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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 REPLY 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

Dated: October 15, 2024

CHRISTENSEN LAW LLC

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

Counsel for Plaintiff Below, Appellant Jenna Harper

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INTRODUCTION

Defendants-Appellee's Answering Brief is premised on the notion that this case must meet the traditional *Caremark* standard or must fail. From that premise, Defendants make a series of arguments, all of which should be rejected—and some of which highlight the need for guidance to the Court of Chancery about an important ambiguity in the law arising from the recently-adopted *Zuckerberg* test for demand futility. As to the third prong of Zuckerberg, Defendants offer only factual arguments requiring inferences exclusively in their favor (and against Plaintiffs) to support the erroneous analysis of the Court below.

I.A. Defendants argue that the Controller *Caremark* question raised here on appeal—*i.e.*, whether the *Zuckerberg* test should be clarified as to its application to *Caremark*-like conduct involving a controlling shareholder or a dual fiduciary beholden to a controlling shareholder—was not raised below and is thus waived. Defendants' argument is not supported by the record. The question of whether this case fits within the *Zuckerberg* standard's articulation of the *Caremark* standard was expressly raised with the Court below and the issue was a central part of the Court's decision and order. Moreover, the question is reviewable because it is one of first impression that raises important questions of law.

B. Defendants' argument that cases such as this one can be adequately addressed under the existing *Caremark* standard also only highlights the need for

this Court to revise or clarify the *Zuckerberg* test. Specifically, the very cases Defendants cite in support of their argument demonstrate that the test as to dual fiduciaries of a controlling shareholder is ambiguous post-*Zuckerberg*, which has caused courts (including the Court below) to split on the applicable test—namely, whether a demand board member's dual fiduciary role with respect to an interested third-party or controller ends the demand futility inquiry. This was the state of the law under the first prong of the *Aronson* test before *Zuckerberg* was decided, but the Court's adoption of *Zuckerberg* has ambiguously left that aspect of *Aronson* implicitly good law, requiring guidance to the Court of Chancery.

C. Defendants say little as to Plaintiff's argument that where dual fiduciaries of a controller sit on the board of a company, the pleading standard should be relaxed. That is, Defendants do not provide an answer to the practical problems posed by such situations, including that no communications will be generated between the dual fiduciary running the controlling company and the company itself. The dual fiduciary manages the company according to the will of the controller directly. As such, the Court should not have faulted Plaintiff for not making a pre-litigation demand for books and records under Section 220, nor should the Court have required specific information about each director's actual conduct and state of mind.

II. As to whether the Court below erred when it held that Plaintiff had failed to allege a material non-ratable benefit to Deutsche Telekom ("DT"), Defendants

merely repeat the Court's factual assertions about the allegations, then add their own factual arguments about what the evidence underlying the allegations should in their view mean. Defendants do not explain why DT's own statements—in its own internal presentations—that it sought and obtained a 40-60% cost savings for the global conglomerate by training ML/AI models at T-Mobile should not be credited. Defendants also have no answer for the Court's failure to consider the allegations that the dual fiduciaries on T-Mobile's board were directly involved in formulating and deploying DT's mandate to centralize data and credentials across NatCos, including T-Mobile.

At bottom, Defendants' Answering Brief makes clear that the Court's decision dismissing the Complaint was incorrect and should be reversed.

ARGUMENT

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

A. Defendants' Preservation Argument Is Meritless

Defendants rest a substantial portion of their Answering Brief on the premise that the Controller *Caremark* question was not raised below and is thus waived. Appellee's Answering Brief ("AB") at 23-25. This is demonstrably false. A question is preserved for appeal if it is "fairly presented to the trial court" or "the interests of justice" require consideration on appeal. Supr. Ct. R. 8. Defendants' argument does not meet the standard for waiver because the issue was squarely and repeatedly raised below—and it is not a close call.

To begin with, the question of whether the facts here fit within the *Caremark* standard as articulated by the second prong of the *Zuckerberg* test was directly addressed by the Court below as part of its opinion. Op. at 13. As the Court explained, it viewed the facts presented here to be a "new species" but concluded that it "appears to be a member of the genus *Caremark*." *Id.* The Court then erred by applying the searching pleading requirements of a traditional *Caremark* case to the facts here, Op. at 30-34—the very standard that Plaintiff argued fails to encompass this sort of case where the directors are dual fiduciaries of a controlling shareholder.

Moreover, the question of whether the facts here fit within the *Caremark* standard as articulated by the *Zuckerberg* test was expressly before the Court. For

example, at oral argument, Plaintiff's counsel and the Court grappled with the very issue presented here on appeal. Indeed, Defendants selectively quote a portion of the oral argument transcript where Plaintiff's counsel states that this is not a "*Caremark*" case, AB at 24, but omit the paragraphs that followed raising the precise question on appeal. Here is the remainder of the exchange (with omissions only for brevity):

> THE COURT: Okay. And before you begin, can you—and maybe I know the answer to this, but I'm not sure. Is this a *Caremark* oversight type claim, or is it just a straight-up disloyalty/shifting of a benefit to the corporate controller?
>
> ATTORNEY BATHAEE: Your Honor, it's not a *Caremark* case. This is a pretty standard case of a controller obtaining a nonratable benefit from the company.
>
> THE COURT: Okay.
>
> ATTORNEY BATHAEE: And there are other distinctions that are important here which I think take it out of the typical analysis of *Caremark*. . . . The analysis is typically under prong one and two in a *Caremark* case.
>
> You're looking at whether they implemented systems and controls, whether it's a conscious failure. And the reason you do that is because these board members are typically exculpated; there's no evidence they did anything wrong, and you want to show they're so reckless they must have breached their fiduciary duty.
>
> But here you have the CEO of Deutsche Telekom sitting on the board of directors of T-Mobile; the CFO; the chief product—the chief of products sitting on Deutsche Telekom's board. And I can go on. . . .

A478-80.

Later in that exchange, Plaintiff's counsel again expressly raised the crux of the question presented here:

> THE COURT: What I'm trying to understand is what action did the board take that was wrongful? Did they just resolve in some way to aggregate data, or was that just something that was below the board level?
>
> ATTORNEY BATHAEE: I think Your Honor may have hit the point during my friend's argument. They didn't do anything specifically. They let it happen because they—it was in their benefit to. It was to the benefit of the company they worked for at the same time to let it happen.
>
> And in that sense, it does resemble a *Caremark* case, because you're looking at sort of this gross recklessness while they're sitting on the board. And the CEO's sued too.

A481. And indeed, the question of how *Caremark* should apply to dual fiduciaries was raised again and again. *See, e.g.*, *id.* ("When you're the CEO of Deutsche Telekom sitting on the T-Mobile board, the fact that you let that happen is disloyal. You're a dual fiduciary. Which hat is the CEO of Deutsche Telekom wearing when he's sitting on that board? Does he take one off and put the other on?"); A517-18 ("And that's what, I think, differentiates this case from a typical *Caremark* case. Typical *Caremark* case, the poor board member, you have no idea what he did. We can't infer that he was doing something bad or disloyal. That's not here, Your Honor. Seven of them were collecting a paycheck from Deutsche Telekom. Some of them were running Deutsche Telekom. The CFO, the CEO, the head of product are sitting on the board. How can—there's no reasonable doubt that they can pass on demand,

you know, fairly, and impartially. Of course there is. It's not a close question, Your Honor."); A525 ("These people, who do they work for when they sit on the board? Which fiduciary duty are they breaching?").

These arguments expressly raise the Controller *Caremark* question presented and do so well beyond the "fairly presented" standard under Rule 8, which requires only that the "broader issue" be presented below. *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 382-83 (Del. 2014); *see also Mundy v. Holden*, 204 A.2d 83, 85 (Del. 1964) (while litigant generally may not raise an "entirely new theory of his case" on appeal, reviewing court should consider argument that is "an additional reason in support of a proposition urged below"); *Kerbs v. Cal. E. Airways*, 90 A.2d 652, 659 (Del. 1952) (same). Indeed, even the subsidiary issues raised here as part of the Controller *Caremark* question were either raised in the trial court or formed the basis of the Court's decision. *See, e.g.*, Op. at 16 (faulting Plaintiff for not making a Section 220 demand of dual-fiduciary-controlled board prior to suit); A475 (same); Op. at 16 (applying traditional *Caremark* standard to dual fiduciaries occupying board, including by requiring allegations as to how DT's "wishes were transmitted to directors" and the identification of a "specific transaction the board undertook").

In any event, even if Defendants are correct about what was raised below—and they are not—this case cries out for guidance to the Court of Chancery as to the

application of the newly-adopted *Zuckerberg* test. *See* § I.B, *infra*. Indeed, the Court below recognized that it was a "new species" that did not neatly fit within the *Caremark* standard—and struggled with the very mismatch between the *Zuckerberg* test and the facts of this case that is raised in this appeal. Such a question fits well within the "interests of justice" prong of Rule 8. *See McBride v. State*, 477 A.2d 174, 184 (Del. 1984) ("However, as the question of the effect of the 1977 amendment is one of first impression, we will waive Rule 8 in the interests of justice to provide guidance to the trial courts and future litigants concerning the burden and degree of proof necessary to secure a change of venue."); *see, e.g.*, *Culver v. Bennett*, 588 A.2d 1094, 1098 (Del. 1991) (considering issues presented for first time on appeal where case "present[ed] questions of first impression concerning the proper construction of Delaware's modified comparative negligence statute").

At bottom, Defendants' treat this case as a traditional *Caremark* case, but then point to statements in the record stating that it does not fit within that standard as some supposed waiver. That short-circuits the very question raised on appeal—whether *Caremark*, as it is articulated in the *Zuckerberg* test, should be clarified or modified to address facts unique to controlling shareholders and dual fiduciaries that fail or refuse to act in the company's best interest. As for statements below that this case nonetheless fits within prong three of the *Zuckerberg* test, that is entirely unremarkable, as it is the same argument Plaintiff makes on appeal here, *see* § II,

infra. There is nothing inconsistent between the Controller *Caremark* argument and the argument that the facts alleged here easily establish demand futility under prong three of the *Zuckerberg* test.

B. Defendants' Arguments Highlight Why the *Zuckerberg* Test Should Be Clarified or Modified to Address Cases Such as This One

Defendants make several arguments as to why they believe this Court need not address the Controller *Caremark* question. However, each argument is based on incorrect assertions either about the cited cases or the question presented.

First, Defendants point to Court of Chancery cases involving dual fiduciaries for the premise that the existing *Zuckerberg* test adequately addresses the facts presented here. AB at 29. Defendants' argument is misplaced. Each cited case addressed dual fiduciaries under *Zuckerberg*'s third prong, not under the *Caremark* standard as articulated in prongs one and two, or simply deemed demand futile as to dual fiduciaries because of their interest in the subject of the litigation. *See Mitchell Partners, L.P. v. AMFI Corp.*, 2024 WL 3289389, at *2-3 (Del. Ch. July 3, 2014) ("Here, Mitchell Partners' strongest argument is under the third prong of *Zuckerberg*—that [the board members] lacked independence from the Subsidiary Defendants, and that the Subsidiary Defendants received material benefit from the alleged misconduct that would be the subject of the litigation demand."); *IBEW Loc. Union 481 Defined Contribution Plan & Tr. ex. rel. GoDaddy, Inc. v. Winborne*

("IBEW"), 301 A.3d 596, 618 (Del. Ch. 2023) ("Two of the directors are readily disqualified. Wittlinger was a dual fiduciary for the Company and Silver Lake, a party interested in the TRA Buyout, so he is not independent.").

Mitchell Partners, which Defendants cite in their brief, illustrates the very point Plaintiff makes on appeal—that dual fiduciaries of a controlling shareholder cannot possibly pass impartially on demand futility. And, more germane to Defendants' argument, shows that the new *Zuckerberg* test requires clarification. In *Mitchell Partners*, the company failed to disclose the issuance of a class of shares issued to its subsidiaries as part of a reverse stock split. 2024 WL 3289389, at *1. The court addressed board members that were dual fiduciaries of the company and the subsidiaries that received the undisclosed stock. The court explained:

> Yancy, Hess, and Harrison are directors of both AMFI and the Subsidiary Defendants. They therefore owe fiduciary obligations to both AMFI and the Subsidiary Defendants. ***A dual fiduciary is conflicted for demand purposes where the dual beneficiaries' interests are not aligned.*** AMFI and the Subsidiary Defendants' interests were not aligned for the purposes of the challenged transactions. For that reason, Yancy, Hess, and Harrison face a conflict in exercising their duties as directors of AMFI that renders demand futile as to those directors.

Id. at *3 (emphasis added). The *Mitchell Partners* court did not—as the Court below did—attempt to fit the dual fiduciary question into the rubric of the *Caremark* standard as articulated in the first and second prongs of *Zuckerberg*. *See, e.g.*, Op. at 16.

Notably, *Mitchell Partners* highlighted the precise ambiguity raised on the appeal here—whether the dual fiduciary role of the board members is enough to end the inquiry or whether those board members must also be addressed under the "material benefit" standard in the third prong of *Zuckerberg*:

> Analytically, one approach would be to conclude that the lack-of-alignment discussion eclipses or subsumes the question of whether the benefit was material to the counterparty—here, the Subsidiary Defendants.

2024 WL 3289389, at *3. After noting the ambiguity in the standard, the court went on to address allegations of material benefit. *Id.* Because the subsidiaries were alleged to have received millions of dollars of stock, the court did not have to resolve the ambiguity. *Id.*

Here, in contrast, the allegations are that dual fiduciaries of a controlling shareholder and the company allowed the company to implement a reckless data aggregation and centralization program mandated by the controller—which served the interests of the controller and harmed the company. Op. at 9. The dual fiduciary roles of the board members that must decide the litigation demand question should suffice to end the demand futility inquiry, but the Court below nonetheless applied not only the "material benefit" standard in *Zuckerberg's* third prong, but also the *Caremark* standard applicable to cases in which there is no direct reason to believe a director cannot exercise business judgment while passing on a litigation demand—namely, requiring individual evidence as to what was communicated to each board

member and their affirmative role in the company's alleged series of actions, *see, e.g.*, Op. at 16. Indeed, Defendants conceded that a majority of the demand board was beholden to DT and lacked independence, and the Court accepted that undisputed fact. Op. at 14. The dual fiduciary roles of a majority of the demand board members should have ended the demand futility inquiry, as it is implausible that these DT executives on T-Mobile's board could exercise sound business judgment in a decision to sue the company concerning the conduct of a controlling shareholder they themselves managed.

It is surprising that Defendants would cite this case in support of their argument that *Zuckerberg's* existing articulation of *Caremark* already addresses this case. *Mitchell Partners* is an example of the Court of Chancery struggling with the very question presented here on appeal.

As for *IBEW*, that decision split directly with the Court below by outright disqualifying dual fiduciaries as capable of exercising business judgment in evaluating a litigation demand. *Id.* at 618. In other words, not only is there ambiguity among the Court of Chancery on the issue presented, but there is a ***split*** in how such cases are decided. Put simply, Defendants' cited cases do not support the argument that there is nothing to address; rather, they demonstrate the importance of clarifying *Zuckerberg* under the facts presented here.

Defendants next assert that Plaintiff's appeal in reality raises the question of whether there should be a "safety valve" for cases that do not meet the *Caremark* standard, which Defendants argue is not a novel question at all. AB at 26 n.15. Not only is this point incorrect, but it reveals what the *Zuckerberg* test failed to address when it synthesized and revised the then-existing *Rales v. Blasband*, 634 A.2d 927 (Del. 1993), and *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), standards. Specifically, Defendants cite *Guttman v. Huang*, 823 A.2d 492 (Del. Ch. 2003), as their leading case on this point. There, the court's "safety valve" discussion addressed the "***second*** *Aronson* prong," *id.* at 500 (emphasis added), which involves a transaction that "was otherwise the product of a valid exercise of business judgment," *Aronson*, 473 A.2d at 814-15 (Del. 1984). Defendants' argument is nothing more than an assumption that this case is about a context wherein the directors' conduct is an exercise of valid business judgment (again, a traditional *Caremark* case), which assumes away the question on appeal entirely.

More importantly to this appeal, Defendants' argument ignores that first part of the *Aronson*, which this Court did not incorporate into the unified *Zuckerberg* standard. The Aronson test deemed an interested director, such as dual fiduciary beholden to an interested controller, to be incapable of deciding a litigation demand, and then ceased the demand futility inquiry altogether, never reaching the second

prong (which is now subsumed within the second prong of the *Zuckerberg* test). *Id.* at 815. As *Aronson* explained:

> As to the former inquiry, directorial independence and disinterestedness, the court reviews the factual allegations to decide whether they raise a reasonable doubt, as a threshold matter, that the protections of the business judgment rule are available to the board. Certainly, if this is an "interested" director transaction, such that the business judgment rule is inapplicable to the board majority approving the transaction, then the inquiry ceases. In that event futility of demand has been established by an objective or subjective standard.

Id.

This Court in *Zuckerberg* parted ways with *Aronson* to the extent it held that the mere application of the entire fairness standard was sufficient to establish demand futility. *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg* ("*Zuckerberg*"), 262 A.3d 1034, 1058-59 (Del. 2021) (*Aronson* depends on "the notion that an elevated standard of review standing alone results in a substantial likelihood of liability sufficient to excuse demand. Perhaps the time has come to move on from Aronson entirely.").

As the Court explained, the "purpose of the demand futility analysis is to assess whether the board should be deprived of its decision-making authority because there is reason to doubt that the directors would be able to bring their impartial business judgment to bear on a litigation demand." *Zuckerberg*, 262 A.3d at 1059. The Court explained that this is "a different consideration than whether the

derivative claim is strong or weak because the challenged transaction is likely to pass or fail the applicable standard of review." *Id.* In adopting the three-part test, however, the Court discarded the entirety of the first-prong analysis of *Aronson*, even though it addressed two distinct situations: (1) the situation addressed by *Zuckerberg*, where the standard of review by itself would have rendered demand futile, and (2) where a majority of directors are "interested" in a transaction, *see Aronson*, 473 A.2d at 815.

This creates ambiguity in cases such as this one, where the second situation is at issue—that is, dual fiduciaries beholden to a controlling shareholder are being asked to pass on a litigation demand.[1] In other words, Defendants' own argument demonstrates that the new *Zuckerberg* universal test has created a gap between the second and third prongs that the *Aronson* test had filled for years. This gap can be addressed by clarifying that a dual fiduciary beholden to a controlling shareholder

[1] The ambiguity is particularly significant given the *Zuckerberg* Court's statement that it was not otherwise overruling *Aronson* and *Rales*. *Zuckerberg*, 262 A.3d at 1059 ("Finally, because the three-part test is consistent with and enhances *Aronson*, *Rales*, and their progeny, the Court need not overrule *Aronson* to adopt this refined test, and cases properly construing *Aronson*, *Rales*, and their progeny remain good law."). Indeed, the *Zuckerberg* Court only overruled the first prong of Aronson to the extent it deemed demand futile simply because of the applicability of the entire fairness standard. *See id.* at 1058-59. This Court can resolve the ambiguity posed by Controller *Caremark* cases by making clear that the first prong of *Aronson* continues to apply and would end the demand futility inquiry once a majority of the demand board is alleged to have been dual fiduciaries or beholden to a controlling shareholder interested in the subject of the litigation.

cannot exercise business judgment about whether to commence litigation in which the controller has an interest. The divided loyalty of a director has always been sufficient to disqualify him from passing on a litigation demand—certainly, where, as here, the director simultaneously works as an executive managing the controlling company. *See Aronson*, 473 A.2d at 815; *cf. Stone v. Ritter*, 911 A.2d 362, 372 (Del. 2006) (a director cannot act in good faith if he acts with a "purpose other than that of advancing the best interest of the corporation" (quoting *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006)); *see also* OB at 26-30.

C. Defendants Do Not Meaningfully Address the Pleading Difficulties Unique to Controller *Caremark* Cases Involving Dual Fiduciaries

Defendants have little to say about Plaintiff's argument in her opening brief that Controller *Caremark* cases involving dual fiduciaries present unique pleading burdens that should be relaxed. OB at 34-38. Indeed, the facts here make clear that it is unlikely that e-mails or documents were transmitted from DT executives to themselves in their capacity as T-Mobile directors. *Id.* at 37. Rather, the commonsense conclusion is that senior DT executives, such as DT's CEO and CFO, directly executed DT's strategy while sitting on the board. *Id.* Nothing would need to be communicated. *Id.* As such, the Court below erred by faulting Plaintiff for failing to make a Section 220 demand for books and records, and further erred by requiring evidence as to what each individual dual fiduciary did while on the board to plead demand futility. *See id.*

Defendants do not explain why documents from T-Mobile (rather than the DT documents pleaded with particularity in the Complaint, *see* OB at 8-16) would be useful or required to plead demand futility in dual fiduciary cases involving a controller. Instead, Defendants dismiss these arguments as "pure conjecture" and conclude that this unique pleading burden "cannot possibly be a justification for the failure to use Section 220 or plead the necessary facts supporting a claim." AB at 35 n.35. This is not at all responsive to the question presented on appeal.

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

Defendants' entire argument as to the third prong of the *Zuckerberg* test is a series of factual, acrobatic maneuvers to contradict the highly particularized facts pleaded in the Complaint, including about the technological issues that led to the company's repeated data breaches and hundreds of millions of dollars of loss. AB at 11-17, 38-42.

Indeed, Defendants cherry-pick parts of the Complaint, act as though their selected sources of evidence are the entirety of the allegations in the Complaint, and dismisses them merely as "three blog posts and one YouTube video that have nothing to do with Plaintiff's theory." AB at 15, 39. Defendants ask this Court to ignore detailed allegations about the technology itself, including the direct match between DT's mandate and T-Mobile's implementation of data and credential centralization systems, asserting that the facts pertain only to "discrete customer care" or to "open source 'micro service' software projects." AB at 16, 39, 41. The identity between the tools mandated by DT and those used at T-Mobile are, according to Defendants, "developed from the ground up." AB at 41. Defendants say this Court should, as a matter of law, take their word for it that the technology alleged with particularity in the Complaint—which was a direct implementation of DT's mandate down to the technical level—"had nothing to do with any T-Mobile company-wide practices." *Id*

at 41-42. All of this is factual argument—supported by pure *ipse dixit*—that directly contradicts the well-pleaded allegations in the Complaint.

To arrive at Defendants' factual conclusions, the Court would have to give Defendants every inference and Plaintiff none—which is in part why the Court's decision below should be reversed. OB at 39-44. All Defendants have to say is that no inference at all is justified because the Complaint supposedly "does not plead facts from which any reasonable inferences logically flow." AB at 39. This circular argument is followed only by repeating the Court's observation that no Section 220 demand had been made. *Id.* None of this explains why the Court was possibly correct to allow no factual inferences as to the question of material benefit or why its factual arguments contradicting the Complaint should be credited without discovery or a trial.

Defendants also argue that the Court did not err by ignoring the dual fiduciary roles played by DT's board when it evaluated the question of "material personal benefit" because the argument is supposedly a repeat of the request to lower the pleading standard for dual fiduciary cases. AB at 38. Not so. The dual fiduciary roles of the board have independent evidentiary value as to the question of material personal benefit. For example, Dr. Susan Wegner at DT, who created and rolled out the data sharing and centralization mandate to T-Mobile and other NatCos, reported directly to the very same DT executives that simultaneously sat on T-Mobile's board.

OB at 8 (citing A201 ¶ 61 & A202-03 ¶ 67). That T-Mobile implemented precisely what DT had described in its board presentations to the very executives sitting on T-Mobile's board is evidence that T-Mobile's board was beholden to DT and did not in fact put the company's interests first.

As for statements made in DT's presentations stating that they received a direct benefit from the data and credential centralization mandate, Defendants have nothing to say at all about why the Court's refusal to credit those factual allegations was correct. Indeed, DT's presentations outright state that DT was imposing its data and credential centralization mandate to obtain a 40-60% benefit to DT—a benefit inuring to the benefit of its global conglomerate, which operated in countries with more stringent data protection laws. *See* OB at 43. This is definitionally a non-ratable benefit to DT at the expense of T-Mobile's shareholders. *See id.* Defendants' only argument in their brief is to make factual arguments about the presentation in which the assertion is made, including about whether the presentation referred to only European NatCos and therefore inexplicably (and supposedly *sub silentio*) excluded T-Mobile from its ambit. AB at 12-13, 34. These highly factual (and disputed) arguments, even if credited, do not explain why the Court refused to accept DT's own statement as to what material benefit it sought and in fact received from its mandate.

The supposed coup de grâce of Defendants' argument is an outright denial that any of the pleaded allegations even happened. AB at 42. Defendants ask this Court to ignore all of the factual allegations in the Complaint, including that T-Mobile board members, such as DT's CEO, worked directly with Wegner at DT to devise the data and credential centralization plan, A202-03; that DT's T-Labs was rolling out AI-driven products and needed trained models from a large source of data, A234 ¶ 142; that DT's management ran into regulatory problems in the EU and looked to the United States for its lax data privacy regulation to train ML/AI models, A204-06 ¶ 73-75; that DT rolled out detailed requirements for data and credential centralization across all of its NatCos in 2018, including a so-called "app store" for data, A216 ¶ 96; that T-Mobile created test servers and implemented precisely the specifications set forth by DT and did so at exactly the time Wegner and DT mandated it across NatCos, A233 ¶ 139, A292 ¶ 307; that T-Mobile used the exact unusual tools used by Wegner and T-Labs in its implementation, *id.*; that T-Mobile implemented a system called qAPI, which was a precise implementation of the T-Labs credential centralization, data lake, and API specification, A215-16 ¶ 94; that the hacker who broke into T-Mobile described and exploited precisely the credential and data centralization mandated by DT for NatCos, A270-72 ¶¶ 254-58. According to Defendants, all of this should be disregarded because they say—with no support

at all—that nothing happened here. This flippant and unsupported factual denial cogently highlights why the Court's decision below should be reversed.

Indeed, the facts so overwhelmingly support T-Mobile's implementation of DT's mandate that the Court below observed (when shown the mandated technical specifications next to T-Mobile's qAPI) that "it's clear that they [T-Mobile] implemented it [DT's centralization mandate]." A502. Defendants argue that the Court nonetheless was correct to dismiss the Complaint because the implementation was not for the "exclusive benefit[]" of DT, AB at 42 n.20, but that is a false construct. All that has ever been required is a non-ratable, material benefit to DT for its receipt of the benefit to be presumptively suspect under the entire fairness standard. *See In re Sears Hometown & Outlet Stores, Inc. Stockholder Litig.*, 309 A.3d 474, 514 (Del. Ch. 2024) ("Since 1994, Delaware law has deemed the business judgment rule rebutted and applied the entire fairness test *ab initio* to any transaction between the corporation and a controlling stockholder in which the controller receives a non-ratable benefit."). Neither *Zuckerberg* nor any predecessor line of cases requires an ***exclusive*** material benefit. *Zuckerberg*, 262 A.3d at 1059. To the extent Defendants contend that the Court below based its decision on such a standard, that legal error alone would require reversal.

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 LAW LLC

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

Counsel for Plaintiff Below, Appellant Jenna Harper

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