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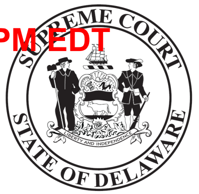

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CITY OF CORAL SPRINGS POLICE OFFICERS' PENSION PLAN, derivatively on behalf of BLOCK, INC.,	)	
Plaintiff Below/Appellant,	)	
v.	)	No. 161, 2023
JACK DORSEY, ROELOF BOTHA, AMY BROOKS, PAUL DEIGHTON, RANDY GARUTTI, JIM MCKELVEY, MARY MEEKER, ANNA PATTERSON, LAWRENCE SUMMERS, DAVID VINIAR, and DARREN WALKER,	)	Court Below: Court of Chancery C.A. No. 2022-0091-KSJM **Redacted Public Version** **Filed: August 28, 2023**
Defendants Below/Appellees,	)	
and	)	
BLOCK, INC.,	)	
Nominal Defendant Below/ Appellee.	)	

<u>APPELLANT'S [CORRECTED] REPLY BRIEF</u>

Thomas Curry (#5877)
SAXENA WHITE P.A.
824 N. Market Street, Suite 1003
Wilmington, Delaware 19801
(302) 485-0483
tcurry@saxenawhite.com

Counsel for Plaintiff Below / Appellant

August 24, 2023

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PRELIMINARY STATEMENT

The alleged facts cohere into a simple, easily understandable story: Dorsey decided amidst a vacation with a close friend to use his controlled company to help that friend out of a jam. The idea did not make sense; indeed, it was so preposterous that no unconflicted executive would back it. Yet the Board was unwilling to stand up to the strongly held desire of its conflicted controller and rolled over, resulting in significant and predictable harm to Block and its public stockholders.

To prevail on this appeal, Plaintiff need only convince the Court that its particularized allegations support a reasonable inference, even if not the strongest inference, that this story is accurate. But it is the strongest inference. It is the most plausible account of what happened, a commonsense story that rings true.

Delaware law recognizes that, where a Plaintiff can plead facts of this nature, even facially-independent directors must face disloyalty claims. As Plaintiff explained in its opening brief ("OB"), its particularized allegations support a sufficient pleading-stage inference of bad faith under *Disney*, which recognized directors must face disloyalty claims where a plaintiff can plead "egregious process failures" reflecting a conscious disregard of duty,[1] and under the more recent *CBS*

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[1] *In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 291 (Del. Ch. 2003).

line of cases, which recognize directors must face disloyalty claims where their actions reflect a desire to "appease" or "placate" their controller rather than "land the best transaction possible."[2] (OB 35-41).

In their answering brief ("AB"), Defendants attempt to justify or minimize each of the egregious process failures identified by Plaintiff in isolation. Those arguments fail on their own terms. They also fail because Plaintiff's allegations cannot be considered in isolation from each other. All of Defendants' failures must be considered together, in context with the terms of the deal ultimately approved and Dorsey's influence.

As to the terms of the deal and the significance of Dorsey's influence, Defendants caricaturize Plaintiff's arguments. Plaintiff does not argue that the terms of the Acquisition support an inference of bad faith standing alone, but rather that Defendants' *actions* must be considered in the context of the preposterous transaction they were called to consider and ultimately chose to permit.

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[2] *In re CBS Corp. S'holder Class Action & Deriv. Litig.*, 2021 WL 268779, at *43 (Del. Ch. Jan. 27, 2021) (sustaining claim directors "breached their fiduciary duty of loyalty by approving [a] patently unfair Merger in order to appease [their controller]"); *Berteau v. Glazek*, 2021 WL 2711678, at *22 (Del. Ch. June 30, 2021) (sustaining claims directors breached duty of loyalty where they "[were] not prepared to exercise [their] ability to say 'no' to the controller"); *In re Viacom Inc. S'holders Litig.*, 2020 WL 7711128, at *24 (Del. Ch. Dec. 29, 2020) (sustaining claims directors breached duty of loyalty where their actions "reflect[ed] a desire to placate the controller, not to land the best transaction possible").

Likewise, Plaintiff does not argue that any different standard should apply to consideration of bad faith claims in the context of an interested controller transaction. Rather, Plaintiff submits that the influence of a dominant individual like Dorsey—Block's founder, Chairman, President, CEO, and controlling stockholder—must be considered, as relevant factual context, in drawing pleading-stage inferences about defendants' mental states in specific alleged factual circumstances. Here, it is Dorsey's influence that ultimately explains Defendants' many egregious process failures leading to the challenged Acquisition.

The tenor of the decision below suggests the Court of Chancery was troubled by the facts presented. Indeed, it is not common for that Court to credit allegations that a prominent fiduciary actively "used corporate coffers" for disloyal purposes, or to acknowledge that a challenged transaction was a "terrible" deal marred by "obvious problems." (Op. 18, 1). Yet the Court nevertheless dismissed the case, invoking Delaware's policy of presumptive deference to the decisions of facially-independent directors.

Delaware corporate law has succeeded, however, by carefully balancing its policy of appropriate deference to the business judgment of fiduciaries with a willingness to permit judicial review where necessary to reinforce the integrity of

our system and promote accountability. Plaintiff respectfully submits that the decision below tips the balance too far.

In rare cases where a plaintiff can plead particularized facts supporting that directors consciously failed to satisfy their duty "affirmatively to protect the interests of the corporation," *Guth v. Loft*, 5 A.2d 503, 510 (Del. 1939), Delaware courts must remain willing to permit such a plaintiff discovery to prove out its claim. The circumstances here—where directors committed egregious process failures in permitting their disloyally motivated controller to "use corporate coffers" for a "terrible" deal with "obvious problems" (Op. 18, 1)—present such a case.

ARGUMENT

I. Plaintiff's Particularized Allegations Give Rise To A Reasonable Inference That The Outside Director Defendants Acted In Bad Faith

A. The Outside Director Defendants' Egregious Process Failures Support A Reasonable Inference Of Bad Faith

In its opening brief, Plaintiff demonstrated that its particularized allegations support that the Outside Director Defendants engaged in egregious process failures reflecting that they did not honestly believe the Acquisition was in the best interests of the company, or did not care whether it was, but rather permitted it merely because Dorsey wanted it. (OB 29-41). Defendants fail in their attempt to justify or minimize these many striking process deficiencies.

The Board's Immediate LOI Authorization, Prior to Establishment of the Transaction Committee. Prior to its August 2020 Board meeting, the Board had never even considered expanding into music-streaming. Before the meeting, it received no notice that such a proposal would be raised. At the meeting, [redacted] Yet, at that meeting—[redacted] (A125-127)—the Board authorized Dorsey to submit an LOI to purchase TIDAL at a $550 million valuation—a nearly 900% premium over the price his friend had paid just five years earlier, and well over a full-year's earnings for Block. The Board did so despite being aware of Dorsey's conflict. In recognition thereof, the Board determined at the meeting to establish the Transaction

Committee. Yet, remarkably, it permitted Dorsey to submit his LOI before the Committee was set up. (A27-46, ¶¶37-46; OB 10-12, 29-30).

Defendants do not dispute these striking facts. Instead, they argue that because the LOI was "nonbinding" and the ultimate purchase price was lower than $550 million, there was no harm and no foul. (AB 28). This rings hollow. The Board's immediate LOI authorization constituted a conscious disregard of duty: the Board could not possibly have thought it was sufficiently informed or had afforded the proposal sufficient consideration to authorize an LOI for a conflicted transaction that was both strategically and financially material. *See Marchand v. Barnhill*, 212 A.3d 805, 824 (Del. 2019) ("a corporate board must make a good faith effort to exercise its duty of care. A failure to make that effort constitutes a breach of the duty of loyalty"). This breach was a critical step in the Acquisition process, as it is more than reasonable to infer the valuation indicated by Dorsey's $550 million LOI anchored subsequent negotiations, resulting in the somewhat lower but still outrageous valuation of the ultimate deal. (*See* OB 30). Defendants fail to meaningfully engage with this point.

The Committee's Failure to Hire Advisors. The Committee failed to hire any advisors to provide independent advice. This was a particularly striking failure given Dorsey's conflict and that TIDAL was in a completely new line of business

that neither Block nor its Board had ever considered entering. (A16, ¶11; A29, ¶41; A33, ¶50; A47, ¶69; A56, ¶84; OB 12, 30-31). Defendants fail in their attempt to minimize this significant failure. They argue the Committee's failure to hire advisors was not a problem, because it "share[d] advisors" with Dorsey. (AB 35). This conflicts with the record, which reflects [redacted] Indeed, remarkably, [redacted]—the meeting at which it authorized Dorsey to enter a Term Sheet at a nearly $500 million valuation. (OB 13-18). [redacted] (A267).

The record reflects, moreover, that even management's purported "advisors" performed very little actual work. Defendants' arguments demonstrate this. To support that the Committee received independent advice, they tout that "the Transaction Committee considered independent analyses [redacted] of the music-streaming market, A139-56, A161-81, and received accounting advice [redacted] and legal advice [redacted], A464." (AB 35). Pages A139-56, from management's first report to the Transaction Committee, [redacted]. Block never hired [redacted]

to do anything. Pages A161-81, part of the second report, reflect that (A162) —but the record is exceptionally thin as to . Block's Section 220 production did not include . The same is true for , which purportedly (A464). Every actual report and presentation was prepared by Dorsey's management team. No fairness opinion issued.

But even if Dorsey's advisors had performed meaningful work, and the Committee had consulted with them, it still would have constituted an egregious failure by the Committee to allow Dorsey to retain and lead interactions with those advisors. *See CBS*, 2021 WL 268779, at *39 (recognizing an independent committee should "have its own legal and financial advisors who themselves are free from the influence of any interested board members"); *Glazek*, 2021 WL 2711678, at *22 (finding that even with independent financial advisors, the committee's process was tainted by the use of legal advisors chosen by management). The Committee was established to consider a material transaction, in a fundamentally new line of business, in which their controller had an acknowledged conflict. Their failure to receive any independent advice constituted another striking failure.

The Committee's [redacted]

[redacted] The Committee was established to oversee the process in recognition of Dorsey's conflict. Defendants do not dispute this. Yet, [redacted] Thus, as Plaintiff explained in its opening brief, it is fair to say that the Committee *qua* Committee never even met—or, alternatively, [redacted] (A34, ¶50; A47, ¶70; A50, ¶73; A56, ¶84; OB 12, 31-32). This was yet another remarkable failure, providing strong support for a reasonable inference of bad faith.

Defendants respond by suggesting there was nothing unusual or inappropriate about the Committee allowing Dorsey to attend its meetings. (AB 36). But Defendants' own cases, *Blackmore* and *Smurfit*, discredit their position. Both cases endorse the uncontroversial proposition that a conflicted fiduciary may be permitted to attend *parts* of committee meetings to provide information or assistance. Neither case endorses [redacted] —whose conflict was the very impetus for the committee's existence—at any point in the deal process. *See Blackmore Partners v. Link Energy LLC,* 2005 WL 2709639 (Del. Ch. Oct. 14, 2005) (conflicted CEO and board member were both "asked to leave at crucial moments" of committee meetings); *In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076,

at *22 (Del. Ch. May 20, 2011), *as revised* (May 24, 2011) ("because management's potential conflicts were recognized, the Board took firm control of the sales process and management's involvement in it … [the CEO] was permitted to participate in Special Committee meetings, but only when he was updating the Committee on negotiations and other business matters. He always was excused and not present during important Committee votes"). No case supports Defendants' proposition.

The Committee's Failure to Involve Itself in Negotiations. The Committee never sought to involve itself in the negotiations and instead allowed Dorsey to personally negotiate all terms vis-à-vis his good friend. (OB 32-33). This constituted yet another critically important, and seemingly inexplicable, process failure on the part of the Committee. Defendants suggest this was not a problem, relying on two cases: *Plains* and *Smurfit*. (AB 36). But neither support Defendants' position. Both involved executives facing routine conflicts in corporate sale processes (potential employment, change of control benefits). *In re Plains Expl. & Prod. Co. S'holder Litig.*, 2013 WL 1909124, at *5 (Del. Ch. May 9, 2013); *Smurfit*, 2011 WL 2028076 at *3. Neither involved a Board allowing a conflicted executive to personally negotiate the terms of a material transaction vis-à-vis his close friend. Indeed, *Disney* is much more analogous. There, the Court explained that where directors "allow two close personal friends"—one a powerful fiduciary, the other a

potential counterparty of the corporation—"to control the payment of shareholders' money to [the counterparty]" such facts "cast[] doubt on the good faith" of those directors. *Disney*, 825 A.2d at 287, n.30.

Further, unlike the Committee here, the directors in Defendants' authorities took meaningful action to exercise supervision. In *Smurfit*, for example, the relevant committee substantially involved itself in the negotiations pursuant to its "belief that the process should be driven by the Company's outside directors" rather than the conflicted CEO. *Smurfit*, 2011 WL 2028076, at *17. The committee formed a "subcommittee" of non-conflicted directors "to 'drive the nitty-gritty work that gets done in analyzing a proposal' on a day-to-day basis," made sure that counterparties "direct[ed] their communications and inquiries to the outside directors," and "pushed back against management at times." *Id.* at *17-18. The Court accordingly found the "Committee did not bow to management pressure and, instead, engaged in real, arm's-length dealings." *Id.* at *18.

Nothing of the sort occurred here. Indeed, [redacted] (OB 12-13). Defendants nevertheless suggest the Committee deserves credit for the "price reduction" between Dorsey's $550 million LOI and the ultimately approved deal. (AB 31). But there is no support for this. At the Committee's second meeting,

the first at which it had meaningful information concerning TIDAL, Dorsey wanted to enter a term sheet at a valuation of approximately $490 million. (A043, ¶64). The Committee provided him with the authority to do so. When Dorsey returned more than three months later, he reported that Block management was forced to reduce its valuation before entering the Term Sheet based on new information concerning further deterioration in TIDAL's business that emerged after the Committee's second meeting. There is no evidence the Committee had anything to do with this reduction. (OB 18-20). Defendants nevertheless represent that the Committee "instruct[ed] management [REDACTED] (AB 31). Putting aside that this generalized instruction is logically tantamount to "pay whatever you have to pay to make the deal happen," the document Defendants cite—a page from management's presentation at the Committee's final meeting (A347)—says that [REDACTED] *Id.* Though it refers obliquely to [REDACTED], it does not say the Board instructed management to do anything. *Id.* Notably, Defendants' reliance on thin reeds of this nature demonstrates just how difficult it is to reconcile the record with their positions. The appropriate inference is that the Committee never provided any specific instructions to management. At every

juncture—LOI, Term Sheet, final approval—the Board or Committee simply rubberstamped the valuation their conflicted controller put in front of them.

The Board and Committee's Failure to Follow-Up on Glaring Red Flags, Including "Substantial Push Back" by Executive Leaders. The Board and Committee ignored blatant red flags strongly indicating the Acquisition was not in the best interests of the company—most notably the information that was provided to the Committee at its all-important second meeting and, inferably, relayed to the full Board the next day. (A39-50; ¶¶58-73). These red flags included striking information about the valuation of the deal and the effect it would have on Block's financial position. Most notably, they included the remarkable report that Dorsey was "*the only one*" advocating for the deal to move forward, that Block's executives were exerting "*substantial push back*," and that neither leader of Block's two existing business units supported the deal. Yet no Defendant took any action in response to this information, declining to even meet with the dissenting executives. (OB 13-18, 32-33).

Defendants respond by simply noting, in perfunctory fashion, that they were not required as a general matter to "to insist on broader support from management." (AB 33-34). This fails to engage with the truly extraordinary nature of the situation. The Committee was tasked with overseeing a strategically and financially material

deal in which their controller proposed expanding the company into a new business by acquiring a troubled company the controller's friend "had been trying to dump," (OB 10) at a massive premium to the price the friend had paid for the company just years earlier. They had received all information concerning the deal through their controller and [REDACTED] Then, when confronted with notice that the controller was the only one advocating for the deal to go forward—*i.e.*, despite his colossal influence, he could not find a single ally—*they did nothing about it*. They simply authorized him to go forward with entering a Term Sheet on his desired terms, and then disappeared from the scene for three full months. If anything can support an inference Defendants were acceding to Dorsey rather than truly working to promote Block's best interests, this must.

The Board and Committee's [REDACTED] Finally, [REDACTED]

[REDACTED]

[REDACTED] (OB 34-35). Defendants respond, again in perfunctory fashion, by arguing Plaintiff does not identify any specific alternative. But that was Defendants' job, not Plaintiff's. *In re Rural Metro Corp.*, 88 A.3d 54, 90 (Del. Ch. 2014) ("part of providing active and direct oversight is becoming reasonably informed about the alternatives available to the company."). Defendants [REDACTED]

[REDACTED] to their controller's proposal to buy his friend's

troubled company. Standing alone, this may not rise to the level of bad faith. But considered in context with Defendants' myriad other failures, it provides additional support for an inference Defendants were merely acceding to Dorsey.

Taken together, these alleged process deficiencies are more than sufficient to demonstrate "egregious process failures" reflecting the Outside Director Defendants' conscious disregard of their duties and supporting an inference of bad faith within the spirit of *Disney*. In their brief, Defendants parrot the Court below's alternative conclusion that the alleged facts are more similar to those in *McElrath v. Kalanick*, 224 A.3d 982 (Del. 2020), not meaningfully countering the discussion of the relevant cases in Plaintiff's opening brief. (*Compare* OB 38-40 *with* AB 37-39).

As Plaintiff explained, the facts here are significantly more extreme than in *McElrath*, and there is every reason to believe *McElrath* would have been decided differently if: (i) it involved a deal to acquire from the CEO's friend a business that was fundamentally-unrelated to Uber's core ridesharing business; (ii) the deal involved financially-material consideration; and (iii) the board had been told point blank that their senior management team was in rebellion against the deal and did *nothing* to investigate or assess that extreme set of circumstances. (OB 38-40).

B. The Merits Of The Acquisition Provide Additional Support For A Reasonable Inference Of Bad Faith

The egregious process failures discussed above demonstrate Plaintiff does not, as the Court below suggested, seek an inference of "bad faith based on the merits of the deal alone." (Op. 25). But the merits are important, because the alleged process deficiencies provide a particularly strong inference of bad faith when considered in context with the preposterous terms of, and dubious strategic rationale for, the Acquisition. Throughout their brief, Defendants deride Plaintiff's complaints about the Acquisition's merits, suggesting the merits are irrelevant.[3] But that is incorrect. In *Brinckerhoff*, for example, this Court sustained an allegation of bad faith premised in significant part on a valuation gap where a nominal defendant limited partnership repurchased for $1 billion an asset that had been sold for $800 million six years earlier—*i.e.*, a 25% premium. *Brinckerhoff v. Enbridge Energy*

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[3] Despite this, Defendants also make a half-hearted effort to defend the merits of the deal. (AB 32-34). They are, however, long on rhetoric about the purported "opportunity" in music-streaming and short on addressing the myriad hard facts that were presented to the Board concerning TIDAL's uniquely shambolic condition, its disastrous financial performance, and the specific deleterious effects the acquisition was projected to have on Block's own financial position going forward. (*See* OB 13-15, 18-19). The Court below correctly saw through Defendants' rhetoric in support of the deal and recognized it was a "terrible business decision" marred by "obvious problems." (Op. 1). Block's own unconflicted executives agreed. As did the market, which cut Block's market capitalization by billions upon announcement of the deal. (OB 20). There is no reason for this Court to think otherwise.

Company, 159 A.3d 242, at 247, 255-260 (Del. 2017) (applying "traditional definition of bad faith utilized in Delaware entity law"); *see also Morris v. Spectra Energy P'rs*, 2017 WL 2774559, at *14 (Del. Ch. June 27, 2017) (inferring subjective bad faith based on valuation gap). Similar, albeit more extreme, facts exist here: the deal was signed at a $350 million valuation, representing a greater than 500% premium over the $56 million price Carter had paid to acquire TIDAL just five years earlier (OB 9) and a greater than 400% premium over the [redacted] valuation (generously) suggested by the nearly contemporaneous Napster precedent (OB 20-21), notwithstanding TIDAL's disastrous condition that had developed during the period of Carter's ownership (*see* OB 9, 13-15, 18-19).

Standing alone, the valuation may not be sufficient to support an inference of bad faith. But it provides important context relevant to an evaluation of whether Plaintiff's allegations, considered holistically, support a pleading-stage inference that the Defendants' *actions* were taken in bad faith. For example: is it, as Defendants need it to be, the *only* reasonable inference that the Committee members granted prompt authorization for Dorsey to enter a Term Sheet (at a nearly 800% premium to the price Carter had paid) without consulting the dissenting executives or [redacted] because they viewed the proposal as so overwhelmingly desirable that further diligence was unnecessary?

The preposterous economics of the deal render such a conclusion dubious and provide support for an alternative reasonable inference: that the Committee members were not truly seeking to ensure the Acquisition was a good deal for the company, but rather were merely acceding to Dorsey. *See Kahn v. Stern*, 183 A.3d 715 (TABLE) (Del. 2018) (plaintiffs need not "plead facts that rule out any possibility other than bad faith," but rather need only "plead[] facts that support a rational inference of bad faith").

The same is true as to the dubious strategic rationale for the deal, given the Board had never before considered an expansion into music streaming. Consider, for example, the Board's immediate authorization of an LOI at its initial meeting. Is it truly the *only* reasonable inference that the Board, with no need for reflection or further analysis beyond the oral recommendation received at that meeting, immediately developed a newfound good faith conviction that a venture into music streaming made sense and that submitting an LOI to TIDAL specifically, at an enormous valuation, was a good idea? The sudden deviation from the Company's existing strategy renders that conclusion dubious and provides support for an alternative reasonable inference: that the Board did not act in good faith to sufficiently analyze the merits of an expansion into music-streaming or the appropriate valuation for the LOI, but merely acceded to Dorsey.

C. Dorsey's Conflict And Influence Provide Additional Support For A Reasonable Inference Of Bad Faith

As explained in Plaintiff's opening brief, Dorsey's power and influence as Block's founder, controller, Chairman, and CEO provides additional context and support for a reasonable inference of bad faith premised on the Outside Director Defendants' process failures. Defendants caricaturize Plaintiff's position. They say Plaintiff argues for a new standard in which particularly powerful executives are presumed "so influential that they automatically turn even independent and unconflicted directors into unthinking sycophants." (AB at 4; *id.* at 40-42). Not so. Plaintiff merely submits, consistent with existing law, that "the Court cannot ignore the role of the controller in evaluating the loyalty of [outside directors]" in the deal context. *CBS*, 2021 WL 268779, at *38.

It is true that Delaware recognizes independent directors are capable of standing up to interested controlling stockholders. But Delaware also recognizes the unique power of controlling stockholders (*see* OB at 25-27), and that such power can be augmented by a controller's status as a company's founder and chief executive. *See, e.g.*, *In re Cysive, Inc.*, 836 A.2d 531, 552 (Del. Ch. 2003) (recognizing founder-controller's "day-to-day managerial supremacy" as Chairman and CEO augmented his power).

Thus, although our law recognizes directors *can* stand up to someone like Dorsey where necessary, it also recognizes directors may, in some cases, shrink from that responsibility. *See CBS*, 2021 WL 26877, at *43 (sustaining claim directors "breached their fiduciary duty of loyalty by approving [a] patently unfair Merger in order to appease [their controller]"); *Glazek*, 2021 WL 2711678, at *22 (sustaining claims directors breached duty of loyalty where they "[were] not prepared to exercise [their] ability to say 'no' to the controller"); *Viacom*, 2020 WL 7711128, at *24 (sustaining claims directors breached duty of loyalty where their actions "reflect[ed] a desire to placate the controller, not to land the best transaction possible").[4]

Consistent with this law, Plaintiff does not submit courts should presume facially independent directors are incapable of acting independently of someone like Dorsey. Of course not. Rather, Plaintiff submits that in assessing specific pled factual circumstances and granting pleading-stage inferences, courts cannot blind

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[4] Defendants attempt to distinguish this line of cases by arguing Dorsey did not stand financially on both sides of the transaction. (AB 39). But Delaware law recognizes that "[g]reed is not the only human emotion" that can give rise to a conflict. *In re RJR Nabisco*, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989). Here, it is plain Dorsey's close relationship with Carter gave him a non-corporate interest in pursuing the Acquisition. The Court below held this was well-pled, finding it "reasonably conceivable that Dorsey used corporate coffers to bolster his relationship with Carter." (Op. 18). The establishment of the Transaction Committee itself reflects Defendants' contemporaneous acknowledgment of that reality. (A29-30, ¶42). That Dorsey's motivation was not financial does not alter the dynamic faced by fellow directors charged with standing up to his strongly held desire.

themselves to the reality that, in some cases, the influence of an interested fiduciary like Dorsey—and the familiar human instincts and incentives faced by a director in opposing such a person (*see* OB 26)—can overwhelm facially-independent directors and cause them to permit a deal they would otherwise oppose in order to "appease" or "placate" the dominant individual. *CBS*, 2021 WL 26877 at *43; *Viacom*, 2020 WL 7711128 at *24. That dynamic can and should be considered by the Court in drawing pleading-stage inferences about the mental state of directors in making questionable decisions about a transaction sponsored by such a person.

This dynamic, and its relevance to pleading-stage inferences, is powerfully evidenced here. If one attempts to assume the Outside Director Defendants were acting in good faith, many of the facts alleged by Plaintiff are bizarre. The Board had never before considered entering the music-streaming industry, yet in the span of a single [redacted] videoconference decided to jump in with both feet and immediately authorize an LOI to TIDAL at a valuation in excess of a full-year's earnings? The members of the Committee immediately authorized entry into a Term Sheet at the very first meeting where they had any significant information concerning TIDAL? They did so even though the information presented included highly concerning negative answers to questions they had previously asked, including the fact that all but one of their executives were against the deal? They

did so without consulting the dissenting executives and without considering any other potential alternatives? *Why?* The story makes no sense. But one additional fact operates like a skeleton key rendering every aspect of the story perfectly understandable: that the deal was proposed and pushed by Jack Dorsey. If one assumes the Defendants were acting not to advance the best interests of Block, but rather to appease Dorsey, the story of the Acquisition and all of the Defendants' actions make *perfect* sense. This is the essence of a reasonable inference.

* * *

Taken together and viewed holistically, as they must be, Plaintiff's particularized allegations are sufficient to demonstrate all of the Outside Director Defendants face a substantial likelihood of liability for consciously failing to live up to their duty "affirmatively to protect the interests of the corporation." *Guth*, 5 A.2d at 510. The inference is strongest as to the four members of the Transaction Committee who were involved in each of the striking process failures identified. And, when combined with the Court below's correct determination that demand was futile as to Dorsey and Carter, that is sufficient to excuse demand. But the inference extends to all of the Outside Director Defendants, each of whom took actions during the process leading to the Acquisition that it is more than reasonable to infer were

motivated by a desire to appease Dorsey, rather than protect and advance the best interests of Block and its stockholders generally.

II. The Court Should Supplement *Zuckerberg* To Excuse Demand In Circumstances Like These

If the Court finds Plaintiff's allegations support an adequate inference of bad faith, it would be unnecessary to reach Plaintiff's second argument. If, however, the Court is unwilling to grant an inference of bad faith even on the extreme facts alleged here, Plaintiff respectfully submits that *UF&CW Union v. Zuckerberg*, 262 A.3d 1034 (Del. 2021) should be supplemented with the "fourth element" proposed by former Chief Justice Strine, former Justice Jacobs, and Professor Hamermesh. *See* OB 42-45 (discussing *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 BUS. LAW. 321, 350-361). This is ultimately a policy choice for the Court. Plaintiff summarized the argument in its opening brief, and it is detailed with scholarly precision in *Optimizing*.

Defendants say such a supplement to *Zuckerberg* is unnecessary because Plaintiff "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." (AB 5). But, if Plaintiff's allegations against the Outside Director Defendants are deemed insufficient to plead bad faith, then *this is the case*.

The Court of Chancery correctly held it well-pled that Block's controlling stockholder and chief executive "used corporate coffers" for a disloyal purpose,

resulting in a deal marred by "obvious problems." (Op. 18, 1). This is precisely the type of claim that should be permitted to go forward.

Yet Plaintiff has been barred from pursuing that well-pled claim based on an obvious fiction: that Dorsey's fellow directors can be trusted to sue him, even though they themselves permitted the deal following a process in which, if they did not consciously act to appease Dorsey, they surely acted with gross negligence. *See, e.g.*, *H&N v. Couch*, 2017 WL 3500245, at *5-7 (Del. Ch. Aug. 1, 2017) (inferences of gross negligence supported by allegations directors allowed a conflicted manager to lead deal process with "minimal oversight"). In such circumstances, as the *Optimizing* authors explain, the demand requirement is at odds with a common sense understanding of human behavior. *Optimizing*, 72 BUS. LAW. at 360. Delaware law should not permit this obvious fiction to preclude prosecution of a well-pled and meritorious claim for breach of the duty of loyalty.

CONCLUSION

Plaintiff respectfully requests reversal of the decision below.

SAXENA WHITE P.A.

/s/ Thomas Curry
Thomas Curry (#5877)
824 N. Market Street, Suite 1003
Wilmington, DE 19801
(302) 485-0483
tcurry@saxenawhite.com

Counsel for Plaintiff Below / Appellant

Of Counsel:

David Wales
Sara DiLeo
SAXENA WHITE P.A.
10 Bank Street, 8th Floor
White Plains, New York 10606
(914) 437-8551

Adam Warden
Jonathan Lamet
SAXENA WHITE P.A.
7777 Glades Road, Suite 300
Boca Raton, Florida 33434
(561) 394-3399

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