Spring 2024 Update for use with

BUSINESS ASSOCIATIONS

Agency, Partnerships, LLCs, and Corporations

Tenth and Eleventh Editions

compiled by

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NEW YORK, NEW YORK

FOUNDATION PRESS

2024

CHAPTER 1. AGENCY

SECTION 3. LIABILITY OF PRINCIPALS TO THIRD PARTIES IN TORT

A. SERVANT (A.K.A. EMPLOYEE) VERSUS INDEPENDENT CONTRACTOR

Page 52: Delete Murphy v. Holiday Inns, Inc., *and the analysis and planning questions that follow it. Insert the following*:

Kerl v. Rasmussen, 682 N.W.2d 328 (Wis. 2004).

This case involves a claim of franchisor vicarious liability under the doctrine of respondeat superior. At issue is whether and under what circumstances a franchisor may be vicariously liable for the negligence of its franchisee.

I. FACTS AND PROCEDURAL HISTORY

… Arby's is a national franchisor of fast-food restaurants. DRI operates an Arby's restaurant on the west side of Madison as an Arby's franchisee.

The relationship between Arby's and DRI is governed by a 1985 licensing agreement pursuant to which DRI is authorized to use … Arby's trademarks, service marks, and trade names in accordance with Arby's Operating Standards Manual. Subsequent provisions in the agreement contain specific requirements governing, among other things, building design, construction, and remodeling; purchasing; food service and packaging; signage and advertising. The agreement specifies an up-front license fee of $32,500 and monthly royalty payments of 3.5 percent of DRI's gross sales. …

In February 1999, DRI hired Harvey Pierce to work at its restaurant. At the time, Pierce was a work-release inmate at the Dane County Jail. In the mid-afternoon of June 11, 1999, Pierce walked off the job without permission. He then crossed the street to the Wal–Mart store parking lot, where he lay in wait for Robin Kerl, his former girlfriend, and David Jones, her fiancé, both Wal–Mart employees. When Kerl and Jones emerged from the building, Pierce shot them both in the head. He then shot himself. Jones and Pierce died of their injuries. Kerl survived but sustained serious injuries and is permanently disabled.

Kerl and Jones' estate … alleged that Arby's was liable … under theories of "actual or constructive agency," respondeat superior and/or "active negligence," which we interpret to mean direct negligence.

…

III. DISCUSSION

A. Vicarious Liability

A person is generally only liable for his or her own torts. Under certain circumstances, however, the law will impose vicarious liability on a person who did not commit the tortious conduct but nevertheless is deemed responsible by virtue of the close relationship between that person and the tortfeasor. The doctrine of *respondeat superior* ("let the master answer"), less frequently referred to as the master/servant rule, has been well-settled in the law of agency for perhaps as long as 250 years. Vicarious liability under respondeat superior is "liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) because of the relationship between the two parties." *Black's Law Dictionary* 927 (7th ed.1999).

"Under the doctrine of respondeat superior, a master is subject to liability for the tortious acts of his or her servant.". A prerequisite to vicarious liability under respondeat superior is the existence of a master/servant relationship.

In *Heims v. Hanke,* this court adopted the definition of "servant" in § 220 of the Restatement (Second) of Agency: "[a] servant is one employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control." *Heims v. Hanke,* 5 Wis.2d 465, 468, 93 N.W.2d 455 (1958) (citing Restatement (Second) of Agency § 220). Conversely, a "master" is "a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service." Restatement (Second) of Agency, § 2(1).

The master/servant relationship is a species of agency; all servants are agents but not every agent is a servant. *Arsand,* 83 Wis.2d at 48, 264 N.W.2d 579; *Giese v. Montgomery Ward, Inc.,* 111 Wis.2d 392, 414–15, 331 N.W.2d 585 (1983). Unless an agent is also a servant, his principal will not be vicariously liable for his tortious conduct except under certain limited circumstances.[2]

Vicarious liability is a form of strict liability without fault. A master may be held liable for a servant's torts regardless of whether the master's own conduct is tortious. Although a plaintiff who suffers a single injury may plead both vicarious and direct liability claims against a party who is asserted to be a master (as was done here), vicarious liability is a separate and distinct theory of liability, and should not be confused with any direct liability that may flow from the master's own fault in

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[2] Under the nondelegable duty exception to respondeat superior, a principal may be held liable for a non-servant's tortious acts if the agent was performing responsibilities of the principal that are so important that the principal should not be permitted to bargain away the risks of performance. See Arsand v. City of Franklin, 83 Wis.2d 40, 54 n. 8, 264 N.W.2d 579 (1978).

bringing about the plaintiff's harm. Vicarious liability is … imposed upon an innocent party for the torts of another because the nature of the agency relationship—specifically the element of control or right of control—justifies it.

Vicarious liability under respondeat superior typically arises in employer/employee relationships but is not confined to this type of agency. A servant need not be under formal contract to perform work for a master, nor is it necessary for a person to be paid in order to occupy the position of servant. …

A person who contracts to perform services for another but is not a servant is an independent contractor. An independent contractor is "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." Restatement (Second) of Agency, § 2(3). The use of the label "independent contractor" in the contract between the parties is not by itself dispositive; the test looks beyond labels to factual indicia of control or right to control.

… The requirement of control or the right to control derives from the earliest manifestations of the doctrine and survives today as a justification for vicarious liability. "In early times the servant was a member of the family or of the mercantile household, and intimacy of relation is still the basic idea which today distinguishes the servant from the non-servant." Restatement (Second) of Agency § 219, cmt. a. Persons subject to vicarious liability under the early common law—keepers of servants, fathers of families—were, in fact, endowed with powers of control and as such, able to take responsibility for the conduct of others. *Id.* … More specifically:

> The conception of the master's liability to third persons appears to be an outgrowth of the idea that within the time of service, the master can exercise control over the physical activities of the servant. From this, the idea of responsibility for the harm done by the servant's activities followed naturally. The assumption of control is a usual basis for imposing tort liability when the thing controlled causes harm. It is true that normally one in control of tangible things is not liable without fault. But in the law of master and servant the use of the fiction that "the act of the servant is the act of the master" has made it seem fair to subject the non-faulty employer to liability for the negligent and other faulty conduct of his servants.

Id.

The modern consensus is that vicarious liability is also justified on common law policy grounds as a device for spreading risk and encouraging safety and the exercise of due care by employees/servants. Exposure to vicarious liability creates an incentive for masters who control or have the right to control the conduct of their servants to take steps to ensure that their servants exercise due care in carrying out the master's business. Employees (the most frequent kind of servant) are usually less able to satisfy a judgment for damages, and are therefore less responsive to the threat of tort liability than their employers. Employers (the most frequent kind of master) are usually better able financially to absorb the resulting costs of increased supervision and safety measures or to insure against the risk.

Although the rationale for vicarious liability has expanded and the circumstances of its application have become more diverse, the basic formula for respondeat superior has remained the same: … If a principal does not control or have the right to control the day-to-day physical conduct of the agent, then the opportunity and incentive to promote safety and the exercise of due care are not present, and imposing liability without fault becomes difficult to justify on fairness grounds.

B. Franchising and Franchisor Vicarious Liability

Franchising is a business arrangement that takes a variety of forms, including product franchises, "business format franchises," and certain kinds of dealerships. 1 W. Michael Garner, *Franchise and Distribution Law and Practice* § 1:11–1:19 (2003). The franchise in this case is an example of business format franchising, characterized by the sale of a product or service under the franchisor's trademark pursuant to specified quality, marketing, and operational standards. A franchise relationship is a marriage of convenience. It enables franchisors to spread the capital cost of enlarging the market for their goods and services by transferring most of those costs to local franchisees. The franchise arrangement enables the franchisor to reach new, far-flung markets without having to directly manage a vast network of individual outlets. For the franchisee, the arrangement mitigates the risks of starting a new business by enabling it to capitalize on the good will and established market associated with the franchisor's trademark or trade name. The burdens of starting and operating a business are eased considerably by the franchisor, which provides quality and operational methods and standards, and may offer management training programs to the franchisee.

Use of franchise models has mushroomed in recent years. Once confined almost exclusively to automobile dealerships and gasoline stations, franchising has proliferated in this country, accounting for approximately $1 trillion in annual U.S. retail sales in 2000, representing over 40 percent of all U.S. retail sales.

Most courts that have addressed the issue of franchisor vicarious liability have assumed that respondeat superior applies in the franchising context and have adapted the traditional master/servant "control or right to control" test to determine whether the relationship between the franchisor and franchisee should give rise to vicarious liability. As a general matter, however, the usual justifications for vicarious liability lose some force in the franchising context, and the "control or right to control" test for determining the presence of a master/servant agency is not easily transferable to the franchise relationship.

As we have noted, a franchise is a commercial arrangement between two businesses which authorizes the franchisee to use the franchisor's intellectual property and brand identity, marketing experience, and operational methods. It is quite different from a contract of employment. For one thing, it is the franchisee that pays, not the franchisor. Furthermore, although franchise agreements typically impose detailed requirements on the franchisee's operations (more on that later), the existence of these contractual requirements does not mean that franchisors have a role in managing the day-to-day operations of their franchisees. To the contrary, the imposition of quality and operational requirements by contract suggests that the franchisor does not intervene in the daily operation and management of the independent business of the franchisee.

In addition, because many franchise relationships include a license to use the franchisor's trade or service mark, the detailed quality and operational standards and inspection rights specified in the franchise agreement are integral to the protection of the franchisor's trade or service mark under the Lanham Act. "The purpose of the Lanham Act, however, is to ensure the integrity of registered trademarks, not to create a federal law of agency ... [or to] automatically saddle the licensor with the responsibilities under state law of a principal for his agent." *Oberlin v. The Marlin Am. Corp.,* 596 F.2d 1322, 1327 (7th Cir.1979).

Accordingly, the premises of vicarious liability weaken when applied to a claim that a franchisor should be held strictly liable for the torts of its franchisee. The "control" of a franchisor does not consist of routine, daily supervision and management of the franchisee's business, but, rather, is contained in contractual quality and operational requirements necessary to the integrity of the franchisor's trade or service mark. The perceived fairness of requiring a principal who closely controls the physical conduct of an agent to answer for the harm caused by the agent is diminished in this context.

Similarly, while the rationale of encouraging safety and the exercise of due care is present in the domain of franchising, as elsewhere, it has less strength as a justification for imposing no-fault liability on a franchisor. The typical franchisee is an independent business or entrepreneur, often distant from the franchisor and not subject to day-to-day managerial supervision by the franchisor. The imposition of vicarious liability has less effectiveness as an incentive for enhancing safety and the exercise of care in the absence of the sort of daily managerial supervision and control of the franchise that could actually bring about improvements in safety and the exercise of care.

In light of these considerations, the clear trend in the case law in other jurisdictions is that the quality and operational standards and inspection rights contained in a franchise agreement do not establish a franchisor's control or right of control over the franchisee sufficient to ground a claim for vicarious liability as a general matter or for all purposes.[5]

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[5] A few older cases were willing to treat general quality and operational requirements in franchise agreements as indicia of control sufficient to get the plaintiff past summary judgment on that issue. Drexel v. Union Prescription Centers, 582 F.2d 781, 788 (3rd Cir.1978) (grant of summary judgment to drug store reversed because general provisions in franchise agreement were "so broadly drawn as to render uncertain the precise nature and scope of [franchisor's] rights vis-á-vis its franchisee"); Raasch v. Dulany, 273 F.Supp. 1015,

These courts have adapted the traditional master/servant "control or right to control" test to the franchise context by narrowing its focus: the franchisor must control or have the right to control the daily conduct or operation of the particular "instrumentality" or aspect of the franchisee's business that is alleged to have caused the harm before vicarious liability may be imposed on the franchisor for the franchisee's tortious conduct. The quality and operational standards typically found in franchise agreements do not establish the sort of close supervisory control or right to control necessary to support imposing vicarious liability on a franchisor for the torts of the franchisee for all or general purposes.

…

Consistent with the majority approach in other jurisdictions, we conclude that … a franchisor may be held vicariously liable for the tortious conduct of its franchisee only if the franchisor has control or a right of control over the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm.

C. The Arby's–DRI Relationship

Applying these principles here, we conclude that Arby's did not have control or the right to control the day-to-day operation of the specific aspect of DRI's business that is alleged to have caused the plaintiffs' harm, that is, DRI's supervision of its employees. We note first that the license agreement between Arby's and DRI contains a provision that disclaims any agency relationship. … The label the parties attach to their relationship is informative but not dispositive, however.

The license agreement contains a plethora of general controls on the operation of DRI's restaurant, the most sweeping of which is Article 4, which covers "Operating Standards and Guidelines." The centerpiece of this clause in the agreement is a requirement that DRI must operate the business "strictly in conformity with the Manual provided by Arby's." The agreement also provides that DRI must comply with all laws and regulations pertaining to the operation of the business. The agreement requires DRI to maintain records of its business operations in a manner satisfactory to Arby's. It requires that DRI's building and equipment must meet specifications

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1018–19 (E.D.Wis.1967) (provisions in automobile rental franchise agreement imposing quality control requirements on franchisee create issue of fact as to whether franchisor had right of control, precluding summary judgment); Billops v. Magness Const. Co., 391 A.2d 196, 198 (Del.Sup.Ct.1978) (provisions in hotel franchise agreement "reveal a triable issue on the question of actual agency," precluding summary judgment on a claim that the franchisor should be held vicariously liable for franchisee's harassment of hotel customer); Singleton v. Int'l Dairy Queen, Inc., 332 A.2d 160, 161–2 (Del.Super.Ct.1975) (provisions of restaurant franchise agreement suggest "excessive" control by franchisor over franchisee, precluding summary judgment on claim of franchisor vicarious liability for injury to restaurant customer caused by defective glass door). The more recent cases reject the general proposition that the contractual quality and operational standards in a franchise agreement give rise to a basis for franchisor vicarious liability, opting instead for a more precisely focused test….

designated and approved by Arby's. DRI must obtain its supplies from a list of approved suppliers provided by Arby's. The agreement specifies standards regarding containers, uniforms, paper goods, and other packaging supplies.

DRI is required under the agreement to carry at least $1 million of liability insurance, naming Arby's as an additional insured. Arby's retains the right under the agreement to inspect DRI's premises and to test the products. The agreement specifies that if DRI fails to comply with the agreement or fails to operate the business in accordance with the then-current operating manual, Arby's may demand that DRI cure its failure, and may unilaterally terminate the license if DRI has not done so within ten days.

These provisions in the license agreement are consistent with the quality and operational standards commonly contained in franchise agreements to achieve product and marketing uniformity and to protect the franchisor's trademark. They are insufficient to establish a master/servant relationship. More particularly, they do not establish that Arby's controlled or had the right to control DRI's hiring and supervision of employees, which is the aspect of DRI's business that is alleged to have caused the plaintiffs' harm.

The agreement's provisions regarding the specific issue of personnel are broad and general. Section 6:1 of the agreement provides that DRI is required "to hire, train, maintain and properly supervise sufficient, qualified and courteous personnel for the efficient operation of the Licensed Business." Section 6:2 states that someone in charge at the restaurant is required to complete a management training seminar conducted by Arby's. The operating manual provides guidelines for hiring, training, and supervising employees in accordance with applicable labor laws and to achieve an efficient, courteous, and satisfied work force.

By the terms of this agreement, DRI has sole control over the hiring and supervision of its employees. Arby's could not step in and take over the management of DRI's employees. Arby's right to terminate the relationship because of an uncured violation of the agreement is not the equivalent of a right to control the daily operation of the restaurant or actively manage DRI's work force. Accordingly, ... Arby's cannot be held vicariously liable for DRI's alleged negligent supervision of Pierce.

QUESTIONS

1. In order for a master/servant relationship—or, to use the Restatement (Third) terminology, an employee/employer relationship—to give rise to liability under agency law, there must first be an agency relationship. As we saw above, this requires not only that the purported agent be subject to the principal's control but also must act on the principal's behalf. How does a franchisee act on behalf of the franchisor?

2. Why is the label given the relationship by the parties not dispositive? Conversely, why is it informative?

3. Doesn't the right to "terminate the relationship because of an uncured violation of the agreement" give Arby's substantial control over all aspects of the business?

4. Would the result in either Humble Oil or Sun Oil have come out differently if the courts in those cases had applied the law as stated in *Kerl*?

5. Today, of course, most oil company franchisees run stores that are more akin to a convenience store or mini-mart that also sells gasoline than the service stations at issue in *Humble Oil* and *Sun Oil*. Does that change in the nature of the business justify a change in result?

6. Is there a policy argument for applying the older rule that "general quality and operational requirements in franchise agreements" are "sufficient indicia of control" to support imposing vicarious liability on a franchisor?

Chapter 4. The Duties of Officers, Directors, and Other Insiders

Section 1. The Obligations of Control: Duty of Care

Page 243: Delete Note on Legislative Response and text that follows. Insert the following:

NOTES AND QUESTIONS ON EXCULPATION

1. The decision in Smith v. Van Gorkom caused considerable consternation and anxiety among corporate directors. To relieve the anxiety, many states adopted provisions designed to afford directors protection from liability. There was widespread adoption, with shareholder approval, of amendments to corporate certificates of incorporation to provide the protection contemplated by this provision (and provisions in other states with similar objectives).

In 2022, § 102(b)(7) was amended to authorize the articles of incorporation to authorize exculpation of officers in addition to directors:

> (7) A provision eliminating or limiting the personal liability of a director or officer to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director or officer, provided that such provision shall not eliminate or limit the liability of:
>
> > (i) A director or officer for any breach of the director's or officer's duty of loyalty to the corporation or its stockholders;
> >
> > (ii) A director or officer for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law;
> >
> > (iii) A director under § 174 of this title;
> >
> > (iv) A director or officer for any transaction from which the director or officer derived an improper personal benefit; or
> >
> > (v) An officer in any action by or in the right of the corporation.
>
> No such provision shall eliminate or limit the liability of a director or officer for any act or omission occurring prior to the date when such provision becomes effective.
>
> An amendment, repeal or elimination of such a provision shall not affect its application with respect to an act or omission by a director or officer occurring before such amendment, repeal or elimination unless the provision provides otherwise at the time of such act or omission.
>
> All references in this paragraph (b)(7) to a director shall also be deemed to refer to such other person or persons, if any, who, pursuant to a provision of the certificate of incorporation in accordance with § 141(a) of this title, exercise or perform any of the powers or duties otherwise conferred or imposed upon the board of directors by this title.

> All references in this paragraph (b)(7) to an officer shall mean only a person who at the time of an act or omission as to which liability is asserted is deemed to have consented to service by the delivery of process to the registered agent of the corporation pursuant to § 3114(b) of Title 10 (for purposes of this sentence only, treating residents of this State as if they were nonresidents to apply § 3114(b) of Title 10 to this sentence).

2. As discussed in more detail in Chapter 7, the Delaware General Corporation Law limits the amount of dividends a corporation may pay to its shareholders. Section 174 provides that directors who authorize a dividend in excess of that amount may be held personally liable to the corporation or, in the event of insolvency, to the corporation's creditors. Section 102(b)(7)(iii) precludes exculpation of directors for monetary liability for such improper dividends.

3. Section 102(b)(7)(ii) precludes exculpation of a director or officer for acts or omissions that are not in good faith, involve intentional misconduct, or involve a knowing violation of law. Can you think of intentional misconduct or a knowing violation of law that could be committed in good faith?

4. Section 102(b)(7)(iv) authorizes exculpation of monetary liability in cases in which a director or officer derived an improper personal benefit from a transaction. Can you think of a situation in which a director or officer would receive such a benefit without also breaching the duty of loyalty? In other words, what if anything does § 102(b)(7)(iv) add to § 102(b)(7)(i)?

5. Section 3114(b) of Title 10 of the Delaware Code is a jurisdictional statute providing that officers of a Delaware corporation shall, by agreeing to assume that position, will "be deemed thereby to have consented to the appointment of the registered agent of such corporation (or, if there is none, the Secretary of State) as an agent upon whom service of process may be made in all civil actions or proceedings brought in this State, by or on behalf of, or against such corporation, in which such officer is a necessary or proper party, or in any action or proceeding against such officer for violation of a duty in such capacity, whether or not the person continues to serve as such officer at the time suit is commenced." It goes on to state that the term officer includes anyone who:

> (1) Is or was the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer of the corporation at any time during the course of conduct alleged in the action or proceeding to be wrongful;
>
> (2) Is or was identified in the corporation's public filings with the United States Securities and Exchange Commission because such person is or was 1 of the most highly compensated executive officers of the corporation at any time during the course of conduct alleged in the action or proceeding to be wrongful; or
>
> (3) Has, by written agreement with the corporation, consented to be identified as an officer for purposes of this section

SECTION 4. SHAREHOLDER DERIVATIVE ACTIONS

B. THE REQUIREMENT OF DEMAND ON THE DIRECTORS

Delete Grimes v. Donald *and its accompanying Analysis questions. Insert* UFCW v. Zuckerberg *and accompanying Analysis questions*.

D. DIRECTOR INDEPENDENCE

Delete Section heading, Sanchez *opinion and Analysis questions. Move Problem to end of Section B.*

United Food and Commercial Workers Union v. Zuckerberg, 262 A.3d 1034 (Del. 2021)

. . .

I. RELEVANT FACTS AND PROCEDURAL BACKGROUND

A. The Parties and Relevant Non-Parties

Appellee Facebook is a Delaware corporation with its principal place of business in California. Facebook is the world's largest social media and networking service and one of the ten largest companies by market capitalization.

Appellee Mark Zuckerberg founded Facebook and has served as its chief executive officer since July 2014. Zuckerberg controls a majority of Facebook's voting power and has been the chairman of Facebook's board of directors since January 2012.

Appellee Marc Andreessen has served as a Facebook director since June 2008. Andreessen was a member of the special committee that negotiated and recommended that the full board approve the Reclassification. In addition to his work as a Facebook director, Andreessen is a cofounder and general partner of the venture capital firm Andreessen Horowitz.

. . .

Appellee Reed Hastings began serving as a Facebook director in June 2011 and was still a director when Tri-State filed its complaint. . . . In addition to his work as a Facebook director, Hastings founded and serves as the chief executive officer and chairman of Netflix, Inc. ("Netflix").

Appellee Erskine B. Bowles began serving as a Facebook director in September 2011 and was still a director when Tri-State filed its complaint. Bowles was a member of the special committee that negotiated and recommended that the full board approve the Reclassification.

Appellee Susan D. Desmond-Hellman began serving as a Facebook director in March 2013 and was still a director when Tri-State filed its complaint. Desmond-Hellman was the chair of the special committee that negotiated and recommended that the full board approve the Reclassification. In addition to her work as a Facebook director, Desmond-Hellman served as the chief executive officer of the Bill and Melinda Gates Foundation (the "Gates Foundation") during the events relevant to this appeal.

. . .

B. Zuckerberg Takes the Giving Pledge

According to the allegations in the complaint, in December 2010, Zuckerberg took the Giving Pledge, a movement championed by Bill Gates and Warren Buffet that challenged wealthy business leaders to donate a majority of their wealth to philanthropic causes. . . .

In March 2015, Zuckerberg began working on an accelerated plan to complete the Giving Pledge by making annual donations of $2 to $3 billion worth of Facebook stock. Zuckerberg asked Facebook's general counsel to look into the plan. Facebook's legal team cautioned Zuckerberg that he could only sell a small portion of his stock—$3 to $4 billion based on the market price—without dipping below majority voting control. To avoid this problem, the general counsel suggested that Facebook could follow the "Google playbook" and issue a new class of non-voting stock that Zuckerberg could sell without significantly diminishing his voting power. The legal team recommended that the board form a special committee of independent directors to review and approve the plan and noted that litigation involving Google's reclassification resulted in a $522 million settlement. Zuckerberg instructed Facebook's legal team to "start figuring out how to make this happen."

C. The Special Committee Approves the Reclassification

At an August 20, 2015, meeting of Facebook's board, Zuckerberg formally proposed that Facebook issue a new class of non-voting shares, which would allow him to sell a substantial amount of stock without losing control of the company. . . .

A couple of days later, Facebook established a special committee, which was composed of three purportedly-independent directors: Andreessen, Bowles, and Desmond-Hellman (the "Special Committee"). The board charged the Special Committee with evaluating the Reclassification, considering alternatives, and making a recommendation to the full board. The board also authorized the Special Committee to retain legal counsel, financial advisors, and other experts.

. . .

Throughout the negotiations about the Reclassification, Andreessen engaged in facially dubious back-channel communications with Zuckerberg about the Special Committee's deliberations. . . .

On April 13, 2016, the Special Committee recommend that the full board approve the Reclassification. The next day, Facebook's full board accepted the Special Committee's recommendation and voted to approve the Reclassification. Zuckerberg . . . abstained from voting on the Reclassification.

D. Facebook Settles a Class Action Challenging the Reclassification

On April 27, 2016, Facebook revealed the Reclassification to the public. . . .

On April 29, 2016, the first class action was filed in the Court of Chancery challenging the Reclassification. Several more similar complaints were filed, and in May 2016 the Court of Chancery consolidated thirteen cases into a single class action (the "Reclassification Class Action"). . . .

On June 24, 2016, Facebook agreed that it would not go forward with the Reclassification while the Reclassification Class Action was pending. The Court of Chancery certified the Reclassification Class Action in April 2017 and tentatively scheduled the trial for September 26, 2017. About a week before the trial was scheduled to begin, Zuckerberg asked the board to abandon the Reclassification. The board agreed, and the next day Facebook filed a Form 8-K with the Securities and Exchange Commission disclosing that the company had abandoned the Reclassification and mooted the Class Action. The Form-8K also disclosed that despite abandoning the Reclassification, Zuckerberg planned to sell a substantial number of shares over the coming 18 months. . . .

E. Tri-State Files a Class Action Seeking to Recoup the Money that Facebook Spent Defending and Settling the Reclassification Class Action

Facebook spent about $21.8 million defending the Reclassification Class Action, including more than $17 million on attorneys' fees. Additionally, Facebook paid $68.7 million to the plaintiff's attorneys in the Reclassification Class Action to settle a claim under the corporate benefit doctrine.

On September 12, 2018, Tri-State filed a derivative action in the Court of Chancery seeking to recoup the money that Facebook spent defending and settling the Reclassification Class Action. The complaint asserted a single count alleging that . . . the "Director Defendants" . . . breached their fiduciary duties of care and loyalty by improperly negotiating and approving the Reclassification. When Tri-State filed its complaint, Facebook's board was composed of nine directors: Zuckerberg, Andreessen, Bowles, Desmond-Hellman, Hastings, Thiel, Sandberg, Chenault, and Zients (collectively, the "Demand Board").

The complaint alleged that demand was excused as futile under Court of Chancery Rule 23.1 because "the Reclassification was not the product of a valid exercise of business judgment" and because "a majority of the Board face[d] a substantial likelihood of liability[ ] and/or lack[ed] independence."* Facebook and the Director

* [Eds.—Delaware Court of Chancery Rule 23.1 requires, *inter alia,* that a derivative suit complaint must "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort." This is known as the demand requirement. "The 'demand' contemplated by Rule 23.1 is really a form of notice designed to afford to the corporation's board an opportunity to consider the facts asserted and to exercise its business judgment whether to press any arguable claim the corporation may

Defendants moved to dismiss the complaint under Court of Chancery Rule 23.1 for failing to comply with the demand requirement.

On October 26, 2020, the Court of Chancery issued a memorandum opinion dismissing the complaint for failing to comply with Rule 23.1. . . .

III. ANALYSIS

"A cardinal precept" of Delaware law is "that directors, rather than shareholders, manage the business and affairs of the corporation."[95] . . . The board's authority to govern corporate affairs extends to decisions about what remedial actions a corporation should take after being harmed, including whether the corporation should file a lawsuit against its directors, its officers, its controller, or an outsider.

"In a derivative suit, a stockholder seeks to displace the board's [decision-making] authority over a litigation asset and assert the corporation's claim."[98] Thus, "[b]y its very nature[,] the derivative action" encroaches "on the managerial freedom of directors" by seeking to deprive the board of control over a corporation's litigation asset."[99] In order for a stockholder to divest the directors of their authority to control the litigation asset and bring a derivative action on behalf of the corporation, the stockholder must" (1) make a demand on the company's board of directors or (2) show that demand would be futile.[100] The demand requirement is a substantive requirement that " '[e]nsure[s] that a stockholder exhausts his intracorporate remedies,' 'provide[s] a safeguard against strike suits,' and 'assure[s] that the stockholder affords the corporation the opportunity to address an alleged wrong without litigation and to control any litigation which does occur.'"[101]

The plaintiff in this action did not make a pre-suit demand. Thus, the question before the Court is whether demand is excused as futile. This Court has articulated two tests to determine whether the demand requirement should be excused as futile: the *Aronson* test and the *Rales* test. The *Aronson* test applies where the complaint challenges a decision made by the same board that would consider a litigation demand. Under *Aronson*, demand is excused as futile if the complaint alleges particularized facts that raise a reasonable doubt that "(1) the directors are disinterested and independent[,] [or] (2) the challenged transaction was otherwise the

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possess or to take other action." Schick Inc. v. Amalgamated Clothing and Textile Workers Union, 533 A.2d 1235, 1240 (Del. Ch. 1987).]

[95] Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984), overruled on other grounds 746 A.2d 244 (Del. 2000).

[98] Op. at 16.

[99] *Aronson*, 473 A.2d at 811.

[100] [Lenois v. Lawal, 2017 WL 5289611, at *9 (Del. Ch. Nov. 7, 2017).]

[101] *Id.* (alterations in original) (first quoting *Aronson*, 473 A.2d at 811-12; and then quoting Kaplan v. Peat, Marwick, Mitchell & Co., 540 A.2d 726, 730 (Del. 1988)).

product of a valid business judgment."[106] This reflects the "rule ... that where officers and directors are under an influence which sterilizes their discretion, they cannot be considered proper persons to conduct litigation on behalf of the corporation. Thus, demand would be futile."[107]

The *Rales* test applies in all other circumstances. Under *Rales*, demand is excused as futile if the complaint alleges particularized facts creating a "reasonable doubt that, as of the time the complaint is filed," a majority of the demand board "could have properly exercised its independent and disinterested business judgment in responding to a demand."[108] "Fundamentally, *Aronson* and *Rales* both 'address the same question of whether the board can exercise its business judgment on the corporat[ion]'s behalf' in considering demand."[109] . . .

. . . Thus, the demand-futility analysis provides an important doctrinal check that ensures the board is not improperly deprived of its decision-making authority, while at the same time leaving a path for stockholders to file a derivative action where there is reason to doubt that the board could bring its impartial business judgment to bear on a litigation demand.

. . .

On appeal, Tri-State raises two issues with the Court of Chancery's demand-futility analysis. First, Tri-State argues that the Court of Chancery erred by holding that exculpated care violations do not satisfy the second prong of the *Aronson* test. Second, Tri-State argues that its complaint contained particularized allegations establishing that a majority of the directors on the Demand Board were beholden to Zuckerberg.

For the reasons provided below, this Court affirms the Court of Chancery's judgment.

A. Exculpated Care Violations Do Not Satisfy *Aronson's* Second Prong

. . .

. . . Section 102(b)(7) of the DGCL authorizes corporations to adopt a charter provision insulating directors from liability for breaching their duty of care:

> "[T]he certificate of incorporation may ... contain any or all of the following matters: (7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve

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[106] *Aronson*, 473 A.2d at 814.

[107] *Id*. (citations omitted).

[108] [Rales v. Blasband, 634 A.2d 927, 934 (Del. 1993).]

[109] *Lenois*, 2017 WL 5289611, at *9 (quoting *Kaplan*, 540 A.2d at 730).

> intentional misconduct or a knowing violation of law; ... or (iv) for any transaction from which the director derived an improper personal benefit.

Facebook's charter contains a Section 102(b)(7) clause; as such, the Director Defendants face no risk of personal liability from the allegations asserted in this action. Thus, Tri-State's demand-futility allegations raise the question whether a derivative plaintiff can rely on exculpated care violations to establish that demand is futile under the second prong of the *Aronson* test. The Court of Chancery held that exculpated care claims do not excuse demand because the second prong of the *Aronson* test focuses on whether a director faces a substantial likelihood of liability. Tri-State argues that this analysis was wrong because *Aronson's* second prong focuses on whether the challenged transaction "satisfies the applicable standard of review," not on whether directors face a substantial likelihood of liability.

. . .

1. The second prong of *Aronson* focuses on whether the directors face a substantial likelihood of liability

. . .

Tri-State's argument hinges on the plain language of *Aronson's* second prong, which focuses on whether "the challenged transaction was ... the product of a valid business judgment":

> [I]n determining demand futility, the Court of Chancery ... must decide whether, under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent and (2) *the challenged transaction was otherwise the product of a valid business judgment*. Hence, the Court of Chancery must make two inquiries, one into the independence and disinterestedness of the directors and *the other into the substantive nature of the challenged transaction and the board's approval thereof*.[124]

Later opinions issued by this Court contain similar language that can be read to suggest that *Aronson's* second prong focuses on the propriety of the challenged transaction. These passages do not address, however, why *Aronson* used the standard of review as a proxy for whether the board could impartially consider a litigation demand. The likely answer is that, before the General Assembly adopted Section 102(b)(7) in 1995, rebutting the business judgment rule through allegations of care violations exposed directors to a substantial likelihood of liability. Thus, even if the demand board was independent and disinterested with respect to the challenged

[124] *Aronson*, 473 A.2d at 814 (emphasis added). [Eds.—Subsequently in the opinion the court explained that, as a pleading matter, "the second prong requires particularized allegations raising a reasonable doubt that a majority of the demand board is subject to a sterilizing influence because directors face a substantial likelihood of liability for engaging in the conduct that the derivative claim challenges."]

transaction, the litigation presented a threat that would "sterilize [the board's] discretion" with respect to a demand.[127]

. . .

Although not unanimous, the weight of Delaware authority since the enactment of Section 102(b)(7) supports holding that exculpated care violations do not excuse demand under *Aronson's* second prong. For example, in *Lenois*, the Court of Chancery held that the second prong focuses on whether director-defendants face a substantial likelihood of liability:

> [W]here an exculpatory charter provision exists, demand is excused as futile under the second prong of *Aronson* with a showing that a majority of the board faces a substantial likelihood of liability for non-exculpated claims. That a non-exculpated claim may be brought against less than a majority of the board or some other individual at the company, or that the board committed exculpated duty of care violations alone, will not affect the board's right to control a company's litigation.[131]

. . .

This Court's opinion in *In re Cornerstone Therapeutics, Inc. Stockholder Litigation*, changed the landscape even more.[141] Before *Cornerstone*, there was some uncertainty about how to apply a Section 102(b)(7) provision when deciding a motion to dismiss under Court of Chancery Rule 12(b)(6). . . .

Cornerstone eliminated any uncertainty and held that where a corporation's charter contains a Section 102(b)(7) provision, "[a] plaintiff seeking only monetary damages must plead non-exculpated claims against a director who is protected by an exculpatory charter provision to survive a motion to dismiss, regardless of the underlying standard of review for the board's conduct."[144] Thus, under current law a Section 102(b)(7) provision removes the threat of liability and protracted litigation for breach of care claims. As such, *Cornerstone* eliminated "any continuing vitality from *Aronson's* use of the standard of review for the challenged transaction as a proxy for whether directors face a substantial likelihood of liability sufficient to render demand futile."[145]

Accordingly, this Court affirms the Court of Chancery's holding that exculpated care claims do not satisfy *Aronson's* second prong. . . . When *Aronson* was decided, raising

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[127] *Aronson*, 473 A.2d at 814.

[131] [*Lenois*, 2017 WL 5289611, at *14.]

[141] 115 A.3d 1173, 1186-87 (Del. 2015) ("[W]hen the plaintiffs have pled no facts to support an inference that any of the independent directors breached their duty of loyalty, fidelity to the purpose of Section 102(b)(7) requires dismissal of the complaint against those directors.").

[144] *See Cornerstone*, 115 A.3d at 1186-87.

[145] Op. at 885.

a reasonable doubt that directors breached their duty of care exposed them to a substantial likelihood of liability and protracted litigation, raising doubt as to their ability to impartially consider demand. The ground has since shifted, and exculpated breach of care claims no longer pose a threat that neutralizes director discretion. These developments must be factored into demand-futility analysis, and Tri-State has failed to provide a reasoned explanation of why rebutting the business judgment rule should automatically render directors incapable of impartially considering a litigation demand given the current landscape. For these reasons, the Court of Chancery's judgment is affirmed.

2. Tri-State's other arguments do not change the analysis

. . . Tri-State argues that construing the second prong of *Aronson* to focus on whether directors face a substantial likelihood of liability erases any distinction between the two prongs of the *Aronson* test. The argument goes like this. If directors face a substantial likelihood of liability for approving the challenged transaction, then they are interested with respect to the challenged transaction. The first prong of *Aronson* already addresses whether directors are interested in the challenged transaction. Thus, construing the second prong to require a substantial risk of liability makes it redundant. This argument misconstrues *Aronson*. The first prong of *Aronson* focuses on whether the directors had a personal interest in the challenged transaction (i.e., a personal financial benefit from the challenged transaction that is not equally shared by the stockholders). This is a different consideration than whether the directors face a substantial likelihood of liability for approving the challenged transaction, even if they received nothing personal from the challenged transaction. The second prong excuses demand in that circumstance. Thus, the first and second prongs of *Aronson* perform separate functions, even if those functions are complementary.

3. This Court adopts the Court of Chancery's three-part test for demand futility

. . . The Court of Chancery noted that turnover on Facebook's board, along with a director's decision to abstain from voting on the Reclassification, made it difficult to apply the *Aronson* test to the facts of this case:

> The composition of the Board in this case exemplifies the difficulties that the *Aronson* test struggles to overcome. The Board has nine members, six of whom served on the Board when it approved the Reclassification. Under a strict reading of *Rales*, because the Board does not have a new majority of directors, *Aronson* provides the governing test. But one of those six directors abstained from the vote on the Reclassification, meaning that the *Aronson* analysis only has traction for five of the nine. *Aronson* does not provide guidance about what to do with either the director who abstained or the two directors who joined the Board later. The director who abstained from voting on the Reclassification suffers from other conflicts that renders her incapable of considering a demand, yet a strict reading of *Aronson* only focuses on the challenged decision and therefore would not account for those conflicts. Similarly, the plaintiff alleges that one of the directors who subsequently joined the Board has conflicts that render him incapable of considering a demand, but a strict reading of *Aronson* would not account for that either.

> Precedent thus calls for applying *Aronson*, but its analytical framework is not up to the task. The *Rales* test, by contrast, can accommodate all of these considerations.[164]

The court also suggested that in light of the developments discussed above, "*Aronson* is broken in its own right because subsequent jurisprudential developments have rendered non-viable the core premise on which *Aronson* depends—the notion that an elevated standard of review standing alone results in a substantial likelihood of liability sufficient to excuse demand. Perhaps the time has come to move on from *Aronson* entirely."[165]

To address these concerns, the Court of Chancery applied the following three-part test on a director-by-director basis to determine whether demand should be excused as futile:

> (i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand;
>
> (ii) whether the director would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand; and
>
> (iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that is the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand.*

. . .

This Court adopts the Court of Chancery's three-part test as the universal test for assessing whether demand should be excused as futile. When the Court decided *Aronson*, it made sense to use the standard of review to assess whether directors were subject to an influence that would sterilize their discretion with respect to a litigation demand. Subsequent changes in the law have eroded the ground upon which that framework rested. Those changes cannot be ignored, and it is both appropriate and necessary that the common law evolve in an orderly fashion to incorporate those developments. The Court of Chancery's three-part test achieves that important goal. . . .

Further, the refined test "refocuses the inquiry on the decision regarding the litigation demand, rather than the decision being challenged."[170] . . . The purpose of

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[164] Op. at 890.

[165] *Id*. at 889-90.

* [Eds.—Subsequently in the opinion the court explained that, "[i]f the answer to any of the questions is 'yes' for at least half of the members of the demand board, then demand is excused as futile."]

[170] Op. at 887.

the demand-futility analysis is to assess whether the board should be deprived of its decision-making authority because there is reason to doubt that the directors would be able to bring their impartial business judgment to bear on a litigation demand. That is a different consideration than whether the derivative claim is strong or weak because the challenged transaction is likely to pass or fail the applicable standard of review. It is helpful to keep those inquiries separate. And the Court of Chancery's three-part test is particularly helpful where, like here, board turnover and director abstention make it difficult to apply the *Aronson* test as written.

Finally, because the three-part test is consistent with and enhances *Aronson*, *Rales*, and their progeny, . . . cases properly construing *Aronson*, *Rales*, and their progeny remain good law.

. . .

B. The Complaint Does Not Plead with Particularity Facts Establishing that Demand Would Be Futile

The second issue on appeal is whether Tri-State's complaint pleaded with particularity facts establishing that a litigation demand on Facebook's board would be futile. The Court resolves this issue by applying the three-part test adopted above on a director-by-director basis.

The Demand Board was composed of nine directors. Tri-State concedes on appeal that two of those directors, Chenault and Zients, could have impartially considered a litigation demand. And Facebook does not argue on appeal that Zuckerberg, Sandberg, or Andreessen could have impartially considered a litigation demand. Thus, in order to show that demand is futile, Tri-State must sufficiently allege that two of the following directors could not impartially consider demand: Thiel, Hastings, Bowles, and Desmond-Hellmann.

Tri-State concedes on appeal that neither Thiel, Hastings, Bowles, nor Desmond-Hellmann had a personal interest in the Reclassification. This eliminates the possibility that demand could be excused under the first prong of the demand-futility test, as none of the remaining four directors obtained a material personal benefit from the alleged misconduct that is the subject of the litigation demand.

Similarly, there is no dispute that Facebook has a broad Section 102(b)(7) provision; and Tri-State concedes on appeal that the complaint does not plead with particularity that Thiel, Hastings, Bowles, or Desmond-Hellmann committed a *non-exculpated* breach of their fiduciary duties with respect to the Reclassification. This eliminates the possibility that demand could be excused under the second prong of the demand-futility test, as none of the remaining four directors would face a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand.

This leaves one unanswered question: whether the complaint pleaded with particularity facts establishing that two of the four remaining directors lacked independence from Zuckerberg.

"The primary basis upon which a director's independence must be measured is whether the director's decision is based on the corporate merits of the subject before the board, rather than extraneous considerations or influences."[177] Whether a director is independent "is a fact-specific determination" that depends upon "the context of a particular case."[178] To show a lack of independence, a derivative complaint must plead with particularity facts creating "a reasonable doubt that a director is ... so 'beholden' to an interested director ... that his or her 'discretion would be sterilized.' "[179]

. . . The plaintiff must allege that "the director in question had ties to the person whose proposal or actions he or she is evaluating that are sufficiently substantial that he or she could not objectively discharge his or her fiduciary duties."[181] . . .

"A variety of motivations, including friendship, may influence the demand futility inquiry. But, to render a director unable to consider demand, a relationship must be of a bias-producing nature."[185] Alleging that a director had a "personal friendship" with someone else, or that a director had an "outside business relationship," are "insufficient to raise a reasonable doubt" that the director lacked independence.[186] "Consistent with [the] predicate materiality requirement, the existence of some financial ties between the interested party and the director, without more, is not disqualifying."[187]

1. Hastings

. . . According to the complaint, Hastings was not independent because:

- "Netflix purchased advertisements from Facebook at relevant times," and maintains "ongoing and potential future business relationships with" Facebook.
- According to an article published by *The New York Times*, Facebook gave to Netflix and several other technology companies "more intrusive access to users'

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[177] Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1049 (Del. 2004) (citing *Rales*, 634 A.2d at 936); *see also* Sandys v. Pincus, 152 A.3d 124, 128 (Del. 2016) ("At the pleading stage, a lack of independence turns on 'whether the plaintiffs have pled facts from which the director's ability to act impartially on a matter important to the interested party can be doubted because that director may feel either subject to the interested party's dominion or beholden to that interested party.' " (quoting Del. C'ty Empls. Ret. Fund v. Sanchez, 124 A.3d 1017, 1024 n.25 (Del. 2015))).

[178] *Beam*, 845 A.2d at 1049.

[179] *Id.* at 1050 (quoting *Rales*, 634 A.2d at 936).

[181] [Kahn v. M&F Worldwide Corp., 88 A.3d 635, 649 (Del. 2014).]

[185] *Beam*, 845 A.2d at 1050.

[186] *Id.*

[187] *M&F Worldwide*, 88 A.3d at 649.

personal data than it ha[d] disclosed, effectively exempting those partners from privacy rules."

- "Hastings (as a Netflix founder) is biased in favor of founders maintaining control of their companies."
- "Hastings has ... publicly supported large philanthropic donations by founders during their lifetimes. Indeed, both Hastings and Zuckerberg have been significant contributors ... [to] a well-known foundation known for soliciting and obtaining large contributions from company founders and which manages donor funds for both Hastings ... and Zuckerberg ...."

These allegations do not raise a reasonable doubt that Hastings was beholden to Zuckerberg. Even if Netflix purchased advertisements from Facebook, the complaint does not allege that those purchases were material to Netflix or that Netflix received anything other than arm's length terms under those agreements. Similarly, the complaint does not make any particularized allegations explaining how obtaining special access to Facebook user data was material to Netflix's business interests, or that Netflix used its special access to user data to obtain any concrete benefits in its own business.

Further, having a bias in favor of founder-control does not mean that Hastings lacks independence from Zuckerberg. Hastings might have a good-faith belief that founder control maximizes a corporation's value over the long-haul. If so, that good-faith belief would play a valid role in Hasting's exercise of his impartial business judgment.[193]

Finally, alleging that Hastings and Zuckerberg have a track record of donating to similar causes falls short of showing that Hastings is beholden to Zuckerberg. . . .

2. Thiel

. . . According to the complaint, Thiel was not independent because:

- "Thiel was one of the early investors in Facebook," is "its longest-tenured board member besides Zuckerberg," and "has ... been instrumental to Facebook's business strategy and direction over the years."
- "Thiel has a personal bias in favor of keeping founders in control of the companies they created ...."
- The venture capital firm at which Thiel is a partner, Founders Fund, "gets 'good deal flow' " from its "high-profile association with Facebook."
- "According to Facebook's 2018 Proxy Statement, the Facebook shares owned by the Founders Fund (*i.e.*, by Thiel and Andreessen) will be released from escrow in connection with" an acquisition.
- "Thiel is Zuckerberg's close friend and mentor."
- In October 2016, Thiel made a $1 million donation to an "organization that paid [a substantial sum to] Cambridge Analytica" and "cofounded the Cambridge Analytica-linked data firm Palantir." Even though "[t]he Cambridge Analytica scandal has exposed Facebook to regulatory investigations" and litigation, Zuckerberg did not try to remove Thiel from the board.

- Similarly, Thiel's "acknowledge[ment] that he secretly funded various lawsuits aimed at bankrupting [the] news website Gawker Media" lead to "widespread calls for Zuckerberg to remove Thiel from Facebook's Board given Thiel's apparent antagonism toward a free press." Zuckerberg ignored those calls and did not seek to remove Thiel from Facebook's board.

These allegations do not raise a reasonable doubt that Thiel is beholden to Zuckerberg. The complaint does not explain why Thiel's status as a long-serving board member, early investor, or his contributions to Facebook's business strategy make him beholden to Zuckerberg. And for the same reasons provided above, a director's good faith belief that founder controller maximizes value does not raise a reasonable doubt that the director lacks independence from a corporation's founder.

. . .

The final pair of allegations suggest that because "Zuckerberg stood by Thiel" in the face of public scandals, "Thiel feels a sense of obligation to Zuckerberg." These allegations can only raise a reasonable doubt about Thiel's independence if remaining a Facebook director was financially or personally material to Thiel. As the Court of Chancery noted below, given Thiel's wealth and stature, "[t]he complaint does not support an inference that Thiel's service on the Board is financially material to him. Nor does the complaint sufficiently allege that serving as a Facebook director confers such cachet that Thiel's independence is compromised." . . .

3. Bowles

The complaint does not raise a reasonable doubt that Bowles lacked independence from Zuckerberg. According to the complaint, Bowles was not independent because:

- "Bowles is beholden to the entire board" because it granted "a waiver of the mandatory retirement age for directors set forth in Facebook's Corporate Governance Guidelines," allowing "Bowles to stand for reelection despite having reached 70 years old before" the May 2018 annual meeting.
- "Morgan Stanley—a company for which [Bowles] ... served as a longstanding board member at the time (2005-2017)—directly benefited by receiving over $2 million in fees for its work ... in connection with the Reclassification ...."
- Bowles "ensured that Evercore and his close friend Altman financially benefitted from the Special Committee's engagement" without properly vetting Evercore's competency or considering alternatives.

These allegations do not raise a reasonable doubt that Bowles is beholden to Zuckerberg or the other members of the Demand Board. The complaint does not make any particularized allegation explaining why the board's decision to grant Bowles a waiver from the mandatory retirement age would compromise his ability to impartially consider a litigation demand or engender a sense of debt to the other directors. For example, the complaint does not allege that Bowles was expected to do anything in exchange for the waiver, or that remaining a director was financially or personally material to Bowles.

The complaint's allegations regarding Bowles's links to financial advisors are similarly ill-supported. None of these allegations suggest that Bowles received a personal benefit from the Reclassification, or that Bowles's ties to these advisors made him beholden to Zuckerberg as a condition of sending business to Morgan Stanley, Evercore, or his "close friend Altman." . . .

IV. CONCLUSION

For the reasons provided above, the Court of Chancery's judgment is affirmed.

ANALYSIS

1. Under Delaware law, what is the legal effect and likely consequence of a shareholder demand that the board pursue a corporate cause of action?

2. Under Delaware law, when is demand excused? What must a shareholder allege in her or his complaint to establish that demand is excused? How does the plaintiff find the necessary facts?

3. Is it not true that a derivative suit is always a challenge to the wisdom, judgment, or competence of the board? Suppose you have been a member of the board of a corporation for ten years and a suit is filed naming other long-time members of the board as defendants. Do you think you could be fair and unbiased in deciding whether the suit should be dismissed? If not, what would you do?

4. Suppose a plaintiff in a derivative suit seeks recovery of funds embezzled by one of the corporation's officers and alleges with particularity the facts of the embezzlement and the failure of the board to seek recovery. Under the Delaware rule, is demand required? Should it be?

5. Should the inquiry into a director's independence focus solely on whether the director is economically beholden to the alleged controlling person, the director is a close personal friend of the alleged controlling person, or both?

6. Director independence is an issue in many areas of corporate law. Only the vote of disinterested and independent directors count for purposes of DGCL § 144(a)(1)'s provisions on approval of related party transactions. In connection with going private transactions initiated by a controlling shareholder, the Delaware Supreme Court called upon boards to create "an independent negotiating committee of its outside directors to deal with [the buyer] at arm's length." Weinberger v. UOP, Inc., 457 A.2d 701, 709 n.7 (Del. 1983). Indeed, the Court went on to equate "fairness in this context" to the conduct that might be expected from "a theoretical, wholly independent, board of directors acting upon the matter before them." Id. Similarly, with respect to antitakeover defenses, the Court has held that the validity of such defenses is "materially enhanced . . . where, as here, a majority of the board favoring the proposal consisted of outside independent directors." Moran v. Household Intern., Inc., 500 A.2d 1346, 1356 (Del. 1985). As this case illustrates, it is relevant to the question of whether demand should be excused in derivative litigation. As we saw in the prior cases in this section, it is also relevant to the question of whether a court should defer to the recommendation of a special litigation committee. Should the standard of

whether someone is independent depend on the context? For example, is there an argument for imposing a more stringent standard in the special litigation committee context?

SECTION 6. INSIDER TRADING

Delete Goodwin v. Agassiz *and* Texas Gulf Sulphur. *Convert those cases and the materials that follow them into problems for the end of the chapter. Delete* Dirks v. SEC *and replace it with* Chiarella v. U.S. *Convert* Dirks *and following materials into problems. Move* Salman v. U.S. *to follow* O'Hagan v. U.S. *Expand discussion in* Salman *of tipping law.*

Add the following problem:

PROBLEMS

Louis Kinskis is a billionaire businessman and investor who is the principal owner of the Lewis Group, an international private investment fund. By virtue of Kinskis' and the Lewis Group's investments in certain companies, he controls one or more board of director seats at those companies. Kinskis does not personally sit on any of the pertinent boards but and deputized Lewis Group employees to serve on those company boards. In turn, through these employees, Kinskis received material, non-public information about these companies, including, for example, information about upcoming favorable test results for biochemical companies. Kinskis travels frequently on a corporate jet owned by Lewis Group. Last year, Kinskis told the two pilots who fly the jet—Connor Carole and Evelyn Wall—a Christmas bonus in the form of material, non-public information about one of the companies in which Kinskis and Lewis Group are invested. Kinskis encouraged them to buy stock in the company but did not inform Carole and Wall that the information was non-public. Carole texted a friend that the "Boss is helping us out and told us to get into the stock ASAP" and assured the friend that "all conversations on this app is encrypted so all good. No one can ever see." Carole also texted the friend that "I'm guessing the Boss has inside info and knows the outcome" of not-yet-public clinical testing. Carole, Carole's friend, and Wall all later sold the stock they had purchased on the basis of these tips for a profit. What liability do Kinskis, Carole, Carole's friend, and Wall have in connection with those events?

CHAPTER 6. MERGERS, ACQUISITIONS, AND TAKEOVERS

SECTION 2. TAKEOVERS

D. EXTENSION OF THE UNOCAL/REVLON FRAMEWORK TO SHAREHOLDER DISENFRANCHISEMENT

Delete Hilton Hotels *and the material that follows. Insert the following in place thereof:*

Coster v. UIP Companies, Inc., --- A.3d ---- (Del.2023)

This appeal returns to the Supreme Court following remand. As the Court of Chancery recognized in its latest opinion, "[m]any aspects of the facts of this case were vexingly complicated or unique" and "the case gave rise to many close calls on which reasonable minds could differ."[2] We agree with the court's assessment and appreciate its work to address the issues remanded for reconsideration. We also agree with the court's observation that the dispute has been driven by hard feelings on both sides—the untimely death of Marion Coster's husband, Wout Coster, who could not secure his wife's financial security before his death, and the UIP board's desire to preserve UIP's operational viability after the loss of one of its major stockholders and founding members.*

. . .

I.

. . . UIP Companies, Inc. is a real estate services company founded in 2007 by Steven Schwat, Cornelius Bruggen, and Wout Coster ("Wout").The company operates

[2] Coster v. UIP Cos., Inc., 2022 WL 1299127, at *14 (Del. Ch. May 2, 2022) [hereinafter *Coster II*].

* [Ed.: In a footnote to a portion of the text that has been omitted, the court explained that:

> For those unfamiliar with the Delaware cases referred to in the opinion that now have shorthand references, Schnell refers to Schnell v. Chris-Craft Industries, Inc. 285 A.2d 437, 439 (Del. 1971), where Justice Herrmann famously wrote that "inequitable action does not become permissible simply because it is legally possible" and management cannot inequitably manipulate corporate machinery to perpetuate itself in office and disenfranchise the stockholders. Blasius refers to Blasius Industries, Inc. v. Atlas Corp., 564 A.2d 651, 659–61 (Del. Ch. 1988), where Chancellor Allen wrote that directors who interfere with board elections, even if in good faith, must have a compelling justification for their actions. And Unocal refers to Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985), where the Supreme Court used an enhanced standard of review to decide whether the directors "had reasonable grounds for believing that a danger to corporate policy and effectiveness existed" and that the board's response "was reasonable in relation to the threat posed."]

through various subsidiaries that provide a range of services to investment properties in the Washington, D.C. area. Many of these properties are held in special purpose entities ("SPEs") that UIP owns alongside third-party investors.

Each of the three founders initially controlled a third of UIP's shares. In 2011, Bruggen left UIP and tendered his shares to the Company at no cost. This left Schwat and Wout as half owners of UIP.

In 2013, Wout notified Schwat and Peter Bonnell, a senior UIP executive, that he had been diagnosed with leukemia. Shortly after, the group began negotiations for a buyout in which Bonnell and Heath Wilkinson, another UIP executive, would purchase Wout's shares in the company. Bonnell had previously been promised equity in UIP on multiple occasions. As the prospect for promotion had stalled, Bonnell and Wilkinson had both considered leaving UIP. Therefore, beyond providing Wout with an exit, the buyout was also useful in incentivizing Bonnell and Wilkinson to stay.

Unfortunately, negotiations were unsuccessful. . . . Wout passed away on April 8, 2015, and his widow, Marion Coster ("Coster"), inherited his UIP interests.

Immediately after Wout's death, Schwat and Bonnell continued exploring buyout options with Coster. . . . Negotiations between the parties continued throughout 2016 and into 2017 as Coster sought an independent valuation of UIP.

A.

In August 2017, Coster provided UIP with a $7.3 million valuation and demanded to inspect UIP books and records. Coster followed up with a second inspection demand in October 2017. Then, "[a]fter much back and forth about the adequacy of the documents provided, on April 4, 2018, Coster called for a UIP stockholders special meeting to elect new board members."[15] At this time, UIP had a five-member board composed of Schwat, Bonnell, and Stephen Cox, UIP's Chief Financial Officer. Two seats were vacant due to Wout's passing and Cornelius Bruggen's departure in 2011.

The stockholder meeting took place on May 22, 2018. Coster, represented by counsel, raised multiple motions affecting the size and composition of the board. Predictably, each of Coster's motions failed due to Schwat's opposition. Later that day, the UIP board reduced the number of board seats to three through unanimous written consent.

A second stockholder meeting followed on June 4, 2018. The meeting also ended in deadlock as Schwat and Coster each opposed the other's respective motions. With the deadlock, Schwat, Bonnell, and Cox remained UIP's directors.

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[15] [Coster v. UIP Cos., Inc., 255 A.3d 952, 956 (Del. 2021) (hereinafter *Coster Appellate Decision*)].

B.

Coster filed a complaint in the Court of Chancery seeking appointment of a custodian under 8 Del. C. § 226(a)(1) (the "Custodian Action").[16] Coster's "complaint mainly sought to impose a neutral tie-breaker to facilitate director elections, but it also lodged allegations against Schwat" about the lack of distributions and transparency into the company's affairs.[17] Coster "sought the appointment of a custodian with broad oversight and managerial powers."[18]

Coster's request for a "broadly empowered" custodian rather than one specifically tailored to target the stockholder deadlock "posed new risks to the Company."[19] As the Court of Chancery would later find, "[t]he appointment of a custodian with these powers would have given rise to broad termination rights in SPE contracts and threatened UIP's revenue stream, as UIP's business model is dependent on the continued viability of those contracts."[20] "Facing this threat to the Company," the UIP board decided to "issue the equity that they had long promised to Bonnell." Having conducted its own valuation that "valued a 100-percent, noncontrolling equity interest in UIP at $123,869," the UIP board offered, and Bonnell purchased, a one-third interest in the company for $41,289.67 (the "Stock Sale").[21]

The Stock Sale diluted Coster's ownership interest from one half to one third and negated her ability to block stockholder action as a half owner of the company. The Stock Sale also mooted the Custodian Action. Coster responded by filing suit and sought to cancel the Stock Sale.

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[16] 8 Del. C. § 226 allows for the Court of Chancery to appoint a custodian "upon application of any stockholder ... when ... [a]t any meeting held for the election of directors the stockholders are so divided that they have failed to elect successors to directors whose terms have expired or would have expired upon qualification of their successors."

[17] *Coster I*, at *10; *see* App. to Opening Br. at A94 ("[D]espite the apparent success of the Company in recent years, [Coster] has been denied any distributions from the Company since 2015, the year her husband, a founder, died. Over the same period, Mrs. Coster believes the current Chairman of the Board and President of the Company, Defendant Steven Schwat, has received a generous salary from the Company and is enjoying significant benefit from his 50% stake. Mr. Schwat has further prevented Mrs. Coster from gaining a meaningful view into the Company's financial affairs, and has barred her from any representation on the Board.").

[18] [Coster v. UIP Cos., Inc., 2020 WL 429906, at *10 (Del. Ch. Jan. 28, 2020), *rev'd*, 255 A.3d 952 (Del. 2021) (hereinafter *Coster I*)].

[19] *Coster II*, at *4.

[20] *Id.*

[21] *Id.* at 5.

C.

In its opinion following trial, the Court of Chancery upheld the Stock Sale under the entire fairness standard of review.[23] . . .

D.

In the first appeal, this Court did not disturb the Court of Chancery's entire fairness decision but remanded with instructions to review the Stock Sale under *Schnell* and *Blasius*. As explained in our first decision, while entire fairness is "Delaware's most onerous standard of review," it is "not [a] substitute for further equitable review" under *Schnell* or *Blasius* when the board interferes with director elections:

> In a vacuum, it might be that the price at which the board agreed to sell the one-third UIP equity interest to Bonnell was entirely fair, as was the process to set the price for the stock. But "inequitable action does not become permissible simply because it is legally possible." If the board approved the Stock Sale for inequitable reasons, the Court of Chancery should have cancelled the Stock Sale. And if the board, acting in good faith, approved the Stock Sale for the "primary purpose of thwarting" Coster's vote to elect directors or reduce her leverage as an equal stockholder, it must "demonstrat[e] a compelling justification for such action" to withstand judicial scrutiny.
>
> After remand, if the court decides that the board acted for inequitable purposes or in good faith but for the primary purpose of disenfranchisement without a compelling justification, it should cancel the Stock Sale and decide whether a custodian should be appointed for UIP.[25]

. . .

E.

On remand, the Court of Chancery found that the UIP board had not acted for inequitable purposes under *Schnell* and had compelling justifications for the Stock Sale under *Blasius*. . . . The court found that the threat posed by the Custodian Action was "an existential crisis" that justified the UIP board's actions and "that the Stock Sale was appropriately tailored to achieve the goal of mooting the Custodian Action while also achieving other important goals, such as implementing the succession plan that Wout favored and rewarding Bonnell."[34]

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[23] *Coster I*, at *12.

[25] [*Coster Appellate Decision*] at 953–54 (quoting *Schnell*, 285 A.2d at 439 then quoting *Blasius*, 564 A.2d at 661–62).

[34] [*Coster II,*] at *12–13.

II.

In her second appeal, Coster has challenged the Court of Chancery's ruling on both remand questions. . . .

A.

. . . To frame our analysis, it is helpful to review again the circumstances of Schnell and Blasius. Both cases involved board action that interfered with director elections in contests for control—*Schnell*, a proxy solicitation, and *Blasius*, a consent solicitation.

In *Schnell*, the incumbent Chris-Craft board faced the prospect of a difficult proxy fight to retain their seats. In response to the threat to their tenure as board members, the board accelerated the annual meeting date and moved the meeting to a more remote location. The director defendants mounted no real defense to the Court of Chancery suit except to argue that their actions did not violate the Delaware General Corporation Law ("DGCL") or Chris-Craft's bylaws and were therefore legal. . . . On appeal, the Supreme Court took a dim view of the board's intentional efforts to obstruct the insurgent's proxy contest. As the Court held, even though the board's actions met all legal requirements, the Chris-Craft board was "attempt[ing] to utilize the corporate machinery and the Delaware Law for the purpose of perpetuating itself in office; and, to that [sic] end, for the purpose of obstructing legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest against management."[39] In Justice Herrmann's oft-quoted words, "inequitable action does not become permissible simply because it is legally possible."[40] The Supreme Court ordered the Chris-Craft board to reinstate the original meeting date.

In *Blasius*, the Court of Chancery explored how *Schnell* operates in contested election cases, and specifically how *Schnell* was not the end of the road for judicial review of good faith board actions that interfered with director elections. Like *Schnell*, Blasius involved an incumbent board facing a consent solicitation aimed at replacing a majority of the board. Atlas Industries had a staggered board. Only seven of the authorized fifteen board seats were occupied. With a majority of stockholders behind the effort, an insurgent could in one action amend the company's bylaws, increase the board size to fifteen, and elect a new board majority of eight members.

If the Atlas board had acted on a clear day to establish new seats and to fill the vacancies, the circumstances would have been different. But for the Atlas board, the skies were cloudy, and it was raining. It faced a serious consent solicitation. In response, the board added two seats and filled the newly created positions with

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[39] [285 A.2d at 439.]

[40] *Id.*

directors friendly to management. Now, Blasius had to win not one, but two elections to control the board.

. . .

Ultimately, Chancellor Allen concluded that, even if the board acted in good faith, it did not justify its interference with the stockholder franchise. The court did not propose to "invalidat[e], in equity, every board action taken for the sole or primary purpose of thwarting a shareholder vote."[53] But the board could not rely on the justification that it "knows better than do the shareholders what is in the corporation's best interest."[54]

B.

In the years since the Supreme Court and the Court of Chancery decided these iconic cases, . . . "[a]lmost all of the post-*Schnell* decisions involved situations where boards of directors deliberately employed various legal strategies either to frustrate or completely disenfranchise a shareholder vote."[57] [Accordingly], the Chancellor was correct in this case to cabin *Schnell* and its equitable review to those cases where the board acts within its legal power, but is motivated for selfish reasons to interfere with the stockholder franchise.

C.

. . .

Blasius [required] a board, even if acting in good faith, to demonstrate a "compelling justification" for interfering with the stockholder franchise. But another standard of review could also apply when the board interferes with the stockholder vote during a contest for control. In *Unocal Corporation v. Mesa Petroleum Company*, this Court noted [that when] stockholders challenge a board's use of anti-takeover measures, the board must show (i) that "they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed," and (ii) that the response was "reasonable in relation to the threat posed."[61] A defensive measure is an unreasonable response in relation to the threat if it is either draconian—coercive or preclusive—or falls outside a range of reasonable responses.[62]

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[53] [*Blasius*, 564 A.2d] at 662.

[54] *Id.* at 663; *see also* Stahl v. Apple Bancorp, Inc., 579 A.2d 1115, 1124 (Del. Ch. 1990) (rejecting "the notion that the prospect that the shareholders might vote differently than the board recommends can alone constitute any threat to a corporate interest").

[57] Stroud v. Grace, 606 A.2d 75, 91 (Del. 1992).

[61] [493 A.2d] at 955.

[62] *See* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1367 (Del. 1995).

In Stroud v. Grace, our Court first recognized how both *Blasius* and *Unocal* review were called for in a proxy fight involving a tender offer:

> Board action interfering with the exercise of the franchise often arose during a hostile contest for control where an acquiror launched both a proxy fight and a tender offer. Such action necessarily invoked both Unocal and Blasius. We note that the two "tests" are not mutually exclusive because both recognize the inherent conflicts of interest that arise when shareholders are not permitted free exercise of their franchise. . . .[63]

. . .

In MM Companies v. Liquid Audio, Inc., . . . the Supreme Court applied *Blasius* "within *Unocal*" as the standard of review:

> When the primary purpose of a board of directors' defensive measure is to interfere with or impede the effective exercise of the shareholder franchise in a contested election for directors, the board must first demonstrate a compelling justification for such action as a condition precedent to any judicial consideration of reasonableness and proportionately.... To invoke the Blasius compelling justification standard of review within an application of the Unocal standard of review, the defensive actions of the board only need to be taken for the primary purpose of interfering with or impeding the effectiveness of the stockholder vote in a contested election for directors.[68]

Even though the Supreme Court in *Liquid Audio* combined *Blasius* and *Unocal* review, it did not solve the practical problem of how to turn *Unocal's* reasonableness review and *Blasius*' "primary purpose" and "compelling justification" elements into a useful standard of review. The *Blasius* "compelling justification" standard of review turned out to be unworkable in practice. Once the court required a compelling justification to justify the board's action, the outcome was, for the most part, preordained.[69] The Court of Chancery also skirted *Blasius* review by limiting the "primary purpose" requirement and redefining what it meant to be compelling.

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[63] *Stroud*, 606 A.2d at 92 n.3 (internal citations omitted); *see also Unitrin*, 651 A.2d at 1379–80 (noting use of *Blasius* and *Unocal* in contests for corporate control).

[68] [MM Cos. v. Liquid Audio, Inc., 813 A.2d 1118, 1132 (Del. 2003).]

[69] *See* [Chesapeake Corp. v. Shore, 771 A.2d 293, 323 (Del. Ch. 2000)] ("In reality, invocation of the *Blasius* standard of review usually signals that the court will invalidate the board action under examination. Failure to invoke *Blasius*, conversely, typically indicates that the board action survived (or will survive) review under Unocal."); William T. Allen et. al., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1314 (2001) ("[T]he post-*Blasius* decisions surfaced the reality that a sorting mechanism was needed to insulate from the severe 'compelling justification' test, situations where directors took direct action to influence the electoral process, but in a

. . .

D.

In *Unocal*, the Supreme Court remarked that "our corporate law is not static."[88] Experience has shown that *Schnell* and *Blasius* review, as a matter of precedent and practice, have been and can be folded into *Unocal* review to accomplish the same ends—enhanced judicial scrutiny of board action that interferes with a corporate election or a stockholder's voting rights in contests for control. When *Unocal* is applied in this context, it can "subsume[ ] the question of loyalty that pervades all fiduciary duty cases, which is whether the directors have acted for proper reasons" and "thus address[ ] issues of good faith such as were at stake in *Schnell*."[90] *Unocal* can also be applied with the sensitivity *Blasius* review brings to protect the fundamental interests at stake—the free exercise of the stockholder vote as an essential element of corporate democracy.

. . . When a stockholder challenges board action that interferes with the election of directors or a stockholder vote in a contest for corporate control, the board bears the burden of proof. First, the court should review whether the board faced a threat "to an important corporate interest or to the achievement of a significant corporate benefit." The threat must be real and not pretextual, and the board's motivations must be proper and not selfish or disloyal. As Chancellor Allen stated long ago, the threat cannot be justified on the grounds that the board knows what is in the best interests of the stockholders.

Second, the court should review whether the board's response to the threat was reasonable in relation to the threat posed and was not preclusive or coercive to the stockholder franchise. To guard against unwarranted interference with corporate elections or stockholder votes in contests for corporate control, a board that is properly motivated and has identified a legitimate threat must tailor its response to only what is necessary to counter the threat. The board's response to the threat cannot deprive the stockholders of a vote or coerce the stockholders to vote a particular way.

Applying Unocal review in this case with sensitivity to the stockholder franchise is no stretch for our law. . . .

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manner that was consistent with their legitimate authority. ... The elements of the *Unocal/Unitrin* analysis therefore gave courts the tool to answer the predicate question to the application of *Blasius*—did the directors act with the primary purpose of disenfranchisement?").

[88] 493 A.2d at 957.

[90] [Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786, 807 (Del. Ch. 2007).]

E.

In our first decision, we highlighted facts in the Court of Chancery's first decision that might have led to the conclusion that the board acted for selfish reasons. But we recognized that the court had made findings inconsistent with this result and remanded to allow the Court of Chancery to reconsider its decision in light of our first opinion. On remand the court did as requested. The court found that there was "more to the story" than contained in its first opinion.[98] It supplemented the earlier factual findings with the following:

- "Without making any meaningful effort to negotiate board composition, Plaintiff filed a complaint in this Court seeking the appointment of a custodian;"
- "Plaintiff's request for custodial relief was extremely broad. Plaintiff did not present a tailored request for relief that targeted the stockholder deadlock. Rather, she asked the court to empower a custodian to 'exercise full authority and control over the Company, its operations, and management;'"
- "The threat of a court-appointed custodian so broadly empowered posed new risks to the Company. The appointment of a custodian with these powers would have given rise to broad termination rights in SPE contracts and threatened UIP's revenue stream, as UIP's business model is dependent on the continued viability of those contracts;"
- "Facing this threat to the Company," the UIP board "identified a solution" to issue equity "long promised to Bonnell" that "implent[ed] a succession plan" proposed "on a clear day;"
- The Stock Sale would "moot the Custodian Action and eliminate the risks the appointment of a custodian posed to UIP" and would "eliminate the stockholder leverage that Plaintiff was using to try to force a buyout at a price detrimental to the Company;"
- The UIP board's motives were not "pretexts for entrenchment for selfish reasons" or "post-hoc justifications;" and
- "[T]hese were genuine motivations for their actions that stood alongside the more problematic purposes that [Coster I] identified and the Appellate Decision collected."

After its additional fact findings, the Court of Chancery gathered the many strands of precedent and conducted a careful review of the UIP board's actions. The Chancellor found that the UIP board faced a threat—which the court described as an "existential crisis"—to UIP's existence through a deadlocked stockholder vote and the risk of a custodian appointment. Although the court thought that some of the board's reasons for approving the Stock Sale were problematic, on balance the court held that the board was properly motivated in responding to the threat. According to the court, the UIP board acted in good faith "to advance the best interests of UIP" by "reward[ing] and retain[ing] an essential employee," "implement[ing] a succession

[98] *Coster II*, at *3.

plan that Wout had favored," and "moot[ing] the Custodian Action to avoid risk of default under key contracts."[106] The court also relied on its earlier finding that the UIP board issued UIP stock to Bonnell at an entirely fair price.

The Court of Chancery also found that the UIP board responded reasonably and proportionately to the threat posed when it approved the Stock Sale and mooted the Custodian Action. As it held, "in the exceptionally unique circumstances of this case," without the Stock Sale, the possibility that a custodian appointed with broad powers would jeopardize key contracts caused an existential crisis at UIP. The Stock Sale, the court held, "was appropriately tailored to achieve the goal of mooting the Custodian Action" while implementing the succession plan and retaining Bonnell.[108] And the court noted that there were more aggressive options that could have been, but were not, pursued to break the deadlock.

Finally, the board's response to the existential threat posed by the stockholder deadlock and custodian action was not preclusive or coercive. Although the Stock Sale effectively foreclosed Coster from perpetuating the deadlock facing UIP, the new three-way ownership of the company presented a potentially more effective way for her to exercise actual control. As the Court of Chancery noted, Schwat and Bonnell are not bound to vote together, meaning Coster could cast a swing vote at stockholder meetings.[110] As an equal one third owner with the two other stockholders, Coster can join forces with either one of UIP's other owners "at some point in the future."[111]A realistic path to control of UIP negates the preclusive impact of the Stock Sale.

. . .

III.

The judgment of the Court of Chancery is affirmed.

NOTES AND QUESTIONS

1. If the case had been decided under the original *Blasius* compelling justification standard, what would the result have been?

2. What does the court mean by its reference to "clear day" actions? How would such actions be analyzed?

3. When does the *Coster* standard apply rather than the business judgment rule?

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[106] *Id*. at *10.

[108] *Id*. at *11–12.

[110] *See Coster II,* at *13 ("Bonnell could switch sides tomorrow and unite with Plaintiff to Schwat's detriment. The record reflects that Schwat and Bonnell have disagreed on a number of business decisions").

[111] Air Prod. & Chemicals, Inc. v. Airgas, Inc., 16 A.3d 48, 115 (Del. Ch. 2011).

4. Given the apparent ability of courts to use the *Schnell* doctrine to police incumbent interference with the shareholder franchise, is the *Coster* standard necessary?

5. In *Coalition to Advocate Public Utility Responsibility, Inc. v. Engels*,[1] the directors of Northern States Power Company (referred to by the court as N.S.P.) tried to manipulate the corporation's bylaws to prevent an insurgent director candidate—one Alpha Smaby[2]—from being elected:

> 4) N.S.P. has historically elected Directors each year for a one-year term. In February of 1973, there were 14 Directors. At the Board of Directors' meeting of February 28, 1973, the Board of Directors considered in detail a proposed draft proxy soliciting statement which contemplated the continuation of the 14 member Board. These draft materials made direct and substantial reference to Alpha Smaby and urged the shareholders to reject her candidacy. . . .
>
> 6) Subsequent to the February meeting, the exact date is not known at this time, it was decided by the Directors of N.S.P. to reduce the number of Directors from 14 to 12 and to classify the Directors in groups of four for election to staggered terms of one, two and three years. Without the changes, just over 7% of the vote would be sufficient to elect one Director under the cumulative voting provision, but after the changes about 20% of the vote would be required. There was good reason to believe that Alpha Smaby might control up to 9% of the voting shares. Although the above changes were not formally approved by the Board of Directors until a special meeting was called on March 27, 1973, the proposed changes were submitted to the SEC approximately one week prior to the Board's formal approval.
>
> 7) N.S.P. candidly admits that such changes were not proposed because of long-term business considerations but that the changes were specifically aimed at the candidacy of Alpha Smaby. It is

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[1] 364 F. Supp. 1202 (D. Minn. 1973)

[2] According to Wikipedia:

> Alpha Sunde Smaby (February 11, 1910–July 18, 1991) was an American politician and teacher.
>
> Born in Sacred Heart, Minnesota, Smaby graduated from University of Minnesota and Winona State University. She then taught school and then worked for Cargill, Inc. Smaby served in the Minnesota House of Representatives from 1965 until 1969 and was a Democrat. During the 1968 United States Presidential campaign, Smaby was a delegate to the Democratic Party Convention and supported United States Senator Eugene McCarthy. Smaby died of cancer in Saint Paul, Minnesota.

Alpha Sunde Smaby, https://en.wikipedia.org/w/index.php?title=Alpha_Sunde_Smaby (last visited July 25, 2017).

> clear to the Court that the changes were instigated in an attempt to make her effort to win a seat on the Board more difficult and, in fact, were done to frustrate her efforts.
>
> . . .
>
> Plaintiffs concede that the actions of the defendants do not violate any state statutory law but argue that the manipulation of the corporate machinery by insiders for the sole purpose of frustrating the candidacy of a minority shareholder . . . is a breach of the insiders' fiduciary duty to the minority shareholders. Plaintiffs rely heavily on . . . Delaware cases which basically stand for the proposition that actions by insiders, although otherwise lawful, may be enjoined if they act to injure the rights of minority shareholders. In [*Schnell v. Chris-Craft Industries*, 285 A.2d 437 (Del.Supr.1971),] the Delaware Supreme Court held that management's efforts to use the corporate machinery and Delaware law for the purpose of perpetrating itself in office and obstructing legitimate efforts of the dissident stockholders in the exercise of their rights to undertake a proxy contest against management was impermissible. The insiders had advanced the date of the stockholders' meeting in an effort to frustrate the efforts of minority shareholders who desired to wage a proxy contest. The actions of the insiders were enjoined despite the fact that they were in compliance with the company by-laws and applicable Delaware law. The basis for these opinions rests on the fiduciary duty imposed on Directors and Officers of a corporation to deal fairly and justly with the corporation and all of its shareholders including minority shareholders. The Officers and Directors of N.S.P. are in a fiduciary relationship with the minority shareholders and as such owe them a duty to deal with them fairly and in good faith.
>
> In the instant case, the actions of the insiders, if not unfair, were certainly questionable in light of their fiduciary obligation to the plaintiff shareholders. Not only did the defendants change the rules in the middle of the game, but they refused to disclose the existence of the changes when approached by the plaintiffs. Both of these actions served to frustrate the plaintiff shareholders' legitimate efforts to run for the Board of Directors and may well be a breach of fiduciary duty. . . .

Both of the changes made by the N.S.P. board were permitted by statute. So why did the court invalidate them? Would the *Blasius* court have reached the same result? Would the *Coster* court have reached the same result?

Suppose that one month after the 1973 annual shareholder meeting the N.S.P. board amended the company's bylaws to effect a reduction in the number of directors and to classify the board effective with the 1974 annual shareholder meeting. Would the court enjoin those changes? Would the *Blasius* court have enjoined those changes? Would the *Coster* court have enjoined those changes?

6. In *Portnoy v. Cryo-Cell Int'l, Inc.*,[3] the incumbent directors feared losing a proxy contest and took a variety of steps intended to ensure their victory. One of those steps involved a deal pursuant to which a large shareholder—one Andrew Filipowski—agreed to support the incumbent board provided that the board would include the shareholder on its slate of candidates and—if successful in winning the proxy contest—would increase the number of board members from six to seven and appoint a crony of the shareholder to fill the resulting vacancy. Then Vice Chancellor Leo Strine explained that:

> As defined by Vice Chancellor Hartnett in his important decision in *Schreiber v. Carney*, "[v]ote-buying . . . is simply a voting agreement supported by consideration personal to the stockholder, whereby the stockholder divorces his discretionary voting power and votes as directed by the offeror." . . .
>
> To say that the law of corporations has struggled with how to address the subject of so-called "vote buying" is no insult to judges or corporate law scholars, the question of what inducements and agreements may legitimately be forged to cement a voting coalition is doubtless as old as the concept of a polity itself. For these very real-world reasons, *Schreiber* refused to say that any sort of arrangement involving the exchange of consideration in connection with a stockholder's agreement to vote a particular way was forbidden vote buying. Indeed, distinguished scholars have anguished (the adjective I take away from their work) over how to deal with such arrangements, with most concluding that flat-out prohibitions are neither workable nor of utility to diversified stockholders. . . .
>
> To deal with these complexities, *Schreiber* declined to find that vote buying was, in the first instance, per se improper. Rather, *Schreiber* articulated a two-pronged analysis. In the first instance, if the plaintiff can show that the "object or purpose [of the vote buying was] to defraud or in some way disenfranchise the other stockholders," the arrangement would be "illegal per se." Putting this in terms that I think are truer to the way our corporate law works, what I take from this is that if the plaintiff proved that the arrangement under challenge was improperly motivated, then the arrangement would be set aside in equity, irrespective of its technical compliance with the DGCL.[157] That is, in keeping with the traditional vigilance this court has displayed in ensuring the fairness of the corporate election process, and in particular the process by which directors are elected, purposely inequitable

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[3] 940 A.2d 43 (Del. Ch. 2008).

[157] See Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del.1971) (holding that "inequitable action does not become permissible simply because it is legally possible") . . . .

conduct in the accumulation of voting power will not be tolerated. Even when a vote buying arrangement cannot be found, in the first instance, to be motivated by a fraudulent, disenfranchising, or otherwise inequitable intent, *Schreiber* concluded that "because vote-buying is so easily susceptible of abuse it must be viewed as a voidable transaction subject to a test for intrinsic fairness."

Subjecting an agreement to add a potential insurgent to a management slate to the *Schreiber* intrinsic fairness test would, in my view, be an inadvisable and counterproductive precedent. If one takes a judicial standard of review seriously, as the members of this court do, the decision to subject all such arrangements to the entire fairness standard could result in creating litigable factual issues about a large number of useful compromises that result in the addition of fresh blood to management slates, new candidates who will tend to represent actual owners of equity and might therefore be more independent of management and more useful representatives of the interests of stockholders generally. . . .

. . . If the only arrangement at issue is a promise to add a potential insurgent to the management slate in exchange for the insurgent's voting support, then the arrangement is subject to stockholder policing in an obvious, but nonetheless, potent form. That policing occurs at the ballot box itself.

Here, to be specific, the Cryo-Cell stockholders went to the polls knowing that Filipowski had been added to the Management Slate. Those stockholders also knew that Filipowski had contracted to vote the Filipowski Group's shares for the Management Slate. Although it was not publicly disclosed that Filipowski's agreement to vote for the Management Slate had been conditioned on his addition to that Slate, and that the incumbents had added Filipowski to the Management Slate in exchange for his support, that inference was, I think, unmistakable to any rational stockholder. . . .

In expressing concerns about over-breadth in this area, this decision echoes concerns voiced by the Supreme Court and this court about the difficulty of applying the compelling justification test articulated in *Blasius* in a manner that works sensible results.[162] But like those decisions, this decision is rooted in the premise that the *Schnell* doctrine, authorizing this court to set aside conduct that is inequitably motivated

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[162] See, e.g., Williams v. Geier, 671 A.2d 1368, 1376 (Del.1996) ("Blasius' burden of demonstrating a 'compelling justification' is quite onerous, and is therefore applied rarely.") . . . .

> and that unfairly tilts the electoral playing field, is itself a potent tool of equity.

Why shouldn't *Blasius* apply to vote buying? If *Blasius* had been applied, what compelling justification—if any—could the incumbent board have put forward to justify the deal with Filipowski?

Would *Coster* apply to vote buying? If *Coster* had been applied, what arguments could the incumbent board have put forward to justify the deal with Filipowski?

Strine's opinion in *Portnoy* can be seen as part of a larger trend in Delaware corporate law towards judicial deference to informed, non-coerced shareholder votes. The leading example of that trend is *Corwin v. KKR Financial Holdings LLC*,[4] in which the Delaware Supreme Court held that the business judgment rule was the proper standard of review for a merger between a target corporation and a minority shareholder that was approved by a fully informed, non-coerced vote of the disinterested shareholders. "When the real parties in interest—the disinterested equity owners—can easily protect themselves at the ballot box by simply voting no, the utility of a litigation-intrusive standard of review promises more costs to stockholders in the form of litigation rents and inhibitions on risk taking than it promises in terms of benefits to them." Put another way, *Corwin* posits that informed, disinterested, non-coerced shareholders—rather than plaintiffs' lawyers or courts—should have the last word on the merits of a transaction.

7. Some courts have suggested that *Blasius* should be limited to proxy contests involving director elections:

> *Blasius* anticipates a defensive measure in response to a threat to corporate control. Beyond this, its application has been largely limited to disputes over the election of directors. Accordingly, "courts will apply the exacting *Blasius* standard sparingly, and only in circumstances in which self-interested or faithless fiduciaries act to deprive stockholders of a full and fair opportunity to participate in the matter." Of particular significance here, "the reasoning of *Blasius* is far less powerful when the matter up for consideration has little or no bearing on whether the directors will continue in office."[5]

Is there a good reason for not applying *Coster* to issue contests?

8. If UIP had been a Massachusetts corporation, would Marion Coster have had a cause of action under *Wilkes v. Springside Nursing Home*? Would Coster have been entitled to a dissolution of UIP under *Alaska Plastics v. Coppock*?

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[4] 125 A.3d 304 (Del. 2015).

[5] In re Bear Stearns Litig., 870 N.Y.S.2d 709, 733 (N.Y. Sup. 2008) (citations and footnote omitted).