EFiled: Mar 31 2023 04:58PM EDT
Transaction ID 69710170
Case No. 2022-0890-JTL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JAMES MCRITCHIE, Plaintiff, v. MARK ZUCKERBERG, SHERYL K. SANDBERG, ROBERT M. KIMMITT, PEGGY ALFORD, MARC L. ANDREESSEN, ANDREW W. HOUSTON, NANCY KILLEFER, TRACY T. TRAVIS, TONY XU, and META PLATFORMS, INC., Defendants.	)	C.A. No. 2022-0890-JTL

DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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Dated: March 31, 2023

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PRELIMINARY STATEMENT

Plaintiff's Verified Amended Complaint (the "Amended Complaint or "AC") should be dismissed because its claims are contrary to well-established Delaware corporate law. Plaintiff, a stockholder of Meta Platforms, Inc. ("Meta" or the "Company"), alleges that Defendants breached their fiduciary duties as directors, officers and/or controlling stockholders because they worked to "maximiz[e] Company enterprise value," AC ¶ 34, without considering the potential negative effects that their corporate decisions might have on the value of Plaintiff's investments in *other* companies. But the fiduciaries of Delaware corporations do not owe a duty to oversee, consider, or protect a stockholder's investments in other companies—their duties are to Meta and its stockholders in their capacity as stockholders of that company. Thus, Plaintiff's claims—which are foreclosed by decades of Delaware precedent on fiduciary duties—fail as a matter of law.

Plaintiff's breach of fiduciary duty claims are also not well-pled. Plaintiff asserts that decisions by Meta's directors to maximize the Company's long-term profits were improperly self-interested because—according to Plaintiff—Meta's directors own "concentrated positions" in Meta stock, *id.* ¶ 9, and so they personally benefit from Meta's success while so-called "diversified stockholders" (Meta stockholders who also own stock in other companies) are purportedly harmed as a result. Plaintiff, however, does not allege any facts to support this fiction, and does

not attempt to explain how he, *as a Meta stockholder*, was financially harmed or otherwise damaged by Meta's success. To the contrary, Plaintiff acknowledges that Meta's "top and bottom lines" have grown "spectacularly" under the stewardship of Defendants, *id.* ¶ 30, and that "[o]n or around" the date the Amended Complaint was filed, Meta had a "market capitalization of $494.73 billion, making it one of the top five companies in market capitalization in the world," *id.* And in the six months since Plaintiff first filed this suit, his investment in Meta has grown in value by more than *$50 per share*, or nearly 40%. *See* AC, Exhibit A ("Redline") at 12-13.

Plaintiff previously asserted breach of fiduciary duty claims directly, purportedly on behalf of a class of so-called "diversified" Meta stockholders, and also derivatively, purportedly on behalf of Meta. In his Amended Complaint, Plaintiff purports to assert only direct claims. Yet Plaintiff's claim that Defendants "acted with gross negligence and consciously disregarded" a "history of red flags" relating to Meta's purportedly harmful conduct, *see* AC ¶ 158, is quintessentially derivative in nature, irrespective of how Plaintiff chooses to label it. As such, it must also be dismissed because Plaintiff does not allege that he has derivative standing, or that the Company itself was harmed by the alleged wrongdoing.

At bottom, Plaintiff is not pursuing claims under the law as it exists, but rather using this case to broadcast his theories about how he would like the law to change. Tellingly, Plaintiff never explains how his preferred version of fiduciary duty law

could feasibly be followed—where the decisions of corporate fiduciaries must be guided by not only what is in the best interests of the corporation itself, but also what is in the best interests of every other company, including Meta's competitors, or the "global economy." *E.g., id.*, ¶¶ 2, 5. Regardless, the Amended Complaint does not state a claim under decades-old, black-letter Delaware law. Plaintiff's claims should be dismissed with prejudice.

BACKGROUND[1]

A. Meta's Business and Board of Directors

Meta is a Delaware corporation based in Menlo Park, California, that builds technology that helps people connect, find communities, and grow businesses. *See* AC ¶ 15. Its products include Facebook, Instagram, Messenger, and WhatsApp, among others. *Id.* ¶ 29.

Meta has a nine-member Board consisting of Mark Zuckerberg, Robert Kimmitt, Peggy Alford, Marc Andreessen, Andrew Houston, Nancy Killefer, Sheryl Sandberg, Tracy Travis, and Tony Xu (collectively, the "Board" or "Director Defendants"). *Id.* ¶¶ 16-25. Meta's stock ownership guidelines require Board members to own Meta stock. *Id.* ¶ 34. Meta's executive directors must own shares with a value of at least $4 million, and non-employee directors must own shares with

[1] "Ex." citations are to the exhibits attached to the Affidavit of Holly E. Newell, Esq., filed contemporaneously herewith.

a value of at least $750,000. *Id*. These ownership requirements are intended to "further align the interests of [Meta's] executive officers and directors with those of [Meta's] shareholders," Ex. A (Meta's 2022 Proxy Statement) at 50, consistent with long-settled Delaware law.[2]

B. Meta's Financial Performance and Share Repurchases

As alleged in the Amended Complaint, Meta's services "are used by 3.59 billion people every month and 2.82 billion people every day, with 140 billion messages sent daily." AC ¶ 29. As Plaintiff acknowledges, "Meta's ubiquity has driven its top and bottom lines spectacularly," and in 2021, Meta generated $118 billion in revenue and $39.3 billion in profit, both significant increases from the years before. *Id.* ¶ 30. "On or around" the date the Amended Complaint was filed, Meta had a "market capitalization of $494.73 billion, making it one of the top five companies in market capitalization in the world." *Id.* As noted, in the six months since Plaintiff first filed this lawsuit, Meta's stock price has increased in value by more than *$50 per share*, or nearly 40%. *See* Redline at 12-13.

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[2] The Court may consider Meta's proxy statement and related public filings as part of this motion because they are incorporated by reference into the Amended Complaint, *see*, *e.g.*, AC ¶¶ 37, 100, 103, 107-08, 116-17, 121-22, 125-26, and are also subject to judicial notice, *see, e.g.*, *Dolan v. Altice USA, Inc.*, 2019 WL 2711280, at *2 (Del. Ch. June 27, 2019) (the Court may consider "documents incorporated by reference or integral to the Complaint and judicially noticeable facts available in public . . . filings").

In November 2016, to return profits to its stockholders, Meta's Board authorized a share repurchase program that commenced in January 2017. AC ¶ 137. Every year since then Meta has repurchased its stock pursuant to that program. *Id.* ¶¶ 138-141. In 2021, for example, Meta distributed over $44 billion to its stockholders through share repurchases and, as of the end of that year, the Board had authorized an additional $38.79 billion for repurchases. *Id.* ¶¶ 30, 142. Plaintiff does not allege that the repurchases were improper transactions, but rather that the Board "could have" spent the money on other things, such as "safety." *Id.* ¶ 142.

C. Meta's Efforts to Protect Safety and Security

Meta undertakes significant efforts to protect both user and community safety and security. As Plaintiff notes, its executive bonuses depend, in part, on whether Meta is "making progress on the major social issues facing the internet and [the] Company, including privacy, safety, and security," AC ¶ 97, and the Company spent "approximately $5 billion on safety and security in 2021 alone," *id.* ¶ 107.

Further, although not required to resolve this motion, the Company's 2022 Proxy Statement discloses that such efforts have also included: maintaining an independent oversight board that provides recommendations regarding content policies and practices; issuing quarterly Community Standards Enforcement Reports that track Meta's progress in enforcing content policies; maintaining a corporate human rights policy that commits Meta to human rights due diligence in accordance

with the United Nations Guiding Principles on Business and Human Rights; conducting an internal civil rights audit and maintaining a dedicated Civil Rights Team to advance civil rights across Meta's services; maintaining a privacy committee that oversees efforts to enforce user privacy preferences and protect their personal information; and committing to achieving net zero greenhouse emissions by 2030, among many other endeavors. *See* Ex. A at 29–32.

D. 2022 Stockholder Proposals

Meta's 2022 Proxy Statement disclosed that twelve stockholder proposals had been presented at the Company's 2022 Annual Meeting, and that the Board recommended a "no" vote on each of them. *See* AC ¶ 100. Plaintiff alleges that the Board's opposition to four of those proposals, which purportedly related to the "broad social harm" allegedly caused by Meta's products, demonstrates that "the Board never accounted for nor considered the impact [of those alleged social harms] on the portfolios of diversified stockholders." *Id.* ¶ 102; *see also id.* ¶¶ 103–132.

The Proxy Statement indicated that the Board recommended a "no" vote on those proposals because the proposals were unworkable as a practical business matter,[3] or the work requested by the proposals was already being performed by the

[3] *See, e.g.*, Ex. A at 72–73 (the "external costs" proposal was "both too vague in its definition and too broad in its scope to be feasible or effective").

Company.[4] Notably, Meta stockholders rejected the proposals, including the "external costs" proposal—which, like Plaintiff's lawsuit here, demanded that the Board make decisions based on how they would affect the "returns of its diversified shareholders," AC ¶ 103; *see* Ex. B (Meta's Form 8-K regarding its 2022 Annual Meeting) at 4.

E. Plaintiff's Amended Complaint And Theory Of Liability

Plaintiff is an individual stockholder activist who runs a website on corporate governance and the how-to's of stockholder activism.[5] On his website, Plaintiff admits that he is using this lawsuit against Meta and its Board to "open[] up a new legal battle," one that "asks that fiduciary duty [law to] recognize the realities of modern portfolio theory" in ways that it currently does not.[6]

Plaintiff's original complaint was filed October 3, 2022, and advanced two causes of action for breach of fiduciary duty—one alleged directly, the other

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[4] *Id.* at 75 ("[g]iven the robust efforts already in place that demonstrate our commitment to our Community Standards and the transparency we provide into our enforcement actions, our board of directors believes" the "proposal is unnecessary"); *id.* at 77 ("[g]iven that we are already working with numerous researchers, experts, and advocates around the globe to better understand potential risks and mitigations . . . our board of directors believes [the metaverse] proposal is unnecessary"); *id.* at 79 ("[g]iven our active approach to addressing human rights, including our regular independent assessments against our commitments, our board of directors believes that the [human rights] proposal is unnecessary.").

[5] https://www.corpgov.net.

[6] https://www.corpgov.net/2022/10/meta-lawsuit-beyond-director-feedbags/.

derivatively. On December 16, 2022, Defendants moved to dismiss the original complaint, arguing that the claims failed as a matter of law and that Plaintiff could not establish derivative standing because he failed to adequately plead that a pre-suit demand on the Board would have been futile.

Rather than oppose Defendants' motion to dismiss, Plaintiff filed the Amended Complaint, which (i) drops the derivative cause of action for breach of fiduciary duty, *see* Redline at 85, 94–95, despite retaining allegations of failed board oversight that sound derivatively, *see* AC ¶ 158; (ii) makes cosmetic changes to Plaintiff's conclusory allegations, *see, e.g.,* Redline at 3–4; and (iii) adds two new direct causes of action for breach of fiduciary duty, *see id.* at 94–97.

Now, Count I for Breach of Fiduciary Duty is averred directly "against all Defendants as directors" for allegedly "administer[ing] Meta in a manner that ignores the interests" of Meta's "diversified" stockholders and "cause[s] harm to [them] while increasing Meta's share price and bottom line." AC ¶ 157. As alleged, Defendants breached their duties as directors because Meta's actions purportedly "imposed [costs] on [the] diversified stockholders' investment portfolios." *Id.* ¶ 49; *see also id.* ¶ 158 (Defendants "acted with gross negligence and consciously disregarded the threat posed to the interests of the Company's diversified stockholders as investors"). In short, Plaintiff asserts that Defendants are directly liable as directors of Meta for supposedly diminishing Plaintiff's investment returns

in the stocks of *other* companies. *See, e.g.*, *id.* ¶ 166 (Defendants allegedly failed to consider "how Meta's activities and policies effect society and the economy at large and thus the portfolios of its diversified stockholders").

Count II for Breach of Fiduciary Duty is premised on the same allegations as Count I, *see id.* ¶ 171, and is averred directly "against Zuckerberg and Sandberg as Officers" for purportedly causing the "Company activity that threatened the value of the diversified portfolios of the Company's stockholders," *id.* ¶ 173.[7] Count III for Breach of Fiduciary Duty is likewise based on the same allegations, *id.* ¶ 176, and is averred directly against Mr. "Zuckerberg as Controlling Stockholder" on the ground that he was allegedly "responsib[le] for each of the harms to diversified stockholders described in th[e] [Amended] Complaint," *id.* ¶ 178.

The Amended Complaint, like the original complaint, does not allege any facts (as opposed to conclusions) to demonstrate that (i) any Defendant has a "highly concentrated" position in Meta stock, (ii) any Defendant's investment portfolio is not diversified, (iii) Plaintiff's investment portfolio is in any way more or less diversified than Defendants' portfolios, (iv) Defendants' and Plaintiff's financial

[7] As Plaintiff acknowledges, however, Ms. Sandberg's tenure at Meta "ended in 2022," AC ¶ 17, and therefore she is no longer an officer of the Company.

interests are in any way "at odds," *see* AC ¶ 5, or (v) Plaintiff's investment portfolio was in any way damaged by Meta's actions.[8]

ARGUMENT

A. Plaintiff's Theory Of Liability Is Foreclosed By Delaware Law

Plaintiff is suing Meta as a test case in which he can share his theories on how he thinks corporations *should* operate. *See* AC ¶¶ 2–3, 41–48. He asserts that Defendants breached their fiduciary duties because they made decisions to "maximize the Company's long-term cash flows" without considering how it would affect Plaintiff's investments in other companies. *Id*. ¶ 2. But Defendants have no duty to consider Plaintiff's investments in other companies.

Under well-settled Delaware law, Meta's fiduciaries must govern the corporation so as to maximize long-term value for the corporation, *see Frederick Hsu Living Tr. v. ODN Holding Corp*., 2017 WL 1437308, at *18 n.18 (Del. Ch. Apr. 24, 2017) (citing Leo E. Strine Jr., *Corporate Power Ratchet: The Courts' Ability in Eroding "We the People's" Ability to Constrain Our Corporate Creations*,

[8] Plaintiff's claim that Meta's actions have "undermin[ed] the global economy," AC ¶ 5, which in turn supposedly harms "diversified stockholders," is likewise unsupported by any facts. Plaintiff calls Gross Domestic Product (GDP) a measure of "the economy's intrinsic value," *id.* ¶ 45, but notably omits any factual allegations that the global GDP has fallen in recent years, let alone specifically due to any of Defendants' decisions. And while Plaintiff claims that a diversified portfolio is properly measured by "how the market performs as a whole," *id.* ¶ 43, he offers no facts to show how the market as a whole has performed, or that any poor performance could possibly be attributed to Defendants.

51 Harv. C.R.–C.L. L. Rev. 423, 440–41 (2016)), and cannot base their decisions on the "idiosyncratic" preferences of particular stockholders, *see, e.g.*, *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 38 (Del. Ch. 2013) ("Stockholders may have idiosyncratic reasons for preferring decisions that misallocate capital. Directors . . . need not cater to stockholder whim.").[9] Simply put, Defendants have an "obligation to maximize the value of the corporation for the benefit of the undifferentiated equity," so "[w]hen exercising their authority, [they] must seek 'to promote the value of [Meta] for the benefit of its stockholders.'" *Allen v. El Paso Pipeline GP Co.*, 113 A.3d 167, 179–80 (Del. Ch. 2014) (citation omitted), *aff'd*, 2015 WL 803053 (Del. Feb. 26, 2015); *see also Prod. Res. Grp. L.L.C. v. NCT Grp., Inc.*, 863 A.2d 772, 791 (Del. Ch. 2004) (fiduciaries "have the task of attempting to maximize the economic value of the firm"); William T. Allen, *Ambiguity in Corporation Law*, 22 Del. J. Corp. L. 894, 896–97 (1997) ("[T]he proper orientation of corporation law is the protection of long-term value of capital committed indefinitely to the firm.").

[9] Even where there are different groups of stockholders with diverging interests, directors do not breach their fiduciary duties merely by choosing one group over the other. *See In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 618-19 (Del. Ch. 1999) ("Since the two stockholder groups had potentially divergent interests, plaintiffs believe that they state a duty of loyalty claim merely by alleging that the Board treated one group unfairly . . . . In my view, that is not the law."); *see also* Andrew S. Gold, *Dynamic Fiduciary Duties*, 34 Cardozo L. Rev. 491, 501-02 (2012) ("Delaware courts have made it clear that it is up to directors . . . to decide whether to favor shareholders who are *diversified or undiversified*; shareholders who are hedged or unhedged; shareholders who are risk-averse or risk-neutral; shareholders who are affiliated or unaffiliated with the corporation." (emphasis added)).

Even "[i]n a world with many types of stock . . . and many types of stockholders—record and beneficial holders, long-term holders, short-term traders, activists, momentum investors, noise traders, *etc.*," this duty remains the same, which is owed to "the undifferentiated equity as a collective, without regard to any special rights." *Frederick Hsu*, 2017 WL 1437308, at *17.

Here, the interest that Plaintiff seeks to vindicate with this lawsuit—his investments in *other* companies—is unrelated to his rights as a Meta stockholder. Defendants owe fiduciary duties to Meta stockholders only in their capacity as Meta stockholders. *See, e.g.*, *Riblet Prods. Corp. v. Nagy*, 683 A.2d 37, 37 (Del. 1996) (although fiduciaries owe "duties to minority stockholders *qua* stockholders, those duties are not implicated when the issue involves the rights of the minority stockholder [in a different capacity]"). While the Board can sometimes consider interests beyond those associated with increasing Meta's profits, it may only do so when "giving consideration to them can be justified as benefiting [Meta] stockholders." *Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, 2019 WL 4927053, at *14 n.8 (Del. Ch. Oct. 7, 2019) (quoting Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50

Wake Forest L. Rev. 761, 771 (2015)).[10] Meta is not a "public benefit corporation," governed by 8 *Del. C.* § 362, which "vitiate[s] any profit maximization duty," and imposes a "mandatory, enforceable duty on the part of directors to consider the best interests of [all] corporate constituencies and those affected by the corporation's conduct when they make decisions." Leo E. Strine, Jr., *Making it Easier for Directors to "Do the Right Thing"?*, 4 Harv. Bus. L. Rev. 235, 243, 249 (2014).

Beyond economic and voting rights specific to Meta itself, any other rights that Meta stockholders may have must be granted by statute, contract, or common law. *See, e.g.*, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (holding that because "[t]he rights of the [noteholders] were fixed by contract" the noteholders "required no further protection" from Revlon's board). Plaintiff has identified no such law that obligates Defendants to consider the interests of companies in which some Meta stockholders may have also invested. Because Defendants do not have an obligation to monitor, consider, or protect Plaintiff's

[10] Plaintiff's claim that Meta's "core constituency" is "the Company's diversified stockholders," AC ¶ 6, is incorrect under Delaware law—the Company's "core constituency" is *all* Meta stockholders. *See Gilbert v. El Paso Co.*, 575 A.2d 1131, 1147-48 (Del. 1990) (where there are "competing interests of various shareholder groups," directors' "fiduciary duties . . . require[] them . . . to protect and advance the interests of *all* [of a company's] shareholders"). And Meta's directors and officers could not possibly have the unworkable duty to advance every private interest that each Meta stockholder has, however important.

investments in other companies, "[t]his is not a case of breach of fiduciary duty to [Plaintiff] *qua* [Meta] stockholder." *Riblet*, 683 A.2d at 40.

The same analysis applies to the Amended Complaint's new claims for breach of fiduciary duty against Mr. Zuckerberg and Ms. Sandberg as officers of the Company, *see* AC ¶¶ 171–75, and against Mr. Zuckerberg as a controlling stockholder, *id.* ¶¶ 176–78. Because corporate officers owe fiduciary duties that are identical to those owed by corporate directors, *see In re McDonald's Corp. Stockholder Derivative Litigation*, 289 A.3d 343, 362-64 (Del. Ch. 2023), Meta's officers' fiduciary duties are likewise owed to Plaintiff "qua [Meta] stockholder," *Riblet*, 683 A.2d at 40, and do not extend to monitoring, considering, or protecting Plaintiff's personal investments or interests in other companies. And while controlling "stockholders have fiduciary duties to minority stockholders *qua* stockholders, those duties are not implicated when the issue involves the rights of the minority stockholders" outside of the corporation-stockholder relationship. *Id.* at 37.

This fundamental defect dooms Plaintiff's lawsuit at the threshold, and the Court can and should dismiss it without further analysis. But as detailed below, Plaintiff's lawsuit suffers from additional fatal defects that require its dismissal.

B. Plaintiff Fails To State A Claim For Breach Of Fiduciary Duty

The Amended Complaint's three Breach of Fiduciary Duty claims should be dismissed pursuant to Court of Chancery Rule 12(b)(6) because the Complaint fails to plead any non-conclusory facts that would make it "reasonably conceivable" that Defendants breached any fiduciary duty to Plaintiff and his alleged class of so-called "diversified stockholders."[11]

As discussed above, Defendants owe Plaintiff fiduciary duties "*qua* [Meta] stockholder," *Riblet*, 683 A.2d at 40, and have no duty to monitor, consider, or protect Plaintiff's interests in *other* companies, which is Plaintiff's theory of the case. Put simply, because Plaintiff cannot "demonstrate that the duty [allegedly] breached was owed to [Meta] stockholder[s]," *Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1266 (Del. 2021) (citation omitted), the breach of fiduciary duty claims must be dismissed on that basis alone.[12]

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[11] On a Rule 12(b)(6) motion, the Court must accept all well-pleaded factual allegations in the Amended Complaint as true, but need not accept as true conclusory allegations without specific supporting factual allegations. *See Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 535 (Del. 2011). The Court draws all reasonable inferences in favor of Plaintiff and denies the motion unless Plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof. *Id.*

[12] To the extent Plaintiff also asserts this claim against Meta itself, it "is well established that corporations themselves do not owe fiduciary duties." *Standard Gen. L.P. v. Charney*, 2017 WL 6498063, *7 n.69 (Del. Ch. Dec. 19, 2017), *aff'd*, 195 A.3d 16 (Del. 2018).

Separately, the business judgment rule protects the actions of Defendants, affording them the presumption that they acted on an informed basis and in the honest belief that they acted in the best interest of the corporation and its stockholders. *See Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984); *see also Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 594-95 (Del. Ch. 1986) (business judgment rule applies to controlling stockholder actions where the benefits inure to all stockholders equally). To overcome that presumption, Plaintiff must plead facts showing that Defendants failed to act (1) in good faith, (2) in the honest belief that the action taken was in the best interest of the company and its stockholders, or (3) on an informed basis. *Aronson*, 473 A.2d at 812.

Moreover, pursuant to 8 *Del. C.* § 102(b)(7), Meta's certificate of incorporation includes an exculpatory provision[13] that immunizes the Director Defendants in their capacities as directors from liability arising out of any breach of the duty of care. *See In re Cornerstone Therapeutics Inc. S'holder Litig.*, 115 A.3d 1173, 1181 (Del. 2015). Accordingly, Plaintiff must plead facts that raise a "rational inference that" each of the Director Defendants "harbored self-interest adverse to the stockholders' interests, acted to advance the self-interest of an interested party

[13] *See* Ex. C (Meta's Amended and Restated Certificate of Incorporation) at Art. VII. The Court "may take judicial notice of the certificate in deciding a motion to dismiss." *McPadden v. Sidhu*, 964 A.2d 1262, 1273 n.28 (Del. Ch. 2008).

from whom they could not be presumed to act independently, or acted in bad faith." *Id.* at 1179–80. Plaintiff utterly fails in this regard.

As Plaintiff would have it, Defendants acted in bad faith and in their own self-interest because they are "concentrated stockholders of the Company," and thus when they took actions designed to "maximize Company returns," they benefitted themselves to the detriment of more "diversified stockholders" like Plaintiff, who invest in other (unnamed) companies that are purportedly harmed by Meta's success. *See* AC ¶¶ 157-60. But the Amended Complaint offers no *facts* to support any part of that conclusory assertion.[14] Moreover, and in any event, Delaware law requires the Defendants' interests to be aligned with the interests of Meta stockholders *qua* Meta stockholders, not *qua* "diversified stockholders," and the more Meta equity a Defendant owns, the more closely his or her interests will align with those of all other Meta stockholders. Indeed, Delaware law has long held precisely the opposite of what Plaintiff asserts here: that when fiduciaries "own 'material' amounts of common stock, it *aligns* their interests with other stockholders." *Chen v. Howard-Anderson*, 87 A.3d 648, 670–71 (Del. Ch. 2014) (emphasis added) (citation omitted);

[14] For example, the Amended Complaint alleges no facts showing that any Defendant has a "concentrated" position in Meta stock or that Plaintiff or any other Meta stockholder has a more diversified investment portfolio than any Defendant. In any event, a large position in Meta stock "does not create a disqualifying 'personal pecuniary interest' to defeat the operation of the business judgment rule." *Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946, 958 (Del. 1985).

see also In re PLX Tech. Inc. S'holders Litig., 2018 WL 5018535, at *41 (Del. Ch. Oct. 16, 2018) (similar), *aff'd*, 211 A.3d 137 (Del. 2019).

In sum, Defendants' stock ownership aligns their interests with all other Meta stockholders. And, more importantly, the Amended Complaint's allegations show that Defendants have acted in compliance with longstanding Delaware law by seeking to maximize Meta's value. Accordingly, Plaintiff cannot, as a matter of law, state a claim that any Defendant acted in a disloyal, self-interested, or bad faith manner. *See, e.g.*, *Ryan v. Buckeye Partners, L.P.*, 2022 WL 389827, at *12 (Del. Ch. Feb. 9, 2022) (concluding that plaintiff's "narrative does not come close to supporting a reasonable inference that the Buckeye Defendants engaged in bad faith," "especially" because "the Individual Buckeye Defendants were themselves unitholders" and therefore had same "incentive" as other unitholders), *aff'd*, 385 A.3d 459 (Del. 2022).

Plaintiff next argues that Defendants violated their duties of care and loyalty when they purportedly ignored warning signs of ongoing harm to Meta's diversified stockholders, *see* AC ¶¶ 159, 173, and, as directors, wrongly "recommended against" the 2022 shareholder proposals that would have purportedly cured those harms, *id* ¶¶ 161-64. But Plaintiff does not allege that Defendants were motivated by anything other than maximizing Meta's value—which is not actionable—and the Board's decision on how to respond to each of the shareholder proposals is a

quintessential business judgment. Alleging, as Plaintiff does here, "that a board incorrectly exercised its business judgment and made a 'wrong' decision in response to red flags . . . is insufficient to plead bad faith." *Melbourne Mun. Firefighters' Pension Tr. Fund v. Jacobs*, 2016 WL 4076369, at *9 (Del. Ch. Aug. 1, 2016), *aff'd*, 158 A.3d 449 (Del. 2017); *see also Pettry ex rel. FedEx Corp. v. Smith*, 2021 WL 2644475, at *8 n.91 (Del. Ch. June 28, 2021) ("Plaintiff's quibbles with [defendants'] approach amount to nothing more than a disagreement about the merits of a deliberate decision . . . and fall well short of supporting an inference of bad faith."), *aff'd*, 273 A.3d 750 (Del. 2022).

Plaintiff also alleges that Defendants exhibited bad faith by apportioning "$38.79 billion available for the Company's share repurchase program rather than putting more money towards addressing the types of issues raised by the 2022 Stockholder Proposals." AC ¶ 165. But it is "well established that, in the absence of evidence of fraud or unfairness, a corporation's repurchase of its capital stock . . . is entitled to the protection of the business judgment rule." *Grobow v. Perot*, 539 A.2d 180, 189 (Del. 1988). Indeed, "[i]f, when, and how much stock to repurchase are precisely the types of decisions that are subject to the business judgement rule and protected against judicial second-guessing." *Tilden v. Cunningham*, 2018 WL

5307706, at *19 (Del. Ch. Oct. 26, 2018) (emphasis removed).[15] Stock repurchases advance various objectives—including distributing profits to stockholders—that have long been regarded by this Court as proper business purposes. *See, e.g.*, *Frank v. Arnelle*, 1998 WL 668649, at *6 (Del. Ch. Sept. 16, 1998), *aff'd*, 725 A.2d 441 (Del. 1999). In the absence of facts suggesting that the Board was conflicted when it approved the repurchases (there are no such allegations), or that the repurchases were illegal (they were not), it is not for Plaintiff to say how Meta should have spent its cash. That business judgment is reserved to the Board, and there are no facts alleged to overcome the protections of the business judgment rule.

Even ignoring his inability to plead any facts to support his claims for breach of fiduciary duty, if Plaintiff wants to "be awarded a meaningful remedy," he must also establish that a "sufficiently convincing causal linkage exists between the breach of duty and the remedy sought." *Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC*, 2018 WL 3326693, at *23–24 (Del. Ch. July 6, 2018), *aff'd*, 221 A.3d 100 (Del. 2019). But Plaintiff does not—and cannot—do so. The Amended Complaint fails to allege any facts showing that there is a causal link between Defendants' alleged actions and any purported injury to Plaintiff. It includes no facts

[15] Plaintiff also asserts that Mr. Zuckerberg "violated his duties of care and loyalty to the Company's diversified stockholders as a controlling stockholder through his responsibility for each of the harms to diversified stockholders described in this Complaint," AC ¶ 178, but there are no facts alleged to support any part of that claim.

to show that Meta's business harmed any identified company's stock price, let alone the stock price of a company in which Plaintiff is invested. It also contains no facts to indicate that any aspect of Plaintiff's portfolio was harmed at all, let alone harmed due to any decision that Defendants made. Plaintiff speculates that due to Defendants and Meta's actions his investments in other companies are "likely to be financially harmed," AC ¶ 2, but there are no facts to show that Plaintiff's investments in other companies were actually harmed, let alone facts that would show a causal connection between Defendants' actions and that speculative harm.

Finally, even if Plaintiff adequately alleged an injury to his other investments that was causally linked to Defendants actions, and he does not, Plaintiff's claims would still fail because he is not seeking redress "for injuries affecting his or her legal rights as a stockholder" *in Meta.* *See Brookfield*, 261 A.3d at 1263. The Amended Complaint fails to allege any damage to Plaintiff as a Meta stockholder—there is no allegation that his economic interest or voting rights in Meta have been impaired. To the contrary, the Amended Complaint openly acknowledges that Plaintiff, in his capacity as a Meta stockholder, benefited immensely, as Defendants' "decisions" have "increas[ed] Meta's share price and bottom line," AC ¶ 157, "spectacularly," *id.* ¶ 30; *see also* Redline at 12-13 (showing that between the filing of the original complaint and Amended Complaint, Plaintiff's investment in Meta has grown in value by nearly 40%).

C. Plaintiff's Claims Are Ostensibly Derivative In Nature And Must Be Dismissed For That Additional Reason

In his original complaint, Plaintiff asserted a derivative claim purportedly on behalf of Meta against the Director Defendants for alleged breaches of fiduciary duty arising from the Board supposedly "consciously ignoring red flags" and "prioritiz[ing] [] share price over economic impact." Redline at Count II. After Defendants filed a motion to dismiss that demonstrated that Plaintiff lacks derivative standing, and that the derivative claim failed as a matter of law, Plaintiff abandoned the derivative claim in the Amended Complaint, and now purports to pursue only direct claims against Defendants. *See, e.g.*, Redline at 94.[16]

Yet Plaintiff still avers allegations that sound as derivative claims. "[A] claim is not 'direct' simply because it is pleaded that way . . . . Instead, the court must look to all the facts of the complaint and determine for itself whether a direct claim exists." *Dieterich v. Harrer*, 857 A.2d 1017, 1027 (Del. Ch. 2004). Here, despite eschewing his derivative cause of action, Plaintiff still alleges that Defendants "acted with gross negligence and consciously disregarded" a "history of red flags" relating

[16] In their motion to dismiss the original complaint, Defendants demonstrated that Plaintiff's derivative claim failed at the outset for lack of harm to the corporation. *See* Defendants' Opening Brief in Support of Their Motion to Dismiss Plaintiff's Verified Complaint (Dkt. 17) ("Defs' First MTD") at 17-19. While this fact precludes a viable derivative claim, "it does not necessarily follow that the complaint states a direct, individual claim. . . [I]n reality, it states no claim at all." *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004).

to Meta's purportedly harmful conduct in order to "maximize Company returns." AC ¶ 158. "On its face, engaging in a 'business plan' to disregard [harmful conduct] is a form of mismanagement, whether or not it is styled as a *Caremark* claim for failing to exercise proper oversight and supervision. The duty implicated is plainly the directors' normal duty to manage the affairs of the corporation, which is owed to the corporation and not separately or independently to the stockholders." *In re Massey Energy Co. Derivative & Class Action Litig.*, 160 A.3d 484, 503 (Del. Ch. 2017) (internal quotations and citation omitted); *see also Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *13 (Del. Ch. Aug. 26, 2005) ("Essentially, this a claim for mismanagement, a paradigmatic derivative claim.").

Plaintiff's derivative claims in disguise fail as a matter of law for two distinct reasons. First, it is clear from the face of the Amended Complaint that Meta was not actually harmed by the alleged misconduct—indeed, Plaintiff admits that Defendants' decisions have "increas[ed] Meta's share price and bottom line," AC ¶ 157, "spectacularly," *id.* ¶ 30. Without an "injury to the corporate entity[, t]here is no relief that would go the corporation," *Tooley*, 845 A.2d at 1039, and therefore a derivative claim cannot be maintained.

Second, Plaintiff did not make a pre-suit demand on the Board, and the Amended Complaint does not even attempt to allege specific facts to show that a pre-suit demand would have been futile, as required by Court of Chancery Rule 23.1.

See Rales v. Blasband, 634 A.2d 927, 932 (Del. 1993) (a stockholder's right to sue derivatively "is limited to situations where the stockholder has demanded that the directors pursue the corporate claim and they have wrongfully refused to do so or where demand is excused" as futile).[17] Because Plaintiff "brings [his] derivative claims without first making demand, and demand is not excused, th[e] claims must be dismissed." *Albert*, 2005 WL 2130607, at *13.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Amended Complaint with prejudice.

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Dated: March 31, 2023

[17] As explained in Defendants' motion to dismiss the original complaint, Plaintiff cannot adequately plead that a pre-suit demand on the Board would have been futile in any event. *See* Defs' First MTD at 19-28.