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IN THE SUPREME COURT OF THE STATE OF DELAWARE

RICHARD SCARANTINO, Plaintiff Below / Appellant, v. THE TRADE DESK, INC., Defendant Below / Appellee.	No. 1, 2026 Appeal from the Court of Chancery of the State of Delaware, C.A. No. 2025-0442-LM **PUBLIC VERSION FILED MARCH 3, 2026**

APPELLANT RICHARD SCARANTINO'S CORRECTED OPENING BRIEF

Dated: February 19, 2026

MCCARTER & ENGLISH, LLP
Sarah E. Delia (Bar No. 5833)
Renaissance Centre
405 North King Street, 8th Floor
Wilmington, DE 19801
(302) 984-6300
sdelia@mccarter.com

Attorneys for Plaintiff Below / Appellant Richard Scarantino

Of Counsel:

FIELDS KUPKA & SHUKUROV LLP
William J. Fields
Christopher J. Kupka
Samir Shukurov
Béranger Rios
141 Tompkins Ave, Suite 404
Pleasantville, NY 10570
(212) 231-1500

RM LAW, P.C.
Richard A. Maniskas
1055 Westlakes Drive, Suite 300
Berwyn, PA 19312
(484) 324-6800

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NATURE OF PROCEEDINGS

This is an appeal from a ruling by a Magistrate in Chancery, as affirmed by the Court of Chancery, declining to afford plaintiff-appellant Richard Scarantino ("Appellant") access to certain director communications pursuant to 8 *Del. C.* § 220 ("Section 220") based, in part, on a determination that *as-yet unproduced and wrongfully withheld* materials were sufficient for Appellant's proper purpose. Appellant's Section 220 demand concerned the reincorporation of defendant-appellee The Trade Desk, Inc. ("Appellee", "Trade Desk", or the "Company") from Delaware to Nevada (the "Reincorporation").

Appellant is attempting to investigate whether the Reincorporation was part of a multi-step plan to extend the Company's dual-class capitalization, through which its co-founder and Chief Executive Officer, Jeffrey Green ("Green"), maintains voting control. In Delaware, any dual-class extension would have been reviewed for entire fairness unless it was made contingent on the approval of unaffiliated stockholders.[1] In Nevada, however, controller transactions are not

[1] *See Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 644 (Del. 2014) ("*MFW*"), *superseded by* 85 *Del. Laws* ch. 6 §§ 1, 3 (2025) (eliminating the majority-of-the-minority voting requirement unless an action challenging the transaction(s) was filed before February 17, 2025). Appellant has intervened in a plenary action challenging the Reincorporation. *See Gunderson v. The Trade Desk, Inc.*, C.A. No. 2024-1029-PAF (Del. Ch. May 20, 2025) (ORDER) ("In the exercise of the court's discretion,

reviewed for fairness and unaffiliated stockholder approval is not required for business judgment protections to attach to a dual-class extension.[2] If Appellee's board of directors (the "Board") pursued the Reincorporation to avoid having to secure unaffiliated Trade Desk stockholder approval of an extension, the multi-step transaction would be reviewed under Delaware's entire fairness standard.[3]

In response to Appellant's demand, Appellee produced certain materials concerning the Reincorporation but refused to produce director communications or any materials relating to the dual-class structure. Appellant sued. Following trial, the Magistrate in Chancery found that Appellant had stated a credible basis to suspect wrongdoing and ordered production of "materials relating to the dual class capitalization structure, the sunset provision, and Mr. Green's Class B shares" (the "Capitalization Matters").[4] However, the Magistrate determined that director communications were not necessary for Appellant's proper purpose.[5] Appellant took

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the motion to intervene for the limited purpose of staying proceedings pending completion of the intervenor's books and records inspection is granted.").

[2] *Guzman v. Johnson*, 483 P.3d 531, 537 (Nev. 2021) (overturning the fairness standard endorsed in *Shoen v. SAC Holding Corp*., 137 P.3d 1171 (Nev. 2006)).

[3] *Maffei v. Palkon*, 339 A.3d 705, 741 n.249 (Del. 2025).

[4] Exhibit B (the "Final Report" or "Rep.") at 28; *see id.* at 11-14.

[5] Rep. at 17-19.

exception to that finding, which the Court of Chancery overruled.[6] Appellant timely took this appeal from the Letter Opinion and Final Report.

[6] Exhibit A (the "Letter Opinion" or "Op.") at 9-14.

SUMMARY OF ARGUMENTS

The Court of Chancery abused its discretion by denying Appellant access to books and records that are necessary and essential for his proper purpose.

1. The trial court erred by denying Appellant access to director communications relating to the Board's consideration of the Capitalization Matters. While the Board had formed a committee that met from September 2023 through May 2024 to assess an extension of the Company's dual-class structure, it did not produce *any* materials reflecting the Board's deliberations on this topic. Nonetheless, the trial court incorrectly determined that Informal Board Materials[7] were not necessary and essential because Appellant had not shown that unproduced Formal Board Materials on this topic were insufficient for his investigation.[8]

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[7] Under the *AmerisourceBergen* taxonomy, books and records are classified into three categories: (i) "Formal Board Materials" that "formally evidence the directors' deliberations and decisions and comprise the materials that the directors formally received and considered"; (ii) "Informal Board Materials" including "communications between directors and the corporation's officers and senior employees" and "emails and other types of communication sent among the directors themselves"; and (iii) "Officer-Level Materials" comprising "communications and materials that were only shared among or reviewed by officers and employees[.]" *Lebanon Cty. Emps. Ret. Fund v. AmerisourceBergen Corp.*, 2020 WL 132752, at *24-25 (Del. Ch. Jan. 13, 2020), *aff'd sub nom. AmerisourceBergen Corp. v. Lebanon Cty. Emps. Ret. Fund*, 243 A.3d 417 (Del. 2020).

[8] Rep. at 17-19; Op. at 9-10.

That reasoning turns Section 220 on its head. It is impossible to reach a sufficiency determination with respect to books and records that have not been produced. Delaware law affords no basis for corporations to refuse to produce Formal Board Materials of the sort which the Court of Chancery has recognized should be readily made available for inspection and then rely on the unknown content of those documents to argue that stockholders have not shown that Informal Board Materials are necessary and essential.

2. The trial court further erred by denying Appellant access to director communications relating to the Board's consideration of the Reincorporation. The Formal Board Materials produced to date are insufficient for Appellant's investigatory needs.

First, the Company produced only short-form materials for April through July 2024 that document nothing more than [redacted] of the Reincorporation. The trial court nonetheless determined that those materials provided sufficient insight into more than three months of deliberations.[9] Describing "a process that deepened over time", the Court of Chancery downplayed the first several months of Board and committee deliberations as "preliminary" and excused the total lack of substance based on the

[9] Rep. at 18; Op. at 9-10.

content of materials relating to subsequent meetings.[10] The Court of Chancery did not cite any authority for the proposition that the board of a Delaware corporation may attempt to clean up its failure to maintain useful minutes through the creation of backwards-looking materials.

Second, the later-dated materials—while more detailed—set forth reasoning that was demonstrably pretextual. Appellant showed that, of the Board's three ostensible reasons for the Reincorporation, the only one that holds up to scrutiny is the Board's desire to avoid fiduciary liability under permissive Nevada law — *i.e.*, the subject of Appellant's investigation. The trial court abused its discretion by dismissing Appellant's showing as to the insufficiency of these materials as "[m]ere disagreement with a board's reasoning".[11]

The Board's first purported reason was that Nevada law would supposedly facilitate the Company's ability to pursue its long-term strategy. However, it gave no plausible explanation of how redomiciling in Nevada would accomplish this end. The only attempt it made was to claim that the ability under Nevada law to "consider the interests of other constituents when evaluating our business strategy" would enable Appellee to make "long-term strategic decisions", but its related claim that

[10] Op. at 9-10.

[11] *Id*. at 13.

"[u]nder Delaware law . . . fiduciary duties in most circumstances instead require directors to seek to maximize the value of the corporation" is a red herring. Delaware has repudiated shareholder primacy theory outside of one narrow context and the business judgment rule affords directors wide latitude to consider all stakeholders.[12] This was not "[m]ere disagreement with a board's reasoning", as the Court of Chancery characterized it, but rather a demonstration of pretext.

The Board's second purported reason—that Nevada offers "More Predictability and Certainty in the Underlying Laws that Impact Decision-Making"—is also facially pretextual. In support of its position, Appellee made claims about "*MFW* creep" that were wrong as a matter of Delaware law, as explained at length by this Court in the very case that was the focus of the Board's discussion.[13] Again, the Court of Chancery dismissed Appellant's showing as "a dispute on legal theory" concerning the "competing considerations" before a board weighing redomestication.[14] While courts should be reluctant to disturb a *bona fide* decision between competing regimes, they should not deny books and records

[12] *See* 8 *Del. C.* § 141(a); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

[13] A837-38, A933; *see In re Match Grp., Inc. Deriv. Litig.*, 315 A.3d 446, 460-65 (Del. 2024).

[14] Op. at 13-14 (citing *Maffei*, 339 A.3d at 743).

inspections based on pretext. Delaware's application of entire fairness review has not expanded. Nor is there any truth to the balance of the Board's claims about "predictability". Nevada's corporate law statute simply culls standards from Delaware law without accompanying interpretive authority, such that Nevada courts have yet to decide multiple issues of first impression that are settled in Delaware.

That leaves just the Board's consideration of reduced stockholder litigation rights — *i.e.*, the very thing that this Court has recognized could give rise to liability in connection with a reincorporation when tethered to "well-pled allegations of a material, non-ratable benefit flowing to the directors or controllers[.]"[15] Trade Desk did not contest the Magistrate's finding that Appellant had advanced a credible basis to suspect that the Board undertook the Reincorporation to avoid liability for extending Green's control.

The Court of Chancery therefore abused its discretion in denying Appellant access to necessary and essential books and records based on Formal Board Materials that were either unproduced, useless, or pretextual.

[15] *Maffei*, 339 A.3d at 744.

STATEMENT OF FACTS

A. The Initial Extension of Green's Control

Following the Company's initial public offering ("IPO") in 2016, its capitalization was split into publicly traded, single-vote Class A common stock ("Class A") and non-publicly traded ten-vote Class B common stock ("Class B").[16] Green has controlled Trade Desk since the IPO through his ownership of Class B shares.[17] In connection with the IPO, Trade Desk filed an amended and restated certificate of incorporation (the "Charter") with the Secretary of State of the State of Delaware, providing that, following the date on which the number of outstanding Class B shares came to represent less than ten percent of the aggregate number of then outstanding Class A and Class B shares, each Class B share would convert into one Class A share (the "Dilution Trigger").[18]

By the second quarter of 2020, with the ratio of Class A to Class B approaching the Dilution Trigger, Green canceled his ongoing sales of shares pursuant to an advanced-trading plan and emailed his cofounder, asking him not to

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[16] A78 (¶¶ 4-6).

[17] *See* A511 (reflecting ownership of 98% of Class B shares and 53.5% of total voting power as of September 30, 2020); A1132 (reflecting ownership of 97.6% of Class B shares and 48.4% of total voting power as of June 30, 2025).

[18] A78 (¶¶ 7-8).

convert Class B shares to afford Green time to find a way to extend the dual-class capitalization.[19] Green also sent an email to the other members of the Board, telling them that since they had "recently learned that the dual class sunset provision will take effect much sooner than we thought, we need to have a board meeting to discuss what to do next."[20] In the email, Green included agenda items for discussion at the proposed meeting that included the historical impact of Trade Desk's dual-class structure and potential ways to alter the Dilution Trigger.[21] Green also sent emails to Trade Desk executives and two directors individually about a potential extension.[22]

The Board held the meeting proposed by Green and formed a special committee to consider extending Green's control.[23] This Court described minutes of one of this committee's meetings as follows: "The substantive portion of the meeting minutes consist of three sentences and lack any detail as to the Special Committee's discussion with its advisors."[24] Ultimately, the committee—after negotiations

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[19] *City Pension Fund for Firefighters & Police Officers in City of Miami v. The Trade Desk, Inc.*, 2022 WL 3009959, at *3 (A593) (Del. Ch. July 29, 2022).

[20] *Id.* at *4 (A593).

[21] *Id.* (A593).

[22] *Id.* at *3-4 (A593).

[23] *Id*. at *4 (A593).

[24] *Id.* at *6 (A595).

opposite Green's personal counsel at Wilson Sonsini Goodrich & Rosati, P.C. ("WSGR")—approved an amendment to the Charter to replace the Dilution Trigger with terms providing for each Class B share to automatically convert into a Class A share on a 1:1 basis on the five-year anniversary of approval of the Charter amendment by Trade Desk stockholders (the "Final Conversion").[25] The full Board approved this amendment (the "Dilution Trigger Amendment") and filed with the United States Securities and Exchange Commission a Definitive Proxy Statement (the "2020 Proxy") to solicit stockholder support for its approval. In the 2020 Proxy, the Board stressed the importance of "a long-term vision and strategy for our platform, supported by long-term investments" and disclosed the following:

> The Committee believes that Mr. Green's *long-term strategic vision* for the Company has been and will continue to be critical to our success. Success in our *highly competitive industry* requires leadership vision and strong direction. We compete for advertising dollars against massive companies, including Google and Facebook. Mr. Green brings the vision and decisiveness necessary to take on such formidable competitors. The Committee believes that it is in the best interests of the Public Stockholders to continue to permit Mr. Green, as our Chief Executive Officer, to make investments that will have *long-term* benefits and to execute on the *vision* and objectives that he and our management team have carefully established. The Committee also believes that, in addition to guiding *our long-term strategy*, Mr. Green fosters and protects our positive corporate culture, which is essential to attracting and retaining talent.

[25] *Id.* at *7 (A595).

> Overall, the Committee believes that our current governance structure has enabled us to innovate and invest *for the long term*. The Committee believes that this ability to *focus on the long term* has generated, and will continue to generate, substantial benefits for our stockholders and has been an important competitive advantage.
>
> The Proposals will allow our dual class capitalization structure to stay in place for, at most, five additional years, which we believe will enable the Company sufficient time to execute on its *long-term strategy* and further establish a foundation for *long-term*, continued success.[26]

Stockholders approved the Dilution Trigger Amendment on December 22, 2020, such that the Final Conversion was scheduled to take place on December 22, 2025.[27]

B. The Board Considers Another Extension of Green's Control and Undertakes the Reincorporation.

A few years later, the Board began deliberating over another extension of Green's control and formed a committee to consider the question, which met from September 2023 until it was dissolved in May 2024.[28] Meanwhile, [redacted]

[redacted]

[redacted]

[26] A488, A497 (emphasis added).

[27] A79 (¶¶ 10-12).

[28] A1119. Trade Desk would not disclose the existence of this committee until after it had already reincorporated to Nevada and, thereafter, determined to extend Green's control again with no majority-of-the-minority approval vote. These disclosures were made for the first time in a preliminary proxy statement filed on July 14, 2025 (the "2025 Proxy"). *See* Statement of Facts § D, *infra*.

[redacted]

[redacted] The Board next discussed [redacted]

[redacted]

[redacted]

[redacted]

That same day, the Board's Nominating and Corporate Governance Committee also met [redacted]

[redacted]

[redacted]

[redacted]

[29] A617.

[30] A642.

[31] A651.

[redacted]

At the next Board meeting on August 13, 2024, the minutes reflect that [redacted]

Solomon has (co-)authored papers:

- criticizing time-based sunsets of dual-class capitalization structures;[37]

[32] A653, A658.

[33] A666-67. These minutes reflect that Trade Desk was now being advised by WSGR, the firm that had negotiated the Dilution Trigger Amendment on Green's behalf opposite the Company.

[34] A667.

[35] *Id.*

[36] *Id.*

[37] A433 (Jill E. Fisch & Steven Davidoff Solomon, *The Problem of Sunsets*, 99 B.U. L. REV. 1057 (2019)).

- proposing a framework for companies to follow to avoid *MFW* scrutiny when extending dual-class sunsets and specifically discussing Green's control of Trade Desk;[38] and

- advocating that Delaware require less scrutiny of conflicted-controller transactions.[39]

[redacted]

[redacted] The minutes of this meeting reflect that:

[redacted]

Also at this meeting, [redacted]

[redacted]

[38] A620 (Jill E. Fisch, David J. Berger, & Steven Davidoff Solomon, *Extending Dual Class Stock: A Proposal*, 25 THEORETICAL INQUIRIES L. 23 (2024)). One of Green's attorneys at WSGR is a coauthor of this article.

[39] A757 (Jill E. Fisch & Steven Davidoff Solomon, *Control and Its Discontents*, 173 U. PENN. L. REV. 641 (2025)).

[40] A670.

[41] A669 (emphasis added).

[42] A670.

The minutes for the next Board meeting, [redacted]

- [redacted]
- [redacted]
- [redacted]

The minutes also reflect [redacted]

On September 20, 2024, the Board met to approve resolutions concerning the Reincorporation. The minutes reflect that [redacted]

[43] A671-72.

[44] A672.

[redacted] The Board resolved to recommend that stockholders vote for the Reincorporation at a special meeting to be held on November 14, 2024.[46]

On October 3, 2024, the Company filed a proxy (the "2024 Proxy") to solicit support of the Reincorporation at a special meeting to be held on November 14, 2024.[47] In the 2024 Proxy, the Board disclosed:

> Our strategic advantage against outsized competitors has been *Mr. Green's ability to see around corners to make long-term strategic decisions*, including those that benefit the broader advertising ecosystem, along with our ability to be nimble and react quickly to market developments. In an uncertain industry environment, we believe our ongoing success will be predicated on the ability to make *long-term strategic decisions* that build upon our core business strategy, like expanding our addressable markets by serving smaller and medium-sized advertisers; continuing expansion of our international business; investing in a multi-year build of a forward market CTV product; and furthering our ongoing investments in what we have identified as the "open internet," with its premium content, and retail media, with its capacity for superior objective measurement. We see a path to helping build an advertising ecosystem that has improved quality, transparency and accountability, and one that also results in a better experience for the recipient of advertising. These *long-term decisions will require near-term investments and trade-offs* that we believe will benefit our business and our stockholders in the longer term.[48]

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[45] A673 (emphasis added).

[46] A677-678.

[47] A824.

[48] A837 (emphasis added).

The Board further disclosed:

> ***Dual Class Capital Structure***
>
> The Delaware Charter provides that the dual class capital structure of our Delaware Corporation Common Stock will terminate on December 22, 2025 (the "Dual Class Sunset Date"). The Nevada Charter includes the same Dual Class Sunset Date. From time to time, our board of directors has considered, without making a decision, if the timing of the Dual Class Sunset Date is still in the best interest of our stockholders. Whether or not the Nevada Reincorporation is approved, our board of directors may still further evaluate the merits and timing of the Dual Class Sunset Date.[49]

The Board also identified two main purported reasons for the Reincorporation. As to the claimed need for "More Predictability and Certainty in the Underlying Laws that Impact Decision-Making", the Board disclosed that "removing judicial ambiguity can offer our board of directors and management clearer guideposts for action that will benefit our stockholders".[50] As to "Avoiding Unmeritorious and Costly Litigation Safeguards Company Resources and Limits Management Distraction",[51] the Board disclosed that an "increasingly litigious environment facing corporations with controlling stockholders has created unpredictability in decision-making and has started to impede [the Company's] ability to act quickly."[52]

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[49] A858.

[50] A839.

[51] A840.

[52] A837.

On November 18, 2024, the Company reported the results of stockholders' vote on the Reincorporation. Exclusion of Green's 433,163,436 votes shows a majority of unaffiliated stockholders voted against the Reincorporation.[53]

C. Appellant Seeks Books and Records to Determine Whether the Reincorporation Is Part of a Plan to Extend Green's Control.

On October 21, 2024, Appellant served his Section 220 demand to investigate whether the Reincorporation was part of a multistep plan to extend Green's control while avoiding liability risk under Delaware law.[54] On December 19, 2024 and February 5, 2025, the Company made productions of certain Formal Board Materials, including minutes of meetings of the Board and/or committees of the Board at which the Company's potential reincorporation from Delaware to Nevada was discussed, as well as materials presented at those meetings. Trade Desk refused to produce (i) Formal Board Materials concerning the Board's consideration of whether to extend Green's control by delaying the Final Conversion and (ii) any Informal Board Materials responsive to Appellant's demand. Appellant commenced the underlying action by filing his complaint[55] on April 24, 2025, and trial was

[53] A1000.

[54] A986.

[55] A15.

scheduled for July 16, 2025.[56]

D. The Board Approves Another Extension of Green's Control.

Two days before trial in the underlying action, Trade Desk filed the 2025 Proxy, in which it disclosed for the first time not only that the Board had been considering another extension of Green's control since as early as September 2023—deliberations that overlapped with the Reincorporation process in April and May of 2024—but also that the Board had approved a further ten-year extension of Green's control to December 22, 2035.[57] Specifically, Trade Desk disclosed that following the Reincorporation, which had become effective November 15, 2025, the Board decided "to revisit an amendment or extension of our dual class structure."[58] According to Defendant's disclosures in the 2025 Proxy, the Board met on January 30, 2025 with, among others, Grant and Latham to discuss a potential extension of the Company's dual-class structure.[59] Next, on February 28, 2025, the Board created a committee to which it delegated authority to negotiate the structure, form, terms, and conditions of any extension of the Class B sunset.[60]

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[56] *See* Rep. at 2.

[57] A1116, A1119.

[58] *Id.*

[59] A1121.

[60] *Id.*

In the 2025 Proxy, Trade Desk set forth a narrative description of meetings of the committee that took place from March through June of 2025.[61] These meetings culminated in agreement to accept a proposal put forward by Green, whereby the Company would extend Green's control for ten years in exchange for (i) increasing the frequency of non-binding "say-on-pay" votes on executive compensation from triannual to annual, and (ii) the ability of a lead independent director to call meetings at which no action can be taken (the "Extension Proposal").[62] Because the Extension Proposal was not conditioned upon the approval of unaffiliated stockholders, Green would be able to cast his ~48.4% voting power to guarantee that the proposal would pass at the meeting to be held on September 16, 2025.[63]

In support of the Extension Proposal, the Board offered nearly identical rationales to those it had advanced in connection with the Reincorporation. In the 2025 Proxy, the Board disclosed:

> We have outperformed other ad-tech enterprises during our tenure with a unique approach and dedication to our customers. This is in large part attributable to the foresight, *vision* and grit of our founder, Jeff Green. Jeff has *repeatedly seen around industry corners*, ahead of the pack and well before the paths to success were obvious. While the company excels thanks to the efforts of all our talented employees, we believe Jeff has demonstrated an unmatched ability to anticipate and adapt to

[61] A1122-24.

[62] A1124.

[63] A1130, A1132.

> shifts in the industry's landscape and to steer the company toward promising opportunities. We believe this kind of adept leadership is critically important as AI completely reshapes the industry landscape. . . .[64]
>
> Our strategic advantage has time and again been Mr. Green's *ability to see around corners to make bold long-term strategic decisions*, including those that benefit the broader advertising ecosystem, along with *our ability to be nimble and react quickly* to market developments. We believe the next several years will be critical as advertisers continue to seek viable alternatives to "walled gardens"—alternatives that can operate at scale, across advertising channels.[65]

The Board further disclosed:

> Success in our highly competitive industry and navigating the complex landscape of digital advertising *require leadership vision and strong direction.* We compete for advertising dollars against massive companies, including Google and Amazon, whose extensive resources and market influence present significant challenges. Mr. Green brings *the vision and decisiveness* necessary to take on such formidable competitors. Evolving technologies, like the use of AI in digital advertising, and uncertainty created by global and macroeconomic conditions generally, may prove to bring further unknown or unforeseen challenges. Mr. Green's unique perspective has fostered the innovation and differentiation that The Trade Desk has needed and will need for a rapidly evolving market. We have invested in a company culture that prioritizes agility and responsiveness, enabling swift adaptation to changes in the competitive landscape and planning for evolving trends and shifting market conditions.
>
> In an uncertain industry environment, we believe our ongoing success will be predicated on the ability to make *long-term strategic decisions* that build upon our core business strategy, like expanding our addressable markets by serving smaller and medium-sized advertisers;

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[64] A1104 (emphasis added).

[65] A1120 (emphasis added).

> continuing expansion of our international business; investing in a multi-year build of a forward market CTV product; and furthering our ongoing investments in what we have identified as the "open internet," with its premium content, and retail media, with its capacity for superior objective measurement. We see a path to helping build an advertising ecosystem that has improved quality, transparency and accountability, and one that also results in a better experience for the recipient of advertising. *These long-term decisions will require near-term investments and trade-offs* that we believe will benefit our business and our stockholders in the longer term. As a result, the next several years will also be critical in solidifying the *long-term success* of our model.[66]

E. The Final Report and Letter Opinion

Following a half-day trial, the Magistrate issued her Final Report on July 31, 2025, in which she found that Appellant had demonstrated a credible basis to suspect that the Board had approved the Reincorporation as part of a multistep plan to extend Green's control while avoiding liability.[67] The Magistrate ordered production of Formal Board Materials relating to the Capitalization Matters.[68] However, the Magistrate found that director communications were not necessary and essential to Appellant's proper purpose.[69]

While Appellee took no exception to the Final Report, Appellant took

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[66] A1126-27 (emphasis added).

[67] Rep. at 11-14.

[68] *Id*. at 14-16.

[69] *Id.* at 17-19.

exception to the Magistrate's findings regarding Informal Board Materials.[70] In its Letter Opinion resolving the exception, the Court of Chancery inexplicably held that Appellant had not shown that the unproduced Formal Board Materials relating to the Capitalization Matters—the contents of which were unknown to the Court of Chancery or Appellant—were insufficient to assess the Board's deliberations for that period.[71]

With respect to meetings at which the Board discussed the Reincorporation, the Court of Chancery incorrectly determined that the materials produced for meetings beginning in August were "detailed" and sufficient for Appellant's proper purpose. The Court made this determination notwithstanding the "preliminary" nature of Board deliberations from April through July 2024, which yielded only short-form minutes.[72] The Court rejected Appellant's arguments that the "detailed" reasons in the post-July 2024 materials were pretextual, characterizing the arguments as "[d]isagreement with the Board's [r]ationale".[73]

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[70] Op. at 7.

[71] *Id.* at 8-11. Following issuance of the Letter Opinion, the Company made a limited production of materials from 2024 that did not inform the Court of Chancery's analysis and are not part of the record on appeal.

[72] Op. at 9-10.

[73] *Id*. at 12-14.

ARGUMENT

I. THE COURT OF CHANCERY ABUSED ITS DISCRETION IN DENYING APPELLANT ACCESS TO INFORMAL BOARD MATERIALS WHERE FORMAL BOARD MATERIALS WERE IMPROPERLY WITHHELD.

A. QUESTION PRESENTED

Did the Court of Chancery err in denying Appellant access to Informal Board Materials relating to the Capitalization Matters based on the presumed sufficiency of Formal Board Materials that Appellee refused to produce?[74] This issue was preserved below. Appellant's Opening Brief in Support of His Exceptions to the Magistrates Final Report ("Exception Opening Brief") (A209-10, A229); Appellant's Reply Brief in Support of His Exception to the Magistrates Final Report (A390-91).

B. SCOPE OF REVIEW

This Court reviews a determination of the scope of relief in a Section 220 action for abuse of discretion.[75] A court abuses its discretion by "exceed[ing] the bounds of reason in view of the circumstances" or "ignor[ing] recognized rules of

[74] Op. at 8-12.

[75] *KT4 Partners LLC v. Palantir Techs., Inc.*, 203 A.3d 738, 748 (Del. 2019).

law or practice so as to produce injustice[.]"[76] This "can occur in three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment."[77]

C. MERITS OF ARGUMENT

The Court of Chancery abused its discretion in finding that *unproduced* Formal Board Materials were sufficient for Appellant's investigation of the Capitalization Matters. The Court of Chancery had no information about the unproduced Formal Board Materials. Appellant advanced evidence regarding Trade Desk's deficient minute-keeping practices, while Appellee advanced no evidence supporting their sufficiency for Appellant's proper purpose.[78] By putting the sufficiency cart before the production horse, the Court of Chancery stymied Appellant's proper investigation.

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[76] *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988) (citations omitted).

[77] *Homestore, Inc. v. Tafeen*, 886 A.2d 502, 506 (Del. 2005) (citation and quotations omitted).

[78] *Cf. Palantir*, 203 A.3d at 754 ("In [arguing that stockholder had not proven that emails were essential], Palantir did not buttress its claims with any evidence that other materials would be sufficient to accomplish [the stockholder's] purpose.").

Under established Delaware law, "a petitioner meets her burden to prove necessity by identifying the categories of books and records she needs and presenting some evidence that those documents are indeed necessary."[79] The Magistrate in Chancery determined that Appellant had pleaded numerous facts in support of his credible basis to suspect that the Reincorporation was tied to the Capitalization Matters.[80] Appellee did not take exception to this finding. Appellant also pointed to the Board's past use of email to arrange for a dual-class extension.[81] Because Appellee refused to produce the Formal Board Materials for the trial court to assess their sufficiency, Appellant has "made as strong of a showing that emails were necessary as can be reasonably expected of a petitioner in a summary § 220 proceeding."[82]

This case demonstrates why the Court of Chancery has repeatedly encouraged corporations to timely produce Formal Board Materials following receipt of a

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[79] *Id.* at 755.

[80] Rep. at 13-14 (finding Appellant had carried his burden "considering Trade Desk's prior decisions to delay the dilution trigger, the most recent proxy proposing the removal of the sunset provision filed soon after their reincorporation to Nevada, and the benefit flowing to Mr. Green as primary owner of Class B stock[.]").

[81] A227-28; *accord City Pension Fund*, 2022 WL 3009959, at *3-5 (A593-94).

[82] *Palantir*, 203 A.3d at 754-58 (ordering production of emails where company did not produce responsive Formal Board Materials and stockholder had submitted evidence that emails would contain answers needed for its investigation).

Section 220 demand.[83] "[C]ompanies can and should provide these documents voluntarily without forcing stockholders to litigate over them."[84] Here, Appellee withheld Formal Board Materials on the basis that Appellant had not articulated a credible basis to investigate whether the Reincorporation was related to the Capitalization Matters — all while the Board was actively engineering a dual-class extension that could not have been forced through absent the Reincorporation. Indeed, two days before trial, Appellee filed the 2025 Proxy, disclosing that the Board had extended Green's control to December 22, 2035, and had been considering such an extension since September 2023.[85] Given this timeline, as well as the other facts that the Magistrate in Chancery cited in concluding that Appellant had established a credible basis, Appellee's refusal to produce Formal Board Materials appears to have been nothing more than gamesmanship.[86]

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[83] *Lebanon Cty.*, 2020 WL 132752, at *24 ("A corporation should be able to collect and provide its Formal Board Materials promptly and with minimal burden.").

[84] *Pettry v. Gilead Scis., Inc.*, 2020 WL 6870461, at *24 (Del. Ch. Nov. 24, 2020).

[85] A1116, A1119.

[86] *See* Rep. at 13-14. Any one of these facts constituted "some evidence" sufficient to satisfy the "credible basis" standard, which is "the "lowest possible burden of proof" under Delaware law. *Seinfeld v. Verizon Communs., Inc.*, 909 A.2d 117, 123 (Del. 2006). To the extent that Appellee was arguing that Appellant had not definitively shown the Reincorporation was undertaken to facilitate a dual-class extension, it was inappropriately lodging a merits-based defense that, predictably,

Precedent counsels against rewarding such behavior. In *Moran*, for example, the company refused to participate in Section 220 litigation and defaulted, leading to an "order that award[ed] the stockholder nearly all of the records sought", including "the functional equivalents of missing books and records where applicable[.]"[87] The *Moran* Court warned against the risk of creating "an adverse incentive for corporations not to participate in these proceedings if", under the newly revised Section 220, "the court cannot provide more relief than granting access to the statutorily defined books and records" of a non-participating company.[88] The same reasoning applies here under the previous version of Section 220. Appellee should not be allowed to create a bar to inspection of Informal Board Materials by refusing to turn over plainly responsive materials.

Nor is there reason to afford Appellee the benefit of the doubt concerning the sufficiency of the unproduced Formal Board Materials. Delaware courts have repeatedly observed that Trade Desk's minutes lack substance.[89] Here too, the

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has "interfere[d] with [the summary Section 220] process." *AmerisourceBergen*, 243 A.3d at 437.

[87] *Moran v. Unation, Inc.*, 2025 WL 3706330, at *1 (Del. Ch. Dec. 22, 2025).

[88] *Id.* at *13; *see generally id.* at *4-5 (discussing the amendments to Section 220 adopted in 2025).

[89] *City Pension Fund*, 2022 WL 3009959, at *6 (A595) (observing that "The substantive portion of [certain] meeting minutes consist of three sentences and lack any detail"); *In re The Trade Desk, Inc. Deriv. Litig.*, 2025 WL 503015, at *4-5 &

Formal Board Materials that Appellee did produce contained no substance until Trade Desk brought on Green's personal lawyers as advisors in the three months preceding the Reincorporation.[90] To the extent Appellant could have demonstrated the insufficiency of materials he has not been provided, he has advanced good evidence to believe they will be lacking. Appellee, on the other hand, has advanced nothing.

In these circumstances, *Palantir* controls.[91] There, the Court rejected the company's argument that the stockholder failed to prove that emails were essential because it "did not buttress its claims with any evidence that other materials would be sufficient to accomplish [the stockholder's] purpose."[92] In *Palantir*, this Court concluded that, "[i]f a respondent in a § 220 action conducts formal corporate

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n.48 (Del. Ch. Feb. 14, 2025) (quoting at length from superficial minutes and reflecting that certain minutes were "sparse" and "not detailed"); *In re Trade Desk, Inc. Deriv. Litig.*, No. 114, 2025, oral argument video at 29:09-22 (Del. Oct. 22, 2025), available at: https://courts.delaware.gov/supreme/oralarguments (Q: "What are we to do with the lack of substantive minutes? It really puts us at a disadvantage when they're really just perfunctory and we can't rely on them one way or another?").

[90] *See* Argument § II.C.1, *infra*.

[91] *AmerisourceBergen*, 243 A.3d at 439 (This Court "attempted in *Palantir* to offer guidance as to how Section 220 proceedings, which are intended to be summary in nature, should be litigated.").

[92] *Palantir*, 203 A.3d at 754.

business without documenting its actions in minutes and board resolutions or other formal means, but maintains its records of the key communications only in emails, the respondent has no one to blame but itself for making the production of those emails necessary."[93] There is no meaningful difference between a corporation that does not maintain minutes and a corporation that refuses to produce them as a litigation strategy.[94]

As a final matter, even if Appellee had advanced evidence that the unproduced Formal Board Materials concerning the Capitalization Matters would be significantly different from the short-form materials it has kept over the years, *arguendo*, the Court of Chancery erred by unqualifiedly shutting the door to Informal Board Materials.[95] It could have directed the parties to meet and confer on a settle order or entered an order preserving jurisdiction to hear argument, if any, that Formal Board Materials were insufficient.[96] Instead, the Court of Chancery established a

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[93] *Id*. at 758.

[94] *Cf*. *Moran*, 2025 WL 3706330, at *1.

[95] *Palantir*, 203 A.3d at 758 ("[I]f the Vice Chancellor doubted that the production of emails was necessary for [Appellant's] proper purposes, [s]he could have ordered emails to be produced only if [Trade Desk] could not in good faith produce other documents sufficient to fairly address the proper subjects of the inspection. Instead, the court denied [Appellant's] request for emails categorically.").

[96] A398-99.

playbook for companies to avoid ever having to produce Informal Board Materials by refusing to produce Formal Board Materials and later declaring, without substantiation, that the answers stockholders seek lie in the unproduced documents. Such a practice would undermine Section 220.[97]

[97] *Cf. Roberta Ann K.W. Wong Leung Revocable Tr. v. Amazon.com, Inc.*, 345 A.3d 965, 976-77 (Del. 2025) (rejecting new test that would have allowed corporations to challenge inspection efforts based on the "lucidity" of the stockholder's purpose).

II. THE COURT OF CHANCERY ABUSED ITS DISCRETION BY DENYING APPELLANT ACCESS TO INFORMAL BOARD MATERIALS WHERE FORMAL BOARD MATERIALS WERE DEMONSTRABLY INSUFFICIENT.

A. QUESTION PRESENTED

Did the Court of Chancery err in denying Appellant access to Informal Board Materials concerning the Reincorporation where the related Formal Board Materials produced by Appellee were either short-form or demonstrably pretextual?[98] This issue was preserved below. Exception Opening Brief (A228-37).

B. SCOPE OF REVIEW

This Court reviews a determination of the scope of relief in a Section 220 action for abuse of discretion.[99]

C. MERITS OF ARGUMENT

The Court of Chancery abused its discretion in finding that Appellant failed to demonstrate that the Formal Board Materials produced by Trade Desk were insufficient for his investigation of the Reincorporation. To the contrary, Appellant demonstrated that the Formal Board Materials produced by Appellee related to the first few months of Board deliberations on the topic were short-form and devoid of

[98] Op. at 8-14; Rep at 17-19.

[99] *Palantir*, 203 A.3d at 748; *see generally* Argument § I.B, *supra*.

substance. Appellant further demonstrated that the reasoning set forth in backwards-looking records of deliberations, prepared after the retention of Green's lawyers, was demonstrably pretextual. The Court of Chancery incorrectly excused the former deficiency as the product of "preliminary" discussions and the latter deficiency as a difference of opinion, without grappling with the substance of Appellant's showing.

Because the Formal Board Materials relating to the Reincorporation were insufficient for his investigation, access to Informal Board Materials is necessary and essential for Appellant to assess the Board's deliberations in the months leading up to the Reincorporation.

1. The Formal Board Materials from April through July 2024 Are Short-Form and Provide no Insight into the Board's Reasoning.

For the period from April through July 2024, the Formal Board Materials reflect only the following about the Board's deliberations over the Reincorporation:

[redacted]

Even if "the Board's discussions in April and July 2024 were preliminary,"[100] the corresponding Formal Board Materials should have memorialized *something* of substance. At trial, counsel conceded [redacted] Yet the minutes do not reflect [redacted] and the presence of counsel does not excuse this deficiency.[102]

Moreover, it is reasonable to infer that Trade Desk possesses materials that contain details that were not set forth in the Formal Board Materials. In the 2024 Proxy, Appellee disclosed information about the meetings that was not contained in the minutes:

> At a meeting held on April 23, 2024, our board of directors, Chief Legal Officer and a representative of [Latham], counsel to the Company, met to discuss a number of matters, including the Company's potential

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[100] Op. at 9.

[101] *Scarantino, v. The Trade Desk, Inc.*, C.A. No. 2025-0442-LM, at 74 (A344) (Del. Ch. July 16, 2025) (TRANSCRIPT).

[102] *Compare id.* (suggesting that the Board's discussions were privileged because counsel was present) *with SICPA Holdings S.A. v. Optical Coating Lab.*, 1996 WL 577143, at *2 (Del. Ch. Sep. 23, 1996) ("[T]he presence of a lawyer at a business meeting called to consider a problem that has legal implications does not itself shield the communications that occur at that meeting[.]").

> reincorporation. As part of this discussion, a number of states, including Delaware, Nevada, California, New York, Texas and Maryland, were considered based on predominant market practice and other factors relevant to the Company's business. The board of directors decided to focus its considerations between Delaware and Nevada. . . .

This was more detail than [redacted] and [redacted].[103] This account in the 2024 Proxy "must have relied on documents that memorialize their content" and those documents and the information therein clearly were not the minutes.[104]

The Court of Chancery nonetheless incorrectly found that Appellant's "characterizations" of these materials as "short-form" and "reflect[ing] virtually nothing" were "refuted by the record" because subsequent "minutes reflect a process that deepened over time."[105] Plaintiff is not aware of any authority supporting the proposition that subsequent materials can render insufficient materials from prior deliberations retroactively sufficient, nor did the trial court cite any.

The Court of Chancery was also wrong to conclude that Appellant was

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[103] *Michigan Elec. Emps. Pension Fund v. Squarespace, Inc.*, C.A. No. 2024-1041-SEM, at 10 (A412) (Del. Ch. Dec. 3, 2025) (TRANSCRIPT) ("When a proxy contains descriptions of decisions that were made and matters that were discussed at meetings not reflected in the minutes, it is hard to imagine that these descriptions came from memory." (cleaned up)).

[104] *Id.*

[105] Op. at 9-10.

seeking "minutes that approximate a transcript—or advance his litigation narrative[.]"[106] Appellant seeks what he is entitled to under Section 220, *viz*: materials sufficient to accomplish his proper purpose. The short-form April and July 2024 materials were anything but. Appellee produced no Formal Board Materials reflecting anything of substance concerning the Reincorporation from the time period prior to August 2024 (when Green's personal lawyers joined the process).[107]

The situation is no different from past instances in which corporations were compelled to produce Informal Board Materials where stockholders demonstrated that Formal Board Materials were insufficient.[108] In *Facebook*, for example, the company argued that "the Board and Special Committee minutes already produced provide[d the stockholder] with sufficient information to assess the Board's decision-making process."[109] Because those minutes were "heavily redacted" and

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[106] Op. at 10.

[107] *See* A666-67.

[108] *See, e.g.*, *Bucks Cty. Emps. Ret. Fund v. CBS Corp.*, 2019 WL 6311106, at *3-10 (Del. Ch. Nov. 25, 2019) (ordering production of communications when minutes from that time reflected only discussion of "strategic possibilities"); *Emps. Ret. Sys. of R.I. v. Facebook, Inc.*, 2021 WL 529439, at *5 (Del. Ch. Feb. 10, 2021) ("[I]f non-email books and records are insufficient, then the court should order emails to be produced." (citation omitted)); *Palantir*, 203 A.3d at 752 n.71 (collecting seven cases where production of communications was ordered).

[109] 2021 WL 529439, at *7.

"reveal[ed] little or nothing of the Board's thinking", however, the *Facebook* Court was "satisfied . . . that non-privileged electronic communications concerning the [subject matter were] necessary and essential to Plaintiff's proper purpose."[110]

In sum, the first few months' worth of Formal Board Materials produced by Appellee are devoid of virtually any information about the Board's consideration of the Reincorporation. They say nothing of who introduced the idea, who decided to hire Green's personal lawyers and Solomon, the topics the Board discussed, or anything else that would ordinarily be reflected in corporate records. In excusing this deficiency by pointing to the content of materials produced long afterwards, the Court of Chancery deviated from authority holding communications are necessary when contemporaneous "formal minutes of" meetings "do not capture their content."[111] This was an abuse of discretion.

2. The Formal Board Materials from August through October 2024 Are Procedurally Suspect and Reflect Facially Pretextual Reasoning.

The Court of Chancery further incorrectly found that Appellant had not

[110] *Id.* at *8.

[111] *Squarespace*, Tr. at 15 (A417). The *Squarespace* Court ordered production of Informal Board Materials where Formal Board Materials documented a decision made just two days earlier, concluding the later minutes did "not serve as a contemporaneous record of an earlier decision." *Id.* at 21-22 (A423-24).

demonstrated that Informal Board Materials were necessary and essential because the produced Formal Board Materials prepared from August through October 2024 "apprise[d Appellant] of the Board's decision-making, explaining what the Board discussed, what it decided, and why."[112] As Appellant explained below, however, the reasons set forth in those materials were pretextual." By failing to credit Appellant's showing, the trial court abused its discretion.

As an initial matter, the Court of Chancery ignored that the "detailed presentations" that ostensibly informed the Board's supposed reasons [redacted], who had represented Green opposite the Company in connection with prior dual-class extension talks.[113] Nor did the Court of Chancery consider Appellant's showing regarding the positions staked out in Solomon's published works, which included a July 2024 article on extending dual-class sunsets coauthored with a WSGR attorney that criticized the application of *MFW* to dual-class extensions.[114] Appellant did not plead these facts as gratuitous

[112] Op. at 10.

[113] *See generally Grabski ex rel. Coinbase Glob., Inc. v. Andreessen*, 2026 WL 251652, at *12 (Del. Ch. Jan. 30, 2026) (stopping short of "reach[ing p]laintiff's arguments as to [counsel], except to say what is undoubtedly uncontroversial—advising [a firm] on multiple transactions while advising the SLC on its investigation into [that firm's] sizeable trades was suboptimal").

[114] A620.

barbs — they bore directly on the Board's decision making in selecting advisors.

After WSGR and Solomon were brought into the fold, the Board identified three purported reasons for the Reincorporation: (i) the need for "long-term strategic decisions" given Trade Desk's "competition"; (ii) comparative "predictability and certainty" under Nevada law; and (iii) a need to avoid "unmeritorious litigation against the corporation" and its insiders.[115] The first two reasons are plainly pretextual, while the third relates directly to Appellant's investigation.

The Board's invocation of "competition", "long-term strategic vision", and Green's ability to "see around corners" were pretextual and a stalking-horse for the perpetuation of Green's control. The Board cited these exact same reasons when it solicited stockholder support of the last extension of Green's control in 2020, as well as the post-Reincorporation extension in 2025.[116] The only discernible way in which

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[115] A839-40.

[116] A473, A497 (the 2020 Proxy) ("We would not enjoy the enviable industry position we hold today without our platform, our founder's ability to both *see around corners* and keep us a step ahead, and the support and trust of our stockholders… If the amendments are approved, the dual class structure will terminate in five years, which allows for certainty regarding the end of the structure and *reasonable time for the company to execute on its long-term strategy*… The Committee believes that Mr. *Green's long-term strategic vision* for the Company has been and will continue to be critical to our success. Success in our highly *competitive industry* requires leadership vision and strong direction." (emphasis added)); A1120 (the 2025 Proxy) ("Our strategic advantage has time and again been Mr. Green's *ability to see around corners to make bold long-term strategic decisions*, including those that benefit the

Nevada could facilitate Green's periscopic vision was by enabling the Board to extend his control without unaffiliated stockholder approval. The Court of Chancery explained away this "consistent use of language to describe its strategy" as "suggest[ing] a consistent corporate philosophy rather than a cover-up."[117] This deliberate language did not describe a "philosophy" of any sort but only made sense as a pretext for keeping Green at Trade Desk's helm.

Appellee's materials do not provide any insight into how Nevada supposedly offered a competitive edge over Delaware. It is not difficult to conceive ways in which a state could offer a competitive advantage: a comparatively lean regulatory framework, favorable tax policy, or even positive perception by a select customer base. Yet the only explanation offered by the Board was that Nevada's constituency statute would supposedly enable Trade Desk to "consider the interests of other constituents when evaluating our business strategy" and thereby more easily make "long-term strategic decisions[.]"[118] The problem, of course, is that Delaware law already empowers decision makers to consider all stakeholders.

The business judgment rule affords directors of Delaware corporations near-

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broader advertising ecosystem, along with our ability to be nimble and react quickly to market developments." (emphasis added)).

[117] Op. at 13.

[118] A840.

unfettered discretion to promote the long-term interests of the corporation however it sees fit.[119] The Board's observation that "[u]nder Delaware law . . . fiduciary duties in most circumstances instead require directors to seek to maximize the value of the corporation" is not to the contrary. Delaware directors only have a "duty to maximize long-term value" and in so doing "can consider the interests of other stakeholders instrumentally."[120] The pretextual nature of the Board's claim is revealed by the plain terms of Nevada's constituency statute, which permits directors to consider other stakeholders only "with a view to the interests of the corporation[.]"[121] Just like Delaware law, which has repudiated short-term shareholder primacy theory outside of the discrete *Revlon* context.[122] All told, the Board offered no concrete explanation for how Nevada could be better for Trade Desk's "long-term vision" and "long-term

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[119] *See generally* Lynn Stout, The Shareholder Value Myth at 29-31 (Berrett-Koehler Publishers, Inc. 2012) (discussing the expansive discretion contemplated by the business judgment rule and citing *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48 (Del. Ch. 2011)). Indeed, Solomon noted that certain Delaware companies "have adopted constituency provisions that enable boards to consider stakeholders beyond shareholders in their decision-making[,]" even if there were any ambiguity under *Airgas*. JX 026 at 99.

[120] *McRitchie v. Zuckerberg*, 315 A.3d 518, 563 (Del. Ch. 2024).

[121] NEV. REV. STAT. § 78.138(4).

[122] *See* 8 *Del. C.* § 141(a). The single-minded focus on short-term "shareholder value" attributed to Delaware law by the Board *only* applies in the narrow instance where the sale of the corporation is inevitable. *See Revlon*, 506 A.2d 173.

strategy". Appellant's explanation of how Appellee's claimed reasoning was untrue was not "[m]ere disagreement with a board's reasoning" as the Court of Chancery characterized it, but rather a demonstration of pretext.[123]

The Board's second purported reason was an appeal to the comparative predictability and certainty of Nevada law.[124] This was also pretextual.[125] In the 2024 Proxy, the Board claimed that "Nevada can offer more predictability and certainty in decision-making because of its statutory regime" and "removing judicial ambiguity can offer our board of directors and management clearer guideposts for action that will benefit our stockholders."[126] The contention that Chapter 78 of the Nevada Revised Statutes offers greater predictability than Title 8 of the Delaware Code is demonstrably false.

Comparison of Nevada law with Delaware law reveals that the relevant

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[123] Op. at 13.

[124] A839.

[125] And self-serving. In the 2020 Proxy, the Board had appealed to "certainty regarding the end of the structure" through setting a date certain for the sunset, rather than the Dilution Trigger. (A473). The Board has since introduced *uncertainty* as to when stockholders will realize their contractual expectation of control by making clear it will keep Green in charge at least another decade, regardless of investor input.

[126] A839.

Nevada statutory provisions are simply cribbed from Delaware.[127] For example, Nevada allows directors to rely on experts — just like Delaware.[128] Neveda has codified its business judgment rule by borrowing language from Delaware.[129] Nevada's defensive measure provision simply adopts the Delaware standard.[130] Yet Nevada has little of the case law that makes Delaware law predictable.

Appellee concedes as much, hedging its claims in the 2024 Proxy by telling stockholders that "Nevada case law concerning the effects of its statutes and regulations is more limited [than Delaware case law]" such that Trade Desk and its "stockholders would not have the benefit of Delaware's breadth of precedent to anticipate the legality of certain corporate affairs and transactions and stockholders' rights to challenge them, particularly on matters as to which Nevada's statutes do not provide a clear answer and a Nevada court must make a determination as a matter

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[127] *See* NEV. REV. STAT. § 78.138.

[128] *Compare* NEV. REV. STAT. § 78.138(2) *with* 8 *Del. C.* § 141(e).

[129] *Compare* NEV. REV. STAT. § 78.138(3) *with Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) ("It is a presumption that in making a business decision the directors of a corporation 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." (citation omitted)).

[130] *Compare* NEV. REV. STAT. § 78.139 *with Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 953, 955 (Del. 1985) (bringing defensive actions within the protection of the business judgment rule where a threat to corporate policy is "reasonably perceived" and the responsive action is "reasonable in relation to the threat posed").

of first impression."[131] Bare assertions that "code" is more predictable than precedent cannot withstand scrutiny.

Finally, the 2024 Proxy also reflects that the Board considered a supposedly "increasingly litigious environment facing corporations with controlling stockholders [that had] created unpredictability in decision-making",[132] with the Board claiming that *Match Group* "confirmed what corporate and legal communities had viewed in recent years as an expansion in Delaware of the application of *MFW*."[133] Any such "view" cannot be reconciled with the *Match Group* opinion, which confirmed that entire fairness had applied to transactions in which a controller realizes a non-ratable benefit for decades.[134] To the extent that *Match Group* clarified

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[131] A841. Even Solomon acknowledged "open question[s]" in Nevada concerning, for example, "what cleansing mechanism, if any, would be appropriate for controller transactions in freeze-outs, let alone for other controller transactions" or the "scope and application of [controlling stockholder] duties". (A935).

[132] A837. Again, query the viability of Trade Desk's defense that Appellant had not alleged a sufficient relationship between the Reincorporation and a potential dual-class extension. The Board was considering the law applicable to controlling stockholders at a time when Green's control was to imminently sunset.

[133] *Id.*

[134] *Match Grp.*, 315 A.3d at 458-63; *see also In re EZCORP Inc. Consulting Agrmt. Deriv. Litig.*, 2016 WL 301245, at *12-15 *et seq.* (Del. Ch. Jan. 25, 2016) (recognizing that "[i]n several decisions, the Delaware courts have expressly rejected the contention that the entire fairness framework only applies to squeeze-out mergers" and collecting cases); *Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (Del. 1997) ("Ordinarily, in a challenged transaction involving self-dealing by a controlling shareholder the substantive legal standard is that of entire fairness, with

Delaware law concerning the impact of a conflicted director on a special committee, the Court's reasoning was based in decades-old authority.[135] Like its claims about the Nevada Revised Statutes and Delaware's supposed embrace of short-term shareholder primacy, the Board's claim of *MFW* creep was demonstrably wrong and thus put forth only as a pretext.

In rejecting Appellant's arguments below, the Court of Chancery improperly recast his assertions as "a dispute on legal theory" concerning the "competing considerations" before a board weighing redomestication.[136] That is incorrect. The Board was not engaged in some abstract academic debate — it was advancing concrete factual assertions capable of being tested and disproven. Appellant was not "litigat[ing] the merits of a board action" but, rather, demonstrating that the Board's claimed assertions had no basis in Delaware or Nevada law.[137] Understandably, courts should be reluctant to disturb *bona fide* considerations of a board debating reincorporation on a clear day. But that does not support denial of inspection of

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the burden of persuasion resting upon the defendants."); *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 406 (Del. 1988) ("It is well established in Delaware that one who stands on both sides of a transaction has the burden of proving its entire fairness.").

[135] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 709 n.7 (Del. 1983).

[136] Op. at 13-14 (citing *Maffei*, 339 A.3d at 743-44).

[137] Op. at 12.

necessary and essential books and records based on demonstrable falsehoods.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Court reverse the Letter Opinion and award production of director communications relating to Appellant's proper purpose.

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Of Counsel:

FIELDS KUPKA & SHUKUROV LLP
William J. Fields
Christopher J. Kupka
Samir Shukurov
Béranger Rios
141 Tompkins Ave, Suite 404
Pleasantville, NY 10570
(212) 231-1500

RM LAW, P.C.
Richard A. Maniskas
1055 Westlakes Drive, Suite 300
Berwyn, PA 19312
(484) 324-6800

MCCARTER & ENGLISH, LLP

/s/ *Sarah E. Delia*

Sarah E. Delia (Bar No. 5833)
Renaissance Centre
405 North King Street, 8th Floor
Wilmington, Delaware 19801
(302) 984-6300

Attorneys for Plaintiff Below / Appellant Richard Scarantino

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February, 2026, true and correct copies of the foregoing **Appellant Richard Scarantino's Corrected Opening Brief** were served on the following individuals via File & Serve*Express*:

Brad D. Sorrels (Bar No. 5233)
Andrew D. Cordo (Bar No. 4534)
Nora M. Crawford (Bar No. 6399)
Joshua A. Manning (Bar No. 6859)
Amanda L. Day (Bar No. 7038)
Jacqueline G. Conner (Bar No. 7181)
WILSON SONSINI GOODRICH & ROSATI P.C.
222 Delaware Avenue, Suite 800
Wilmington, Delaware 19801
(302) 304-7600

Counsel for Defendant Below / Appellee
The Trade Desk, Inc.

/s/ *Sarah E. Delia*
Sarah E. Delia (Bar No. 5833)