal Labor Law by Calling Staten Island Union Organizers 'Thugs,' Interrogating Workers*, CNBC (Dec. 1, 2023), https://www.cnbc.com/2023/12/01/amazon-broke-federal-labor-law-by-racially-disparaging-union-leaders.html [https://perma.cc/T376-98XA]; Amazon.com Servs. Inc., Case No. 29-CA-277198 (N.L.R.B. Admin. L. Judge Decision Nov. 21, 2023), https://apps.nlrb.gov/link/document.aspx/09031d4583bce5bf [https://perma.cc/TUJ6-9H8H].
14. *Amazon.com Servs. Inc.*, Case No. 29-CA-277198 at 80.

loss of reliable transportation, out-of-pocket medical expenses, and credit card debt.[15] In their efforts to avoid unions, corporations often take actions that they know are ULPs and see the light repercussions as the cost of doing business.[16] The NLRB cannot assess penalties against those who have violated the NLRA; rather, the Board can only issue make-whole remedies.[17] Therefore, corporate directors often allow, or even encourage, these ULPs to persist, as they feel the benefits of avoiding a union far outweigh any negative consequences of breaking the law.

While the NLRB's inability to assess penalties gives it little power to deter labor law violations, this Note proposes an alternative. This Note argues that when directors intentionally lead a corporation to commit ULPs, as with any intentional violation of the law, they breach their fiduciary duty of good faith to corporate shareholders. While a finding of intentionality may be difficult in many instances, this Note also proposes a theory of a prong-two *Caremark* claim for repeated unfair labor practices.

Part I of this Note provides an overview of several high-profile union drives that have been met with repeated ULPs, a survey of the duty of good faith jurisprudence in Delaware corporate law, and an explanation of *Caremark* claims. Part II describes a theory of duty of good faith claims against corporations that have committed a pattern of ULPs, with a focus on *Caremark* claims, which do not require that a plaintiff prove intentionality on the part of management. Part III discusses why such a claim has not yet been brought and the types of plaintiffs who might find it appealing. It also details the potential deterrent effect that such claims could have if they were widely acknowledged, and policy proposals for increasing the power of shareholders to hold corporations accountable for violations of labor law—which would, in turn, lower the hurdle for bringing a duty of good faith/*Caremark* claim for ULPs and increase their viability.

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15. *See generally* Thryv, Inc., 372 N.L.R.B. no. 22, slip op. at 8 (Dec. 13, 2022) (noting harmful knock-on effects for unlawfully fired employees).

16. *See* Celine McNicholas et al., *Civil Monetary Penalties for Labor Violations are Woefully Insufficient to Protect Workers*, ECON. POL'Y INST. (July 15, 2021), https://www.epi.org/blog/civil-monetary-penalties-for-labor-violations-are-woefully-insufficient-to-protect-workers/ [https://perma.cc/KHM3-UNHQ].

17. Traditional make-whole remedies for ULPs against individual workers include reinstatement and back pay. *See* Republic Steel Corp. v. NLRB, 311 U.S. 7, 11 (1940).

I. THE CURRENT STATE OF LABOR LAW ENFORCEMENT AND THE DUTY OF GOOD FAITH

While U.S. labor law is insufficient to discourage violations,[18] this Note proposes that shareholder plaintiffs can instead bring *Caremark* claims—breaches of the fiduciary duty of good faith because of oversight failures—to achieve a deterrent effect. Part I.A discusses the spate of recent, high-profile anti-union campaigns by major corporations, highlighting how the NLRA's lack of penalties allows ULPs to go on unchecked. Part I.B discusses the duty of good faith in Delaware corporate law, and Part I.C explains *Caremark* claims for failure to monitor violations of the law.

A. UNFAIR LABOR PRACTICE CHARGES AND THEIR INADEQUACY

While the rate of private-sector union membership remains low—5.9% in 2024[19]—workers have been leading high-profile unionization drives at some of the country's most prominent companies over the past few years.[20] Since workers at a Buffalo, New York, cafe began a representation campaign in 2021, Starbucks—long admired for its progressive corporate culture and treatment of employees—has launched an extensive anti-union campaign across the United States.[21] The company's efforts included firing union leaders, denying benefits to union employees, and closing stores.[22] Sen. Bernie Sanders called Starbucks' efforts

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18. The relevant sections of the NLRA are Sections 7 and 8. Section 7 confers the right of employees to organize, collectively bargain, and "engage in other concerted activities for the purpose of . . . mutual aid or protection . . . ." 29 U.S.C. § 157. Section 8 defines ULPs, which include impeding employees' Section 7 rights, interfering with the formation of a union, and discriminating against employees to discourage union membership. *See id.* § 158.

19. *See Union Members Summary*, U.S. DEP'T OF LAB. (Jan. 28, 2025), https://www.bls.gov/news.release/union2.nr0.htm [https://perma.cc/886S-ZZXE].

20. *See, e.g.*, Heidi Shierholz et al., *Unionization Increased by 200,000 in 2022*, ECON. POL'Y INST. (Jan. 19, 2023), https://www.epi.org/publication/unionization-2022/ [https://perma.cc/D7BU-J44C] ("Union activity last year included organizing drives within notable companies such as Starbucks, Amazon, Trader Joe's, and Chipotle." (internal citations omitted)).

21. *See* Matthew T. Bodie, *Labor Relations at the Woke Corporation*, 79 N.Y.U. ANN. SURV. AM. L. 171, 186–88 (2023) [hereinafter Bodie, *Labor Relations*].

22. *See* Justin Stabley, *Why Scrutiny of Starbucks' Alleged Union Violations Is Boiling Over Now*, PBS NEWS (Mar. 29, 2023, 6:00 a.m.), https://www.pbs.org/newshour/economy/the-union-busting-practices-that-landed-starbucks-in-hot-water [https://perma.cc/QC8R-J3SW].

"the most aggressive and illegal union-busting campaign in the modern history of our country."[23] As of February 18, 2025, the NLRB had issued over 135 complaints against Starbucks, covering a staggering 434 ULP charges, and issued 25 decisions against the company.[24]

Amazon has similarly committed flagrant labor law violations in its attempts to stop unionization efforts at its warehouses.[25] In 2021, the NLRB ordered an election at Amazon's Bessemer, Alabama warehouse to be held again after determining that the company had "essentially highjacked the process and gave a strong impression that it controlled the process."[26] NLRB ALJs have since found several violations stemming from the union drive at Amazon's Staten Island, New York warehouse, including Daequan Smith's unlawful termination.[27]

Amazon and Starbucks are not unique in committing a slew of unfair labor practices in their anti-union battles. Over the past few years, the NLRB has filed complaints against household names including Chipotle, Apple, SpaceX, and Trader Joe's.[28]

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23. Press Release, Bernie Sanders, Senate, Chairman Sanders Questions Howard Schultz in HELP Committee Hearing and Calls on Starbucks to End the Illegal Union Busting (Mar. 29, 2023), https://www.sanders.senate.gov/press-releases/prepared-remarks-chairman-sanders-questions-howard-schultz-in-help-committee-hearing-and-calls-on-starbucks-to-end-the-illegal-union-busting/ [https://perma.cc/VJ73-3WQ5].

24. Parker Purifoy, *Trump Labor Board Jeopardizes Starbucks Union's Litigation Path*, BLOOMBERG L. (Feb. 18, 2025, 5:05 a.m.) (on file with the *Columbia Journal of Law & Social Problems*), https://news.bloomberglaw.com/in-house-counsel/starbucks-union-losing-footing-as-trump-overhauls-labor-board?context=search&index=0.

25. *See* Parker Purifoy, *Amazon Illegally Cut Hours, Threatened Workers, NLRB Judge Says*, BLOOMBERG L.: DAILY LAB. REP. (Nov. 21, 2023) (on file with the *Columbia Journal of Law & Social Problems*), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/XCRV1QS0000000?bna_news_filter=daily-labor-report.

26. Amazon.com Servs., LLC, Case No. 10-RC-269250, slip op. at 14 (N.L.R.B. Reg'l Dir. Decision Nov. 29, 2021), https://apps.nlrb.gov/link/document.aspx/09031d458350f488 [https://perma.cc/N97M-K3CK]; *see also* Bodie, *Labor Relations*, *supra* note 21, at 191–92; Jay Greene, *Labor Board Calls for Revote at Amazon Warehouse in Alabama in Major Victory for Union*, WASH. POST (Nov. 29, 2021) (on file with the *Columbia Journal of Law & Social Problems*), https://www.washingtonpost.com/technology/2021/11/29/amazon-warehouse-union-revote/.

27. *See* Purifoy, *supra* note 25; Palmer, *supra* note 13; Khafagy, *supra* note 1.

28. *See* Patrick Whittle, *Chipotle Agrees to Pay After Closing Store that Sought Union*, ASSOCIATED PRESS (Mar. 27, 2023), https://apnews.com/article/chipotle-union-store-closure-settlement-lawsuit-af89f99249bd805fd714751bae040181 [https://perma.cc/QD5X-USXJ]; Tripp Mickle, *N.L.R.B. Issues Complaint Against Apple*, N.Y. TIMES (Oct. 4, 2022) (on file with the *Columbia Journal of Law & Social Problems*), https://www.nytimes.com/2022/10/04/business/apple-store-nlrb-ruling.html; Sarah Fortinsky, *National Labor Relations Board Issues Complaint Against SpaceX*, THE HILL (Jan. 3, 2024), https://thehill.com/business/4387940-national-labor-relations-board-issues-complaint-against-spacex/ [https://perma.cc/E8UW-8QAT]; Diti Kohli, *Trader Joe's Illegally Fired a Hadley Union Worker, New Ruling*

These corporations typically hire specialized law firms and consultants to carry out the campaign.[29] These firms toe the line of legality with tactics such as intense anti-union messaging, mandatory anti-union staff meetings (often called captive audience meetings), and detailed audits of unionizing activity.[30]

Many corporations and the law firms and consultants they hire include unfair labor practices in their anti-union campaigns.[31] This is largely because the NLRB does not have the power to assess penalties; it can only order make-whole remedies.[32] That is, the NLRA limits monetary remedies to what the affected employees would have earned in the absence of ULPs, which traditionally consists of back pay and lost benefits.[33] As a result, if directors buy

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Finds, BOS. GLOBE (Dec. 21, 2023) (on file with the *Columbia Journal of Law & Social Problems*), https://www.bostonglobe.com/2023/12/21/business/trader-joes-illegally-fired-hadley-union-worker-new-ruling-found/.

29. *See* Bodie, *Labor Relations*, *supra* note 21, at 190 (discussing Trader Joe's hiring Littler Mendelson); Palmer, *supra* note 13 (noting that Amazon spent $14 million on anti-union consultants in 2022 alone); Celine McNicholas et al., *Employers Spend More than $400 Million per Year on 'Union-Avoidance' Consultants to Bolster Their Union-Busting Efforts*, ECON. POL'Y INST. (Mar. 29, 2023), https://www.epi.org/publication/union-avoidance/ [https://perma.cc/FG2V-PCRK].

30. *See* John Logan, *The Labor-Busting Law Firms and Consultants that Keep Google, Amazon and Other Workplaces Union-Free*, THE CONVERSATION (Aug. 24, 2020), https://theconversation.com/the-labor-busting-law-firms-and-consultants-that-keep-google-amazon-and-other-workplaces-union-free-144254 [https://perma.cc/CAN6-EZ7W] (discussing the involvement of law firm Little Mendelson and IRI Consultants in Starbucks' and Google's ULP-filled anti-union campaigns); *see also* Celine McNicholas et al., *Employers Regularly Engage in Tactics to Suppress Unions*, ECON. POL'Y INST. (Mar. 28, 2023), https://www.epi.org/blog/employers-regularly-engage-in-tactics-to-suppress-unions-examples-at-starbucks-amazon-and-google-illustrate-employers-anti-union-playbook/ [https://perma.cc/ZY57-8RSA] [hereinafter McNicholas et al., *Employers*].

31. *See, e.g.*, McNicholas et al., *Employers*, *supra* note 30 (documenting illegal tactics used in recent high-profile anti-union campaigns by corporations and the law firms and consultants they hire); Dave Jamieson, *Inside Corporate America's Favorite 'Union Busting' Firm*, HUFFPOST (July 25, 2023), https://www.huffpost.com/entry/inside-corporate-americas-favorite-union-busting-firm_n_64b92176e4b08cd259dad4f2 [https://perma.cc/FA54-BW8Y] (discussing an anti-union consultant who committed ULPs by "carrying out an unlawful interrogation" and pressuring workers with illegal promises).

32. *See* Celine McNicholas et al., *Civil Monetary Penalties for Labor Violations are Woefully Insufficient to Protect Workers*, ECON. POL'Y INST. (July 15, 2021), https://www.epi.org/blog/civil-monetary-penalties-for-labor-violations-are-woefully-insufficient-to-protect-workers/ [https://perma.cc/SDM4-QM4Z] [hereinafter McNicholas et al., *Civil Monetary Penalties*] ("Because workers' rights . . . violations result in such low financial penalties, these fines function as the cost of doing business rather than as deterrents."); Republic Steel Corp. v. NLRB, 311 U.S. 7, 11 (1940) (holding that the NLRB can only order make-whole remedies).

33. *See, e.g.*, McCann Steel Co. v. NLRB, 570 F.2d 652, 656 (6th Cir. 1978) (discussing back pay calculations in the context of the purpose of back pay awards, which is to restore the status quo had the employee not been fired); NLRB v. Coca-Cola Bottling Co. of Buffalo,

into the wisdom that unions are best avoided at nearly any cost, then they will believe that the minimal cost of committing the unfair labor practices will be dwarfed by the benefit of avoiding unionization.[34] Because American labor law lacks enforcement and deterrence mechanisms for violators, managers can simply choose to commit ULPs—or allow them to persist, or hire law or consulting firms that commit them on the corporation's behalf—with minimal repercussions. Unlike other illegal activities that come with the threat of penalties and sanctions, ULPs do not provide wealthy corporations strong incentive to comply with the NLRA.

B. THE DUTY OF GOOD FAITH

Under Delaware law,[35] corporate directors owe fiduciary duties to the corporation's shareholders.[36] Traditionally, directors' fiduciary duties were divided into the duty of care and the duty of loyalty.[37] Within the last two decades, though, Delaware courts have recognized the duty of good faith in the corporate context.[38] A major principle under the duty of good faith is that directors may not knowingly cause the corporation to break the law, even if they reasonably believe that doing so may maximize shareholder value.[39] Statutes in nearly every state have long placed similar

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191 F.3d 316, 324 (2d Cir. 1999) (enforcing the NLRB's order for the employer to pay the union's pension fund).

34. *See* McNicholas et al., *Civil Monetary Penalties*, *supra* note 32.

35. This Note focuses on Delaware because of its outsized importance in corporate law. More than sixty percent of Fortune 500 companies are incorporated in the state, in large part due to the corporate expertise of its Court of Chancery and its predictable case law. Charlotte Morabito, *Here's Why More Than 60% of Fortune 500 Companies are Incorporated in Delaware*, CNBC (Mar. 13, 2023), https://www.cnbc.com/2023/03/13/why-more-than-60percent-of-fortune-500-companies-incorporated-in-delaware.html [https://perma.cc/H54A-ER4U].

36. *See, e.g.*, Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1, 3 (2006) (explaining directors' fiduciary duties).

37. *See id.*

38. *See id.* at 3 n.1. After recognizing the duty of good faith as a separate fiduciary duty, the Delaware Supreme Court then placed the duty of good faith under the umbrella of the duty of loyalty in 2006. *See* Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006).

39. *See* Eisenberg, *supra* note 36, at 31. Moreover, "a deliberate attempt to undermine the regulatory authority of a government agency, although short of an actual violation of law, constitute[s] a lack of good faith that preclude[s] indemnification." *Id.*; *see also In re* Landmark Land Co. of Carolina, Inc., 76 F.3d 553, 565 (4th Cir. 1996) ("[W]e find that a deliberate attempt to undermine the regulatory authority of a government agency cannot constitute good faith conduct, even if such actions benefit the corporation.").

requirements on corporate fiduciaries.[40] Courts have also implicitly recognized the duty of good faith for some time, such as by developing and applying the deferential business judgment rule[41] to directors who act illegally.[42] It is only relatively recently, though, that Delaware courts began to explicitly recognize and develop the duty.[43]

In 1985 the Delaware Supreme Court significantly weakened the protection afforded by the business judgment rule in *Smith v. Van Gorkom*, in which a class of shareholders sued for rescission of a cash-out merger between Trans Union and New T Company.[44] Justice Horsey wrote that the "fulfillment of the fiduciary function requires more than the mere absence of bad faith or fraud."[45] The directors of Trans Union were held liable for gross negligence in violation of the duty of care, and the court clarified that failing to make an informed business decision breaches the duty of care rather than the duty of loyalty.[46] This decision "shook the foundations of the corporate world,"[47] and within months the Delaware legislature passed a statute, section 102(b)(7) of Delaware's General Corporation law, allowing corporations to

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40. *See* Eisenberg, *supra* note 36, at 4.

41. The business judgment rule presumes that directors "acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. The burden is on . . . the party challenging the directors' decision[ ] to rebut this presumption." *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 124 (Del. Ch. 2009) (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)). If the party challenging the directors' decision cannot show that the directors were self-interested or disloyal to the corporation, then a factfinder will not second-guess the directors' judgment. *See Citigroup*, 964 A.2d at 124.

42. *See* Eisenberg, *supra* note 36, at 4 ("The duty of good faith also has long been implicitly recognized in case law—for example, in the formulation of the business judgment rule, and in fiduciary obligations that can only be explained by that duty, such as the duty not to knowingly cause the corporation to violate the law . . . ."); Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2019–20 (2019) [hereinafter Pollman, *Corporate Oversight*] ("[A] fiduciary may not choose to manage an entity in an illegal fashion, even if the fiduciary believes that the illegal activity will result in profits for the entity." (quoting Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc., 854 A.2d 121, 131 (Del. Ch. 2004))); *see also* Miller v. AT&T, 507 F.2d 759, 762 (3d Cir. 1974) (holding that the directors breached their fiduciary duty by engaging in illegal activity); Roth v. Robertson, 118 N.Y.S. 351, 354 (N.Y. Sup. Ct. 1909) (same).

43. *See* Eisenberg, *supra* note 36, at 4.

44. *See* 488 A.2d 858 (Del. 1985).

45. *Id.* at 872.

46. *See id.* at 872–73; *see also* Sarah Helene Duggin & Stephen M. Goldman, *Restoring Trust in Corporate Directors: The* Disney *Standard and the "New" Good Faith*, 56 AM. U. L. REV. 211, 230–31 (2006) (discussing the "judicial earthquake" of *Smith v. Van Gorkom* as the start of the line of cases toward *Disney V* that define the duty of good faith).

47. Duggin & Goldman, *supra* note 46, at 231.

shield directors from personal liability for violating the duty of care.[48] Under 102(b)(7), however, there can be no exculpation for a breach of the duty of loyalty, intentional misconduct or knowingly violating the law, unlawful distributions of corporate assets, or an improper personal benefit (traditionally understood as a duty of loyalty breach).[49] Subsection (ii) further forbids exculpation of directors and officers for "acts or omissions not in good faith," although the concept of "good faith" was not clearly defined in corporate law at the time of enactment.[50]

Decided in 1996, *Caremark*[51] was the first major step toward a modern understanding of the contours of good faith in Delaware corporate law.[52] *Caremark* does not explicitly deal with good faith as a separate fiduciary duty, but instead delineates a duty of oversight—itself not a separate fiduciary duty.[53] Crucially, *Caremark* clarified that some conduct that is not necessarily a traditional violation of the duty of loyalty—specifically, oversight failure—may still be so egregious that it crosses over from care to good faith, and thus corporations cannot exculpate directors for it.[54]

Delaware courts further defined the doctrine of good faith as major corporate scandals during the first years of the millennium (e.g., Enron, WorldCom, Adelphia) amplified calls for enhanced

48. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2024); *see also* Duggin & Goldman, *supra* note 46, at 231–32 ("Within months, both chambers of the General Assembly passed, and the governor signed, legislation amending Delaware's corporate code in an effort to undo the damage wrought by what a dissenting justice called the *Van Gorkom* majority's 'comedy of errors.'" (quoting *Smith*, 488 A.2d at 894 (McNeilly, J., dissenting))).

49. *See* Duggin & Goldman, *supra* note 46, at 232–33. Shortly after the statute was enacted, the Delaware Chancery Court explained that all its subparts should be understood as illustrations of disloyal conduct. *See* Pollman, *Corporate Oversight*, *supra* note 42, at 2026 (citing Guttman v. Huang, 823 A.2d 492, 506 n.34 (Del. Ch. 2003)).

50. *See* Duggin & Goldman, *supra* note 46, at 233 ("The exception 'for acts or omissions not in good faith' set forth in the first part of subsection (ii), however, is less [straightforward], because the concept of 'good faith' has always been somewhat amorphous in corporate law." (quoting DEL. CODE ANN. tit. 8, § 102(b)(7) (2024))).

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

52. *See, e.g.*, Duggin & Goldman, *supra* note 46, at 236 (introducing *Caremark* as the first significant development to "the rise of the new good faith"); Hillary A. Sale, *Monitoring Caremark's Good Faith*, 32 DEL. J. CORP. L. 719, 720–21 (2007) ("*Caremark* is a key opinion, laying structural groundwork to bridge the gap between the fiduciary duty of care and acts that, although not necessarily financially conflicted, exceed the bounds of good faith or the appropriate conduct of a faithful and loyal fiduciary.").

53. *See* Sale, *supra* note 52, at 721.

54. *See id.* at 724.

rules and enforcement of corporate good faith and oversight.[55] In 2006, the *Disney V* court clarified the modern understanding of good faith in corporate law.[56] The Delaware Supreme Court quoted the Chancellor's definition:

> The good faith required of a corporate fiduciary includes not simply the duties of care and loyalty . . . but all action required by a true faithfulness and devotion to the interests of the corporation and its shareholders. A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating conscious disregard for his duties.[57]

This explicitly non-exhaustive list indicates that a corporate fiduciary's intentional failure to act or conscious disregard for one's duties would constitute a violation of the duty of good faith.

Later that year, *Stone v. Ritter* further cemented this understanding of good faith and specifically applied it to *Caremark*

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55. *See* Duggin & Goldman, *supra* note 46, at 233–34; Sale, *supra* note 52, at 720. Enron and WorldCom were the sites of high-profile scandals in 2001 and 2002, respectively; the companies engaged in widespread fraudulent accounting to deceive investors. *See* Richard A. Oppel Jr. & Kurt Eichenwald, *Enron's Collapse: The Overview; Arthur Andersen Fires an Executive for Enron Orders*, N.Y. TIMES (Jan. 16, 2002) (on file with the *Columbia Journal of Law & Social Problems*), https://www.nytimes.com/2002/01/16/business/enron-s-collapse-overview-arthur-andersen-fires-executive-for-enron-orders.html; Kurt Eichenwald & Simon Romero, *Turmoil at WorldCom: The Decision Making; The Latest Corporate Scandal is Sudden, Vast and Simple*, N.Y. TIMES (June 27, 2002) (on file with the *Columbia Journal of Law & Social Problems*), https://www.nytimes.com/2002/06/27/business/turmoil-worldcom-decision-making-latest-corporate-scandal-sudden-vast-simple.html. In the Adelphia scandal, the founding and controlling Rigas family looted corporate assets to the detriment of shareholders. *See* Peter Grant & Deborah Solomon, *Adelphia to Pay $715 Million In 3-Way Settlement*, WALL ST. J. (Apr. 26, 2005), (on file with the *Columbia Journal of Law & Social Problems*), https://www.wsj.com/articles/SB111445555592816193. The family gave up roughly $1.5 billion in assets and the corporation paid $715 million to shareholders as part of the settlement. *See id.*

56. In *Disney V*, the Supreme Court of Delaware determined that directors did not violate their fiduciary duties, including good faith, in approving the president's employment agreement, which resulted in an approximately $130 million severance payment after he was fired without cause just 14 months after taking the position. *See generally In re* Walt Disney Co. Derivative Litig., 906 A.2d 27 (Del. 2006).

57. *Disney V*, 906 A.2d at 67 (quoting *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 755 (Del. Ch. 2005)).

claims regarding oversight failures.[58] The *Stone* court specified that the duty of good faith is actually part of the duty of loyalty rather than a separate, third fiduciary duty.[59] By doing so, the court extended duty of loyalty violations beyond conflict of interest situations to include "[w]here directors fail to act in the face of a known duty to act."[60]

C. *CAREMARK* CLAIMS

If a director knowingly and intentionally causes the corporation to commit unfair labor practices, just as if the director knowingly and intentionally caused the corporation to violate any law, then they would breach the duty of good faith and therefore face liability. Even with a section 220 action to review internal documents prior to filing,[61] however, pleading intentionality may be unlikely, since major corporate directors and anti-union law firms and consultants are sophisticated enough not to put into writing their knowledge of unlawful activity. If a claim survives the pleading stage, discovery may not turn up sufficient evidence to prove intentionality for the same reason.[62]

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58. *See* Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362 (Del. 2006).

59. There remains debate over whether the duty of good faith should properly be understood as a separate, third fiduciary duty or as subsumed into the duty of loyalty. *See* Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 752 (2019) [hereinafter Pollman, *Corporate Disobedience*] (summarizing prominent arguments in this debate). The classification of the duty of good faith is outside the scope of this Note. Regardless, section 102(b)(7) of Delaware's General Corporation law explicitly forbids director exculpation for both breaches of the duty of loyalty and "acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law." DEL. CODE ANN. tit. 8, § 102(b)(7) (2024); *see also supra* text accompanying note 50.

60. *Stone*, 911 A.2d at 370.

61. Delaware General Corporation Law (DGCL) Section 220 gives shareholders a qualified right to inspect corporate books and records. *See* Roy Shapira, *Corporate Law, Retooled: How Books and Records Revamped Judicial Oversight*, 42 CARDOZO L. REV. 1949, 1952 (2021); DEL. CODE ANN. tit. 8, § 220 (2010). In March 2025, the Delaware legislature amended the DGCL to "restrict[ ] what stockholders can request in a 220 demand, potentially excluding emails, text messages, or informal board communications, which have become central to derivative litigation." Eric Talley et al., *Delaware Law's Biggest Overhaul in Half a Century: A Bold Reform—or the Beginning of an Unraveling?*, CLS BLUE SKY BLOG (Feb. 18, 2025) https://clsbluesky.law.columbia.edu/2025/02/18/delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling/ [https://perma.cc/XZY4-SUNP]; *see also* 85 Del. Laws ch. 6 (2025).

62. Though unlikely in most cases, it may be possible to prove intent by examining internal documents produced through discovery or Section 220. For example, one could imagine discovery revealing evidence pointing to intentionality at Tesla, where director Elon Musk publicly posted an anti-union tweet during a 2018 union drive. *Cf.* Tesla, Inc. v. NLRB, 120 F.4th 433 (5th Cir. 2024) (despite holding that the NLRB could not order the

But the landmark *Caremark* case expanded director liability to some situations in which corporations break the law regardless of directors' intent to do so.[63] In *Caremark*, a derivative suit against a corporation that entered into illegal contracts, Chancellor Allen identified a duty for directors to monitor corporate operations.[64] Since *Caremark*, Delaware courts have developed a body of law clarifying that the duty of good faith includes both the longstanding requirement of legal obedience and the new duty of oversight.[65]

In *Stone v. Ritter*, a case in which shareholders charged directors with a failure to implement a reasonable compliance system under the Bank Secrecy Act,[66] the Delaware Supreme Court clarified the two sets of conditions necessary to demonstrate a failure of oversight: "(a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."[67] For these conditions to constitute a breach of fiduciary duty, and therefore for the court to impose liability, plaintiffs must show "that the directors knew that they were not discharging their fiduciary obligations."[68] A claim for the breach of fiduciary duty based on oversight failures is often called a *Caremark* claim, and the two sets of conditions from *Stone*—failing to implement any reporting system or failing to monitor operations—are prong one and prong two of a *Caremark* claim, respectively.[69]

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tweet be deleted as a ULP remedy, positing that there may well be evidence of internal calls for further ULPs by Tesla directors).

63. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996) (holding that directors violated their oversight duty without any affirmative illegal action).

64. *See id.* at 967.

65. *See* Pollman, *Corporate Oversight*, *supra* note 42, at 2031–32.

66. *See* 911 A.2d 362 (Del. 2006).

67. *Id.* at 370 (emphasis in original).

68. *Id.*

69. *See, e.g.*, *In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343, 359 (Del. Ch. 2023) (explaining that *Stone v. Ritter* characterized a duty of oversight complaint as "either a prong-one *Caremark* claim or a prong-two *Caremark* claim"). While oversight responsibilities were previously understood to be limited to directors, courts have recently recognized an oversight duty for officers as well. *See id.* at 362. Proving indifference to workplace red flags, or even an intention to ignore or encourage illegal activity, may be easier for officers than for directors in many cases because officers are significantly more involved in day-to-day management and oversight. *See id.* at 360. Where directors are not also liable, however, shareholders will not be able to show that demand was futile and the

Despite expanding liability in some instances, the *Caremark* standard is designed to be difficult for plaintiffs to win.[70] Courts did not want *Caremark* claims to become a route for disgruntled shareholders around the business judgment rule, as a means of holding directors liable for poor business decisions.[71] But while *Caremark* liability has largely been restricted to extreme situations,[72] a line of cases since 2019 may indicate some flexibility in the highly plaintiff-unfriendly standard.

The case law for *Caremark* claims has developed primarily through settlement opinions and motions to dismiss under Rule 12(b)(6) and the Rule 23.1 demand requirement; few cases have survived these motions.[73] Today, a successful *Caremark* claim requires, in effect, a showing of utter failure or disobedience (or something quite close) on the part of the board.[74] Successful pleading of the second *Caremark* prong—failure to monitor—must include a plausible claim that the fiduciaries participated in illegal activity or an improper handling of legal risk.[75] Business risk is given the protection of the business judgment rule, while *Caremark* liability is only extended to cases involving legal violations.[76] In a selection of prong-two *Caremark* claims that survived a motion to dismiss, the pleadings went beyond a showing that the directors ignored red flags (information that should have made management aware of legal violations[77]); they suggested that there was some element of participation or complicity in violation of the law.[78] For example, in *In re Massey Energy Co.*, shareholders survived a motion to dismiss against the directors of a coal mining

derivative suit will likely be dismissed. *See id.* at 367; *see also* DEL. R. CH. CT. 23.1 (demand futility rule).

70. *See* H. Justin Pace & Lawrence J. Trautman, *Mission Critical:* Caremark*, Blue Bell, and Director Responsibility for Cybersecurity Governance*, 2022 WIS. L. REV. 887, 905 (2022).

71. *See id.*

72. *See* Pollman, *Corporate Oversight*, *supra* note 42, at 2031–32.

73. *See id.* at 2031; Angela N. Aneiros & Karen E. Woody, Caremark*'s Butterfly Effect*, 72 AM. U. L. REV. 719, 741 (2023).

74. *See* Pollman, *Corporate Oversight*, *supra* note 42, at 2031.

75. *See id.* at 2031, 2038.

76. *See id.* at 2032. Business risk refers to the risk of harm to corporations through their business decisions, while legal risk refers to the risk of harm resulting from legal noncompliance. *See id.* at 2031–32.

77. *See* Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 364 (Del. 2006).

78. *See* Pollman, *Corporate Oversight*, *supra* note 42, at 2036–41.

company after an explosion killed 29 miners, claiming that the board oversaw a pattern of flouting mine safety laws.[79]

A series of decisions for plaintiffs in 2019 signaled a potential shift regarding the *Caremark* and *Stone* standards, which were previously nearly impossible to overcome. In *Marchand v. Barnhill*, a shareholder claimed that the board of an ice cream company failed to implement food safety monitoring protocols, resulting in a listeria outbreak.[80] The Delaware Supreme Court, in a rare move, denied the defendants' motion to dismiss, writing that the shareholder's pleading that directors made no effort to be aware of compliance issues supported an inference that the board did not meet the good faith requirement of *Caremark*.[81] The opinion expanded the *Caremark* standard by noting that specific acts of bad faith are not necessary for a *Caremark* claim.[82] Rather, the mere lack of good faith efforts constitutes bad faith—no complicity needed.[83]

The plaintiffs' relative success was followed by a string of *Caremark* claims that also survived motions to dismiss, including three prong-two (failure to monitor) claims.[84] This potential shift may point to future denials of motions to dismiss[85]—although each of the three cases involved egregious facts.[86] These include fatal crashes of Boeing's 737 Max after the company allegedly concealed serious issues with its stabilization system from the Federal Aviation Administration and a drug company distributing allegedly contaminated syringes to immunocompromised cancer

79. No. 5430-VCS, 2011 WL 2176479 (Del. Ch. May 31, 2011). This was not the first time that the company's miners had been killed or seriously injured. *See id.* at *1.

80. *See* 212 A.3d 805, 807 (Del. 2019).

81. *See id.* at 822.

82. *See id.* at 823.

83. *See id.* at 822.

84. *See* Aneiros & Woody, *supra* note 73, at 741–63 (summarizing cases successfully stating claims under *Caremark*).

85. *See id.* at 764. With the corporate world perceiving a possible increase in risk, there may already be an impact on the director and officer (D&O) insurance market. *See id.* A survey of D&O insurance underwriters found that 85% felt risk was rising in 2022. *See id.* at 771.

86. *See In re* Clovis Oncology, Inc. Derivative Litig., No. 0222-JRS, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019) (a biopharmaceutical company allegedly used inflated clinical trial statistics for a drug in an application for FDA approval); Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. 0816-SG, 2020 WL 5028065 (Del. Ch. Aug. 24, 2020) (a company's pre-filled, single-dose syringes for cancer patients were allegedly contaminated through intentional cost-cutting measures); *In re* Boeing Co. Derivative Litig., No. 0907-MTZ, 2021 WL 4059934 (Del. Ch. Sept. 7, 2021) (Boeing allegedly cut costs on its stabilization system for the 737 Max and concealed the issues with the plane from the FAA, after which the 737 Max had two fatal crashes in less than a year).

patients.[87] While the impetus for these claims involved severe regulatory penalties and newsworthy consumer harm, the suits may indicate a "possible shift in the once-impenetrable standard required for plaintiffs to overcome a motion to dismiss" under *Caremark* that could apply to less extreme cases.[88] Specifically, because *Marchand* did not require that a *Caremark* claim allege affirmative acts of bad faith,[89] it seems to have created a more plaintiff-friendly standard.

While the *Marchand* court did not look for affirmative bad-faith action, it was more willing to find a well-pleaded *Caremark* claim because the alleged failure to monitor was for a "mission critical" compliance risk directly at odds with the corporation's core business.[90] Although *Marchand* was a prong-one (failure to implement reporting) *Caremark* claim, courts have applied the mission-critical standard in rulings on prong-two claims as well.[91] In *McDonald's*, however, the Chancery Court denied a motion to dismiss for a prong-two *Caremark* claim that fiduciaries "permitted a toxic culture to develop at the Company that turned a blind eye to sexual harassment and misconduct."[92] Such violations are not mission critical to McDonald's' core business; a mission-critical risk for McDonald's might involve food safety, for example.[93] In fact, the decision does not reference the mission-critical standard at all.[94] Despite the discussion of mission-critical risks in *Marchand* and subsequent cases, *McDonald's* demonstrates that illegal activity in question does not need to touch the company's core business for a *Caremark* claim to survive a motion to dismiss.

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87. *See Boeing*, 2021 WL 4059934, at *12; *Teamsters*, 2020 WL 5028065, at **1–2.

88. Aneiros & Woody, *supra* note 73, at 741.

89. *See* Marchand v. Barnhill, 212 A.3d 805, 822 (Del. 2019).

90. *Id.* at 824 ("Although Caremark may not require as much as some commentators wish, it does require that a board make a good faith effort to put in place a reasonable system of monitoring and reporting about the corporation's central compliance risks. In Blue Bell's case, food safety was essential and mission critical." (internal citations omitted)).

91. *See, e.g.*, *Teamsters*, 2020 WL 5028065, at **17–18 ("[F]louting laws meant to ensure the safety and purity of drugs destined for patients suffering from cancer is directly inimical to the central purpose of ABC's business."); *Clovis Oncology*, 2019 WL 4850188, at **13–14 ("[Plaintiffs] have well-pled that the Board consciously ignored red flags that revealed a mission critical failure to comply with the RECIST protocol and associated FDA regulations.").

92. *In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343, 377 (Del. Ch. 2023).

93. *Cf. Marchand*, 212 A.3d. at 824 ("In Blue Bell's case, food safety was essential and mission critical.").

94. *See McDonald's*, 289 A.3d at 376–82.

Although a *Caremark* claim may remain the "most difficult theory in corporation law upon which a plaintiff might hope to win a judgment,"[95] the line of cases following *Marchand*—particularly *McDonald's*—may offer a glimmer of hope to prospective plaintiffs. In short, while shareholders traditionally brought *Caremark* claims when corporations' oversight lapses led to egregious, disastrous outcomes—and even then rarely survived motions to dismiss—the previously unrelenting standard may be becoming more forgiving.

II. THEORY OF A *CAREMARK* CLAIM FOR REPEATED UNFAIR LABOR PRACTICES

This Part will outline how a shareholder may bring a *Caremark* claim against directors of a corporation that has committed repeated unfair labor practices. First, Part II.A will show that, like other legal violations, deliberate unfair labor practices constitute a breach of the duty of good faith. Part II.B will then walk through the practical contours of a *Caremark* claim, demonstrating how a pattern of ALJ determinations of unfair labor practices would be a red flag that management consciously ignores when the corporation commits further ULPs, thereby demonstrating a breach of the duty of good faith.

A. UNFAIR LABOR PRACTICES AS BREACHES OF THE DUTY OF GOOD FAITH

A director who consciously causes a corporation to commit unfair labor practices has, as for any other legal violation, breached the fiduciary duty of good faith. A failure to act in good faith includes when the fiduciary intends to violate the law.[96] Even if a director believes the illegal action will be profitable for the corporation, they are still in violation of their fiduciary duties.[97]

Long before Delaware courts fleshed out the duty of good faith through *Caremark* and its progeny, courts recognized that directors knowingly causing a corporation to violate the law

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95. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996).
96. *See In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 67 (Del. 2006).
97. *See* Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc., 854 A.2d 121, 131 (Del. Ch. 2004).

constituted a breach of fiduciary duty.[98] This recognition stemmed from the fact that the corporate charters do not allow illegal pursuit of profit, and fiduciaries have a duty to act loyally to the charter.[99]

Prior to *Caremark*, some law and economics scholars argued that management does not have a general obligation to follow the law if it believes lawbreaking would be profitable because the penalties for breaking the law should be understood as the "price" of the illegal action.[100] This "law-as-price" argument has been vocally countered by a number of scholars, who stress the normative power of law and argue that one of management's most significant core duties is to follow the law.[101] For instance, former Chief Justice and Chancellor of Delaware Leo E. Strine, Jr., Professor Lawrence A. Hamermesh, and Delaware lawyers R. Franklin Balotti and Jeffrey M. Gorris, firmly wrote: "American corporate law embeds law compliance within the very mission of the corporation. Loyalty to the corporation's obligation as a citizen to attempt in good faith to abide by the law is not incidental to a director's duties, it is fundamental."[102]

Since *Disney* and *Stone*, Delaware courts view management's intentional lawbreaking or failure to act when they know they are supposed to as a breach of their fiduciary duty of good faith.[103]

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98. *See* Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 652 (2010) [hereinafter Strine et al., *Loyalty's Core Demand*].

99. *See id.*

100. This argument set aside laws concerning acts characterized as *malum in se*. *See* Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1168 n.36 (1982); *see also* Pollman, *Corporate Disobedience*, *supra* note 59, at 725–26 (summarizing Easterbrook and Fischel's argument).

101. *See* Strine et al., *Loyalty's Core Demand*, *supra* note 98, at 652 n.71; *see also* Cynthia A. Williams, *Corporate Compliance with the Laws in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1385 (1998) ("Law, in a democracy, is more than a price tag. It is a command in which we participate, a limit on unacceptable behavior, and an architecture for social, political, and economic interaction."); Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1201 (2009) (arguing that economism "devalues any conception of law as expressing norms or public purposes"); Pollman, *Corporate Disobedience*, *supra* note 59, at 726–27 (summarizing the above arguments).

102. Strine et al., *Loyalty's Core Demand*, *supra* note 98, at 652 n.71.

103. *See In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 67 (Del. 2006) ("A failure to act in good faith may be shown . . . where the fiduciary acts with the intent to violate applicable positive law[ ] or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties."); Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 369 (Del. 2006) (citing approvingly to *Disney* for examples of "conduct that would establish a failure to act in good faith" and clarifying that they are fully consistent with *Caremark*); *see also* Desimone v. Barrows, 924

Currently, any decision by corporate fiduciaries to cause the corporation to act illegally, or fail to act when there are red flags that warn of illegal activity, will violate the duty of good faith and automatically result in liability.[104] This automatic liability is still imposed even if the illegal activity was profitable for the corporation.[105]

Corporations often engage in illegal union-busting techniques because labor law enforcement does not result in heavy financial penalties.[106] Therefore, management that engages in illegal union busting often does a cost-benefit analysis that leads them to believe that committing unfair labor practices will be more profitable than simply allowing the unionization drive to run its course untouched, or limiting the corporation to legal methods of dissuading unionization.[107] Crucially, because directors cannot escape automatic liability for intentionally causing a corporation to break the law if the act is profitable, directors who intentionally commit unfair labor practices, or fail to curtail them despite red flags, would be in breach of the duty of good faith and be liable.

Successful *Caremark* claims typically involve significant financial losses stemming from underlying illegal activity,

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A.2d 908, 934 (Del. Ch. 2007) ("Delaware corporate law has long been clear . . . that it is utterly inconsistent with one's duty of fidelity to the corporation to consciously cause the corporation to act unlawfully.");.

104. *See* Stephen M. Bainbridge et al., *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 594 (2008).

105. *See Desimone*, 924 A.2d at 934–35 ("[I]t is utterly inconsistent with one's duty of fidelity to the corporation to consciously cause the corporation to act unlawfully. The knowing use of illegal means to pursue profit for the corporation is director misconduct."); Bainbridge et al., *supra* note 104, at 594.

106. *See* GORDON LAFER & LOLA LOUSTAUNAU, ECON. POL'Y INST., FEAR AT WORK: AN INSIDE ACCOUNT OF HOW EMPLOYERS THREATEN, INTIMIDATE, AND HARASS WORKERS TO STOP THEM FROM EXERCISING THEIR RIGHT TO COLLECTIVE BARGAINING 5 (2020), https://www.epi.org/publication/fear-at-work-how-employers-scare-workers-out-of-unionizing/ [https://perma.cc/VZ7F-EXYW] ("[I]n NLRB elections, even employers who willfully and repeatedly break the law by threatening employees, bribing employees, destroying union literature, firing union supporters, or lying to federal officials in an effort to cover up these deeds can never be fined a single cent, have any license or other commercial privilege revoked, or serve a day in prison.").

107. *See, e.g.*, McNicholas et al., *Civil Monetary Penalties*, *supra* note 32; CELINE MCNICHOLAS ET AL., ECON. POL'Y INST., UNLAWFUL: U.S. EMPLOYERS ARE CHARGED WITH VIOLATING FEDERAL LAW IN 41.5% OF ALL UNION ELECTION CAMPAIGNS 2 (Dec. 11, 2019), https://files.epi.org/pdf/179315.pdf [https://perma.cc/46UX-4N3F] [hereinafter MCNICHOLAS ET AL., UNLAWFUL]; Kristen Talman, *The Cost-Benefit Analysis of Pushing Back on Unionization*, CFO BREW (July 22, 2022), https://www.cfobrew.com/stories/07-22-cost-of-unionization [https://perma.cc/99H8-7SWC].

generally in the form of criminal and civil penalties.[108] For example, Boeing shareholders brought their claims after the company incurred billions of dollars in penalties by consenting to the filing of a criminal information charging Boeing with conspiracy to defraud the United States, on top of $20 billion in non-litigation costs and over $2.5 billion in litigation-related expenses.[109] Because there is automatic liability for directors who act illegally or fail to act when they know they have a duty to do so, however, such financial loss is unnecessary for a successful duty of good faith claim. It is likely that *Caremark* claims have only been made when the corporation—and thus its shareholders—suffered great financial loss because plaintiffs want recovery to exceed their legal fees.[110] Even in cases with significant loss of shareholder value, and thus large recovery, the primary beneficiary is typically the plaintiffs' lawyers.[111] If the corporation suffered little loss from the breach, and certainly if it profited, it is unlikely that a plaintiff without funds to spare would bring a duty of good faith claim. The reason plaintiffs have not brought successful duty of good faith and *Caremark* claims when corporations have not suffered financial loss is not that these claims are impossible; rather, it may simply be that the prohibitive cost of litigation deters prospective plaintiffs. Because of this reality, duty of good faith or *Caremark* claims over unfair labor practices (which are generally not accompanied by significant financial losses) would have to come from a shareholder who is genuinely concerned about the welfare of a corporation's workers or who believes that it would be profitable in the long term to avoid breaking labor law.[112]

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108. *See, e.g.*, *In re* Clovis Oncology, Inc. Derivative Litig., No. 0222-JRS, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019); Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. 0816-SG, 2020 WL 5028065 (Del. Ch. Aug. 24, 2020); *In re* Boeing Co. Derivative Litig., No. 0907-MTZ, 2021 WL 4059934 (Del. Ch. Sept. 7, 2021).

109. *See Boeing*, 2021 WL 4059934, at *20 (Del. Ch. Sept. 7, 2021).

110. *See* Bainbridge et al., *supra* note 104, at 593 ("Shareholder lawsuits alleging that directors violated the purported duty to act lawfully will be brought as derivative actions. The real party in interest in derivative litigation is the plaintiff's attorney, not the nominal shareholder-plaintiff.").

111. *See id.* ("In most cases, the bulk of any monetary benefits go to the plaintiffs' lawyers rather than the corporation or its shareholders.").

112. For discussion of the rise in activist investors concerned with environmental, social, and governance (ESG) issues and employee wellbeing and their potential willingness to bring *Caremark* claims over ULPs, see *infra* Part III.

B. BRINGING A *CAREMARK* CLAIM FOR REPEATED UNFAIR LABOR PRACTICES

Directors are liable for a breach of fiduciary duty if they intentionally cause the corporation to commit an unfair labor practice.[113] Prior to pleading, a plaintiff could use a section 220 action to inspect corporate records[114] to elicit evidence of management intentionally committing unfair labor practices. If the claim survives a motion to dismiss, the plaintiff can use traditional tools of discovery to uncover this evidence, too. For example, corporate management may document its deployment of a robust anti-union strategy that it knows will contain ULPs.[115] Records of corporations hiring aggressive law firms or labor spy agencies[116] known to cross legal lines for the express purpose of union busting[117] may also be evidence of intentionality. Generally, though, pleading and proving intentional lawbreaking will be

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113. *See supra* Part II.A. Some investors propose that unionized companies are more productive, have better health and safety, experience less turnover, and do not suffer the reputational risk of anti-union activity. *See* TRILLIUM ASSET MGMT., THE INVESTOR CASE FOR SUPPORTING WORKER ORGANIZING RIGHTS 2 (2022), https://www.trilliuminvest.com/whitepapers/the-investor-case-for-supporting-worker-organizing-rights [https://perma.cc/8N4V-46XV] [hereinafter TRILLIUM ASSET MGMT., SUPPORTING WORKER ORGANIZING].

114. *See* DEL. CODE ANN. tit. 8, § 220 (2010).

115. A robust anti-union strategy requires many levels of coordination across a business, which would be difficult to achieve without documentation. *See* Amary Wiggin, *Anatomy of a Union-Busting Campaign*, EMERGENCY WORKPLACE ORGANIZING COMM. (July 30, 2024), https://workerorganizing.org/anatomy-of-a-union-busting-campaign-8748/ [https://perma.cc/5QY7-98BF] (highlighting seven typical union-busting strategies that involve multiple levels of management). For example, Starbucks demonstrated intricate coordination when "after learning about the [Buffalo] organizing effort, [it] immediately set its vigorous antiunion campaign in motion, employing an expansive array of illegal tactics such as raising wages, promising benefits, bringing in a cadre of managers to monitor employees and discourage union activity, closing stores with active organizing drives, and threatening employees—culminating in the discharge of seven union activists at five different stores over the course of six weeks." Press Release, NLRB, NLRB Region 3-Buffalo Files in Federal Court Seeking Nationwide Cease and Desist Order Against Starbucks, Reinstatement for Seven Workers, and a Bargaining Order (June 21, 2022), https://www.nlrb.gov/news-outreach/region-03-buffalo/nlrb-region-3-buffalo-files-in-federal-court-seeking-nationwide [https://perma.cc/2DLS-B3NY].

116. Corporations often hire intelligence experts or contract with corporate intelligence firms such as Pinkerton to spy on workers and discourage unionization. *See* Meagan Day, *Corporations Like Amazon Hire Union-Busting Labor Spies All the Time*, JACOBIN (Sept. 2, 2020), https://jacobin.com/2020/09/amazon-jeff-bezos-union-busting-surveillance [https://perma.cc/KAK9-GMHX].

117. *See* John Logan, *Corporate Union Busting in Plain Sight*, ECON. POL'Y INST. (Jan. 8, 2025), https://www.epi.org/publication/corporate-union-busting/ [https://perma.cc/NLU6-MZCN] (documenting law firm Littler Mendelson's extensive work on the Starbucks union-busting campaign, which has included hundreds of ULPs).

difficult, as sophisticated corporations are unlikely to record details of intentional lawbreaking.[118]

Because pleading and proving intentionality would be difficult or impossible in most cases, *Caremark* claims are a more useful method for bringing suits alleging breach of good faith for repeated unfair labor practices. Under the first prong, a successful plaintiff must show that the board implemented no oversight system at all—that is, they did not supervise managers' approach to union drives or the company's union avoidance strategies.[119] Under the second prong, a successful plaintiff must show that there was a "red flag"—that directors knew of evidence of illegal union-busting actions by the corporation—and consciously disregarded their duty to correct that misconduct.[120]

It is unlikely that a *Caremark* claim for repeated unfair labor practices would take the form of a prong-one claim. Such a claim would require showing that the company had no oversight mechanism regarding labor compliance or the status of employee union drives. Most corporations, though, hire anti-union consultants to monitor unionization,[121] who often encourage or commit ULPs themselves.[122] Even if a company does not hire outside consultants, nearly all of them mount an anti-union campaign,[123] which would presumably be overseen or monitored by the board or at least an HR department.

Therefore, a *Caremark* claim for repeated unfair labor practices is best made as a prong-two *Caremark* claim. Under prong two,

118. *See* Michael K. Shaub, *Plausible Deniability and the Insulation of Upper Management*, MAYS BUS. SCH. (Sept. 14, 2016), https://news.mays.tamu.edu/bottom-line-ethics/2016/09/plausible-deniability-and-the-insulation-of-upper-management/ [https://perma.cc/6C78-3UCD] (commenting on upper management intentionally distancing itself from culpability by cultivating plausible deniability).

119. *See* Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006).

120. *See* Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. 0816-SG, 2020 WL 5028065, at *17 (Del. Ch. Aug. 24, 2020).

121. *See In Solidarity: Removing Barriers to Organizing: Hearing Before the H. Comm. on Educ. & Lab.*, 117th Cong. 10 (2022) [hereinafter Bronfenbrenner, *In Solidarity*] (statement of Kate Bronfenbrenner, Dir. of Lab. Educ. Rsch., Cornell Univ.) (finding that in a random sample of 286 NLRB elections between 2016 and 2022, 74% of employers hired consultants for an anti-union campaign).

122. *See* McNicholas et al., *Employers*, *supra* note 30.

123. *See id.* at 9 (finding that 85% of employers held captive audience meetings during work hours); KATE BRONFENBRENNER, ECON. POL'Y INST., NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING 10 (2009), https://files.epi.org/page/-/pdf/bp235.pdf [https://perma.cc/D9MB-QRXT] [hereinafter BRONFENBRENNER, NO HOLDS BARRED] (finding that employers mounted a campaign against the union in 96% of NLRB elections during 1999–2003).

plaintiffs must show that a red flag of illegality or regulatory non-compliance was waved in front of directors' faces, yet the board consciously chose to ignore it.[124] According to the Delaware Chancery Court in *In re Clovis Oncology*, "red flags are only useful when they are either waived [sic] in one's face or displayed so that they are visible to the careful observer. . . . [T]he careful observer is one whose gaze is fixed on the company's mission critical regulatory issues."[125] In other words, directors are the exact individuals who should be attuned to relevant red flags. In a *Caremark* claim for prior unfair labor practices, the string of ULPs constitute the red flags raised for directors.

Courts have held that indications of merely a chance of illegal activity do not rise to the level of a red flag.[126] In *Fisher v. Sanborn*, the Chancery Court held that a grand jury subpoena and notice of investigations by federal agencies did not automatically constitute red flags because the plaintiff did not allege that the board knew of ongoing legal violations based on the notices.[127] Similarly, in *Rojas v. Ellison*, the Chancery Court held that, while "settlements and warnings can constitute red flags, even absent a liability determination," they do not *necessarily* indicate that management knew or should have known that the corporation was violating the law.[128] Rather, the inquiry depends on the circumstances.[129] Red flags must indicate to management that they face a "substantial likelihood" of liability for ignoring them, rather than just a "mere threat" of liability.[130]

In *Teamsters Local 443 Health Services & Insurance Plan v. Chou*, the Chancery Court denied a motion to dismiss because management's lack of discussion after receiving a Department of

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124. *See In re* Clovis Oncology, Inc. Derivative Litig., No. 0222-JRS, 2019 WL 4850188, at *13 (Del. Ch. Oct. 1, 2019) (citing South v. Baker, 62 A.3d 1, 16–17 (Del. Ch. 2012)).

125. *Id.* (citing Marchand v. Barnhill, 212 A.3d 805 (Del. 2019)).

126. *See* Fisher *ex rel.* LendingClub Corp. v. Sanborn, No. 2019-0631-AGB, 2021 WL 1197577, at **12, 16 (Del. Ch. Mar. 30, 2021); Rojas *ex rel.* J.C. Penney Co., Inc. v. Ellison, No. 2018-0755-AGB, 2019 WL 3408812, at *11 (Del. Ch. July 29, 2019).

127. *See Fisher*, 2021 WL 1197577, at **12, 16.

128. *Rojas*, 2019 WL 3408812, at *11.

129. *See id.*

130. *In re* Intel Corp. Derivative Litig., 621 F. Supp. 2d 165, 176 (D. Del. 2009) (holding that multiple ongoing investigations did not constitute red flags because the plaintiff did not identify what the directors knew about the red flags or how they responded); *see also In re* Chemed Corp., S'holder Derivative Litig., No. 13-1854-LPS-CJB, 2015 WL 9460118 (D. Del. Dec. 23, 2015) (holding that subpoenas and regulatory inquiries did not amount to red flags because the plaintiffs did not sufficiently plead that the directors knew about the misconduct or were aware of the red flags).

Justice subpoena indicated that they consciously ignored that red flag and did nothing to correct the compliance issues.[131] In *Boeing*, the Court noted that media coverage of the plane crash, including speculation about the cause being manufacturing issues, put the directors on notice that they should have been aware of the regulatory risk.[132] But the board failed to respond to the crash as a regulatory red flag, instead treating it merely as an "anomaly, a public relations problem, and a litigation risk."[133] The Court found that treatment to be conscious ignorance of the issue, rather than just a "failed attempt" at addressing the red flag.[134]

In bringing a *Caremark* claim for repeated unfair labor practices, what should a prospective plaintiff point to as the red flag? A court would be unlikely to find that ULP charges alone constitute a red flag because, like the filing of any lawsuit, ULP charges do not necessarily indicate any actual wrongdoing or management's knowledge thereof.[135] Anyone can file charges, which does not necessarily suggest any validity of the underlying claims, and most charges are either withdrawn or dismissed by the NLRB.[136] While NLRB attorneys decide the merits of the charge, the NLRB tries to facilitate settlement between the parties, and a large portion of ULP charges are typically settled.[137] Only a small percentage of charges result in a complaint heard before an ALJ, which then go on to a determination on the merits.[138] Therefore, the red flag must be some indication of heightened likelihood of

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131. *See* Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. 0816-SG, 2020 WL 5028065, at *24 (Del. Ch. Aug. 24, 2020). The Court also found that an independent compliance report and a whistleblower suit, which the board appeared to ignore, constituted red flags. *See id.* at **19–23. The derivative case discussed here concerned a company distributing syringes that were allegedly contaminated as a result of illegal cost-cutting measures. *See id.* at **4–6.

132. *See In re* Boeing Co. Derivative Litig., No. 0907-MTZ, 2021 WL 4059934, at *34 (Del. Ch. Sept. 7, 2021).

133. *Id.* (internal quotation marks omitted).

134. *Id.*

135. A union, employee, or employer can file a ULP charge with the NLRB. *See What We Do: Investigate Charges*, NLRB, https://www.nlrb.gov/about-nlrb/what-we-do/investigate-charges [https://perma.cc/YQY4-DUYW]. NLRB agents investigate the charge and, if it is supported by sufficient evidence, issue a complaint. *See id.* An ALJ then holds a hearing on the complaint and issues a determination. *See id.*

136. *See Disposition of Unfair Labor Practice Charges Per FY*, NLRB, https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/disposition-of-unfair-labor-practice [https://perma.cc/CKE4-9SH5].

137. *See id.*

138. *See id.*

actual wrongdoing, which a manager acting in good faith would have responded to by trying to prevent future ULPs.

This Note posits that an ideal red flag for this type of claim would be a series of ALJ determinations of unfair labor practices. In line with their oversight duties, directors should reasonably be aware of ALJ determinations against the corporation. It would further support the assertion that the board should have been aware of the wrongdoing if there is a pattern of multiple similar ALJ determinations, and in particular if the determinations have been reported in the news (as in *Boeing*).[139]

Many corporations may be willing to settle ULP charges prior to a hearing, in which case a prospective plaintiff would not have ALJ determinations to point to as a red flag. In these cases, the plaintiff could plead that the settlements are the red flag.[140] Although settlements do not necessarily show that the board knew or should have known about any wrongdoing, the inquiry is situation specific.[141] It is true that ignoring a handful of settlements would not necessarily indicate a "substantial threat" of liability either.[142] A string of major settlements, however, increase the likelihood that a court would see them as red flags.[143]

McDonald's offers two other useful examples of red flags in a labor-related *Caremark* claim: walkouts and strikes.[144] In *McDonald's*, following over a dozen coordinated Equal Employment Opportunity Commission (EEOC) complaints, employees at stores in multiple states organized walkouts and

139. *See, e.g.*, Robert Iafolla & Parker Purifoy, *Starbucks Is Racking up Labor Law Violations as Rulings Roll in*, BLOOMBERG L.: DAILY LAB. REP. (June 2, 2023) (on file with the *Columbia Journal of Law & Social Problems*), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/XAP9N9L0000000?bna_news_filter=daily-labor-report#jcite (reporting on 16 NLRB ALJ determinations against Starbucks).

140. *See In re* McKesson Corp. Derivative Litig., No. 17-cv-01850-CW, 2018 WL 2197548, at *10 (N.D. Cal. May 14, 2018) (recognizing a settlement agreement as a red flag).

141. *See* Rojas *ex rel.* J.C. Penney Co., Inc. v. Ellison, No. 2018-0755-AGB, 2019 WL 3408812, at *11 (Del. Ch. July 29, 2019) ("A settlement of litigation or a warning from a regulatory authority—irrespective of any admission or finding of liability—may demonstrate that a corporation's directors knew or should have known that the corporation was violating the law. . . . When such events become a 'red flag' depends on the circumstances.").

142. *See In re* Intel Corp. Derivative Litig., 621 F. Supp. 2d 165, 176 (D. Del. 2009).

143. *See In re* Pfizer Inc. S'holder Derivative Litig., 722 F. Supp. 2d 453, 455–57 (S.D.N.Y. 2010) (finding that at least three prior settlements made directors "acutely aware" of the need to prevent similar illegal practices).

144. *See In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343, 377 (Del. Ch. 2023).

strikes to protest sexual harassment and misconduct.[145] The court recognized the strikes and walkouts as red flags of sexual harassment at the company.[146] The court held that, following each of the multi-city walkouts, the executive responsible for overseeing human resources "should have been figuring out whether something was seriously wrong and either addressing it or reporting upward."[147] In a *Caremark* claim for repeated ULPs, a plaintiff may similarly point to walkouts or strikes as red flags.[148] Like ULP settlements, walkouts and strikes do not necessarily indicate unlawful conduct.[149] Directors reasonably should know about a strike, however, and a ULP strike may indicate that the employees are concerned about potentially illegal activity.[150] More broadly, *McDonald's* indicated that legal issues concerning worker wellbeing are within the realm of a plausible *Caremark* claim, even if they are not critical to the corporation's core business. Rather than leaning on the severity of regulatory penalties or the importance of human resources to the company's bottom line, the plaintiffs' claim was instead that the executive "breached his fiduciary duties by allowing a corporate culture to develop that condoned sexual harassment and misconduct."[151]

The next step to proving the red flags is demonstrating that the board consciously ignored the regulatory risks indicated by the ALJ determinations, settlements, walkouts, or strikes and did not

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145. *See id.*

146. *See id.* at 378.

147. *Id.*

148. Workers have recently staged numerous walkouts over high-profile companies' unfair labor practices. *See, e.g.*, Kevin Miller, *Maple Grove REI Closes as Workers Launch Strike over 'Unfair Labor Practices'*, CCX MEDIA (Oct. 27, 2023), https://ccxmedia.org/news/maple-grove-rei-closes-as-workers-launch-strike-over-unfair-labor-practices/ [https://perma.cc/Z45V-9PQM] (reporting on an REI walkout over unfair labor practices); Granth Vanaik & Arriana McLymore, *Starbucks Employees at Hundreds of US Stores Walkout on Red Cup Day*, REUTERS (Nov. 16, 2023), https://www.reuters.com/business/retail-consumer/starbucks-employees-hundreds-us-stores-walkout-red-cup-day-2023-11-16/ [https://perma.cc/UN5K-A8F3] (reporting on a nationwide Starbucks walkout over unfair labor practices).

149. Section 7 of the NLRA enshrines the right to strike not only over unfair labor practices but also over economic issues. *See* 29 U.S.C. § 157. Even if an unfair labor practice occurred in the lead-up to a strike, its purpose may still be an economic strike. *See* Pirelli Cable Corp. v. NLRB, 141 F.3d 503, 517 (4th Cir. 1998).

150. *See In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343, 378 (Del. Ch. 2023).

151. *Id.* at 349. For more on the implications of the *McDonald's* decision, see *supra* Part I.C.

act to bring the corporation in line with the law.[152] To show this, a prospective plaintiff can point to ALJ determinations or settlements for similar unfair labor practice charges that occurred after the initial red flag. In either case, a showing that the corporation continued to commit similar violations of which the board knew or should have known indicates that directors ignored the red flag. Alternatively, if corporate fiduciaries themselves commit subsequent unfair labor practices, it would be clear that they have ignored prior red flags of potential labor law violations.[153] Directors would have "consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."[154]

While a *Caremark* claim may be more difficult to plead with settlements as both the original red flag and proof of intentional ignorance by the board, such a claim is still possible. Although settlements do not automatically constitute red flags or ignorance thereof, they can indicate notice of a substantial threat of liability in certain situations.[155] When settlements for similar ULPs continue over an extended period of time, a plaintiff can argue that repeated ULP settlements should put directors on notice of wrongdoing, and future settlements are evidence of their choice to pay instead of halting the illegal practices. Without a recognition of settlements as a possible basis for ignorance of red flags in a *Caremark* claim for repeated ULPs, a corporation can effectively avoid liability—even if management is consciously failing to correct unlawful activity—simply by settling every ULP charge that is neither dismissed nor withdrawn. With such a loophole, a lawbreaking corporation could easily avoid director liability. But this loophole would be closed by properly recognizing a string of ULP settlements as both a red flag and ignorance thereof.

Directors causing or ignoring unfair labor practices, like any other lawbreaking, violate their duty of good faith. Therefore,

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152. *See, e.g.*, South v. Baker, 62 A.3d 1, 15 (Del. Ch. 2012) ("A plaintiff . . . can plead that the board consciously failed to act after learning about evidence of illegality—the proverbial 'red flag.'").

153. *See* Annie Palmer, *Amazon CEO Andy Jassy Violated Labor Laws with Union Remarks, Federal Agency Alleges*, CNBC (Oct. 27, 2022), https://www.cnbc.com/2022/10/27/nlrb-says-amazon-ceo-andy-jassy-violated-labor-laws.html [https://perma.cc/9QYR-J8J] (reporting on an NLRB complaint against the Amazon CEO for his own remarks regarding unionization).

154. Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006).

155. *See* Rojas *ex rel.* J.C. Penney Co., Inc. v. Ellison, No. 2018-0755-AGB, 2019 WL 3408812, at *11 (Del. Ch. July 29, 2019).

shareholders of a corporation that routinely breaks labor law can sue for breach of fiduciary duty. Even if the shareholder cannot prove that the directors intentionally acted illegally, a pattern of ALJ determinations of ULPs, ULP settlements, walkouts, or strikes can serve as the red flags of a *Caremark* claim.

III. Practical Implications and Recommendations

While a shareholder plaintiff is unlikely to receive a monetary windfall from a *Caremark* claim over ULPs, certain institutional shareholders are concerned with workers' rights—and recognition of these claims could deter corporations from continued labor law violations. Part III.A discusses what might motivate a shareholder to bring a *Caremark* claim for repeated ULPs, and Part III.B discusses two changes to the law that would help shareholders keep directors accountable for wrongdoing: allowing plaintiffs to recover attorneys' fees for any duty of good faith claim and recognizing industry-wide practices as red flags.

A. Prospective Plaintiffs

With the NLRB unable to assess penalties for violations of the NLRA, corporate directors may not only feel that it is more profitable to commit unfair labor practices (or allow them to perpetuate), but that they are able to continue down that path without serious consequences. Despite the lack of penalties, however, violations of the NLRA are violations of the law, so by allowing the ULPs to continue, directors breach their fiduciary duties. If investors successfully bring claims against repeat labor law violators as outlined in this Note, then corporations may be incentivized to adhere more closely to labor law.

Although corporate America continues to take an overwhelmingly anti-union stance,[156] investors are increasingly concerned with environmental, social, and governance (ESG) issues. There is growing recognition that corporations' singular focus on pleasing institutional investors is bad for the planet and consumer welfare, and may even encourage unlawful activity.[157]

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156. *See* Bronfenbrenner, *In Solidarity*, *supra* note 121, at 8.

157. *See* Leo E. Strine, Jr. et al., Caremark *and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *and EESG Strategy*, 106 IOWA L. REV. 1885, 1901–02 (2021) [hereinafter Strine et al., Caremark *and*

The ESG approach sometimes acknowledges that employee concerns fall under "social" issues, as employees are one of the corporation's core stakeholders.[158] Prominent investors have promoted employee wellbeing—and even unionization—not only to that end, but also to increase long-term value.[159] Still, the attention paid toward employee issues by those flying the ESG banner has been largely eclipsed by other concerns.[160] And within the reduced, albeit growing, call for focus on employee wellbeing, investor demand for corporate governance to include organized labor is essentially nonexistent.[161] This is hardly surprising given the corporate world's dogmatic anti-union stance. For if a corporation treats its workers well, it will drive away concerns over the perceived specter of a union.[162]

But while investor concern for worker organizing is rare, it does exist. And as it grows, advocates may see more shareholders willing to bring claims against corporate fiduciaries that oversee repeated violations of labor law. A handful of venture capitalists are trying to aid organized labor.[163] Roy Bahat, head of the Michael Bloomberg-backed venture firm Bloomberg Beta, has led investment in various tech-oriented tools for labor organizers, including Unit of Work[164] and Open Collective.[165] Bahat is trying to persuade current and future corporate leaders that organizing drives and worker movements are positive assets, rather than

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ESG] (discussing an increasing concern that "the so-called stockholder wealth maximization principle is not just legally erroneous, but socially harmful").

158. *See* Bodie, *Labor Relations*, *supra* note 21, at 173.

159. *See, e.g.*, Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 1163, 1172–73. (2022); TRILLIUM ASSET MGMT., SUPPORTING WORKER ORGANIZING, *supra* note 113, at 2.

160. *See* Strine et al., Caremark *and ESG*, *supra* note 157, at 1903. Former Chief Justice Strine has used the term "EESG" to explicitly recognize the importance of explicitly integrating employee interests into good corporate governance. *See id.*

161. *See* Bodie, *Labor Relations*, *supra* note 21, at 173 ("Accounts of this new wave of enlightened enterprises generally do not include unions within the set of important stakeholders.").

162. *See id.* ("Happy workers obviate concerns about collective bargaining.").

163. *See* Sam Dean, *The Organized Labor Movement Has a New Ally: Venture Capitalists*, L.A. TIMES (Aug. 12, 2022), https://www.latimes.com/business/story/2022-08-12/venture-capital-startup-unit-labor-organizing [https://perma.cc/4N2M-2ERC].

164. Unit of Work provides free consulting to workers organizing unions. *See id.* Then members of the newly established union can opt to pay a monthly fee for the continued support of Unit of Work. *See id.*

165. Open Collective is software that helps grassroots groups raise and manage money. *See* Issie Lapowsky, *This VC Believes in Unions. Can He Convince the Rest of Corporate America to Join Him?*, FAST CO. (Aug. 31, 2023), https://www.fastcompany.com/90940726/roy-bahat-vc-unions-labor [https://perma.cc/UR6M-BGUZ].

obstacles.[166] He sees the labor organizers today not as anti-corporate rioters, but as "people who actually genuinely say that they care about the values of the company, and they just want it to live up to those values."[167]

Another group that engages business leaders to push for worker empowerment is the Coalition for Inclusive Capitalism, a nonprofit organization that collaborates with the private sector, policymakers, and academics to "make capitalism inclusive and its benefits more widely and equitably shared."[168] The Coalition produced a "Framework for Inclusive Capitalism," which encourages including worker voice in corporate government, calls for employers to remain neutral during union drives, and states that workers "should have adequate protection from employer interference, pressure, coercion and retaliation in their choice of whether to organize."[169]

In 2022, a group of investors representing over $1 trillion in assets, led by Trillium Asset Management, wrote a letter to the CEO of the *New York Times* urging the company to stop violating labor law in regards to the Times Tech Guild's election, the treatment of Wirecutter Union members, and an open contract at the Times Guild.[170] Trillium also sent similar letters to Starbucks and Luxottica (the owner of Oakley and Ray-Ban) urging compliance with labor law.[171] The asset management firm outlined its pro-union stance, which it treats not as altruistic but as good for long-term investment, in its white paper, *The Investor Case for*

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166. Bahat taught a class at the University of California, Berkeley on leading an organized workforce and led a roundtable for corporate executives on "reinventing corporate America's relationship with organized labor." *Id.*

167. *Id.*

168. COAL. FOR INCLUSIVE CAPITALISM, https://coalitionforinclusivecapitalism.com/ [https://perma.cc/5KHP-WZXM].

169. COAL. FOR INCLUSIVE CAPITALISM, FRAMEWORK FOR INCLUSIVE CAPITALISM: A NEW COMPACT AMONG BUSINESSES, GOVERNMENT & AMERICAN WORKERS 17 (2021), https://coalitionforinclusivecapitalism.com/wp-content/uploads/2021/02/The-Framework-for-Inclusive-Capitalism-1.pdf [https://perma.cc/7PET-JQK9].

170. *See* Eric Rosenbaum, *The Market Starts Speaking Out on a Tech Worker Union Effort at the* New York Times, CNBC (Feb. 1, 2022), https://www.cnbc.com/2022/02/01/investors-speak-out-on-tech-worker-union-battle-at-the-new-york-times.html [https://perma.cc/5625-87AH]; Letter from Trillium Asset Mgmt. to Meredith Kopit Levien, CEO, N.Y. Times Co. (Feb. 1, 2022), https://www.trilliuminvest.com/documents/nyt-investor-statement-on-unionization-efforts [https://perma.cc/47BC-Y94U].

171. *See* Kate Rogers, *Investor Group Led by Trillium Urges Starbucks to Respect Union Vote, Proceed 'Expeditiously'*, CNBC (Dec. 10, 2021), https://www.cnbc.com/2021/12/10/investor-group-led-by-trillium-urges-starbucks-to-respect-union-vote-.html [https://perma.cc/58W9-RDPE]; *see also* Rosenbaum, *supra* note 170.

Supporting Worker Organizing Rights.[172] Trillium argues that companies that are respectful of unions are more productive, experience lower turnover, and avoid the reputational risk of anti-union activity.[173] Such efforts by investors point to the existence (and perhaps growing number) of shareholders who are concerned enough with viable unionization efforts and employee governance structures to bring a claim such as described in this Note.

Additionally, union pension and benefit funds are institutional shareholders that often participate in shareholder activism.[174] While some pension funds have pushed for a pro-worker agenda, getting other shareholders' support is difficult.[175] Even the highest-profile pension fund offensives against anti-union directors meet resistance. For example, in 2004, CalPERS, the pension fund for the state of California, campaigned to restrain shareholder support for certain Safeway directors over fraught negotiations with the United Food and Commercial Workers (UFCW), yet only 17% of shares ultimately voted against the targeted directors.[176] But a motivated pension fund could choose to bring a *Caremark* claim for repeated ULPs as a means of holding management accountable without the need for other shareholders' backing.

Funds are already pursuing workers' rights through alternate means. For example, the New York City Retirement Systems were part of a successful proposal to get an independent assessment of Starbucks' labor policies and released a scathing analysis thereof.[177] Globally, the Committee on Workers' Capital partners with unions and pension fund trustees to use investments as a tool

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172. *See generally* TRILLIUM ASSET MGMT., SUPPORTING WORKER ORGANIZING, *supra* note 113.

173. *See id.* at 2.

174. *See* Matthew T. Bodie, *Labor Interests and Corporate Power*, 99 B.U. L. REV. 1123, 1137 (2019) [hereinafter Bodie, *Labor Interests*]. Judge O'Connor in the Northern District of Texas recently held that fiduciaries of American Airlines 401(k) plans breached their duty to monitor by allowing Blackrock to invest the funds' assets in line with Blackrock's shareholder-supported ESG initiatives. *See* Spence v. Am. Airlines, Inc., 718 F. Supp. 3d 612 (N.D. Tex. 2024). The case concerned Blackrock's choice of where to invest the funds' assets, however, rather than traditional shareholder activism (e.g., electioneering) by the funds at a company where they already owned shares. *See id.*

175. *See* Bodie, *Labor Interests*, *supra* note 174, at 1138–39.

176. *See id.* at 1137–38.

177. *See* Press Release, N.Y.C. Comptroller, NYC Comptroller & Investor Coalition: Starbucks' Workers' Rights Assessment Beset by Lack of Worker Input & Failure of Board to Accept Responsibility (Jan. 26, 2024), https://comptroller.nyc.gov/newsroom/nyc-comptroller-investor-coalition-starbucks-workers-rights-assessment-beset-by-lack-of-worker-input-failure-of-board-to-accept-responsibility/ [https://perma.cc/KYJ3-9RU9].

for labor, not only through traditional shareholder activism but also by amplifying workers' rights campaigns and policy advocacy.[178] Union benefit and pension funds already use *Caremark* claims as a tool against corporate wrongdoing,[179] so why not use them to protect workers' rights?

Moreover, a prospective plaintiff need not be convinced that collective bargaining is itself a desirable goal to bring this type of claim. An investor who is truly concerned with the rights of employees may simply want to protect workers' right to freedom of association and self-organization—rights the NLRA and international bodies such as the International Labour Organization (ILO) set out to protect.[180] In line with other ESG concerns, activist investors may care that a corporation ensures its employees' fundamental rights and follows its legal obligations, regardless of their opinion on the union itself.[181] Shareholders may also be motivated by a belief that a unionized workforce supports their long-term investment goals, backed up by studies such as Trillium's white paper.[182]

With the current state of the law, in which the NLRB cannot assess penalties,[183] shareholders who view a union as beneficial or are concerned about the rights of employees should bring claims

178. *See About Us*, COMM. ON WORKERS' CAP., https://www.workerscapital.org/about/ [https://perma.cc/8ZVB-KA9A].

179. *See* Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. 0816-SG, 2020 WL 5028065 (Del. Ch. Aug. 24, 2020).

180. *See, e.g.*, National Labor Relations Act, 29 U.S.C. § 151 ("It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 20 (Dec. 10, 1948) ("Everyone has the right to freedom of peaceful assembly and association."); Int'l Lab. Org. [ILO] Constitution, pmbl. ("And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by . . . recognition of the principle of freedom of association . . . ."); Int'l Lab. Org. [ILO] Declaration on Fundamental Principles and Rights at Work § 2 (2022) ("Declares that all Members . . . have an obligation . . . to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining . . . .").

181. *See* TRILLIUM ASSET MGMT., SUPPORTING WORKER ORGANIZING, *supra* note 113, at 2.

182. *See id.*

183. *See* 29 U.S.C. § 160(c); Republic Steel Corp. v. NLRB, 311 U.S. 7, 11 (1940).

against corporate fiduciaries that have overseen, or ignored, a pattern of unfair labor practices. While the NLRB lacks a mechanism to hold corporations accountable, they should not be able to continue to violate labor law unchecked—even if management believes doing so is profitable. But if directors believe that illegal union busting is beneficial for the corporation and its shareholders, they currently have little incentive to cease such behavior.

The potential for personal liability for directors would provide that incentive. Widespread recognition of duty of good faith and *Caremark* claims for repeated unfair labor practices could encourage corporate adherence to labor law, curbing intentional violations and increasing monitoring. Where labor law fails to discourage noncompliance because of its lack of penalties, liability for breaches of fiduciary duties can play a deterrent role instead. *Caremark* claims are difficult to win, but plaintiffs would only need a few suits to get the directors' attention. The suits may get directors to connect their responsibilities to employees to their fiduciary obligations, beyond the mere illegality of ULPs that come with minimal damages. Even if the claims create no liability, the message they send may spark organizational changes toward a union-neutral corporate posture.

No *Caremark* or duty of good faith claims have yet been brought for NLRA violations. Thus far, most *Caremark* claims have occurred when the wrongdoing in question caused the corporation severe financial loss.[184] Even in these situations, including when the claim is successful (or, much more likely, is settled), there is not much money left over for shareholders after legal fees.[185] Labor law violations, on the other hand, are unlikely to cause severe, if any, financial trauma to the corporation, as the NLRB can only seek make-whole remedies. The minor costs to a corporation of backpay for unlawfully fired workers and informational postings, for example, which would constitute harm for the purposes of a

184. *See, e.g.*, Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. 0816-SG, 2020 WL 5028065, at *8 (Del. Ch. Aug. 24, 2020) (The company paid $260 million to the Department of Justice and resolved civil claims with the U.S. Attorney's Office for the Eastern District of New York for $625 million.); *In re* Clovis Oncology, Inc. Derivative Litig., No. 0222-JRS, 2019 WL 4850188 at *8 (Del. Ch. Oct. 1, 2019) ("Clovis' stock price immediately dropped 70%, wiping out more than $1 billion in market capitalization.").

185. *See* Bainbridge et al., *supra* note 104, at 593 ("In most cases, the bulk of any monetary benefits go to the plaintiffs' lawyers rather than the corporation or its shareholders.").

Caremark claim, are extremely unlikely to make the litigation worthwhile from a purely financial standpoint. Potential recovery further diminishes because, in a derivative suit, any recovery goes to the corporation, which is then shared by shareholders as an increase in value.[186]

While *Marchand* expanded *Caremark* pleading standards somewhat, Delaware courts' reliance on the mission-critical standard would have further dissuaded any potential plaintiffs from bringing a *Caremark* claim for repeated unfair labor practices.[187] Since early 2023, however, when the *McDonald's* court denied dismissal of a prong-two *Caremark* claim with a non-mission-critical oversight failure—concerning misconduct toward employees, to boot—such a claim has become more feasible.[188]

The lack of obvious financial benefit in bringing a *Caremark* claim for labor law violations limits potential plaintiffs to those who are acting altruistically in the interests of the employees or who believe in long-term investment value of unionization. This limited pool, which likely excludes major plaintiffs' firms, also limits the deterrent power of such claims. This is because most corporations would not have shareholders with such deeply held convictions toward labor policy; the corporations could continue to violate labor law knowing it is unlikely that one of their shareholders would bring a claim.

Relying on asset management firms to enforce the rights of workers is far from the most empowering or democratic solution. Labor organizers might prefer to see decisive changes from government and grassroots worker action. But as long as U.S. labor law remains insufficient to protect worker organizing, any means to curb corporate union busting would be welcome. A handful of high-profile suits by investors like Trillium or major pension funds could make directors across industries more cautious of ULPs and possible repercussions from shareholders. And with a few changes to Delaware corporate law, these claims could become more accessible to plaintiffs and therefore increase their deterrent effect.

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186. *See* Brookfield Asset Mgmt., Inc. v. Rosson, 261 A.3d 1251, 1262–63 (Del. 2021) ("Because a derivative suit is brought on behalf of the corporation, any recovery must go to the corporation.").

187. *See* Marchand v. Barnhill, 212 A.3d 805, 823–24 (Del. 2019) ("In Blue Bell's case, food safety was essential and mission critical.").

188. *See In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343, 377 (Del. Ch. 2023).

B. PROPOSED CHANGES TO THE LAW

1. *Attorneys' Fees for Duty of Good Faith Claims*

Currently, courts are allowed to award attorneys' fees under the common fund doctrine.[189] Derivative litigation such as a *Caremark* claim would be a fund-creating action.[190] Delaware courts use the *Sugarland* factors for calculating attorneys' fees:

> (1) the size of the benefit achieved; (2) whether the plaintiffs can rightly receive all the credit for the benefit conferred or only a portion thereof; (3) the time and effort of counsel; (4) the standing and ability of counsel; (5) the relative complexities of the litigation; (6) the stage at which the litigation ended; and (7) any contingency factor.[191]

The factors are not weighted equally: the most important factors for determining an award are the size of the benefit achieved, and whether the plaintiff can be credited for the benefit.[192] Because an award of attorneys' fees is largely calculated based on the size of the benefit, and the amount awarded in a successful labor law *Caremark* claim or settlement would be extremely low,[193] plaintiffs would functionally be unable to collect attorneys' fees. But the *Sugarland* standard, and the common fund doctrine in general, does not account for non-monetary benefits of the litigation—and protecting workers' rights is the main rationale for bringing a

189. *See* Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1252–53 (Del. 2012) ("[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." (quoting Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980))).

190. *See id.* at 1253.

191. *In re* AMC Ent. Holdings, Inc. S'holder Litig., No. 2023-0215-MTZ, 2023 WL 5165606, at *36 (Del. Ch. Aug. 11, 2023) (citing Sugarland Indus., Inc. v. Thomas, 420 A.2d 142 (Del. 1980)).

192. *See id.* at *36.

193. Because the NLRB is limited to ordering make-whole remedies, the companies' losses due to the unlawful behavior would presumably top out at the total of affected workers' compensatory damages. Consider, for example, the sum of several months' pay for a Starbucks employee and its miniscule impact on the corporation's value. The average hourly wage at Starbucks is $17.50 as of November 2023, while its market cap is $112.67 billion as of March 19, 2025. *See* Dee-Ann Durbin, *Starbucks Increases US Hourly Wages and Adds Other Benefits for Non-Union Workers*, AP NEWS, https://apnews.com/article/starbucks-union-pay-benefits-afbac2631843f09c3d755b14b4b40f14 [https://perma.cc/73KB-9N25] (Nov. 6, 2023); *Starbucks Corporation (SBUX)*, YAHOO FIN., https://finance.yahoo.com/quote/SBUX/ [https://perma.cc/2875-2H4G] (last visited Mar. 19, 2025).

Caremark claim for ULPs.[194] In these claims, the benefit is holding corporate fiduciaries accountable—even if only through forcing the corporation to incur legal fees or dissuading future ULPs—for their unlawful action or oversight failure and securing the rights of employees.

Delaware should make plaintiffs' attorneys' fees awards available for successful duty of good faith claims even if the monetary value of the common fund benefit is greater than the attorneys' fees. This change would make smaller shareholders and traditional plaintiffs' and public interest firms significantly more likely to bring duty of good faith claims for ULPs—as well as for other corporate lawbreaking that incurs low regulatory penalties. Because Delaware law enshrines the duty for corporations to act lawfully,[195] it should incentivize efforts to curtail corporate lawbreaking. As this Note argues, duty of good faith claims, including *Caremark* claims, are a tool for shareholders to ensure corporations act lawfully.[196] Shareholders should be incentivized to use that tool—or at least not disincentivized. Because corporations are pressured to settle most duty of good faith claims that survive a motion to dismiss,[197] courts must recognize that these settlements should include at least significant partial attorneys' fees. Of course, changes to Delaware corporate law that are unfavorable to management may cause businesses to incorporate elsewhere, as TripAdvisor and Tesla have recently done.[198] That risk should not, however, stand in the way of Delaware law promoting fair, lawful corporate governance.

194. Shareholder plaintiffs who believe protecting employees' right to organize will be financially beneficial in the long term may also be motivated by future profits, but *Sugarland* and the common fund doctrine do not account for prospective gain, either. *See AMC Entertainment Holdings*, 420 A.2d at *2.

195. *See, e.g.*, DEL. CODE ANN. tit. 8, § 101(b) (2025) ("A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State.").

196. *See supra* Part III.A.

197. *See* Eisele Ibarra, *Tighten the Line for* Caremark *Claims*, 20 FLA. ST. U. BUS. REV. 115, 121 (2021).

198. *See* Theo Francis, *The Big Loser in Tesla's Shareholder Vote Is Delaware*, WALL ST. J. (June 16, 2024) (on file with the *Columbia Journal of Law & Social Problems*), https://www.wsj.com/business/tesla-texas-incorporation-delaware-edcbd0dd; Jennifer Kay, *Musk Gets Blueprint for Moving Tesla with TripAdvisor Opinion*, BLOOMBERG L. (Feb. 21, 2024) (on file with the *Columbia Journal of Law & Social Problems*), https://www.bloomberglaw.com/bloomberglawnews/litigation/XEGF5LKS000000?bna_news_filter=litigation#jcite; Palkon v. Maffei, 311 A.3d 255 (Del. Ch. 2024), *rev'd*, No. 125, 2024, 2025 WL 384054 (Del. Feb. 4, 2025).

2. *Industry-Wide Unlawful Practices as Red Flags*

This Note also proposes that Delaware courts should view industry-wide unlawful practices as viable red flags for a prong-two *Caremark* claim. Red flags demonstrate that directors knew or reasonably should have known about the unlawful activity or regulatory risk. In the labor law context, the boards of most corporations oppose organized labor.[199] Most directors should reasonably expect that their corporation's officers and managers will play hardball against a union because that is the standard practice.[200] And while some of these corporations will oppose the union while fully complying with the NLRA, most directors should reasonably expect that an anti-union campaign will include multiple unfair labor practices.[201]

Given the realities of corporate governance in America, directors should reasonably expect corporations to commit ULPs during an active unionization drive.[202] Therefore, Delaware courts should recognize an active unionization drive as an automatic red flag for a *Caremark* claim for ULPs, alongside the potential red flags of ALJ determinations, settlements, walkouts, or strikes. Where there is an active unionization drive, directors should be alert to a substantial risk of unlawful activity and have a duty to act to avoid it.

Institutional shareholders who are concerned about workers' right to unionize—either altruistically or because they believe it will help their long-term investment—may wish to bring a

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199. *See* Bronfenbrenner, *In Solidarity*, *supra* note 121, at 8.

200. *See* BRONFENBRENNER, NO HOLDS BARRED, *supra* note 123, at 10 (finding that employers mounted a campaign against the union in 96% of NLRB elections from 1999 to 2003).

201. *See, e.g.*, MCNICHOLAS ET AL., UNLAWFUL, *supra* note 107, at 2 (finding that employers were charged with ULPs in 41.5% of all NLRB-supervised union elections in 2016 and 2017).

202. "[I]t is standard practice for workers to be subjected to threats, interrogation, harassment, surveillance, and retaliation for union activity" during the NLRB election process. BRONFENBRENNER, NO HOLDS BARRED, *supra* note 123, at 1. "[E]mployers threatened to close the plant in 57% of elections, discharged workers in 34%, and threatened to cut wages and benefits in 47% of elections." *Id.* at 2. While "[u]nions filed unfair labor practice charges in . . . 40% of the NLRB election sample," the charges likely undercount actual ULPs because "filing charges where the election is likely to be won could delay the election for months if not years; workers fear retaliation for filing charges, especially where the election is likely to be lost; and the weak remedies, lengthy delays, and the numerous rulings where ALJ recommendations for reinstatement, second elections, and bargaining orders have then been overturned, delayed, or never enforced, have diminished trust that the system will produce a remedy." *Id.* at 2–3.

Caremark claim over a pattern of ULPs. These claims can send a message to the board of directors, drive institutional change, and deter other companies from breaking labor law. Since steep legal fees and little potential monetary recovery would discourage these claims, Delaware should encourage corporate accountability by awarding plaintiffs' attorneys' fees for successful duty of good faith claims even if damages are insignificant. Delaware courts should also recognize industry-wide practices as potential red flags for a prong-two *Caremark* claim.

CONCLUSION

With the NLRB unable to assess penalties for violations of labor law, corporations are able to commit unfair labor practices—even intentionally—with little effect to their bottom line. But because ULPs are violations of the law, directors who intentionally cause the corporation to commit ULPs breach their fiduciary duty of good faith. A shareholder who is concerned about the employees' rights or simply the corporation's commitment to abiding by the law may wish to bring such a claim. In cases where it is difficult to prove that directors intentionally caused the ULPs, but where a corporation has been found to have committed many ULPs over a period of time, prospective plaintiffs can instead bring a *Caremark* claim. If plaintiffs begin to bring these claims, the potential liability may start to have a deterrent effect on corporations, making them more hesitant to allow ULPs to be committed. A small but growing emphasis on employee wellbeing in good corporate governance points to the existence of institutional shareholders who may be willing to take up such a case.

With the NLRB severely limited in its ability to deter unfair labor practices, *Caremark* claims over repeated ULPs may be a tool with which motivated shareholders can pressure corporations into compliance with labor law. These suits would be a step toward ensuring workers' right to organize—a right of which workers are routinely deprived today. Further, if the Delaware legislature made it easier for plaintiffs to recover attorneys' fees and identify red flags, it would be more feasible to litigate *Caremark* claims over repeated ULPs. Increased litigation could deter companies from committing ULPs in the first instance. While corporate governance is no substitute for worker power, it can hold accountable directors who would prioritize profits over their legal obligations.