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Case No. 2020-0085-JRS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

EMPLOYEES' RETIREMENT SYSTEM OF RHODE ISLAND,	:	
Plaintiff,	:	C.A. No. 2020-0085-JRS
v.	:	**Original Filed: April 7, 2020**
FACEBOOK, INC.,	:	**Public Version Filed: April 14, 2020**
Defendant.	:	

PLAINTIFF'S OPENING PRE-TRIAL BRIEF

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Dated: April 7, 2020

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Plaintiff Employees' Retirement System of Rhode Island[1] brings suit against Defendant Facebook, Inc.[2] to enforce a books-and-records demand for Board-level documents and communications concerning the negotiation of Facebook's $5 billion settlement with the Federal Trade Commission.[3]

INTRODUCTION

I'm CEO, and I'm responsible for everything that happens in the company.
- *Mark Zuckerberg*[4]

In March 2019, this Court conducted a trial in *In re Facebook, Inc. Section 220 Litigation*, a books-and-records action seeking to investigate *Caremark* claims arising from potential oversight failures by Facebook's Board and senior management relating to the Cambridge Analytica matter.[5] Here, Rhode Island seeks books and records relating to actions taken by Facebook's Board *after* the trial in the Prior 220 Action, which provided a non-ratable benefit to its controlling stockholder, Mark Zuckerberg, and will cost the Company billions of dollars.

Specifically, in the Settlement, which was announced in July 2019,[6] Facebook

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1 "ERSRI," "Rhode Island," or "Plaintiff."

2 "Facebook" or the "Company."

3 The "FTC" and the "Settlement." Rhode Island's demand is attached as JX-089.

4 JX-091.

5 2018-0661-JRS (Del. Ch.) (the "Prior 220 Action").

6 The "Settlement."

agreed to pay a $5 billion fine to the FTC to resolve allegations that the Company's conduct in connection with the Cambridge Analytica matter violated a 2011 agreement.[7] This was the largest fine in FTC history—222 times larger than the previous record for a privacy fine (a $22.5 million penalty against Google in 2012).[8]

Board minutes produced to Rhode Island—from meetings that took place after the trial in the Prior 220 Action—show that [redacted][10]

Entire fairness applies to any transaction "in which the controller receives a non-ratable benefit."[11] This includes agreements, such as the Settlement, that extinguish potential, material liability for a controller.[12] Yet despite the conflict

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7 The "First FTC Agreement."

8 JX-016.

9 JX-053 at 7-10; JX-052.

10 JX-053; JX-054; JX-056.

11 *In re EZCORP Inc. Consulting Agreement Deriv. Litig.*, 2016 WL 301245, at *11 (Del. Ch.); *Tornetta v. Musk*, 2019 WL 4566943, at *10 (Del. Ch.) ("Our courts are steadfast in requiring corporate fiduciaries to prove entire fairness when a controller stands on both sides of a transaction.").

12 *In re AmTrust Fin. Services, Inc. S'holder Litig.*, 2020 WL 914563, at *11 (Del. Ch.); *In re Straight Path Commc'ns Inc. Consol. S'holder Litig.*, 2018 WL

between Facebook's interests and Zuckerberg's interests, the Board failed to [redacted] whose niece works for Facebook. [redacted] Zuckerberg's friend and colleague Marc Andreessen who—while serving on a [redacted] special committee that was supposed to negotiate with Zuckerberg on behalf of public stockholders in connection with Facebook's proposed issuance of low-voting stock—secretly coached Zuckerberg and leaked sensitive details about the Committee's deliberations to Zuckerberg without informing the other members of the Committee.

Rhode Island seeks to evaluate the fairness of the Settlement—both the process by which it was negotiated and the final terms. Rhode Island also seeks to

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3120804, at *15 (Del. Ch.), *aff'd sub nom. IDT Corp. v. JDS1, LLC*, 206 A.3d 260 (Del. 2019); *In re Riverstone Nat'l, Inc. S'holder Litig.*, 2016 WL 4045411, at *1 (Del. Ch.); *In re Primedia, Inc. S'holders Litig.*, 67 A.3d 455, 487 (Del. Ch. 2013).

evaluate Board members' potential affirmative defenses to a potential breach of fiduciary duty claim for approving the Settlement—which would, presumably, include defenses based on 8 *Del. C.* § 141(e) and/or advice-of-counsel.

The Court should order Facebook to produce all Board-level documents and communications about Facebook's negotiations with the FTC, including [redacted] and electronic communications to or from Board members regarding the negotiations.

This necessarily includes privileged documents. Where, as here, a stockholder has a credible basis to investigate a process that was necessarily lawyer-driven, it is entitled to the production of privileged communications about that process.[13] If Rhode Island was investigating the fairness of a merger, it would be entitled to know what the Board was told by its bankers. Here, the negotiations were run primarily by counsel. So the only way for Rhode Island to uncover what Board members were told about the strength of the FTC's potential claims (against both the Company and Zuckerberg) and the likely results if those claims were litigated is to gain access to privileged documents.

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[13] *Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1279 (Del. 2014).

FACTUAL BACKGROUND

A. The Parties

Plaintiff Employees' Retirement System of Rhode Island is the largest public employee retirement system in the State of Rhode Island. It has approximately 32,000 beneficiaries and provides retirement, disability, and survivor benefits to state employees, public school teachers, judges, state police, municipal police and fire employees, and general municipal employees.[14] Rhode Island is the beneficial owner of over 164,000 shares of Facebook common stock and has continuously been a stockholder of the Company since at least March 31, 2017.[15]

Defendant Facebook, Inc. is a Delaware corporation that is headquartered in Menlo Park, California.[16]

B. Zuckerberg Controls Facebook

Zuckerberg is the "chairman and CEO of Facebook, which he founded in 2004. [He] is responsible for setting the overall direction and product strategy for the company. He leads the design of Facebook's service and development of its core

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14 JX-095.

15 JX-099.

16 *See* JX-093.

technology and infrastructure."[17] In 2018, Zuckerberg testified before Congress: "I started Facebook, I run it, and I'm responsible for what happens here."[18]

Zuckerberg is—and, at all relevant times, was—Facebook's controlling stockholder holding a majority of the Company's voting power.[19] Zuckerberg's control of Facebook is facilitated through the Company's dual-class common stock structure, in which Class A common stock has one vote per share and Class B common stock has ten votes per share.[20] As of Facebook's most recent annual proxy, Zuckerberg held 57.7% of the Company's total voting power.[21]

C. Facebook Has A History of Early Privacy Scandals

Privacy has always been Facebook's core compliance issue. In its first filing after its IPO, Facebook cautioned: "[w]e have in the past experienced, and we expect that in the future we will continue to experience, media, legislative, or regulatory scrutiny of our decisions regarding user privacy or other issues, which may adversely

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17 JX-096.

18 JX-036 at 1.

19 *See, e.g.*, JX-093 at 25; JX-072 at 14 ("Because Mr. Zuckerberg controls a majority of our outstanding voting power, we are a 'controlled company' under the corporate governance rules of The Nasdaq Stock Market LLC … .").

20 JX-093 at 36.

21 JX-072 at 41. This total includes shares beneficially owned by Dustin Moskovitz over which Zuckerberg holds an irrevocable voting proxy.

affect our reputation and brand."[22] As of January 2020, Facebook "[is], and expect[s] to continue to be, the subject of investigations, inquiries, data requests, requests for information, actions, and audits by government authorities and regulators in the United States, Europe, and around the world, particularly in the areas of privacy [and] data protection," among others.[23]

Shortly after creating Facebook in 2004, "Zuckerberg explained to a friend that his control of Facebook gave him access to any information he wanted on any Harvard student:"

> Zuck: yea so if you ever need info about anyone at harvard
>
> Zuck: just ask
>
> Zuck: i have over 4000 emails, pictures, addresses, sns
>
> Friend: what!? how'd you manage that one?
>
> Zuck: people just submitted it
>
> Zuck: i don't know why
>
> Zuck: they 'trust me'
>
> Zuck: dumb fucks[24]

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22 JX-015 at 41.

23 JX-093 at 9.

24 JX-010.

In 2006, Facebook launched its "News Feed" feature, which "allow[ed] users to track their friends' Facebook movements by the minute."[25] Within days, Zuckerberg was forced to adjust the feature and address heavy backlash in an open letter, stating "[w]e really messed this one up" and apologizing for doing "a bad job of explaining what the new features were and an even worse job of giving [users] control of them."[26]

In 2007, Facebook found itself mired in another privacy controversy over a feature called "Beacon" that tracked users' online spending habits outside of Facebook. As with the News Feed, in response to fierce public criticism, Facebook changed the terms of the program, and paid $9.5 million into a fund for privacy and security to settle a class action lawsuit against the Company.[27] Zuckerberg issued yet another a public apology, writing: "We've made a lot of mistakes building this feature, but we've made even more with how we've handled them. We simply did a bad job with this release, and I apologize for it."[28]

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25 JX-003.

26 JX-004.

27 JX-084.

28 JX-005.

In 2009, without warning its users, Facebook changed its platform so that certain information that users had designated as private was made public.[29] Various consumer protection groups responded by filing a complaint with the FTC alleging unfair and deceptive trade practices.[30] The FTC launched a two-year investigation[31] and in 2011, as part of a settlement, the FTC filed a complaint alleging that:

- In December 2009, Facebook changed its website so certain information that users may have designated as private – such as their Friends List – was made public. They didn't warn users that this change was coming, or get their approval in advance.
- Facebook represented that third-party apps that users' installed would have access only to user information that they needed to operate. In fact, the apps could access nearly all of users' personal data – data the apps didn't need.
- Facebook told users they could restrict sharing of data to limited audiences – for example with "Friends Only." In fact, selecting "Friends Only" did not prevent their information from being shared with third-party applications their friends used.
- Facebook had a "Verified Apps" program & claimed it certified the security of participating apps. It didn't.
- Facebook promised users that it would not share their personal information with advertisers. It did.

29 JX-012.

30 JX-007.

31 JX-013.

- Facebook claimed that when users deactivated or deleted their accounts, their photos and videos would be inaccessible. But Facebook allowed access to the content, even after users had deactivated or deleted their accounts.

- Facebook claimed that it complied with the U.S.-EU Safe Harbor Framework that governs data transfer between the U.S. and the European Union. It didn't.[32]

Facebook entered into a settlement with the FTC (the "First FTC Agreement") that barred Facebook from making any further deceptive privacy claims, required Facebook to obtain users' consent before changing the way the Company shared their data, and imposed auditing requirements on the Company for 20 years.[33]

Under the Agreement, Facebook was:

- barred from "misrepresent[ing] in any manner . . . the extent to which it maintains the privacy or security of [consumer] information";[34]

- required to "clearly and promimently disclose" the information that will be disclosed to third parties and "obtain the user's affirmative express consent" to disclose such information;[35]

- required to "implement procedures" to ensure that user information "cannot be accessed by any third party . . . after a reasonable period of time, not to exceed thierty (30)

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32 JX-012.

33 JX-009

34 *Id*. at 4.

35 *Id*.

days, from the time that the user has deleted such information or deleted or terminated his or her account";[36]

- required to "establish and implement, and thereafter maintain, a comprehensive privacy program . . . designed to (1) address privacy risks related to the development and management of new and existing products and services for consumers, and (2) protect the privacy and confidentiality of consumers' information";[37] and

- required, within 180 days, and every two years after that for the next 20 years, to "obtain initial and biennial assessments and reports . . . from a qualified, objective, independent third-party professional" certifying compliance with the Agreement.[38]

If Facebook violated any of the terms of the First FTC Agreement, it would be liable for up to $16,000 per day per count.[39] Not surprisingly, Zuckerberg once again admitted that Facebook had "made a bunch of mistakes."[40]

D. Origins of the Cambridge Analytica Scandal

This was not the end of Facebook's privacy problems.

In 2010, Facebook launched its Graph Application Programming Interface ("Graph API"). The Graph API allowed third-party apps to access an enormous amount of data about users' *friends* without their consent, including friends' "about

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36 *Id*. at 5.

37 *Id*.

38 *Id*. at 6.

39 JX-012.

40 JX-014.

me, actions, activities, b-day, check-ins, education, events, games, groups, hometown, interests, likes, location, notes, online status, tags, photos, questions, relationships, religion/politics, status, subscriptions, website, [and] work history."[41]

Sandy Parakilas—a former Facebook operations manager tasked with monitoring Facebook's data handling procedures in 2011 and 2012—later testified before a British parliamentary committee that while he was at Facebook, "it was known and understood both internally and externally that there was risk with respect to the way that Facebook Platform was handling data."[42] In response to a question about whether Zuckerberg was aware of the privacy concerns, Parakilas testified that, although he lacked first-hand knowledge, he "d[id] not think it was a secret that this was a problem."[43] Parakilas also testified that he had warned "senior executives in charge of Facebook Platform and people in charge of privacy" about "the various data vulnerabilities of Facebook Platform."[44]

Senator Richard Blumenthal formally relayed Parakilas' testimony to the FTC.[45] Despite Parakilas' warnings, however, [redacted]

41 JX-027; *see* JX-048 ¶37 (alleging same).

42 JX-028 at Q1196.

43 *Id.*

44 *Id.* at Q1191-Q1194.

45 JX-040.

[redacted][46]

The seeds of the Cambridge Analytica scandal were planted while the Graph API was in place—and after the First FTC Agreement took effect. According to Zuckerberg, "in 2013, a Cambridge University researcher named Aleksandr Kogan created a personality quiz app. It was installed by around 300,000 people who shared their data as well as some of their friends' data. Given the way [the Facebook] platform worked at the time this meant Kogan was able to access tens of millions of their friends' data."[47]

By 2013, as the FTC later alleged, Facebook was "[redacted][48] An internal Facebook document [redacted]

46 JX-048 ¶12.

47 JX-029.

48 JX-048 ¶95.

[redacted][49] In 2014, Zuckerberg announced at the F8 conference that the Company would implement a second version of the API that limited the amount of information flowing to third-party apps.[50]

Despite Zuckerberg's assurances, Facebook secretly whitelisted some third-party apps[51] and allowed them to continue harvesting users' friends' information—[redacted][52] [redacted] that in order to decide which apps to whitelist, "[redacted]

[redacted]

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49 *Id*. ¶96.

50 *See* JX-018; JX-048 ¶38.

51 The practice of "whitelisting" refers to Facebook "allowing certain whitelisted apps to access data contrary to [Facebook's] Privacy." *In re Facebook, Inc. Sec. Litig.*, 2019 WL 4674347, at *24 (N.D. Cal. Sept. 25, 2019).

52 *See* JX-033 [redacted] JX-048 ¶133 [redacted]

53 JX-048 ¶108.

[redacted]

[redacted]

[redacted]"[54]

According to Zuckerberg, Facebook learned from journalists at THE GUARDIAN in 2015, "that [Aleksandr] Kogan had shared data from his app with Cambridge Analytica."[55] Facebook "demanded that Kogan and Cambridge Analytica formally certify that they had deleted all improperly acquired data," but did not confirm whether the data had actually been deleted.[56] It had not.

Sheryl Sandberg, Facebook's Chief Operating Officer,[57] [redacted]

[redacted]

[redacted]"[58] Zuckerberg has since acknowledged that Facebook's failure to confirm that user data had, in fact, be deleted was "one of the biggest mistakes that we made."[59]

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54 *Id.* ¶¶118-121.

55 JX-029.

56 *Id.*

57 *See* JX-097.

58 JX-033.

59 JX-030.

E. The Cambridge Analytica Scandal Breaks

On March 17, 2018, THE GUARDIAN reported that Cambridge Analytica, "[t]he data analytics firm that worked with Donald Trump's election team and the winning Brexit campaign[,] harvested millions of Facebook profiles of US voters, in one of the tech giant's biggest ever data breaches, and used them to build a powerful software program to predict and influence choices at the ballot box."[60]

Following the March 17, 2018 story, Facebook was immediately engulfed in a firestorm of negative publicity and government investigations.

On March 21, 2018, REUTERS reported that Parakilas had "told a British parliamentary committee … that data harvesting of member profiles by outside software developers was once routine[,] that the company took years to clamp down on the practice[,]" and that he had "warned senior executives at Facebook" of these problems.[61] Also on March 21, 2018, Zuckerberg released a public statement acknowledging that "[i]n 2013, a Cambridge University researcher named Aleksandr Kogan created a personality quiz app [that] allowed Kogan … to access tens of millions of [users'] friends' data."[62]

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60 JX-026.

61 JX-031.

62 JX-029.

F. The FTC Takes Action as the Scandal Widens

On March 26, 2018, the FTC issued a press release stating that: "Companies who have settled previous FTC actions must also comply with FTC order provisions imposing privacy and data security requirements. Accordingly, the FTC takes very seriously recent press reports raising substantial concerns about the privacy practices of Facebook. Today, the FTC is confirming that it has an open non-public investigation into these practices."[63]

On April 4, 2018, Facebook revealed that "we believe the Facebook information of up to 87 million people—mostly in the US—may have been improperly shared with Cambridge Analytica."[64] A story published that same day by THE NEW YORK TIMES quoted Zuckerberg as stating: "It's clear now that we didn't focus enough on preventing abuse. … We didn't take a broad enough view of what our responsibility is. *That was a huge mistake, and it was my mistake.*"[65]

On April 10, 2018, Zuckerberg testified before two committees of the United States Senate.

- In his prepared testimony, Zuckerberg stated: "it's clear now that we didn't do enough to prevent [Facebook's] tools from being used for harm. … We didn't take a broad enough view of our responsibility, and that was a big mistake. It was my mistake, and

63 JX-032.

64 JX-034.

65 JX-035.

I'm sorry. I started Facebook, I run it, and I'm responsible for what happens here."[66]

- In his questioning, Senator Blumenthal expressed the view that "what happened here was, in effect, willful blindness. It was heedless and reckless, which, in fact, amounted to a violation of the FTC consent decree."[67]

- In response to questioning from Senator Cornyn, Zuckerberg testified that "there's a very common misperception about Facebook—that we sell data to advertisers. And we do not sell data to advertisers. We don't sell data to anyone."[68]

Zuckerberg's statement to Senator Cornyn was false, or, at best, highly misleading. As a committee of the U.K. House of Commons later concluded, "data transfer for value is Facebook's business model and … Mark Zuckerberg's statement that 'we've never sold anyone's data' is simply untrue."[69]

On April 30, 2018, THE NEW YORK TIMES reported that Jan Koum—a Facebook Board member—was leaving Facebook. Citing a company executive, the TIMES reported that "Koum had grown increasingly concerned about Facebook's

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66 JX-037 at 8.

67 *Id*. at 43.

68 *Id*. at 42.

69 JX-051 at 42. On April 16, 2019, NBC News would report that, in fact, "Zuckerberg oversaw plans to consolidate the social network's power and control competitors by treating its users' data as a bargaining chip, while publicly proclaiming to be protecting that data, according to about 4,000 pages of leaked company documents largely spanning 2011 to 2015 and obtained by NBC News." JX-039.

position on user data in recent years. Mr. Koum was perturbed by the amount of information that Facebook collected on people and had wanted stronger protections for that data[.]"[70] The story went on to report that, by November 2017, Koum had "shared his unease over Facebook's data and privacy policies with others," and "[w]hile Mr. Koum personally got along with Mark Zuckerberg …, he felt the company's board simply paid lip service to privacy and security concerns he raised[.]"[71]

On June 3, 2018, THE NEW YORK TIMES reported that "Facebook ha[d] reached data-sharing partnerships with at least 60 device makers—including Apple, Amazon, BlackBerry, Microsoft and Samsung—over the last decade," and that "Facebook allowed the device companies access to the data of users' friends without their explicit consent, even after declaring that it would no longer share such information with outsiders. Some device makers could retrieve personal information even from users' friends who believed they had barred any sharing[.]"[72]

During the summer of 2018, the federal investigation into Facebook's role in the Cambridge Analytica scandal widened to include the FBI, the SEC, and the DOJ, in addition to the FTC.

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70 JX-041.

71 *Id.*

72 JX-042.

On September 6, 2018, Board minutes reflect [redacted]

[redacted]

[redacted]

[redacted]

[redacted]"[73]

On November 14, 2018, THE NEW YORK TIMES published a lengthy story about tension at the highest levels of Facebook, based on interviews with more than 50 people, including current and former Facebook executives and other employees, lawmakers and government officials, lobbyists, and congressional staff members.[74] According to that story, Erskine Bowles, chairman of Facebook's Audit Committee, had received a report in 2017 from Alex Stamos, the then-Chief-Information-Security-Officer, and Stretch, about Russian interference with Facebook's platform as well as potential data privacy violations.[75] After receiving the report, Bowles questioned Zuckerberg and Sandberg at a Board meeting regarding their lack of transparency with the Board regarding data privacy issues. At that meeting, Stamos

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73 JX-043 at 3.

74 JX-044.

75 *Id.*

suggested that the Company had not properly monitored the protection of user data carefully, causing Sandberg to accuse Stamos of "throw[ing] us under the bus!"[76]

On December 5, 2018, a committee of the U.K. Parliament published a cache of internal Facebook documents, which showed that, starting in 2012, Facebook began planning to monetize its services by "privatizing" user data through "whitelisting" agreements with outside partners.[77] The documents showed that the plan to monetize user data within the Facebook platform was Zuckerberg's brainchild. He emailed the idea and the implementing steps to Sandberg and others.[78] The documents also revealed that Facebook accessed users' Android phone data without their permission.[79] Although Facebook employees recognized this was "high risk," the plan was approved at the highest levels of the Company.[80]

G. The Second FTC Agreement Was Negotiated in an Unfair Manner

By late 2018, Facebook management was prepared to again update the Board on the status of negotiations with the FTC. On December 19, 2018, Sandberg

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76 *Id.*

77 JX-047 at 1-15 (summarizing the key issues found within the documents, including whitelist agreements with certain companies).

78 *Id.* at 16-20.

79 *Id.* at 11-12, 21-29.

80 *Id.* at 11, 22.

(Facebook's COO and a member of the Board) and Stretch (Facebook's General Counsel) exchanged emails regarding "[redacted]."[81]

On February 6, 2019, [redacted].[82]

[redacted]

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81 JX-001, Entries No. 1264-65.

82 JX-048.

83 *Id.* ¶¶113-115.

[redacted] ”[85]

The next day, Nick Clegg (the former Deputy Prime Minister of the U.K. and now Facebook's head of Global Affairs) wrote to Sandberg, [redacted] [86]

[redacted]

[redacted]

[redacted]

84 *Id.* ¶¶118-120.

85 *Id.* ¶121.

86 JX-049.

[redacted]

On February 14, 2019, THE WASHINGTON POST reported that "[t]he Federal Trade Commission and Facebook [were] negotiating over a multi-billion dollar fine that would settle the agency's investigation into the social media giant's privacy practices[.]"[87] Its story noted that "a collection of consumer advocates urged the FTC last month to penalize Facebook aggressively with 'substantial fines,' perhaps exceeding $2 billion[.]"[88]

Four days later, a committee of the U.K. House of Commons released a devastating report, accusing Facebook of behaving like a "digital gangster[]."[89] The Report declared that Zuckerberg's actions showed "contempt" for Parliament and repeatedly accused him of making false or misleading statements about Facebook's privacy policies.[90]

[redacted]

87 JX-050.

88 *Id.*

89 JX-051 at 42.

90 *Id.* at 14.

[redacted] 15 U.S.C. § 45(l),[92] which is subject to a cap of "$42,530 for each violation."[93] [redacted]

[redacted]

[redacted]

[redacted]

91 JX-052.

92 JX-048 ¶¶203-204.

93 16 C.F.R. § 1.98(c).

> [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[94] [redacted]. JX-048 ¶196. There were 2,463 days between December 1, 2012 and August 30, 2019. If we multiply 2,463 days by a maximum statutory penalty of $42,530, Facebook's maximum monetary exposure was $104,751,390—about $4.9 billion less than it agreed to pay.

[redacted]

95 JX-053.

96 *Id.*

97 JX-054.

[redacted]

98 *Id.*

99 JX-055.

100 JX-056.

101 *Id.*

[redacted]

102 *Id.*

103 *Id.*

104 *Id.*

105 JX-057; *see* JX-058 – JX-065 (individual Board member approvals).

[redacted] Alison Schumer, [redacted], has been a product manager at Facebook since 2017.[109]

[redacted][110] In 2016, the Facebook Board had appointed Andreessen to a special committee that was supposed to negotiate with Zuckerberg on behalf of public stockholders in connection with a reclassification proposal that would have allowed Zuckerberg to liquidate substantial portions of his economic interest in Facebook without losing voting control.[111] While serving on that committee, Andreessen sent

106 JX-057.

107 JX-066 – JX-071; JX-073; JX-077; JX-081.

108 *Id.*

109 JX-017; JX-045; JX-098.

110 JX-057.

111 JX-022.

secret text messages to Zuckerberg ***during negotiations*** to advise him on how best to outwit the other members: "This line of argument is not helping. … They are both genuinely trying to get to the right answer. THIS is the key topic. Agree[.] NOW WE'RE COOKING WITH GAS[.] I'll push them on having a longer period at least for Sheryl and Chris. Don't know if that's helpful but."[112]

On the day that the [redacted] special committee recommended approval of the reclassification, Andreessen and Zuckerberg had the following exchange:[113]

> Andreessen: The cat's in the bag and the bag's in the river.
>
> Zuckerberg: Does that mean the cat's dead?
>
> Andreessen: Mission accomplished. ☺

[redacted]

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112 JX-021 at 14.

113 *Id.*

114 JX-066.

115 JX-067.

116 JX-068.

117 JX-069.

118 JX-070.

119 JX-071.

120 JX-073.

[redacted][124]

The Board minutes produced by Facebook show [redacted].

121 JX-077.

122 JX-081.

123 JX-024.

124 JX-046.

[redacted]

On April 19, 2019, THE WASHINGTON POST reported that "[f]ederal regulators investigating Facebook for mishandling its users' personal information have set their sights on the company's chief executive, Mark Zuckerberg," explaining that "discussions about how to hold Zuckerberg accountable for Facebook's data lapses have come in the context of wide-ranging talks between the Federal Trade

125 JX-074.

126 *Id*. at 5-6.

127 *Id*. at 7-6.

Commission and Facebook that could settle the government's probe of more than a year[.]"[128]

On April 25, 2019, Facebook filed its 1Q 2019 Form 10-Q and disclosed that its discussions with the FTC had "progressed to a point that, in the first quarter of 2019, we reasonably estimated a probable loss and recorded an accrual of $3.0 billion which is included in accrued expenses and other current liabilities on our condensed consolidated balance sheet."[129]

On May 4, 2019, THE NEW YORK TIMES reported that FTC commissioners were "split on the size and scope of [Facebook's] punishment," and that "one of the most contentious undercurrents throughout the negotiations has been the degree to which Mark Zuckerberg, Facebook's chief executive, should be held personally liable for any violation of a 2011 agreement[.]"[130] The TIMES reported that "Facebook has put up a fierce fight, saying Mr. Zuckerberg should not be held legally responsible for the actions of all 35,000 of his employees."[131] The story went on to note that "[i]n an early version of the complaint and proposed settlement, Mr.

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128 JX-075.

129 JX-078 at 21.

130 JX-079.

131 *Id.*

Zuckerberg was named as a responsible party," but "Facebook pushed back on the inclusion of Mr. Zuckerberg, saying it would not agree to that in a settlement."[132]

[redacted]

On July 22, 2019, THE WASHINGTON POST reported that Facebook had agreed to pay a record-setting $5 billion fine, which was "more than it believed was required[,] in a bid to assuage regulators and win other concessions from the feds."[136]

The most critical concession: a lack of personal consequences for Zuckerberg. According to the POST, the FTC's "primary concern" was "Zuckerberg and other

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132 *Id.*

133 JX-082.

134 The [redacted]."

135 *Id.* at 5.

136 JX-083.

top-tier Facebook executives.[137] The commission's Democratic members—Rohit Chopra and Rebecca Kelly Slaughter—for months had hinted publicly their belief that corporate leaders should be held personally accountable for their companies' repeated privacy mishaps."[138] This could have "resulted in Zuckerberg, personally, being put under an FTC order, opening the door for fines and other penalties against him if Facebook erred again in the future. The FTC had considered placing Zuckerberg under order during its last investigation in 2011" before ultimately abandoning the issue. But, according to those same reports, in settlement negotiations led by Stretch, Facebook "steadfastly opposed placing Zuckerberg under order, including during meetings with commission negotiators starting last year. The tech giant's internal briefing materials reflected its willingness to cease settlement talks and send the matter to court, if necessary, to protect their executive from one of the most severe penalties the FTC could levy on him directly."[139] Two days later, the POST reported that the agreement had been reached before the FTC deposed Zuckerberg.[140] Notably, the Settlement contained a broad release of all

137 *Id*.

138 *Id.*

139 *Id.*

140 JX-085.

claims that the FTC might otherwise be able to bring against Facebook's officers and directors for conduct prior to June 12, 2019.[141]

Commissioners Chopra and Slaughter dissented from the settlement. Commissioner Chopra criticized the "unusual legal shield" that the Second FTC Agreement gave to Zuckerberg, Sandberg, and others, describing the "blanket release" as "deeply problematic."[142] "When individuals make a calculated decision to break or ignore the law," Commissioner Chopra wrote, "they—and not just their firm or shareholders—should be held accountable. To instead expressly shield individuals from accountability is dubious as a matter of policy and precedent."[143] He went on to explain that the "grant of broad immunity is highly unusual. It is a departure from FTC precedent and established guidelines. Americans should ask why Mark Zuckerberg, Sheryl Sandberg, and other executives are being given this treatment, while leaders of small firms routinely face investigations, hearings, and charges."[144]

Elsewhere Commissioner Chopra wrote that:

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141 JX-086.

142 JX-087.

143 *Id.* at 19.

144 *Id.*

- Facebook "was resistant to providing documents from Zuckerberg's files."[145]

- "Because the law imposes affirmative obligations on officers and directors whose firms are under order, uncovering their role in potential violations is critical to any investigation. It is especially critical in this investigation, which involved a firm that is tightly controlled by its founder, CEO, and Chairman, Mark Zuckerberg. Given the structure of his ownership and his special voting rights, it is hard to imagine that any of the core decisions at issue were made without his input."[146]

- "[T]here is already sufficient evidence, including through public statements, to support a charge against Mark Zuckerberg for violating the 2012 order."[147]

- "[T]he Commission had enough evidence to take … Zuckerberg to trial."[148]

Commissioner Rebecca Kelly Slaughter echoed Commissioner Chopra's concerns. She wrote that:

- "[T]here was extremely compelling evidence of a series of significant, substantial order violations and law violations," including "sufficient evidence to name Mr. Zuckerberg in a lawsuit."[149]

- "I would have preferred to name Mr. Zuckerberg in the complaint and in the order. I disagree with the decision to omit him now, and I strenuously object to the choice to release him and all other executives from any potential liability for their roles

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145 *Id.* at 6.

146 *Id.* at 11.

147 *Id.* at 12 n.36.

148 *Id.* at 20.

149 JX-088 at 6.

> to date. I am concerned that a release of this scope is unjustified by our investigation and unsupported by either precedent or sound public policy."[150]

RHODE ISLAND'S DEMAND

Following reports that Facebook had "paid more than it believed was required" to avoid Zuckerberg being named personally, Rhode Island decided to investigate. On September 20, 2019, Rhode Island sent its Demand.[151] In the Demand, Rhode Island demanded, under oath and under penalty of perjury, the following records and documents of the Company, from January 1, 2016 to the present:[152]

1. Hard-copy documents provided to, or generated by, the Board relating to investigations conducted by the Federal Trade Commission, Department of Justice, Securities and Exchange Commission, Federal Bureau of Investigation and European Information Commissioner's Office regarding Facebook's data privacy practices;

2. Facebook's formally adopted policies and procedures respecting data privacy and access to user data, including those promulgated following the entry of the First FTC Agreement;

3. Facebook's Atlas (SOC1 & SOC 2/3), Custom Audience (SOC 2/3) and Workplace (SOC 2/3) audits performed on behalf of the Company, and any other formal internal audits performed regarding compliance with Facebook formal data privacy policies and procedures or with the First FTC Agreement;

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150 *Id.* at 14.

151 JX-089.

152 *Id.* at 17.

4. Electronic communications, if coming from, directed to or copied to a member of the Board, concerning Facebook's post-First-FTC-Agreement whitelist practices, post-First-FTC-Agreement government investigations into Facebook's data privacy practices and compliance with the First FTC Agreement, to be collected from the following custodians: Erskine B. Bowles, Sheryl Sandberg, Alex Stamos, and Mark Zuckerberg;

5. Hard-copy documents provided to, or generated by, any member of the Board relating to Facebook's negotiations with the FTC;

6. Electronic communications, from, to, or copied to a member of the Board or to Stretch, concerning Facebook's negotiations with the FTC concerning the Second FTC Agreement, to be collected from the following custodians: Erskine B. Bowles, Sheryl Sandberg, Mark Zuckerberg, Colin Stretch, Paul Grewal, and Ashlie Beringer;

7. All draft versions of the Second FTC Agreement;

8. All draft versions of the FTC's complaint filed in connection with the Second FTC Agreement; and

9. Documents concerning the independence of Facebook's directors and committees of the Board, including, specifically, the Board disclosure questionnaires.[153]

The Demand identified Rhode Island's purposes: (1) to investigate potential wrongdoing, mismanagement, and/or breaches of fiduciary duty by all current members of the Board as well as by Zuckerberg, Sheryl Sandberg, and Colin Stretch in their capacities as officers, (2) to determine whether a pre-suit demand is necessary or would be excused prior to commencing any derivative action, and (3) to

153 *Id*. at 17-18.

gather information for the purposes of communicating with other stockholders in order to effectuate changes in management policies.[154]

After an agreed-upon extension of time to respond, Facebook responded to the Demand on October 14, 2019.[155] The Response did not raise any issues with Rhode Island's compliance with the form-and-manner requirements of Section 220. Facebook's objections were limited to credible basis and scope.

After receiving the Response, Rhode Island and Facebook engaged in extensive meet-and-confer discussions. As a result of those discussions, the parties agreed to a Confidentiality Agreement and Facebook agreed to—and months later did—produce (1) the materials given to plaintiffs in the Prior Action; (2) "minutes of the [redacted] subject to redactions for privilege," and (3) "copies of minutes of the Board of Directors concerning the FTC settlement" with redactions of privileged and non-responsive information.[156]

Facebook otherwise refused to produce documents responsive to categories 5 and 6 of the Demand (the "Disputed Documents"), including [redacted]

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154 *Id.* at 2-3.

155 JX-090 (the "Response").

156 JX-094 ¶65.

[redacted] or any privileged documents or email communications about the negotiations with the FTC.

ARGUMENT

A. Standard Of Review

"Section 220 … permits a stockholder, who shows a specific proper purpose and who complies with the procedural requirements of the statute, to inspect specific books and records of a corporation."[157] A stockholder can establish a proper purpose through "documents, logic, testimony or otherwise,"[158] including circumstantial evidence[159] and hearsay evidence, such as news reports.[160]

Facebook does not contest that Rhode Island is a beneficial owner of the Company's common stock, its demand complied with the form-and-manner requirements of Section 220, and its stated purposes are its actual purposes.[161]

What remain in dispute are two, intertwined issues: (1) whether Rhode Island's

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157 *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 566–67 (Del. 1997).

158 *Id.* at 568.

159 *Wal-Mart*, 95 A.3d at 1273; *Lebanon Cty. Employees' Ret. Fund v. AmerisourceBergen Corp.*, 2020 WL 132752, at *8 (Del. Ch.).

160 *Id.*; *In re Facebook, Inc. Section 220 Litig.* ("*Facebook 220*"), 2019 WL 2320842, at *2 n.10 (Del. Ch.); *In re Plains All Am. Pipeline, L.P.*, 2017 WL 6066570, at *3–4 (Del. Ch.) (relying on Los Angeles Times article); *Paul v. China MediaExpress Hldgs., Inc.*, 2012 WL 28818, at *4 (Del. Ch.) (relying on "third-party media reports").

161 JX-090.

stated purposes are proper purposes (2) whether the books and records that Rhode Island seeks are necessary and essential to those purposes.

In plain English, the Court must decide two questions:

- Does Rhode Island have a credible basis to investigate the Settlement?
- Does Rhode Island need the Disputed Documents for that purpose?

B. Rhode Island's Purposes Are Proper

1. Conflicted Transactions Are Inherently Suspect

Any transaction where there is a conflict between the interests of a Delaware corporation and its controller is inherently suspect.[162] In recent years, the Court has acknowledged that a "conflicted transaction" with a controller is, alone, enough to provide a credible basis for investigation.[163] That credible basis is only heightened

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[162] *Doerler v. Am. Cash Exch., Inc.*, 2013 WL 616232, at *1 (Del. Ch.) (ordering production where plaintiffs "presented credible evidence that the controlling stockholders of ACE … engaged in self-interested transactions with the corporation. This evidence is sufficient for the Plaintiffs to receive books and records specifically related to the credible allegations of self-dealing[.]"); *Amalgamated Bank v. UICI*, 2005 WL 1377432, at *3 (Del. Ch.) (related-party transactions "are properly within the scope of a Section 220 demand").

[163] *Donnelly v. Keryx Biopharmaceuticals, Inc.*, 2019 WL 5446015, at *5 (Del. Ch.) ("Plaintiff has met his burden to point to some evidence sufficient to imply that this was a conflicted transaction investigation of which is a proper purpose."); *Bucks Cty. Employees Ret. Fund v. CBS Corp.*, 2019 WL 6311106, at *7 (Del. Ch.) (evidence controller obtained non-ratable benefit constituted "some evidence of possible wrongdoing").

where, as here, the *MFW* safeguards were not utilized despite those conflicts.[164]

2. The Settlement Was A Conflicted Transaction That Created A Non-Ratable Benefit For Zuckerberg

Facebook will no doubt argue that those cases were decided in the context of transformative transactions. True. But the same logic extends to these facts.

In plenary actions, this Court has recognized that similar conflicts exist in any transaction "in which the controller receives a non-ratable benefit,"[165] including even such "work-a-day … board decisions" as setting executive compensation.[166]

One such type of non-ratable benefit is the extinguishment of a viable, potentially material claim against a controller. Because of the conflict created by that type of benefit, *Primedia*,[167] *Riverstone*,[168] and, most recently, *AmTrust*,[169] applied entire fairness to review merger transactions that extinguished pending or threatened derivative claims against directors or a controller. For the same reason, *Straight Path* applied entire fairness to a transaction that extinguished an indemnification right

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164 *CBS*, 2019 WL 6311106, at *6; *Kosinski v. GGP Inc.*, 214 A.3d 944, 954 (Del. Ch. 2019) ("grounds … for calling into question compliance with *MFW* establish a credible basis to investigate possible wrongdoing.") (cleaned up).

165 *EZCORP*, 2016 WL 301245, at *11.

166 *Tornetta*, 2019 WL 4566943, at *1.

167 *Primedia*, 67 A.3d at 487.

168 *Riverstone*, 2016 WL 4045411, at *1.

169 *AmTrust*, 2020 WL 914563, at *11.

held by the company against an entity affiliated with the controller.[170]

That same conflict existed here. Board minutes show that [redacted]:

- On March 19, 2019, the Board directed [redacted] to "[redacted]"[171]
- On March 26, 2019, the Board was informed that "[redacted]."[172]
- On March 30, 2019, the Board was informed that "[redacted]"[173]

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170 *Straight Path*, 2018 WL 3120804, at *15.

171 JX-053 at 3.

172 JX-054 at 2.

173 JX-056 at 2 (emphases added).

[redacted].[174] This belated attempt to impose procedural protections was insufficient to cleanse the Settlement, but does demonstrate that the Board members themselves perceived a serious conflict existed.[175] Similarly, the fact that Zuckerberg [redacted][176] shows that he also perceived a potential conflict between his interests and those of the Company.

The claims against Zuckerberg were viable. This Court has already concluded, there is "some evidence" that Zuckerberg and other Board members "failed to oversee Facebook's compliance with the Consent Decree resulting in unauthorized access to its users' private data and attendant consequences to the Company."[177] With respect to the FTC charges, specifically, Commissioner Chopra stated "there [was] already sufficient evidence, including through public statements, to support a charge against Mark Zuckerberg for violating the 2012 order" and "the Commission

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174 *Id*. at 3.

175 *See Klein v. H.I.G. Capital, L.L.C.*, 2018 WL 6719717, at *15 (Del. Ch.) ("The inference that the HIG Share Sale had unique value to, and posed a conflict for, HIG is bolstered by the fact that HIG's representative … abstained from voting on the Transactions.").

176 JX-055.

177 *Facebook 220*, 2019 WL 2320842, at *2.

had enough evidence to take … Zuckerberg to trial."[178] Similarly, Commissioner Slaughter wrote that "there was extremely compelling evidence of a series of significant, substantial order violations and law violations," including "sufficient evidence to name Mr. Zuckerberg in a lawsuit."[179] For purposes of a Section 220 action, this is more than sufficient.[180]

The potential FTC charges against Zuckerberg were also material to him, as the Court can infer from the extraordinary emphasis that both Facebook and the FTC placed on this deal point.[181] If Zuckerberg had been personally named, he could have faced substantial fines for future violations and been immediately subject to "fencing in" injunctive prohibitions.[182]

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178 JX-087 at 12 n.36.

179 JX-088 at 6.

180 *AmerisourceBergen*, 2020 WL 132752, at *9 (Del. Ch.) ("Ongoing investigations and lawsuits can provide the necessary evidentiary basis to suspect wrongdoing or mismanagement warranting further investigation. This type of evidence is stronger when governmental agencies or arms of law enforcement have conducted the investigations or pursued the lawsuits."); *In re Plains All Am. Pipeline, L.P.*, 2017 WL 6016570, at *4 (indictment established credible basis); *Cohen v. El Paso Corp.*, 2004 WL 2340046, at *2 (Del. Ch.) (formal SEC investigation established credible basis).

181 Internal emails at Facebook sent to Zuckerberg and Sandberg [redacted]. *See, e.g.*, JX-080; JX-076.

182 "The Federal Trade Commission Act (FTCA) authorizes imposition of comprehensive prophylactic injunctive relief. As the Supreme Court admonishes, those caught violating the [FTCA] must expect some fencing in. … Accordingly, courts have routinely imposed some form of fencing in, barring violators from

Moreover, "*[h]omo sapiens* is not merely *homo economicus*"; there are "an array of other motivations exist that influence human behavior[.]"[183] If Zuckerberg had been personally named, he would have suffered extensive reputational harm—highly material given Zuckerberg's sensitivity about his public image,[184] as well as his reported political ambitions.[185]

Zuckerberg would also have faced an overwhelming [redacted] to step down or take a more limited role at the Company.[186] Clegg—the former Deputy Prime Minister of the United Kingdom and a highly sophisticated political observer—warned Sandberg [redacted]

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participating in certain lines of business or forms of marketing." *Fed. Trade Comm'n v. John Beck Amazing Profits LLC*, 888 F. Supp. 2d 1006, 1011 (C.D. Cal. 2012) (internal citations omitted), *aff'd sub nom. F.T.C. v. John Beck Amazing Profits, LLC*, 644 Fed. Appx. 709 (9th Cir. 2016).

183 *In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917, 938 (Del. Ch. 2003). In *Oracle*, then-Vice-Chancellor Strine recognized that a special litigation committee's decision to bring insider trading claims against defendants would inflict "great reputational harm" on them and that this was likely material to the SLC's determination. 824 A.2d at 941. Courts have also long recognized that governmental charges carry a powerful stigmatizing effect. *O'Neill v. City of Auburn*, 23 F.3d 685, 691 (2d Cir. 1994).

184 [redacted] *See* JX-038; JX-025.

185 JX-023.

186 JX-049.

[redacted]

[redacted]"[187]

3. There Is A Basis To Suspect That The Process Was Unfair

Rhode Island "has introduced documentary evidence that provides a basis to suspect an improper transaction process."[188]

First, there was no stockholder vote. By "declining to submit the [Settlement] to [Facebook's] unaffiliated stockholders for approval, the [Facebook] Board … tacitly agreed to submit the [Settlement] to entire fairness review if challenged. In the Section 220 context, that fact will pique suspicion because it opens the possibility that the [Settlement] was not at arm's length, less than optimal, and potentially tainted by the undermining influence of a controller."[189]

Second, the [redacted]

[redacted]

[redacted]

[redacted]

187 *Id.*

188 *CBS*, 2019 WL 6311106, at *7.

189 *Id.* at *6 (cleaned up).

190 *Olenik v. Lodzinski*, 208 A.3d 704, 707 (Del. 2019).

[redacted][191]

Third, [redacted]

[redacted][194] [redacted]

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[191] JX-056 at 2. *Compare with Salladay v. Lev,* 2020 WL 954032, at *10 (Del. Ch.) ("commencing negotiations prior to the special committee's constitution may begin to shape the transaction in a way that even a fully-empowered committee will later struggle to overcome. In that scenario … the existence of the committee is insufficient to replicate an arms-length transaction. Consequently, it is also insufficient to revive business judgement review.").

[192] *See AmTrust*, 2020 WL 914563, at *9 (noting that argument that Special Committee must negotiate directly "seems to find support in *Synutra*, where the high court emphasized that 'the entire point of the *MFW* standard is to recognize the utility to stockholders of replicating the two key protections that exist in a third-party merger: an independent negotiating agent *whose work* is subject to stockholder approval.") (emphasis original to *AmTrust*) (quoting *Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 766–67 (Del. 2018)).

[193] JX-057 at 1. *Compare with In re MFW S'holders Litig.*, 67 A.3d 496, 507 (Del. Ch. 2013) (a special committee "empowered … simply to 'evaluate' the offer," has a "weak mandate[]"), *aff'd sub nom. Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014); *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1146 (Del. Ch. 2006) ("a well constituted special committee should be given a clear mandate setting out its powers and responsibilities in negotiating the interested transaction."); *In re Tele-Commc'ns, Inc. S'holders Litig.*, 2005 WL 3642727, at *9 (Del. Ch.) ("Perhaps the most daunting problem facing the Special Committee was the ambiguity of its mandate, as this weak cornerstone seemingly contributed to numerous flaws that followed.").

[194] JX-057 at 2. *Compare with Biondi v. Scrushy*, 820 A.2d 1148, 1156 (Del. Ch. 2003) ("if the committee is not fully empowered to act for the company without

[redacted][195]

Fourth, one of the [redacted] was Andreessen, a venture capitalist whose brand is based heavily on his widely marketed view that stockholders and boards should defer to founders.[196] One article described Andreessen's "main job [on Facebook's Board as being] to ensure that Mark [Zuckerberg] can do whatever he wants, to provide a layer of insulation between Zuckerberg and shareholders."[197] Andreessen has been Zuckerberg's friend and mentor since he earned Zuckerberg's trust by encouraging Zuckerberg to reject Yahoo!'s $1 billion offer to buy Facebook in 2006.[198] The Zuckerbergs and Andreessens have regular movie nights together, and Andreessen's wife has advised Zuckerberg and Chan in connection with philanthropy planning.[199] In litigation

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approval by the full board, … its ability to instill confidence is, at best, compromised and, at worst, inutile"); *Freedman v. Rest. Assocs. Indus., Inc.*, 1990 WL 135923, at *7 (Del. Ch.) (special committee was ineffective "where ... the management group could (and did) veto any action of the special committee that was not agreeable to the … management directors") (emphasis added).

195 *See, e.g.*, JX-066; JX-067; JX-069.

196 JX-008; JX-006; JX-011.

197 JX-019.

198 JX-020.

199 JX-019.

arising from Facebook's ultimately withdrawn proposal to extend Zuckerberg's control by creating a class of non-voting shares, it was revealed that Andreessen—who was serving on a Special Committee supposed to protect minority stockholders—secretly coached Zuckerberg and leaked sensitive details about the Committee's deliberations to Zuckerberg without informing the other members of the Committee.[200]

Fifth, the [redacted] failed to obtain independent advisors. The [redacted] team was led by [redacted], whose niece is a Facebook employee.[201]

4. There Is A Basis To Suspect That The Terms of the Settlement Were Unfair and Harmed the Company

There is also a credible basis to believe that the substantive terms of the Settlement were unfair. Facebook agreed to pay billions of dollars more than its maximum exposure to ensure that Zuckerberg was not held personally liable.

[redacted] to 15 U.S.C. § 45(l), which is subject to a cap of "$42,530 for each violation."[202] [redacted]

[redacted]

200 JX-021 at 12-17.

201 JX-017; JX-045; JX-098.

202 16 C.F.R. § 1.98(c).

[redacted][205]

5. The Existence of Potential Defenses Does Not Defeat Rhode Island's Proper Purposes

Facebook will likely no doubt argue that Zuckerberg is such a unique talent and so central to Facebook's success and its brand that protecting Zuckerberg at all costs was in Facebook's best interests. Perhaps. But the *l'etat c'est moi* argument should be decided at trial in a plenary action, not here. That fiduciaries might have defenses in plenary litigation challenging a conflicted transaction poses no obstacle to a books-and-records demand.[206] To the contrary, the fact that stockholders will

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203 JX-052 at 8-10.

204 JX-053 at 2.

205 *See supra* note 94.

206 *AmerisourceBergen*, 2020 WL 132752, at *22 ("Delaware Supreme Court precedent does not require an actionable claim as a predicate to a books-and-records inspection, and it would upset the proper balancing of interests in Section 220

face defenses in a plenary action "is precisely the reason this court … encourage[s] stockholders, if feasible, to demand books and records before filing their complaints when they have a credible basis to suspect wrongdoing[.]"[207]

C. The Disputed Documents Are Necessary and Essential to Rhode Island's Proper Purposes And Rhode Island Has Good Cause To Obtain Them Under *Garner*

To date, Facebook has produced [redacted][208] It has also produced a privilege log which contains [redacted] referring to electronic communications regarding [redacted][209]

After reviewing the documents that Facebook has produced, Rhode Island has narrowed its request to categories (5) and (6) of the Demand: (5) board minutes and other hard-copy documents provided to, or generated by, any member of the Board relating to Facebook's negotiations with the FTC and (6) electronic

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proceedings to effectively require one."); *Inter-Local Pension Fund GCC/IBT v. Calgon Carbon Corp.*, 2019 WL 479082, at *13 (Del. Ch.) ("Even if certain of Calgon's merits arguments turn out to be correct in subsequent plenary litigation, they cannot bar the Fund from asserting its rights to inspect books and records under Section 220.").

207 *Lavin v. West Corp.*, 2017 WL 6728702, at *9 (Del. Ch.).

208 JX-094 ¶65.

209 JX-001 (*see, e.g.*, entries listed on Appendix A).

communications, from, to, or copied to a member of the Board, concerning Facebook's negotiations with the FTC concerning the Settlement.

The crux of the parties' dispute is whether Facebook should have to produce (i) [redacted];[210] (ii) electronic communications concerning the FTC negotiations; and (iii) privileged documents (including both electronic communications and unredacted copies of Board and [redacted] minutes) concerning the FTC negotiations.

1. Rhode Island Is Entitled To [redacted]

The Court should order Facebook to produce [redacted] For one thing, the Company agreed to produce "copies of minutes of the Board of Directors concerning the FTC settlement."[211] And [redacted][212] Yet Facebook withheld the [redacted] from its production.

More fundamentally, in any plenary action, Zuckerberg and other fiduciaries would undoubtedly rely on [redacted] to argue that

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[210] To the extent that there are other non-privileged hard copy documents (*i.e.*, other than the [redacted] and the minutes of Board and [redacted] meetings), that were provided to, or generated by, any member of the Board relating to Facebook's negotiations with the FTC, those documents should also be produced. But that set of documents is very likely limited, if not null.

[211] JX-092.

[212] JX-082 at 5.

[redacted] Rhode Island is entitled to see exactly what [redacted] In *Grimes v. DSC Commc'ns Corp.*, the Court ordered the production of the report by a demand-review special committee—a decision that this Court has consistently followed since then.[214] The same logic applies to [redacted][215]

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[213] [redacted]

[214] 724 A.2d 561, 567 (Del. Ch. 1998); *see also Louisiana Mun. Police Employees Ret. Sys. v. Morgan Stanley & Co. Inc.*, 2011 WL 773316, at *9 (Del. Ch.) ("The Skadden Report … [is] part of the body of information on which … the Audit Committee, and the Board relied in evaluating and responding to the Litigation Demand. LAMPERS is therefore entitled to those materials.") (cleaned up); *Andersen v. Mattel, Inc.*, 2017 WL 218913, at *4 n.31 (Del. Ch.) ("Plaintiff could have obtained the [demand-review committee's] report through a Section 220 demand[.]").

[215] *AmerisourceBergen*, 2020 WL 132752, at *28 ("Category (g) addresses a decision to task the Governance Committee with preparing a report on the oversight risks associated with opioid distribution. Category (h) seeks books and records supplied to the Governance Committee in connection with that report. The plaintiffs are entitled to these categories of books and records. … Any reports that the Governance Committee prepared … will show the extent to which AmerisourceBergen's directors and senior management knew about and addressed mismanagement or unlawful activity."); *Rock Solid Gelt Ltd. v. SmartPill Corp.*, 2012 WL 4841602, at *6 (Del. Ch.) ("Rock Solid has stated that its purpose is to investigate the independence of the Special Committee that approved the Series B financing and the conversion of preferred stock to common stock. Under *Grimes*, a plaintiff stating such a purpose is entitled to receive copies of the special committee report[.]") (cleaned up).

2. Rhode Island Is Entitled To Email Communications

When "a [stockholder] reasonably identifies the documents it needs and provides a basis for the court to infer that those documents likely exist in the form of electronic mail, the respondent corporation cannot insist on a production order that excludes emails[.]"[216] Emails and text messages should be produced if they are needed to "provide otherwise unavailable information about and insight into [fiduciaries'] discussions and negotiations," including "what [those fiduciaries] knew and when[.]"[217] In the Prior 220 Action, the Court ordered the production of electronic communications because the plaintiffs "presented evidence that Board members were not saving their communications regarding data privacy issues for the boardroom."[218]

So too here. As demonstrated by the privilege log entries identified in Appendix A,[219] Board members did not save their communications about negotiations with the FTC for the boardroom. There are hundreds of email and text message exchanges about that subject. And those communications will provide

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216 *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 756 (Del. 2019); *see also*

217 *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 792 (Del. Ch. 2016), *abrogated, on unrelated grounds, by Tiger v. Boast Apparel, Inc.*, 214 A.3d 933 (Del. 2019).

218 *Facebook 220*, 2019 WL 2320842, at *18.

219 The full log is attached as JX-001.

otherwise unavailable insight into what Board members were told, what they knew, and when.

The documents produced to date are simply inadequate for that purpose.

The first category of documents that Facebook has provided—*i.e.*, the documents produced to the other 220 plaintiffs pursuant to the Court's order in the Prior 220 Action—contain only glancing references to Facebook's negotiations with the FTC. That is likely because the Court declined to order Facebook to give the prior 220 plaintiffs privileged documents or documents related to negotiations with the FTC as "those documents [were] far removed" from the *Caremark* claims that those "Plaintiffs [sought] to investigate[.]"[220] Here, of course, such documents are at the core of the entire fairness claim that Rhode Island seeks to investigate.

The documents in the second and third category—redacted Board [redacted]—are more helpful but tell only half the story. They provide the basic outlines of what happened in the negotiations with the FTC. But to evaluate any potential breach of fiduciary duty claim—including the overall fairness of the Settlement and fiduciaries' potential affirmative defenses based on 8 *Del. C.* § 141(e) and/or advice-of-counsel—Rhode Island must investigate and understand what

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[220] *Facebook 220*, 2019 WL 2320842, at *19; *see also id.* at *18 n.184 ("Plaintiffs have not met their heavy burden under *Garner* because, on this record, they have not demonstrated that the privileged information they seek is both necessary to prosecute the action and unavailable from other sources.") (cleaned up).

Board members were told about the strength of the FTC's potential claims against both the Company and Mr. Zuckerberg and the likely results if those claims were litigated. Those questions are not answered by the documents produced to date. They can, however, be answered by a production of the Disputed Documents.

3. Rhode Island Is Entitled to Privileged Or Work Product Documents

Rhode Island has also shown "good cause" under *Garner*—and, with respect to work product, Rule 26(b)(3)[221]—to obtain privileged documents.[222] Delaware courts have identified three *Garner* factors as having "particular significance."[223] They are: "(1) the colorability of the claim; (2) the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; and (3) the apparent necessity or desirability of shareholders having the information and availability of it from other sources."[224]

Each factor supports Rhode Island.

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221 *Garner* does not apply to work product but the *Garner* factors "overlap with the required showing under the Rule 26(b)(3) work-product doctrine." *Wal-Mart*, 95 A.3d at 1280–81.

222 *Id.* at 1277-78 (quoting *Garner v. Wolfinbarger*, 430 F.2d 1093, 1104 (5th Cir. 1970)).

223 *Salberg v. Genworth Fin., Inc.*, 2017 WL 3499807, at *5 (Del. Ch.) (quoting *In re Fuqua Indus., Inc.*, 2002 WL 991666, at *4 (Del. Ch.)).

224 *Id*.

"In the context of [a] Section 220 action, … the 'colorability'" factor must be assessed under the credible basis standard.[225] Here, Rhode Island's claim is colorable because, for all the reasons set forth above, Rhode Island has a credible basis for its assertion that Facebook's settlement with the FTC was subject to entire fairness and reflects an unfair process and price.

Rhode Island satisfies the second significant *Garner* factor by identifying specific documents related to the Settlement: [redacted], unredacted Board/[redacted] and the privileged communications that Facebook described as [redacted].[226] The requests are tailored to Rhode Island's allegations, and the records sought "fall within a limited number of documents" that will not be "overly burdensome" to Facebook.[227] The requests are also narrowly tailored insofar as they seek only "Board-level documents (and communications)."[228]

Finally, the third significant *Garner* factor is satisfied because the documents in question are not available from other sources. By their nature, communications

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225 *Genworth*, 2017 WL 3499807, at *5.

226 *See* Appendix A. To the extent there are other privileged communications about [redacted] that are not on the existing log, those documents should also be produced but Rhode Island can hardly be faulted for failing to identify them.

227 *de Vries v. Diamante Del Mar, LLC*, 2015 WL 3534073, at *8 (Del. Ch.).

228 *Compare with Facebook 220*, 2019 WL 2320842, at *19.

about settlement negotiations are almost guaranteed to be privileged. These documents are necessary and essential to Rhode Island's purpose because they "address[] the crux of the shareholder's purpose and [] the essential information the document[s] contain[] is unavailable from any other source."[229] In other words, it is likely that the privileged documents are the only documents that can shed light on the process used to reach the Settlement, making them necessary to Rhode Island.[230]

In short, where, as here, the plaintiff has a credible basis to investigate a process that was necessarily lawyer-driven, courts consistently order the production of privileged communications. In *Wal-Mart*, the Supreme Court affirmed the Court of Chancery's order requiring the production of privileged communications where "there [was] a colorable basis that part of the wrongdoing was in the way [an internal] investigation itself was conducted," and there "wasn't a way to do it without

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[229] *de Vries*, 2015 WL 3534073, at *4 (granting stockholder plaintiff's motion to compel privileged, post-settlement documents under *Garner* where the documents "in fact [might have been] the only records that address[ed] the issue of what occurred after the settlement . . .").

[230] *Wal-Mart*, 95 A.3d at 1278 ("Of particular import is the fact that the documents sought are unavailable from any other source while at the same time their production is integral to the plaintiff's ability to assess [its claims]") (quoting *Grimes v. DSC Commc'ns Corp.*, 724 A.2d 561, 569 (Del. Ch. 1998).

outside counsel."[231] There, as here, it was "very difficult to find [the necessary information] by other means."[232]

In *Saito v. McKesson HBOC, Inc.*, the Court ordered the production of privileged communications because "Plaintiff's purpose … [was] to determine what the board knew when approving the merger. The legal advice given to the board in conjunction with the merger is relevant and necessary in determining what information the board relied upon. This information, considered by the board before the merger, is not obtainable elsewhere."[233] The same is true here. Rhode Island seeks to understand what the Board knew when approving the Settlement. The legal advice given to the Board in connection with the Settlement is relevant and necessary to that purpose and not obtainable elsewhere.

Finally, the other less significant *Garner* factors[234] also weigh in favor of production:

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231 *Wal-Mart*, 95 A.3d at 1279.

232 *Id.*

233 2002 WL 31657622, at *13 (Del. Ch.).

234 The complete list of *Garner* factors includes "[1] the number of shareholders and the percentage of stock they represent; [2] the bona fides of the shareholders; [3] the nature of the shareholders' claim and whether it is obviously colorable; [4] the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; [5] whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; [6] whether the communication related to past or to prospective actions; [7] whether the communication is of advice concerning the

- Rhode Island's holdings may be small relative to the size of the Company itself, but "this Court historically has given the least weight to the percentage of a stockholder's ownership, reasoning that the 'ownership factor' only will come into play when no other factor supports good cause.[235]

- As a state pension fund, Rhode Island easily satisfies the "bona fides of the shareholder" factor.[236]

- "Although the wrongful conduct alleged … likely was not criminal, [Rhode Island] do[es] contend that [the Board] acted in a manner inconsistent with [its] fiduciary obligations."[237]

- The communications relate only to past actions, not prospective actions.

- The communications do not concern this litigation nor any pending or threatened litigation involving Rhode Island.

- The communications will not expose trade secrets.

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litigation itself; [8] the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; [and 9] the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons." *Fuqua*, 2002 WL 991666, at *3 (internal quotation omitted).

235 *de Vries*, 2015 WL 3534073, at *7.

236 *Wal-Mart*, 95 A.3d at 1280 ("IBEW is a legitimate stockholder as a pension fund.").

237 *de Vries*, 2015 WL 3534073, at *8. Indeed, *Garner* itself was a class action suit to recover the purchase price paid for the fraudulent issuance of stock, among other things. 430 F.2d 1093.

CONCLUSION

The Court should order the production of the Disputed Documents.

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