EFiled: Aug 26 2024 05:49PM EDT
Filing ID 74155793
Case Number 253,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JENNA HARPER, Derivatively on behalf of T-Mobile US, Inc., Plaintiff-Appellant, v. G. MICHAEL SIEVERT, TIMOTHEUS HÖTTGES, MARCELO CLAURE, SRIKANT M. DATAR, SRINIVASAN GOPALAN, CHRISTIAN P. ILLEK, RAPHAEL KÜBLER, LETITIA A. LONG, THORSTEN LANGHEIM, DOMINIQUE LEROY, TERESA A. TAYLOR, KELVIN R. WESTBROOK, BAVAN HOLLOWAY, MICHAEL WILKENS, OMAR TAZI, LAWRENCE H. GUFFEY, AND RONALD FISHER Defendants-Appellees, and T-MOBILE US, INC. Nominal Defendant-Appellee.	:	No. 253, 2024 Case Below: Court of Chancery of the State of Delaware C.A. No. 2022-0819-SG

APPELLANT'S CORRECTED OPENING BRIEF

OF COUNSEL

BATHAEE DUNNE LLP
Yavar Bathaee (*pro hac vice*)
Andrew Wolinsky
445 Park Ave., 9th Floor
New York, New York. 10022

Brian J. Dunne
Edward Grauman
901 South MoPac Expressway
Barton Oaks Plaza I, Suite 300
Austin, TX 78746

CHRISTENSEN & DOUGHERTY LLP

Joseph L. Christensen (#5146)
1201 North Market Street, Suite 1404
Wilmington, Delaware 19801
(302) 212-4330

Counsel for Plaintiff Below, Appellant Jenna Harper

Dated: August 26, 2024

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

NATURE OF PROCEEDINGS

In its decision dismissing the Amended Complaint (the "Complaint") on demand futility grounds, the Court of Chancery aptly referred to it as asserting a "new species" of the "genus *Caremark*." Indeed, this case involves a controlling shareholder, Deutsche Telekom AG ("DT"), that has caused the controlled company, T-Mobile (the nominal defendant), to implement technological measures for DT's non-ratable gain, resulting in repeated data breaches at T-Mobile, including one of historic size that resulted in more than $500 million in loss to shareholders.

Referred to in this brief as "Controller *Caremark*" claims, such claims do not fit squarely within the existing prongs of this Court's *Zuckerberg* test for demand futility, and, where the management of the controlling company occupies a majority of the controlled company's board, such claims pose unique pleading burdens, as highlighted by the Court's decision below.

Indeed, unlike typical *Caremark* cases, Controller *Caremark* claims are proven by a direct showing of the "bad faith" required to establish a breach of the duty of loyalty—not an indirect inference from systematic oversight failures. Under this Court's *Caremark* precedent, such a showing of bad faith arises directly from proof that the board did not act in the primary interest of the company. Prongs two and three of the *Zuckerberg* test, however, address situations where either a director's own oversight failures give rise to an inference of bad faith, and thus liability, or

when a third party, such as a controller, obtains a material personal benefit from the actions of an interested board. This Court should for the first time clarify its *Zuckerberg* test to address Controller *Caremark* claims, which do not fit within either paradigm, and should also address the unique demand-futility pleading burdens associated with a subset of these claims that involve dual fiduciaries who are uniquely capable of implementing the controller's wishes without leaving any evidentiary trace.

Moreover, even as to the Court's application of the third prong of the *Zuckerberg* test below, the Court erred by setting aside director dependence as a conceded issue and gave no evidentiary weight to the dual fiduciary role of a majority of T-Mobile's board members. The Court's decision also failed to allow plaintiffs all logical inferences that flow from the pleaded facts, and assessed the question of "material benefit" in dismembered isolation from evidence that DT's most senior management occupied the T-Mobile board at the time of the implementation of DT's global policies and its own oversight failure. The result was the radical conclusion that DT's CEO, CFO, executives, and board members, while sitting on the demand board, could exercise their business judgment in assessing a litigation demand to sue *themselves* for their own divided loyalties.

At bottom, the Court failed to evaluate all the evidence to assess the important big-picture question posed by *Zuckerberg*—whether a "majority of the directors on

the demand board are subject to an influence that would sterilize their discretion with respect to the litigation demand." The Court's 180-degree backward conclusion flowed from an erroneous analysis, under a test that does not account for the unique species of *Caremark* claim asserted here.

The Court's decision dismissing the Complaint should be reversed.

SUMMARY OF ARGUMENT

I. A. This Court should for the first time clarify its existing *Zuckerberg* test for demand futility as it relates to claims the Court referred to as a "new species" of the "genus *Caremark*," referred to here as "Controller *Caremark*" claims, where a controlling shareholder causes a controlled company to implement dangerous policies that result in corporate trauma. In such cases, demand is futile where members of the board are beholden to the controller and they act in the controller's primary interest rather than that of the controlled company. In such cases, a board beholden to a controlling company cannot exercise business judgment in evaluating a litigation demand. The existing *Zuckerberg* test, however, encompasses only traditional *Caremark* claims in which a director is personally liable for his systematic lapse in oversight of the company, or paradigmatic controller cases, such as those involving a controlling shareholder that obtains a "material personal benefit" from the actions of a board beholden to it. Controller *Caremark* claims fall through the cracks of the second and third prongs of *Zuckerberg*.

B. In addition, a subset of the Controller *Caremark* case involving dual fiduciaries pose unique pleading burdens, including because of the airtight coupling between the controller and the board members, who are its agents and fiduciaries. This Court should clarify the demand futility pleading standard as to these claims.

II. This Court should also reverse the decision of the Court below because it misapplied the third prong of the *Zuckerberg* test, including by assuming away director dependence as conceded without considering the nature of the dependence and its effect on the board's ability to assess a litigation demand. The Court's opinion also failed to give Plaintiffs all logical inferences flowing from the pleaded facts and assessed the "material benefit" question in a dismembered fashion, devoid of any reference to the fact that DT's CEO, CFO, board members, and executives occupied the board at the time of the alleged oversight and corporate trauma.

STATEMENT OF FACTS

A. T-Mobile's Controlling Shareholder, Deutsche Telekom, and Its Board of Directors

T-Mobile US, Inc. ("T-Mobile"), the nominal defendant in this case, is a telecommunications company. A187 ¶19. Its controlling shareholder is Deutsche Telekom AG ("DT"), a telecommunications conglomerate, which does business in several countries through "National Companies" or "NatCos." A200 ¶61. In addition to maintaining a controlling interest in T-Mobile, its U.S. NatCo, DT controls a majority of the seats on T-Mobile's board of directors. A186 ¶16.

DT exerts its control over T-Mobile through its own management, who it has placed on T-Mobile's board:

(1) Timotheus Höttges is both the Chairman of T-Mobile's board and CEO of DT. A188 ¶23;

(2) Christian Illek serves on the T-Mobile board while also serving as CFO of DT. A188-89 ¶25;

(3) Raphael Kubler has served on T-Mobile's board since 2013 and is also a Senior VP at DT. A189 ¶26; A301 ¶335;

(4) Thorsten Langheim, who has served on T-Mobile's board since 2013, is a DT executive, the Chairman and co-founder of Deutsche Telekom Capital Partners, and serves on DT's board of management ("DT board"). A189 ¶27; A301 ¶336;

(5) Dominique Leroy, who has been a T-Mobile director since 2020, is also a DT board member. A190 ¶28; A301 ¶337;

(6) Srinivasan Gopalan has been on the T-Mobile board since 2022 and also runs DT in several capacities, including as a member of the DT board of management and as Managing Director at DT focusing on DT's technology and big data operations. A188 ¶24; A302 ¶338.

(7) Omar Tazi, was the Chief Product and Innovation Officer at DT while he served on the board (later Executive Vice President and Chief Product Officer at DT). A192-93 ¶36.

In all, seven of T-Mobile's thirteen board members were DT executives, officers, and board members at the same time they sat on T-Mobile's board. What's more, Michael Sievert, the President and CEO of the company, responsible for executing its business strategy, was not just a DT appointee, but maintained his role because of a DT-controlled committee of T-Mobile's board. A187 ¶22; A289-90 ¶300; A305 ¶353; A311-12 ¶364. Even board member Marcelo Claure, the CEO of Softbank International and COO of Softbank, is beholden to DT through a shareholder lockup agreement. A190 ¶29; A312-13 ¶365.

T-Mobile conceded below, without argument, that a majority of the T-Mobile board is beholden to DT. A423; A432; A455.

B. DT Devises a Plan to Develop and Train AI for Its Global Operations, but Runs into Stringent European Data Privacy Laws

In or around 2014, a team within DT's Telekom Innovation Laboratories ("T-Labs") subgroup, led by DT Vice President Susan Wegner, a Ph.D. data scientist—was asked to research ways in which DT might benefit from the adoption of "Data Driven Business Models." A201 ¶62. Wegner worked directly with DT's management, including DT's then-CFO, Thomas Dannenfeldt (who was also on the T-Mobile board at the time) and DT's board of management for input on organization-wide strategy. A202-03 ¶67. Wegner's first task was to centralize user data so that it could be queried through application programming interfaces ("APIs") by DT's engineers. A202-03 ¶67.

A significant hurdle for DT, however, was the European regulatory landscape surrounding data privacy. A203 ¶70. Indeed, DT's Germany-based executives and officers pushed back, flagging German privacy laws. *Id.* DT's solution was to create a separate, wholly-owned subsidiary to avoid blowback from DT for Wegner's aggressive data mining. A204 ¶71. Nonetheless, data obtained across the EU, including in Germany, could not move clearly across borders given stringent and varied data privacy laws. A204-05 ¶73. DT had hit a data-privacy wall. If it was going to train AI models, it would need to look to the United States.

C. DT Exploits Relatively Unregulated T-Mobile Customer Data to Train AI for Its Global Operations—a Non-Ratable Benefit to the Controlling Shareholder

DT's solution to the data privacy problem it faced in Europe was its U.S. NatCo, T-Mobile. DT had identified the U.S.'s "[m]ore friendly regulatory environment" as to data privacy. A204-05 ¶¶73-75. As Wegner explained in 2016, "in Europe and in Germany you do everything to protect the data," whereas "in the U.S. you really have more focus on how you can commercialize your data." *Id.* ¶73. Lax U.S. laws on data privacy meant that DT could use T-Mobile's data to train and develop AI systems, then deploy those systems across its global business, including in Europe. *See* A206-09 ¶¶76-82.

The first step was to create standardization across the global entity, so that the AI models could be deployed once trained. Accordingly, between 2017 and 2018, DT transformed itself into a data- and AI-driven enterprise in which Wegner's team developed standardized data models, tools, strategies, and frameworks for information sharing across DT's disparate NatCos, subsidiaries, and affiliates. A209 ¶82. By 2018, DT was rolling out a standard strategy, developed by Wegner's T-Labs group and intended to increase DT's companywide profits, to each of its NatCos and business units—even those with distinct data pools. *Id.*

As Wegner described in July 2018, her team was tasked by the DT board with rolling out a "harmonized groupwide data model" across all of DT's NatCos and

subsidiaries and developing "Central Data Virtualization" across all of DT's component companies. A209-10 ¶83. This entailed developing aligned activities and roadmaps across DT's various NatCos and subsidiaries, creating a DT Common Use Case Repository for data mining and AI/machine learning ("ML") tools and models, and facilitating exchange within and across communities within DT's many companies and subgroups. A210 ¶84. Each NatCo within DT was to have its own distinct "data lake"—a pooled, centralized repository of all data available to that NatCo, open to mining by ML/AI tools from across the company—and then comingle and share everything learned from that data for the benefit of DT as a whole. A210-11 ¶85. Further, each DT NatCo and subsidiary was to follow a harmonized data model and align its ML/AI activities and strategies with those of the parent—*i.e.*, the data model, activities, and roadmaps developed by Wegner's group for use across all of DT. *Id.*

DT made a significant investment across its global operations in anticipation of its exploitation of the U.S. NatCo's (T-Mobile) massive and relatively unregulated trove of customer data. Indeed, by 2018, T-Mobile doubled its size after it merged with Sprint, A222-24 ¶¶110-14, creating the opportunity to mine an unprecedented amount of user data unfettered by EU regulations.

Wegner and DT called its data and AI initiative "sharing is caring." A211 ¶87. The reason for this initiative and philosophy (which was "quite unusual for a

company as big as Deutsche Telekom," A211 ¶88) was in order to have a "big business impact" at DT, *id.* That is, as Wegner explained, "[y]ou can only really have scale if you share information . . . if you really have sharing it all over the company. And that sharing means data sharing, tool sharing, model sharing, and business experience sharing." *Id.*

The business impact to DT of standardizing and sharing common data, tools, models, and data-driven business strategies across DT's NatCos and business units was immense, on the order of a 40% to 60% cost savings for the parent company, DT. A212-13 ¶89. As DT's Wegner explained:

> The main thing here is really about savings. So we started . . . with a common data model, to have one model within DT to look at how we access data, how we have data privacy in there, we have [a] sandbox environment with tools and stuff like that, and as you can imagine, we have a priority list, which are our biggest use cases. . . . From the status where we are right now, we are not in everything in the end, we are just starting, we already have a saving there of 40%—our estimation is we will have 60% if we have only these things already implemented.

Id.

A DT presentation by Wegner in July 2018 confirms that DT was implementing its "sharing its caring plan" across its various NatCos—country-by-country—in order to save money for the corporate parent. *See* A213-14 ¶90 (noting 40% savings resulting from implementation). The same document states that DT was

targeting "easy implementation in all NatCos," "AVAILABLE for everyone in the [DT] group," with a "ROLLOUT currently in preparation (NatCo by NatCo, driven by use cases)." A214 ¶91.

DT was preparing to deploy the models it would develop in the lax U.S. data-privacy environment across its global business. "Sharing is caring" served as the scaffolding for the data mining and AI training that was to occur across the global conglomerate. As Wegner explained in 2018, DT was setting up "an internal DT-wide data platform," which would cross DT's different companies—and countries. A215 ¶92; *see id.* ¶93 (Wegner: "[W]e said okay we need something like a data platform where we really can access the data all over the company, even though in different countries we have different kind of implementation of the data lake.").

"Sharing is caring" had a distinct hallmark. It required the centralization not only of data, but permissions and credentials for access. Specifically, DT's plan required each NatCo to implement a "backend" that would automatically, in a centralized way, "control permission," "link to (local) sources," and process a request virtually. A215-16 ¶94. DT was also setting up a centralized, self-service tool for engineers and data scientists across all its NatCos and groups in which they would place trained models, along with code and comments from data scientists and discussion of business impact, for access across the entirety of DT—what DT's Wegner described as "an app store for data models." A216-17 ¶96. By late 2018, DT

had laid the groundwork for the final step of its strategy—the exploitation of T-Mobile's customer data to train the models it would deploy globally.

D. DT's Plan Forces T-Mobile to Dangerously Centralize Its Users' Data and the Security Credentials Used to Access that Data

In 2018, T-Mobile, began implementing the exact data model described by Susan Wegner in the United States. A224-25 ¶¶115-19. It hired a small group of engineers and data scientists and gave them unfettered access to all of T-Mobile's data and systems, complete with a consolidated credential and data repository system that mirrored DT's "app store for data models." A225 ¶119. By late 2018, T-Mobile was aggressively implementing the DT "sharing is caring" plan to massively centralize data, credentials, and models for organization-wide use. A225-26 ¶¶120-23.

T-Mobile's data scientists and engineers eschewed sophisticated and robust programming languages used by most enterprises in favor of the programming language R—a statistical modeling language used by Wegner's T-Labs team at DT that allowed for rapid model training yet was ill-suited for security, data management, and data infrastructure. A227-28 ¶¶124-26. Following the DT "sharing is caring" model, T-Mobile built its new data-driven/AI infrastructure to streamline access to data across its entire company—and in fact, quickly deployed a centralized credentialing and permission framework nearly identical to that developed by Wegner's team ad DT. A229 ¶130. Diverging from other enterprises whose business

models rely on data-driven AI (*e.g.*, LinkedIn or Facebook), T-Mobile centralized its data, centralized the credentials to access its databases, and created a single point from which its models could pull massive amounts of customer data, including on test servers. A233 ¶139; *see* A241-49 ¶¶164-90.

For example, to facilitate centralized data access across the company, T-Mobile developed a system called qAPI, the purpose of which was to allow disparate systems and users to quickly access data from across T-Mobile in a centralized fashion using a standardized API. A243-44 ¶172. As a T-Mobile engineer explained, the company's qAPI system was designed to unify data across multiple databases and create a single point of access to T-Mobile's entire data ecosystem. A244-45 ¶¶173-74. And the system minimized access restrictions in doing so, including by facilitating and in fact prioritizing "[r]eusability and sharing," by "[m]aintaining all the queries on a user specified repository, where teams can save and update their queries on a key-value basis." A244-46 ¶¶174, 176; *see also* A247 ¶181 ("[A]ll database configurations are centralized in one location so if credentials ever need to be added or updated, they can be done in one location, rather than on a test by test basis.").

None of this remotely resembled a best practice—or even an acceptable one—for safeguarding user data. In fact, T-Mobile's new data/AI infrastructure flipped the script on essentially every recognized enterprise security pillar: centralizing access

to data from across disparate data sources; making this data accessible with no controls to track exporting or consumption; and perhaps most outrageously, centralizing hardcoded credentials (the "keys to the kingdom") on remotely accessible servers. A249-52 ¶¶191-98; *see also* A244-49 ¶¶173-90.

There was no question why T-Mobile had implemented these systems. They were a beat-for-beat implementation of the "sharing is caring" plan devised at DT and rolled out at the same time across its NatCos globally. A226 ¶121; A229 ¶130; A233-34 ¶140; A234-35 ¶142; A236-37 ¶149; A242 ¶168; A243-44 ¶171-90. T-Mobile's implementation was unmistakably the planned U.S. aspect of the initiative. Indeed, the data and credential centralization at T-Mobile was built to allow frictionless testing of systems, widespread access, and "sharing" across the enterprise, and closely models the data centralization systems designed by DT for use at its various NatCos and affiliates, A250-51 ¶¶192-93—including DT's centralized "backend" to automatically control permissions and provide automated "virtual" access to data, A215 ¶94, DT's "internal, DT wide data platform," A215 ¶92, and DT's so-called "app store for data models," A216-17 ¶96. Simply put, the data architecture and access systems T-Mobile built in 2018 were faithful implementations of DT's data model and "sharing is caring" initiative—which had been rolled out to the United States for DT's benefit.

E. DT Obtained Non-Ratable Benefits But Put T-Mobile's Business at Great Risk

The net result of the T-Mobile implementation is a clear non-ratable benefit to DT. T-Mobile's customer data was put at risk to train models for the rest of DT's global operations, and it is undisputed that Plaintiff and T-Mobile's other shareholders did not obtain the same benefits as DT from its reckless plan. Indeed, the recklessness of T-Mobile's beat-for-beat implementation of DT's plan is readily apparent. *See* A249-52 ¶¶191-98. The risk arises not simply because T-Mobile's centralization creates a single point of attack for a malicious actor, but also because it creates single source from which a wide range of data stored across multiple databases can be obtained—a poorly-protected single point of attack that also happens to store all of the company's valuables without extra security. A249-50 ¶191. However, to DT, this design is a feature, not a bug. As DT's Wegner explained in 2016 and in 2018, the company developed a "harmonized groupwide data model" for deployment across all of DT's NatCos and affiliates, emphasizing "data sharing, tool sharing, model sharing, and business experience sharing," to benefit DT financially, including through "savings." A209-17 ¶¶83-97.

F. An Unprecedented Data Breach Exploits T-Mobile's Credential and Data Centralization, Causing $500 Million in Injury to the Company

Since T-Mobile deployed DT's sharing architecture in 2018, the company has suffered a near-constant series of data breaches. *See* A252-88 ¶¶199-294; A289-91

¶¶299-304. T-Mobile suffered major data breaches in August 2018, A255-58 ¶¶202-17, in November 2019, A259-61 ¶¶218-25, in March 2020, A261-66 ¶¶226-39, in December 2020, A266-68 ¶¶240-45, in February 2021, A268-70 ¶¶246-53, in August 2021, A254-85 ¶¶254-87, in related incidents across 2022, A285-88 ¶¶288-94, and in January 2023, A289-91 ¶¶299-304.

T-Mobile's August 2021 data breach was one of the largest and most notorious in United States history. It occurred when a twenty-one-year-old hacker named John Binns discovered "an unprotected [T-Mobile] router exposed on the internet,"A270-71 ¶254, which turned out to be plugged into T-Mobile's unprecedented data- and credential-centralization apparatus, A271 ¶255. As Binns told the Wall Street Journal:

> Binns said he used th[e] entry point to hack into the cellphone carrier's data center outside East Wenatchee, Wash., ***where stored credentials allowed him to access more than 100 servers.***
>
> "I was panicking because I had access to something big," he wrote. "Their security is awful."

Id. (emphasis in Complaint).

In short, Binns found a single unsecured router publicly exposed on T-Mobile's network and was quickly able to gain access to a centralized repository of credentials that allowed him the keys to T-Mobile's entire data kingdom. A271-72 ¶256. This matches the precise architecture of the qAPI system, *id.*—which itself is

a beat-for-beat implementation of the data architecture developed at DT for deployment at its NatCos and affiliates for DT's benefit, A215-16 ¶94.

T-Mobile's CEO Mike Sievert later stated in a letter that "the bad actor leveraged their knowledge of technical systems, along with specialized tools and capabilities, to gain access to our ***testing environments*** and then used brute force attacks and other methods to make their way into other IT servers that included customer data." A280 ¶277 (emphasis added). This confirmed that the U.S. phase of DT's "sharing is caring program" had been implemented precisely to specification. Although DT's global operations benefited from it, the rest of T-Mobile's shareholders (and T-Mobile's customers) were left holding the bag.

Breach after breach, T-Mobile's board and management did nothing to change the DT-mandated data and credential centralization. In fact, T-Mobile's directors and officers have left the company's data storage, processing, and access systems materially unchanged and seriously vulnerable—to this day. A291-98 ¶¶305-24. Since August 2018—the very month that T-Mobile began centralizing data for machine learning purposes, and just weeks after DT's Wegner explained the conglomerate's aggressive new model centralization and sharing initiatives would be rolling out "country by country" to DT's NatCos and subsidiaries—T-Mobile suffered repeated, increasingly broad, data breaches. A292 ¶307. And in the wake of these, T-Mobile's directors—a majority of whom run both DT and T-Mobile—have

simply left the company's "sharing is caring" data architecture in place, ready to be attacked and exfiltrated yet again. A294 ¶313; A297 ¶322.

G. T-Mobile Settles Liability for Its Unprecedented Data Breach, Costing Shareholders at Least $500 Million

T-Mobile's captured board and management has concretely injured not just T-Mobile's customers, but its stockholders as well. Beyond the obvious risk of future data breaches—and attendant payouts from stockholder funds—given the T-Mobile board's refusal to change the company's DT-designed data and credential centralization, T-Mobile recently agreed to pay $500 million in stockholder funds to settle multiple class-action suits arising out of its August 2021 data breach—without actually changing the data architecture that gave rise to that massive liability. A288-89 ¶¶295-98. Indeed, as predicted in Plaintiff's original complaint, another significant data breach has already occurred during the pendency of this case. A289-91 ¶¶299-304.

H. The *Harper* Action

Plaintiff Harper filed her initial complaint on September 16, 2022, and filed an amended Complaint on April 5, 2023. Op. at 9. The Complaint asserts breach of fiduciary duty claims against the Director Defendants, the Former Defendants, and against Sievert as an Executive Officer. *Id.* Defendants filed a motion to dismiss on June 13, 2023, Plaintiff filed her opposition on August 15, 2023, and Defendants filed their reply on October 13, 2023. Op. at 9-10. Vice Chancellor Glasscock held

oral argument on the motion to dismiss and took the matter under submission on February 1, 2024, Op. at 10, and on May 31, 2024, the Court issued its memorandum and opinion dismissing the case, Op. at 1.

I. The Court of Chancery's Order Dismissing the Complaint

The Court of Chancery held that the "Complaint adequately alleged that the majority of T-Mobile directors lack independence from the corporate controller, DTK [DT]," Op. at 2, but rejected the Complaint's allegations that T-Mobile was "forced" by DT to implement the data and credential centralization program. Specifically, the Court held that "[t]here is no specific allegation supporting that 1) DTK instructed T-Mobile to aggregate its data, let alone in a risky way, 2) T-Mobile's board considered data consolidation, in disregard of its risks to the company, and let alone at DTK's direction, or 3) DTK made any use of T-Mobile's consolidated data, let alone use that constitutes a non-ratable benefit seized by DTK." *Id.* The Court based its dismissal on a failure to plead demand futility under Court of Chancery Rule 23.1. Op. at 2, 19.

In its analysis, the Court observed that the Complaint's allegations appeared to present facts similar to a *Caremark* claim, but involving a board beholden to a majority shareholder—a "new species" of the "genus Caremark." Op. at 13. The Court evaluated the Complaint under the third prong of the unified test announced by this Court in *United Food and Com. Workers Union and Participating Food*

Indus. Emps. Tri-State Pension Fund v. Zuckerberg ("*Zuckerberg*"), 262 A.3d 1034 (Del. 2021), which asks whether "DTK faces a substantial likelihood of liability or received a material personal benefit from the challenged conduct." *Id*. The Court explained that because "Defendants conceded for purposes of this Motion that the Demand Board lacks independence from DTK," it would "only consider whether the Defendant Directors acted disloyally, by causing DTK to receive a non-ratable benefit from the alleged misconduct, excusing demand as futile." *Id.* at 14.

Notably, the Court set to one side the undisputed (and conceded) facts showing that seven of the T-Mobile board members simultaneously managed and operated DT at the most senior levels, and instead considered a single factual question in isolation—whether Plaintiffs had alleged "with particularity that DTK held a material interest in the misconduct or received a material benefit in the wrongdoing." Op. at 15.

The Court began its analysis by comparing the instant case with a factually incorrect description of an unpublished Delaware Chancery opinion, *Chester County Employees' Retirement Fund v. New Residential Inc.* ("*Chester County*"), 2016 WL 5865004 (Del. Ch. 2016), Op. at 15, which contrary to the Court's assertion, did not involve a controlling shareholder or a bord beholden to one. *Id.* at *2 (third-party was 7.4% owner of the company). From there, the Chancery Court then held that the

Complaint here likewise failed to allege the "material personal benefit" prong of the *Zuckerberg* test. Op. at 15-16.

In doing so, the Court held that the Complaint was "replete with conclusory allegations that DTK 'directed' T-Mobile to implement the 'sharing is caring' plan," but did not allege "what actions DTK undertook to execute the implementation, or even how its wishes were transmitted to the directors, and (ii) how DTK benefited from such execution." Op. at 16. Notably, in deciding that the Complaint had failed to show how DT's "wishes were transmitted to the directors," the Court ignored detailed allegations that the interested T-Mobile members were senior executives at DT—meaning, nothing would need to be transmitted to them from DT's management because the T-Mobile board members ***were*** DT's management.

Although the Complaint was replete with DT executives and documents clearly explaining the purpose and benefits associated with the "sharing is caring" plan, as well as outlining the technical specifications for the data centralization systems that T-Mobile implemented beat-for-beat, the Court faulted Plaintiffs for failing to "identify a specific transaction the board undertook or board action that adopted data centralization with T-Mobile" and for having not undertaken a "Section 220 demand to determine whether the board assessed implementing the 'sharing is caring plan.'" Op. at 16. Again, the Court ignored the senior management roles that

seven of the T-Mobile board members simultaneously maintained at DT during the implementation and execution of the DT "sharing is caring" plan.

The Court then scrutinized various documents cited in the Complaint in isolation. For example, the Court asserted that a "2016 presentation slide" in the Complaint did not give rise to the "inference that DTK mandated data centralization in T-Mobile," but only "highlights the differences between regulations in Europe and the United States"; that a slide of a 2018 DT supervisory board meeting "simply states that the 'US market [is] more attractive."; and that a 2018 Susan Wegner presentation "solely states that DTK could save money by centralizing data." Op. at 17. The Court concluded that these documents "in combination show DTK's intent to centralize data, but fail to provide a particularized allegation that DTK directed T-Mobile to centralize its data, allowing DTK to monetize T-Mobile's data, and directing the board to disregard the (allegedly) manifest risk." Op. at 17-18.

The Court also rejected the notion that the CEO of DT's presence on the T-Mobile board allowed for an inference that T-Mobile had executed DT's "sharing is caring" plan, holding that the inference was not sufficient to satisfy Rule 23.1 "because plaintiff has failed to state what specific actions this director *or any other director* took to implement the plan." Op. at 18 (emphasis in original). Again, despite the fact that DT's plans for T-Mobile would likely have been devised and discussed

at DT, not T-Mobile, the Court faulted Plaintiffs for making a Section 220 demand. Op. at 18.

The Court further held that the Complaint failed to "demonstrate that DTK in fact accessed or received T-Mobile's customer data, resulting in a material benefit to DTK that would subject the Demand Board to a disabling conflict." Op. at 18. The Court ignored the undisputed allegations that members of the T-Mobile board were senior DT executives that actively managed both DT and T-Mobile—an inherently disabling conflict in favor of executing DT's plans to the detriment of non-controlling stockholders. The Court concluded that Plaintiff's allegations had "merely shown that both DTK and T-Mobile centralized data to make it easier to access," and also questioned "why DTK, a majority owner, would undertake actions to put the Company at risk, such as promoting lax data security, thus jeopardizing its majority interest in the Company." Op. at 19. The Court did not credit allegations in the Complaint that DT had implemented "sharing is caring" to benefit its global operations—a goal it invested heavily precisely to exploit its U.S. NatCo, T-Mobile, to the benefit of its global business—benefits non-controlling shareholders, such as Plaintiff Harper, indisputably do not obtain from putting T-Mobile's value, operations, and customers at risk.

Plaintiff timely appealed the decision to this Court.

ARGUMENT

I. THIS COURT SHOULD ADDRESS THE DEMAND FUTLITY TEST FOR "CONTROLLER *CAREMARK*" CASES—A QUESTION OF FIRST IMPRESSION

QUESTION PRESENTED

Whether the Court's *Zuckerberg* standard should be modified to address what the Court of Chancery referred to as a "new species" of the "genus *Caremark*," Op. at 13, referred to in this brief as "Controller *Caremark*" claims, by requiring a showing that a director acted for the benefit of a controller and not in the primary interest of the company. A478-82.

SCOPE OF REVIEW

This Court's review of "decisions of the Court of Chancery applying Rule 23.1" is "de novo and plenary." *Lebanon Cty. Employees' Retirement Fund v. Collis*, 311 A.3d 773, 794-95 (Del. 2023) (cleaned up).

MERITS OF THE ARGUMENT

As the Court of Chancery explained in its opinion, this case "is a new species," but "appears to be a member of the genus *Caremark*." Op. at 13. That is, the Complaint asserts claims against the board members and agents of a controlling stockholder for implementing a reckless business strategy that resulted in corporate trauma. *See id.* This Court has never addressed the applicable test for *Caremark*-like claims involving board members serving the interest of a controlling shareholder rather than the primary interest of the company. As explained below, this Court

should clarify the *Zuckerberg* test as it applies to Controller *Caremark* claims, and with respect to the subset of such claims involving dual fiduciaries, should adapt the demand futility test to address the unique pleading burdens such cases present.

A. The *Caremark* Standard Is a Proxy for "Bad Faith," which Is Necessarily Present when Directors Act in the Primary Interest of a Controlling Shareholder Rather than that of the Company

This case differs materially from the typical *Caremark* case. The *Caremark* line of cases canonically address a failure of director oversight that results in corporate trauma. *Lebanon Cty. Employees' Ret. Fund v. Collis*, 311 A.3d 773, 779 (Del. 2023). In most cases, the central demand futility question is whether a majority of directors either "utterly failed to implement any reporting or information system or controls" or "having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being formed of risks or problems requiring their attention." *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006). The existence of either prong overcomes the business judgment rule because such failures, if systematic, are "act[s] of bad faith in breach of the duty of loyalty." *Marchand v. Barnhill*, 212 A.3d 805, 809 (Del. 2019). The lapses must evince "bad faith" because that is "the state of mind traditionally used to define the mindset of a disloyal director." *Id.* at 820-21. That is not, however, the only way to arrive at "bad faith" in cases where a board's failure of oversight causes corporate trauma.

As this Court explained in *Stone* and in *In re Walt Disney Co. Deriv. Litig.* ("*Disney*"), 906 A.2d 27 (Del. 2006), there are at least three factual scenarios that evince bad faith on the part of a director:

> A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties. There may be other examples of bad faith yet to be proven or alleged, but these three are the most salient.

Stone, 911 A.2d at 369 (quoting *Disney*, 906 A.2d at 67). The traditional *Caremark* standard addresses only the third category, where "a sustained or systematic failure of the board to exercise oversight" gives rise to the inference of bad faith. *Id.*

In a case such as this, where a majority of the directors manage the controlling company while sitting on the board, "bad faith" directly exists upon a showing that each "fiduciary intentionally acts with a purpose other than that of advancing the best interest of the corporation." *Id.* When a director's failure of oversight is in the primary interest of the controlling stockholder, it breaches its fiduciary duty to the company—this is certainly so where the director acts or fails to act in a manner that actually or potentially injures the interests of the company. In such cases, although the injury to the company is, as in traditional *Caremark* cases, a "corporate trauma," *South v. Baker*, 62 A.3d 1, 14 (Del. 2012), bad faith is established directly from the

nexus between the director's failure of oversight and the interests of the controlling shareholder to whom the director is beholden.

This Court's decision in *Zuckerberg* announcing a unified test for demand futility provides no room for this direct form of *Caremark*-like liability. Oversight liability involving a controlling shareholder is a category that fits neither within the second nor third prong of the *Zuckerberg* test. Traditional *Caremark* claims fit neatly within the second prong of *Zuckerberg*, which asks whether a "director would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand." *Id.* In cases where a director's failure of oversight rises to the level of bad faith, the director breaches the duty of loyalty and demand is deemed futile. Likewise, in typical cases involving controlling shareholders, prong three can be satisfied, as a board member that is beholden to someone that receives a non-ratable, material benefit from the company cannot generally decide whether to bring derivative litigation using good-faith business judgment. *See In re Sears Hometown and Outlet Stores, Inc. Stockholder Litig.*, 309 A.3d 474, 514 (Del. Ch. 2024). Thus, in cases where a controlling shareholder loots the company or obtains favor in a transaction with the company, the "material benefit" question is sufficient to resolve the demand futility inquiry.

In an oversight liability case involving a director beholden to a controlling shareholder, the director's liability is not established based on "a sustained or

systematic failure of the board to exercise oversight" that gives rise to the inference of bad faith, but instead from a director's divided loyalty, which is expressed when a director acts in the primary interest of the controlling stockholder. In such cases, the third prong is underinclusive because such a showing can be made irrespective of whether the controlling shareholder actually obtains a "material personal benefit."

Put simply, in a *Caremark*-like case involving a controlling shareholder, the demand futility inquiry need not find a failure of oversight so egregious that it implies bad faith, nor need it determine whether the controlling shareholder obtained a "material personal benefit." Demand should instead be futile when a director who is beholden to a controlling shareholder acts (or fails to act) in the controlling shareholder's primary interest, rather than the company's.

This direct means of showing director bad faith has been expressly part of the *Caremark* standard since this Court's adoption of *Caremark* in *Disney*, but because the paradigmatic *Caremark* claim involves only the indirect means of showing "bad faith," this Court's decision in *Zuckerberg* left the direct means—where a director does not act in the primary interest of the company—described in *Disney*, behind. As such, this Court should make clear that under *Zuckerberg*, demand is futile in a "Controller *Caremark*" claim where a majority of the board is beholden to a controlling shareholder and the failure of oversight is in the controlling shareholder's primary interest.

As explained below, if the Court applied the traditional means of showing bad faith expressly recognized in this Court's early *Caremark* jurisprudence, it would have easily found demand to have been futile as to the T-Mobile board. The court failed to do so because the *Zuckerberg* test does not address cases such as this one.

B. Demand Is Futile Because the Facts Alleged Show that a Majority of the T-Mobile Board's Acts and Omissions Were in the Primary Interest of DT, Not T-Mobile

In light of the gap in the *Zuckerberg* test as to "Controller *Caremark*" claims, the Court applied an understandably incoherent hybrid of the second and third prong of the *Zuckerberg* test, noting, for example, supposed lapses in pleading as to whether T-Mobile board members were aware, or acted on behalf, of controlling shareholder, DT, *see* Op. at 16, while also expressing skepticism as to whether DT obtained a personal benefit from the failure of oversight (*e.g.*, whether DT actually used T-Mobile data to train AI), *id.* at 16-19. Applying the appropriate standard set forth above (§ I.A, *supra*), however, demand is unquestionably futile.

To begin with, the Court gave no regard to the fact that a majority of T-Mobile's board also managed DT at the highest levels. Höttges was the CEO of DT while he served as Chairman of T-Mobile's board; Illek was DT's CFO; Kübler was a DT Senior Vice President; Langheim served on DT's board of management and was the co-founder of Deutsche Telekom Capital Partners; Leroy was a member of DT's board; Gopalan is a DT managing director who focuses on DT's big data

operations; and Tazi was DT's Chief Product and Innovation Officer (and was promoted at DT after he left T-Mobile's board). *See* pp. 6-7, *supra*. In a lawsuit alleging that DT dangerously leveraged T-Mobile's customer data and lax regulatory environment to train AI models for deployment throughout its global conglomerate, it strains credulity to posit that DT's CEO, CFO, senior executives, and board members could act in good faith and exercise their business judgment as to a demand involving DT's conduct—certainly, where, as here, claims are asserted against T-Mobile's CEO and the directors individually for serving DT's interests at the expense of T-Mobile, its customers, and its non-controlling shareholders. The Court addressed none of these facts, but instead recognized that a majority of the board was concededly beholden to DT, then proceeded to evaluate the question of "material personal benefit" in dismembered isolation. *See* Op. at 14.

Next, the Court applied the traditional *Caremark* proxies for "bad faith"—namely, assessing whether T-Mobile's board members had in fact acted at the direction of DT, how they did so, and what non-ratable benefit DT actually obtained. *Id.* at 14-19. All these facts are no doubt relevant where a *Caremark* claim seeks to establish that a director's lack of oversight gives rise to an inference of bad faith, but they are far afield in a case such as this one. For example, the Court questioned how "DTK 'directed' T-Mobile to implement the 'sharing is caring' plan," but the CEO, CFO, senior executives, and board members of DT, who occupy a majority of the T-

Mobile board seats, need not be directed by those who manage DT—they are the very people that manage DT. Op. at 16. Likewise, the Court asked how DT's "wishes were transmitted to the directors"—a nonsensical question where the directors are alleged to have created the DT "sharing is caring" program that injured T-Mobile. *Id.* Nothing would need to be communicated. In other words, questions that would be germane to the canonical *Caremark* case, are irrelevant to this one, and unsurprisingly, led the Court astray, leading to the facially incorrect conclusion that DT's CEO, CFO, senior executives, and board members could in good faith evaluate a demand to sue themselves for putting the interests of DT over T-Mobile's.

Applying the more straightforward test above, which asks whether the failure of oversight by the beholden board was in the controlling shareholder's primary interest—a direct test for "bad faith" that has had its roots in this Court's *Caremark* jurisprudence since its inception—the demand futility question is not a close one.

The Complaint pleads particularized facts as to T-Mobile's "sharing is caring" program, including the impetus, timeframe, and specifications of the program's technology. Indeed, the Complaint pleads that Wegner, a DT executive, worked directly with DT senior management—many of whom occupied the T-Mobile board at the time—to create centralized data stores at each NatCo, along with centralized access credentials to those data stores, A283 ¶283, and did so to obtain a 40-60% cost savings to the global conglomerate, A212-14 ¶¶88-90. A central part of that plan

involved the exploitation of lax data privacy standards in the U.S, A204-06 ¶¶73-75, making its U.S. NatCo, T-Mobile, the primary means of obtaining customer data and training AI to be deployed across the global organization. The Complaint pleads that DT spent significant time and resources to roll out "sharing is caring" globally by 2018 as part of this plan. A209-18 ¶¶82-99. Moreover, the Complaint pleads that T-Mobile began its AI initiative at the same time in 2018, using the same technology employed by DT's Wegner and its T-Labs division. *Id.* Most notably, T-Mobile implemented its qAPI system, A271-72 ¶256, which was a beat-for-beat implementation of the DT data and credentialing centralization systems mandated for implementation across NatCos, A215-16 ¶94.

Since T-Mobile deployed DT's sharing architecture in 2018, A292 ¶307, the company has suffered a near-constant series of data breaches. *See* A252-88 ¶¶199-294; A289-91 ¶¶299-304. T-Mobile suffered major data breaches in August 2018, A255-58 ¶¶202-17, in November 2019, A259-61 ¶¶218-25, in March 2020, A261-66 ¶¶226-39, in December 2020, A266-68 ¶¶240-45, in February 2021, A268-70 ¶¶246-53, in August 2021, A254-85 ¶¶254-87, in related incidents across 2022, A285-88 ¶¶288-94, and in January 2023, A289-91 ¶¶299-304. T-Mobile has suffered repeated, increasingly broad, data breaches. A292 ¶307. And in the wake of these, T-Mobile's directors—a majority of whom run both DT and T-Mobile—have simply

left the company's "sharing is caring" data architecture in place, ready to be attacked and exfiltrated over and again. A294 ¶313; A297 ¶322.

Unlike in traditional *Caremark* cases where these repeated data breaches would be pleaded as "red flags" ignored by the board, giving rise to the inference of "bad faith," *see In re McDonald's Corp. S'holder Derivative Litig.* ("*McDonald's*"), 291 A.3d 652, 676 (Del. Ch. 2023), the data breaches have a different evidentiary value here. The board's inaction is probative of the fact that the directors beholden to DT left the dangerous "sharing is caring" architecture in place to serve DT's interest—not T-Mobile's. These directors left—and continue to leave—T-Mobile, its customers, and its minority shareholders vulnerable to costly cyberattacks; it is implausible that board members that manage DT at the most senior levels did so in due regard for T-Mobile's interests. These alleged facts unmistakably plead that T-Mobile implemented DT's dangerous "sharing is caring plan" under a disloyal and disabled board's watch. This, along with other particularized facts pleaded in the complaint, should be enough to plead that demand is futile.

C. The Burden for Demand Futility Should be Lower for Controller *Caremark* Claims Involving Dual-Fiduciary Directors

As this Court recognized in *Stone*, *Caremark* claims are a "difficult theory" to prevail on. *Stone*, 911 A.2d at 372 (citation omitted). This is because "[m]ost of the decisions that a corporation, acting through its human agents, makes are . . . not the subject of director attention," *id.* (citation omitted); however, *Caremark* claims

typically depend on showing systemic lapses by a director, either through a failure to put information systems in place or through a conscious disregard for red flags. *McDonald's*, 291 A.3d at 676 ("A plaintiff typically pleads a prong-one *Caremark* claim by alleging that the board lacked the requisite information system and controls."); *id.* at 677 ("To plead a Red-Flags Claim, a plaintiff 'must plead particularized facts that the board knew of evidence of corporate misconduct—the proverbial red flag—yet acted in bad faith by consciously disregarding its duty to address that misconduct.'" (citation omitted)).

To ensure that this showing is substantial enough to displace "the board's statutory authority to control the business and affairs of the corporation, which encompasses the decision whether to pursue litigation," *In re Match Grp., Inc. Derivative Litig.*, 315 A.3d 446, 469 (Del. 2024), this Court does not deem demand to be futile without a showing that a "majority of the directors on the demand board are subject to an influence that would sterilize their discretion with respect to the litigation demand." *Zuckerberg*, 262 A.3d at 1056. This Court does not relax this demand futility standard solely because the "entire fairness" standard applies or when a controlling shareholder is involved. *See Match Grp.*, 315 A.3d at 470; *see also Zuckerberg*, 262 A.3d at 1056 (refusing to adopt a test that "collapses the distinction between the board's capacity to consider a litigation demand and the propriety of the challenged transaction"). This is not a problematic standard in most

cases because "influence that would sterilize" a board member's discretion can be pleaded with particularity, including as part of the traditional *Caremark* standard applicable to oversight failure cases, which focus on what each director direct knew and what systems were in place to inform the board.

Dual fiduciaries on the board, however, change how this Court's carefully calibrated standard applies. A director that actively manages the controlling shareholder while sitting on a company's board is not merely beholden to the controller, but an agent of the controller. In this rare case, the controlling shareholder's coercive power is significantly magnified, as a majority of the board is controlled directly by the management of the controller. In such cases, the controller's will need not be transmitted to a beholden board member, nor will there be direct evidence that the controller has forced the hand of the company to do its bidding. The coupling between the controller and the board of the company is airtight. In such cases, none of the normal evidence will be available, and instead, a reasonable and logical inference will be required—that an employee sitting on a company's board while running the business of a controller acts in bad faith when he primarily pursues the controller's interest while on the board of the controlled company.

To be sure, this Court has admonished that plaintiffs pursuing *Caremark* claims should avail themselves of Section 220's provisions allowing them to request

the company's books and records to enable them to plead their claims with particularity. *See Marchand*, 212 A.3d at 824. But a demand for books and records will not ameliorate the pleading problem posed by dual fiduciaries in Controller *Caremark* cases. There will often be no board minutes reflecting candid discussion; there will likely be no internal e-mails or documents discussing the *controller's* business strategy at the controlled company; and the controller's agents on the controlled company's board will not need to communicate any directives to accomplish their goals at the controlled company. In a Controller *Caremark* case, dual fiduciaries can not only quietly turn a blind eye to risk and injury caused by the controller's imposed will on the controlled company but can carry out the controller's will without leaving a shred of evidence to be ferreted out by a Section 220 demand. A Section 220 demand will yield particularized evidence that corroborates or falsifies the typical *Caremark* claim, *see, e.g.*, *In re Boeing Co. Derivative Litig.*, 2021 WL 4059934, at *29-31 (Del. Ch. Sept. 7, 2021) (noting board "updates" from management, board presentations, and internal company communications pleaded as part of *Caremark* claim), but it will not likely do so where dual fiduciaries—acting as agents of the controller—are involved.

The decision below is a case in point. The Court's dismissal was based on a lack of evidence as to how "DTK 'directed' T-Mobile to implement the 'sharing is caring' plan," and how DT's "wishes were transmitted to the directors." Op. at 16.

The Court even faulted Plaintiffs for not seeking books and records from T-Mobile, Op. at 16-17, even though the Complaint pleads particularized facts ***from DT*** about that company's data and credential centralization mandate to its NatCos and its global AI strategy, A215-16 ¶94. The decision precisely highlights why the demand futility pleading standard should be relaxed where dual fiduciaries are involved in Controller *Caremark* claims. In such cases, the case must be pleaded through evidence from the *controller*—who will not be subject to Section 220 demands by the controlled company's shareholder—and the controlled company's documents will not reveal communications, candid conversations, or even an accurate picture of the interactions and state of mind of the dual-fiduciary directors on the controlled company's board.

II. THE COURT OF CHANCERY ERRED BY FAILING TO CONSIDER THE PLEADED EVIDENCE AS A WHOLE, AND ALLOW LOGICAL INFERENCES IN PLAINTIFF'S FAVOR, AS PART OF ITS *ZUCKERBERG* PRONG THREE ANALYSIS

QUESTION PRESENTED

Whether the Court of Chancery erred when it held that the Complaint failed to plead demand futility under the third prong of the *Zuckerberg* test, including by ignoring the dual-fiduciary roles of the DT board members, allowing plaintiff's logical inferences from the pleaded facts, and failing to credit evidence, including DT's admissions, as to the non-ratable benefits DT was pursuing and received. A397-412.

SCOPE OF REVIEW

This Court's review of "decisions of the Court of Chancery applying Rule 23.1" is "de novo and plenary." *Lebanon Cty. Employees' Retirement Fund*, 311 A.3d at 794-95 (cleaned up).

MERITS OF ARGUMENT

Even if the Court of Chancery correctly applied the third prong of the *Zuckerberg* test, it erred in its application of that test. Prong three asks "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." 262 A.3d at 1059. The Court incorrectly applied this standard for three reasons, each requiring reversal.

First, the Court of Chancery excised the "material personal benefit" requirement from the rest of the test, which is designed to assess director independence from a third party. The Court set aside the latter question as conceded and then turned to assessing the "material personal benefit" question in isolation. Op. at 13. Director independence from a third party is not, however, a binary question. The nature and degree of a director's relationship with a third party is itself important evidence under the standard, as is the third party's relationship to the company and the asserted claim. *See Zuckerberg*, 262 A.3d at 1056.

Here, seven members of T-Mobile's demand board not only lacked independence from an interested third party but were agents—and fiduciaries—of a third party. A188-93 ¶¶22-38. Moreover, the third party was not a mere bystander or counterparty but the controlling shareholder of T-Mobile. T-Mobile's counsel astutely conceded the question of independence, hoping to avoid drawing attention to who the seven beholden board members were, and the Court paid little mind to those important facts. That the seven interested board members were the CEO, CFO, board members, and senior executives of DT makes it more likely that DT obtained a material personal benefit when it implemented the "sharing is caring" strategy at T-Mobile. It also makes it more likely that the beat-for-beat implementation at T-

Mobile of the data and credential centralization specifications set forth by Wegner's T-Labs was a result of DT's exertion of control over T-Mobile, its board, and its management. The Court erred when it assumed away these facts as part of a conceded question without regard to their probative value on the question of "material personal benefit"—and, more importantly, as to the overarching question of whether a majority of board's relationship with DT was such that it would "sterilize their discretion with respect to the litigation demand." *Zuckerberg*, 262 A.3d at 1056.

Second, the Court of Chancery erred when it failed to allow Plaintiff "all reasonable inferences that logically flow from the well pleaded factual allegations" in the Complaint, *Match Group*, 315 A.3d at 458, particularly as to whether T-Mobile's board and management had implemented the dangerous data centralization at the behest of DT. The Complaint alleged particularized facts pleading that (a) DT's management—including individuals such as DT's CEO who sat on T-Mobile's board—worked directly with Wegner, A202-03 ¶67, including by creating a subsidiary called T-Labs, A201 ¶62, to implement ML / AI systems across DT's global business, A234 ¶142, and that while doing so, DT's management ran into regulatory problems mining data within the EU, A206 ¶75, requiring them to look to lax U.S. data privacy regulation (where T-Mobile, DT's only U.S. NatCo operated) to mine data and train ML/AI models, A204-06 ¶73-75; (b) DT rolled out

detailed requirements for data and credential centralization across of its NatCos in 2018, including a so-called "app store" for data, A216 ¶96; (c) T-Mobile began creating test servers and centralizing its data and access credentials in 2018, A233 ¶139, at exactly the time Wegner and DT had mandated centralization across NatCos, AC292 ¶307, and moreover, that T-Mobile used the same technology as Wegner's T-Labs group to do so, *id.*; (d) T-Mobile implemented a system called qAPI, which was a beat-for-beat implementation of the T-Labs data and credential centralization specifications mandated to NatCos, A215-16 ¶94; and (e) when the hacker that caused one of the largest data breaches in U.S. history at T-Mobile described the vulnerability he exploited and the breadth of data he stole, A270-72 ¶¶254-58, his description (and statements by T-Mobile's CEO) directly described T-Mobile's recklessly configured test servers, centralized access credentials, and dangerous centralization of data stores, *id*; A282 ¶¶274-81.

All this evidence, taken together, clearly pleads that T-Mobile implemented DT's "sharing is caring" mandate while DT's senior management sat on T-Mobile's board. When taken together with the eight data breaches that began within weeks after T-Mobile's implementation of DT's technological specifications and continued for years, *see* A252-88 ¶¶199-294, an inference that the captured T-Mobile board's lack of oversight was a feature, not a bug. The inference was so logical that the court stated at oral argument when shown a comparison of qAPI to the DT specifications,

"Well, it's clear that they [T-Mobile] implemented it [DT's centralization mandate]." A502. Nonetheless, the Court's opinion considered public DT presentations referenced in the Complaint in isolation, holding that they did not "suggest that DTK directed T-Mobile to centralize data nor mention DTK participated in mining T-Mobile's data." Op. at 17. Tellingly, the Court focused on the wrong question—whether the board "disregard[ed] the (allegedly) manifest risk" of a data breach (the question at issue in traditional *Caremark* cases that do not involve dual fiduciaries), Op. at 18, not whether the pleadings supported the inference that the captured board was acting, or failing to act, in service of the DT's interests, which then *caused* the data breach.

Finally, the Court of Chancery erred when it decided that the Complaint had not pleaded that DT benefited materially from the captured T-Mobile board allowing DT free reign to implement "sharing is caring." Op. at 16. The Court gave no weight to DT's own statements as to why it was implementing "sharing is caring." DT's documents clearly state that it was implementing the program to achieve a 40-60% cost savings for its global conglomerate. A212-13 ¶89. The Court refused to take Wegner and DT at their words in their own contemporaneous documents. The Court also failed to consider those statement in light of DT documents describing regulatory barriers to mining customer data for ML/AI training in Europe, A204 ¶72, while also pointing to lax U.S. data privacy laws as an opportunity, A204-06 ¶¶73-

75. The Court read the documents in isolation, concluding that they only showed that DT found the U.S. market to be more attractive and to be highlighting the differences between EU and U.S. data privacy regulations. Op. at 17. These documents, when combined with clear evidence of implementation of data and credential centralization at T-Mobile precisely according to DT's specifications, gives rise to an inference that DT benefitted from putting its U.S. subsidiary at risk—all to create cost savings for DT's broader organization. These are indisputably non-ratable benefits that did not inure to the benefit of Harper or other non-controlling T-Mobile shareholders. These allegations are strengthened further when, as explained above, the dual-fiduciary roles of the seven DT officers, executives, and board members dominating T-Mobile's board are considered. On this record, the Court erred in its determination that the Complaint failed to plead the third prong of the *Zuckerberg* test.

CONCLUSION

For the reasons set forth above, the Court should reverse the Court of Chancery's order dismissing Plaintiff's Amended Complaint.

OF COUNSEL

BATHAEE DUNNE LLP
Yavar Bathaee (*pro hac vice*)
Andrew Wolinsky
445 Park Ave., 9th Floor
New York, New York. 10022

Brian J. Dunne
Edward Grauman
901 South MoPac Expressway
Barton Oaks Plaza I, Suite 300
Austin, TX 78746

CHRISTENSEN & DOUGHERTY LLP

/s/ Joseph L. Christensen
Joseph L. Christensen (#5146)
1201 North Market Street, Suite 1404
Wilmington, Delaware 19801
(302) 212-4330

Counsel for Plaintiff Below, Appellant Jenna Harper

Dated: August 26, 2024