

CONFIDENTIAL REPORT FOR CONSIDERATION FROM
ENGULF & DEVOUR RESEARCH
A DIVISION OF STERLING COOPER, INC.

IS THERE A Breach of Fiduciary Duties by the Board of Directors at
Berkshire Hathaway, Inc., and Nepotism at (“BRK”)?



PREPARED FOR THE CONFIDENTIAL REVIEW BY WARREN E.
BUFFETT, CEO, AND THE BOARD OF DIRECTORS.

Directors of public companies, including Berkshire Hathaway, Inc., owe a fundamental **fiduciary duty** to the corporation and its shareholders. This duty is primarily composed of two core components under Delaware law, which governs BERKSHIRE HATHAWAY, INC.; the **duty of care** and the **duty of loyalty**.

THESE ARE MR. BUFFETT’S WORDS:

“Transparency and Trust



- **Buffett calls for transparency in corporate governance, urging leaders to communicate openly about mistakes and challenges. He believes that honesty fosters trust with shareholders.”**
- **WHERE ARE THE EXPECTED DIVIDENDS AND DISTRIBUTIONS TO STOCKHOLDERS, WAITING FOR 60 YEARS!!!!**

The **duty of care** requires directors to make decisions on an informed basis, after a reasonable investigation and careful consideration of all available material information. They must act with the same level of care that an ordinarily prudent person would exercise in a similar situation.

In essence, it's about making a good-faith effort to make good decisions. This duty also includes an obligation to oversee the company's management and operations, ensuring a system is in place to monitor the company's performance, finances, and compliance with the law. A breach of this duty, often termed gross negligence, occurs when directors act with a conscious disregard for their responsibilities or fail to act when a prudent person would have.

The **duty of loyalty** is arguably more stringent. It requires directors to act in the best interests of the corporation and its shareholders, putting those interests ahead of their own personal interests or the interests of others. This means a director must not engage in self-dealing, exploit corporate opportunities for personal gain, or approve transactions that are unfair to the company. A breach of the duty of loyalty is considered more serious than a breach of the duty of care, as it implies a lack of good faith.

The Question of Family Relationships on the Board

The appointment of family members who have absolutely no big company management experience, to a board of directors, particularly in a company as large and influential as Berkshire Hathaway, introduces a complex layer to these fiduciary duties.

The presence of Warren Buffett's elderly son, Howard Buffett, and elderly daughter, Susan Buffett, on the board, raises questions about their qualifications and independence from their father.

Howard Buffett has served on the board since 1993, while Susan Buffett was appointed more recently. While their father, Warren Buffett, has stated his trust in his children and



has prepared them for their roles, the core issue for any board member is whether they possess the requisite **expertise and experience** to fulfill their fiduciary duties effectively.

Howard Buffett's background includes a variety of roles in business, farming, and philanthropy, and he has served on other corporate boards. Susan Buffett's background is primarily in philanthropy, where she chairs two large foundations.

While these experiences demonstrate a capacity for leadership and oversight, a critique often levied is whether they have the deep, specific financial acumen and operational experience necessary to oversee a complex, multinational conglomerate with a diverse portfolio of businesses like Berkshire Hathaway.

The concern isn't about their character, but about their ability to challenge management, understand complex financial reports, and make informed decisions on a colossal scale, particularly when those decisions involve multibillion-dollar investments.

Furthermore, the issue of **independence** is paramount. A board member's independence can be compromised by a close family relationship with the CEO or controlling shareholder.

While the board has a nominating committee that is responsible for vetting candidates, the fact that these family members are on the board, and one (Howard) is designated to be the non-executive chairman after Warren Buffett steps down as CEO later this year, raises concerns about the board's ability to act independently of the founder.

An independent board is crucial for effective corporate governance, as it provides a check on management, especially during periods of transition, and ensures that the interests of all shareholders—not just the controlling family—are protected.

It seems that the BRK board has not, on information and belief ever, questioned the decisions of Warren Buffett relating to the lack of dividends or strategy of “stock picking” and the buying and selling timing of such.

For example, recently the long-held Apple shares were reported sold last quarter, while missing the run-up of that stock recently. Should the stockholders continue to rely on a 94-year-old stock picker to make the necessary timing decisions? It seems more ego than timing prowess.

Does the “Buffett Premium” to the stock price still valid?



Now it is referred to as the "Conglomerate discount" instead.

The Succession Plan and Board's Role

Recent news surrounding Berkshire Hathaway has brought these issues into sharp focus. Warren Buffett has announced that Greg Abel will take over as CEO, but Warren will remain chairman. Why is it Mr. Buffett making that decision, that should clearly be the decision of the Board.

His son, Howard Buffett, is expected to become the non-executive chairman of the board after Warren Buffett's death. This succession plan highlights the board's ongoing responsibility to ensure a smooth transition that protects shareholder interests.

BUT ARE THESE PLANS FOR THE REAL BENEFIT TO STOCKHOLDERS? Likely not, IN OUR OPINION.

The board's fiduciary duty requires them to carefully consider the qualifications of the new leadership and ensure the company's long-term strategy remains sound. This is where the lack of extensive, relevant experience of some board members could be a point of concern for investors.

While Warren Buffett has explicitly stated that his son's role will be to protect the company's culture and select a CEO if needed.

Mr. Buffett has already emphatically stated that Mr. Abel will be the new CEO, not picked by the Board, (BUT SEEMINGLY picked AS THE CEO HEIR APPARENT BY MR. BUFFETT) as would be the proper corporate necessary decision to manage day-to-day operations, it still places a significant responsibility on a person (Howard) who, by his own admission, has a different professional background AND no real big company experience not to mention that he is getting up in age as well, and is clearly the definition of nepotism.

The board as a whole is responsible for overseeing this transition and ensuring that the company's unique culture of decentralized management and capital allocation is preserved, and that the new leadership is held accountable.

Yet it is clearly not taking that role...seriously, and frankly, has here ever been any news from BRK from a spokesman other than Warren Buffett?

The Annual meeting table presentation, clearly demonstrated Mr. Buffett's absolute control of every narrative...and was frustrating to watch this clearly elderly 94-year-old dominating the presentation.



It would have been appropriate to see the BOARD members at that presentation, participate in that discussion. NONE WERE THERE!

The situation with Berkshire Hathaway underscores that the ethical and fiduciary duties of a board of directors are not just abstract legal concepts; they are critical to the long-term health and stability of a corporation.

The presence of family members on the board, regardless of their good intentions, requires a particularly careful analysis of their qualifications, independence, and the potential for a conflict of interest. In this case, the challenge for the board is to prove to the market that their structure, including the familial relationships, is designed to serve the best interests of all shareholders, not just to perpetuate Mr. Buffett's and the family's influence.

Berkshire Hathaway's board approval of Greg Abel as next CEO provides a video clip from Reuters about the company's succession plan.

<https://youtu.be/OHd5LNV7RfI>

Divergent Standards of Director Independence and Their Impact on Corporate Governance

The concept of director independence is a cornerstone of corporate governance, but its definition is not universal. For a public company like Berkshire Hathaway, which is incorporated in Delaware and listed on the NYSE, a director's independence is scrutinized through multiple, often-divergent legal and regulatory lenses.

These standards—stemming from Sarbanes-Oxley (SOX), the stock exchanges (NYSE/NASDAQ), and Delaware case law—each have their own unique criteria and implications, with Delaware law posing the most significant challenges and consequences for directors.

The Different Standards of Director Independence

The various standards for director independence serve different purposes and, therefore, apply different tests.

- **Sarbanes-Oxley Act (SOX):** This federal law establishes "bright-line standards" for directors who serve on a company's audit committee.
- Under SOX, an audit committee member cannot accept any consulting, advisory, or other compensatory fees from the company or its subsidiaries, nor can they be an "affiliated person" of the issuer.



- This standard is designed to prevent financial conflicts of interest that could compromise the integrity of financial reporting. The focus is narrow and specific to the audit committee's role.
- **NYSE and NASDAQ Rules:** These stock exchange rules are more comprehensive than SOX and contain both "general principles and bright-line rules." They require a board to determine that an independent director has no "material relationship" with the company, and they establish specific relationships that automatically disqualify a director from being considered independent.
- For example, under NYSE rules, a director who has been an employee of the company within the past three years or has an immediate family member who was an executive officer of the company is not considered independent. The NASDAQ rules have similar, but slightly different, financial and familial thresholds. These standards are broader, aiming to ensure a level of oversight that is free from entanglements that could sway a director's judgment.
- **Delaware Law:** Unlike the bright-line tests of SOX and the stock exchanges, Delaware law uses a more subjective, fact-intensive standard. Delaware courts define independence as a director's decision being "based on the corporate merits of the subject before the board rather than extraneous considerations or influences." **Aronson v. Lewis, 473 A.2d 805, 816 (Del. 1984)**. This standard is not limited by time or specific financial thresholds. A court applying Delaware law can look back decades to uncover relationships or influences that might compromise a director's independence.
- This is a crucial distinction, as a director who is independent under SOX and exchange rules may still be found not independent under Delaware law due to a long-standing personal or business relationship with a controlling shareholder or executive.
- A key example of this expansive view is the case of **in re Oracle Corp. Derivative Litig., 824 A.2d 917 (Del. Ch. 2003)**, where the court took into account connections dating back over twenty years to conclude that special litigation committee members were not sufficiently independent due to their ties to Stanford University, which had received significant donations from Oracle's CEO.



The Consequences of a Lack of Independence under Delaware Law

The distinction between these standards is not merely academic; it has serious and material litigation consequences. If a majority of a corporation's board is found to be not independent under Delaware law, it can affect the entire legal landscape of a fiduciary duty claim.

1. **Standard of Review:** The most critical consequence is the potential shift in the **standard of review** applied to a challenged transaction.
 - The **Business Judgment Rule** is the default standard. It is a rebuttable presumption that directors acted on an informed basis, in good faith, and in the honest belief that their actions were in the best interests of the corporation. This standard is highly deferential to the board and makes it very difficult for a plaintiff to win a case.
 - However, if a plaintiff can rebut this presumption by showing that a majority of the directors were either interested in the transaction or **lacked independence** from an interested party, the standard of review shifts to **Entire Fairness**.
 - Under the **Entire Fairness** standard, the directors must prove that the challenged transaction was the result of both "fair dealing" and "fair price."¹¹ This is a far more difficult standard to meet and dramatically increases the likelihood of a successful lawsuit and significant liability for the directors.
2. **Special Committees and Litigation:** Independence is also vital when a board forms a **special committee** to review a transaction or to investigate a **derivative lawsuit**. A derivative action is a lawsuit brought by a shareholder on behalf of the corporation against the directors.
3.
 - If a board delegates authority to a special litigation committee (SLC) to dismiss a derivative action, that committee must prove its independence to the court. The burden of proof is on the committee itself, a higher bar than a plaintiff in a derivative action must meet to show demand futility.
 - In the **Oracle** case, for instance, the court concluded that the SLC had not met its burden of proving independence due to substantial ties between the committee members, the defendant directors, and Stanford University, creating a "reasonable doubt" about their ability to impartially consider the suit.



- This highlights the fact that even seemingly innocuous connections, like those to a non-profit organization that receives corporate donations, can be fatal to a claim of independence under Delaware law.
4. **Derivative Litigation and Demand Futility:** Before a shareholder can file a derivative lawsuit, they must typically make a formal demand on the board of directors to take action. If the board refuses, the shareholder must show that the demand was "wrongfully refused."

The shareholder can bypass this demand requirement entirely by alleging that a demand would be "futile." To do so, the plaintiff must create a reasonable doubt that a majority of the directors are disinterested and independent.

This is where a director's independence, or lack thereof, is fiercely debated. Allegations of extensive personal friendships, or perhaps domination by Mr. Buffett or business ties, especially when an interested director controls a material relationship, can be sufficient to raise a "reasonable doubt" about a director's independence and, therefore, excuse the demand.

The Berkshire Hathaway Board and Delaware Independence

Given the structure of Berkshire Hathaway's board, particularly the presence of Warren Buffett's son, Howard Buffett, and daughter, Susan Buffett, who has NO experience at all to qualify for the board at such a large enterprise, other than Mr. Buffett wanted her on that board because she is his daughter; the issue of Delaware independence becomes highly relevant.

While their appointments might satisfy the bright-line rules of the NYSE because they are not employees or executive officers of the company, their independence could still be challenged under Delaware's more subjective standard.

The central question would be whether they are "beholden" to their father, (Howie has already stated so in interviews) the controlling shareholder and long-time CEO, to an extent that their judgment is compromised.

The fact that their positions on the board are a direct result of their familial relationship with the founder could lead a Delaware court to scrutinize their decisions with a higher level of skepticism, particularly in any future related-party transactions or succession-related decisions.



The board's challenge, therefore, is to demonstrate that even with these close personal ties, its members can and do exercise their independent and disinterested business judgment on behalf of all shareholders.

The fact that their long-standing relationships with Warren Buffett are public record is both a strength, in that there is no hidden information, and a potential vulnerability, as it provides a clear basis for a plaintiff to allege a lack of independence in a derivative lawsuit.

Fiduciary Duties and the Primacy of Shareholder Value in Delaware Law

In Delaware, the fundamental and unremitting purpose for which corporate directors must act is the **maximization of value for shareholders**.

This principle is not a mere suggestion but is at the core of a director's **fiduciary duty of loyalty**. Directors are legally obligated to act in good faith, meaning they must sincerely believe their actions are intended to benefit shareholders.

They are not permitted to pursue other purposes or ends, whether to benefit themselves or other constituencies, unless doing so is rationally related to increasing long-term shareholder value.

The Paramount Rule: Shareholder Primacy

The principle that directors must prioritize shareholder value is a central tenet of Delaware corporate law. This is clearly articulated in numerous court decisions.

- In **In re Trados Inc. S'holder Litig., 73 A.3d 17, 36 (Del. Ch. 2013)**, the court noted that directors' statutory responsibility is to "promote the value of the corporation for the benefit of its stockholders."
- The Delaware Supreme Court stated in **Malone v. Brincat, 722 A.2d 5, 9 (Del. 1998)**, that "The board of directors has the legal responsibility to manage the business of a corporation for the benefit of its shareholder owners."
- This was reaffirmed in **N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007)**, which cited *Malone* to emphasize the point.



This rule is not a call for shortsighted profit-seeking. Directors are given "great deference" by Delaware courts regarding the means they choose to achieve this ultimate end.

For example, a board can invest in research and development today for future profits, or provide non-shareholder constituencies (such as employees, customers, or suppliers) with benefits to which they are not legally entitled, but only if the directors have a rational belief that these actions will ultimately produce a net benefit for shareholders in the long run.

The landmark case of **Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182-83 (Del. 1986)** is often cited for this rule, as it emphasizes that a board may have "regard for various constituencies... provided there are rationally related benefits accruing to the stockholders."

A later case, **Paramount Commc'ns., Inc. v. QVC Network, Inc., 637 A.2d 34, 45-48 (Del. 1994)**, further discussed this duty imposed on directors by *Revlon*.

Some commentators have argued that Delaware law is less strict on this point, but a lawyer who advises otherwise would be committing legal malpractice. This view is based on a misreading of cases like *Revlon*, which, while allowing for the consideration of other constituencies, still requires such consideration to be tethered to a rational belief that it will ultimately benefit shareholders.

The Role of Special Committees and Entire Fairness

To mitigate this risk, a corporation may form a **special committee** of independent and disinterested directors to negotiate and approve the transaction. Delaware courts have consistently emphasized that the independence and good faith of this committee are paramount.

Court cases collectively demonstrate that while directors may have a long leash to pursue means to an end, the ultimate end must always be the maximization of shareholder value.

The integrity and independence of a board, particularly a special committee, are not just best practices; they are a legal requirement that can have billion-dollar consequences if breached. The Delaware courts will not hesitate to scrutinize such boards and their processes to ensure that directors are fulfilling their unremitting duty to their shareholders.

A Detailed Examination of Board Duties and Recent Events at Berkshire Hathaway

The fiduciary duties of a corporate board of directors are not static; they are dynamically shaped by corporate law, regulatory mandates, and market expectations.



At Berkshire Hathaway, the unique culture and long-standing leadership and celebrity status where he is referred as the ORACE OF OMAHA, of Warren Buffett have set a high bar for these duties.

However, as the company transitions to a post-Buffett era, recent events concerning board members and the company's performance bring these duties into sharper focus, especially in the context of the family's role.

The Duty of Loyalty, Insider Trading, and Recent Board Member Transactions

The **duty of loyalty** is a director's core obligation to act in the best interests of the corporation and its shareholders. A critical component of this duty is the prohibition against insider trading—the buying or selling of a security in breach of a fiduciary duty or other relationship of trust and confidence, while in possession of material, non-public information. This is a fundamental ethical and legal obligation. Berkshire Hathaway's own Code of Business Conduct and Ethics explicitly prohibits insider trading, and directors are subject to these policies.

Berkshire Hathaway's board members, specifically:

- **Meryl Witmer (Director):** Sold 2 shares of A stock in March 2025 for over \$1.5 million. The filing noted that these shares were held in her spouse's account.
- **Ajit Jain (Vice Chairman):** Sold a significant number of shares in August 2023 and March 2023 for a combined value of over \$12 million. A later sale in September 2024 of 200 Class A shares for \$139 million was also reported.
- **Greg Abel (Vice Chairman):** Purchased a small number of shares in September 2022.

Delaware law holds directors to a high standard of disclosure. As seen in the case of **in re Oracle Corp. Derivative Litig., 824 A.2d 917 (Del. Ch. 2003)** illustrates that a court will go to great lengths to analyze relationships and potential conflicts. While there is no public indication that the transactions by Witmer and Jain were based on insider information, the timing and size of such sales, especially those by high-level executives like Jain who is responsible for the company's vast insurance operations, would likely attract scrutiny in any shareholder litigation. The law on insider trading liability, is premised on a breach of this fiduciary duty of loyalty and a relationship of trust and confidence.

The converse is also true. The purchases by Greg Abel, the heir apparent, could be seen as an action consistent with his fiduciary duty. By increasing his stake in the company, he is more closely aligning his personal financial interests with those of the shareholders, a move



that would be viewed favorably by Delaware courts and investors. It signals a strong belief in the company's future and a commitment to its long-term success.

The Exploitation of an Unindependent Board: A Case for a New Corporate Structure at Berkshire Hathaway

A trenchant analysis of Berkshire Hathaway reveals a profound failure of fiduciary duty by its board of directors.

The board, far from being an autonomous body, appears to be a captive audience to the deeply entrenched, yet increasingly obsolete and outdated, "Conglomerate" philosophy of its aging CEO, Warren Buffett.

This dynamic leads to a direct and measurable destruction of shareholder value, primarily through the insidious **conglomerate discount** and a strategic paralysis that is completely at odds with a board's **duty of care** and **duty of loyalty**.

The standard of conduct required of directors is a two-pronged attack on complacency: the **duty of care** and the **duty of loyalty**. The duty of care demands that directors be reasonably informed and act with the prudence of a reasonable person in a similar position. The duty of loyalty requires them to act in the best interests of the company, free from conflicts of interest.

At Berkshire, both duties are being systematically eroded by a board that appears to prioritize a founder's legacy and unquestioned unilateral actions, over the financial well-being of its shareholders. Mr. Buffet regularly recalls deals that HE ALONE seemingly decided for the Company.

The central argument is this: Warren Buffett's investment decisions, once a source of unparalleled success, have become a liability due to their scale and rigid adherence to an outdated ideology. The board's failure to challenge this dogma, to demand a more modern and dynamic approach, is a clear breach of its fiduciary obligations.



The Unassailable Folly of the Conglomerate Discount and Board Inaction

The **conglomerate discount** is a stark, quantifiable measure of a board's failure. It is the gap between a company's market capitalization and the true value of its underlying assets. For Berkshire Hathaway, with its "hodgepodge" collection of businesses, **this discount is a tangible penalty paid by shareholders.**

A truly independent and vigilant board, fulfilling its **duty of loyalty**, would not passively accept this state of affairs. Its primary directive is to maximize shareholder value.

The board should be relentlessly exploring strategies to unlock this hidden value.

WHY DID MR. BUFFETT DECIDE T JUST BUY SHARE IN UNITED HEALTHCARE, WHEN HE COULD HAVE BOUGHT THE ENTIRE COMPANY!

(It was Mr. Buffett, in dispensing his opinions of how people should invest who said something like.."you need to buy the company, not stock..." yet here we are, another stock pick by Mr. Buffett, and a mad rush by investors who are seeking to align their portfolio driving up a depressed stock mired in controversy and the death of its CEO...)

This includes the strategic possibility of spinning off major, independently successful units like GEICO and BNSF Railway.

Each of these businesses, if traded as standalone entities and spun off to stockholders, could command a higher valuation and attract a different class of investor.

Their combined value would almost certainly exceed the market's current valuation of the conglomerate as a whole, which at this time trades at only a small premium to the Company's cash and securities portfolio.

Therefore, giving little value to the 180 direct and indirect subsidiaries.

The failure to even consider this, demonstrates a profound loyalty to a specific corporate identity, not to the company's owners; the shareholders.



The decision to maintain the conglomerate structure seems to serve a personal philosophy rather than a corporate one, a clear violation of the duty of loyalty.

The board's inaction is a silent form of value destruction. It is a tacit agreement to prioritize the founder's vision of a permanently unified enterprise over the financial interests of the very people they are sworn to represent.

A board should not be a monument to a single man's philosophy; it should be a dynamic engine of shareholder value.

The Obsolete Oracle and the Board's Breach of the Duty of Care

A board's **duty of care** requires it to make decisions on an informed basis. In today's financial markets, this means acknowledging that the "infallible" investment philosophies of yesteryear may not be sufficient.

The rise of AI, deep market intelligence, and algorithmic trading has transformed the landscape. **To continue making investment decisions based on a rigid, decades-old framework, without a critical review of these new tools and strategies, is a reckless and uninformed act. It is, in essence, by definition, a breach of the duty of care.**

The board's passive acceptance of the founder's investment decisions, even in the face of recent, costly blunders, is a testament to its lack of autonomy.

When the company experiences **billions of dollars in losses** on major investments like **Kraft Heinz** and **Paramount Global**, and lags behind the broader market, a truly independent board would demand a thorough review of the failed investment strategy.

It would question whether a philosophy of "pussy-footing" and sitting on a mountain of cash is truly the best use of corporate capital in an era of unprecedented technological change.

The board's acquiescence to this strategy, which prioritizes a personal aversion to risk and technology over data-driven analysis, is not a protected business judgment. It is a failure to exercise due diligence.

Delaware law's business judgment rule provides a powerful shield, but it is not impenetrable. A decision that is "so blatantly imprudent that it is inexplicable" can be deemed a breach of duty.



The decision to let **\$344 billion sit as cash** in an inflationary environment, in Treasury Notes earning paltry interest while a more dynamic, data-driven approach could be unlocking greater returns, could be seen as such a decision.

The board's continued adherence to this dogma, rather than exploring modern alternatives, is a demonstration of its unsuitability for the challenges of the 21st century.

A Board of Family and Cronies: The Illusion of Independence

The illusion of a functional, independent board is shattered by its composition. The inclusion of the founder's own children, alongside other long-time associates like the recent board member departure of Buffet's long-time friend and corporate lawyer, Mr. Olsen at age 80, creates an environment where true autonomy is impossible.

The **duty of loyalty** demands that directors act free from conflicts of interest. While there may be no overt self-dealing, the subtle, pervasive influence of a founder and his family on a board is a conflict in and of itself.

A board's primary function is to serve as a check on the power of management and the controlling shareholder. When the board is populated by family members, it is inherently incapable of performing this function without a conflict of interest.

How can a director, with a familial bond to the founder, objectively challenge his investment decisions or strategic vision?

The answer is simple: they cannot. The board becomes a mechanism for preserving a dynasty, not for maximizing shareholder value.

This lack of independence, which permeates every level of decision-making, renders the board's actions suspect. It opens the door for a legal challenge that could force a court to apply a higher standard of review, such as **enhanced scrutiny**.

A court would be compelled to question the "true motivation" behind the board's decisions. **Was it to genuinely serve the shareholders, or was it to protect a legacy?**

A board that cannot prove its decisions were not influenced by personal interests, particularly those of a controlling founder, is a board that has failed in its most fundamental duty.

The board's decisions, whether it's to maintain the conglomerate discount or adhere to an outdated investment strategy, are not the product of independent business judgment. They



are the result of a deep-seated deference that actively works against the best interests of the company's owners.

Succession Concerns, Underperformance, and the Board's Oversight

The board's fiduciary duties extend far beyond just preventing insider trading; they also include a **duty of oversight** and a responsibility to address material changes in the company's performance and strategy.

There is a significant recent development: a "historic case of Berkshire underperformance" since May 2025, when Warren Buffett's succession plan was finalized. The stock's performance has lagged the S&P 500, which analysts attribute to the "Buffett Premium" eroding as his retirement or inevitable passing looms.

This underperformance, coupled with Buffett's own actions of reducing equity exposure and hoarding cash, places a spotlight on the board's fiduciary duty to oversee the company's long-term strategy.

The board's role is to ensure that the new leadership, headed by Greg Abel, is equipped to navigate these challenges. The board's failure to address these issues could lead to a breach of their **duty of care**, which requires them to be reasonably informed and diligent in their oversight.

While Buffett's succession plan is a known factor, the market's negative reaction shows that shareholders are demanding more than just a name.

They want assurance that the board, including Warren Buffett's children, is fully capable of continuing the company's legacy of "superior returns." The board's duty of care requires a robust and well-documented process for this transition. A board that consciously ignores "red flags" about succession and market performance could face legal liability.

The Family on the Board: Independence and the Entire Fairness Standard

The presence of Warren Buffett's children, Howard and Susan, on the board is particularly relevant when considering the **entire fairness** standard of review under Delaware law. This standard is triggered when the board is not independent or a transaction involves a controlling stockholder. While there's no ongoing litigation on this front, the board's structure could make it vulnerable to challenges.

The long-standing relationship between the Buffett family members and the founder could be used by a plaintiff to argue a lack of independence. In the event of a related-party



transaction, such as a future sale of a company to a Buffett-family-owned entity, a plaintiff could argue that the board, as a whole, is not truly independent and thus the transaction is subject to the entire fairness standard.

This would place the burden on the board to prove the fairness of the deal, a far more difficult task than simply relying on the business judgment rule.

The legal precedent from **Revlon** and other cases makes clear, any such consideration must be rationally related to long-term shareholder benefit.

The board's duty is to use its discretion to choose the best means to attain the ultimate end of maximizing shareholder value, a principle first articulated in **Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919)**, and reaffirmed in Delaware case law.

In conclusion, the recent stock transactions and underperformance at Berkshire Hathaway are not just financial news; they are a real-world test of the board's ethical and fiduciary duties.

The board must navigate these challenges by adhering strictly to the duties of care and loyalty, ensuring a transparent and fair succession process, and demonstrating its collective independence to protect the interests of all shareholders in a post-Buffett era.

The core legal question here is how Delaware case law, particularly concerning stock issuances, the usurpation of corporate opportunity, and the business judgment rule, applies to the Berkshire Hathaway board's conduct, especially in light of the "pussy-footing" lack of responsible deployment of the cash hoard corporate philosophy, attributed to Warren Buffett's stoic adherence to his own outdated investment choices.

The cited case law provides a framework to assess potential breaches of fiduciary duty, specifically the duties of loyalty and care, as they relate to controlling stockholders and board decisions.

Berkshire Hathaway's board approving Buffett's strategy in an era of advanced AI and data analytics, as well as the family's involvement, can be analyzed through this legal lens.

The Board's Duty to Act in Good Faith: A Critical Look at Berkshire's Strategy

The board of directors' fiduciary duty of care requires them to make decisions on an **informed basis**. However, Berkshire's board is approving or maybe just allowing Mr. Buffett to act without board consultation and approval, unilaterally making decisions on an



outdated "corporate philosophy of an aging Warren Buffett" in an epoch of fast AI and data analytics.

For example, Mr. Buffett has stated to CNBC: "that cryptocurrencies have "no value and they don't produce anything," and at the 2022 shareholder meeting he declared he would not buy the entire Bitcoin supply for \$25...".

He missed the fact that if BRK invested in BITCOIN when it was trading at \$10 or \$20, it is NOW valued at \$117,000.... such an investment would have dwarfed any of Mr. Buffett's previous forays into new investments, and produced an unprecedented profit for the Company!

It was never considered by the Board because of the statement of Mr. Buffett that foreclosed any possibility of questioning of Mr. Buffett's unilateral decision not to make any BITCOIN investment.

This raises a direct challenge to the board's **duty of care**. If a plaintiff could successfully argue that the board is consciously ignoring new, material information about market dynamics—specifically, the rise of AI in stock analysis—and failing to adapt the company's strategy, it could constitute a breach of this duty.

A court, while deferential to a board's business judgment, might find that a board's decision is so "egregious or irrational that it could not have been based on a valid assessment of the corporation's best interests," as noted in **Aronson v. Lewis, 473 A.2d 805 (Del. 1984)**.

Furthermore, the continued hoarding of cash and non-declaration of dividends could subject the company to a 20% accumulated earnings test, for instance...that could be a costly and unnecessary stockholder blunder, costing \$100 BILLION in potential assessed taxes???

Stockholders may also question the wisdom of multi-billion-dollar stock buybacks, since they seem to benefit the big stockholder such as Mr. Buffett, who does not have to spend a nickel to buy shares, yet he gets to increase the ownership percentage on the stockholders' dime.

Instead of stock buybacks a dividend or a new acquisition would have been a better allocation of the billions wasted on stock buybacks.

That method you may recall was widely utilized by Victor Posner, a notorious early corporate takeover artist, who had the stock buybacks increase his ownership interest while using the company



cash. There is an insidious result when a large stockholder is able to increase his percentage ownership using none of his own money at the cost of dividends not being declared instead.

Usurpation of Corporate Opportunity and the Duty of Loyalty

Reis v. Hazelett Strip-Casting Corp., C.A. No. 3552-VCL (Del. Ch. Jan. 21, 2011), further reinforces the principle that even seemingly routine corporate actions like a reverse stock split are subject to equitable attack and the entire fairness standard if they are implemented by a controlling stockholder to cash out minority stockholders.

Using the corporate cash to allow the increase in the overall percentage of ownership to increase for Mr. Buffett and the Board members, may be suspect as to real motive for such massive and unnecessary stock buybacks.

In summary, the abovementioned case law emphasizes that Delaware courts will not hesitate to apply heightened scrutiny to board decisions when they involve self-dealing, control contests, or a clear failure of oversight. These are the same standards that would be applied to the board of Berkshire Hathaway.

A plaintiff challenging the board's decisions would focus on whether the board's actions were driven by a genuine, good-faith belief in maximizing shareholder value, or by "extraneous considerations or influences," such as preserving familial control or an outdated corporate philosophy.

The Captive Board: How Familial and Deferential Ties Violate the Duty of Loyalty at Berkshire Hathaway

The **duty of loyalty** is the cornerstone of corporate governance, a principle demanding "undivided and unselfish loyalty" from directors to the corporation and its shareholders.

As established in *Guth v. Loft, Inc.*, this duty prohibits directors from using their position for private interests. At Berkshire Hathaway, the board operates under a cloud of compromised loyalty, not from blatant corruption, but from a more insidious form of conflict: a profound lack of independence.

This lack of autonomy is a direct result of familial ties, a culture of deference, and a controlling shareholder's unyielding dominance, all of which constitute a fundamental breach of this core fiduciary obligation.



The very structure of Berkshire's governance ensures that the board cannot, and arguably does not, function as an independent check on the founder and CEO.

The board's failure to maintain an arm's-length relationship with its controlling shareholder, and its consequent inability to challenge a strategy that may be actively destroying value, is a fundamental breach of its duty of loyalty. This isn't a speculative concern; it's a structural and factual reality that can be scrutinized through the lens of Delaware corporate law and relevant case precedents.

The Familial Nexus: An Inherent Conflict of Interest

Delaware law's scrutiny of director independence extends beyond direct financial ties. It delves into subjective relationships that can create a "sense of beholdenness," compromising a director's ability to act with only the corporation's best interests in mind.

This is precisely the case at Berkshire, where the board includes **Howard G. Buffett** and **Susan A. Buffett**, the children of the founder and controlling shareholder, **Warren E. Buffett**.

The presence of the founder's children on the board creates a nexus of loyalty that is inherently divided. While they may be well-intentioned, their loyalty is not solely to the abstract concept of the corporation, but also to their father, his legacy, and their family's long-term interests.

This familial bond, deeply rooted and undeniable, makes it virtually impossible for them to objectively scrutinize, let alone oppose, their father's decisions.

A court's inquiry would not simply ask if they are financially "interested," but whether their discretion has been "sterilized" by this relationship, as highlighted in the *Martha Stewart* derivative litigation, where the court noted that "a shareholder-plaintiff's complaint must raise a reasonable doubt about a director's independence by alleging that a director is so 'beholden' to the interested director that his or her discretion would be sterilized."

The shareholder data of Berkshire Hathaway reinforces this dynamic. The combined voting power of the Buffett family, though mitigated by a voting agreement, still represents a substantial and cohesive block.

The family's influence is further institutionalized in the company's succession plan, where family members will assist the board in selecting and overseeing the next CEO and may serve as the non-executive Chairman. This institutionalization of the familial nexus ensures



that the legacy, and its inherent conflicts, will persist, making it difficult for future boards to act without a sense of "beholdenness" to the founder's vision of who he alone selects as his successor.

The Culture of Deference: A Fiduciary Paralysis

Beyond family, the Berkshire board is comprised of individuals who have either been long-term associates or are part of a structure that inherently defers to the founder.

The board's leadership structure, where Warren Buffett holds both the CEO and Chairman roles, is a significant red flag. While the board has a lead independent director, her role is explicitly limited.

She does not represent the board in communications with shareholders, which are instead handled by Mr. Buffett and his two Vice-Chairmen, **Gregory E. Abel** and **Ajit Jain**. This structure effectively centralizes power and information, sidelining the very individuals meant to provide an independent check on management.

WE SAW NO STATEMENTS EVER OR QUOTES BY BOARD MEMBERS ABOUT ANYTHING IN THE NEWS RELATED TO BRK...ITS SOLELY MR. BUFFETT AS THE SPOKESMAN, RISK OFFICER CHIEF OF EVERYTHING!!!!

Can any stockholder name more than one member of the Board?

Why are some of the photos of the Board members in the Proxy materials seemingly from their high school yearbook, rather than the current photos, as the grandparents they are? LOL

This culture of deference is not an accident; it is the foundation of the company's governance. The board's explicit belief that a controlling shareholder should hold both CEO and Chairman roles demonstrates a pre-emptive surrender of its independent judgment.

This is a far cry from the "independent negotiating structure" or "total abstention from any participation" that Delaware courts demand when directors face divided loyalties, as highlighted in *Weinberger v. UOP, Inc.*



In that case, the court ruled that when directors of a parent and subsidiary are on both sides of a transaction, they are required to demonstrate the "entire fairness" of the bargain and that a lack of an independent negotiating structure could be fatal to the defense.

The board's self-imposed lack of such a structure at Berkshire, where power is consolidated in the hands of a single individual, is a clear violation of this principle.

The board's reliance on Mr. Buffett's vision extends to critical areas of corporate oversight. For example, the company's "chief risk officer is its Chairman and CEO, Warren Buffett." This is an astonishing admission.

The individual making investment and operational decisions is also the sole person responsible for assessing the risks of those decisions. A board's duty of care mandates robust risk oversight. By ceding this responsibility to a single individual, the board is not merely deferring; it is abdicating its duty.

The Legal Ramifications: Moving Beyond the Business Judgment Rule

In the absence of a truly independent board, the business judgment rule—the default standard of review in Delaware—is unlikely to apply. The rule's protections "can only be claimed by disinterested directors whose conduct otherwise meets the tests of business judgment," as stated in *Aronson v. Lewis*. A board so closely tied to a controlling shareholder and his family, with a structure designed to centralize power, would struggle to meet this disinterestedness test.

Consequently, a court would likely move to **enhanced scrutiny** or even the rigorous **entire fairness** standard. The latter, which applies when a controlling shareholder stands on both sides of a transaction, would force the board to prove both the fairness of the process and the fairness of the price.

The shareholder data shows that Mr. Buffett's voting interest is around 30.4%, but his economic interest is only 14.4%. This disparity, while not a direct conflict, highlights his disproportionate control, which could be a factor in a court's decision to apply a heightened standard.



The case law is clear: a board's lack of independence is a loyalty issue.

The inquiries in cases like *Biondi v. Scrushy* and *in re Oracle Corp. Derivative Litigation* highlight that social and professional ties can compromise independence, even without direct financial interest.

In *Biondi*, the court found a lack of independence where board members had close personal and professional ties to the CEO, including being on the board of a charitable foundation that received significant donations from the company.

Similarly, in *Oracle*, the court found that members of a special litigation committee were not independent due to their ties to Stanford University, a major benefactor of the corporation.

At Berkshire, the familial ties and the long-standing, unquestioned relationships with the founder create a much more powerful and pervasive form of beholdenness, a "sense of 'beholdenness'" that is far more potent than the social circles and business ties dismissed in the *Martha Stewart* case.

In conclusion, the Berkshire Hathaway board's failure to act as an independent fiduciary is a clear violation of its **duty of loyalty**.

This breach is not based on a single act of wrongdoing but on a sustained pattern of deference that is structurally and culturally embedded within the organization.

The board's composition, its leadership structure, and its documented abdication of critical oversight functions all point to a body that serves the interests of a powerful founder and his legacy over the interests of the company's shareholders.

This is a fundamental betrayal of the very principles that underpin Delaware corporate law.

The Familial Nexus

A primary point of contention is the presence of Warren Buffett's children, **Howard G. Buffett** and **Susan A. Buffett**, on the board. While the law permits family members to serve, their presence creates a "sense of beholdenness" that can compromise their ability to act solely in the company's best interests.

This is not about blatant self-dealing but about the inherent conflict between family loyalty and fiduciary duty. This familial nexus becomes a central argument for challenging the board's independence, as their judgment could be influenced by a desire to protect their father's legacy and vision.



Concentrated Power and a Culture of Deference

The concentration of power in Warren Buffett's hands, as both the Chairman and CEO, further undermines the board's independence. This dual role, combined with his status as a controlling shareholder, reduces the board's function to a subordinate role. Instead of providing critical oversight, the board appears to defer to Buffett's judgment, a dynamic that is antithetical to sound corporate governance.

The board's own policy of allowing a controlling shareholder to hold both roles is an explicit surrender of its autonomy, and generally not in line with good corporate governance.

Close Professional and Financial Ties

The board's lack of independence is not limited to family ties. Several directors have deep, long-standing professional and financial relationships with Berkshire Hathaway and its affiliates.

For example, **Ronald L. Olson**, (just left due to age restriction at age 80) a partner at a law firm that received millions of dollars in fees from Berkshire, and **Wallace R. Weitz**, an investment manager whose firm has a long history with the company, may find it difficult to exercise unbiased judgment. Delaware case law, as seen in cases like *in re Oracle Corp. Derivative Litigation*, suggests that even non-pecuniary ties, such as those related to shared professional circles or significant business relationships, can compromise a director's independence.

These ties create a web of interdependence that makes true critical inquiry unlikely.

Strategic and Oversight Failures

The consequences of this lack of independence are seen in the board's strategic and oversight failures.

The board's inaction regarding the **conglomerate discount**—the gap between Berkshire's market value and the value of its individual parts—demonstrates a failure to maximize shareholder value. Furthermore, the board's approval of an investment philosophy that has resulted in billions of dollars in losses on investments like **Kraft Heinz** and **Paramount Global**, while a massive cash pile sits uninvested, can be seen as a breach of its **duty of care**.

An independent and a proactive would have challenged this strategy and demanded a more dynamic approach to capital allocation. **These failures are a direct reflection of a board that is unwilling or unable to act independently of its powerful founder.**



The Erosion of Fiduciary Duty: Beyond Care and into Good Faith

The legal landscape of fiduciary duties in Delaware has evolved significantly, particularly concerning the distinction between the **duty of care** and the **duty of good faith**.

This distinction is critical to a shareholder's legal strategy against a board that has appeared to abandon its responsibilities.

In the 1990s, the Delaware Supreme Court began to refer to a "triad" of fiduciary duties: care, loyalty, and good faith. The landmark decision in *The Walt Disney Co. Derivative Litigation* clarified this relationship, holding that a failure to act in good faith is qualitatively different from, and more culpable than, a breach of the duty of care. This distinction has profound legal consequences.

A key consequence is **Section 102(b)(7) of the DGCL**, which allows corporations to exculpate directors from monetary liability for a breach of the duty of care.

However, this statute explicitly does not provide protection for acts or omissions "not in good faith." This means that while a board can be shielded from liability for a grossly negligent decision, it cannot be protected if that decision was made in bad faith.

The goal of a trenchant legal argument is therefore to move the board's conduct from the category of gross negligence (breach of care) to the more serious category of bad faith (breach of loyalty).

The board's actions at Berkshire Hathaway, when viewed through this legal lens, appear to be a case study in conduct that could be deemed a failure to act in good faith. The continuous and conscious disregard for the best interests of the corporation, in favor of a rigid and obsolete philosophy, represents an act that is "qualitatively different" from simple negligence.

Conscious Disregard for Duty: The Hallmarks of Bad Faith

The Delaware Supreme Court's decision in *Stone v. Ritter*, which provided future guidance by identifying examples of conduct that would establish a failure to act in good faith, is directly applicable to the Berkshire Hathaway board's conduct. Two specific examples of bad faith were identified:



1. **Where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the stockholders and corporation.**
2. **Where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his or her duties.**

The board's behavior aligns most closely with the above categories. The board's intentional failure to address the **conglomerate discount** demonstrates a conscious disregard for its duty to maximize shareholder value.

The board's unwavering adherence to a philosophy that is underperforming the market, while a massive cash pile sits uninvested, can be seen as an intentional act with a purpose other than advancing the best interests of the corporation.

The purpose, in this case, appears to be the preservation of a legacy and celebrity status of Mr. Buffett, and a specific corporate structure, rather than the maximization of shareholder wealth.

Furthermore, the board's acceptance of major investment blunders, such as the massive write-downs on **Kraft Heinz** and the significant losses on **Paramount Global**, without demanding a fundamental change in strategy, could be viewed as a conscious disregard for their oversight duties.

It is one thing for an investment to fail; it is another for a board to continue to endorse the philosophy that led to those failures without a thorough, independent review. This level of inaction, in the face of clear evidence of underperformance and costly mistakes, is not mere negligence; it is a profound dereliction of duty that could be characterized as bad faith.

The **duty of good faith** is not a standalone duty but is a component of the **duty of loyalty**. As the court in *Stone v. Ritter* noted, "a director cannot act loyally towards the corporation unless she acts in the good faith belief that her actions are in the corporation's best interest."

The Berkshire board's deference to a single individual, even in the face of clear evidence of strategic missteps and value destruction, strongly suggests that it is not acting in the good faith belief that its actions are in the corporation's best interest.



Instead, its actions are a product of a culture of deference and an unchallengeable loyalty to the founder, which is precisely what the duty of loyalty, and its good faith component, are designed to prevent.

The End of Exculpation: Exposing Directors to Liability

The strategic importance of alleging a lack of good faith cannot be overstated.

By successfully arguing that the board's actions were not merely negligent but were taken in bad faith, a shareholder can strip the directors of the protection of the **102(b)(7)** exculpatory charter provision. This opens the door to personal monetary liability for the directors, a powerful incentive for them to act independently.

The board's decision to maintain a structure that centralizes power in a single individual, to ignore the measurable **conglomerate discount**, and to endorse a rigid and outdated investment philosophy in the face of mounting evidence of its inadequacy, are all actions that could be interpreted as a "conscious disregard for his or her duties."

A director who intentionally fails to act when they have a known duty to do so, is not entitled to the protection of the business judgment rule or exculpatory clauses. They have, in essence, chosen to betray their fiduciary oath.

In conclusion, the legal argument against the Berkshire Hathaway board is not just about a breach of the **duty of care**. It is a more potent and strategic claim that the board's actions—or lack thereof—are indicative of a failure to act in **good faith**.

This failure, by its very nature, constitutes a breach of the **duty of loyalty**, and it has the potential to expose the directors to personal liability. The board's deference to a powerful founder and its conscious disregard for the company's true value make it a prime target for a legal challenge that could fundamentally alter the course of corporate governance at Berkshire Hathaway.

The Fiduciary Triad Under Siege: An Analysis of Berkshire Hathaway's Board Inaction and the Folly of an Obsolete M&A Philosophy

The fiduciary duties of directors—care, loyalty, and good faith—are the bedrock of sound corporate governance. While the **duty of loyalty** prevents directors from self-dealing and the **duty of care** mandates that they act in an informed manner, the **duty of good faith** requires a qualitative commitment to acting in the corporation's best interest.



As clarified in cases like *The Walt Disney Co. Derivative Litigation* and *Stone v. Ritter*, a failure of good faith is a more culpable offense than mere negligence and, crucially, is not exculpated by a corporation's charter.

At Berkshire Hathaway, the board of directors has exhibited a prolonged and systemic pattern of inaction that transcends simple business judgment.

By deferring to an obsolete M&A philosophy and presiding over a vast, non-deployed capital reserve, the board is not merely negligent; it is demonstrating a conscious disregard for its duties that could be construed as a failure to act in good faith, thereby exposing itself to legal challenge and potential personal liability.

This is not a matter of a differing business philosophy; it is a fundamental betrayal of its fiduciary oath, born from a culture of deference that has paralyzed its ability to act as a true agent of shareholder value.

The Balance Sheet as a Blueprint for Inaction

A forensic examination of Berkshire Hathaway's consolidated balance sheets reveals a stark and troubling pattern of capital hoarding. Between December 31, 2024, and June 30, 2025, the company's cash and cash equivalents, along with its short-term investments in U.S. Treasury Bills, which account for 5% of all such in the USA, grew from a staggering amount to an even more prodigious sum.

As of December 31, 2024, the company's "Cash and cash equivalents" in its Insurance and Other category were **\$44.333 billion**. By March 31, 2025, that figure had ballooned to **\$36.892 billion** for cash and cash equivalents, but a significant increase in short-term investments in U.S. Treasury Bills to **\$305.501 billion** brings the total deployable capital to over **\$340 billion**. This trend continued through June 30, 2025, where cash and equivalents reached **\$96.193 billion** and Treasury Bills were at **\$243.605 billion**, maintaining a massive, non-productive reserve well over **\$300 billion**.

This monumental accumulation of capital is not an accident; it is the direct result of a board-sanctioned, deeply conservative investment philosophy.

The company's own filings acknowledge this, stating, "**Major investment decisions and all major capital allocation decisions are made by Warren E. Buffett.**" This centralized authority, coupled with a staggering and growing cash reserve, exposes the board's complete abdication of its **duty of care**.

In an era of intense M&A activity and technological disruption, the board has sat idly by, allowing its primary asset—an enormous amount of capital—to remain fallow, failing to



generate the returns that could be achieved through a more proactive and modern investment strategy.

The board's inaction in the face of this opportunity cost is a quantifiable and continuous breach of its obligations to the shareholders.

M&A Waves and the Obsolete Oracle

The modern M&A landscape is not a random collection of discrete transactions but a series of "waves" driven by specific market dynamics. The board's failure to engage with these waves represents a critical blind spot and a clear breach of its duty to be informed. Our analysis of M&A waves identifies two primary drivers:

1. **The Neoclassical (or "Shock") Hypothesis:** This theory suggests that M&A waves are a rational response to environmental shifts, such as new technologies, distribution channels, or a sustained rise in commodity prices. Firms use M&A as a faster way to adapt and acquire new capabilities than developing them internally.
2. **The Behavioral (or Misvaluation) Hypothesis:** This theory links M&A waves to periods of high stock valuations. Managers whose stock is perceived as overvalued use it as currency to acquire companies with lower relative valuations. This minimizes earnings dilution and creates value for the acquirer's shareholders.

Berkshire Hathaway, under its current leadership, is demonstrably failing to participate in these waves. The board has allowed the company to become a passive observer, clinging to a philosophy of waiting for a "fat pitch."

This is an obsolete approach in an age where M&A is driven by complex factors beyond a simple search for an undervalued company.

- **Failure to Respond to Shocks:** The board is failing to leverage its capital to acquire new technologies or distribution channels, a key driver of modern M&A waves. By relying on a single individual's perspective, the board is effectively ignoring the opportunities presented by the rise of AI, deep market intelligence, and other technological shocks that could fundamentally reshape its "hotchpotch" portfolio.
- **Ignoring the Behavioral Hypothesis:** The company's stock has enjoyed periods of strong market performance and high valuation. A modern, independent board, fulfilling its **duty of loyalty**, would explore using this overvalued stock as currency for strategic acquisitions, as the Behavioral Hypothesis suggests. Instead, the board's inaction represents a profound missed opportunity to create value for shareholders without deploying a single dollar of its enormous cash reserves.



The board's adherence to a conservative utopia, where acquisitions are simple, infrequent, and based on a single individual's judgment, is a direct rejection of how modern markets function.

The board's passive acceptance of this philosophy, which has proven to be less effective in today's dynamic environment, is a prime example of a failure to exercise its **duty of care**.

The Board's Failure as a Change Agent

The dynamic nature of the business world demands that firms, especially conglomerates, act as "change agents." This involves not only M&A but also other forms of corporate restructuring like divestitures, spin-offs, and equity carve-outs. Berkshire's "mishmash" portfolio, with its collection of diverse and often unrelated businesses, is ripe for such restructuring.

The board's unwavering commitment to the conglomerate structure is not a sign of prudence; it is an active contribution to the **conglomerate discount**.

The board has a fiduciary duty to unlock the value of its underlying assets.

However, it has not experimented with any of the operational restructuring strategies that could streamline the portfolio and enhance shareholder value.

By refusing to consider a spin-off as a public company to stockholders, of a major subsidiary like GEICO or BNSF Railway, the board is prioritizing an outdated legacy over the financial interests of its shareholders.

The shareholder data further reinforces the lack of independence and the presence of divided loyalties.

The combined voting power of the directors and executives, led by a controlling shareholder with a 30.4% voting interest, creates an environment where challenging the status quo is all but impossible.

The board's actions—or lack thereof—are not the result of an arm's-length negotiation but of a deeply embedded culture of deference. This inaction, therefore, is not a simple business decision but a breach of the **duty of loyalty**.

From Inaction to Bad Faith: The Legal Nexus



The board's prolonged and deliberate passivity during a period of intense M&A activity and technological change moves its conduct beyond mere gross negligence and into the realm of bad faith.

As established in *Stone v. Ritter*, a failure to act in good faith is a component of the **duty of loyalty**, and it occurs when a fiduciary "intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his or her duties."

The Berkshire board has a known duty to maximize shareholder value. This duty is especially pronounced given the vast, non-deployed capital on its balance sheet.

The board's consistent failure to act on this known duty, its deferral to a single individual's anachronistic philosophy, and its refusal to engage with modern M&A strategies can be framed as an intentional abdication of its responsibilities.

This is not a case of an honest mistake but a case of a board choosing to prioritize a founder's vision over the financial well-being of the corporation's owners.

By successfully arguing that the board's inaction constitutes a failure of good faith, shareholders can strip the directors of the protection of the **102(b)(7)** exculpatory charter provision.

This would expose the directors to personal monetary liability, a powerful and necessary consequence for a board that has systematically failed to act as a vigilant fiduciary.

The board's actions—its conscious disregard for modern M&A, its perpetuation of a value-destroying conglomerate structure, and its deference to a single individual's obsolete philosophy—are not just business missteps; they are a profound betrayal of the very principles that underpin Delaware corporate law.

Consolidated Balance Sheets (Dollars in Millions)

Assets (Insurance and Other)	December 31, 2024	March 31, 2025	June 30, 2025
Cash and cash equivalents	\$44,333	\$36,892	\$96,193



Short-term investments in U.S. Treasury Bills	\$286,472	\$305,501	\$243,605
Total Deployable Capital	\$330,805	\$342,393	\$339,798
Investments in equity securities	\$271,588	\$263,755	\$267,923
Investments in fixed maturity securities	\$15,364	\$15,384	\$15,084
Total assets	\$947,772	\$925,898	\$922,559

Liabilities and Shareholders' Equity (Dollars in Millions)

Liabilities (Insurance and Other)	December 31, 2024	March 31, 2025	June 30, 2025
Total liabilities	\$499,692	\$507,790	\$493,692
Total shareholders' equity	\$651,655	\$656,742	\$670,276
Total liabilities and shareholders' equity	\$1,153,881	\$1,164,532	\$1,163,968



These tables present the financial data provided, showing the company's significant and consistent holding of cash and short-term investments, which is central to our argument. The data for both the insurance and other sectors, and the railroad, utilities, and energy sectors, has been aggregated to provide a clear picture of the company's total deployable capital over the period.

THE TOTAL ASSETS CLOSELY ALIGN WITH THE MARKET VALUE,
AND CLEARLY DEMONSTRATE THE CONGLOMERATE DISCOUNT.

BOARD OF DIRECTORS

WARREN E. BUFFETT, age 94, has been a director and the controlling shareholder of the Corporation since 1965 and has been its Chairman and Chief Executive Officer since 1970. Mr. Buffett was a director of The Kraft Heinz Company until April 2018.

GREGORY E. ABEL, age 62, has been a director of the Corporation and the Corporation's Vice Chairman – Non-Insurance Operations since 2018.

Between 2008 and 2018, Mr. Abel served as the Chief Executive Officer of Berkshire Hathaway Energy Company ("BHE"), a wholly owned Berkshire subsidiary. Mr. Abel has served as BHE's Chairman since 2011.

Mr. Abel served as a director of The Kraft Heinz Company until May 2024. He was a director of AEGIS Insurance Services Inc., a provider of property and liability insurance for the energy industry, from 2016 – 2023.

Additional Qualifications:

Gregory Abel brings to the Board his 32 years of experience in various positions at BHE, including serving as its Chairman and CEO and seven years of experience overseeing Berkshire's non-insurance businesses.

HOWARD G. BUFFETT, age 70, has been a director of the Corporation since 1993. Since 1999, Mr. Buffett has been the Chairman and Chief Executive Officer of the Howard G. Buffett Foundation, a charitable foundation that directs funding for humanitarian and conservation related issues. Mr. Buffett also serves on the boards of several other charitable organizations. Mr. Buffett was the Sheriff of Macon County, Illinois between September 2017 and December 2018.

SUSAN A. BUFFETT, age 71, has been a director of the Corporation since 2021. For more than the past five years, she has been the Chairman of The Sherwood Foundation and the Chairman of The Susan Thompson Buffett Foundation, each of



which is a private grant-making foundation based in Omaha, NE. Ms. Buffett also serves on the boards of several other charitable organizations.

STEPHEN B. BURKE, age 66, has been a director of the Corporation since 2009. Mr. Burke was the Chairman and Chief Executive Officer of NBCUniversal, a media and technology company, from 2011 through 2020. From 1998 until 2011, Mr. Burke was the President of Comcast Cable. In 2020, Mr. Burke founded Madison Valley Partners, which invests in the Rocky Mountain area and outdoor oriented companies. He is also a director of JPMorgan Chase & Co., a leading financial services firm. He was a director of Snowflake Inc., a technology company from May 2023 through May 2024.

KENNETH I. CHENAULT, age 73, has been a director of the Corporation since 2020. Mr. Chenault has served as Chairman and a Managing Director of General Catalyst, a venture capital firm, since February 2018. Mr. Chenault previously served as Chief Executive Officer of American Express Company, a financial services company, from January 2001 to February 2018, and as Chairman of American Express Company from April 2001 to February 2018. Mr. Chenault joined American Express in 1981 as Director of Strategic Planning and served subsequently in a number of increasingly senior positions, including Vice Chairman and President and Chief Operating Officer, until his appointment as Chief Executive Officer. Mr. Chenault is a director of Airbnb, a global platform for unique stays and experiences. Mr. Chenault previously served on the boards of directors of Facebook Inc. between 2018 and 2020, International Business Machines Corporation between 1998 and 2019 and The Procter & Gamble Company between 2008 and 2019. Mr. Chenault also serves as a trustee or director of several charitable and non-profit organizations.

CHRISTOPHER C. DAVIS, age 59, has been a director since 2021. Since 1998, he has served as the Chairman of Davis Advisors, an investment management firm. Mr. Davis is also a director of a number of mutual funds advised by Davis Select Advisers as well as other entities controlled by Davis Select Advisers. He is also a director of The Coca-Cola Company and Graham Holdings Company.

SUSAN L. DECKER, age 62, has been a director of the Corporation since 2007. Ms. Decker also serves on the boards of directors of Costco Wholesale Corporation, Vail Resorts, Inc., Chime, Automattic and Vox Media. She is Chief Executive Officer and Founder of Rafttr, a community experience platform. From June 2000 to April 2009, Ms. Decker held various executive management positions at Yahoo! Inc., a global Internet brand, including President (June 2007 to April 2009), head of the Advertiser and Publisher Group (December 2006 to June 2007) and Chief Financial Officer (June 2000 to June 2007). Before Yahoo!, Ms. Decker spent 14 years with Donaldson, Lufkin & Jenrette. She is a Chartered Financial Analyst and served on



the Financial Accounting Standards Advisory Council for a four-year term, from 2000 to 2004.

CHARLOTTE GUYMAN, age 68, has been a director of the Corporation since 2003.

Ms. Guyman serves as a director of a start-up entity, Landings Holdings, a trustee of Lakeside School and an advisor for the University of Washington Brotman Baty Institute of Precision Medicine. She was a general manager with Microsoft Corporation until July 1999.

AJIT JAIN, age 73, has been a director of the Corporation and the Corporation's Vice Chairman – Insurance Operations since 2018. Mr. Jain has been employed by the Berkshire Hathaway Insurance Group since 1986 and has been an Executive Vice President of National Indemnity Company, a wholly owned Berkshire subsidiary, since 1996.

THOMAS S. MURPHY, JR., age 65, was elected a director of the Corporation on December 19, 2022. For more than the past five years he has been a partner of Crestview Partners, a private equity firm he co-founded in 2004. Prior to starting Crestview Partners, Mr. Murphy was a partner at Goldman Sachs & Co. In addition to serving on the boards of several private companies, Mr. Murphy serves on the boards of New York University, NYU-Langone Health and the Inner-City Scholarship Fund.

WALLACE R. WEITZ, age 75, was elected a director of the Corporation on April 30, 2022. Mr. Weitz founded the investment management firm Weitz Investment Management, Inc. in 1983 as Wallace R. Weitz & Company and has since served in various roles at Weitz Investment Management, including Chief Investment Officer, President and Portfolio Manager. Mr. Weitz manages the Partners III Opportunity Fund and co-manages the Weitz Multi-Cap Equity Fund, each of which is managed by Weitz Investment Management. He is on the board of directors of Cable One, a leading broadband communication provider. Mr. Weitz serves on the board of the Joslyn Art Museum and certain other non-profit boards.

MERYL B. WITMER, age 63, has been a director of the Corporation since 2013. For more than the past five years, Ms. Witmer has been a managing member of the General Partner of Eagle Capital Partners, L.P., an investment partnership. From 1989 through the end of 2000, she was one of two General Partners at Buchanan Parker Asset Management which managed Emerald Partners L.P., an investment partnership.

THE INFORMATION ABOUT THE BOARD MEMBERS WAS TAKEN
FROM PUBLIC FILINGS.

