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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE THE TRADE DESK, INC. DERIVATIVE LITIGATION	Case No. 114, 2025 On appeal from the Court of Chancery of the State of Delaware, Consol. C.A. No. 2022-0461-PAF **PUBLIC VERSION FILED MAY 14, 2025**

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NATURE OF PROCEEDINGS

This derivative action on behalf of Trade Desk, Inc. ("**Trade Desk**" or the "**Company**") asserts claims for breach of fiduciary duty and unjust enrichment against the Company's controlling stockholder and certain members of Trade Desk's board of directors ("**Board**") in connection with a facially excessive stock option award (the **"Mega Grant"**) to the Company's controlling stockholder, co-founder, Chairman, and President/CEO resulting from an unfair process.

Plaintiffs' Complaint,[1] based on the Company's books and records, details how Green orchestrated and controlled the process to secure his Mega Grant. The Complaint specifically alleges how a majority of the directors who approved the Mega Grant lack independence from Green through their personal and financial ties, and operated under a "controlled mindset" by allowing him to dominate the process. These directors face a substantial likelihood of a liability for capitulating to Green and approving the Mega Grant, which had no genuine benefit to the Company. Notwithstanding, the Trial Court dismissed the Complaint under Court of Chancery Rule 23.1. *See* Memorandum Opinion dated February 14, 2025 ("**Opinion**"), Ex. A; Exs. B-C. For these reasons discussed herein, that decision should be reversed.

[1] A0027, Verified Amended and Consolidated Stockholder Derivative Complaint (Trans. ID 68372748) ("Complaint" or "¶__").

SUMMARY OF ARGUMENT

1. Dismissal under Court of Chancery Rule 23.1 was not warranted. Considering the allegations holistically and drawing reasonable inferences in Plaintiffs' favor, Plaintiffs adequately plead that demand is excused as to a majority of the relevant Board under *UFCW & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034 (Del. 2021) ("*Zuckerberg II*").

STATEMENT OF FACTS

Trade Desk, co-founded in 2009 by Green and Pickles, was incorporated in Delaware when the Complaint was filed, but has since reincorporated in Nevada.[2]

A. Green Controls Trade Desk

Green is the co-founder, President/CEO and Chairman of Trade Desk.[3] The Company's dual-class stock structure (ten votes per Class B share to one per Class A share) gives him 50% of the total voting power despite his minority economic stake.[4] Trade Desk acknowledges that Green has "substantial control over [the] Company" and is "able to influence or control matters requiring approval by [Trade Desk's] stockholders, including the election of the directors."[5]

Trade Desk's Charter cements Green's control through provisions making it "difficult for stockholders" other than Green to "take [] corporate actions, including effecting changes in [] management."[6] Green's voting power ensures no director can

[2] A0035, A0036, ¶¶17, 25. Opinion at 2.

[3] A0035 A0036, ¶¶18, 27.

[4] A0038-A0042, ¶¶30-39.

[5] A0042, ¶¶40-41.

[6] A0043, ¶42.

be elected or removed without his approval and lets him block amendments to the Charter or Bylaws.[7]

In 2020, Green extended his control for another five years by orchestrating a Charter amendment (the **"Trigger Amendment**") to delay the automatic conversion of super-voting Class B shares to ordinary Class A shares.[8] Pursuant to the Trigger Amendment, Green automatically loses control of Trade Desk once he is no longer CEO, President or Chairman.[9] Green's influence is evident in the Board's makeup, which comprised eight members (including Green) at the start of this action, four with longstanding personal, professional, and financial ties to him.[10]

B. Four Directors are Beholden to Green

Pickles and Green have been acquainted since at least 2007, when Green hired him to work at AdECN, which Green founded three years prior.[11] Microsoft acquired AdECN for $50-75 million, with Green and Pickles remaining post-acquisition.[12] The duo co-founded Trade Desk in November 2009. In March 2010, Pickles left

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[7] A0043-0044, ¶¶43-46.

[8] A0045-0047, ¶¶47-51.

[9] A0046, ¶50, n.11.

[10] A0047, 0103, 0104-0123 , ¶¶52,157, 160-208.

[11] A0104, ¶¶160-61.

[12] *Id*.

Microsoft to join Trade Desk.[13] Green admitted he would never have started Trade Desk without Pickles.[14] Pickles received over $7.2 million in compensation in 2021.[15] Trade Desk acknowledged Pickles is not "independent," and Pickles recused himself from voting on Green's Mega Grant.[16]

Paley has known Green since at least 2010, when The Founder Collective, L.P. ("**FC**"), a venture fund Paley co-founded, provided Trade Desk's initial funding.[17] FC was one of two initial investors, and Paley has described the investment as the most "worthwhile" he has ever made.[18] Paley joined the Board as part of the financing deal.[19] In less than ten years, Paley's $2 million investment turned into hundreds of millions of dollars.[20]

Paley remained on the Board even after FC sold its Trade Desk stake in 2019. As of June 2022, he personally owned 215,918 of the Company's Class A shares

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[13] A0104, ¶¶160-162.

[14] A0105, ¶164.

[15] A0104, ¶163.

[16] A0105-0106, ¶¶165,169.

[17] A0047, 0110-0111, 0112, ¶¶52, 180-82, 185-86.

[18] A0112, 0116, ¶¶185, 189.

[19] A0035, 0111-0112, ¶¶21, 183-85.

[20] A0116-0117, ¶¶190-91.

worth $11 million.[21] Paley is admittedly close to Green, describing their relationship as "special," "amazing," and "most intimate[]."[22] In 2015, Paley shared that he and Green have maintained biweekly conversations since FC's initial investment.[23] Trade Desk has been prominently featured on FC's website, and Green is now an investor in FC.[24]

Buyer's consulting firm, Class V Group LLC ("**Class V**"), advised Trade Desk on its IPO.[25] As payment, she received $175,000 and an option to buy 2,500 shares of Trade Desk stock.[26] As one of Class V's two members, Buyer was intimately involved in the IPO, admittedly "spend[ing] a lot of time with the CEO and the CFO, and [] the board," both before and for "almost a year" after.[27]

Buyer characterizes her relationship with the Company as "material," acknowledges her reliance on Green and Trade Desk to generate new business.[28] Buyer's ties to Trade Desk are instrumental for Class V's success and her financial

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[21] *Id*.

[22] A0013-0016, ¶¶187-89.

[23] A0013, ¶187.

[24] A0117-0118, ¶¶192-93

[25] A0107, ¶173.

[26] A0047-0048, 0107, ¶¶52, 172.

[27] A0106-0107, 0107, ¶¶170-71, 173.

[28] A0107-0108, ¶¶174-75.

well-being. Buyer's primary income, apart from Class V, comes from her job as a Trade Desk director – earning over $1.2 million in her first three years on the Board.[29]

The Company concedes Buyer lacked independence under the Nasdaq listing rules when she joined the Board in March 2019.[30] A year later Buyer, as chair of the special committee, played a pivotal role in solidifying Green's control by leading the negotiations on the Trigger Amendment.[31] In February 2021, she became the "lead independent" director, with Green appointing her as a *de facto* member of the Compensation Committee (the "**Committee**") to push the Mega Grant through.[32]

Green hired ***Falberg*** as AdECN's CEO in May 2007.[33] An "early investor in AdECN," Falberg profited tremendously when Microsoft acquired AdECN just three months later.[34] Green then hand-picked Falberg for the Board in August 2016.[35] She was immediately appointed to the Committee.[36] As of June 3, 2022, Falberg owned

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[29] A0109, ¶178.

[30] A0108, ¶177.

[31] A0047, ¶51 (citing October 2020 Proxy).

[32] *Id.*; A0086, 0108, ¶123,177

[33] A0047-0048, 0119, ¶¶52, 195.

[34] A0047-0048, 0120, ¶¶52, 196-97.

[35] A0120, ¶199.

[36] A0121, ¶201.

281,410 Class A shares (worth $14.4 million) and 103,030 Class B shares (worth $5.3 million).[37] From 2016-2021, Falberg received over $1.8 million as a Trade Desk director.[38] As a serial board member with no other full-time job, her directorship compensation is her primary, if not only, source of income.[39] As Committee chair, Falberg was integral in awarding Green the Mega Grant.[40]

C. The Board Awards Green the Mega Grant

On October 6, 2021, the Board held a special meeting and approved Green's "Mega Grant," a special award of performance-based stock options covering 19,200,000 shares of Trade Desk's Class A Common Stock.[41] The options vest in eight tranches ("**Tranche(s)**") as the Company reaches various stock price goals ("**Stock Price Goal(s)**") ranging from $90 to $340 per share.[42]

The Mega Grant, one of the largest equity awards ever, had a grant date fair value of $819 million and equaled 4% of the Company's outstanding common

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[37] A0121-0122, ¶203.

[38] A0121, ¶202.

[39] A0122-0123, ¶¶204-06.

[40] A0123, ¶207.

[41] A0030-0031, 0094, ¶¶4, 139. The options have an exercise price of $68.29, the closing price of the Company's Class A shares on the grant date. A0053, ¶63.

[42] A0030, 0052-0053, ¶¶4, 63-64. The Mega Grant allows until 10/6/2031 to achieve the Stock Price Goals. A0053, ¶64.

stock.[43] If all eight Stock Price Goals are met, Green stands to gain between $3.5-$5.2 billion.[44]

The Mega Grant originated in 2020, when the Committee engaged Compensia, Inc. ("**Compensia**") "to assist in evaluating CEO Compensation alternatives[,]" with the objective of retaining/motivating Green "for the next 7 years."[45] Compensia's "CEO Compensation Considerations" report (the "**Report**"), presented to the Committee at its December 4, 2020 meeting, was the sole analysis reviewed.[46]

The Report detailed three potential approaches for Green's compensation through 2027.[47] [redacted]

[43] A0055, ¶¶67-68.

[44] A0031, 0061-0060, ¶¶5, 80.

[45] A0068, ¶89.

[46] A0058, 0067-0082, ¶¶75, 88-115.

[47] A0070, ¶94.

[redacted].[48] Compensia also calculated the realizable value of these approaches: [redacted][49]

Compensia detailed the "Pros" and "Cons" of each approach but did not recommend one.[50] [redacted])[51]

In contrast, [redacted]

[48] A0070-0071, ¶¶95-97.

[49] A0070-0071, ¶¶95-97.

[50] A0078-0082, ¶¶108-115.

[51] A0078, ¶109.

[redacted]. Notably, the first two benefits could be achieved by less risky and costly means, while the third merely justified more substantial compensation to Green.[52]

Compensia compared special equity awards and compensation packages of other CEOs, [redacted].[53] Considering the "Pros" and "Cons," and Green's 2020 compensation of $15.9 million already outpacing his peers, the Board had no evident justification to deviate from the [redacted] approach.[54] The Report [redacted].[55]

Compensia's Report indicated that the Mega Grant should not exceed 2% of the Company's outstanding shares, corresponding to an estimated grant date value of $352 million.[56] Compensia identified additional considerations to achieve the Mega Grant's goals, including: (i) minimum 5-year vesting/achievement period, and

[52] A0081-0082, 0062, ¶¶115, 82.

[53] A0073- 0078, ¶¶101-107.

[54] A0067, ¶88.

[55] A0062, ¶82.

[56] A0068, ¶90.

(ii) requiring Green to continue serving as CEO for the options to vest; the Mega Grant adopted neither.[57]

Compensia raised key "questions" and "decisions points" to consider, including [redacted][58] In sum, Compensia's recommendations illustrated what independent directors would have pursued in arms-length negotiations. The Committee obtained none, with no indication in the record suggesting they even tried.

D. Green Weighs In

The December 4, 2020 Committee minutes are silent about whether it contemplated awarding Green a "mega grant."[59] But Green quickly intervened, attending a number of subsequent meetings.[60] Most of them were spearheaded by Green's personal attorney, Larry Sonsini ("**Sonsini**") of Wilson Sonsini, who delivered Green's terms. Green and Sonsini's attendance was contrary to the Company's representation in its April 2022 Proxy Statement ("**Proxy**"), which states

[57] A0068-0069, 0097, ¶¶91, 149.

[58] A069, ¶92.

[59] A0081-0082, ¶115.

[60] A0082-0083, ¶116.

Green "recuses himself from, and is not present during, discussions and decisions regarding his own compensation."[61]

Green attended the next Committee meeting on January 6, 2021, where he "discussed his views of executive and CEO compensation" with Falberg and the rest of the Committee, which led them to "consider a large CEO equity grant further."[62]

At the January 13, 2021 Committee meeting (attended by non-members Buyer and Green's attorney, Sonsini), the Committee determined Buyer and Sonsini would "facilitate [] discussions around a potential significant equity grant" to Green.[63] After discussing the "key terms" of a potential award, the Committee "determined to seek input from [Green] on his thoughts around how a significant equity grant might be structured in order to properly incentivize key management team members and to be well received by the Company's stockholders."[64] To this end, Falberg asked Sonsini "to discuss the matter with [Green] and then revert with input for the [Compensation] Committee's consideration."[65]

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[61] *Id.*; A0033, ¶12; A0255. The Court may take judicial notice of SEC Filings. *See, e.g., Omnicare, Inv. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1167 n.3 (Del. Ch. 2002).

[62] A0082-0083, ¶116; A0470-471.

[63] A0085-0086, ¶¶122-23.

[64] A0086, ¶123.

[65] *Id.*

During the January 22, 2021 Committee meeting (attended by Buyer), Sonsini [redacted] [66] Again, Falberg asked Sonsini "to further discuss the matter with Mr. Green and then revert with additional input for the [Compensation] Committee's consideration."[67]

On February 3, 2021, the Committee discussed the "framework for the CEO equity grant in 2021."[68] Non-members Buyer and Paley attended "to provide input to the Committee on the size and framework for the grant," and thus became privy to the same information as the Committee.[69] The next day, the full Board, including Green, was briefed on the discussion, ensuring Green was informed about the Committee's deliberations.[70]

On February 18, 2021, the Board discussed the "potentially significant performance equity grant for Mr. Green."[71] Sonsini attended and spoke about the

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[66] A0087, ¶124.

[67] *Id.*

[68] A0087 ¶125.

[69] *Id.*

[70] A0088, ¶126.

[71] A0088, ¶127.

grant's framework.[72] With Sonsini present, the Board discussed the "key considerations" for the grant, including [redacted].[73]

On April 27, 2021, the Committee met with Green to review the Company's 2021 financial results and discuss the "framework for the CEO equity grant in 2021."[74] On April 29, 2021, the Board [redacted].[75]

On July 15, 2021, the Committee (except for Rajaram) met with Green and Sonsini.[76] With Green present, Sonsini reviewed the "key parameters" of the Mega

[72] *Id.*

[73] A0088, ¶¶127-28.

[74] A0089, ¶129.

[75] A0091-0092, ¶133.

[76] A0092, ¶134.

Grant.[77] On August 3, 2021, the Committee met with Buyer in attendance.[78] While neither Green nor Sonsini attended, Compensia and the Committee's counsel both "relayed input from Larry Sonsini… regarding the parameters of the potential grant[.]" In response, the Committee instructed Compensia "to update the summary of terms for the potential grant" and the Committee's counsel "to communicate with Mr. Green regarding the status of discussions."[79] On September 17, 2021, the Committee recommended the Mega Grant for Board approval "based on input from Mr. Green's advisors"[80]

On October 6, 2021, the Board held a special meeting attended by Buyer, Falberg, Green, Paley, Pickles, Rajaram, Wells, Sonsini and others.[81] The attendees discussed the forecasted accounting charges regarding the Mega Grant and the Company's communication plan.[82] Both Green and Sonsini stayed during the "closed session," despite representations in the Proxy to the contrary.[83] After

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[77] A0092, ¶¶134-35.

[78] A0092-0093, ¶136.

[79] A0093, ¶137.

[80] A0094, ¶138.

[81] A0094, ¶139.

[82] *Id.*

[83] A0094-0095, ¶140-41.

confirming the financial impact of the Mega Grant and related forthcoming disclosures, Green, Sonsini, and Pickles exited so that the remaining Board members could proceed with the formality of approving the Mega Grant.[84]

E. The Mega Grant Is Unfair

1. The Mega Grant is Outsized Relative to Green's Peers

The Mega Grant's grant date fair value was $819 million; when accounting for its achievable Stock Price Goals, the Mega Grant could be worth $5.2 billion.[85] An $819 million award represents 68% of the Company's 2021 annual revenue and is 1,606% greater than Green's total compensation for 2016-2020 ***combined***.[86] As Compensia informed the Committee, the Mega Grant was [redacted].[87]

[redacted].[88]

[84] *Id.*

[85] A0055, 0061-0062, ¶¶67, 80.

[86] A0062, ¶81.

[87] A0058-0061, ¶¶75-79.

[88] A0060, ¶77.

[redacted][90]

The Mega Grant also surpasses other CEO awards as a percentage of company shares, accounting for approximately 4% of Trade Desk's total outstanding shares– 10x the median of reported awards and above the 90th percentile (3.7%).[91]

2. The Mega Grant Was Unnecessary to Retain or Incentivize Green

The Mega Grant aimed to align Green's interests with stockholders, retain him as CEO for a "long time," and drive long-term value[92] – but was entirely unnecessary to accomplish these goals.

Green, already motivated by substantial equity ownership, had taken the Company public five years earlier and owned over 45 million shares of Trade Desk stock worth over $3 billion.[93] His equity stake already aligned his interest with stockholders, as he stood to gain (or lose) millions of dollars from even the slightest

[89] A0060-0061, ¶78.

[90] A0059-0061, ¶¶76-78.

[91] A0061, ¶79.

[92] A0056, ¶70.

[93] A0056-0057, ¶71.

stock price fluctuation.[94] Moreover, Green was well-compensated as CEO, earning $15.9 million in 2020 and consistently receiving packages in the 75th percentile of peer CEOs.[95]

Green had no plans to leave Trade Desk, as demonstrated by his push for the Trigger Amendment, approved by the Board a year earlier, which secured his control for five more years and solidified his roles as President, CEO, and Chairman to advance his long-term vision.[96] Nothing in the record indicates there was any concern Green might leave.

3. The Stock Price Goals Were Easily Achievable by Design

Compensia warned the Board that [redacted][97] Yet the Committee structured the Mega Grant such that five of the eight Tranches will vest and Green will gain between $1.5 to $2.25 billion if the Company's stock price simply matches the compound annual growth rate ("**CAGR**") of the S&P 500 Index for the ten-year period prior to the grant date (14.12%).[98] If the stock price achieved 17.42% CAGR,

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[94] A0057, ¶72.

[95] A0030, 0048-0052, ¶¶3, 54-62.

[96] A0030, 0046-0047, 0056-0057, ¶¶3, 50-51, 54-62, 71.

[97] A0062, ¶82.

[98] A0062-0063, ¶83.

all eight Tranches would vest and Green would gain at least $2.5 billion. Given that the Company's stock increased 2,516% between October 6, 2016 and October 6, 2021, the Stock Price Goals were designed to be reachable.[99]

4. The Mega Grant's Terms Are Inconsistent With its Purported Objectives

Compensia's Report also warned that [redacted].[100] Accordingly, Compensia recommended [redacted].[101] Compensia advised that [redacted][102]

The Board ignored these recommendations.[103] The Mega Grant was structured so that it: (i) can fully vest at any moment; and (ii) allows Green to benefit even if he no longer serves as CEO.[104]

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[99] *Id.* A0063, ¶84.

[100] A0072, ¶99.

[101] A0063-0066, ¶85.

[102] A0097, ¶149.

[103] A0063-0066, 0097, ¶¶85, 148.

[104] *Id.* The Mega Grant contains provisions favoring Green if terminated "without Cause" or if resigning for "Good Reason."

The Committee also declined to impose a meaningful clawback provision on the Mega Grant, which is inconsistent with improving the Company's long-term value.[105] The Tranches vest once the Company's Class A shares achieve a Stock Price Goal, based on the average closing price over any 30 consecutive trading days, but there is no provision requiring Green to return vested Tranches if the stock price later declines.[106] Thus, the Mega Grant prioritizes short-term gains over long-term value, as evidenced by the 4.8 million vested stock options that Green received from brief stock price surges in late 2021 and 2024.[107] Although Trade Desk's stock was trading as high as $132 in November 2024, the share price has since plummeted – failing to trade above $100 per share since February 13, 2015, recently closing at $48.66 per share on April 22, 2025 – highlighting the absence of any "long-term" value.[108]

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[105] *Id.*

[106] *Id.*

[107] A0063-0067, ¶¶85-86. The Company's stock price dropped from an average closing price of over $90 per share for a thirty-day period in late 2021 to under $70 per share in January 2022. *Id*.; *see also* Schedule 14A Proxy Statement filed April 9, 2025 at 43 (2.4 million options vested in December 2021 and 2.4 million in November 2024).

[108] Nasdaq, The Trade Desk, Inc. Class A Common Stock (TTD) Historical Quotes, https://www.nasdaq.com/market-activity/stocks/ttd/historical (last visited Apr. 21, 2025). The court may take judicial notice of historic stock price data. *Lee v. Pincus*, 2014 WL 6066108, at *4 n.11 (Del. Ch. Nov. 14, 2014) (citing D.R.E. 201(b)(2)).

ARGUMENT

I. The Trial Court Erred in Finding the Complaint Failed to Allege Facts Creating Reasonable Doubt About the Board's Independence

A. Question Presented

Did the Complaint allege particularized facts sufficient to create reasonable doubt about the independence of Paley, Buyer, and Falberg from Green, Trade Desk's co-founder, President/CEO and controlling stockholder? The issue was preserved below in Plaintiffs' Answering Brief in Opposition to Defendants' Motion to Dismiss ("Answering Brief" or "Pl. Br.") and at oral argument.[109]

B. Scope of Review

The Court's review of a Rule 23.1 dismissal is *de novo* and plenary. *Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000).[110]

C. Merits of Argument

Demand is excused under Rule 23.1 when a complaint alleges particularized facts that, collectively, create a reasonable doubt that a majority of directors received a material personal benefit, face a substantial likelihood of liability, or lack independence from someone who does. *Zuckerberg II*, 262 A.3d at 1059. The

[109] A.0343 *et seq.*, A.0460 *et seq*.

[110] Unless otherwise noted, emphasis in quotations is added and internal quotation and citation marks are omitted.

concept of reasonable doubt is "flexible and workable" and permits a plaintiff to control a derivative action "in an appropriate case where the claim is not based on mere suspicions or stated solely in conclusory terms." *Grimes v. Donald*, 673. A.2d 1217 (Del. 1996), *overruled on other grounds, Brehm*, 746 A.2d 244 (Del. 2000). In making this determination, the court must "consider all the particularized facts pled by the plaintiffs... in their totality and not in isolation from each other." *Del. Cnty. Empls. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1019 (Del. 2015).

Although plaintiffs must plead particularized facts under Rule 23.1, "[t]he particularized pleading standard [] does not change the principle that the plaintiff receives the benefit of favorable inferences on a pleading-stage motion to dismiss." *IBEW Loc. Union 481 Defined Contribution Plan & Tr. on Behalf of GoDaddy, Inc. v. Winborne*, 301 A.3d 596, 617 (Del. Ch. 2023). When assessing demand futility, "the Court does not weigh the evidence, must accept as true all of the complaint's particularized and well-pleaded allegations, and must draw all reasonable inferences in the plaintiff's favor." *Zuckerberg II*, 262 A.3d at 1048.

1. The Trial Court Failed to Consider Plaintiffs' Allegations Holistically, Improperly Weighed Evidence and Drew Inferences in Defendants' Favor.

The Board for assessing demand futility consists of eight directors: Green, Pickles, Paley, Buyer, Falberg, Rajaram, Wells, and Cunningham. It is undisputed

that Rajaram, Wells, and Cunningham are independent and that Green is not. Opinion at 27. Thus, to implicate a majority of the Board, Plaintiffs must adequately plead that three of the four remaining directors – Pickles, Paley, Buyer, Falberg – face a substantial likelihood of liability (*see* Section II, *infra*) or lack independence from Green.

"Independence means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences." *Aronson v. Lewis,* 473 A.2d 805, 816 (Del. 1984), *overruled on other grounds by Brehm*, *supra*. Courts must "review the complaint on a [director-by-director] basis to determine whether it states with particularity facts indicating that a relationship—whether it preceded or followed board membership—is so close that the director's independence may *reasonably* be doubted. *Beam ex. rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1051 (Del. 2004). This doubt might arise because of "financial ties… a particularly close or intimate personal or business affinity or because of evidence that in the past the relationship caused the director to act non-independently vis à vis an interested director." *Id.*

Delaware law "requires that all the pled facts regarding a director's relationship to the interested party be considered in full context in making the… pleading stage determination of independence." *Sanchez*, 124 A.3d at 1022. To this

end, "allegations levied against a director's independence must be viewed holistically." *In re Oracle Corp. Derivative Litig.*, 2022 WL 3136601, at *8 (Del. Ch. May 20, 2022).

The Trial Court properly found reason to doubt Pickles' independence from Green. *See* Opinion at 32. The Trial Court's citation to *Cal. Pub. Empls.' Ret. Sys. v. Coulter* is instructive. *Id.* at 28-29. In *Coulter*, the Court reasoned that individual allegations, *without more*, may be inadequate to raise a reasonable doubt as to a director's disinterestedness or independence, but that when taken together, such allegations were sufficient. 2002 WL 31888343, at *9 (Del. Ch. Dec. 18, 2022).

The Trial Court properly considered Plaintiffs' allegations holistically in assessing Pickles' independence. In addition to his position and salary, and the fact that he recused himself from voting on the Mega Grant, the Trial Court also considered Pickles' "lengthy professional relationship with Green," which "further strengthen[ed] the reasonable inference that Pickles could not impartially consider a demand to pursue litigation to challenge the [Mega Grant]." Opinion at 30-32.

In contrast, the Trial Court did not properly consider Plaintiffs' well-pled allegations against Paley, Buyer and Falberg – repeatedly concluding that certain allegations "alone" or "without more" were not enough. *See, e.g.*, Opinion at 36, 40, 42, 55. The Trial Court erred by minimizing the outsized influence that Green (both

directly and through his lawyer Sonsini) had on Paley, Buyer, and Falberg's independence, and failing to assess Plaintiffs' independence and controlled mindset allegations in tandem (*see* Section II.C.2., *infra*). Opinion at 29-30.

i. The Trial Court Erred by not Giving due Weight to Green's Status as a Controller.

"[T]he presence and influence of a controller is an important factor that should be considered in the director-based focus of the demand futility inquiry… particularly on the issue of independence." *In re BGC Partners, Inc. Derivative Litig.*, 2019 WL 4745121, at *8 (Del. Ch. Sept. 30, 2019). Although the Trial Court agreed "Green's position as the Company's controlling stockholder" should be "[a]n additional overlay to the independence inquiry," Opinion at 29, it failed to afford Green's status as the Company's controller its proper weight. Instead, the Trial Court reasoned that "[a] derivative plaintiff cannot successfully rebut the presumption of a director's ability to consider demand by simply alleging the director was elected or appointed by an interested party, or even a controller." *Id.* (collecting cases).

Plaintiffs' control allegations are *not limited* to Green's ability to nominate or elect directors. Rather, the Complaint alleges that Paley, Buyer and Falberg "…actually *showed* themselves to be incapable of acting independently of [Green]

in connection with the Mega Grant[.]"[111] The minutes evidence that Green or his attorney Sonsini attended – and actively participated in – eight meetings discussing the Mega Grant and the Board "labor[ed] in the shadow of a controlling stockholder[.]"[112] *In re EZCorp Inc.*, 2016 WL 301245, at *20 (Del. Ch. Jan. 25, 2016).

Despite acknowledging that the minutes of these meetings are "sparse" and "not detailed," the Trial Court drew inferences in Defendants' favor, erroneously concluding it was unreasonable to infer that Green unduly influenced the process simply because Plaintiffs do not allege that Green engaged in "retributive behavior." Opinion at 10, fn. 48; 12; 56-57, fn. 162; 69; 73, fn. 175. This was error, as the court cannot draw inferences in Defendants' favor or "discredit or weigh the persuasiveness of [Plaintiffs'] well-pled allegations." *La. Mun. Police Emps.' Ret. Sys. v. Pyott*, 46 A.3d 313, 351, *rev'd on other grounds*, 74 A.3d 612 (Del. 2013).

Furthermore, allegations of overtly "interfering actions" or retributive behavior are unnecessary to demonstrate that directors failed to oppose the controller or otherwise fulfill their duties. A controller has no reason to resort to those actions if the "inherent coercion" of his presence is enough to prompt compliance. As co-

[111] A0420, Pl. Br. at 66.

[112] A0067-A0092, ¶¶88, 115-116, 122, 124, 126-27, 129, 133-34.

founder, controller, President/CEO and Chairman, Green "br[ought] with him into the boardroom an element of 'inherent coercion.'" *In re Tesla Motors, Inc. Stockholder Litig.*, 2022 WL 1237185, at *33 (Del. Ch. Apr. 27, 2022). The Trial Court failed to adequately consider this "inherent coercion" in evaluating demand futility.

ii. The Trial Court Erred in Finding Paley Independent from Green.

The Trial Court improperly dissected Plaintiffs' allegations individually, finding each insufficient to alone cast reasonable doubt on Paley's independence. Opinion at 33-44. Plaintiffs' allegations of Paley's financial gains from his association with Green, his long Board tenure, over 300 one-on-one calls, expressions of gratitude for Green, and Green's investment in Paley's venture capital firm,[113] together "support a reasonable inference that there are very warm and thick personal ties of respect, loyalty, and affection between [Paley] and [Green]" that may impair Paley's impartiality in considering litigation against Green. *Marchand v. Barnhill*, 212 A.3d 805, 819 (Del. 2019).

The Trial Court glossed over the import of Paley's long and lucrative history with Green, focusing on the fact that FC had other successes, but ignoring that: (i)

[113] A0047, A0110-A0119, ¶¶52, 180-94.

FC was brand new when it invested in Trade Desk in 2010, and thus heavily reliant on Trade Desk's success; (ii) FC was one of only two initial investors; and (iii) Paley described it as "the 'most worthwhile investment…' he has ever made."[114] The Trial Court dismissed these weighty allegations. Such "owingness" reasonably impairs Paley's impartially in evaluating a demand. *BGC*, 2019 WL 4745121, at *12.

The Trial Court drew improper inferences in Defendants' favor, dismissing Paley's social media posts as insignificant and framing his long-standing, close, and unique working relationship with Green as nothing more than "Paley's interest as a director and investor [and] Green's desire to keep Paley informed." Opinion at 36-37, 40. And although the Complaint alleges that Paley himself used the words "intimate," "so lucky," and "special" to describe his relationship with Green,[115] the Trial Court disregarded these allegations simply because the Complaint does not contain the word "friend." *Id.* at 40-41.

The Trial Court fixated on unknowable details and treated their absence as dispositive. For instance, Plaintiffs have no way to ascertain the size of Green's

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[114] A0112, A0116, ¶¶185, 189-91. Contrary to the Trial Court's findings, Plaintiffs do not argue these facts are precisely analogous to *Goldstein v. Denner*, 2022 WL 1671006, at *47-48 & fn. 31 (Del. Ch. May 26, 2022). Opinion at 36, fn. 120. Rather, *Goldstein* emphasizes the relevance of close-knit networks, which must be assessed when evaluating independence.

[115] A0113-A0115, ¶¶187-88.

investment in FC's third and fourth funds.[116] On this basis, the Trial Court dismissed Plaintiffs' allegations altogether – wrongfully focusing on the size of the investments rather than what their existence implies about Green's relationship with Paley. Opinion at 42-44. The Trial Court disregarded Plaintiffs' argument that Paley was unlikely to sue an investor in his own firm.[117] In sum, the Trial Court erred in selectively addressing Plaintiffs' allegations, which, when considered in full, show a "long-standing pattern of mutually advantageous business relations" between Paley and Green, which creates a reasonable doubt that Paley "could impartially consider a demand that [Trade Desk] file a lawsuit adverse to [Green's] interests."[118]

The Trial Court acknowledged the plausibility that Paley would engage in a "pragmatic calculus" if asked to sue Green. However, it found the allegations insufficient to infer that such a consideration would "so *dominate* Paley's decision-

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[116] Even where "actual extent" of investments is not known at pleading stage, "the existence of these [investments]" should be assigned weight and may be "enough to defeat a motion to dismiss," especially in light of the other particularized allegations. *See In re Carvana Co. S'holders Litig.*, 2022 WL 2352457, at *15 (Del. Ch. June 30, 2022).

[117] A04335, Pl. Br. at 81; *see Sandys v. Pincus*, 152 A.3d 124, 134 (Del. 2016) (excusing demand when "reasonable to expect that [a mutually beneficial ongoing business] relationship might have a material effect on the parties' ability to act adversely toward each other."); *In re Oracle Corp. Derivative Litig*, 824 A.2d 917, 943 (Del. Ch. 2003).

[118] *See* A0435, Pl. Br. at 81.

making as to render him unable to impartially consider a demand." Opinion at 36, fn. 120. In so finding, the Trial Court applied a much stricter standard than the law allows. *See Goldstein*, 2022 WL 1671006, at *49 (reasonable doubt standard applies to demand futility analysis). The Trial Court more appropriately articulated the demand futility standard with respect to Pickles – *i.e.*, whether a director is "able to consider [a] demand *without improper considerations intervening*." Opinion at 32 (citing *Coulter*, 2002 WL 31888343, at *9). Framing Plaintiffs' independence allegations under the proper standard, and viewing them in their totality, there is reason to doubt Paley's independence from Green.

iii. The Court Erred in Finding Buyer Independent from Green.

Plaintiffs sufficiently plead that Buyer's prior work for Trade Desk, her admitted reliance on Green to generate new business, compensation as a Trade Desk director, service as a *de facto* member of the Committee, and pivotal role in facilitating the Trigger Amendment, raise a reasonable doubt about her ability to impartially evaluate a litigation demand against Green.[119] The Trial Court erred in finding otherwise. Opinion at 44-51.

[119] A0048, A0106-A0110, ¶¶52, 170-179.

First, the Trial Court wrongfully equated Plaintiffs' allegations about Buyer's reliance on Green for referrals with allegations about Facebook director Peter Thiel in *Zuckerberg II*. There, the Court found a conclusory allegation concerning Thiel's venture capital firm benefitting from increased "deal flow" due to his association with Facebook was insufficient. 262 A.3d at 1063. Specifically, the Court found that the complaint failed to identify any deals that "would be material to Thiel's interests," making particular note of his "wealth and stature." *Id.* Notably, Thiel is a well known multi-billionaire who does not need to list anyone as a reference for professional opportunities.

Buyer's professional circumstances are wholly dissimilar. Buyer identified her reliance on Green as a professional reference as "material" to her independence, and admits her relationship with Green has likely generated work for her – work that constitutes her principal employment.[120] Such business resources and *references* compromise Buyer's independence. *In re Loral Space & Communs. Consol. Litig.*, 2008 WL 4293781, at *6 (Del. Ch. Sept. 19, 2008) (noting independence-compromising effects of director and controller "serv[ing] as business resources and *references* for each other").

[120] A0107-A0108, ¶¶174-75.

Buyer's reliance on Green to "generate ongoing economic opportunities" seriously compromises her independence. *Sandys*, 152 A.3d at 126. Moreover, Plaintiffs' allegations are far from "generalized" (Opinion at 50) – they are functionally equivalent to Plaintiffs' allegations against Pickles, which the Trial Court found sufficient. Opinion at 30-32. Like Pickles, Buyer's livelihood is likely to be affected if she were to fall out of favor with Green.[121] *See BGC*, 2019 WL 4745121, at *12 (reasonable to infer "it would be important to [director] not to compromise her good relationship with [controller], who has the unilateral power to discontinue the benefits [the director] has received[.]").

Second, the Trial Court erred in speculating that Buyer's prior experience in "hefty roles" enables her to get work without Green's help. Opinion at 50, fn. 147. The Trial Court surmised that, given her years of experience, Buyer would have "roughly 50 available references" to tap into should her relationship with Green become impaired. *Id.* Neither of these improper, defendant-friendly inferences has any record support.

Third, the question is not whether Buyer needs Green "to sustain her consulting business," but whether Buyer's relationship with Green "might have a material effect on [her] ability to act adversely toward [Green]." *Sandys*, 152 A.3d

[121] A0109, ¶179.

at 134. "Causing a lawsuit to be brought against another person is no small matter, and is the sort of thing that might plausibly endanger a relationship." *Id.* Buyer's prior work with Green and her reliance on him to help generate business are reasons to doubt that Buyer could impartially consider a litigation demand against him. *See Orman v. Cullman*, 794 A.2d 5, 29-30 (Del. Ch. 2002) ("reasonable to question the objectivity" of director whose consulting role depended on controller for $75,000 in annual fees); *In re HomeFed Corp. Stockholder Litig.*, 2020 WL 3960335, at *13-14 (Del. Ch. July 13, 2020) (consulting agreement with company indicates lack of independence when it is the director's sole employment).

Finally, the Trial Court glossed over Plaintiffs' allegations regarding Buyer's inexplicable heavy involvement in *both* the Mega Grant (attending meetings as an *ad hoc* member of the Committee despite not being appointed to that role) and as the leader of the Trigger Amendment process.[122] These particularized allegations are highly relevant in assessing Buyer's independence. *See Orman*, 794 A.2d at 24 ("To raise a question concerning the independence of a particular board member, a plaintiff asserting the control of one or more directors must allege particularized facts manifesting a direction of corporate conduct in such a way as to comport with

[122] A0046-A0048, A0086, ¶¶51-52, 123.

the wishes or interests of the corporation (or persons) doing the controlling.") (cleaned up).

iv. The Trial Court Erred in Finding Falberg Independent from Green.

Plaintiffs sufficiently plead, and the Trial Court acknowledges, that Falberg has "derived substantial wealth" from her relationship with Green – *i.e.*, more than $14 million in her Trade Desk Class A shares alone. Opinion at 53. But the Trial Court faults Plaintiffs for not alleging "when or how" Falberg acquired her stake. *Id*. Plaintiffs do, however, allege that Falberg was appointed as a director and acquired Trade Desk stock before the Company went public.[123] Plaintiffs are entitled to the reasonable inference that Falberg amassed considerable wealth in Trade Desk because Green invited her into his private company just prior to the Company's IPO and that she consequently harbors a sense of "owingness" towards him. *BGC*, 2019 WL 4745121, at *12.

The Trial Court wrongfully dismissed Plaintiffs' allegation that Falberg's Trade Desk stock constitutes "a substantial portion of her net worth," simply because Plaintiffs did not "contextualize those holdings[.]" Opinion at 54, fn. 158. But it is reasonable to infer that $14 million is *per se* material to someone who is not

[123] A0120-A0122, ¶¶199-200, 203.

extremely wealthy. That includes Falberg, who earned, on average, just over $300,000 per year as a Trade Desk director.[124]

Further, the Trial Court failed to afford the proper weight to Plaintiffs' allegations regarding Green hiring Falberg as CFO at AdECN and her substantial reward when Green sold the company to Microsoft.[125] It further erred in rejecting Plaintiffs' allegations that Falberg is a professional director who relies on these positions for her livelihood.[126] A professional director, like Falberg, may be especially reluctant to sue colleagues for fear of retribution from directors on other boards she serves (should litigation arise). Falberg may also be reluctant to sue Green over the Mega Grant, as she chaired the Committee that orchestrated it.

Finally, as elaborated below, the Trial Court erred by treating Plaintiffs' independence allegations as distinct from their controlled mindset allegations, rather

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[124] A0121, ¶202. The Trial Court erred in concluding it was unreasonable to infer Falberg's directorship fees compromised her ability to impartially assess a demand. Opinion at 55-56; *see BGC*, 2019 WL 4745121, at *12-13 (director's compensation, accounting for over 30% of her annual income, was substantial); *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *34 (Del. Ch. May 3, 2004) (director fees and consulting payments amounting to 22.5% of income were significant).

[125] A0047-A0048, A0104, A0119, A0120, A0121, ¶¶52, 160, 195, 197, 200.

[126] A0122-A0123, ¶¶202-05.-06.

than viewing them as complementary. When considered together, these allegations cast significant doubt on the independence of Falberg, Paley, and Buyer from Green.

II. The Trial Court Improperly Rejected Plaintiffs' "Controlled Mindset" Theory by Discounting Plaintiffs' Well-Pled Allegations and Failing to Draw Reasonable Inferences in Their Favor

A. Question Presented

Did the Trial Court err in holding that Plaintiffs failed to sufficiently plead that Paley, Buyer, and Falberg face a substantial likelihood of liability for approving the Mega Grant where the Complaint alleges that they operated under a controlled mindset and breached their duty of loyalty? The issue was preserved below in Plaintiffs' Answering Brief and at oral argument.[127]

B. Scope of Review

See Section I.B. *supra*.

C. Merits of Argument

This case requires the Court to draw a pleading-stage distinction between gross negligence and its "qualitatively more culpable" sibling, the failure "to act in good faith." *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 66 (Del. 2006). "Although the distinction between actions not in good faith and actions that are merely grossly negligent may be difficult to discern in some cases, it is nonetheless an important feature of Delaware law." *Kahn v. Portnoy*, 2008 WL 5197164, at *7 (Del. Ch. Dec. 11, 2008). The Trial Court erred in not making this distinction.

[127] A0394-420; A0508-532.

If a plaintiff alleges particularized facts supporting the reasonable inference that directors "approved a conflicted transaction for improper reasons," the claim survives a Rule 23.1 motion because the directors face a substantial likelihood of liability acting in bad faith. *In re CBS Corp. S'holder Class Action & Deriv. Litig.*, 2021 WL 268779, at *31, *45-46 (Del. Ch. Jan. 27, 2021). "Although framed as a 'substantial likelihood' of liability, the standard [] only requires that plaintiffs 'make a threshold showing, through the allegations of particularized facts, that their claims have some merit.'" *UFCW & Participating Food Indus. Empls. Tri-State Pension Fund v. Zuckerberg*, 250 A.3d 862, 887 (Del. Ch. 2020).

To meet this standard, Plaintiffs are required only to plead "facts that support a rational inference of bad faith," *not* "facts that rule out any possibility other than bad faith[.]" *Kahn v. Stern*, 183 A.3d 715, 1 (Del. 2018) (TABLE). An inference of bad faith arises when the particularized facts suggest the challenged decision was "tainted" by "a purpose other than pursuing the best interests of the corporation and its stockholders[.]" *Winborne*, 301 A.3d at 623.

One such improper purpose is appeasing a controlling stockholder. A plaintiff sufficiently pleads that directors are subject to a substantial likelihood of liability through particularized allegations that they allowed the controller "to dictate the terms and structure" of an unfair self-dealing transaction. *In re Southern Peru*

Copper Corp. S'holder Derivative Litig., 52 A.3d 761, 798 (Del. Ch. 2011). The key difference between a controlled mindset (bad faith) and "a truly independent mindset" (good faith) lies in directors' ability to check a controller's demands and do what is "necessary to serve as an effective proxy for arms-length bargaining" on behalf of the company. *In re Loral*, 2008 WL 4293781, at *25.

The Trial Court erred by treating Green as a regular CEO, not a *controller*, and wrongfully deferring to the Board's approval of the Mega Grant as if it were a routine compensation decision, which was both logically and doctrinally flawed. As the Chancellor recently observed, a material transaction with a founder-controller fundamentally "changes the dynamics of corporate decision making," and thus it is "imperative" to have "staunchly independent directors" negotiating on the company's behalf. *Tornetta v. Musk*, 310 A.3d 430, 507-08 (Del. Ch. 2024). This analytical aspect has particular salience in evaluating "controlled mindset" allegations, given the controller's overwhelming influence (like a "proverbial 800-pound gorilla") and the "extraordinary potential" for abuse in such situations. *In re Cox Commc'ns, inc. S'holders Litig.*, 879 A.2d 604, 617 (Del. Ch. 2005).

The Trial Court also erred by treating Buyer, Falberg, and Paley as "staunchly independent" directors approving a garden-variety compensation award, as opposed to a facially indefensible Mega Grant to a controller. Viewed in the appropriate

context, Plaintiffs allege particularized facts that support a pleading-stage inference that Buyer, Falberg, and Paley approved the Mega Grant in bad faith because, *inter alia*, (1) the independence of these directors was dubious at best; (2) there was no negotiation with Green over the size or other material terms of the award; (3) the award was double the size of the maximum award recommended; (4) the award's stated purposes (retention and stockholder alignment) were demonstrably pretextual and unachievable; and (5) all material decisions favored Green, including the decision not to seek minority stockholder approval. It is reasonable to infer from these facts that Buyer, Falberg, and Paley breached their duty of loyalty by knowingly "prioritizing [Green's] interests… over those of [Trade Desk's] minority stockholders." *In re Viacom Inc. S'holders Litig.*, 2020 WL 7711128, at *19 (Del. Ch. Dec. 29, 2020).

1. Plaintiffs Were Entitled to a Pleading-Stage Inference that Buyer, Falberg, and Paley Breached their Duty of Loyalty by Favoring Green's Interests over the Company's.

"Bad faith is a state of mind." *Winborne*, 301 A.3d at 619. A "controlled mindset" is a culpable state of mind and species of bad faith. *CBS*, 2021 WL 268779, at *29. Well-pled "controlled mindset" allegations support a loyalty claim where directors approve a transaction benefiting the company's controlling stockholder without a genuine belief that it benefits the company. *Viacom*, 2020 WL 7711128,

at *10-11; *see also Tornetta*, 310 A.3d at 511 ("A controlled mindset can be evidenced by the directors approaching negotiations seeming less intent on negotiating with the controller and more interested in achieving the result that the controller wanted.").

The Court of Chancery has upheld controlled mindset allegations in three cases, which Plaintiffs relied upon below:

- In ***CBS***, the court found plaintiffs alleged facts suggesting the directors faced a substantial likelihood of liability for approving a merger benefiting the controller where their behavior "evidenced their inability to push back against the asserted will of the controller." 2021 WL 268779, at *41.

- In ***Viacom***, the court upheld breach of loyalty claims against special committee members who, in approving a merger, "acted in deference, and out of loyalty, to [the controller]," which "reflect[ed] [their] desire to placate the controller, not to land the best transaction possible[.]" 2020 WL 7711128, at *10, 24.

- In ***Berteau v. Glazek***, the complaint survived a motion to dismiss based on well-pled allegations that "the Special Committee was not prepared to exercise its ability to say 'no' to the controller" and was "dominated" by the controller as a result. 2021 WL 2711678, at *22 (Del. Ch. June 30, 2021).

The Trial Court distinguished these cases by crediting Falberg and her colleagues for seeking "reasoned advice, [and having] repeatedly met and discussed the challenged transaction," Opinion at 83, but a superficial process does not negate the inference of disloyalty. *See Tornetta*, 310 A.3d at 447 (ten meetings over nine-

months does not evidence "thorough and extensive" process when it "elide[s] the lack of substantive work.").

i. The Trial Court drew a Defense-Friendly Inference that Green did not Demand the Mega Grant.

The Trial Court inferred the "mega grant" concept originated independently of Green. Opinion at 76-78. The record, however, contains no evidence of this, while Plaintiffs' detailed allegations suggest that Green was the primary force behind the Mega Grant and its magnitude. The allegations, combined with minimal meeting minutes, imply that the Committee intended to maintain its traditional approach until Green intervened to assert "his views" clearly.[128]

The Trial Court further inferred that "the Compensation Committee was undecided when it sought Green's input." Opinion at 77, fn. 178. But the chronology of events and the meeting minutes reasonably suggest that Green directed all attention to the Mega Grant. Even if Falberg and the Committee remained "undecided" after the initial meeting, no alternative approaches emerged once Green made "his views" known. *See Tornetta*, 310 A.3d at 517 ("Delaware law recognizes that 'asking the controlling stockholder to consider alternative options can change the negotiating dynamic.'"). Accordingly, the Trial Court erred in not drawing the

[128] A0082-A0083, ¶116.

fair inference that the Mega Grant was "initiated" by Green's demands and that he was "the driving force behind it." *Frederick Hsu Living Trust v. Oak Hill Capital Partners III, L.P.*, 2020 WL 2111476, at *36 (Del. Ch. May 4, 2020).

ii. Green and Sonsini Presided over a One-Sided "Negotiation."

The record of subsequent meetings illustrates Green's domination of the process he initiated. On January 13, 2021, Green dispatched both Sonsini and Buyer to be in charge of "facilitat[ing]" the Committee's consideration of the Mega Grant.[129] Green's controlling influence swiftly eliminated the possibility of a stockholder vote, thereby depriving minority stockholders of "any chance to protect themselves." *In re MFW S'holders Litig.*, 67 A.3d 496, 503 (Del. Ch. 2013). In *Berteau*, the special committee made a "deliberately vague" justification for not pursing a minority stockholder vote. *Berteau*, 2021 WL 2711678, at *23. Here, no justification (or an attempt at one) was made. Compensia's [redacted] at the February 18, 2021 Board meeting was rejected without any recorded reason. A reasonable inference—not drawn by the Trial Court—is that [redacted] was rejected because *Green's attorney [was] present* during the discussion.[130]

[129] A0086, ¶123.

[130] A0088, ¶¶127-28.

Unlike *Berteau*, which involved "reversals" of negotiating positions in response to pressure from the controller, here, Green's dominance ensured opposing interests never gained traction.[131] By focusing solely on overt interference and positional reversals, the Trial Court missed the forest for the trees.

iii. The Stated Purpose of the Mega Grant was Pretextual.

It is not reasonable to infer that Buyer, Falberg, or Paley genuinely believed that, despite his ***$3 billion stake*** in the Company, Green needed a special award valued at $819 million to further "motivate" him or align his interests with stockholders.[132] Inexplicably, no one raised the implications of Green's already massive equity stake to push back on the *size* of a Mega Grant, much less question whether such an award made sense. *See, e.g.*, *Tornetta*, 310 A.3d at 513 ("most striking omission from the process is the absence of adversarial negotiations between the [b]oard and [controller] concerning the size of the [mega] [g]rant."). Moreover, the Mega Grant did not "further align" Green's interests with stockholders' because there was no restriction on Green's ability to sell his shares and the Mega Grant prioritized short-term gains over long-term value.[133]

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[131] 2021 WL 2711678, at *16.

[132] A0056-A0058, ¶¶71-73.

[133] A0088, A0102, ¶¶128, 152.

Nothing suggests that Green was threatening to leave or that there was a belief he would.[134] Green was already "retained" by virtue of the Trigger Amendment, which the Board failed to use as leverage against him. Green's large equity stake and the Trigger Amendment made the rationale for the Mega Grant questionable, and without a minimum vesting or achievement period, it became clearly pretextual.[135] These facts suggest the underlying "process" was at best "an exercise in rationalization." *Southern Peru*, 52 A.3d at 801.

In acknowledging that "[o]f course, it is reasonable to infer that Green may have remained at the Company without the [Mega Grant]," the Trial Court credited Plaintiffs with having "a decent argument on fair price[,]" but failed to draw the reasonable inference that this warranted. Opinion at 78-79. Plaintiffs' allegations did not present a borderline argument on whether the price was fair, *e.g.*, Green received an $819 million award when he should have only received a $300 million award. Rather, the argument was whether Green should have received any "mega grant" at

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[134] A0091-A0092, ¶144.

[135] *See Tornetta*, 310 A.3d at 447 (recipient of mega grant with "no intention of leaving" evidenced award was unnecessary to achieve purported goals); *id.* at 536-537 ("where an executive has a sizeable pre-existing equity stake, there is a good argument that the executive's interests are already aligned with those of the stockholders.").

all. If the Trial Court agreed that Plaintiffs' allegations showed the Mega Grant was unnecessary *and irrational*, the $819 million award reflects the directors' state of mind beyond mere "price" considerations.

The Trial Court never asked the questions posed by the Chancellor in *Tornetta*: was the Mega Grant necessary for Trade Desk to retain Green and achieve its goals? No. *Could* the Mega Grant have even served to achieve its stated goals? Again, the answer is no. Thus, the decision to approve the Mega Grant reflects "[d]eliberate indifference" on the part of Buyer, Falberg, and Paley, which "is the epitome of faithless conduct." *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 755 (Del. Ch. 2005).

iv. None of the Protections Recommended by Compensia were Sought.

Defendants admitted that there is nothing "in the record that shows the [directors] pushed back [on Green]" because "there aren't specific details about the negotiation back and forth," and "the particular[s] are obviously not in the minutes" documenting the process.[136] Instead, Defendants referred to "revised proposals" and "further discussions." *Id.* But the lack of specifics reasonably suggests that no negotiation occurred. *Tornetta*, at 511(directors did not "act[] in the best interests of

[136] A0538-A0539, Transcript of April 3, 2023 Hearing at 77-80.

the [c]ompany" where there was "barely any evidence of negotiations at all"). The Trial Court erred in granting Defendants deference and finding otherwise.

Further, that the Committee sided with Green on every key point raised by Compensia as crucial for the award evidences their "desire to placate the controller, not to land the best transaction possible." *Viacom*, 2020 WL 7711128, at *24. As with the special committee that negotiated the merger in *CBS*, here, the Committee achieved "none of the terms flagged by [the Committee's] advisors" as important "apparently because these priorities conflicted with [Green's] preferences." 2021 WL 268779, at *42. Where, as here, the final terms of a transaction "reveal that [the controller] won on nearly every key deal point," there is a reasonable pleading-stage inference to be drawn that the directors fell victim to a controlled mindset and breached their duty of loyalty. *Id.* at *14.

v. The Mega Grant's "Extreme" Nature Suggests Bad Faith.

In evaluating whether a set of facts gives rise to an inference of bad faith, or here controlled mindset, "[o]ne of the objective indicia that a trial court can consider is how extreme the decision appears to be." *Winborne*, 301 A.3d at 620. In this context, a failure to consider "the objective reasonableness" of the Mega Grant makes the transaction "virtually unchallengeable." *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 107 (Del. 2013). Buyer, Falberg, and Paley's decision to approve

it has all the earmarks of outright capitulation to Green, which supports an inference of bad faith.

A poor business decision for a typical CEO becomes something else altogether in a controller setting, as it reasonably implies the directors prioritized the controller's interests over the company's. "A director does not act in good faith, even if there is not a direct conflict of interest as to that director, unless the director 'acts in the good faith belief that her actions are in the corporation's best interest.'" *Kahn*, 2008 WL 5197164, at *7. As the Trial Court acknowledged, the deep skepticism that Delaware law has for conflicted controller transactions is in tension with the extreme deference afforded to directors in ordinary executive compensation cases. Opinion at 19-23. Reconciling these two strands requires something the Trial Court failed to do: view the transaction objectively and draw appropriate inferences if it is facially "extreme."

vi. The Trial Court Failed to Assess Plaintiffs' Independence and Controlled Mindset Allegations Together.

Contrary to the Trial Court's assertion, almost six pages of Plaintiffs' Answering Brief are dedicated to advancing the argument that Green's ability (as a self-interested controller) to exert pressure and influence over the Company's directors should be considered ***in tandem*** with Plaintiffs' allegations that certain

directors had substantial personal, financial, and professional relationships that compromised their independence from Green. *Compare* Opinion at pp. 56, fn. 162 *with* A0420-A0425, Pl. Br. at 66-71. Again, Plaintiffs specifically argue that Paley, Buyer and Falberg "actually *showed* themselves to be incapable of acting independently of [Green] in connection with the Mega Grant." A0420, Pl. Br. at 66; *Tornetta*, 310 A.3d at 510 ("When assessing independence, Delaware courts consider not only the directors' relationships with the party to whom they are allegedly beholden, but also how they acted with respect to that party."); This argument is particularly salient as to Falberg, who chaired the Committee and who allowed Green, the proverbial "800-pound gorilla," to call the shots. *In re Pure Res. S'holders Litig.*, 808 A.2d 421, 436 (Del. Ch. 2002).

Although the Trial Court states that it considered Plaintiffs' "controlled mindset" argument in analyzing Falberg's independence, it afforded no weight to the allegations – finding them be "weaker" than the controlled mindset allegations in *Viacom* simply because Plaintiffs alleged no "retributive behavior by Green." Opinion at 56, fn. 162 (citing *Viacom*, 2020 WL 7711128). In so finding, the Trial Court failed to consider the totality of Plaintiffs' allegations.

In *Viacom*, "past retributive behavior" was just one of numerous allegations that, when "***taken together***," impugned the directors' independence. *Id.* at *25.

Among other things, the *Viacom* Court considered the directors' personal relationships with the controller, the circumstances of their appointment to the board and their actions as special committee members. *Id.* By focusing solely on what was not alleged, the Trial Court minimized Plaintiffs' allegations about Falberg's relationship with and indebtedness to Green. When combining Plaintiffs' independence and controlled mindset allegations, there is reason to doubt Falberg's independence from Green. Similarly, Buyer and Paley's actions in connection with the Mega Grant, in combination with Plaintiffs' allegations showing that Buyer and Paley are beholden to Green generally, are sufficient to raise a reasonable doubt that they could impartially consider a demand. *Sanchez*, 124 A.3d at 1020.

2. Policy Considerations Warrant Reversal.

The demand futility analysis is designed to ensure that non-meritorious cases are dismissed at the outset while "leaving a path" for stockholders to pursue a derivative action "where there is reason to doubt that the board could bring its impartial business judgment to bear on a litigation demand." *Zuckerberg II*, at 1049. In order for the concept of "reasonable doubt" to remain "flexible and workable" and allow the demand futility test to serve its proper function, it is essential to permit derivative claims to proceed to discovery when, as in this case, they are plainly "not

based on mere suspicions or stated solely in conclusory terms." *Grimes*, 673 A.2d at 1217.

If directors at a controlled company do not face a substantial likelihood of liability for approving a "mega grant" that they refused to negotiate, is contrary to the guidance they received from their advisors and cannot achieve any of the purported objectives used to justify the award, then no set of facts will excuse demand in this context. Controllers, especially small-minority controllers like Green,[137] will consider it a golden invitation to extract value for themselves through similar abuses, leaving minority stockholders with no recourse. That should not be Delaware law.

[137] The likelihood of abuse is highest in this context, as "dual-class structures with small-minority controllers generate significant governance risks because they feature a unique absence of incentive alignment." *Viacom*, 2020 WL 7711128, at *f.n. 183, quoting Bebchuk & Kastiel, *The Perils of Small-Minority Controllers*, 107 Geo. L.J. 1453, 1466 (2019).

CONCLUSION

Plaintiffs respectfully request reversal of the judgment below.

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE THE TRADE DESK, INC. DERIVATIVE LITIGATION	Case No. 114, 2025 On appeal from the Court of Chancery of the State of Delaware, Consol. C.A. No. 2022-0461-PAF

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2025, a copy of the foregoing ***Public Version of Appellants' Opening Brief*** was caused to be served upon the following counsel of record via File & Serve*Xpress*:

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