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Case Number 161,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CITY OF CORAL SPRINGS POLICE OFFICERS' PENSION PLAN, derivatively on behalf of BLOCK, INC.,

Plaintiff Below/Appellant,

v.

JACK DORSEY, ROELOF BOTHA, AMY BROOKS, PAUL DEIGHTON, RANDY GARUTTI, JIM MCKELVEY, MARY MEEKER, ANNA PATTERSON, LAWRENCE SUMMERS, DAVID VINIAR, and DARREN WALKER,

Defendants Below /Appellees,

and

BLOCK, INC.,

Nominal Defendant.

No. 161, 2023

On Appeal from the Court of Chancery of the State of Delaware
C.A. No. 2022-0091-KSJM

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Dated: July 27, 2023

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NATURE OF THE PROCEEDINGS

This lawsuit boils down to an attack on a business deal that the plaintiff claims it would not have made if it were in charge. But the plaintiff was not—and is not—in charge. Directors, not stockholders, are responsible for overseeing the business of a corporation. The plaintiff now seeks to bring claims, purportedly on behalf of Block, against the members of its board of directors who made the business decision, or who delegated that decision to unconflicted members of the board. But before a stockholder may step into the shoes of the corporation and bring claims on the corporation's behalf, the stockholder must first make a demand on the board of directors to file suit. Only in rare cases is that demand excused—when the directors are somehow conflicted, when they are beholden to someone who is conflicted, or when the potential lawsuit creates a significant threat of liability for them. The Court of Chancery correctly concluded that none of those exceptions to the demand rule applies here.

The plaintiff, the City of Coral Springs Police Officers' Pension Plan, disagrees with the decision by an independent committee of the Block board of directors to cause Block, a company founded to break down barriers between sellers and their customers, to acquire TIDAL, a company founded to break down barriers between musical artists and their fans. Coral Springs does not allege that any

member of the Block board at the time of the transaction had any financial interest in the deal. Instead, it cobbles together various scraps of information—a tabloid story, a paparazzi photo, and single sentences taken out of context from board presentations or committee meetings—to allege that Block's chief executive officer and chairman, Jack Dorsey, was friends with TIDAL's owner, Shawn Carter; that Mr. Dorsey pushed the deal forward as a favor to Mr. Carter; and that nobody on the Block board stood up to Mr. Dorsey and stopped the deal.

Not liking a deal is nowhere near enough under Delaware law. To be eligible to assert its claim, Coral Springs would need to show that at least six members of the Block board could not have objectively considered whether Block should bring the suit itself. To avoid this burden, Coral Springs simply alleges, without any support, that it would have been futile to make any demand on the board because every board member faced a serious threat of legal liability for approving the deal. But Coral Springs makes essentially no argument as to six of the board members—the outside directors who had no involvement in the transaction apart from their unimpeachable decision to appoint a four-member Transaction Committee to vet the deal.

So the demand issue turns on the four members of the Transaction Committee assigned to vet the proposed deal. If Coral Springs fails to plead particularized facts

showing that they could not have objectively considered a demand, it is not entitled to decide whether Block should prosecute this case against its board members. This is a tall order, and the Court of Chancery correctly concluded that Plaintiff could not carry its heavy burden here. Neither the complaint nor the documents Coral Springs received from its books-and-records demand demonstrate that the Committee members intentionally and in bad faith pushed through a deal they knew was a bad one. To the contrary, the contemporaneous board records show the Committee members actively participated in a months-long diligence process, received detailed reports containing hundreds of pages of strategic and financial analysis, met multiple times, and asked dozens of questions about a wide range of topics, including trends in the music business, the assumptions supporting Block management's valuation of TIDAL, Block's plan for integrating TIDAL, and the risks of the proposed transaction.

Coral Springs says that is not enough. For the most part, it quibbles with the merits of the deal, arguing that Block had no reason to get into the music business, that the deal presented too many risks, and that Block overpaid. Coral Springs did the same below. As the Court of Chancery put it, Coral Springs asked it "to presume bad faith based on the merits of the deal alone." Opn. at 25. But Coral Springs now acknowledges that attacks on the substance of a deal will not cut it, so it looks for

process failures instead. The ones it claims to find hardly suggest any director acted in bad faith. For example, the Transaction Committee had no obligation to hire its own advisors, especially because no stockholder stood on both sides of the transaction and because Block already had retained reputable banking, legal, and accounting advisors.

Coral Springs then asks this Court to fundamentally change the law of demand futility in two ways. First, Coral Springs contends that judicial scrutiny automatically should be more searching when a deal involves a controlling stockholder and "superstar" CEO. But Coral Springs never defines that term or offers anything resembling a serious, practicable legal test for determining when CEOs are so influential that they automatically turn even independent and unconflicted directors into unthinking sycophants. And for any company that is run by a "superstar," the longstanding presumption that directors are loyal to the corporation and act in its best interests would be flipped on its head. There is no reason to create a rule that would unpredictably render the demand futility requirement irrelevant in every case involving a "superstar"—whatever that means.

Coral Springs' second argument for changing the law—that gross negligence should be enough to excuse demand—was rejected by this Court not even two years ago in *United Food & Commercial Workers Union v. Zuckerberg*, 262 A.3d 1034

(Del. 2021). Coral Springs does not offer the Court any good reason to change course. It does not cite any cases suggesting that the Court's decision in *Zuckerberg* is deterring meritorious lawsuits, or allowing bad actors to harm the companies they are duty bound to serve.

Coral Springs insists the TIDAL deal was folly. Block and its directors disagree. But it should be time that will tell who is right, not a court. Block's directors were free to decide the direction of the company, so long as they did so in good faith. Because Coral Springs has not alleged any facts remotely showing bad faith, the Court of Chancery correctly dismissed this case. This Court should affirm the judgment.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held that Coral Springs has not alleged particularized facts showing that demand would have been futile here as to at least half of Block's twelve-person board of directors. Six members of the board, none of whom is alleged to have had any financial interest in the acquisition of TIDAL, appropriately delegated to the Transaction Committee the authority to supervise and approve the deal, and Coral Springs presents no serious argument that this delegation could somehow expose those directors to liability. And Coral Springs has alleged no facts showing that the four members of the Committee intended to harm the company. To the contrary, the complaint and the records requested by Coral Springs demonstrate that the Committee members were earnestly engaged in a months-long effort to understand and vet the proposed acquisition of TIDAL—an effort that ultimately drove down the purchase price far below the initial valuation. The Court of Chancery correctly concluded that Coral Springs' complaint is not really with the good faith of the Committee or the process it followed, but instead with the substance of the deal. Coral Springs' conviction that Block made a mistake in acquiring TIDAL, no matter how strongly held, does not support the conclusion that Block's independent, unconflicted directors face a significant threat of personal liability for their role in the deal.

2. Denied. Coral Springs has given this Court no reason to overrule *United Food & Commercial Workers Union v. Zuckerberg*, 262 A.3d 1034 (Del. 2021), which held that stockholder plaintiffs may not evade the demand requirement by pleading facts showing that the directors were grossly negligent. There is no reason for this Court to abandon recent precedent, particularly where, as here, the party seeking to overturn it offers no explanation why it was clearly wrong or shows that it has caused serious confusion or unjust results in the Court of Chancery. In any event, Coral Springs has not alleged facts demonstrating the directors here are guilty of gross negligence, so the radical change in the law that Coral Springs calls for would not change the outcome of this case.

STATEMENT OF FACTS

I. Block considers buying TIDAL, a music-streaming service.

Block was founded in 2009 to empower businesses, sellers, and individuals who have historically faced barriers to participation in the economy. (The company was initially called Square but changed its name to Block in late 2021.) Block has since expanded its offerings, including with Cash App, which allows customers to transfer money to each other. *See* A170. The company has the benefit of an experienced board, whose members include partners in venture-capital firms, senior executives at other major corporations, leaders of major charitable foundations, and former high-ranking government officials, including former Treasury Secretary Larry Summers. A020–22.

In August 2020, Block's cofounder, chief executive officer, and chairman, Jack Dorsey, presented a potential transaction to the company's board: the acquisition of TIDAL, a music-streaming service. A125–26. TIDAL, founded in Norway under the name Aspiro, had been acquired soon after its 2015 launch by Shawn Carter, better known as Jay-Z; he paid almost $60 million for the new business, [redacted] A227. By the time Block first began considering buying the business, TIDAL had over two million subscribers [redacted] A224. And its ownership group

included not just Mr. Carter, but a list of other prominent musical artists, including Kanye West, Alicia Keys, Beyoncé, Madonna, Rihanna, and the members of Coldplay. A219–20. TIDAL's strategy was to [redacted]

[redacted] A227–28.

After discussing "the strategic rationales" for the proposed deal, along with "proposed valuations," "potential costs and long-term value to the Company, as well as the Company's proposed integration strategy," Block's board "instructed management to continue to evaluate" the possibility of a deal and decided to "set up a transaction committee to help review the potential transaction." A126. The Transaction Committee consisted of four board members: Darren Walker, the President of the Ford Foundation; Roelof Botha, a partner at Sequoia Capital and the former CFO of Paypal; Mary Meeker, a partner at BOND, a venture-capital firm, and a former Morgan Stanley analyst; and Amy Brooks, the NBA's Chief Innovation Officer. A129–31, A492.

Block also entered into a non-binding letter of intent to acquire TIDAL, [redacted] that would give Block an opportunity to perform diligence on

TIDAL's business model, contracts with artists and wireless carriers, culture, technology, and more. A183.

II. After its initial due diligence, the Transaction Committee recommends continuing to explore an acquisition of TIDAL, but at a lower price.

In the first month after its formation, the Transaction Committee received three lengthy diligence reports addressing the potential advantages and disadvantages of acquiring TIDAL. A136–210.

The first report explained the "deal thesis"— [REDACTED]

[REDACTED] A136–59. Block could use TIDAL to expand beyond TIDAL's core business of music streaming to other potentially lucrative markets: [REDACTED] A136. Those markets were estimated to account for [REDACTED] by 2023, [REDACTED] A136–38. Management also summarized the pros and cons of entering each potential market. A138.

The report explained that TIDAL's approach to all these markets, like its approach to its core music-streaming business, would be aimed at giving artists more control and more money. The report noted, for example, A145, A151. *E.g.*, A138. The report also explained how Block could use its existing technology to capture market share in the music business— A152.

The second diligence report further analyzed the artist-centric business model discussed in the first report. A161–81. Relying on the report estimated that TIDAL could generate revenue in 2023 ranging from A161–62, A169. The report further explained how TIDAL might approach each current and potential business segment and assessed whether it would be able to win significant market share. A169–81.

The third report summarized key findings from the initial diligence period, further refined the strategy for expanding TIDAL's share of the music-streaming business and for expanding into new market segments, and offered a preliminary view on the investment that would be necessary to put that strategy into action. A183–210. The report estimated that Block would have to invest

A199. Block would need to, among other things,

A203–04. Block was no stranger to a years-long effort to launch a new product; it had done that with Cash App, which grew after years of significant losses into a profitable business segment. A199–202.

With the benefit of these three reports, the Transaction Committee met in late September 2020 to discuss the merits of the potential acquisition. A212–14.

Another detailed report and more meetings followed. The fourth report, delivered in mid-October, addressed, among other things,

as well as the pros and cons of moving forward. A216–49. The "payout waterfall" showed that

A218–19.

The report then outlined reasons to go ahead with the deal and reasons not to. A224–30. The thesis of the deal was to do for the music business what Block had already done for the payments business: to help (and ultimately make money

helping) “a population in need of economic empowerment.” A224. The combination of the two businesses could [redacted]

A225. But there were reasons to be cautious. Among other things, the Committee was told that it was possible that TIDAL would still struggle to add subscribers, and [redacted] A229–30, A241–44.

The report also included a preliminary valuation based on several valuation methodologies, including discounted-cash-flow analysis and an analysis valuing comparable companies based on subscriber counts, A231–34, A248–49, as well as a great deal of information about the performance and competitive position of TIDAL’s core music-streaming business, A235–46. Management expected a purchase price of $550 to $750 million. A224.

About a week after receiving the fourth report, in late October 2020, the Transaction Committee met again. A289. A presentation prepared for and presented at the meeting addressed an updated (and lower) valuation for TIDAL, surveyed the risks of going forward with the transaction, and answered 18 detailed questions asked by the Transaction Committee before the meeting. A251–87. Four different

valuation methodologies pointed to a valuation somewhere between [redacted] [redacted] with the current offer landing at $490 million. A258, A281–83. The risks in pursuing the transaction included the possibility that Block had [redacted] [redacted] there were no fixed agreements with artists who could raise TIDAL's profile, and [redacted] [redacted] A263. And the Transaction Committee asked about (among other things) valuation, the third-party advisors who had been engaged to advise on the potential deal, who the "internal advocates" for the proposed deal were (the answer being that Mr. Dorsey was then its only "strong[] advocat[e]"), how TIDAL would respond to changes in the music business, and how it would be integrated into Block if a deal were completed. A265–79. After "discuss[ing] potential challenges related to pursuing the transaction," the Committee "instructed management to continue pursuing" it. A290.

The full board met the next day and received a report on "the work that the deal team ha[d] undertaken and the discussions that the Transaction Committee of the Board ha[d] had in connection with the review of the target and the negotiation of a potential term sheet." A293, A295.

III. Block agrees to buy TIDAL for substantially less than its initial valuation, then drives down the price further still.

After almost four months of diligence, Block and TIDAL agreed to a term sheet in November 2020. A310. The Transaction Committee met again in late January 2021. A356–58. A detailed presentation prepared for that meeting, A304–54, explained why TIDAL's valuation, initially estimated to be as high as $750 million and later reduced to $490 million, was now only $350 million, A306. The thesis of the deal remained "unchanged"; it was [redacted]

[redacted]

[redacted] A306; *see also* A345

[redacted]

But the price had declined as a result of "the diligence [Block] had done to date and the feedback from the board," which had charged management with [redacted]

[redacted] A347. In negotiating a lower price, Block pointed out that a substantial share of TIDAL's revenue was in jeopardy because a wireless service provider was unlikely to continue packaging TIDAL with new wireless subscriptions, and that TIDAL's [redacted] and financial numbers had underperformed expectations. A306–07, A322, A338, A340. After the latest negotiations, Block would be buying an 88% stake for about

$309 million, [redacted]

A313–15.

The January 2021 presentation, like the October 2020 presentation, featured detailed answers to questions posed by the Transaction Committee. This time, the Committee had asked more than a dozen, addressing, among other things, management's financial projections, the effect of TIDAL's expected near-term losses on Block's financial results, and the segments of the music business in which a combined Block and TIDAL might most effectively compete. A347–54.

After updating the full board on the "risks, price, and vision" of the potential deal, A360, A364–65, the Transaction Committee in February 2021 unanimously approved a deal to buy 88% of TIDAL for $306 million, subject to certain adjustments that were expected to occur after signing and before closing. A377–81. The deal was announced in March and closed in April. Opn. at 12. After the anticipated adjustments had been made, Block "ultimately paid $237.3 million for an ownership interest of 86.23%." *Id.*

IV. A stockholder sues the company's directors over the TIDAL deal without first demanding that they pursue the claim.

In January 2022, after making a demand for the company's books and records, the City of Coral Springs Police Officers' Pension Plan sued the directors of Block.

A008. Coral Springs alleges that Mr. Dorsey "breach[ed] his fiduciary duties by forcing through a highly unfair acquisition by [Block] of the music-streaming company TIDAL" and that the other directors "breach[ed] their fiduciary duties by consciously failing to exercise appropriate oversight in connection with the TIDAL Acquisition." A010. According to Coral Springs, the acquisition "was simply an unfair deal, transparently motivated by Dorsey's relationship with Carter." A062.

The complaint lists many reasons why, in Coral Springs' view, TIDAL was not an attractive acquisition target. It had fewer subscribers than competing services. A023. It was not profitable, and Coral Springs believed it would be a drag on Block's earnings. A024, A028, A039, A057. Mr. Carter had lent it $50 million to fund its operations. A024. The company was the subject of an investigation in Norway (now dismissed) into the accuracy of its reported subscriber figures. A025. Block supposedly used the wrong valuation methodologies to determine how much to pay for TIDAL. A038–39. Another music-streaming service, Napster, had recently sold for less despite having more subscribers. A061–62. TIDAL owed some $127 million to record labels. A043. And the principal backer of the deal was Mr. Dorsey; some other executives were not initially supportive of the transaction. A045, A049, A051, A054.

The complaint states in a conclusory way why Coral Springs did not make a demand on the board before bringing this lawsuit. Coral Springs says no member of the board "is capable of independently and disinterestedly considering whether to prosecute this action." A064. Mr. Carter "received a material personal benefit as a result of the TIDAL Acquisition," A064; Mr. Dorsey is "not independent of his friend Carter," A067; and the rest of the directors "could not independently and disinterestedly consider a demand because each faces a substantial likelihood of liability" for "utterly failing to take action to protect the interests of [Block]," A068.

Coral Springs asserts two breach-of-fiduciary-duty claims, one against Mr. Dorsey for breach of fiduciary duty and the other against all the outside directors. A069–71.

V. The Court of Chancery dismisses the complaint because Coral Springs has not alleged particularized facts showing that demand was excused.

The director defendants and Block moved to dismiss the complaint. A075. They explained that a stockholder generally cannot sue on behalf of a corporation without first demanding that the directors authorize the corporation to bring the lawsuit, and that Coral Springs had not carried its burden of alleging why demand was excused here. A099–102. To show as much, Coral Springs had to allege particularized facts showing that six of the twelve Block directors could not have

objectively considered any demand that Coral Springs could have made. A101. Coral Springs, the directors explained, had not cleared that high bar.

Coral Springs' only theory of demand futility was that the directors faced a substantial likelihood of liability in connection with the transaction. But six of the directors were not involved in evaluating or approving the transaction; they delegated to the four-person Transaction Committee the authority to review and approve any potential deal. A102. Delaware law and Block's bylaws permitted the directors to do just that, and there is no authority supporting Coral Springs' theory that "at some unspecified time, the members of the Board who did not serve on the Transaction Committee should have disbanded [it] or revoked its authority to review and approve a potential transaction with TIDAL, and that by failing to do so, the non-Transaction Committee members must have acted in bad faith." A110.

The directors and Block explained in their motion that the members of the Transaction Committee also faced no realistic prospect of liability. A102. If anything, the complaint and the materials Coral Springs received in response to its books-and-records request demonstrate the Committee members' good faith—that they reviewed a series of detailed reports, asked tough questions of management, carefully weighed the risks of the transaction, and ultimately secured a substantial reduction in the purchase price. A112–22.

The Court of Chancery granted the motion to dismiss. The court recapitulated all the facts on which Coral Springs relied to argue that Block should not have acquired TIDAL, Opn. at 3–12, and then explained why none of them matters: Coral Springs has not pleaded particularized facts showing that the outside directors acted in bad faith and therefore would face any substantial likelihood of liability for approving the deal. *Id.* at 18–19, 25–27.

Coral Springs, the Court of Chancery explained, failed to allege facts showing that the four Transaction Committee members "lacked a business reason for wanting to acquire TIDAL" or that "any of the Committee Defendants were in any way beholden to Dorsey," and the record shows that the Committee members "asked many appropriate questions" in advance of their meetings with management. Opn. at 25–26. Without any allegations suggesting that the Committee members had some malign motive or refused to supervise the deal, Coral Springs was effectively "ask[ing] the court to presume bad faith based on the merits of the deal alone." *Id.* at 25.

Coral Springs' allegations about the remaining outside directors, the Court of Chancery explained, "are even more attenuated." Opn. at 27. Coral Springs' theory is that they "failed to meaningfully supervise the Transaction Committee's process" and "should have intervened to stop the TIDAL acquisition." *Id.* But if Coral

Springs has not alleged enough to demonstrate that the Committee members acted in bad faith, then it necessarily has not alleged enough to show that the remaining directors acted in bad faith in not restraining the Committee from approving the deal. *Id.*

Because Coral Springs has not alleged bad faith as to any outside director, the Court of Chancery concluded, it makes no difference whether demand was futile as to the two remaining directors, Mr. Carter (who had a financial interest in the deal) and Mr. Dorsey (who is friends with Mr. Carter). Opn. at 17–18.

In short, Delaware courts are not "in the business of second-guessing board decisions made by disinterested and independent directors" in good faith. Opn. at 20. Although Coral Springs may have alleged enough "to make a reasonable person question the business wisdom of the TIDAL acquisition," it was not enough to show that any outside director "acted in bad faith and thus faced a substantial likelihood of liability for that decision." *Id.* at 26–27. Coral Springs therefore needed to make a demand of the board before bringing this suit, and its failure to do so mandates dismissal. *Id.* at 27.

Coral Springs appealed. A001.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT CORAL SPRINGS HAS NOT ALLEGED THAT THE OUTSIDE DIRECTORS ACTED IN BAD FAITH.

A. Question presented.

The demand requirement bars this derivative action unless Coral Springs can plead that at least half of the directors could not have objectively and impartially considered a demand. Six of the twelve directors did nothing apart from establishing the Transaction Committee to explore a potential deal with TIDAL, and the four directors on the Committee conscientiously supervised the negotiation process and secured a major price reduction. Has Coral Springs adequately alleged that demand is excused because at least six of the directors face a substantial likelihood of liability for bad-faith conduct? This question was raised and decided by the Court of Chancery. Opn. at 27.

B. Scope of review.

Court of Chancery Rule 23.1 sets forth "stringent requirements of factual particularity" that exceed the Rule 8(a) standard and can't be "satisfied by conclusory statements or mere notice pleading." *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000). This Court reviews de novo the Court of Chancery's application

of Rule 23.1. *United Food & Com. Workers Union v. Zuckerberg*, 262 A.3d 1034, 1047 (Del. 2021).

C. Merits of argument.

1. A stockholder demand on the directors serves important purposes and can be excused only under rare circumstances.

This case concerns a "'cardinal precept' of Delaware law": "that directors, rather than shareholders, manage the business and affairs of the corporation." *Zuckerberg*, 262 A.3d at 1047 (citing 8 *Del. C.* § 141(a)). Section 141 of the Delaware General Corporation Law reflects the policy judgment that directors should have the discretion "to set a corporate course of action, including time frame, designed to enhance corporate profitability," even if that course does not necessarily "maximize shareholder value in the short term." *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989). This broad authority delegated to directors extends to not only internal management and external deal-making, but also "decisions about what remedial actions a corporation should take after being harmed, including whether the corporation should file a lawsuit against its directors, its officers, its controller, or an outsider." *Zuckerberg*, 262 A.3d at 1047.

Stockholders can sue on behalf of the corporation (and thereby displace the default rule of directorial control) only under rare circumstances. This Court has

repeatedly recognized that, "by its very nature," a derivative suit "encroaches 'on the managerial freedom of directors' by seeking to deprive the board of control over a corporation's litigation asset." *Zuckerberg*, 262 A.3d at 1047 (alteration omitted) (quoting *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984)). To ensure that derivative suits remain the exception instead of the norm, Delaware law requires any would-be plaintiff first to make a demand on the company's board of directors to bring the claims—"a recognition of the fundamental precept" of directorial control. *Aronson*, 473 A.2d at 812. Court of Chancery Rule 23.1 implements this demand requirement at the pleading stage by requiring a stockholder plaintiff to "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors . . . ." Ct. Ch. R. 23.1(a).

The demand requirement ensures that the directors get the first crack at the decision to pursue litigation in the name of the corporation. This is not simply a technical procedural hurdle but an important "substantive requirement." *Zuckerberg*, 262 A.3d at 1047. For one thing, the demand requirement deters "strike suits," where stockholders bring derivative suits whose nuisance value exceeds their settlement value, "by promoting this form of alternate dispute resolution." *Aronson*, 473 A.2d at 812. For another, a demand gives the directors an opportunity "to control [the] litigation" even if the corporation cannot "address an alleged wrong

without litigation . . . ." *Kaplan v. Peat, Marwick, Mitchell & Co.*, 540 A.2d 726, 730 (Del. 1988). And finally, the demand requirement recognizes that the business judgment rule protects not only the corporate decision that may form the basis for the stockholder's claims, but also the decision to initiate litigation itself. *Zapata Corp. v. Maldonado*, 430 A.2d 779, 782–83 (Del. 1981).

Courts excuse stockholders from making a demand only if a demand would be futile because "at least half of the members of the demand board" could not objectively and impartially consider the demand request. *Zuckerberg*, 262 A.3d at 1059. In *Zuckerberg*, this Court explained that there are three questions a court must consider when determining whether a plaintiff has adequately alleged that demand is excused as to a director:

> (i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand;
>
> (ii) whether the director faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand; and
>
> (iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand.

Id. A stockholder, in other words, must show that at least half of the directors were on both sides of the transaction, that they are in thrall to someone who was, or that they otherwise are highly likely to be held personally liable in the derivative action.

By design, this test is hard to satisfy. Any derivative action, no matter its merits, "upsets the balance of power" that Delaware law "establishes between a corporation's directors and its stockholders." *Zuckerberg*, 262 A.3d at 1049. And if courts too readily treated demand as futile, stockholders like Coral Springs would have a strong incentive to allege futility as a fast track out of the demand process, undermining the principle that directors control the corporation's affairs. *Id.* at 1056. The constraints of the "demand-futility analysis" thus act as "an important doctrinal check that ensures the board is not improperly deprived of its decision-making authority, while at the same time leaving a path for stockholders to file a derivative action" when the board could not "bring its impartial business judgment to bear on a litigation demand." *Id.* at 1049.

2. The complaint does not clear the high bar for demand futility.

Coral Springs did not comply with the demand requirement, depriving the board of the opportunity to control a corporate asset—Block's potential claim against its own directors. A064. Had Coral Springs made a demand, the demand

board would have consisted of twelve directors: the eleven on the board at the time of the TIDAL transaction, plus Mr. Carter, who joined the board following the transaction. A064. So Coral Springs had to plead particularized facts showing that at least six of those directors could not have objectively and impartially considered the demand it never made. The complaint here falls well short of the exacting standard for futility, as Coral Springs implicitly acknowledges when it suggests that this Court scrap the three-part *Zuckerberg* test altogether.

a. The six directors who voted to establish the Transaction Committee did not act in bad faith.

Start with the six directors who did not serve on the Transaction Committee: Paul Deighton, Randy Garutti, Jim McKelvey, Anna Patterson, Larry Summers, and David Viniar. A021–22. Block's certificate of incorporation exculpates these six, like all of Block's directors, from personal liability to the fullest extent permitted by 8 *Del. C.* § 102(b)(7). B034. And they cannot face liability at all, let alone on an unexculpated claim, for a simple reason: They "'play[ed] no role in the process of deciding whether to approve [the] challenged transaction.'" *In re Morgans Hotel Grp. Co.*, 2017 WL 4810996, at *3 (Del. Ch. Oct. 24, 2017) (citation omitted); *accord, e.g.*, *Citron v. E.I. Du Pont de Nemours & Co.*, 584 A.2d 490, 499 (Del. Ch. 1990). They merely voted to form a committee to review and decide whether to

approve any transaction—an action consistent with Delaware law and Block's bylaws. A029–30, A059; B013; *see* 8 *Del. C.* § 141(c)(1). As the Court of Chancery held, Coral Springs could not allege bad faith on the part of these directors given the highly "attenuated" theory of liability: that they "should have intervened to stop the TIDAL acquisition" as part of a duty to "meaningfully supervise the Transaction Committee's process." Opn. at 27. Such "[a] remote threat of liability is not a good enough reason to deprive the board of control over the corporation's litigation assets." *Zuckerberg*, 262 A.3d at 1052.

On appeal, Coral Springs abandons its theory that these six directors breached their duty to supervise the Transaction Committee, A068–69, retreating back in time to the moment that the directors authorized Mr. Dorsey to submit a letter of intent to purchase TIDAL, AOB at 35–36. Coral Springs criticizes the directors for approving the letter at the same meeting that Mr. Dorsey first raised the potential deal. *Id.* at 29–30. But it cites nothing to support the notion that a director could face liability for approving a *nonbinding* letter of intent after discussing "the strategic rationales for the potential transactions, proposed valuations and the potential costs and long-term value to the Company, as well as the Company's proposed integration strategy with respect to the transaction." A126, A183. Coral Springs instead grasps at behavioral economics, not law, for the proposition that

approving a nonbinding letter is no different from approving the ultimate deal because "a starting value biases future adjustments toward that initial value." *Olenik v. Lodzinski*, 208 A.3d 704, 717 n.65 (Del. 2019). But whatever could be said of anchoring effects generally, the six directors did not simply approve a nonbinding letter; they also established an independent Transaction Committee that oversaw a deal process in which the purchase price moved from $750 million to $237.3 million. A031, A038, A060. That is hardly the stuff of bad faith.

b. The four directors who served on the Transaction Committee did not act in bad faith.

Next take the four directors who served on the Transaction Committee: Roelof Botha, Amy Brooks, Mary Meeker, and Darren Walker. A020–22. Coral Springs does not allege that any of these directors were self-interested or lacked independence from Mr. Dorsey. Opn. at 19. Its lone argument is that these directors could not impartially consider a demand, notwithstanding the certificate of incorporation, because they face a substantial likelihood of personal liability on the unexculpated claim that they approved the TIDAL transaction in bad faith. AOB at 24–41.

This route to demand futility "is a difficult task and requires 'that a director acted inconsistent with his fiduciary duties and, most importantly, that the director

knew he was so acting.'" *McElrath v. Kalanick*, 224 A.3d 982, 991–92 (Del. 2020). "[E]ssentially," Coral Springs has to allege "intentional wrongdoing by" the directors on the Transaction Committee. *Id.* at 993. And "there is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties." *Lyondell Chemical Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009). The Court of Chancery correctly held that Coral Springs has not alleged such intentional wrongdoing under the heightened pleading standards of Rule 23.1. Opn. at 19–26.

Coral Springs' own complaint demonstrates the Transaction Committee's good-faith supervision of the deal:

- *Meetings*. The Committee held three meetings over several months to discuss TIDAL's valuation, the competitive landscape, and potential challenges, as well as how Block could integrate TIDAL into its broader business and develop new offerings for musical artists and streaming subscribers. A032, A034, A056; *see* A212–13, A289–90, A356–57.
- *Reports*. The Committee received four reports and two presentations detailing the market opportunity and due diligence as to TIDAL's business model, contracts, distribution and carrier agreements, litigation, people and culture, and technology. A135–210, A215–87, A303–54.

- *Questions*. The four members of the Committee asked dozens of questions about, among other things, TIDAL's valuation, A266–67; the plans to integrate TIDAL into Block, A268–69; potential revenue streams and cash requirements, A271–72; strategies to increase subscribers, A275; and [REDACTED] at TIDAL, A276–77. And after receiving answers, the Committee continued to probe the risks of the transaction. A347–48.

- *Price reduction.* The Transaction Committee ultimately approved a purchase price nearly hundreds of millions lower than TIDAL's initial valuation after instructing management [REDACTED] A347; *compare* A038 (initial value of $550 to $750 million), *with* A059 (purchase price of $306 million), *and* A060 ($237 million after adjustments).

In short, none of the ten outside directors received a personal benefit from the transaction, was beholden to someone who did, or faces a substantial likelihood of liability. This Court therefore need not address the Court of Chancery's determination that Coral Springs adequately alleged that a demand would have been futile as to Mr. Dorsey and Mr. Carter. Opn. at 17–18. Even with those two directors, Coral Springs would still come up four directors short.

3. Coral Springs wrongly relitigates the deal's merits, nitpicks the negotiation process, and seeks a different standard for "superstar" CEOs.

Coral Springs advances a radical view of demand futility that is at odds with Delaware law. In its view, a stockholder plaintiff can skip the demand process through a three-part playbook of (i) Monday-morning quarterbacking the merits of a deal, (ii) nitpicking the negotiation process, and (iii) speculating that *any* director would have wilted under the glow of a "superstar" CEO. That is not the law, and it would leave nothing to the demand requirement if it were.

To start, Coral Springs says it agrees with the Court of Chancery that the directors on the Transaction Committee face no "'meaningful threat of liability'" even if they approved an allegedly "'terrible business decision.'" AOB at 24 (quoting Opn. at 1). Despite conceding that a supposedly bad decision is not enough to show that the directors could be held liable (and therefore not enough to show demand futility), Coral Springs nevertheless focuses almost exclusively in its brief on why it thinks acquiring TIDAL was a bad decision:

- *Expansion into music*. Coral Springs complains that Block entered "a completely new line of business." AOB at 31. But even if a stockholder might prefer a company to play it safe, the Transaction Committee had a valid "business rationale" for "expanding Block into the music industry,"

Opn. at 26 & n.63—a bet that, while "a big opportunity," was "small relative to the size of [Block]" and fit with the "economic empowerment" ethos of Block's existing business segments, including Cash App, A274.

- *Streaming alternatives*. Coral Springs contends that, if Block was going to enter the music industry, the directors had a duty to consider acquiring a *different* streaming service or creating Block's *own* streaming service "from the ground up." AOB at 34. Yet Coral Springs identifies no alternative target—let alone one that the directors ignored in an intentional attempt to harm Block's best interests—and ignores the irony of arguing that [REDACTED] but would be no obstacle to Block building a new service "from the ground up." *Id.* at 31, 34; *see Lyondell*, 970 A.2d at 243 (holding that claims premised on "failure to pursue" alternatives require "an extreme set of facts") (citation omitted).

- *Substantive disagreement of management*. Coral Springs stresses (AOB at 33) that the Transaction Committee learned that Mr. Dorsey initially was "the primary sponsor of the deal and the only one who [wa]s strongly advocating to move forward" and that there was "substantial push back." A273. But nothing in Delaware law required the directors to insist on

broader support from management—or even to take an executive's opinion at face value. *See* 8 *Del. C.* § 141(e) (permitting board to rely upon the views of anyone "selected with reasonable care"). Here, the Transaction Committee members made their own decision after receiving reports spelling out the benefits and risks of acquiring TIDAL. *Supra*, at 10–15.

- *Comparison to Napster.* Coral Springs also argues that TIDAL should have been valued no higher than Napster, another streaming service that was sold around the same time as TIDAL. AOB at 20. But the Transaction Committee, after specifically comparing TIDAL to Napster, A286–87, came to a different conclusion. While Napster had a tumultuous history of ownership changes, lawsuits, and bankruptcy—and a name synonymous with music piracy—the artist-centric TIDAL had [redacted] A259.

- *Reaction of commentariat.* Coral Springs also cherry-picks criticism of the TIDAL transaction from a *Vox* article and a podcast. AOB at 21, 34–35 n.5 (citing A061–63). That is just more second-guessing of the merits of the deal based on armchair quarterbacking by outside observers, rather than the confidential diligence reports before the Transaction Committee.

For its next move, Coral Springs attempts to repackage its objections to the merits of the deal in the language of several "process failures." *First*, it criticizes the Transaction Committee for sharing advisors with Block rather than hiring separate advisors. AOB at 31. But the Transaction Committee considered independent analyses of the music-streaming market, A139–56, A161–81, and received accounting advice and legal advice A464. Nothing required Block to pay for duplicative consultants—one set for the executives conducting diligence, and another for the Transaction Committee vetting the deal—particularly where there was no stockholder standing on both sides of the transaction. *Kahn v. Stern*, 2017 WL 3701611, at *3 (Del. Ch. Aug. 28, 2017) (dismissing complaint for lack of bad faith even though special committee "did not retain 'any advisors independent of the Company'"), *aff'd*, 183 A.3d 715 (Del. 2018) (TABLE). Although Coral Springs also objects that information was "filtered through Dorsey," AOB at 31, the complaint never alleges that Mr. Dorsey manipulated what was presented in the reports and presentations delivered by management—which flagged the many risks in pursuing the transaction—or otherwise misled the Committee.

Second, Coral Springs argues that the Transaction Committee should have barred Mr. Dorsey from attending its meetings and that, due to his presence, "the

Committee *qua* Committee never even met." AOB at 31. Nonsense. Mr. Dorsey, as Block's CEO, was there to *inform* the Committee about the deal, and "Delaware law does not require that special committees be segregated from sources of vital information." *Blackmore P'rs, L.P. v. Link Energy LLC*, 2005 WL 2709639, at *7 (Del. Ch. Oct. 14, 2005), *abrogation on other grounds recognized by Quadrant Structured Prods. Co. v. Vertin*, 102 A.3d 155, 174 n.4 (Del. Ch. 2014); *accord In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *22 (Del. Ch. May 24, 2011) (holding that directors did not act in bad faith by allowing allegedly conflicted manager "to participate in Special Committee meetings" when "updating the Committee on negotiations").

Third, Coral Springs argues that the directors on the Transaction Committee should have had "at least *some* involvement in the negotiation." AOB at 32. But decision after decision has held that directors do not act in bad faith by allowing a CEO, even if allegedly conflicted, to run the negotiations. Consider, for example, *In re Plains Exploration & Production Co. Stockholder Litigation*, 2013 WL 1909124 (Del. Ch. May 9, 2013), where the directors acted in good faith in designating an "interested" manager to "negotiat[e] a sale of control" of the company; the manager "was in the 'best position to advance the interests of [the] stockholders' because he had the 'most experience with and deepest knowledge of

[the company's] assets.'" *Id.* at *5. And in *Smurfit-Stone*, the outside directors "fully understood that [two managers] potentially faced conflicts of interest" but still reasonably "believed that [they], as management with an intimate knowledge of the Company, were better equipped to effectively and efficiently negotiate due diligence matters." 2011 WL 2028076, at *22. Here, there is no factual allegation that Mr. Dorsey personally was involved in negotiating the transaction. *See* A058 (alleging that "the Transaction Committee 'instructed *management* to continue pursuing the transaction and update the Committee as negotiations progress'" (emphasis added)). But even if Coral Springs had alleged that Mr. Dorsey was involved in negotiating the transaction, there would be no basis to conclude the Transaction Committee acted in bad faith by enlisting Mr. Dorsey to do so under the oversight of the Committee, which had the final say on whether to approve or reject a transaction.

As the Court of Chancery observed, this Court's decisions confirm these supposed process defects fall short of bad faith. Opn. at 22–24. In *McElrath*, Uber poached a Google manager to help run its newly acquired self-driving vehicle startup. 224 A.3d at 987–89. The manager allegedly brought Google's trade secrets along with him, and Uber ended up settling the resulting misappropriation claim by giving Google $245 million in Uber stock. *Id.* at 989. A stockholder, without

making a demand, brought a derivative suit, arguing that the outside directors approved the deal in bad faith because they were on notice of the controlling stockholder's past disregard of intellectual-property rights and an unusual clause in the merger agreement indemnifying the former Google manager. *Id.* at 992–93. The Court held that these allegations could not overcome the demand requirement. Although, "[b]y any reasonable measure, the Uber board of directors approved a flawed transaction," *id.* at 987, they had "heard a presentation that summarized the transaction, reviewed the risk of litigation with Google, generally discussed due diligence, asked questions, and participated in a discussion," *id.* at 993. The Transaction Committee here was even more involved in the process and, like the directors in *McElrath*, "considered the risks and nonetheless proceeded with the transaction." *Id.*

Coral Springs argues that this case is less like *McElrath* and more like *In re Walt Disney Co. Derivative Litigation*, 825 A.2d 275 (Del. Ch. 2003). AOB at 39. Yet *Disney* only underscores the procedural aberrations necessary to establish bad faith. There, the CEO, Michael Eisner, made the unilateral decision to hire his longtime "close friend," Michael Ovitz, as president of Disney. 825 A.2d at 287. The two negotiated free from any oversight from Disney's board, which allegedly approved the agreement without even reviewing a draft or otherwise providing "*any*

board input." *Id.* at 287–88. The deal entitled Mr. Ovitz to the parting gift of cash and stock options allegedly worth $140 million when Mr. Eisner approved a non-fault termination despite Mr. Ovitz's disastrous performance as president. *Id.* at 279, 288. In *Disney*, the directors allegedly put the fox in charge of the henhouse and then fled the scene. This case does not involve similarly "egregious process failures," *id.* at 291, as the Court of Chancery explained, Opn. at 24–26.

The other two cases that Coral Springs touts are even further afield. AOB at 27–29. The first, *In re CBS Corp. Stockholder Class Action & Derivative Litigation*, 2021 WL 268779 (Del. Ch. Feb. 4, 2021), involved an "extreme set of facts" where a controlling stockholder allegedly stood on both sides of the transaction, saw a merger with CBS as a lifeline for her "sinking ship" of Viacom, and had a history of retribution against directors who defied her. *Id.* at *36, *39, *43. The other, *Berteau v. Glazek*, 2021 WL 2711678 (Del. Ch. June 30, 2021), likewise concerned a "classic self-dealing transaction involving a controlling stockholder" where the directors allegedly forwent a "key procedural protection" (a majority-of-the-minority vote) for no reason other than to accede to the demands of the controller. *Id.* at *12, *22. Unlike in *CBS* and *Berteau*, there is no such conflict with a stockholder on both sides of the transaction. The gist of Coral Springs' complaint instead is that the deal was

so unattractive that Mr. Dorsey's friendship with Mr. Carter is the only explanation for it.

That is how the Court of Chancery correctly summarized Coral Springs' position—that it seeks a presumption of "bad faith based on the merits of the deal alone." Opn. at 25. The court correctly decided to stay out of "the business of second-guessing board decisions made by disinterested and independent directors." *Id.* at 20. Coral Springs cannot show that a demand would have been futile under longstanding law.

So Coral Springs resorts to a Hail Mary: that bad faith should be presumed whenever a controlling stockholder or "'superstar CEO'" proposes a transaction. AOB at 29. This carveout conflicts with *Zuckerberg*, where this Court recently refused to treat "conflicted-controller transaction[s]" differently for purposes of demand futility. 262 A.3d at 1056. Ignoring that decision, Coral Springs indiscriminately borrows (AOB at 25–26) from cases applying the entire fairness standard where "a controlling stockholder attempts to acquire the rest of the corporation's shares in a negotiated merger." *In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 435 (Del. Ch. 2002) (citing *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110 (Del. 1994)); *see In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1, 36 (Del. Ch. 2014). Coral Springs is mixing apples and oranges. As decisions

applying *Lynch* have recognized, Rule 23.1's demand requirement (not the entire fairness standard) governs whether "a majority of independent directors can impartially decide whether to sue a controlling stockholder"—that is, the question in this appeal. *Pure Res.*, 808 A.2d at 436 n.17; *accord In re Cornerstone Therapeutics Inc. S'holder Litig.*, 115 A.3d 1173, 1183 n.39 (Del. 2015). Yet Coral Springs muddles these distinct doctrines together in an attempt to lower the threshold for demand futility.

Bad faith, as reconceived by Coral Springs, would also have radical consequences for the demand requirement. Any derivative case involving a "superstar" CEO—whatever that means—would be subject to entire fairness review and presumptively proceed past a motion to dismiss, thereby gutting Rule 23.1. Delaware law has long afforded independent directors a presumption of loyalty. *E.g.*, *Aronson*, 473 A.2d at 812. But that would no longer be true under Coral Springs' novel approach, which presumes *dis*loyalty whenever a controlling stockholder or "superstar" CEO proposes a course of action. And there is no defensible limiting principle that would confine the erosion of the demand requirement to Block or some narrow set of businesses. The superstar theory of demand futility would apply equally to the directors of nearly every major company, most of which are headed by prominent leaders. Coral Springs' proposed rule would

therefore have widespread, unintended consequences—for example, by deterring qualified candidates from agreeing to serve as directors for companies with high-profile executives or by encouraging directors to veto or not pursue transactions out of fear of liability.

Worse still, Coral Springs' proposed rule would be nearly impossible for courts to administer. Who qualifies as a "superstar" is in the eye of the beholder. Coral Springs never explains how much wattage is enough to be a superstar or, more still, how courts are supposed to know—number of magazine profiles, followers on social media, or something else? And Coral Springs also never tells us how to balance wattage against the traditional indicia of bad faith to determine when, or for what transactions, directors have acted loyally or disloyally. This is a recipe for uncertainty—not to mention contrary to established law.

II. THIS COURT SHOULD NOT OVERRULE *ZUCKERBERG*.

A. Question presented.

Only two years ago, this Court held in *Zuckerberg* that when a corporation exculpates directors from liability for breaches of the duty of care, demand is not excused on a substantial-likelihood-of-liability theory unless the plaintiff pleads particularized facts demonstrating that the director breached a duty of loyalty or acted in bad faith. A substantial likelihood of liability for breaching the duty of care is not enough. Has Coral Springs demonstrated that *Zuckerberg* was clearly wrong and should be overruled? This question was raised and implicitly rejected by the Court of Chancery. A436–38; Opn. at 27.

B. Scope of review.

"Under the doctrine of *stare decisis*," this Court overturns "settled law" only "for urgent reasons and upon clear manifestation of error." *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 124 (Del. 2006) (quoting *Oscar George, Inc. v. Potts*, 115 A.2d 479, 481 (Del. 1955)).

C. Merits of argument.

Although some cases once suggested that allegations of gross negligence were enough to bypass the demand requirement, *e.g.*, *Aronson*, 473 A.2d at 814, the General Assembly later authorized corporations to limit directors' personal liability

for such claims, 8 *Del. C.* § 102(b)(7). This Court in *Zuckerberg* clarified that "exculpated care violations" cannot establish a substantial likelihood of personal liability that excuses a demand. 262 A.3d at 1057. *Zuckerberg* brought the demand-futility analysis in line with the "current landscape" of Delaware law by recognizing that "exculpated breach of care claims no longer pose a threat that neutralizes director discretion"—after all, an exculpated director by definition faces *zero* likelihood of personal liability for breaching the duty of care. *Id.* at 1054.

As Coral Springs admits, *Zuckerberg* squarely forecloses Coral Springs' argument that allegations of gross negligence can circumvent the demand requirement. AOB at 42–43. Recall that Block's certificate of incorporation exculpates its directors from personal liability to the fullest extent permitted by 8 *Del. C.* § 102(b)(7). B034. And "[g]ross negligence, without more, is insufficient to get out from under an exculpated breach of the duty of care." *McElrath*, 224 A.3d at 992. The analysis is as simple as that.

Coral Springs identifies no "urgent reasons" or "clear manifestation of error" that justifies overruling *Zuckerberg*. *Seinfeld*, 909 A.2d at 124 (citation omitted). It argues that *Zuckerberg* has made "Delaware's law concerning demand futility unstable." AOB at 43. But only two years have passed since this Court decided *Zuckerberg*, and Coral Springs has not identified the rare sort of evidence that would

justify revisiting it—namely, decisions revealing "practical and analytical difficulties courts have encountered in applying" *Zuckerberg* that "reflect fundamental unworkability." *Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1280 (Del. 2021). Coral Springs instead stakes its overruling request on an article with a seven-point agenda for reshaping Delaware law. Lawrence A. Hamermesh et al., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 BUS. LAW. 321, 325–26 (2022). The authors agree that *Zuckerberg* represents "defensible" policy but argue that its logic conflicts with recent Court of Chancery decisions reasoning that a controlling stockholder can wield inherently coercive power over directors in connection with transactions between that controlling stockholder and the corporation. *Id.* at 356–61 (citing *In re EZCORP Inc. Consulting Agreement Deriv. Litig.*, 2016 WL 301245 (Del. Ch. Jan. 25, 2016)). But it would make little sense for this Court to reconsider its own decisions in light of Court of Chancery decisions made years earlier.

Abandoning *Zuckerberg* also would undermine the legal stability that Coral Springs professes to champion. This Court explained in *Zuckerberg* that the "three-part test" for demand futility "achieves [the] important goal" of ensuring that "the common law evolve[s] in an orderly fashion to incorporate" intervening changes to the law. 262 A.3d at 1058. This doctrinal clarification "d[id] not change the result

of [the] demand-futility analysis" because demand would continue to be excused only when a director was interested in the transaction or faced a substantial likelihood of liability. *Id.* at 1058 & n.169. Because *Zuckerberg* continues to strike an appropriate balance between directorial control and corporate accountability, this Court should leave the law as it stands today. *Seinfeld*, 909 A.2d at 125.

At any rate, this case offers no opportunity to revisit *Zuckerberg* because Coral Springs has not even alleged gross negligence. Even the advocates of a new test broadening the exceptions to the demand requirement took pains to emphasize that plaintiffs must satisfy a "rigorous requirement to plead particularized facts to support a rational inference of ultimate breach" based on gross negligence. Hamermesh, *supra*, 77 BUS. LAW. at 354. Coral Springs cannot meet that requirement—not as to the four directors who conscientiously performed their duties on the Transaction Committee, and certainly not as to the six directors who lawfully delegated approval to the other four.

CONCLUSION

This Court should affirm the dismissal of the complaint for failure to plead with particularity that demand is futile.

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