EFiled: Sep 30 2024 04:27PM EDT
Filing ID 74623104
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 D. 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

APPELLEES' ANSWERING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases **Page(s)**

Rules & Statutes

NATURE OF PROCEEDINGS

Plaintiff Harper brought this stockholder derivative action alleging breach of fiduciary duty claims against former and current directors of nominal defendant T-Mobile US, Inc. ("T-Mobile" or the "Company") after T-Mobile became the victim of criminal cyberattacks in 2021 and 2023. Plaintiff's Amended Verified Shareholder Derivative Complaint ("Amended Complaint") alleged, in sum, that T-Mobile's controlling stockholder, Deutsche Telekom AG ("DT") caused T-Mobile to centralize and share all of its customer data with DT for DT's sole benefit, and without regard to proper data security practices. Plaintiff posited that the T-Mobile directors breached their fiduciary duties by implementing DT's data sharing and centralization mandate at T-Mobile, creating data security vulnerabilities that purportedly resulted in a series of cyberattacks on T-Mobile.

Plaintiff did not seek books and records under Section 220 of the Delaware General Corporation Law to investigate whether there was any factual support for her alleged claims. Nor did Plaintiff make a demand on T-Mobile's Board before filing her complaint. Before the Court of Chancery, Plaintiff argued that demand was futile under the third prong of the test this Court set out in *United Food & Commercial Workers Union & Participating Food Industry Employers Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1058 (Del. 2021) ("*Zuckerberg*") because a majority of the board lacked independence from DT, which Plaintiff

claimed received a material and non-ratable benefit from the alleged misconduct. Plaintiff disclaimed any reliance on *Zuckerberg*'s other two prongs.[1]

The Court of Chancery dismissed Plaintiff's Amended Complaint for Plaintiff's failure to make a demand on the T-Mobile Board. According to the Court, while the Amended Complaint was "replete" with "conclusory allegations" setting out Plaintiff's theory, Plaintiff failed to plead any specific factual allegations showing (i) how DT instructed T-Mobile to centralize or share data, (ii) that the T-Mobile Board even considered data centralization and sharing, much less that it did so at DT's behest or for DT's benefit, (iii) how DT in fact accessed or received any T-Mobile data, or (iv) what material benefit DT received from allegedly accessing such data. *See* Memorandum Opinion Dismissing Plaintiff's Amended Complaint ("Op.") at 2, 16, 18.

On appeal, Plaintiff now argues—for the first time—that the Court should modify its *Zuckerberg* precedent by creating an entirely new demand futility

[1] *See Zuckerberg*, 262 A.3d at 1058 (holding demand is excused only if the complaint adequately pleads "on a director-by-director basis," as to half of the demand board, that the director: (i) "received a material personal benefit from the alleged misconduct that is the subject of the litigation demand"; (ii) "face[s] a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand"; or (iii) "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").

standard to accommodate what she calls a "Controller *Caremark*" claim. Despite having previously described this case to the Court of Chancery as "a straightforward case of corporate looting by a controlling shareholder," A378, Plaintiff now argues that her claims are novel and pose "unique pleading burdens" that purportedly are not addressed by existing Delaware precedent. Plaintiff's argument should be rejected for multiple reasons.

First, Plaintiff never made this new argument below and has therefore waived it. In the Court of Chancery, Plaintiff relied exclusively on *Zuckerberg*'s third prong and not only abandoned any claim that demand was futile under any other standard (including *Zuckerberg*'s second prong)[2] but expressly disavowed asserting any *Caremark* theory of liability. *See* A479 at 33:3–6 ("Your Honor, it's not a *Caremark* case. This is a pretty standard case of a controller obtaining a nonratable benefit from the company."). Having tried—and failed—to show demand futility under this Court's established precedent, Plaintiff cannot now recharacterize her claims for the first time on appeal and ask the Court to create a new, lower pleading standard for claims she told the Court of Chancery she was not pursuing.

Second, in any event, Plaintiff's waived "Controller *Caremark*" theory would fit squarely under existing law, namely *Zuckerberg*'s second prong, which asks

[2] Op. at 13 n.64 (noting that Plaintiff abandoned *Zuckerberg*'s second prong by failing to address it in her brief opposing Defendants' Motion to Dismiss).

whether half of the directors who would evaluate a demand face a substantial likelihood of liability for a non-exculpated claim (under *Caremark* or otherwise). That certain defendants are alleged to be "dual fiduciaries" does not take Plaintiff's claim out of *Zuckerberg*'s second prong—Delaware law is well-developed on this issue and provides a clear framework for the Court to analyze such claims. Plaintiff's request that the Court modify the *Zuckerberg* test for pleading demand futility in this context is thus not only waived but wholly unjustified.

Third, even if this Court were to apply *Zuckerberg*'s second prong to Plaintiff's waived "Controller *Caremark*" claim, the Amended Complaint plainly failed to adequately plead with particularity facts that would show at least half of the demand board would face a substantial likelihood of liability for breaching their duty of loyalty, as *Zuckerberg's* second prong requires. Specifically, as the Court of Chancery held, Plaintiff did not allege any facts showing what the T-Mobile directors allegedly did or did not do to further DT's interests at T-Mobile's expense, nor has Plaintiff alleged any facts showing that DT directed the T-Mobile Board to centralize and share data with DT or that the directors caused any such directive to be implemented at T-Mobile. Op. at 16–19.

Finally, Plaintiff also argues that the Court of Chancery erred in holding that Plaintiff did not demonstrate demand futility under *Zuckerberg*'s third prong. That argument also fails. *Zuckerberg*'s third prong requires Plaintiff to show that the

controller—here, DT—received a "material personal benefit" from the alleged misconduct. As the Court of Chancery determined:

> Plaintiff has not demonstrated that [DT] in fact accessed or received T-Mobile's customer data, resulting in a material benefit to [DT] that would subject the Demand Board to a disabling conflict. Nor has it identified a specific transaction or board decision to which such a conflict might apply. The record is lacking allegations on how the alleged benefit, i.e., the savings and monetization, was accessed by [DT]. There are no specific pleadings showing that [DT] instructed the directors to implement data integration, or that the directors ever assessed the issue . . . From the facts, I cannot infer that [DT] directed T-Mobile to structure implement data centralization to T-Mobile's detriment, nor that [DT] received a material benefit from such implementation.

Op. at 18–19. Plaintiff argues that the Court of Chancery did not give sufficient weight to certain directors' "dual fiduciary" status and that it failed to draw all logical inferences from the pleaded facts in her favor, but both arguments are meritless. Simply alleging that defendants are "dual fiduciaries" does not relieve Plaintiff of her burden to plead *facts* that would support her theory of demand futility, and the Court of Chancery correctly determined that the well-pleaded facts did not satisfy *Zuckerberg*'s third prong.

This Court should affirm the Court of Chancery's decision.

SUMMARY OF ARGUMENT

I.A. Denied. There is no basis for this Court to modify the existing *Zuckerberg* test to accommodate Plaintiff's "Controller *Caremark*" argument. First, Plaintiff waived this argument both by telling the Court of Chancery she was *not* asserting a *Caremark* theory and also by not raising any argument below that a new standard should be applied to her claims, however characterized. Second, Plaintiff's argument that T-Mobile's DT-affiliated directors violated their fiduciary duties to T-Mobile is no different from any other loyalty claim against directors in a conflicted controller situation. Delaware law is fully developed to address such claims, and there is no reason to modify that law. Plaintiff attempts to repackage her ordinary loyalty claims with a novel name, but had she actually pressed them below, they would have fit squarely under *Zuckerberg*'s second prong, which considers whether directors would face a substantial likelihood of liability on any of the claims that are the subject of a litigation demand. Third, even if the Court were to overlook Plaintiff's waiver and consider Plaintiff's claims under *Zuckerberg*'s second prong, dismissal should be affirmed because Plaintiff failed to plead with particularity that at least half of the directors face a substantial likelihood of liability for breaching their duty of loyalty.

I.B. Denied. Where the allegations fail to satisfy the existing *Zuckerberg* test, there is no basis for this Court to relax the demand futility pleading standard to

accommodate deficient claims just because they involve dual fiduciaries. Plaintiff did not make this argument below and has therefore also waived it. But, in any event, Plaintiff's argument that the pleading standard should be relaxed simply because dual fiduciaries are involved is meritless. The Court of Chancery has considered many times whether dual fiduciaries are able to consider a litigation demand impartially, and has never applied—or even suggested—a relaxed pleading standard.

II. Denied. The Court of Chancery correctly applied *Zuckerberg*'s third prong and held that Plaintiff failed to show that demand would have been futile. Plaintiff argues that the Court of Chancery erred by failing to give sufficient weight to certain directors' lack of independence from DT and by failing to give Plaintiff the benefit of all logical inferences from the pleaded facts. Those arguments are meritless. First, Plaintiff's argument that the nature of the relationship between DT and certain of T-Mobile's directors should somehow relieve Plaintiff of her obligation to come forward with well-pleaded facts that would show that DT received a material benefit as a result of challenged actions by the directors simply misstates the law. To show demand futility, Plaintiff was required to plead facts to show both a lack of independence (which the court below properly considered) and that DT had a material interest in or received a material benefit from the alleged misconduct. The Court of Chancery rightly concluded that Plaintiff failed to do so.

Second, the Court of Chancery did not fail to draw in Plaintiff's favor "all logical inferences flowing from the pleaded facts." To the contrary, the Court of Chancery simply—and correctly—concluded that none of the well-pleaded facts in Plaintiff's Amended Complaint supported the speculative and illogical inferences Plaintiff sought to draw. The Court of Chancery thus correctly dismissed Plaintiff's Amended Complaint.

STATEMENT OF FACTS

T-Mobile is a Delaware corporation headquartered in Bellevue, Washington, that provides wireless voice and data services to approximately 119.7 million customers nationwide. T-Mobile, Annual Report (Form 10-K) (Feb. 2, 2024) ("2023 Form 10-K"); Op. at 4. Plaintiff-Appellant Jenna Harper alleges that she is a T-Mobile stockholder. A186 ¶ 17, A304 ¶ 348; Op. at 3. Defendants-Appellees are current and former members of T-Mobile's Board of Directors. A187–93 ¶¶ 21–38; Op. at 3. Non-party DT is T-Mobile's largest stockholder. Op. at 4.

A. T-Mobile, Like All Companies, Faces Substantial Risks Associated With Criminal Cyberattacks

Cybersecurity "is an area of consequential risk that spans modern business sectors. In the past several years alone, cyberattacks have affected thousands of companies and government agencies." *Firemen's Ret. Sys. of St. Louis v. Sorenson*, 2021 WL 4593777, at *11 (Del. Ch. Oct. 5, 2021). T-Mobile has long disclosed to investors the risks associated with criminal cyberattacks. *See, e.g.*, T-Mobile, Annual Report (Form 10-K) at B002 (Feb. 14, 2017) ("2016 Form 10-K").

In 2021, T-Mobile was the victim of a serious cyberattack, in which a criminal hacker maliciously gained unauthorized access to T-Mobile's systems, illegally accessing the data of millions of customers. *See* A270–85 ¶¶ 254–87; T-Mobile, Annual Report (Form 10-K) at B027 (Feb. 11, 2022) ("2021 Form 10-K"). The Company disclosed that it immediately located and closed the unauthorized access

to its system and began a forensic investigation to determine the source of the attack and nature of the impacted data. *See* 2021 Form 10-K at 30; T-Mobile, Quarterly Report (Form 10-Q) at B024 (Nov. 2, 2021).[3] T-Mobile's CEO, Mike Sievert, explained on August 27, 2021 that the Company's investigation revealed that "the bad actor leveraged their knowledge of technical systems, along with specialized tools and capabilities, to gain access to [T-Mobile's] 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 removed). Sievert explained that "[w]e know that the bad actors out there will continue to evolve their methods every single day and attacks across nearly every industry are on the rise." A281 ¶ 280. To further strengthen its cybersecurity systems and efforts, Sievert emphasized, T-Mobile was continuing to partner with cybersecurity experts as part of a "substantial multi-year investment to adopt best-in-class practices" and to "assembl[e] the firepower we need to improve our ability to fight back against criminals and build[] a future-forward strategy to protect T-Mobile and our customers." *Id*.

[3] T-Mobile's SEC filings may be judicially noticed. *See Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 238 A.3d 863, 873 (Del. 2020); *In re Primedia, Inc. S'holders Litig.*, 2013 WL 6797114, at *9 (Del. Ch. Dec. 20, 2013).

In January 2023, T-Mobile was the victim of another cyberattack in which a bad actor obtained certain customer data through unauthorized access to a single Application Programming Interface ("API"). *See* A289 ¶ 299; T-Mobile, Current Report (Form 8-K) at B030 (Jan. 19, 2023) ("2023 Form 8-K"). T-Mobile has disclosed that the information accessed was limited and did not include any sensitive personal information like payment card information, social security numbers, driver's license or other government ID numbers, passwords, or other financial account information. 2023 Form 8-K at 2. Again, T-Mobile promptly investigated the incident with external cybersecurity experts and, within a day of learning of the malicious activity, was able to trace the source and stop it. *Id.*

B. Plaintiff's Unsupported Theory Of Demand Futility

Plaintiff filed her initial complaint on September 16, 2022 and the Amended Complaint on April 5, 2023. Op. at 9. The Amended Complaint asserted breach of fiduciary claims against the Defendants for alleged harm to T-Mobile. Op. at 9. Plaintiff's claims were grounded in an elaborate theory that the Defendants allegedly "allow[ed] reckless, overly aggressive data monetization and AI/[ML] efforts and processes driven by a single shareholder—DT—to supplant, overtake, and otherwise pervert T-Mobile's proper data privacy, cybersecurity, operational viability, and legal compliance concerns." A317–18 ¶ 377. Plaintiff asserted that T-Mobile had data security issues, which made the Company more vulnerable to cyberattacks, and

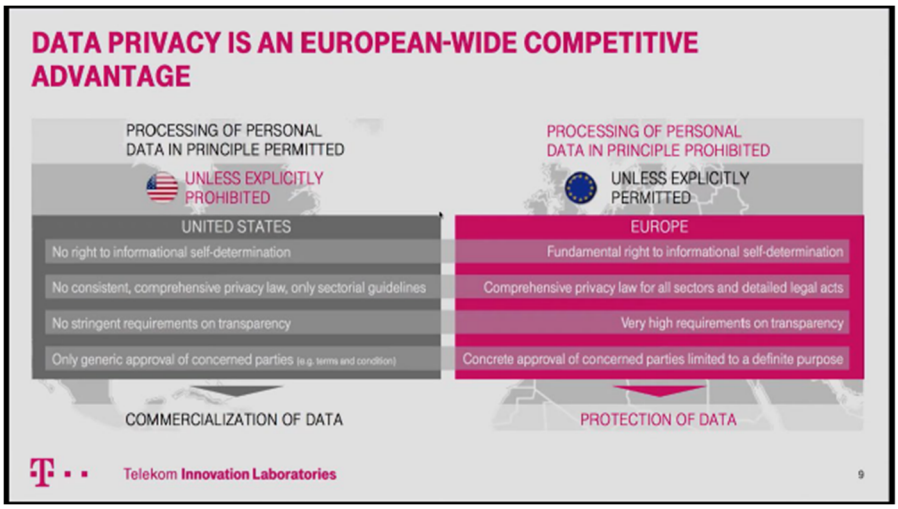
that these issues were "the result of a conscious design decision by T-Mobile at the direction of its captured board and management, one foisted upon it by its DT overlords" and supposedly exposed T-Mobile to cyberattacks. A184 ¶ 10. Wholly absent from the Amended Complaint, however, were any factual allegations explaining how DT's supposed scheme actually took place, who was involved, when it occurred, or anything at all about what the T-Mobile Board actually knew or did with respect to any of it.

1. The Alleged Directive From DT

Plaintiff alleged that starting in 2013, DT had significant interest in developing AI and ML technologies to help it monetize user data. A182 ¶ 3. According to Plaintiff, DT purportedly implemented a group-wide strategy of data-centralization and sharing with its European subsidiaries (i.e., "NatCos"). A209–11 ¶¶ 83, 85, 87, A215 ¶¶ 92, 94, A217 ¶ 97, A224 ¶ 114, A229 ¶ 129; Op. at 4–6. According to the Amended Complaint, DT intended to centralize data at each NatCo, with the resulting data analyses to be shared to benefit DT. A210–11 ¶ 85, A212–13 ¶¶ 89–90, A216 ¶ 95, A217–18 ¶ 98.

The Amended Complaint then posited—without any supporting facts—that, in 2018, DT directed T-Mobile (a U.S. public company, not one of DT's European affiliate NatCos) to share customer data with DT, in service of DT's artificial intelligence ambitions. A181 ¶ 2, A183 ¶¶ 6–7, A202 ¶ 66, A224 ¶¶ 114–15, A226

¶ 121, A241 ¶ 164. According to Plaintiff, DT needed access to U.S. data to "get around European data privacy regulations and disclosures." A206 ¶ 75. The Amended Complaint referenced two documents, but neither provides support for this claim. It first cited a single quote and slide titled "Data Privacy Is An European-Wide Competitive Advantage" (excerpted below) from a DT employee's presentation at a 2016 conference.[4]



The quote and slide, however, merely note generic perceived differences between European and American approaches to data privacy. A204–05 ¶ 73. Neither even mentions T-Mobile, let alone any plan by DT to use T-Mobile's data in any way. Similarly, while Plaintiff alleged that a 2018 DT Supervisory Board Meeting

[4] A204–05 ¶ 73; SAIConference, *Susan Wegner (Deutsche Telekom) - Future Analytics and Big Data*, YouTube (Aug. 4, 2016), https://www.youtube.com/watch?v=Ja_ppVW3jgg.

presentation[5] confirms DT's alleged plan to mine T-Mobile's data (A205–06 ¶¶ 74–75), that document in fact merely states that the U.S. telecommunications market was more attractive for *investing* than European markets; nothing in it supports Plaintiff's theory that T-Mobile adopted an "aggressive and reckless plan of data- and credential-centralization" for DT's benefit. A183–84 ¶¶ 7, 9.

2. T-Mobile's Alleged Compliance With DT's (Alleged) Directive

The Amended Complaint further posited that Defendants, as members of T-Mobile's Board, directed T-Mobile to develop AI and ML "for the benefit of DT" and to "serve[] DT's ultimate goal of milking T-Mobile's vast trove of user data to contribute to DT's data-mining and AI ambitions[.]" A183–85 ¶¶ 9, 13. Yet, despite the many pages filled with technical and jargon-heavy language purportedly about

[5] *State of N.Y. v. Deutsche Telekom et al.*, 1:19-cv-05434-VM (RWL) (S.D.N.Y.) (ECF No. 346-8).

AI and ML, the Amended Complaint contained no factual allegations that the T-Mobile Board had any involvement in developing AI or ML at T-Mobile to benefit DT, let alone what any individual Defendant allegedly did to influence T-Mobile's AI or data security practices, what AI and ML technology or practices T-Mobile actually developed, what T-Mobile data was ever supposedly shared with or made available to DT, or what benefit DT ever received from any of this alleged activity.[6]

Plaintiff's sole sources in support of those sweeping allegations were three blog posts and one YouTube video about small open-source software projects developed by T-Mobile employees. On their face, those sources say nothing about T-Mobile's data architecture or security practices, much less what the Board did (or did not do). Plaintiff relied heavily on two of the blog posts[7] for her claim that "T-Mobile, under the management of the Individual Defendants, dismantled any

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[6] Plaintiff also speculated that T-Mobile's merger with Sprint was somehow driven by DT's desire "to create the United States' second-largest pool of wireless subscribers in a single entity" to further DT's AI strategy. A181 ¶ 2, A224 ¶ 114. Again, Plaintiff provided no well-pleaded factual allegations to support that assertion.

[7] Jacqueline Nolis and Heather Nolis, *Enterprise Web Services with Neural Networks Using R and TensorFlow*, T-Mobile Open Source (Nov. 2, 2018), https://opensource.t-mobile.com/blog/posts/r-tensorflow-api/ B003–12, *quoted by* A226 ¶ 122, A228 ¶ 126, A230 ¶¶ 131, 132; Mark Eric Hanson*, Retraining is the Only Constant, or, The [Machine] Learning is Never Done*, Medium.com (May 13, 2020), https://medium.com/tmobile-tech/retraining-is-the-only-constant-or-the-machine-learning-is-never-done-28e386cf763d B015–22 , *quoted by* A230 ¶ 133, A232 ¶ 136.

safeguards around centralized data, including by providing a new crack team unfettered access to the company's data and resources." A226 ¶ 121. But those blog posts describe no such thing. To the contrary, they describe a single project launched by a team supporting T-Mobile's customer care organization that was given "four months and a small budget," "to see if artificial intelligence and machine learning could truly improve the customer experience at T-Mobile."[8] The team, the blog posts explain, ultimately found ways to use AI and ML to support online customer care chat conversations – nothing more. A230 ¶ 131. Nothing in these sources or anywhere else in the Amended Complaint supports an inference that this discrete customer care chat support project was widely adopted across T-Mobile as a whole or somehow used to benefit DT, as Plaintiff speculates.

Similarly, Plaintiff relied on a single blog post and an accompanying YouTube video about an open source "micro service" software project called qAPI, which was designed to simplify certain challenges associated with running software test scripts.[9] Again, nothing in the sources Plaintiff relied on suggests this tool was

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[8] A226 ¶ 122; Nolis, *supra* note 7.

[9] Julio Zevallos, *Introducing qAPI: Translating database queries into API calls*, Opensource.t-mobile.com (Nov. 7, 2019), https://opensource.t-mobile.com/blog/posts/introducing-qapi/ B013, *quoted* at A244–45 ¶¶ 173, 176, A247 ¶ 181; T-Mobile, *qAPI: Translating database queries into API calls*, YouTube (Nov. 7, 2019), https://www.youtube.com/watch?v=IRU-AcRGL74, *quoted* at A247-49 ¶¶ 185–188.

used in connection with any AI or ML projects or that it was ever widely used within T-Mobile at all, much less that it created "a central repository with the keys to T-Mobile's entire data kingdom," leading to a "dangerous single point of failure for T-Mobile's information security." A236 ¶¶ 147–48.

3. The Alleged Link To The Cyberattacks

From nothing more than these few, inapplicable sources, Plaintiff manufactured a theory that T-Mobile centralized access to data across the entire Company to facilitate the development of AI and ML technology at DT's behest and to its sole benefit. A226 ¶ 121, A229 ¶ 130, A233 ¶ 139, A243 ¶ 170. In so doing, Plaintiff invented her own version of T-Mobile's network and data architecture—untethered from any actual facts—to hypothesize that the supposed data security vulnerabilities of that architecture made possible not only the August 2021 and January 2023 cyberattacks but also several other, smaller attacks. A252 ¶¶ 199–200, A258–59 ¶¶ 217–18, A261 ¶ 224, A263 ¶ 235, A267 ¶243, A270 ¶ 251. But again, Plaintiff's Amended Complaint failed to allege any facts or rely on any documents that would show how, even if T-Mobile had developed the AI technology Plaintiff imagines, the technology provided the means for any of these cyber-attackers to gain access to T-Mobile's data.

4. Plaintiff's Claim That Demand Was Excused

Plaintiff did not make any demand on the T-Mobile's Board[10] before filing her lawsuit in the Court of Chancery. A304 ¶ 350. Instead, Plaintiff argued that demand was excused because a majority of the Demand Board lacked independence from DT, and that DT received a material personal benefit from the alleged misconduct that would be the subject of a litigation demand. A304–16 ¶¶ 351–72. Although Plaintiff predicates her "Controller *Caremark*" theory on alleging that half or more of the Board were DT executives, only six of T-Mobile's fourteen members of the Demand Board—Höttges, Illek, Kübler, Langheim, Leroy, and Gopalan—were allegedly conflicted because of their status as DT executives. A305–10 ¶¶ 354–60. Plaintiff also asserted that demand was excused for Sievert because he was allegedly beholden to DT as the CEO of DT-controlled T-Mobile. A311–12 ¶ 364. And Claure allegedly was conflicted "because of his close ties" to DT and

[10] The 14 members of T-Mobile's Board at the time this lawsuit was filed in September 2022 were: Marcelo Claure, Srikant M. Datar, Srinivasan Gopalan, Bavan Holloway, Timotheus Höttges, Christian P. Illek, Raphael Kübler, Thorsten Langheim, Dominique Leroy, Letitia A. Long, G. Michael Sievert, Teresa A. Taylor, Omar Tazi, and Kelvin R. Westbrook (collectively, the "Demand Board").

DT's purported control over a portion of his wealth through a proxy and lockup agreement. A312–13 ¶ 365.[11]

C. Procedural History And The Decision Below

Plaintiff filed her initial complaint on September 16, 2022. After Defendants moved to dismiss on November 22, 2022, she chose to amend her complaint in lieu of opposing Defendants' motion. She filed her Amended Complaint on April 5, 2023, and Defendants' Motion to Dismiss was fully briefed on October 13, 2023. Op. at 10.

In Defendants' Opening Brief in support of their Motion to Dismiss, Defendants argued that Plaintiff failed to adequately plead demand futility under either *Zuckerberg*'s second or third prongs. A353–68 at 20–35. Plaintiff's Opposition to Defendants' Motion to Dismiss not only made no mention of *Zuckerberg*'s second prong (thus waiving any argument that demand was excused on that prong, as the Court of Chancery held, Op. at 13 n.64), she *expressly* asserted that the Amended Complaint did not plead a *Caremark* claim (of any type) and disclaimed any reliance on the *Caremark* doctrine. A379 at 4. Instead, Plaintiff

[11] Plaintiff further alleged that five other members of the Demand Board, Taylor, Long, Datar, Westbrook, and Holloway were conflicted because of their roles on T-Mobile's Nominating and Corporate Governance, Audit, or Compensation Committees, allegedly exposing them to a substantial likelihood of personal liability. A310–11 ¶¶ 361–63, A313–15 ¶¶ 366–68. However, Plaintiff later abandoned that argument, as explained below.

argued that this was "a straightforward case of corporate looting by a controlling shareholder," A378 at 3, and that she had adequately pleaded demand was futile under *Zuckerberg*'s third prong, A397–413 at 22–38. Nowhere in her Opposition to Defendants' Motion to Dismiss did Plaintiff argue that a different standard should apply to her claims or that a modification to *Zuckerberg* was needed.

The Court of Chancery heard oral argument on the Motion to Dismiss on February 1, 2024. During the argument, Plaintiff's counsel again insisted: "Your Honor, it's not a *Caremark* case." A479 at 33:3–4. And again, Plaintiff insisted that she had adequately pleaded demand futility under *Zuckerberg*'s third prong and at no point argued that a different standard should be applied to her claims. A515 at 69:8–9 ("[T]he theory of the case, it's a theory of nonratable benefit.").

The Court of Chancery issued its decision dismissing Plaintiff's Amended Complaint on May 31, 2024, and the Amended Complaint was dismissed by order on June 12, 2024. *See* A001 at Dkt. 45.

After noting Plaintiff had abandoned any argument that demand was excused under *Zuckerberg*'s second prong, Op. at 13–14, the Court of Chancery correctly dismissed Plaintiff's suit under *Zuckerberg*'s third prong. The Court held that Plaintiff had failed to plead facts supporting the key *Zuckerberg* prong-three element – that DT received a material benefit from any purported misconduct. Op. at 16 ("I find that Plaintiff's allegations concerning a material benefit are insufficient to

satisfy a particularized pleading requirement under Rule 23.1"). The Court further ruled that Plaintiff failed to plead necessary facts supporting every element of her elaborate theory: that she did not adequately allege that DT instructed T-Mobile to aggregate and share its data with DT, let alone in a risky way; that T-Mobile's Board even considered centralizing and sharing data with DT in disregard of the risks to the Company, let alone at DT's direction or for DT's benefit; or, that DT in fact received or made any use of T-Mobile data, let alone used it to gain a non-ratable benefit for DT. *Id.* at 2, 15–19. The Court considered the few public DT sources cited in the Amended Complaint, and concluded they did not show that "[DT] directed T-Mobile to centralize its data, allowing [DT] to monetize T-Mobile's data, and directing the [Board] to disregard the (allegedly) manifest risk." *Id.* at 17–18. The Court ultimately held that because of these many failings, demand was not excused, and it therefore dismissed the Amended Complaint.[12]

[12] As a result, the Court of Chancery did not reach Defendants' alternative argument that the Amended Complaint should be dismissed for failure to state a claim against any of the Defendants under Court of Chancery Rule 12(b)(6). *See* A368 at 35; A442–45 at 21–24.

ARGUMENT

I. PLAINTIFF'S REQUEST THAT THE COURT MODIFY ITS *ZUCKERBERG* PRECEDENT IS WAIVED AND MERITLESS

A. Question Presented

Whether the Court should modify its *Zuckerberg* precedent to address Plaintiff's purportedly novel *Caremark* theory of liability, despite the fact that Plaintiff did not raise this argument below and previously represented she was not asserting a *Caremark* claim.

B. Scope Of Review

Plaintiff did not raise her so-called "Controller *Caremark*" argument below, so the Court of Chancery did not consider it. If the Amended Complaint included a *Caremark* claim, of any type, or if Plaintiff believed a new standard should be applied to such claim, Plaintiff was required to fairly raise these issues for consideration below. Supr. Ct. R. 8. Plaintiff's failure to do so results in its waiver on appeal. *Del. Elec. Coop., Inc. v. Duphily*, 703 A.2d 1202, 1206 (Del. 1997) ("It is a basic tenet of appellate practice that an appellate court reviews only matters considered in the first instance by a trial court. Parties are not free to advance arguments for the first time on appeal").[13]

[13] The only exception—when consideration of an issue raised for the first time on appeal is required in "the interest of justice"—is "extremely limited," *Russell v. State*, 5 A.3d 622, 627 (Del. 2010), and does not remotely apply here as explained below.

If Plaintiff's purported *Caremark* claim (and argument that it should be subject to a new pleading standard) were not waived, the scope of this Court's review would be *de novo*. Although well-pleaded allegations must be accepted as true, the Court will not "credit conclusory allegations that are not supported by specific facts or draw unreasonable inferences in the plaintiff's favor." *Norton v. K-Sea Transp. P'rs L.P.*, 67 A.3d 354, 360 (Del. 2013).

C. Merits Of The Argument

1. Plaintiff Waived Any *Caremark* Claim Or Argument That It Should Be Subject To A Novel Pleading Standard

Plaintiff's argument that her claims represent a new type of *Caremark* cause of action that triggers a new and special pleading standard is doubly waived.

Plaintiff not only failed to make this argument below, she expressly told the Court of Chancery that she was not making any *Caremark* argument at all and that the Amended Complaint did not plead such a claim.

Specifically, no doubt aware of the high bar for sustaining *Caremark* claims arising from cyberattacks,[14] Plaintiff highlighted at every step of the proceedings

[14] *See Constr. Indus. Laborers Pension Fund v. Bingle*, 2022 WL 4102492, at *9–10 (Del. Ch. Sept. 6, 2022) (holding that plaintiffs failed to plead sufficiently particularized facts to infer bad faith on the part of directors relating to allegations that the directors failed to oversee the company's cybersecurity risk), *aff'd*, 297 A.3d 1083 (Del. 2023) (ORDER); *Sorenson*, 2021 WL 4593777, at *1 (dismissing a *Caremark* claim because the complaint's allegations that the company did not remedy its deficient information protection systems did not meet the "high bar" for pleading a bad faith oversight claim).

below that she was not bringing a *Caremark* claim. She first asserted in her Opposition to Defendants' Motion to Dismiss that "Defendants spend most of their brief erecting a straw man and pummeling that, arguing against a Caremark claim for failure to prevent a data breach—*a claim not asserted in this case*." A379 at 4 (emphasis added). Plaintiff's counsel reaffirmed that point at oral argument: "Your Honor, it's not a *Caremark* case. This is a pretty standard case of a controller obtaining a nonratable benefit from the company." A479 at 33:3–6; *see also* A509 at 63:17–19 ("THE COURT: But this isn't a *Caremark* claim. ATTORNEY BATHAEE: No, Your Honor."). Having strategically disclaimed any reliance on *Caremark* before the Court of Chancery, Plaintiff cannot now do an about-face on appeal and argue that the decision below should be reversed because she adequately pleaded a cause of action that she repeatedly told the Court of Chancery she was not asserting.

In addition, Plaintiff has also waived any argument that her claims—however they are characterized—should be analyzed under any standard other than *Zuckerberg*'s third prong, which required her to plead with particularity both that at least half of the Demand Board lacked independence from DT *and* that DT received a material personal benefit. *Zuckerberg*, 262 A.3d at 1058. As the Court of Chancery highlighted in its decision: "Plaintiff conceded that its sole argument for

demand futility is based on whether [DT] derived a material benefit from the alleged misconduct." Op. at 13–14.

Plaintiff's leading argument on appeal—that this Court should modify *Zuckerberg* to craft a new pleading standard specifically for "Controller *Caremark*" claims—is therefore waived. *State Farm Mut. Auto. Ins. Co. v. Spine Care Del., LLC*, 238 A.3d 850, 859 (Del. 2020) ("We first note that [the appellee] did not make this particular argument in the proceedings below and thus, the argument is waived."); *Chester Cnty. Emps' Ret. Fund v. New Res. Inv. Corp.*, 186 A.3d 798 (Del. 2018) (ORDER) (declining to indulge arguments raised for the first time on appeal where the plaintiff, "for tactical reasons," did not raise the arguments below); *Rsrvs. Mgmt., LLC v. Am. Acq. Prop. I, LLC*, 86 A.3d 1119 (Del. 2014) (TABLE) (declining to consider argument that was not made to the court below).

2. Plaintiff's "Controller *Caremark*" Theory Would Have Been Properly Analyzed Under *Zuckerberg*'s Second Prong

The *Zuckerberg* test provides a clear and workable standard for assessing demand futility on a director-by-director basis by giving stockholder derivative plaintiffs three avenues to show that demand is futile. Plaintiff, however, now contends that she has pleaded a new kind of *Caremark* claim that she calls a "Controller *Caremark*" claim, which she argues is purportedly about "oversight liability involving a controlling shareholder," Appeal Opening Brief ("OB") at 28,

and supposedly does not fit into the *Zuckerberg* paradigm.[15] According to Plaintiff, such "Controller *Caremark*" claims are somehow unique in that the directors' bad faith is not shown through sustained and systematic failure of oversight, but by "direct" bad faith – i.e., intentionally acting in the interests of the controller at the expense of the company. *Id.* at 27–29. Plaintiff's attempts to take her claims outside of the established *Zuckerberg* framework fail. For that reason, this case does not come close to presenting the type of "extremely limited" circumstance in which Plaintiff's waiver may be excused. *Russell*, 5 A.3d 622 at 627.

Zuckerberg's second prong is broad and flexibly designed to address any kind of *Caremark* (or other loyalty) claim in which directors are alleged to face personal liability. It simply asks whether at least half of the directors would face a substantial

[15] Plaintiff's "Controller *Caremark*" claim bears some resemblance to unsuccessful arguments made by other plaintiffs under *Aronson*'s second prong, which articulates a "safety valve," i.e., the possibility that demand futility could be satisfied where "the complaint meets a heightened pleading standard of particularity" and the "threat of liability to the directors required to act on the demand is sufficiently substantial to cast a reasonable doubt over their impartiality." *Guttman v. Huang*, 823 A.2d 492, 500 (Del. Ch. 2003) (citing *Aronson v. Lewis*, 473 A.2d 805, 815 (Del. 1984)). Plaintiff's "Controller *Caremark*" claim is in this sense not novel at all, as the "safety valve" theory has been repeatedly considered. *See, e.g.*, *Gottlieb v. Duskin*, 2020 WL 6821613, at *6 (Del. Ch. Nov. 20, 2020) (finding that the complaint failed to plead facts creating a reasonable doubt that the challenged conduct was not the product of business judgment, such that it was reasonable to infer that the directors acted in bad faith and would therefore face a substantial likelihood of liability); *Ryan v. Armstrong*, 2017 WL 2062902, at *17 (Del. Ch. May 15, 2017), *aff'd*, 176 A.3d 1274 (Del. 2017) (ORDER) (same).

likelihood of liability for any reason, irrespective of whether the claim involves a controller or some other circumstance. Plaintiff's contention that the DT-affiliated directors violated their fiduciary duties to T-Mobile because they allegedly intentionally acted in the interests of DT to the detriment of T-Mobile is no different from any other loyalty claim against a director in a conflicted situation.

Attempting to argue that this Court should create a fourth avenue, Plaintiff seizes on the Court of Chancery's passing observation that Plaintiff's theory of liability appears to be a "new species" under the "genus *Caremark*," i.e., that "the Complaint asserts that [DT] wanted access to T-Mobile's customer data, a result to which a majority of the directors acquiesced, disloyally ignoring the obvious risk to T-Mobile." Op. at 13. However, far from supporting Plaintiff, the only point here is that this is a "species" of factual allegations that the Court considered and that it determined could not establish, under *Caremark* and its progeny or otherwise, a sufficient likelihood of liability under the existing *Zuckerberg* test. There is no support for Plaintiff's claim that this Court should reexamine the existing *Zuckerberg* test, as the Court of Chancery expressed no concern that *Zuckerberg* was inadequate to assess Plaintiff's demand-futility arguments.

Indeed, the Court of Chancery has regularly examined similar loyalty claims against directors under *Zuckerberg*'s second prong or under *Rales v. Blasband*, 634 A.2d 927 (Del. 1993), *Zuckerberg*'s predecessor. *See, e.g.*, *Simons v. Brookfield*

Asset Mgmt. Inc., 2022 WL 223464, at *11–13 (Del. Ch. Jan. 21, 2022) (holding that the complaint failed to plead particularized facts showing that the directors acted in bad faith to advance a controller's interest); *cf. Berteau v. Glazek*, 2021 WL 2711678, at *26 (Del. Ch. June 30, 2021) (holding that the complaint pleaded facts supporting a reasonable inference that a director acted in bad faith to further the controller's interest over the company in a transaction between the controller and the company); *In re CBS Corp. S'holder Class Action & Deriv. Litig.*, 2021 WL 268779, at *37–43 (Del. Ch. Jan. 27, 2021) (holding that the complaint pleaded facts showing that eight out of thirteen board members breached their fiduciary duty of loyalty by favoring the controller's interests over the company's minority stockholders). Unlike Plaintiff here, however, the plaintiffs in *Berteau* and *CBS* alleged particularized facts showing what actions the directors took to advance the controllers' interest to the detriment of the company. *See Berteau*, 2021 WL 2711678, at *16 n.135 (the complaint pleaded specific facts showing dual fiduciaries exerted pressure on the company's special committee in connection with a potential transaction between the controller and the company); *In re CBS Corp.,* 2021 WL 268779, at *40 (citing complaint's particularized factual allegations that board members concealed the controller's misconduct from the full board and complied with the controller's wishes to approve a merger transaction, all for the controller's benefit).

The Court of Chancery has also routinely considered demand futility allegations concerning dual fiduciaries under the existing *Zuckerberg* prongs. *See, e.g.*, *Mitchell P'rs, L.P. v. AMFI Corp.*, 2024 WL 3289389, at *2–3 (Del. Ch. July 3, 2024) (considering whether dual fiduciaries could consider a demand under *Zuckerberg*'s third prong); *IBEW Loc. Union 481 Defined Contribution Plan & Tr. ex rel. GoDaddy, Inc. v. Winborne*, 301 A.3d 596, 618 (Del. Ch. 2023) (same). Yet, the plaintiffs in those cases, unlike Plaintiff here, alleged particularized facts showing that the interests of the interested party and the company diverged or that the dual fiduciary took specific actions to advance the interested party's interest to the detriment of the company. *See Mitchell Partners*, 2024 WL 3289389, at *3 (complaint pleaded facts showing that the company's and its subsidiaries' interests were not aligned where the subsidiaries' purported ownership of certain company shares were a nonratable benefit for the subsidiaries at the expense of the company); *Winborne*, 301 A.3d at 607, 618 (complaint alleged facts showing how the dual fiduciary was chosen to negotiate against the company in a transaction between the interested party and the company).

Had Plaintiff included a *Caremark* (or "Controller *Caremark*") claim in her Amended Complaint, the Court of Chancery could have considered whether it established demand futility under *Zuckerberg*'s second prong. There is thus no need for this Court to modify *Zuckerberg* to accommodate a type of claim that is actually

not novel at all—much less does "the interest of justice so require" in light of Plaintiff's clear and intentional waiver. Supr. Ct. R. 8.

3. Even If The Court Considers Plaintiff's Waived *Caremark* Claim Under *Zuckerberg*'s Second Prong, Plaintiff Has Failed To Plead With Particularity That Half Of The Directors Breached Their Duty Of Loyalty

Even if the Court were to permit Plaintiff to now argue that the Amended Complaint includes a *Caremark* claim and were to consider whether it is adequately pleaded to excuse demand under existing law, the Amended Complaint was still properly dismissed.

A claim that demand is excused because directors face a substantial likelihood of personal liability is governed by *Zuckerberg*'s second prong. *Zuckerberg*, 262 A.3d at 1058. To establish demand futility under *Zuckerberg*'s second prong, Plaintiff must "plead with particularity facts that support a meritorious claim for breach of the duty of loyalty." *Sorenson*, 2021 WL 4593777, at *8 (citation omitted). Crucially, this Court's prevailing *Cornerstone* doctrine requires Plaintiff to plead more than just that the T-Mobile directors lack independence from DT – Plaintiff must also plead facts supporting a rational inference that the directors "acted to advance the self-interest" of DT. *In re Cornerstone Therapeutics Inc. S'holder Litig.*, 115 A.3d 1173, 1180 (Del. 2015); *see also Klein v. H.I.G. Cap., L.L.C.*, 2018 WL 6719717, at *18 (Del. Ch. Dec. 19, 2018) (dismissing breach of fiduciary duty claim against CEO of nominal defendant when "there simply are no facts alleged in

the Complaint specific to [the CEO] that indicate that he advanced [controlling stockholder's] self-interest as plaintiff theorizes").

While the Amended Complaint pleaded that half of the T-Mobile Board lacked independence—Plaintiff alleged that six of the T-Mobile board members were fiduciaries of DT, A305–10 ¶¶ 354–60—she did not allege ***any*** facts about what any director did or did not do to further DT's interests at T-Mobile's expense. Indeed, the Amended Complaint failed to plead any facts supporting her conclusory assertions that the T-Mobile directors caused T-Mobile to carry out a "conscious design decision" around "data and credential centralization" for DT's benefit or that this plan was "foisted upon [T-Mobile] by . . . DT." A184 ¶ 10. Simply alleging, without more, that the T-Mobile directors were dual fiduciaries, as Plaintiff did here, is not enough to state a breach of fiduciary claim against them. Thus, even if the Court considers Plaintiff's waived *Caremark* claims, the Amended Complaint would still fail to adequately plead demand futility under *Zuckerberg*'s second prong because Plaintiff did not plead with particularity that at least half of the directors faced a substantial likelihood of liability.

II. PLAINTIFF'S ARGUMENT THAT THE PLEADING STANDARD SHOULD BE RELAXED WHEN THERE ARE DUAL FIDUCIARIES IS ALSO WAIVED AND MERITLESS

A. Question Presented

Whether this Court should depart from decades of precedent to relax the applicable demand futility pleading standard where derivative claims are asserted against dual fiduciaries, despite the fact that Plaintiff did not argue for such a relaxed standard below.

B. Scope Of Review

Plaintiff did not argue before the Court of Chancery that the pleading standard for claims against dual fiduciaries in a conflicted controller situation should be relaxed, so the Court of Chancery did not address this argument. Again, therefore, that argument is waived. *See supra* Sections I.B and I.C.1 (arguments not made during the Court of Chancery's proceedings and brought for the first time on appeal are waived).

C. Merits Of The Argument

As with Plaintiff's "Controller *Caremark*" argument, her failure to make any argument below in favor of a new demand futility pleading standard for claims involving dual fiduciaries waives that argument here.

But even if the Court were to consider Plaintiff's argument, despite the fact that she has waived it, the argument still fundamentally fails both legally and on the pleadings.

The Court of Chancery has regularly considered whether dual fiduciaries would be able to impartially consider a litigation demand, and it has never applied or even discussed applying a relaxed standard. Even where half or more of a board lacks independence from an interested stockholder, establishing "a disabling conflict that excuses demand" requires more. *Chester Cnty. Emps'. Ret. Fund v. New Residential Inv. Corp*., 2016 WL 5865004, at *11 (Del. Ch. Oct. 7, 2016), *aff'd*, 186 A.3d 798 (Del. 2018) (ORDER). Specifically, "[the stockholder's] interest in the transaction must be material" and Plaintiff must allege that the directors acted "without regard to [the Company's] interests." *Id.* at *11–12.

Alleging merely that certain T-Mobile directors are dual fiduciaries is not sufficient to plead demand futility and cannot compensate for the Amended Complaint's many other pleading deficiencies. *See In re Walt Disney Co. Deriv. Litig.*, 731 A.2d 342, 357 (Del. Ch. 1998) (reasonable doubt about some directors' ability to act independently is "inconsequential" unless the allegedly dominating controller is itself interested in the challenged conduct), *aff'd in part, rev'd in part on other grounds sub nom. Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). In other cases, to satisfy demand futility, plaintiffs have had to allege a transaction where the corporate entities stood on both sides or where a controlling stockholder received a non-ratable benefit from the transaction, in either case presenting a conflict between the two entities to whom the "dual fiduciaries" owed duties. Op. at 15–16. As the

Court of Chancery correctly held below, Plaintiff's Amended Complaint contained no such well-pleaded allegations.

The pre-*Zuckerberg* holding in *Chester County* comports with cases applying the *Zuckerberg* test, which have held that demand was futile because, unlike here, plaintiff alleged that the dual fiduciaries *acted* to advance the stockholder's interest in an *actual transaction* in which the stockholder stood on both sides. *See, e.g.*, *Mitchell P'rs*, 2024 WL 3289389, at *3 (under *Zuckerberg*'s third prong, concluding that dual fiduciaries of the company and the company' subsidiaries could not impartially consider a litigation demand involving certain stock transactions where the company and its subsidiaries stood on opposite sides of those transactions); *Berteau*, 2021 WL 2711678, at *19, *27–28 (under *Zuckerberg*'s second prong, holding that dual fiduciaries could not impartially consider a demand involving a challenged buyout by a company's controller of the company's stocks).

The Court of Chancery held that, at most, Plaintiff pleaded facts showing that DT had a plan to centralize data for its *European* "NatCo" subsidiaries. However, Plaintiff failed to plead with particularity how DT instructed the T-Mobile directors to implement data centralization and data sharing, or how any T-Mobile director took any action to implement DT's alleged plan. Op. at 17–18. As the court below pointed out, "[t]he [Amended] Complaint fails to identify a *specific transaction* the

[B]oard undertook or a board action that adopted data centralization within T-Mobile." *Id.* at 16 (emphasis added).

As described above, established law requires plaintiffs claiming demand futility to allege facts showing that individual defendants—even those alleged to be "dual fiduciaries"—could not impartially consider a demand. Merely pointing to certain directors' dual-fiduciary status, in the absence of an actual transaction through which the dual fiduciaries might have advanced DT's interests, is insufficient under Delaware law and Plaintiff has offered no colorable reason to change existing law. Indeed, having failed to avail herself of the tools available under Delaware law to investigate potential derivative claims, like a Section 220 books and records demand, Plaintiff cannot now be heard to complain that established pleading standards are too onerous for her claims.[16]

[16] Plaintiff tries to excuse the fact that she did not even seek corporate books and records under Section 220 to determine whether there was any factual support for her theory, speculating that the documents would not have been useful here because there would be "no board minutes reflecting candid discussion" and "no internal e-mails or documents discussing the controller's business strategy at the controlled company." OB at 37. But that is pure conjecture, and cannot possibly be a justification for the failure to use Section 220 or to plead the necessary facts supporting a claim.

III. THE COURT OF CHANCERY CORRECTLY APPLIED *ZUCKERBERG*'S THIRD PRONG TO DISMISS PLAINTIFF'S SUIT

A. Question Presented

Whether the Court of Chancery correctly determined that Plaintiff failed to satisfy the third prong of the *Zuckerberg* test because she failed to plead particularized factual allegations demonstrating that DT obtained a material nonratable benefit from the alleged misconduct.

B. Scope Of Review

This Court reviews decisions dismissing complaints pursuant to Rule 23.1 *de novo*. *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004). Although well-pleaded allegations must be accepted as true, the Court will not "credit conclusory allegations that are not supported by specific facts or draw unreasonable inferences in the plaintiff's favor." *Norton*, 67 A.3d at 360.

C. Merits Of The Argument

Plaintiff's final argument – and the only argument Plaintiff makes on appeal that was not waived below – is that the Court of Chancery misapplied the third prong of the *Zuckerberg* test. That argument, too, is meritless. The Court of Chancery dismissed Plaintiff's suit under *Zuckerberg*'s third prong because, after drawing all reasonable inferences in Plaintiff's favor, it found that Plaintiff failed to show that DT "in fact accessed or received T-Mobile's customer data, resulting in a material

benefit to [DT] that would subject the Demand Board to a disabling conflict." Op. at 18. This decision correctly applied the law and should be affirmed.

To succeed under *Zuckerberg*'s third prong, Plaintiff had to show that DT received a "material personal benefit" from using T-Mobile's data in a way that left T-Mobile exposed to cyberattacks. As the Court of Chancery correctly held, while "[t]he [Amended] Complaint is replete with conclusory allegations that [DT] 'directed' T-Mobile to implement the 'sharing is caring' plan, [] the [Amended] Complaint fails to state with particularity (i) what actions [DT] undertook to execute the implementation, or even how its wishes were transmitted to the directors, and (ii) how [DT] benefited from such execution." Op. at 16. This easily failed the "material benefit" element of *Zuckerberg*'s third prong. *Id.* at 15. Indeed, the Court of Chancery not only found Plaintiff's theory unsupported but also to be implausible, explaining: "Plaintiff has not addressed why [DT], as 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." *Id.* at 19. Clearly, even if this Court were to entertain Plaintiff's new "Controller *Caremark*" theory, the "material benefit" requirement of *Zuckerberg* would still need to be satisfied, which the Amended Complaint has failed to do.

Plaintiff's arguments on appeal merely repeat the same errors and meritless points from her arguments before the Court of Chancery.

First, Plaintiff argues that the Court of Chancery erred by considering the "material personal benefit" requirement of *Zuckerberg*'s third prong separately from whether the T-Mobile directors were independent from DT, the controller, and that the Court of Chancery thereby "assumed away" the directors' lack of independence from DT. OB at 40–41. This argument is ultimately the same as Plaintiff's argument for lowering the pleading standard—that the directors' mere status as dual fiduciaries should somehow relieve Plaintiff of the obligation to plead particularized facts showing that DT received a material non-ratable benefit or that the directors did something to benefit DT at the expense of T-Mobile. And the argument fails for the same reasons. See *supra* Section II.C. The Court of Chancery expressly considered Plaintiff's argument that certain directors lacked independence from DT (including Plaintiff's argument that "the CEO of [DT] sits on the T-Mobile [B]oard"), and concluded that "Plaintiff has failed to state what specific actions this director or any other director took to implement the plan." Op. at 18.

Second, Plaintiff argues that the Court of Chancery erred by failing to give Plaintiff "all reasonable inferences that logically flow from the well pleaded factual allegations" in the Amended Complaint. OB at 41–43 (citing *In re Match Gp., Inc. Deriv. Litig.*, 315 A.3d 446, 458 (Del. 2024)). This argument is makeweight. The Court of Chancery acknowledged that even though "a plaintiff must plead facts with particularity, she is still entitled to the benefit of all reasonable inferences and the

Court must accept as true all particularized and well-pled allegations contained in the complaint." Op. at 12. But still, the Court explained, "[t]he reasonable inferences 'must logically flow from particularized facts alleged by the plaintiff.'" *Id.*

The Amended Complaint, however, does not plead facts from which any reasonable inferences logically flow. Having not sought books and records under Section 220, Plaintiff relied in her pleadings entirely on public documents. But as the Court of Chancery rightly concluded, "[t]he public presentations utilized by Plaintiff do not suggest that [DT] directed T-Mobile to centralize data nor mention that [DT] participated in mining T-Mobile's data." Op. at 17. Specifically, Plaintiff relied on YouTube videos of two public presentations given by a former DT employee, Susan Wegner, one in 2016 and one in 2018.[17] Drawing all reasonable inferences in Plaintiff's favor, the Court of Chancery found that these videos at most show DT's intent to centralize data at its European "NatCo" subsidiaries, and do not show any plan related to T-Mobile, much less its implementation. Op. at 17–18. Indeed, the presentations, which were given in 2016 and 2018 by the former DT

[17] SAIConference, *Susan Wegner (Deutsche Telekom) - Future Analytics and Big Data*, YouTube (Aug. 4, 2016), https://www.youtube.com/watch?v=Ja_ppVW3jgg; *Digital Wanderlust, Digital Wanderlust #1: How to climb the data summit by Dr.-Ing. Susan Wegner (Full Talk)*, YouTube (Jul. 6, 2018), https://www.youtube.com/watch?v=BQiWLmqMAns.

employee, do not mention T-Mobile even once.[18] Furthermore, Plaintiff alleged no facts, and the presentations do not show, that DT was committed to data-sharing at all costs or willing to compromise data security as a result. Thus, as the Court of Chancery concluded, "[i]n sum, these presentations in combination show [DT]'s intent to centralize data, but fail to provide a particularized allegation that [DT] directed T-Mobile to centralize its data, allowing [DT] to monetize T-Mobile's data, and directing the board to disregard the (allegedly) manifest risk." *Id.*

Plaintiff faults the Court of Chancery for giving "no weight to DT's own statements . . . that it was implementing [the 'sharing is caring' program] to achieve a 40-60% cost savings for its global conglomerate." OB at 43. But the Court of Chancery did consider these statements, including during the oral argument, and the Court of Chancery correctly recognized that there was no reason to conclude that the alleged 40-60% cost savings, if they existed and related to T-Mobile's data at all, represented a benefit that accrued exclusively to DT at T-Mobile's expense. A489 at 43:15–17 ("[B]ut I don't understand why [the alleged cost savings] wouldn't apply

[18] *Id.* Plaintiff also mischaracterized a single slide from a 2018 DT Supervisory Board Meeting presentation as evidence that DT viewed the United States (home of DT's largest telecommunications affiliate, T-Mobile) as uniquely important to its data centralization efforts." A407 at 32. However, that slide simply states a view that overall, the U.S. telecommunications market was more attractive for investment than the European markets.

to T-Mobile centralizing its data."). The allegation about "40-60% cost savings" came from the YouTube video of Susan Wegner's 2018 presentation. That source does not even mention T-Mobile; it only states that a shared development strategy involving the European NatCos could result in cost savings for individual data projects of 40-60%.[19] Nothing in the Amended Complaint supported a conclusion that DT alone would receive that benefit, as opposed to the alleged entity actually implementing the data project, which Plaintiff posited (with no factual support) included T-Mobile.

The other public documents that Plaintiff relied on in the Amended Complaint only reinforce how Plaintiff's theory came up short. As described *supra* at 15–17, Plaintiff's sweeping assertions that T-Mobile launched a company-wide data-centralization strategy were based entirely on three blog posts and one YouTube video that have nothing to do with Plaintiff's theory. Those public sources relate to discrete customer-care and open source "micro service" software projects that T-Mobile employees developed. They make clear that these discrete T-Mobile projects were developed from the ground up, as opposed to implementations of existing tools

[19] *Digital Wanderlust, Digital Wanderlust #1: How to climb the data summit by Dr.-Ing. Susan Wegner (Full Talk)*, YouTube (Jul. 6, 2018), https://www.youtube.com/watch?v=BQiWLmqMAns.

developed by DT, and were small, individual open-source projects that had nothing to do with any T-Mobile company-wide practices. A346–47 13–14.[20]

Finally, while the Court of Chancery did not need to reach this point, the Amended Complaint also failed to plead facts linking any of the purported conduct to harm to T-Mobile. Plaintiff's contention that T-Mobile's data-centralization caused the cyberattacks was not well-pleaded. Plaintiff's theory is that T-Mobile created a single point of entry to the centralized data, which she contended made T-Mobile vulnerable to the cyberattacks. A233 ¶ 139, A236 ¶ 148, A244 ¶ 174, A246 ¶ 179, A249–51 ¶¶ 191–96. Plaintiff did not plead facts showing that T-Mobile actually did any of these things, but even if Plaintiff had pleaded such facts, Plaintiff more fundamentally failed to allege with particularity that this data-centralization actually enabled hackers to carry out their cyberattacks on T-Mobile.

[20] Plaintiff argues that the inference that T-Mobile implemented DT's data-sharing mandate was so "logical" that Vice Chancellor Glasscock stated at the oral argument that T-Mobile had done such an implementation. OB at 42–43, citing A502 at 56:18–19. That conclusion takes Vice Chancellor Glasscock's comment out of context: The point he made was that T-Mobile may have centralized certain of its data for a "cost-savings business reason for T-Mobile" and there was no reason to think it was for DT's exclusive benefits.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Court of Chancery dismissing the Amended Complaint with prejudice.

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Date: September 30, 2024