MARTHA'S (AND STEVE'S) GOOD FAITH: AN OFFICER'S DUTY OF LOYALTY AT THE INTERSECTION OF GOOD FAITH AND CANDOR

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This short paper begins to explore whether a corporate officer's duty of good faith extends to public disclosures of personal facts. To illustrate the factual scenarios I have in mind, I begin with two simple, well-known examples:

- Martha Stewart's alleged failure to accurately and completely disclose details of her 2001 disposition of shares of ImClone Systems, Inc. – a security held as a personal investment – to Martha Stewart Living Omnimedia; and
- Assumed deficiencies and delays in Steve Jobs's disclosures to Apple Inc. about his health in 2008 and 2009.

Martha Stewart's alleged disclosure failure resulted in both a criminal securities fraud action (in which she was acquitted)[2] and a state law fiduciary duty action (which was dismissed "because the plaintiff failed to make pre-suit demand on the corporation's board of directors and failed to demonstrate demand futility.").[3] Steve Jobs's assumed disclosure deficiencies resulted in an SEC investigation.[4] I have written about these and other similar incidents in the past, focusing on the federal securities law disclosure duties that may compel disclosure of personal facts by an executive officer.[5] But an unresolved question continues to nag at me: in the

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[2] *See* United States v. Stewart*,* 305 F. Supp. 2d 368, 369-70, 378 (S.D.N.Y. 2004).

[3] Beam v. Stewart, 845 A.2d 1040, 1044 (Del. 2004).

[4] *See* Harvey Silverglate, *The SEC Should Leave Steve Jobs Alone*, WALL ST. J., Feb. 2. 2009, at A15; Connie Guglielmo et al., *Apple Disclosures Said to Be Subject of SEC Review*, BLOOMBERG.COM, July 8, 2009, http://www.bloomberg.com (search "Apple Disclosures" in "Search News" box).

[5] *See*, *e.g.*, Joan MacLeod Heminway, *Martha Stewart Saved! Insider Violations of Rule 10b-5 for Misrepresented or Undisclosed Personal Facts*, 65 MD. L. REV. 380 (2006); Joan MacLeod Heminway, *Personal Facts about Executive Officers: A Proposal for Tailored Disclosures to Encourage Reasonable Investor Behavior*, 42 WAKE FOREST L. REV. 749 (2007) (hereinafter "*Personal Facts*"); *More on Steve Jobs and Disclosure*, posting of

post-*Stone v. Ritter*,[6] post-*Gantler v. Stephens*[7] era in which we now live, is the absence or inadequacy of an executive officer's disclosure of personal facts to either the board of directors or the shareholders[8] a breach of the duty of good faith and, as a result, of the fiduciary duty of loyalty under Delaware law? A number of commentators have focused on the potential duty of a corporate officer to disclose matters to boards of directors,[9] but this paper explores the possibility that an officer might also owe a direct duty of disclosure of personal facts to shareholders.[10]

Recent Delaware Supreme Court jurisprudence locates the answer to this question at the intersection of the duty of good faith, the duty of disclosure (or candor), and the applicability of fiduciary duties to corporate officers. Accordingly, in a preliminary analysis, this paper first describes that jurisprudence and then applies it to executive disclosures of personal facts. Finally, this paper closes with a brief conclusion that includes a cautionary note about the use of its findings in a litigation setting.

Joan Heminway to The Conglomerate, http://www.theconglomerate.org/2009/01/more-on-steve-j.html (Jan. 15, 2009).

[6] Stone v. Ritter, 911 A.2d 362, 369-70 (Del. 2006) (clarifying the nature of the duty of good faith).

[7] Gantler v. Stephens, 965 A.2d 695, 708-09 (Del. 2009) (explicitly holding that, in addition to directors, corporate officers owe fiduciary duties of care and loyalty).

[8] An officer's disclosure duty has two dimensions: disclosure to the corporation (i.e., the board of directors) and disclosure to the shareholders (i.e., investors); however, one might conclude that an officer owes his disclosure duty only to the board (which may then consider whether to release the information to shareholders). *See generally* Shannon German, *What They Don't Know Can Hurt Them: Corporate Officers' Duty of Candor to Directors*, 34 DEL. J. CORP. L. 221 (2009) (suggesting an express expansion of the duty of candor in Delaware to mandate disclosure to directors); Donald C. Langevoort, *Agency Law Inside the Corporation: Problems of Candor and Knowledge*, 71 U. CIN. L. REV. 1187, 1194 (2003) ("There are many fascinating angles to an inquiry into whether corporate agents have an affirmative duty to disclose information to their superiors, a category that includes – at the very top of the corporate pyramid – the board of directors."). This makes especially good sense for information in the possession of an officer that is generated by or through the business or operations of the corporation, as managed by the board, because the board should be able to control the use of corporate information. *See id.* at 1200 (explaining, in the context of a CEO's duty to disclose facts to the board of directors, that "[w]hat the employment relationship does, in essence, is to make the principal the property holder of the agent's work product. Ideas, innovations, and information gathered within the scope of employment thus belong to the employer."). It also makes good sense because the officer owes fiduciary duties to the corporation. *See infra* note 22 and accompanying text.

[9] *See* Aaron D. Jones, *Corporate Officer Wrongdoing and the Fiduciary Duties of Corporate Officers Under Delaware Law*, 44 AM. BUS. L.J. 475 (2007); German, *supra* note 8; Langevoort, *supra* note 8.

[10] This type of duty might stem from proxy disclosure controversies. *See* Lawrence A. Hamermesh, *Calling Off the Lynch Mob: The Corporate Director's Fiduciary Disclosure Duty*, 49 VAND. L. REV. 1087, 1108-09 (1996) ("At least one observer has suggested that a fiduciary duty of directors and officers to disclose material facts to stockholders can be traced to cases which apply common-law principles to evaluate claims of false or misleading solicitation of proxies.").

I. AN OFFICER'S DUTY OF GOOD FAITH UNDER DELAWARE LAW

With due respect to the Delaware Supreme Court, the law regarding the duty of good faith has been all over the map throughout the past 20 years.[11] In 1993, the Delaware Supreme Court identified good faith as one of a triad of fiduciary duties.[12] This made sense because the court's formulation of the business judgment rule appeared to give equal weight to good faith, informed judgment (i.e., duty of care), and actions taken in the best interest of the corporation (i.e., duty of loyalty).[13] The precise contents of the duty of good faith, as a newly minted fiduciary duty, therefore became a key focus for law scholars (as well as judges and practitioners).[14] To that end, the *Disney* litigation gave us some important benchmarks, informing us – among other things – that irrationality in board decision-making "may tend to show that the decision is not made in good faith,"[15] and that directors have breached their duty of good faith when they have "consciously and intentionally disregarded their responsibilities, adopting a 'we don't care about the risks' attitude concerning a material corporate decision."[16] In a final opinion on this issue, the *Disney* court outlined three ways the duty of good faith may be violated:

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11 *See* Claire A. Hill & Brett H. McDonnell, *Stone v. Ritter and the Expanding Duty of Loyalty*, 76 FORDHAM L. REV. 1769, 1771 (2007) ("The doctrine of good faith in Delaware corporate law followed a rather twisted path on its way to Stone v. Ritter.").

12 Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993); *see* Malone v. Brincat, 722 A.2d 5, 10 (Del. 1998) ("The director's fiduciary duty to both the corporation and its shareholders has been characterized by this Court as a triad: due care, good faith, and loyalty. That triparte [sic] fiduciary duty does not operate intermittently but is the constant compass by which all director actions for the corporation and interactions with its shareholders must be guided." (footnote omitted)).

13 *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (identifying the business judgment rule as "a presumption that in making a business decision the directors of a corporation 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."); *see also* Hill & McDonnell, *supra* note 11, at 1772 ("[T]he business judgment rule provides three ways in which a plaintiff may attempt to rebut the presumption: by showing that the directors either did not act on an informed basis, did not act in good faith, or did not have an honest belief that the action they took was in the best interests of the company.").

14 *See* Hill & McDonnell, *supra* note 11, at 1773 (noting that early cases "gave no guidance as to what the duty might entail"); Mark Loewenstein, *The Diverging Meaning of Good Faith*, 34 DEL. J. CORP. L. 433, 438 (2009) ("In the corporate arena, the Delaware courts have struggled to define the duty of good faith.").

15 Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000).

16 *In re* Walt Disney Co. Derivative Litig., 825 A.2d 275, 289 (Del. Ch. 2003) (emphasis omitted). The Delaware Supreme Court later endorsed this formulation and clarified that it is equivalent to the Chancery Court's post-trial formulation of the duty – an *"intentional dereliction of duty,* a *conscious disregard for one's responsibilities*," and "[d]eliberate indifference and inaction *in the face of a duty to act*." *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 62 (Del. 2006) (emphasis in the original).

> 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 a conscious disregard for his duties. There may be other examples of bad faith yet to be proven or alleged, but these three are the most salient.[17]

Later in 2006, however, the duty of good faith landscape changed a bit. In its decision in *Stone v. Ritter*, the Delaware Supreme Court clarified that the duty of good faith is not itself a fiduciary duty distinct from the fiduciary duties of care and loyalty.[18] Rather, the court situated the duty of good faith within the duty of loyalty.[19] This was "news" to many students of Delaware fiduciary duty law.[20] However, *Stone* and its progeny did not change the essential contents of the duty of good faith.[21]

The latest twist? Recent Delaware Supreme Court jurisprudence has confirmed that officers, as well as directors, owe fiduciary duties to the corporation,[22]

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17 *In re Disney*, 906 A.2d at 67. *See also* Ryan v. Gifford, 918 A.2d 341, 357 (Del. Ch. 2007) (indicating that bad faith may include "any action that demonstrates a faithlessness or lack of true devotion to the interests of the corporation and its shareholders.").

18 Stone v. Ritter, 911 A.2d 362, 369 (Del. 2006) ("[A] failure to act in good faith is not conduct that results, *ipso facto*, in the direct imposition of fiduciary liability.").

19 *Id.* at 369-70. *See also* Ryan v. Lyondell Chem. Co., C.A, No. 3176-VCN, 2008 Del. Ch. LEXIS 125, at *19 n.27 (Del. Ch. Aug. 29, 2008) ("Now, in light of *Stone*, it is the duty of loyalty that serves as the legal framework for liability for a failure to act in good faith."); Midland Grange No. 27 Patrons of Husbandry v. Walls, C.A. No. 2155-VCN, 2008 Del. Ch. LEXIS 28, at *43-44 (Del. Ch. Feb. 28, 2008) ("The duty of loyalty entails a subsidiary duty to act in good faith. Thus, a corporate fiduciary's failure to act in good faith may result in a breach of the duty of loyalty if the fiduciary does not 'act[ ] in the good faith belief that her actions are in the best interest of the corporation.'" (footnotes omitted)).

20 *See*, *e.g.*, Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. (forthcoming 2009).

21 *Id.* at 14 (noting with approval the descriptions of "good faith" in *Caremark* and *Disney*); *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 125 (Del. Ch. 2009) ("A plaintiff can show bad faith conduct by, for example, properly alleging particularized facts that show that a director *consciously* disregarded an obligation to be reasonably informed about the business and its risks or *consciously* disregarded the duty to monitor and oversee the business." (emphasis in original)).

22 Gantler v. Stephens, 965 A.2d 695, 708-09 (Del. 2009). Earlier cases indicating the officers have fiduciary duties to the corporation include *In re* World Health Alternatives, 385 B.R. 576, 591-93 (Bankr. D. Del. 2008) (concluding that officers of Delaware corporations have fiduciary duties); *In re* Walt Disney Co. Derivative Litig., C.A. No. 15452, 2004 Del. Ch. LEXIS 132, at *14 (Del. Ch. Sept. 10, 2004) ("To date, the fiduciary duties of officers have been assumed to be identical to those of directors."); *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 969 (Del. Ch. 1996) ("[A]bsent grounds to suspect deception, neither corporate boards nor senior officers can be charged with

including the duty of good faith as construed under *Stone*.[23] This development raises the possibility that an executive like Martha Stewart or Steve Jobs could be sued for a breach of the fiduciary duty of loyalty (as a result of a breach of the duty of good faith) for failing to accurately or adequately disclose personal facts. However, much in the area of officer fiduciary duties remains to be said.[24]

II. OFFICER MISSTATEMENTS AND OMISSIONS TO STATE PERSONAL FACTS AS A BREACH OF THE DUTY OF GOOD FAITH

An action against an officer for a breach of the duty of good faith based on the misstatement of (or, possibly, an omission to state) a personal fact is, in essence, a duty of loyalty claim based on a bad faith disclosure failure.[25] This adds the duty of disclosure to the already heady mix of duties implicated in a personal facts disclosure scenario like that involving Martha Stewart or Steve Jobs. Shareholder disclosure cases arise under Delaware fiduciary duty law in two principal contexts: (1) communications to shareholders in connection with the solicitation of a shareholder vote or other shareholder activity; and (2) communications to shareholders outside the context of shareholder action.[26] An officer's inaccurate or incomplete disclosure

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wrongdoing simply for assuming the integrity of employees and the honesty of their dealings on the company's behalf.").

[23] An earlier case indicated that officers could be liable for bad-faith decisions. Stanziale v. Nachtomi (*In re* Tower Air, Inc.), 416 F.3d 229, 239 (3d Cir. 2005) ("The officers' alleged passivity in the face of negative maintenance reports seems so far beyond the bounds of reasonable business judgment that its only explanation is bad faith.").

[24] *See* Lyman Johnson & Dennis Garvis, *Are Corporate Officers Advised About Fiduciary Duties?*, 64 BUS. LAWYER 1105 (Aug. 2009).

[25] In the seminal Delaware case on the duty of disclosure, the court frames its analysis in this way:

> The issue in this case is not whether Mercury's directors breached their duty of disclosure. It is whether they breached their more general fiduciary duty of loyalty and good faith by knowingly disseminating to the stockholders false information about the financial condition of the company. The directors' fiduciary duties include the duty to deal with their stockholders honestly.

Malone v. Brincat, 722 A.2d 5, 10 (Del. 1998). *See also*, *e.g.*, *In re* Tyson Foods, Inc. Consol. S'holder Litig., 919 A.2d 563, 597-98 (Del. Ch. 2007) ("[W]here there is reason to believe that the board lacked good faith in approving a disclosure, the violation implicates the duty of loyalty.").

[26] *Malone*, 722 A.2d at 11-12. The *Malone* court mentions a third context (communications to the market or, in the court's words, "fraud on the market"), which it properly notes is governed by federal law in most cases and, potentially, state law in areas that federal law does not cover. *Id.* at 11, 12-14. This raises an interesting question about whether, in certain cases, misstatements and omissions of personal facts would be considered by Delaware courts to be preempted by the application of federal antifraud prohibitions. *Id.* at 13 ("In deference to the panoply of federal protections that are available to investors in connection with the purchase or sale of securities of Delaware corporations, this Court has decided not to recognize a state common law cause of action against the directors of Delaware

of a personal fact could occur in either situation, but more typically would occur separate from a request for shareholder action. I therefore focus on that context here. According to the Delaware Supreme Court, "[w]hen the directors disseminate information to stockholders when no stockholder action is sought, the fiduciary duties of care, loyalty and good faith apply. Dissemination of false information could violate one or more of those duties."[27]

According to the Delaware Supreme Court, liability for breach of the duty of loyalty in this context results from the knowing dissemination of false information to shareholders.[28] In addition, the Delaware Supreme Court has said that "fiduciaries, corporate or otherwise, may not use superior information or knowledge to mislead others in the performance of their own fiduciary obligations."[29] Moreover, "[p]laintiffs must at the very least allege some connection between the lack of disclosure and an actual harm."[30] In light of *Gantler*,[31] the same principles and elements that apply to disclosure failures by directors also apply to disclosure failures by executives and other officers. Therefore, an aggrieved shareholder may have a viable action against an executive like Martha Stewart or Steve Jobs if the executive

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corporations for 'fraud on the market.'" (footnote omitted)). *See also* Johnson & Garvis, *supra* note 24, at 1124 ("Without . . . attention, the sanctioning and regulation of officers may continue to migrate to the federal government – notably, to the SEC – and away from state law. If that happens . . . we would have – perhaps we already have – an incomplete federalism in corporate law, with directors attended to by state law and officers by federal law.").

27 *Malone*, 722 A.2d at 12 (Note that the court's formulation of the applicable fiduciary duties includes the duty of good faith as a separate fiduciary duty, since the *Malone* case predates the *Stone* case.). *See also id.* at 14 ("When the directors are not seeking shareholder action, but are deliberately misinforming shareholders about the business of the corporation, either directly or by a public statement, there is a violation of fiduciary duty."). In an earlier case, the Delaware Supreme Court clarified the context in which a disclosure failure would implicate the duty of care. *See* Zirn v. VLI Corp., 681 A.2d 1050, 1062 (Del. 1996) ("A good faith erroneous judgment as to the proper scope or content of required disclosure implicates the duty of care rather than the duty of loyalty."). That context is not applicable here. *See also* Hill & McDonnell, *supra* note 11, at 1783 ("A decision violates only the duty of care when the misstatement or omission was made as a result of a director's erroneous judgment with regard to the proper scope and content of disclosure, but was nevertheless made in good faith. Conversely, where there is reason to believe that the board lacked good faith in approving a disclosure, the violation implicates the duty of loyalty." (quoting *In re* Tyson Foods, 919 A.2d at 597-98)).

28 *Malone,* 722 A.2d at 10 (attributing liability to "knowingly disseminating to the stockholders false information"). *See also id.* at 14 ("When the directors are not seeking shareholder action, but are deliberately misinforming shareholders about the business of the corporation, either directly or by a public statement, there is a violation of fiduciary duty.").

29 Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1283 (Del. 1989).

30 *In re* Tyson Foods, 919 A.2d at 597 (footnote omitted).

31 Gantler v. Stephens, 965 A.2d 695, 708-09 (Del. 2009).

knowingly disseminates false or misleading personal facts and that disclosure failure harms the shareholder. Presumably, the action would be direct in nature, since the shareholder must prove harm and should be entitled to any recovery or other remedy.[32]

Omissions to state personal facts raise different, thornier issues.[33] Delaware law regarding corporate disclosure duties does not contemplate or endorse a cause of action against a director for an omission to state facts, except in the context of a request for a shareholder vote or other action. In fact, cases repudiate the purported existence of any independent duty to disclose or duty of candor.[34] Perhaps a court considering the matter would find or extrapolate a duty to disclose private facts based on an executive's overall fiduciary duty of loyalty to shareholders. Should we penalize executives like Martha Stewart and Steve Jobs under state law fiduciary duty standards for making bad-faith decisions to withhold personal information from public distribution in the absence of an affirmative duty to disclose? If a cause of action is afforded to shareholders for an officer's omission to state personal facts, we should (at a minimum) require the same elements of proof as those personal facts required for false or misleading statements – namely, knowing conduct that harms a corporate shareholder.[35]

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[32] *See* Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031 (Del 2004) (en banc) (discarding the "special injury" test for determining whether fiduciary duty actions are derivative or direct in favor of a two-part test analyzing "who suffered the alleged harm" and "who would receive the benefit of any recovery or other remedy.").

[33] *See*, *e.g.*, *In re* Caremark Int'l Inc. Derivative Lit., 698 A.2d 959, 967 (Del Ch. 1996) (noting, in the oversight context, that the theory that directors may be liable for omissions to act "is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.").

[34] *See*, *e.g.*, *Malone*, 722 A.2d at 11 ("In the absence of a request for stockholder action, the Delaware General Corporation Law does not require directors to provide shareholders with information concerning the finances or affairs of the corporation.").

[35] One scholar notes the following, consistent with this approach.

> In one sense, the question of when directors should be liable for their mere omissions admits of a deceptively simple answer: wrongful omissions should be treated no worse and no better than wrongful decisions deliberately undertaken. Put another way, the standard for wrongfulness for omissions should be the same as the standard of wrongfulness for deliberate decisions. Such a view seems sensible because there is no obvious reason to treat wrongful omissions more or less harshly than wrongful decisions. Moreover, the essence of the claim is – in some form or other – negligence, and the standard economic analysis of negligence does not distinguish between active and passive conduct. Whether active or passive in a causal sense, a party is negligent in the economic interpretation of negligence if the party could have modified its conduct at a cost less than the expected cost of the accident. It seems, therefore, that corporate law similarly ought to make no distinction between directors who make a deliberate decision

III. CONCLUSION

For those who are angry with or aggrieved by the perceived misstatements of personal facts and omissions to state personal facts of the Martha Stewarts and Steve Jobses of the world, this short paper may give them some hope and comfort that an action for fiduciary duty, as well as an action for securities fraud, may exist when an executive misrepresents or fails to disclose personal facts. Indeed, the preliminary analysis set forth in this paper indicates that current articulations of the Delaware law on duties of good faith and disclosure may support officer liability for misstatements of (and perhaps even omissions to state) personal facts as a breach of the fiduciary duty of loyalty.

A question remains, however, as to whether (and, if so, when) a cause of action for a breach of the duty of good faith *should* be brought against a corporate officer for disclosure failures relating to personal matters.[36] For one thing, we should be worried about privacy, free speech, and (in cases like Stewart's) self-incrimination, which I address in an earlier work.[37] Individual rights in these areas are not insignificant, and the tensions created by an overlap of positive regulation and constitutional provisions are difficult to resolve.[38] In fact, the balancing of disclosure requirements and specific individual rights may differ based on the nature of the right and the specific facts at issue.[39] Litigants and the courts may together resolve these tensions and perform the required balancing . Although the courts, with their relative independence from political influence, may appear to be a good place to leave these kinds of decisions, scholars should continue to question whether litigants and courts are the appropriate gatekeepers for these causes of action. Certainly, legislatures can limit the need for judicial decision-making or guide it with thoughtful rulemaking.[40]

> harmful to the corporation and directors who fail to act when they should have in order to prevent harm to the corporation.

Robert T. Miller, *Wrongful Omissions by Corporate Directors: Stone v. Ritter and Adapting the Process Model of the Delaware Business Judgment Rule*, 10 U. PA. J. BUS. & EMP. L. 911, 912 (2008) (footnotes omitted).

[36] *See* Hill & McDonnell, *supra* note 11, at 1787 (noting that "the scope of good faith liability is uncertain, and will thus increase litigation and litigation costs.").

[37] *See* Heminway, *Personal Facts*, *supra* note 5, at 772-83.

[38] *Id.* at 774-83.

[39] This may be a reason why Martha Stewart was sued based on her alleged investment disclosure lapses. *See* Beam v. Stewart, 845 A.2d 1040 (Del. 2004). Steve Jobs has, to my knowledge, not yet been sued for his lapses.

[40] I suggest that the SEC take this kind of action in the securities fraud area in my earlier work. *See* Heminway, *Personal Facts*, *supra* note 5, at 789-801.

In addition, prospective plaintiffs should understand from this paper that the threshold for liability is quite high in good faith and disclosure cases.[41] Under *Disney*, it appears that conduct must be intentional or fraudulent in order for a plaintiff to have the potential of succeeding in a good faith case; claims based on gross negligence will not be successful.[42] Moreover, under *Malone*, liability only exists for faulty disclosures that are made knowingly or deliberately.[43] In other words, actions for breach of the duty of loyalty in this context, especially those relating to personal facts, should not be seen as a magic pill to cure the perceived evils of executive disclosure abuses.

Finally, it is important to note that disclosure duties typically are qualified by and limited to the importance and relevance of the information at issue. In general, only material personal facts would be the subject of any officer's disclosure duty.[44]

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[41] *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 125 (Del. Ch. 2009) ("[T]he burden to show bad faith is even higher.. . . The presumption of the business judgment rule, the protection of an exculpatory § 102(b)(7) provision, and the difficulty of proving a *Caremark* claim together function to place an extremely high burden on a plaintiff to state a claim."); *In re* Lear Corp. S'holder Litig., 967 A.2d 640, 653 (Del. Ch. 2008) ("[O]ur Supreme Court has held that to hold a disinterested director liable for a breach of the fiduciary duty of loyalty for acting in bad faith, a strong showing of misconduct must be made.").

[42] *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 65 (Del. 2006) ("[G]rossly negligent conduct, without more, does not and cannot constitute a breach of the fiduciary duty to act in good faith."); *see also* Stone v. Ritter, 911 A.2d 362, 369 (Del. 2006) ("[A] failure to act in good faith requires conduct that is qualitatively different from, and more culpable than, the conduct giving rise to a violation of the fiduciary duty of care (i.e., gross negligence)."); Ryan *ex rel.* Maxim Integrated Prods. v. Gifford, C.A. No. 2213-CC, 2009 Del. Ch. LEXIS 1, at *23 (Del. Ch. Jan. 2, 2009) ("In order to recover at trial . . . plaintiffs would be required to meet their burden of proof . . . a task that should not be underestimated when a party is required to show intent or fraud."); Kahn v. Portnoy, C.A. No. 3515-CC, 2008 Del. Ch. LEXIS 184, at *26 (Del. Ch. Dec. 11, 2008) ("[D]irector action that constitutes mere gross negligence – a violation of the duty of care – cannot constitute bad faith."); McPadden v. Sidhu, 964 A.2d 1262, 1263 (Del. Ch. 2008) ("[I]t is quite clearly established that gross negligence, alone, cannot constitute bad faith. Thus, a board of directors may act 'badly' without acting in bad faith." (footnote omitted)); Torch Liquidating Trust v. Stockstill, C.A. No. 07-133, 2008 U.S. Dist. LEXIS 19535, at *31 (E.D. La. Mar. 13, 2008) ("Plaintiff must allege that scienter and/or an intent to deceive in order to establish the inapplicability of the business judgment rule's strong presumption."); Ryan v. Gifford, 918 A.2d 341, 358 (Del. Ch. 2007) (indicating that "the intentional violation of a shareholder approved stock option plan, coupled with fraudulent disclosures regarding the directors' purported compliance with that plan, constitute conduct that is disloyal to the corporation, and is therefore an act in bad faith.").

[43] Malone v. Brincat, 722 A.2d 5, 9-14 (Del. 1998). *See also supra* note 21 and accompanying text.

[44] *See*, *e.g.*, Lynch v. Vickers Energy Corp., 383 A.2d 278, 279-81 (Del. 1977) (construing the requirement that a majority shareholder owes a minority shareholder a duty to disclose all information germane to a transaction by reference to the federal securities law materiality standard); Kelly v. Bell, 254 A.2d 62, 71 (Del. Ch. 1969), *aff'd* 266 A.2d 878 (Del. 1970) ("[D]irectors owe a duty to honestly disclose all *material* facts when they undertake to give out statements about the business to stockholders." (emphasis added)).

Arguably, personal facts are less likely to rise to this threshold level of importance or relevance than corporate facts.[45] Accordingly, even if a plaintiff is sanguine about individual rights and can meet the high burdens of proof in a particular case, a defendant officer may be able to argue that the undisclosed information is not important or relevant enough to trigger liability.

Despite these cautionary notes, I think it is important for scholars and other commentators to consider and further analyze the possibility of actions for breach of fiduciary duty in connection with executive disclosures of personal facts for at least two reasons. First, executive disclosure issues regarding personal facts seem to arise more now in a public light than ever before. With our current information-overloaded society, the corporate and personal lives of founding and otherwise iconic executives – like Martha Stewart and Steve Jobs – are far more public.[46] The press builds these executives up and, when provoked, tears them down, in each case reinforcing public notions (accurate and inaccurate) that shareholder value is tied to the executives' every move.[47] Our federal and state laws on officer disclosures in the corporate context (largely decisional law) are inherently reactive and have not yet fully caught up with that phenomenon. Second, a more fulsome analysis of the duty of loyalty (and the subsidiary duties of good faith and disclosure) in the executive disclosure context may be helpful to the judiciary and the bar in tailoring and reforming fiduciary duty law in Delaware and elsewhere. It is important that we keep that conversation going outside symposia, lecture halls, and classrooms, and that as many participants as possible contribute to the dialogue.

Accordingly, this paper invites further commentary, supportive and critical, on whether a corporate officer's duty of good faith extends (or should extend) to public disclosures of personal facts. Given the Delaware Supreme Court's decisions in *Stone* and *Gantler*, the door is left open to scholarly and judicial interpretation. Those who take up the challenge may have a role in shaping fiduciary duty doctrine under Delaware corporate law.

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45 *See* Heminway, *Personal Facts*, *supra* note 5, at 764-65.

46 *Cf.* Johnson & Garvis, *supra* note 24, at 1105 ("Undeniably, corporate executives wield great power and are critical to company success, and they generally play central roles in corporate failure and scandal as well.").

47 *Id.*