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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE THE TRADE DESK, INC. DERIVATIVE LITIGATION	No. 114, 2025 Court Below: Court of Chancery of the State of Delaware Consol. C.A. No. 2022-0461-PAF **REDACTED PUBLIC VERSION** **FILED: June 13, 2025**

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Dated: May 29, 2025

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NATURE OF PROCEEDINGS

In this appeal, Plaintiffs seek to revive a dismissed derivative claim that, as the Court of Chancery recognized, rests on conclusory and non-particularized allegations and unsupported inferences. Plaintiffs appeal the dismissal of their claim brought on behalf of The Trade Desk, Inc. and against its Board of Directors (the "Board") under the theory that the Board acted with a "controlled mindset" influenced by Jeff Green, the Company's CEO and controlling stockholder, in approving an equity incentive compensation grant for him (the "Performance Option").

In their Opening Brief ("OB"), Plaintiffs mischaracterize the record below and the Court of Chancery's robust 85-page Memorandum Opinion (the "Opinion") granting dismissal. The Opinion correctly held that, whether viewed holistically or otherwise, Plaintiffs did not provide particularized factual allegations to impugn the independence of a majority of the eight directors of The Trade Desk Board. The Court of Chancery also, applying established precedent recently reiterated by this Court, held that the presence of a controlling stockholder does not alter the legal standard for demand futility, and in doing so found that Plaintiffs' allegations did not meet the heightened pleading requirements of Court of Chancery Rule 23.1. Plaintiffs provide no basis to reverse that well-reasoned holding.

Plaintiffs likewise offer no reason to disturb the Court of Chancery's holding that there were insufficient allegations to show Ms. Buyer, Ms. Falberg, and Mr. Paley face a substantial likelihood of liability based solely on their approval of the Performance Option. Ms. Buyer and Mr. Paley were not on the Committee that recommended the Performance Option, and Plaintiffs ***concede*** that two of the three members of the Committee (Mr. Rajaram and Mr. Wells) were independent. Plaintiffs are thus left to assert that two directors who ***did not serve*** on the Committee nonetheless acted in bad faith by approving the Performance Option at the Board level, and on the recommendation of a concededly independent and disinterested Committee. Plaintiffs' speculation that this approval must have been driven by a "controlled mindset" is not supported by the record or by Delaware law—as the Court of Chancery found. Plaintiffs failed to provide particularized facts showing that a majority of the directors acted with scienter, or a motive to harm, which is necessary to establish bad faith.

Accordingly, the Court of Chancery's dismissal should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly dismissed Plaintiffs' claims under Rule 23.1 because Plaintiffs failed to allege that a majority of the Board was incapable of independently considering a demand under controlling precedent.

2. Denied. The Court of Chancery correctly concluded that Plaintiffs failed to allege with factual particularity that a majority of the Board faced a substantial likelihood of liability because they approved the Performance Option in bad faith under a "controlled mindset."

STATEMENT OF FACTS

A. Factual Background

1. The Trade Desk Delivers Impressive Stockholder Returns Under Mr. Green's Leadership

Founded in 2009, The Trade Desk is a technology company that provides advertisement buyers a self-service platform to create, manage, and optimize digital advertising campaigns. From October 6, 2016, to October 6, 2021, The Trade Desk's share price increased over 2,500%, significantly outpacing its peers and relevant market indexes. A0063. The Trade Desk's fundamental business performance likewise thrived, with the Company reporting substantial net income and revenue growth in challenging market conditions. B0097; B0108. From its IPO to the date of the Performance Option, The Trade Desk's market capitalization increased to approximately $44 billion, underscoring the Company's continued "significant growth ever since" its IPO. Opinion at 4.

Mr. Green, The Trade Desk's co-founder, President, CEO, and Chairman of the Board, led this growth. A0035-37. Mr. Green previously founded AdECN, the world's first online advertising exchange, which was acquired by Microsoft in 2007. A0238.

The Trade Desk's Compensation Committee (the "Committee") manages the Company's equity and incentive compensation plans. *See* B0045-46; B0052-54. At

all relevant times, the Committee consisted of Kathryn Falberg, Gokul Rajaram, and David Wells. A0035-36.

Mr. Rajaram has served on the Board since May 2018 and serves on the Committee. A0239. He is an experienced executive in the technology sector, including at DoorDash and Square. A0239.

Mr. Wells was a member of the Board at the time of the Complaint and served on the Committee. A0237. He has held numerous management positions at media and healthcare companies, including Netflix and HIMS. A0237.

Appellants do not challenge the independence or disinterestedness of Committee members Mr. Rajaram and Mr. Wells, or director Andrea Cunningham. OB at 23-24.

Ms. Falberg has been a member of the Board since August 2016 and is Chair of the Committee. A0035. She has vast experience in the public technology and life sciences industries. *See* A0237. Before joining the Board, Ms. Falberg was Executive Vice President and CFO at Jazz Pharmaceuticals, a biopharmaceutical firm. A0237. She also served as the CFO of AdECN before it was sold to Microsoft in July 2007. A0048. Throughout her career, Ms. Falberg has served as a director for many public companies, including Arcus Biosciences, Nuvation Bio, and Medivation. A0237.

David Pickles co-founded The Trade Desk with Mr. Green. When the Complaint was filed, he was the Company's Chief Technology Officer and served on the Board. A0238. Mr. Pickles has years of experience in the technology industry, including leading product development at AdECN. A0104; A0238. Mr. Pickles did not participate in considering, negotiating, or voting on the Performance Option. *See* A0293-342; B0055-69.

Eric Paley was a member of the Board from March 2010 through 2023. *See* A0035. He is co-founder and managing partner at Founder Collective, a seed-stage venture capital firm. A0047-48; A0238. He has years of experience working with, and serving on the board of directors of, fast-growing technology companies. A0238.

Lise Buyer has served on the Board since March 2019 and has acted as lead independent director since February 2021. A0035; A0237. She previously held management positions in technology and investment companies, including Google and Technology Partners. Ms. Buyer also co-founded a consulting firm that advises companies on initial public offerings. A0237.

2. The Committee Evaluates Options to Retain Mr. Green as the Company's CEO in the Long Term

The Committee initially created the 2016 Incentive Award Plan (the "Plan") "to promote the success and enhance the value of The Trade Desk … by linking the individual interests of the members of the Board, Employees, and Consultants to those of Company stockholders and by providing such individuals with an incentive for outstanding performance to generate superior returns to Company stockholders." B0034. The Plan empowers the Committee to determine the "terms and conditions" of equity awards granted under the Plan, including the "number of Awards to be granted," "number of Shares to which an Award will relate," "exercise price, grant price, [or] purchase price," and "any restrictions or limitations on the Award." B0046.

The Committee is also responsible for the annual "review [of] the CEO compensation" and to "make recommendations to the Board regarding the compensation of the CEO." B0053. The Board is ultimately responsible for approving the equity compensation for Mr. Green. *See* A0319.

On December 4, 2020, the Committee met to re-evaluate Mr. Green's compensation. B0056-57. The Committee recognized that Mr. Green's "visionary leadership ha[d] created tremendous stockholder value." B0056-57. "[T]o provide

incentive to Mr. Green to remain CEO for a long time," the Committee began considering "a potential CEO grant" for Mr. Green "to help ensure [his] interests are aligned with stockholders." B0056-57. Mr. Green did not attend that meeting. *See* B0056.

The Committee engaged Compensia to advise it on various potential options. A0255. Compensia offered multiple options of [redacted] B0057. One such option Compensia highlighted was a [redacted] that would facilitate [redacted] B0074. According to Compensia, this was the [redacted] B0074. Compensia's presentation also observed that Mr. Green [redacted] B0090.

As Plaintiffs acknowledge, at least initially, *see* OB at 10, Compensia made no recommendations. A0078. It instead identified the "Pros" and "Cons" for each potential approach. A0078; A0095.

The Committee met twice in January 2021 to consider Mr. Green's compensation and to organize how negotiations between the Committee and Mr.

Green would proceed. *See* A0301-06. Specifically, it was determined that Wilson Sonsini Goodrich & Rosati, P.C. ("WSGR") would represent Mr. Green, while Latham & Watkins LLP would represent the Committee. A0302. Compensia served as the Committee's independent compensation consultant throughout the process. A0302.

Only after the Committee established these procedures did it begin discussing "[redacted] A0303.

3. The Committee Considers and Negotiates the Performance Option Over Several Months and During 10 Meetings

From its initial meeting in December 2020 through its recommendation in September 2021, the Committee met 10 times to consider the benefits and drawbacks of a potential performance award for Mr. Green. *See* A0296-316; B0055-69. This process included discussions with its advisors, other directors, and, where appropriate, Mr. Green and his counsel. *See* A0296-316; B0055-69. Throughout this process, the Committee evaluated every aspect of a potential performance award, including the timing, size, structure, and key metrics of such a grant. *E.g.*,

A0293-95; A0301-06; A0314-16. The Committee also considered whether any performance award would take the form of one grant with multiple metrics or multiple grants with varying metrics. *See* A0296-316; B0055-69.

On limited occasions, the Committee met with Mr. Green and his counsel to negotiate key points and to hear Mr. Green's views on what would best incentivize him "to remain CEO … for a long time." B0056. For example, the Committee met on February 18, 2021, with Larry Sonsini of WSGR to discuss key considerations from Mr. Green's perspective, "[redacted]." A0294. The Committee likewise met several times—such as on August 3, 2021—without Mr. Green or WSGR, to "[redacted]" B0065; *see also* B0056-57; B0063-63; B0068-69.

4. The Committee Recommends and the Board Approves the Performance Option

After 10 months of deliberation and negotiations, the Committee recommended the Performance Option to the Board on September 17, 2021. A0094. Mr. Green did not attend that meeting. B0068. The Board, minus Mr. Green and Mr. Pickles, approved the Performance Option on October 6, 2021. A0318-42.

As the Committee stated from the outset, the goal of the Performance Option was "to help ensure Jeff Green's interests are aligned with stockholders and also to provide incentive to Mr. Green to remain CEO of the Company for a long time as his visionary leadership has created tremendous stockholder value." B0056-57. The Performance Option was intended to accomplish this goal by providing that the options will vest only if the price per share of the Company's stock reaches "certain ambitious price goals, with the number of shares vesting … for each tranche increased or decreased depending on" the "common stock's performance relative to the Nasdaq-100 Index." A0260. This structure ensured Mr. Green would receive additional compensation only if stockholders likewise benefitted from The Trade Desk's value appreciating under Mr. Green's continued leadership.

Mr. Green's incentives are structured with eight increasingly large vesting targets or tranches. A0260. Each tranche has an associated price achievement

vesting condition ranging from $90.00 to $340.00. A0260. The stock price targets grow incrementally, from a $25.00 increase for the second tranche to a $40.00 increase for the final five tranches. A0260. If The Trade Desk's Class A common stock equals or exceeds the stock price achievement vesting condition measured over a 30-day consecutive trading day period, Mr. Green will have the option to purchase 2,000,000 shares per tranche at an exercise price of $68.29—the Company's stock price on the grant date. A0260. To ensure that any equity grant accurately reflects value created under Mr. Green's leadership, the number of shares Mr. Green can purchase at each vesting tranche may increase or decrease "by up to 20% based on the relative [Total Shareholder Return, or "TSR"] of [The Trade Desk's] Class A common stock as compared to the TSR of the Nasdaq-100 Index." A0260. The tranches vest and become exercisable as set forth below:

		Number of Shares Subject to Performance Option		
Vesting Tranche	Stock Price Achievement Vesting Condition ($)	<50th Percentile against Nasdaq-100 Index	Target Shares(1)	>75th Percentile against Nasdaq-100 Index
1	90.00	1,600,000	2,000,000	2,400,000
2	115.00	1,600,000	2,000,000	2,400,000
3	145.00	1,600,000	2,000,000	2,400,000
4	185.00	1,600,000	2,000,000	2,400,000
5	225.00	1,600,000	2,000,000	2,400,000
6	260.00	1,600,000	2,000,000	2,400,000
7	300.00	1,600,000	2,000,000	2,400,000
8	340.00	1,600,000	2,000,000	2,400,000

A0260.

The Performance Option likewise only benefits Mr. Green if he continues to work at The Trade Desk. Within the first four years following the award (through October 6, 2025), the shares are contingent upon Mr. Green remaining CEO of the Company. A0261. After four years, Mr. Green must still work for the Company as CEO, Executive Chair, President, "or [an]other strategic position approved by the Company's Board of Directors" for the shares to vest. B0014-15. The Board retains the ability to terminate Mr. Green for cause and provides a mechanism for clawing back any vested shares consistent with applicable law. B0012; A0263.

5. Mr. Green's Compensation From the Performance Option is Unknown

The grant-date fair value of the Performance Option was approximately $819 million. B0030. However, as of the Opinion, nearly three and a half years after the grant date and despite The Trade Desk's continued success and growth, only two of the performance targets have been achieved (Tranches 1 and 2), for which a total of 4.8 million shares are vested. A0063-67. Since November 2024, when the second Tranche vested, The Trade Desk's stock price has traded well below the remaining performance targets as a result of broader market conditions. *See* Yahoo! Finance, *The Trade Desk, Inc. (TTD)*, https://finance.yahoo.com/quote/TTD/history/ (last visited May 28, 2025); *see also Lee v. Pincus*, 2014 WL 6066108, at *4 (Del. Ch.

Nov. 14, 2014) (citing D.R.E. 201(b)(2)) (noting that the Court may "take judicial notice of these reported stock prices because they are not subject to reasonable dispute"). As of the day before filing, The Trade Desk's stock closed at approximately $76.94 per share, or over $65 below the next stock price target of $145 per share.

B. Procedural History

1. The Charter Litigation Rejected Allegations Regarding Director Independence and "Controlled Mindset"

On June 28, 2021, a stockholder filed suit against The Trade Desk challenging the Board's decision to amend the Company's charter to retain its dual-class governance structure. *City Pension Fund for Firefighters & Police Officers in City of Miami v. The Trade Desk, Inc.*, 2022 WL 3009959, at *8 (Del. Ch. July 29, 2022) ("Charter Litigation Opinion"). The Court dismissed that action with prejudice, holding that the defendants satisfied the framework set out in *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014). *Id.* at *23. The Court also held allegations in that action concerning Ms. Buyer, which related to the compensation she received from The Trade Desk as a director and consultant, were insufficiently pled, and that she did not operate with a "controlled mindset." *Id.* at *14-15.

2. The Court of Chancery Dismissed Plaintiffs' Claims in This Case

On November 10, 2022, Plaintiffs filed the consolidated Complaint. On February 14, 2025, the Court of Chancery granted Defendants' motions to dismiss under Rule 23.1. Opinion at 85. It held that Plaintiffs failed to plead particularized facts, giving rise to a reasonable inference that demand was futile, and in particular that Plaintiffs failed to call into reasonable doubt Ms. Buyer's, Ms. Falberg's, and Mr. Paley's independence. *Id.* at 84. Further, the Court of Chancery held that Plaintiffs failed to raise "a reasonable inference that any of the Director Defendants face[d] a substantial likelihood of liability in connection with [the] litigation." *Id.*

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT A MAJORITY OF THE BOARD WAS INDEPENDENT

A. Question Presented

Did the Court of Chancery correctly conclude that the Complaint should be dismissed under Court of Chancery Rule 23.1 in light of Plaintiffs' failure to plead particularized allegations that a majority of the Board lacked independence from Mr. Green?

B. Scope of Review

This Court's review of the Court of Chancery's dismissal of a complaint for noncompliance with Rule 23.1 is "de novo and plenary." *Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000).

C. Merits of Argument

Under the analysis this Court has established for assessing whether demand futility is satisfied under Court of Chancery Rule 23.1, Plaintiffs' claims fail. The Court of Chancery correctly determined that Plaintiffs' Complaint did not meet the stringent requirements necessary to plead demand futility, as it lacked particularized factual allegations demonstrating that a majority of the Board was incapable of independently considering a demand. Opinion at 57.

1. Mr. Green's Status as a Controlling Stockholder Does Not Alter the Legal Standard for Assessing Director Independence

Plaintiffs' first argument, that the Court of Chancery erred by not giving Mr. Green's status a controlling stockholder its "proper weight," OB at 26-27, overlooks binding precedent. This Court recently confirmed that Rule 23.1 controls the demand futility analysis for derivative claims involving controlling stockholders. *See In re Match Grp., Inc. Deriv. Litig.*, 315 A.3d 446, 451-52 (Del. 2024) ("[D]erivative claims against controlling stockholders … are subject to Court of Chancery Rule 23.1 and our demand review precedent."). Plaintiffs offer no authority to the contrary.

Plaintiffs make three arguments in support of this erroneous legal position. None passes muster. First, relying on *BGC*, Plaintiffs urge that "the presence and influence of a controller is an important factor that should be *considered*" in the demand futility analysis. OB at 26 (quoting *In re BGC P'rs, Inc. Deriv. Litig.*, 2019 WL 4745121, at *8 (Del. Ch. Sept. 30, 2019)) (emphasis added). However, in the very next sentence, Plaintiffs concede that the Court of Chancery *did consider* that Mr. Green was a controlling stockholder; its ruling therefore adheres to *BGC*. OB at 26.

Second, citing *In re EZCorp Inc. Consulting Agreement Derivative Litigation*, 2016 WL 301245, at *20 (Del. Ch. Jan. 25, 2016), Plaintiffs argue that the Board "labor[ed] in the shadow of a controlling stockholder," OB at 27. However, that part of the *EZCorp* opinion was decided under Rule 12(b)(6), *not* Rule 23.1, and its discussion concerning the applicable standard of review had nothing to do with director independence. *EZCorp*, 2016 WL 301245, at *20.

Finally, Plaintiffs contend that they need not plead facts, let alone particularized factual allegations, because Mr. Green's status as a controlling stockholder alone provides "inherent coercion." OB at 27-28. Plaintiffs cite to an inapposite entire fairness post-trial decision that does not apply the demand futility framework and cite no authority holding that the independence prong of the demand futility framework can be satisfied by the mere presence of a controlling stockholder. OB at 38-43. No such authority exists, and this Court recently ruled the opposite. *Match*, 315 A.3d at 452.

2. The Court of Chancery Correctly Determined That a Majority of the Board Can Independently Consider a Demand

Plaintiffs concede that three of the Board's eight directors, Mr. Rajaram, Mr. Wells, and Ms. Cunningham, could independently consider a demand. OB at 23-24. Defendants agree that Mr. Green could not impartially consider a demand. Thus, to

adequately plead demand futility, Plaintiffs must plead particularized factual allegations that establish at least three of the Board's four remaining directors are so beholden to Mr. Green that "his or her 'discretion would be sterilized.'" *Beam v. Stewart*, 845 A.2d 1040, 1050 (Del. 2004).

Plaintiffs' chief complaint is that (they say) the Court of Chancery did not assess their demand futility allegations "holistically" and "drew improper inferences in Defendants' favor." *See, e.g.*, OB at 2, 23, 25, 27, 29, 33. In making this argument, Plaintiffs agree that the Court of Chancery correctly considered the allegations regarding Mr. Pickles's independence from Mr. Green "holistically," but they nonetheless argue that it forgot how to perform the same holistic analysis for the other three directors. *Id.* at 25-26. This is incorrect and not supported by the record. The Court of Chancery applied a consistent and thorough analysis to all four directors and on that basis concluded that Plaintiffs failed to allege demand futility for at least three directors.

a. Kathryn Falberg

Plaintiffs argue that Ms. Falberg lacks independence from Mr. Green because of her holdings in The Trade Desk, her claimed status as a "professional director," and her short time having worked with Mr. Green previously as CFO of AdECN. *Id.* at 35-37. The Court of Chancery considered these allegations and correctly

concluded that "[i]individually and collectively, Plaintiffs' allegations fall short." Opinion at 52.

First, Plaintiffs argue that Ms. Falberg's The Trade Desk holdings were a "substantial portion of her net worth." OB at 35. Plaintiffs complain that the Court of Chancery "wrongfully dismissed" these allegations "simply because Plaintiffs did not 'contextualize those holdings.'" *Id.* However, it is Plaintiffs' obligation to allege the materiality of these holdings with particularity, and that is precisely what the Court of Chancery found Plaintiffs failed to do. Opinion at 53-54 & n.158. Plaintiffs do not specify when or how Ms. Falberg acquired her Class A shares. *Id.* at 53. And beyond failing to contextualize how this income might render Ms. Falberg, an experienced executive and director, beholden to Mr. Green, there are also no well pled allegations that Mr. Green has the ability or means to deprive Ms. Falberg of *any* of her accumulated wealth, including her The Trade Desk Holdings. *Id.*

Plaintiffs respond that holdings amounting to "$14 million is *per se* material." OB at 35-36. That misses the point—even if this amount were material to Ms. Falberg (and Plaintiffs have not alleged it was), Plaintiffs have not pled that Mr. Green could unilaterally sell Ms. Falberg's shares or otherwise deprive her of the economic benefit of those holdings. To the contrary, Ms. Falberg's holdings in the Company aligned her interests with *other stockholders*, not Mr. Green. *Owens v.*

Mayleben, 2020 WL 748023, at *10 (Del. Ch. Feb. 13, 2020) (declining to "infer a lack of director independence simply because the director owns stock in the company on whose board he sits"), *aff'd*, 241 A.3d 218 (Del. 2020) (TABLE).

Plaintiffs likewise argue that "Falberg is a professional director who relies on these positions for her livelihood" and that she "may be especially reluctant to sue" her fellow directors—statements that could likely be made about virtually any director of any Delaware corporation. OB at 36. Yet Plaintiffs provide only one year of Ms. Falberg's The Trade Desk Board compensation to support an inference that those fees were material to her. *See* Opinion at 54-55 (noting that in 2021, 19.1% of Ms. Falberg's director compensation was attributed to The Trade Desk). Plaintiffs make no specific allegations regarding Ms. Falberg's income during any other year in her decades-long career as an officer and director. The Court of Chancery found the 19.1% compensation figure comparable to *Kraft Heinz*, where 17% of a director's income, despite alleged conflicts and a non-independent NASDAQ classification, was not sufficient to overcome the presumption of independence for demand futility purposes. Opinion at 56 (citing *In re Kraft Heinz Co. Deriv. Litig.*, 2021 WL 6012632, at *11-13 (Del. Ch. Dec. 15, 2021), *aff'd*, 282 A.3d 1054 (Del. 2022) (TABLE)). This is especially true where the director compensation in question is not "significant enough 'in the context of the director's

economic circumstances, as to have made it improbable that the director could perform [her] duties.'" *McGowan v. Ferro*, 859 A.2d 1012, 1029 n.84 (Del. Ch. 2004); *see also Simons v. Brookfield Asset Mgmt. Inc.*, 2022 WL 223464, at *15 (Del. Ch. Jan. 21, 2022).

Plaintiffs' reliance on *BGC* to argue Ms. Falberg has a "sense of 'owingness'" to Mr. Green is also unsupported. OB at 35 (quoting *BGC*, 2019 WL 4745121, at *12). The Court of Chancery acknowledged that "past benefits of *sufficient materiality* in the *specific circumstances* of a particular director" could give rise to a sense of owingness. Opinion at 53 (citing *BGC*, 2019 WL 4745121, at *12) (emphasis added). However, unlike in *BGC* where there were specific allegations of a deep personal and professional relationship, including $65 million in financial contributions to a college where the director served as Provost, Plaintiffs here "have not made particularized allegations regarding a past benefit that would give rise to a sense of owingness that would affect Falberg's independence from Green." Opinion at 53-54 (citing *Owens*, 2020 WL 748023, at *10).

Next, Plaintiffs maintain that "the Trial Court failed to afford the proper weight to Plaintiffs' allegations regarding Green hiring Falberg as CFO at AdECN." OB at 36. But the Court of Chancery considered "Falberg's brief overlap with Green at AdECN," which lasted "a matter of months," 15 years before this action, and

weighed the absence of any allegations reflecting "any interaction between her and Green over the following nine years." Opinion at 52. The Court of Chancery thus concluded that such "brief tenure," "her 2003 investment in AdECN, and her six-year tenure on the Board do not, individually or collectively, create reason to doubt her independence from Green." Opinion at 52 (citing *United Food & Commercial Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1063 (Del. 2021) ("*Zuckerberg II*")). Plaintiffs have identified nothing erroneous about this conclusion.

b. Lise Buyer

Plaintiffs' allegations regarding Ms. Buyer revolve around her prior consulting work for The Trade Desk, her compensation as a director, and her purported role in facilitating certain amendments to the equity grant. OB at 31-35.

Plaintiffs first argue that Ms. Buyer's past work at The Trade Desk and her purported reliance on Mr. Green for business referrals compromise her independence. OB at 32. However, the mere listing of The Trade Desk as a reference does not create reasonable doubt about her independence. Opinion at 49-50 (citing *Zuckerberg II*, 262 A.3d at 1063). Plaintiffs' lone citation for the alleged "independence-compromising effects of director and controller 'serv[ing] as business resources and references for each other,'" OB at 32 (quoting *In re Loral*

Space & Commc'ns Inc. Consol. Litig., 2008 WL 4293781, at *6 (Del. Ch. Sept. 19, 2008)), involved far more than was alleged here, including that the director was "long-time friends[]" and "business school classmates" with the controlling stockholder, *Loral*, 2008 WL 4293781, at *6. And in any event, the decision in *Loral* does not speak to "independence-compromising effects" at all. *See id.*

Plaintiffs' argument that Ms. Buyer was reliant on Mr. Green as a professional reference is yet another instance of Plaintiffs' "generalized allegations" failing to meet the particularity requirement of Rule 23.1. Opinion at 50 & n.147. There are no particularized allegations that Ms. Buyer actually relies on Mr. Green to serve as a professional reference for her business or that any past references were material. And Plaintiffs do not allege that Ms. Buyer actually used her relationship with Mr. Green to secure any engagements for her consulting business after she joined the Board. A0167. Nor do Plaintiffs offer any specific allegations establishing that Mr. Green possesses any means to deprive Ms. Buyer of her consulting business or otherwise influence Ms. Buyer's future business prospects. *See* OB at 31-35.

Plaintiffs' cited authority does not contradict the Court of Chancery's holding. Ms. Buyer and Mr. Green are not alleged to have the sort of "mutually beneficial ongoing business relationship" alleged in *Sandys*, for example. OB at 33-34 (citing *Sandys v. Pincus*, 152 A.3d 124, 134 (Del. 2016)). Plaintiffs' other authorities are

likewise distinguishable, involving more detailed allegations of closer ties. In *Orman v. Cullman*, the Court of Chancery found sufficient allegations under Rule 12(b)(6) that a director was beholden to a controller due to specific allegations regarding a consulting contract because the controller was "in a position to determine whether particular contracts are to be renewed." *Orman v. Cullman*, 794 A.2d 5, 30 (Del. Ch. 2002). Similarly, in *HomeFed*, the Court of Chancery found sufficient under Rule 12(b)(6) allegations that a director "served in a variety of executive roles" for the controlling stockholder for 15 years, his consulting fees from the company were his "sole employment" apart from serving as a director, and two of his "fellow directors had questioned [his] independence." *In re HomeFed Corp. S'holder Litig.*, 2020 WL 3960335, at *13-14 (Del. Ch. July 13, 2020). Plaintiffs' allegations here fail to meet the same level of particularity, including with respect to how Ms. Buyer's consulting business depended on Mr. Green. *See* Opinion at 48-50; *see also id.* at 48-49 & n.146.

Plaintiffs next take issue with the Court of Chancery's "speculati[on] that Buyer's prior experience in 'hefty roles' enables her to get work without Green's help" and that "Buyer would have 'roughly 50 available references' to tap into" outside of Mr. Green. OB at 33. Plaintiffs complain that "[n]either of these improper, defendant-friendly inferences has any record support." OB at 33. In fact,

the Court of Chancery relied on Plaintiffs' Complaint, their Answering Brief, and the Section 220 documents incorporated by reference. *See* Opinion at 50 n.147. Based on Plaintiffs' claims that Ms. Buyer founded her consulting business Class V Group in 2006—16 years before this case was filed, A0106-08, and that she works with "about four companies per year," A0108, the Court of Chancery conservatively calculated that Ms. Buyer would have "roughly 50 available references." Opinion at 50 n.147. This is not a "defendant-friendly inference." It is math. The Court of Chancery looked to the pleadings and documents incorporated by reference and concluded that they directly contradicted Plaintiffs' allegations. *See H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 139 (Del. Ch. 2003) ("[A] complaint may … be dismissed where the unambiguous language of documents upon which the claims are based contradict the complaint's allegations.").

Finally, Plaintiffs argue that "the Trial Court glossed over" Ms. Buyer's role in the equity grant and having served on a board committee with respect to the prior dual-class extension. OB at 34-35. As support, Plaintiffs cite three paragraphs of the Complaint. *Id.* at 34 n.122 (citing A0046-47; A0086). Of the three, Paragraphs 51 and 52 of the Complaint contain no allegations about Ms. Buyer's alleged role in the equity grant or dual-class extension, *see* A0046-47, and Paragraph 123 merely states that Ms. Buyer would "facilitate" a discussion around the equity grant. *See*

A0086. Those allegations say nothing regarding Ms. Buyer's independence from Mr. Green.

c. Eric Paley

Plaintiffs allege that Mr. Paley lacks independence from Mr. Green because of purported shared financial ties and a personal relationship. OB at 5-6, 28. Neither raises reasonable doubt as to Mr. Paley's independence.

First, Plaintiffs contend that the Court of Chancery disregarded a long-standing pattern of mutually advantageous business relations between Mr. Paley and Mr. Green, including Mr. Paley's financial gains from his association with Mr. Green, and Mr. Green's investment in Mr. Paley's venture capital firm, Founder Collective. *Id.* at 28-29. As the Court of Chancery stated, "[t]he question is one of degree: based on Plaintiffs' particularized allegations, is this a relationship that, alone, provides reason to doubt Paley's ability to consider demand[?]" Opinion at 42.

Based on the specific allegations here (or lack thereof), the answer is no. *See id.* at 42 ("[I]t is not reasonable to infer that Green's minority investments in a couple of eight-figure funds would give reason to doubt Paley's independence from Green."). And likewise, Founder Collective's investment in The Trade Desk, *see* OB at 28-29, does not move the needle. Founder Collective has invested in hundreds

of companies and was not reliant on The Trade Desk alone. Opinion at 34-35. Allegations of The Trade Desk being an important investment, Founder Collective being an early investor, and Mr. Paley describing the investment as "worthwhile," OB at 28-29, do not amount to particularized allegations of a sense of "owingness" or suggest a lack of independence. *See In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 369 (Del. Ch. 2008) ("[O]utside business relationships" generally are "insufficient to raise a reasonable doubt regarding a director's independence."); *see also United Food & Commercial Workers Union v. Zuckerberg*, 250 A.3d 862, 895 (Del. Ch. 2020) ("*Zuckerberg I*") (rejecting allegations of a "collaborative relationship" between the controller's company and the director because they "do not support an inference that the relationship is so important to [that company] as to compromise [the director's] independence"), *aff'd*, 262 A.3d 1034 (Del. 2021); *In re CompuCom Sys., Inc. S'holders Litig.*, 2005 WL 2481325, at *9 (Del. Ch. Sept. 29, 2005) (similar).

Second, Plaintiffs argue that Mr. Paley is not independent because of his long tenure on the Board and a personal relationship with Mr. Green that Mr. Paley has described as "intimate," "so lucky," and "special." OB at 29. As an initial matter, long-term board service does not show a lack of independence. *See Zuckerberg I*, 250 A.3d at 897; *see also In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL

396202, at *6 n.63 (Del. Ch. Jan. 31, 2013). Plaintiffs also claim that the Court of Chancery "disregarded these allegations simply because the Complaint does not contain the word 'friend.'" OB at 29. That is not an accurate reading of the Opinion. Instead, the Court of Chancery compared the allegations here to those in cases where personal relationships *have* successfully cast doubt on a director's independence and found that Plaintiffs' allegations were significantly weaker. Opinion at 40-41. For example, in *Sanchez*, the Court concluded that a 50-year friendship was "valuable." *Del. Cnty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1023 (Del. 2015). And in *Sandys*, two families "own[ed] an airplane together" and were "extremely close to each other and [we]re among each other's most important and intimate friends." *Sandys*, 152 A.3d at 130. Instead, the facts here are just like those in the Court's decision in *Beam*, where allegations that "directors moved in the same social circles, attended the same weddings, developed business relationships before joining the board, and described each other as 'friends,' … [we]re insufficient, without more, to rebut the presumption of independence." *Beam*, 845 A.2d at 1051. The Court of Chancery's observation that Plaintiffs did not use the word "friend" in the Complaint highlighted this pleading failure. Opinion at 40-41 & n.125; *see also Zuckerberg II*, 262 A.3d at 1062-63; *Kraft Heinz*, 2021 WL 6012632, at *8-9.

Third, Plaintiffs' contention that the Court of Chancery applied a stricter standard than the law allows does not save their Complaint. OB at 31 (focusing on whether Mr. Paley could consider a demand without improper considerations intervening). The Court of Chancery correctly applied the reasonable doubt standard, assessing whether Mr. Paley's independence was compromised by improper considerations, and held that Plaintiffs' allegations, when viewed in totality, gave no reason "to doubt Paley's ability to consider [a] demand." Opinion at 44; *see also Zuckerberg II*, 262 A.3d at 1061.

* * *

The Court of Chancery correctly decided that the Complaint inadequately alleged that a majority of The Trade Desk Board lacked independence from Mr. Green.

II. THE COURT OF CHANCERY CORRECTLY REJECTED PLAINTIFFS' CIRCULAR "CONTROLLED MINDSET" THEORY

A. Question Presented

Whether the Court of Chancery correctly concluded that Plaintiffs failed to allege with factual particularity that Ms. Buyer, Ms. Falberg, and Mr. Paley face a substantial likelihood of liability because they approved the Performance Option in bad faith under a "controlled mindset"?

B. Scope of Review

See Section I.B, *supra*.

C. Merits of Argument

Plaintiffs next argue that the Court of Chancery erred in holding that the Complaint failed to allege with particularity that Ms. Buyer, Ms. Falberg, and Mr. Paley each face a substantial likelihood of liability for approving the Performance Option because they acted with a so-called "controlled mindset." OB at 38. Plaintiffs' Complaint alleged that all members of the Committee, Ms. Buyer, and Mr. Paley faced a substantial likelihood of liability. A0123-26; *see also* Opinion at 57. As the Court of Chancery correctly observed, "the mere threat of personal liability for approving a questioned transaction, standing alone, is insufficient to challenge either the independence or disinterestedness of directors." *Aronson v.*

Lewis, 473 A.2d 805, 815 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

Additionally, The Trade Desk's certificate of incorporation exculpates directors from liability for money damages for violations of the duty of care. Opinion at 60. As a result, and because there is no allegation that Mr. Paley, Ms. Buyer, and Ms. Falberg received a personal benefit from the Performance Option, Plaintiffs must allege that their *conduct* amounted to bad faith. *Zuckerberg II*, 262 A.3d at 1052; *see also In re Cornerstone Therapeutics, Inc. S'holder Litig.*, 115 A.3d 1173, 1179-80 (Del. 2015). This is a lofty standard, requiring a showing beyond "a questionable or debatable decision on their part." *Ironworkers Dist. Council of Philadelphia & Vicinity Ret. & Pension Plan v. Andreotti*, 2015 WL 2270673, at *27 (Del. Ch. May 8, 2015), *aff'd*, 132 A.3d 748 (Del. 2016) (TABLE). Plaintiffs must plead particularized facts supporting a reasonable inference that Ms. Buyer, Ms. Falberg, and Mr. Paley "acted with scienter, *i.e.*, with a motive to harm, or with indifference to harm that will necessarily result from the challenged decision." *Id.*; *see also In re USG Corp. S'holder Litig.*, 2020 WL 5126671, at *29 (Del. Ch. Aug. 31, 2020).

1. Plaintiffs' "Controlled Mindset" Theory Is Circular and Unsupported by This Court's Precedent

As the Court of Chancery observed, the term "controlled mindset" has been overused in Delaware "to characterize the conduct of a board or committee that negotiates against an alleged controller." Opinion at 65. The problem with adopting it in the way Plaintiffs urge here is that it assumes "that a stockholder has a general right to control corporate claims" anytime a stockholder disagrees with a controller transaction. *See Zuckerberg II*, 262 A.3d at 1055. That theory would put incredible power in the hands of stockholders to defeat a Rule 23.1 motion to dismiss based on their own views of what a board or committee should or should not do. *See Eckert v. Hightower*, 2025 WL 930788, at *6 (Del. Ch. Mar. 24, 2025) (dismissing "controlled mindset" claims where plaintiff pled no "*conduct*" that would "cause" directors "to act disloyally") (emphasis added). Endorsing Plaintiffs' "controlled mindset" theory would "collapse[] the distinction between the board's capacity to consider a litigation demand and the propriety of the challenged transaction." *Zuckerberg II*, 262 A.3d at 1056.

The Court of Chancery has repeatedly recognized the circular nature of the theory. *See Eckert*, 2025 WL 930788, at *6; Charter Litigation Opinion at *15; *Harrison Metal Cap. III, L.P. v. Mathé*, 2024 WL 1299579, at *14 (Del. Ch. Mar.

27, 2024); *In re BGC P'rs, Inc. Deriv. Litig.*, 2022 WL 3581641, at *21-22 & n.309 (Del. Ch. Aug. 19, 2022), *aff'd*, 303 A.3d 337 (Del. 2023) (TABLE); *In re Match Grp., Inc. Deriv. Litig.*, 2022 WL 3970159, at *24 (Del. Ch. Sept. 1, 2022), *rev'd on other grounds*, 315 A.3d 446 (Del. 2024). According to Plaintiffs, alleging a "controlled mindset" and including conclusory allegations that a particular controller transaction is "facially indefensible," OB at 40, and the product of a "superficial process," *id.* at 42, is alone sufficient to overcome the presumption that directors "acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company," *Aronson*, 473 A.2d at 812. That is not the law.

Plaintiffs cobble together cases from various contexts, some of which use the phrase "controlled mindset," and claim it is now an established "theory." OB at 38-43. Not so. As the Court of Chancery noted, that phrase appears in one Delaware Supreme Court opinion—*Americas Mining*—but that opinion did not endorse "controlled mindset" as a theory, nor did it address whether a complaint alleging a "controlled mindset" satisfied Rule 23.1's stringent requirements. *See Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1235 (Del. 2012). Instead, this Court used the term "controlled mindset" solely when accepting the post-trial findings of the Court of Chancery in *Southern Peru*, an entire fairness action in which Rule 23.1

was not in issue and the members of the special committee that negotiated the transaction were not subject to liability. *See id.* Of the eight total references to "controlled mindset" in the Supreme Court's opinion, six quote the Court of Chancery decision below, one starts with "[a]ccording to the Court of Chancery," and the final reference states that "[t]he record indicates that the Special Committee's controlled mindset was reflected in its assignments to Goldman." *Id.* at 1246. This is not an endorsement of a broader theory—let alone support for applying that theory in the Rule 23.1 context.

Unable to find support in this Court's precedent, Plaintiffs instead rely on a number of inapposite Court of Chancery decisions. OB at 39-42. Far from showing any cohesive "theory" that supports Plaintiffs' arguments here, none of those cases used "controlled mindset" to find that directors faced a substantial likelihood of liability for acting in bad faith:

- *In re Southern Peru Copper Corp. Shareholder Derivative Litig.*, 52 A.3d 761 (Del. Ch. 2011), referenced "controlled mindset" in holding that the fair process prong of entire fairness was not satisfied. *Id.* at 800. Plaintiffs incorrectly cite *Southern Peru* for the proposition that "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." OB at 39-40 (citing *Southern Peru*, 52 A.3d at 798). *Southern Peru*, a post-trial opinion, says nothing of the sufficiency of pleadings or substantial likelihood of liability under Rule 23.1.

- *In re CBS Corp. Stockholder Class Action & Derivative Litig.*, 2021 WL 268779 (Del. Ch. Jan. 27, 2021), does not use the phrase "controlled mindset" at all. Instead, it involved "a quintessential bad faith analysis." Opinion at 67. Plaintiffs cite *CBS* to support the assertion that "[a] 'controlled mindset' is a culpable state of mind and species of bad faith." OB at 41 (citing *CBS*, 2021 WL 268779, at *29). The page to which Plaintiffs cite discusses the independence of the CBS board, but it does not mention "controlled mindset," "state of mind," or "bad faith."
- *In re Viacom Inc. Stockholders Litig.*, 2020 WL 7711128 (Del. Ch. Dec. 29, 2020), was decided under Rule 12(b)(6) and reasoned that a "controlled mindset," combined with other allegations, undermined the *independence* of the Viacom special committee members. *Id.* at *23.

- *Berteau v. Glazek*, 2021 WL 2711678 (Del. Ch. June 30, 2021), likewise involved Rule 12(b)(6) and did not mention "controlled mindset."
- *In re Loral Space & Communications Inc. Consolidated Litig.*, 2008 WL 4293781 (Del. Ch. Sept. 19, 2008), does not mention "controlled mindset," and the Court declined to impose liability on special committee members because it "would have to find that the Special Committee members … acted in bad faith by approving" the transaction. *Id.* at *33 n.163.
- Neither *Tornetta v. Musk*, 250 A.3d 793 (Del. Ch. 2019), nor *Tornetta v. Musk*, 310 A.3d 430 (Del. Ch. 2024) ("*Tornetta II*"), concerned allegations of bad faith under Rule 23.1. The Court of Chancery in *Tornetta II* referred to a "controlled mindset" as undermining the fair process prong in a post-trial entire fairness opinion with extreme facts not present here. *See Tornetta II*, 310 A.3d at 531.

Finally, even if Plaintiffs could support a "controlled mindset" claim, they are wrong that it sounds in loyalty. *See* OB at 41-42. To the contrary, *Southern Peru* held that acting with a "controlled mindset" is, at most, a violation of the duty of care. *See In re S. Peru Copper Corp. S'holder Deriv. Litig.*, C.A. No. 961-CS, at

123:22-129:5 (Del. Ch. Dec. 21, 2010) (TRANSCRIPT) (granting summary judgment despite later post-trial finding of a "controlled mindset," as the record lacked evidence of a nonexculpated breach of fiduciary duty claim). Therefore, as the Court of Chancery correctly recognized, any cognizable "controlled mindset" theory is "at most a breach of the duty of care"—and thus not a basis for finding a substantial likelihood of liability. *See* Opinion at 67 n.169.

2. Plaintiffs Made No Particularized Allegations Regarding Non-Committee Members Ms. Buyer's and Mr. Paley's Purported Bad Faith

Plaintiffs cannot satisfy the Rule 23.1 burden by grouping Mr. Paley, Ms. Buyer, and Ms. Falberg together. "[E]ach director has a right to be considered individually when the directors face claims for damages in a suit challenging board action." *Cornerstone*, 115 A.3d at 1182. Plaintiffs ignore this guidance, instead referring to some combination of "Buyer, Falberg, and Paley" nine times in their Opening Brief. *See* OB at 38, 40, 41, 45, 48, 50. Notably, Plaintiffs seek to attribute *the Committee's* actions and its supposed "controlled mindset" to non-Committee members Ms. Buyer and Mr. Paley—even though Plaintiffs do not even challenge two of the three Committee members' actions. *See*, *e.g.*, OB at 48 (asserting "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'") (emphasis added).

Plaintiffs failed to preserve their bad faith arguments as to Ms. Buyer and Mr. Paley because, as Defendants argued, Plaintiffs have never identified what alleged conduct by Ms. Buyer and Mr. Paley supported any inference of bad faith. B0142 (citing *Owens*, 2020 WL 748023, at *10 n.126); A0475-76. Plaintiffs failed to respond regarding Mr. Paley and asserted in conclusory fashion that Ms. Buyer "also faces a substantial likelihood of liability" for "attend[ing] five of the ten committee meetings at which the mega grant was considered." A0527-28.

Even if Plaintiffs did not waive the argument, they remain unable to allege any conduct by Ms. Buyer or Mr. Paley that supports an inference of bad faith. As to Ms. Buyer, the Complaint alleges that despite not being a member of the Committee, she failed to negotiate for certain provisions in the Performance Option and voted to approve the Performance Option as a director. *See* A0096-98; A0123-24. The allegations against Mr. Paley are limited to his approval of the Performance Option on the Committee's recommendation. A0125-26. As the Court of Chancery correctly observed, these allegations are insufficient "because Plaintiffs have failed to plead any particularized facts as to either's involvement other than their having voted for the transaction and sitting in on a few of the Compensation Committee's

meetings." Opinion at 84 n.189. That is consistent with *Zuckerberg I*, where the complaint likewise failed to "describe any 'individual conduct'" to "support a pleading-stage inference that" a director "committed a non-exculpated breach of fiduciary duty and thus could face personal liability as a result of voting to approve" a challenged transaction. *Zuckerberg I*, 250 A.3d at 896.

The allegations concerning Ms. Buyer and Mr. Paley become even more implausible with Plaintiffs' concession that two of the three Committee members, Mr. Wells and Mr. Rajaram, negotiated and approved the Performance Option in good faith. OB at 23-24. Plaintiffs fail to explain why non-Committee members Ms. Buyer and Mr. Paley acted in bad faith by relying on Mr. Rajaram and Mr. Wells's good-faith recommendation. *Stritzinger v. Barba*, 2018 WL 4189535, at *6 (Del. Ch. Aug. 31, 2018) (demand not excused where allegations of bad faith "boil[ed] down to … a disagreement with the *substance of the decision* the Board made to approve" a transaction).

Because Plaintiffs failed to allege any conduct by Ms. Buyer or Mr. Paley that could support a reasonable inference that either of them acted in bad faith, demand is not excused as to them, making a majority of the Board capable of considering a demand.

3. Plaintiffs' Disagreement With the Performance Option and the Related Process Do Not Support a Reasonable Inference of Bad Faith

Even if this Court accepts Plaintiffs' "controlled mindset" theory, the Court of Chancery correctly held that the Complaint lacks sufficiently particularized allegations supporting a reasonable inference that any The Trade Desk director acted in bad faith. Opinion at 83-84. Despite dedicating 15 pages to arguing that Ms. Buyer, Ms. Falberg, and Mr. Paley acted in bad faith, Plaintiffs cite to the Complaint six times. *See* OB 38-52. Plaintiffs advance six arguments for why the Court of Chancery erred in holding the Complaint failed to sufficiently allege bad faith. *Id.* at 41-52. Viewed independently and together, these arguments do not come close to establishing that any director acted in bad faith.

a. The Committee Did Not Accede to Mr. Green's Purported "Demand" for the Performance Option

Plaintiffs argue that the Court of Chancery incorrectly declined to grant them the inference "that the Committee intended to maintain its traditional approach until Green intervened to assert 'his views' clearly." OB at 43. To support this argument, Plaintiffs cite paragraph 116 of the Complaint, which describes the January 6, 2021, Committee meeting and alleges that "[a]fter '[q]uestions were asked and discussion

ensued,' the Compensation Committee, with Green apparently still present 'determined to consider a large CEO equity grant further.'" A0082.

Again, even if the Complaint sufficiently alleged (it does not) that "the Committee" wanted to continue "its traditional approach," but "Green directed" the Committee's "attention to the Mega Grant," OB at 43, that allegation does not rebut the presumption of good faith for non-Committee members Ms. Buyer and Mr. Paley, neither of whom were at the January 6, 2021, Committee meeting. A0297. As to Ms. Falberg, Plaintiffs' arguments are belied by their own concession on appeal that the other two members of the Committee did not act in bad faith by allegedly capitulating to "Green's demands." OB at 44.

More importantly, the Court need not credit Plaintiffs' theory because it is contradicted by the undisputed chronology of events. During the December 4, 2020, meeting, the Committee (again without Ms. Buyer or Mr. Paley present) considered "a potential large CEO equity grant," and the minutes reflect that it was Ms. Falberg who "discussed *initial* thoughts on a potential CEO grant." B0056-57 (emphasis added). The sole reasonable inference from the record is that the Committee first considered a potential grant to Mr. Green on December 4, 2020. B0056-57. Mr. Green did not attend that meeting, and nothing in the Complaint alleges that he "[d]emand[ed] the Mega Grant" at or before that time. OB at 43.

b. No Alleged Facts Establish Mr. Green's and His Counsel's Supposed "Domination" of the Process

Plaintiffs next argue that the Committee minutes "illustrate[] Green's domination of the process he initiated." OB at 44. This contention is based on the conclusory claim that Mr. Green "dispatched" his counsel, Mr. Sonsini, and Ms. Buyer "to be in charge of 'facilitat[ing]' the Committee's consideration of the Mega Grant" and that the Committee "rejected" a minority vote on the Performance Option, supposedly suggested by Compensia, "because *Green's attorney [was] present* during the discussion." *Id.*

These arguments are not supported by the Complaint or the Committee minutes incorporated therein. Mr. Green and Mr. Sonsini's presence at *some* Committee meetings is insufficient to infer that they "dominated" the process or that the Committee, let alone Ms. Buyer and Mr. Paley, acted in bad faith by negotiating the Performance Option with Mr. Green and his counsel. *Eckert*, 2025 WL 930788, at *6 (holding controller's "mere presence … d[id] not establish that he controlled" directors' votes); *see also Cornerstone*, 115 A.3d at 1184 ("[O]ur law has recognized that the negotiating efforts of independent directors can help to secure transactions with controlling stockholders that are favorable to the minority.").

Plaintiffs likewise invent that the Board rejected some suggestion by Compensia for [redacted] because of Ms. Sonsini's presence. The Complaint and minutes to which Plaintiffs cite, OB at 44-45, suggest only that at a February 18, 2021, Board meeting, [redacted] A0088. It nowhere alleges that [redacted] was "Compensia's suggestion" or that Mr. Sonsini opposed [redacted]

c. The Committee's Interest in Retaining Mr. Green Does Not Support Bad Faith

Plaintiffs contend that the Performance Option was "clearly pretextual" because Mr. Green had not threatened to leave the Company and his existing ownership of The Trade Desk stock was alone sufficient to "align his interests with stockholders." OB at 45-46. The Court of Chancery rejected this argument because it does not address the ultimate Rule 23.1 issue: whether the Committee, and Ms. Buyer and Mr. Paley, approved the award in bad faith. Opinion at 78.

The December 4, 2020, Committee minutes show that the Committee believed that a "potential CEO grant" was necessary "to ensure Jeff Green's interests are aligned with stockholders and also to provide incentive to Mr. Green to remain CEO of the Company for a long time as his visionary leadership has created tremendous

stockholder value." B0056-57. That belief is not undercut by Mr. Green's ownership stake in The Trade Desk. Mr. Green retains that stake regardless of his leadership position, whereas the Performance Option's 10-year vesting period helped ensure Mr. Green remained with the Company through 2031. A0260.

Plaintiffs' post-hoc "mere disagreement" with the Performance Option is not enough to justify "imposing liability based on alleged breaches of fiduciary duty." *Brehm*, 746 A.2d at 266; *Stritzinger*, 2018 WL 4189535, at *6.

d. The Committee's Decision Not to Adopt all of Compensia's "Recommendations" Does Not Support Bad Faith

Plaintiffs cannot decide whether Compensia "did not recommend" an approach to the Committee, OB at 10, or whether the Board "ignored" Compensia's "recommendations," *id.* at 20. As the Court of Chancery correctly noted, Compensia "did not, however, provide explicit recommendations." Opinion at 80. Instead, its presentation to the Committee in December 2020 was a [redacted] B0071; B0074.

Compensia made its presentation solely to the Committee (not to Ms. Buyer or Mr. Paley) on December 4, 2020. B0056-57. The presentation makes clear on the first page that [redacted]

[redacted]" B0072 (emphasis added). Any claimed refusal to implement Compensia's "recommendations" cannot impugn Ms. Buyer's and Mr. Paley's approval of the Performance Option at the Committee's recommendation. *Wood v. Baum*, 953 A.2d 136, 142 (Del. 2008) ("Delaware law on this point is clear: board approval of a transaction, even one that later proves to be improper, without more, is an insufficient basis to infer culpable knowledge or bad faith on the part of individual directors."); *see also Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 768 (Del. 2018) (holding that "disagree[ing] with the [special] committee's strategy" is insufficient to support a breach of fiduciary duty claim).

And as the Court of Chancery correctly held, contrary to Plaintiffs claims, the Committee did not "side[] with Green on every key point." OB at 48. For example, the Performance Option "contained higher stock price hurdles than those contemplated in the Straw Model" prepared by Compensia. Opinion at 80-81. The Performance Option likewise includes the stock price measuring period, change in control, and clawback provisions. B007-13. Plaintiffs fail to address these differences.

e. The Performance Option's Terms Do Not by Their Very Existence Establish Bad Faith

Plaintiffs assert that the Court of Chancery should have inferred that Ms. Buyer, Mr. Paley, and Ms. Falberg acted in bad faith because Plaintiffs believe the Performance Option was "facially 'extreme.'" OB at 49. This is yet another attempt by Plaintiffs to "collapse[] the distinction between the board's capacity to consider a litigation demand and the propriety of the challenged transaction." *Zuckerberg II*, 262 A.3d at 1056.

In assessing this contention, the Court of Chancery did exactly what Plaintiffs claim it did not: it reviewed the "terms of the final Award," and specifically determined that those terms "are not so extreme as to, themselves, exceed the realm of reason." Opinion at 81. Plaintiffs cite *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 107 (Del. 2013) for the proposition that "a failure to consider 'the objective reasonableness' of the Mega Grant makes the transaction 'virtually unchallengeable.'" OB at 48. But that case supports the Court of Chancery's decision: in *Allen*, this Court held that allegations that a committee "may have negotiated poorly does not permit a reasonable inference that they subjectively believed they were acting against [the company]'s best interests." *Allen*, 72 A.3d at 108.

f. The Court of Chancery Considered the "Totality" of Plaintiffs' Allegations

Finally, Plaintiffs argue the Court of Chancery "failed to consider the totality of Plaintiffs' allegations." OB at 50. In so arguing, however, Plaintiffs admit that the Court of Chancery "considered Plaintiffs' 'controlled mindset' argument in analyzing Falberg's independence." *Id.* Plaintiffs are arguing about the sufficiency of their own allegations, not that the Court erred in "fail[ing] to consider the totality of" those allegations. *Id.*

Further, Plaintiffs inaccurately describe the Court of Chancery's Opinion, asserting that it "afforded no weight to" "Plaintiffs' 'controlled mindset' argument … simply because Plaintiffs alleged no 'retributive behavior by Green.'" OB at 50 (quoting Opinion at 56 n.162). But the record reflects that the Court of Chancery rejected this argument for three distinct reasons: (1) "Plaintiffs' allegations regarding Falberg's personal relationships and controlled mindset are weaker than in *Viacom*"; (2) "Plaintiffs proffer no allegations regarding retributive behavior by Green"; and (3) "the relevant standard of review [Rule 23.1 instead of Rule 12(b)(6)] is materially higher." Opinion at 56 n.162. This is precisely the type of analysis the Court of Chancery performed in *Viacom*. *See Viacom*, 2020 WL 7711128, at *25

(holding that a complaint's allegations, "taken together," sufficiently pled reasonably conceivable breaches of the duty of loyalty).

Plaintiffs likewise argue that "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." OB at 51. Yet, other than approving the Performance Option (based on the recommendation of the Committee), the Complaint points to no "actions" by Ms. Buyer and Mr. Paley that support an inference of bad faith. Combining these non-existent allegations with Plaintiffs' insufficient independence arguments does not render them unable to consider a demand.

CONCLUSION

Defendants request that the Court affirm the Court of Chancery's ruling.

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