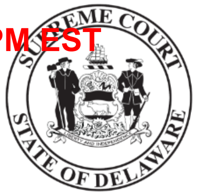
EFiled: Jan 28 2021 04:55PM EST
Filing ID 66292728
Case Number 404,2020



IN THE SUPREME COURT OF THE STATE OF DELAWARE

UNITED FOOD AND COMMERCIAL WORKERS UNION AND PARTICIPATING FOOD INDUSTRY EMPLOYERS TRI-STATE PENSION FUND, Plaintiff Below, Appellant, v. MARK ZUCKERBERG, MARC ANDREESSEN, PETER THIEL, REED HASTINGS, ERSKINE B. BOWLES, and SUSAN D. DESMOND-HELLMANN, Defendants Below, Appellees, - and - FACEBOOK, INC., Nominal Defendant Below, Appellee	No. 404, 2020 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2018-0671-JTL

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NATURE OF PROCEEDINGS

In *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), this Court established the now familiar two-part test for evaluating demand futility allegations in a stockholder derivative action challenging a corporate transaction. To survive a motion to dismiss under Del. Ch. Ct. R. 23.1 ("Rule 23.1"), *Aronson* requires plaintiffs to plead particularized facts that create a reasonable doubt that "(1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." 473 A.2d at 814.

But in its October 26, 2020 Opinion,[1] the Court held that *Aronson* was no longer "up to the task" and declined to apply it, even though it is controlling Delaware precedent. Op. at 42-43. In its place, the Court fashioned a *new* demand futility test eliminating the second prong of *Aronson*, focusing instead on whether the directors faced a "substantial likelihood of liability" for approving the challenged transaction. *Id.* Thus, the traditional inquiry whether the challenged transaction "was otherwise the product of a valid exercise of business judgment" was erased from the analysis. The Opinion upends decades of Delaware precedent and would significantly weaken the accountability of corporate fiduciaries. This Court should reverse.

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[1] The Court's October 26, 2020 Opinion ("Opinion" or "Op.") is attached hereto as Exhibit A. The Court's October 26, 2020 Order is attached hereto as Exhibit B.

This matter concerns a share reclassification approved by the Facebook, Inc. Board of Directors in 2016 whereby Facebook would create a new class of capital stock to allow Mark Zuckerberg, its founder and controlling stockholder, to sell most of his Facebook stock while retaining control of Facebook. The proposed transaction was negotiated between Zuckerberg and a Special Committee of the Board, but far from zealously representing Facebook's interests and driving a hard bargain, the Special Committee was corrupted and singularly focused on meeting Zuckerberg's demands. After a deeply flawed process, the Special Committee approved (and the Board rubber-stamped) the reclassification even though the terms were manifestly unfair and one-sided. Zuckerberg's voting control ensured a majority when the Board put the reclassification to a shareholder vote, but the public stockholders rejected it by a 3 to 1 margin.

After the reclassification was challenged by stockholders in class action lawsuits filed in the Court of Chancery in 2016, it was scrapped on the eve of trial. The abandonment of the reclassification before it could be tested by a neutral fact-finder confirmed that it was indefensible on the merits and served no legitimate business purpose. Facebook stated at the time that "withdrawing the reclassification was in the best interests of Facebook and its shareholders," a remarkable admission for a board-approved transaction of such magnitude.

In this shareholder derivative action, Plaintiff-Appellant ("Plaintiff") asserts claims against Zuckerberg and Facebook's directors for breach of fiduciary duty for approving the reclassification, and seeks to recover $21.8 million that Facebook expended pursuing the reclassification and defending it, plus $68.7 million it paid to the class action plaintiffs as a fee award, among other damages flowing from the scrapped transaction.

As alleged in the Complaint,[2] blatant governance failures permeated the Special Committee process. This was exemplified by the conduct of director Marc Andreesen, a Special Committee member and long-time Zuckerberg friend and confidant, who shared information with Zuckerberg about the Special Committee's confidential deliberative processes and even coached him by text message during telephonic Board meetings in what the Court described as "facially dubious back-channel communications." ¶51. This flawed process produced an equally dubious outcome. Facebook green-lighted Zuckerberg's ability to sell his stock and retain his voting control while giving up virtually nothing in return.

Plaintiff's primary argument below was that demand on the nine-member Board to bring the asserted claims was excused based on the second prong of *Aronson*. The second prong requires an inquiry into "the substantive nature of the

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[2] Citations in the form "¶_" refer to Plaintiff's Verified Amended Shareholder Derivative Complaint, filed February 28, 2019 (the "Complaint"). *See* Appendix A14-66.

challenged transaction and the board's approval thereof." *Aronson*, 473 A.2d at 814. Based on established Delaware precedent, Plaintiff alleged that the *substance* of disputed transaction was unfair to stockholders and the company, and that the Board's *approval* of the transaction was so devoid of process as to raise a reasonable doubt regarding business judgment protection. Because the reclassification was a conflicted controlling stockholder transaction, Plaintiff asserted that it was subject to entire fairness review, requiring defendants to show fair dealing and fair price at trial. The allegations plainly raised a reasonable doubt that the Board could meet the heightened standard of review.

In conducting the analysis, the Court made several "pro-plaintiff assumptions" including that: (a) the reclassification would, indeed, be subject to entire fairness review at trial because the reclassification did not follow the framework for controlling stockholder transactions in *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014); (b) Andreessen's behavior "prevented the [Special] Committee from functioning effectively" and the burden would remain with the defendants to prove that the reclassification was entirely fair at trial; (c) there was a "substantial likelihood" that the Court would conclude after trial that the transaction was *not* entirely fair; and (d) Zuckerberg and Andreessen each faced a substantial risk of liability for non-exculpated claims. Op. at 48-49. Thus, the Court identified

an unfair process, an unfair transaction, and actionable claims for breach of fiduciary duty against the controlling stockholder and another director.

A straightforward application of *Aronson*'s second prong to these facts would result in demand excusal. But the Court dismissed the Complaint for failure to plead demand futility, citing "Delaware's evolving jurisprudence." Op. at 36. The Court fashioned a new demand futility test, discarding altogether the second prong's focus on the substance and procedure of the challenged transaction. Instead, it held that, unless a director lacks independence or is interested in the subject matter of the challenged transaction, demand is excused only if the director's approval creates a "substantial likelihood of liability" for a non-exculpated claim for breach of fiduciary duty. According to the Court, while Plaintiff's allegations against Zuckerberg and Andreessen would suffice, there were insufficient allegations of bad faith or disloyal conduct against any of the *other* directors, and a substantial likelihood of liability against a board majority therefore did not exist. Op. at 48-63.

The Court's repudiation of *Aronson* was error. *Aronson* is controlling Delaware Supreme Court authority establishing the pleading requirements for demand futility in a derivative action challenging a corporate transaction, and the Court was bound to follow it. Contrary to the Court's analysis, the second prong remains vital to Delaware demand futility law. It extends to situations where, as here, breaches of the duty of care by the board have actively facilitated non-exculpable

bad faith and/or disloyal acts, and a reasonable doubt therefore exists as to the directors' willingness and ability to pursue the asserted claims. This Court should restore *Aronson*'s decisional rubric.

If allowed to stand, the erasure of *Aronson*'s second prong would destroy important safeguards against overreaching and abuse, particularly in transactions shaped and orchestrated by controlling stockholders, as the result here aptly illustrates. The Court's decision strongly suggests it would strike down the reclassification as unfair and find Zuckerberg and Andreessen liable at trial. But the brazen conduct of these defendants was shielded from meaningful judicial review by premature dismissal on demand futility grounds. Affirmance would undoubtedly embolden faithless behavior, weakening Delaware law and policy. Furthermore, allowing this matter to proceed would not unduly expand the universe of shareholder derivative litigation, as this case implicates the inherently limited subset of controlling stockholder transactions subject to entire fairness review.

The Court likewise erred in rejecting Plaintiff's allegations that a board majority lacked independence from Zuckerberg. With Zuckerberg and Andreessen already disqualified, and a concession that Chief Operating Officer and director Sheryl Sandberg was not independent, Plaintiff needed to raise a reasonable doubt regarding the independence of just *two* additional directors to establish demand futility. The Court signaled that director Susan Desmond-Hellmann lacked

independence from Zuckerberg, but declined to decide the issue because, according to the Court, the allegations were insufficient as to at least one additional director.

The Court's independence analysis was flawed. First, it reasoned that the same Special Committee members (Desmond-Hellmann and Erskine D. Bowles) who accommodated Zuckerberg in the committee's negotiations and caved to his demands were nevertheless capable of independently investigating him for breach of fiduciary duty. This reasoning, if affirmed, would render the independence inquiry virtually meaningless. Second, apart from the lack of independence displayed by the Special Committee members, Plaintiff's allegations raise a reasonable doubt regarding the independence of Desmond-Hellmann, Bowles, Peter Thiel and Reed Hastings, based on their personal and professional ties to Zuckerberg. In sum, the lack of an independent majority provides a separate basis for reversal.

SUMMARY OF ARGUMENT

1. The Court failed to apply controlling Delaware Supreme Court authority and improperly rewrote the test for demand futility. By discarding *Aronson*'s second prong in favor of a test requiring allegations that directors face a substantial likelihood of liability for approving a challenged transaction, the Court erased important protections provided by Delaware law when shareholders challenge transactions in derivative litigation, particularly controlling stockholder transactions subject to the entire farness standard. The Court erred by holding that demand was not excused under *Aronson*'s second prong despite particularized allegations establishing breaches of the fiduciary duty of care by the Board and non-exculpated conduct by Zuckerberg and Andreessen.

2. The Court failed to properly apply Delaware law on director independence to the operative Board. The Court erred by holding that a majority of the Board was independent of Zuckerberg, Facebook's controlling stockholder. By approving the reclassification – a transaction the Court stated would likely not be defensible at trial – under *Aronson* a majority of the directors have demonstrated their lack independence from Zuckerberg. Additionally, Plaintiff alleges with particularity that at least two outside directors lacked independence from Zuckerberg, which is all that was required to disqualify a board majority.

STATEMENT OF FACTS

A. Zuckerberg Decides to Sell Facebook Stock to Fund His Philanthropy.

Facebook is a publicly-traded Delaware corporation based in Menlo Park, California. Facebook is a social networking platform. Since its founding, Facebook has become one of the world's most valuable companies.

Facebook's success has made Zuckerberg a multibillionaire, with his stock valued at $70 billion as of September 2018. ¶18. Since before its 2012 initial public offering, Facebook has maintained a dual-class capital structure that enabled Zuckerberg to preserve outsized voting control compared to his economic interest. *Id.* Zuckerberg has held a majority voting interest in Facebook throughout, allowing him to control the stockholder vote, including the election of directors. *Id.*

Facebook's IPO created two classes of common stock: (1) publicly-traded Class A stock with one vote per share; and (2) Class B stock which was primarily allocated to Zuckerberg and a select few others, with ten votes per share. ¶19. Except for these differences on voting rights and conversion issues, the rights of Class A and Class B stockholders are identical. *Id.*

In December 2010, Zuckerberg joined an elite group of billionaires to take the Giving Pledge—a movement championed by Bill Gates and Warren Buffett—who challenged wealthy business leaders to pledge to donate a majority of their wealth during their lifetime or upon their death. ¶21.

However, Facebook's legal team cautioned Zuckerberg that selling more than approximately $3 to $4 billion of his stock could jeopardize his voting control. ¶22. At the time, Zuckerberg controlled over 60% of Facebook's voting power primarily through his massive Class B holdings, while holding fewer than 17% of Facebook's total outstanding shares. ¶ 3. By significantly ramping up his philanthropy (a contemplated $2 to $3 billion annually), he might cede control to the Class A stockholders—an unacceptable result. ¶¶3, 22.

Zuckerberg was advised that Facebook could follow the "Google playbook" – a structure implemented at Google, Inc. This would require issuing a new class of non-voting stock which Zuckerberg could sell without significantly diminishing his voting power. *Id.* Facebook's legal team noted that this approach would likely require review by a special committee of independent directors and Board approval, and that litigation involving Google's share reclassification resulted in a $522 million settlement. *Id.* Zuckerberg instructed Facebook's legal team to "start figuring out how to make this happen." *Id.*

At an August 20, 2015 Board meeting, Zuckerberg's counsel formally proposed that Facebook issue a new non-voting share class. ¶ 27. The purpose was clear: it was intended to preserve Zuckerberg's majority control when the only threat to such control was his *own* promise to liquidate stock for personal reasons. *Id.* The intended effect would skew control further in Zuckerberg's favor, re-inflating the

voting weight of his Class B share holdings and allowing him to sell massive amounts of stock for philanthropic goals. ¶4.

B. The Special Committee Is Appointed.

On August 22, 2015, Facebook established the Special Committee consisting of directors Andreessen, Bowles, and Desmond-Hellmann (Chair) to negotiate a proposal with Zuckerberg to change Facebook's capital or voting structure. ¶¶16, 28. It was also charged with evaluating potential alternatives. ¶28. While the Special Committee was authorized to retain advisors, it was Facebook management—not the Special Committee—that selected the committee's lawyers, Wachtell Lipton Rosen & Katz. *Id.* Wachtell was retained without first meeting the Special Committee. *Id.* Though it was directed to prepare a charter stating its processes and duties, the Special Committee never did so. *Id.*

The Board selected conflicted Special Committee members with close ties to Zuckerberg. Andreessen is a close friend of Zuckerberg's and is well-known for his support of founder-controlled companies. ¶29. Desmond-Hellmann's history of cultivating Zuckerberg's philanthropy was also no secret. ¶¶30-31. Frequent recipients of Zuckerberg's charitable giving included, at relevant times, the University of California at San Francisco ("UCSF") (where Desmond-Hellmann served as Chancellor from 2009-2014 and still remained affiliated as a professor on leave, and where Zuckerberg's wife, Priscilla Chan, trained as a medical school

resident) and the Bill and Melinda Gates Foundation (the "Gates Foundation") (where Desmond-Hellmann was the Chief Executive Officer). *Id.*

The structurally flawed Special Committee embarked on a negotiating exercise with a preordained outcome.

C. The Special Committee Was Totally Passive from the Beginning.

Before ever meeting its client, the Special Committee, Wachtell called Zuckerberg's counsel, Simpson Thacher & Bartlett, to discuss potential share reclassification models. ¶33. Simpson rejected as non-starters deal terms from the "Google playbook," such as "stapling" provisions that would have required meaningful consideration from Zuckerberg, like the requirement to sell a share of Class B stock each time he sold a share of Class C stock, or a "true-up" payment to Facebook's Class A stockholders to compensate them. *Id.*

When Wachtell first "met" the Special Committee in a September 23, 2015 telephone call, key contours of the reclassification were already taking shape, and the Special Committee was already signaling its role as, at most, advisory. ¶33. When the Special Committee hired its financial advisor Evercore Group LLC on October 12, 2015—a firm founded by Special Committee member Bowles's close friend—the reclassification was well underway, with Evercore observing that it had been hired "in the second inning." ¶34.

On October 23, 2015, Wachtell proposed to Simpson a list of eight demands of Zuckerberg, but Simpson immediately rejected the three most substantive ones: (1) conditioning the reclassification on the approval of Facebook's Class A stockholders (which Zuckerberg could not control); (2) inclusion of stapling or transfer restrictions; and (3) a "true up" financial payment from Zuckerberg. ¶35. The only concessions Zuckerberg would consider were: (1) "sunset" provisions; (2) "equal treatment" provisions; (3) "non-compete" provisions; (4) "acquisition" protections; and (5) an independent nominating committee. *Id.*

Ultimately, the Special Committee's proposal to Zuckerberg did not demand money or a differential distribution ratio for the Class A stockholders. ¶38. Additionally, it did not demand that the Class A stockholders separately approve the reclassification plan. ¶¶36, 38. When the Special Committee learned in November 2015 that Facebook's Class A stockholders' approval of the Reclassification Plan was "unlikely to be obtained," it did not ask for any explanation as to why. ¶37. Nor did the Special Committee require that Zuckerberg's stock sales actually be tied to philanthropic projects. *Id.* Lastly, the Special Committee did not ask for restrictions on Zuckerberg's ability to sell as much stock as he wanted, for whatever purpose, on whatever timetable. ¶38.

Throughout the process, the Special Committee chose not to stand in Zuckerberg's way, wrongly believing that it lacked the ability to reject his demands

because he would have “figured out [another] way to be philanthropic while retaining control of the company.” ¶53.

D. Zuckerberg Treats the Reclassification Plan as a *Fait Accompli.*

Meanwhile, although the Special Committee had just begun work, behind the scenes, Zuckerberg was operating as though Board approval was academic. ¶39. At the time, Zuckerberg told Sandberg that there were still “lots of details to work through, but at this point we’re much more in the mode of making decisions and locking things down rather than broad consideration.” *Id.*

On November 9, 2015, Zuckerberg publicly reaffirmed his Giving Pledge. ¶40. The next day, Zuckerberg circulated a draft announcement within Facebook proclaiming his “new model of philanthropy,” upping his earlier pledge. *Id.* Zuckerberg solicited edits from Facebook personnel, including from Desmond-Hellmann “as a friend”— even as she was supposed to be negotiating against him. *Id.* Zuckerberg also told Bowles and Andreessen before going public. *Id.*

None of the Special Committee members suggested that Zuckerberg await the negotiation process. ¶40. Instead, Andreessen and Bowles privately heaped praise on him. *Id.* Zuckerberg also gave Buffett and Gates notice about his plan. *Id.* Melinda Gates forwarded her email from Zuckerberg to Desmond-Hellmann, adding a “☺.” *Id.* Zuckerberg also informed the Board that he was about to announce his “commitment to give 99% of [his and his wife’s] FB shares during our lives with a

focus on improving the world for the next generation." *Id.*

A day after Zuckerberg's daughter was born on November 30, 2015, he posted on Facebook his intention to give away 99% of his wealth, while "remain[ing] Facebook's CEO for many, many years to come." ¶41. Absent was any mention that Zuckerberg's plans hinged on the reclassification that was still being negotiated, and subject to approval by the Special Committee and the Board. *Id.*

The December 1, 2015 public announcement gave the Special Committee new negotiating leverage to extract consideration from Zuckerberg. ¶42. Yet, the Special Committee again failed to demand a monetary payment, nor did it insist that Zuckerberg revisit the previously-rejected deal terms. *Id.* By January 27, 2016, the substantive terms of the Reclassification Plan were in place and Wachtell had circulated a draft Special Committee report. ¶44.

E. The Special Committee Prioritizes Zuckerberg's Interests.

Between its first meeting in November 2015 and its finalization of the Reclassification Plan in April 2016, the Special Committee primarily focused on negotiating the terms of the "sunset" provisions. ¶45. Rather than demand terms that forced Zuckerberg to remain engaged as Facebook's leader, the Special Committee acquiesced to provisions that permitted him to take extended absences. *Id.*

The final slate of governance terms vested lifetime voting control in Zuckerberg even if he took years off to work for the government, or if his long-term

attention inevitably drifted toward Chan-Zuckerberg Initiative, LLC ("CZI"), where the bulk of his wealth would eventually reside. *Id.*

The Special Committee remained critically uninformed regarding: (1) how the Reclassification Plan would impact Facebook's stock price in the short term; (2) how the Class C shares would trade relative to the Class A shares; (3) how the Reclassification Plan differed from Google's reclassification (which resulted in a $522 million settlement); (4) the value Zuckerberg would receive by extending his control (and the value public stockholders would lose); (5) whether Zuckerberg's "gives" carried any value for Facebook or the public stockholders; and (6) the likely economic effects on Facebook of Zuckerberg's philanthropy. ¶46.

Additionally, the integrity of the negotiating process was incurably compromised. ¶47. Andreessen leaked to Zuckerberg pivotal details about what the Special Committee was focused on, what questions committee members would ask Zuckerberg, and how each committee member felt about key issues. *Id.* For instance, Zuckerberg was scheduled to talk to Desmond-Hellmann on March 11, 2016 about the Reclassification Plan, so Zuckerberg texted Andreessen the day before to ask, "Do you have any context before I talk to Sue tomorrow." *Id.*

Andreessen also reassured Zuckerberg that, in the end, he would get whatever he wanted. ¶48. An hour before a February 11, 2016 Board meeting to discuss the reclassification, Andreessen texted Zuckerberg that, "Between us – re special board

session. 1 new share class will happen. 2 everyone loves CZI." *Id.* Andreessen reiterated that the Special Committee "love[d] the intent." *Id.* Andreessen conceded to Zuckerberg that the Special Committee was working "around the edges of the big things you want" and would yield to Zuckerberg's desires. *Id.*

Andreessen also confirmed to Zuckerberg that the Special Committee was working both to "protect the company *and* *you personally*" and that "[a]ll our feedback is entirely to protect *you* and the company." ¶48 [emphasis supplied]. Andreessen acknowledged that the Special Committee would never consider in earnest whether to ultimately reject the share reclassification. *Id.* Rather, the process was a formality despite several Facebook "senior staff think[ing] this is a big mistake." *Id.* Andreessen told Zuckerberg that Facebook staff "wish you would stop but don't want to challenge you." *Id.*

Andreessen even coached Zuckerberg during calls with the Special Committee. ¶49. On March 5, 2016, Zuckerberg was pushing for an eight-year leave on a teleconference with the Special Committee. *Id.* During the meeting, Andreessen gave Zuckerberg live updates, both negative ("This line of argument is not helping ☺"; "The committee wants to do this. You don't need to question that") and positive ("NOW WE'RE COOKING WITH GAS"). *Id.* When later confronted with these texts, Desmond-Hellmann agreed that it appeared Andreessen was "coaching" Zuckerberg. *Id.* Andreessen later texted Zuckerberg: "The cat's in the

bag and the bag's in the river." *Id.* Zuckerberg replied, "Does that mean the cat's dead?" and Andreessen answered, "Mission accomplished ☺." *Id.*

Andreessen, Desmond-Hellmann, and Bowles bypassed regular deliberative processes—the hallmark of any independent committee—opting to communicate with Zuckerberg directly. ¶50. The Court previously characterized the text messages between Andreessen and Zuckerberg as "facially dubious back-channel communications." ¶51.

F. The Special Committee Obtained Virtually Nothing from Zuckerberg.

Given its flawed composition and lack of motivation, the Special Committee caved and never seriously considered alternatives. ¶53. Rather, it merely responded to Zuckerberg's request to create Class C shares and conferred billions of dollars of value on Zuckerberg. Indeed, Evercore estimated that the "Value of Control" of Facebook was equal to "3-4%" of Facebook's market capitalization (between $6.5-$8.7 billion when Facebook's stock traded at roughly $100 per share; and $14.3-$19 billion in September 2017 when the reclassification was dropped). *Id.*

Under its terms, the reclassification distributed two Class C shares for each outstanding share of Class A and Class B stock. ¶56. The plan also included corporate governance changes reflected in a proposed amended charter and Founder Agreement which Zuckerberg and others would have executed. *Id.*

One such governance term concerned "sunset" provisions which were aimed at reducing the likelihood that Zuckerberg would leave Facebook. ¶57. Yet, there was never any reason to believe that Zuckerberg intended to step away from Facebook, rendering this provision worthless. *Id.* Indeed, his December 1, 2015 open letter following his daughter's birth claimed he planned on "remain[ing] Facebook's CEO for many, many years to come." *Id.*

Another illusory "sunset" provision concerned Zuckerberg's voluntary resignation, yet he could defeat sunsetting if he remained a loosely-defined "Approved Executive Officer." ¶58. As long as he maintained a small portion of his Facebook shares, he could take an unlimited government service leave. *Id.* According to Andreessen, Bowles was "worried" that this concession would be "the straw that breaks the camel's back on the optics of good governance" and "the thing people will point to on announcement and say 'what the fuck are you guys doing agreeing to this.'" *Id.* Thus, even the Special Committee members internally acknowledged that the consideration obtained was meaningless. *Id.*

On April 5, 2016, the Special Committee held a meeting, also attended by Zuckerberg and Thiel. ¶54. There, a draft of the Special Committee's report was discussed. *Id.* On April 13, 2016, the Special Committee voted to recommend the Reclassification Plan, and on April 14, 2016, the Board approved it. *Id.* Andreessen, Thiel, Hastings, Bowles, and Desmond-Hellmann voted in favor, while Zuckerberg

and Sandberg abstained. ¶¶12-16, 55.

G. The Reclassification Plan's Disastrous Fallout.

Facebook waited two weeks—until April 27, 2016—to reveal the Reclassification Plan so that the news would coincide with the company's best-ever quarterly earnings announcement, thereby muting the expected negative reaction. ¶59. At the time, Evercore project leader Roger Altman emailed Desmond-Hellmann, saying, "Anytime FB announces earnings like that, *no one will care about an equity recapitalization*." [emphasis supplied]. *Id.*

Class action lawsuits challenging the Reclassification Plan were filed in the Court of Chancery beginning on April 29, 2016 (the "Class Action"). ¶61. On June 20, 2016, Facebook held its annual stockholders meeting, where the Reclassification Plan was nominally subject to consideration by the stockholders. ¶¶7, 60. By virtue of Zuckerberg's majority vote, the proposal passed. ¶60. Not counting Zuckerberg's votes, however, the tally was approximately 453 million (for) to 1.5 billion (against), reflecting that over 75% of the non-Zuckerberg votes rejected the plan. *Id.*

With the specter of trial and certain defeat looming in the Class Action on September 27, 2017, the Board abandoned the plan on September 21, 2017. ¶¶8, 61. By doing so, Facebook tacitly admitted that the Reclassification Plan was indefensible, fundamentally unfair to the Class A stockholders, and lacked any legitimate business purpose. *Id.* Indeed, at the time, Facebook's spokeswoman said

the Board had "determined that withdrawing the reclassification was in the best interests of Facebook and its shareholders."

H. Zuckerberg's Subsequent Stock Sales Prove the Reclassification was Unnecessary.

In a September 22, 2017 Form 8-K filing with the U.S. Securities and Exchange Commission, Facebook announced Zuckerberg's continued intention to sell stock. ¶62. In an accompanying Facebook post, Zuckerberg explained that he "knew [the Reclassification Plan] was going to be complicated and it wasn't a perfect solution." *Id.* He continued, "Today I think we have a better one," whereby Zuckerberg could "fully fund [his and Chan's] philanthropy and retain voting control of Facebook for 20 years or more." *Id.* Zuckerberg "want[ed] to be clear: this doesn't change Priscilla and my plans to give away 99% of our Facebook shares during our lives. In fact, we now plan to accelerate our work and sell more of those shares sooner." *Id.* This effectively acknowledged that the Reclassification Plan served no legitimate business purpose. ¶62. Confirming same, by January 3, 2019, Zuckerberg sold about 30.4 million shares worth approximately $5.6 billion.

I. Damages to Facebook.

Facebook spent at least $4.5 million on financial advisors and attorneys retained in connection with the Reclassification Plan and the Board's approval thereof. ¶¶25, 34. In defending the Reclassification Plan in the Class Action, Facebook spent approximately $21.8 million, including $17.1 million on attorneys'

fees. ¶63. Facebook also agreed to pay a $68.7 million fee award to plaintiffs' counsel in the Class Action. *Id.*

ARGUMENT

I. THE COURT ERRED BY FAILING TO APPLY *ARONSON*'S SECOND PRONG AND REWRITING CONTROLLING DELAWARE DEMAND FUTILITY LAW.

A. Question Presented.

Whether pre-suit demand is excused under *Aronson*'s second prong in a shareholder derivative action challenging a controlling stockholder transaction subject to entire fairness review where particularized allegations demonstrate that a board majority breached their fiduciary duties in approving the transaction and non-exculpated claims are stated against the controlling stockholder and another director. This issue was preserved for appeal (A97-104, A120-123, A126-127, A199-216, A228-229).

B. Scope of Review.

The Court's review of decisions under Rule 23.1 is *de novo*. *Brehm v. Eisner*, 746 A.2d 244, 253-54 (Del. 2000).

C. Merits of Argument.

This shareholder derivative action challenges a board decision, namely the Facebook Board's approval of the Reclassification Plan. Therefore, under well-settled principles, Plaintiff framed the demand futility issue below pursuant to the two-pronged *Aronson* test. But instead of applying *Aronson*, the Court conducted a survey of Delaware law and devised a new demand futility test – relief that no party

to the litigation sought. Under this proposed test (Op. at 43), for each subject director, the reviewing court must consider:

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

By its terms, this test eliminates *Aronson*'s central holding that demand futility is focused on the application of the business judgment rule to the substance and procedure of the disputed transaction. The Court's *sua sponte* departure from the bedrock law of *Aronson* was error and, if affirmed, would dramatically weaken Delaware law and lead to poor outcomes.

1. The Court Misapprehended *Aronson* and Its Proper Application.

In a shareholder derivative action challenging a transaction approved by the board, *Aronson* requires plaintiffs to plead particularized facts that create a reasonable doubt that "(1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." 473 A.2d at 814. "Hence, the Court of Chancery must make two inquiries, one into the independence and disinterestedness of the directors and the

other into the substantive nature of the challenged transaction and the board's approval thereof." *Id.* This Court has confirmed that the test is disjunctive - "if either prong is satisfied, demand is excused." *Brehm*, 746 A.2d at 253-54.

The Court in *Aronson* explained that in evaluating the first prong (director disinterest and independence), the court "reviews the factual allegations to decide whether they create a reasonable doubt, as a threshold matter, that the protections of the business judgment rule are available to the board." *Aronson*, 473 A.2d at 814. By its express terms, the first prong involves "threshold" issues concerning the transaction. Thus, for example, if a board majority lacks independence from a controlling shareholder or interested party, or has a personal stake in the outcome of the disputed transaction, demand is plainly excused and the inquiry ends.

The Court also explained that "the mere threat of personal liability for approving a questioned transaction, standing alone, is insufficient to challenge either the independence or disinterestedness of directors, although in rare cases a transaction may be so egregious on its face that board approval cannot meet the test of business judgment, and a substantial likelihood of director liability therefore exists." *Id.* at 815. Thus, in a facially egregious case, a director's "independence or disinterestedness" under *Aronson*'s first prong may be challenged without the need for further review of the underlying transaction. Whether a "substantial likelihood

of director liability" exists is therefore a factor limited to evaluating director "independence or disinterestedness" under *Aronson*'s first prong. *Id.*

But under *Aronson*'s second prong, the court must closely examine particularized allegations regarding the "substantive nature of the challenged transaction and the board's approval thereof." *Aronson*, 473 A.2d at 814. Pursuant to that analysis, pre-suit demand is excused when plaintiffs "create a reasonable doubt that the directors' action was entitled to the protections of the business judgment rule." *Id.* at 808. If a majority of the board breached any of their fiduciary duties (such as the duty of care) in approving the challenged transaction, their ability to consider whether to prosecute the corporation's claims arising from that same transaction is plainly in doubt, and demand is therefore excused.

As the contours of *Aronson*'s second prong make clear, the operative question at the demand futility stage is *not* a director's potential personal liability for approving a disputed transaction. As explained below, the cases correctly applying the second prong of *Aronson* demonstrate that, once the shareholder plaintiff successfully creates a reasonable doubt regarding whether the transaction satisfies the applicable standard of review, the reviewing court's inquiry *continues*. It then evaluates whether, in light of demand excusal, the allegations support a non-exculpated claim for relief against any defendant named in the case.

2. A Substantial Likelihood of Director Liability Is Not Required To Excuse Demand Under *Aronson*'s Second Prong.

The Court performed a lengthy survey of demand precedent in formulating its new test. According to the analysis, the enactment of 8 Del. Code §102(b)(7) ("Section 102(b)(7)") fundamentally altered what was required for demand to be excused under *Aronson*'s second prong. The Court characterized *Aronson*'s second prong as a "proxy" for whether directors face a substantial likelihood of liability for approving a challenged transaction. It then held that under current law, a director only faces a substantial likelihood of liability when a non-exculpated claim has been adequately pleaded. Op. at 33, citing *In re Cornerstone Therapeutics Inc. S'holder Litig.*, 115 A.3d 1173 (Del. 2015). "Exculpation dominates the analysis," the Court concluded. Op. at 35.

Cornerstone addressed the sufficiency of allegations required to state a claim against directors in a direct action and did not implicate demand futility. By relying on it, the Court improperly collapsed *Aronson*'s second prong into an inquiry of whether a particular director faces a substantial likelihood of liability for a non-exculpated claim, and is therefore "interested" in the litigation demand. However, as explained, director "interest" falls under the disjunctive first prong of *Aronson*, not the second. A faithful application of *Aronson* shows that a substantial

likelihood of liability is not required for demand to be excused under the second prong. In fact, such an imposition would fundamentally transform Delaware law.

This Court's decision in *Brehm* is instructive. There, the Court explained that a plaintiff establishes demand futility under *Aronson*'s second prong by alleging particularized facts creating reason to believe that the board breached its process-based duty of care. Thus, demand excusal does *not* depend on whether bad faith or disloyal conduct was alleged:

> Pre-suit demand will be excused in a derivative suit if the Court of Chancery in the first instance, and this Court in its de novo review, conclude that the particularized facts in the complaint create a reasonable doubt that the informational component of the directors' decision making process, *measured by concepts of gross negligence*, included consideration of all information reasonably available. [emphasis in original].
>
> *Brehm*, 746 A.2d at 259.

Proper application of the second prong requires an analysis under Rule 23.1 and a separate analysis under Del. Ch. Ct. R. 12(b)(6) ("Rule 12(b)(6)"). Chancellor Chandler correctly applied the test in *McPadden v. Sidhu*, 964 A.2d 1262 (Del. Ch. 2008). In that case, the nominal defendant sold a subsidiary to an officer for $3 million. Two years later, the officer resold the subsidiary to a third party for more than $25 million. The plaintiff sued the corporation's board for breach of fiduciary duty for selling the subsidiary at too low a price, and sued the officer for breach of fiduciary duty and unjust enrichment. 964 A.2d at 1264-68. Plaintiff alleged that

demand was excused under *Aronson*'s second prong because the board's approval of the transaction was not a valid exercise of business judgment.

In evaluating the allegations, Chancellor Chandler focused on the board's flawed sale process. The directors had tasked the officer, who the directors knew was interested in purchasing the subsidiary, with conducting the sale. 964 A.2d at 1271. The board did little to oversee the process and did not attempt to rectify the officer's "half-hearted" efforts to solicit bids. *Id.* at 1271-72. The sale price was at the lowest end of the valuation range, and thus the board should have been "alerted to carefully consider whether [the officer's] offer was high enough." *Id.* at 1272. According to the Court, the board's actions were properly "characterized as either recklessly indifferent or unreasonable" and grossly negligent. *Id.* at 1274-75.

Chancellor Chandler held that "because plaintiff has pleaded a duty of care violation with particularity sufficient to create a reasonable doubt that the transaction at issue was the product of a valid exercise of business judgment, demand is excused as futile." *Id.* at 1270-75. Although the Court dismissed the claims against the directors because their breaches of fiduciary duty were exculpated under Section 102(b)(7), the non-exculpated claims for bad faith against the officer proceeded to trial. Demand excusal thus did not depend on the potential liability of the directors, but on whether the subject transaction satisfied the applicable standard of review. This is what *Aronson* requires.

H&N Mgmt. Grp. v. Couch, 2017 Del. Ch. LEXIS 140 (Del. Ch. August 1, 2017) is another case in which demand was excused based on alleged duty of care violations by the reviewing board, followed by a Rule 12(b)(6) analysis, citing *McPadden*. There, the board of a real estate investment trust approved two disputed transactions, the renewal of a management agreement with an outside management entity, and an internalization agreement whereby the outside management entity was acquired. Plaintiffs asserted that the company overpaid in both, and alleged various flaws with the board's review and approval process.

For the management agreement renewal, the court observed that the responsible committee met only briefly, did not retain advisors, was conflicted, received information only from the self-interested manager, and purportedly relied on stale and incomplete information. Thus, "the Complaint alleges particularized facts sufficient to raise a reason to doubt that the board was adequately informed in its consideration" of the renewal. *Couch*, 2017 Del. Ch. LEXIS 140, at *12. With respect to the internalization, the board "allowed [a senior executive] to dominate their process, dictate the transaction structure, and direct the ultimate deal terms," which raised "a reason to doubt that the board was adequately informed" in approving it. *Id*. at *17. Thus, demand was excused under Rule 23.1 as to both transactions based on "potential breaches of the duty of care." *Id.* at *18.

Only *after* conducting a demand futility analysis based on the business judgment rule did the court go on to analyze whether any actionable claims had been stated, ultimately sustaining claims for gross negligence because the company at issue did not have a Section 102(b)(7) provision in its charter. That is the proper sequence to be followed. *See also In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 290 (Del. Ch. 2003) (demand was excused under second prong where allegations gave reason to doubt business judgment protection, and allegations were also sufficient to survive Rule 12(b)(6) motion to dismiss because conduct fell "outside the liability waiver" in the certificate of incorporation).

Indeed, the cited cases illustrate how the second prong is intended to function. When a plaintiff creates a reasonable doubt whether the subject transaction satisfies the standard of review, such as by alleging particularized duty of care violations by the board in approving the subject transaction, demand will be excused where the plaintiff *also* pleads non-exculpated conduct by one or more fiduciaries. In this way, stockholders are provided a remedy when fiduciary breaches facilitate non-exculpated misconduct. The second prong therefore remains an important and necessary component of Delaware law and its enforcement. As illustrated below, Plaintiff's allegations in this case fit this very paradigm.

Plaintiff recognizes that other Court of Chancery decisions have grafted onto *Aronson*'s second prong that a board majority must be at risk for a substantial

likelihood of liability for non-exculpated claims to excuse demand in a case challenging a board-approved transaction. *See Lenois v. Lawal*, 2017 Del. Ch. LEXIS 784, at **35-44 (Del. Ch. Nov. 17, 2017), cited at Op. at 29, 34, fn 11, 15 (surveying decisions requiring a substantial likelihood of director liability under the second prong and adopting them as the "weight of authority" after contrasting them with *McPadden*). However, decisions like *Lenois* run counter to the language and purpose of *Aronson* and have never been endorsed by this Court. By reversing, this Court can and should restore *Aronson*'s intended analysis.

3. Demand Is Excused Under *Aronson*'s Second Prong.

A proper application of *Aronson*'s second prong is straightforward in this case and compels demand excusal. Plaintiff argued below that the Reclassification Plan was subject to entire fairness review because it was a controlling stockholder transaction, and that it was not entirely fair. Based on the pleadings, the Court assumed as much in analyzing the claims. *See* Op. at 48-49.

Entire fairness means fair dealing and fair price. *Weinberger v. UOP*, 457 A.2d 701, 711 (Del. 1983). Fair dealing concerns "questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained." *Id.* Fair price "relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and

any other elements that affect the intrinsic or inherent value of a company's stock." *Id.* Defendants have the burden at trial to meet both requirements. *Id.* at 710.

Here, the Court assumed that there was a "substantial likelihood" that defendants could *not* show entire fairness at trial, signaling based on the allegations that it would find unfair dealing, unfair price, or both. Op. at 49. Where the complaint contains particularized allegations creating a reasonable doubt that the transaction satisfies entire fairness, demand is excused under *Aronson*'s second prong. *See Parfi Holding AB v. Mirror Image Internet, Inc.*, 794 A.2d 1211, 1231 n.47 (Del. Ch. 2001) ("The complaint pleads particularized facts that suggest that the entire fairness standard of review -- rather than the business judgment rule -- would apply to the Transactions and that the Transactions might not have been fair. As a result, the complaint satisfies the second prong of *Aronson*.").

This result is borne out by Plaintiff's allegations of: (1) unfair dealing, as exemplified by a hopelessly flawed Special Committee process, underscored by Andreessen's subversion of the committee's deliberations (¶¶28-55), and (2) unfair price, as demonstrated by a one-sided transaction that unjustly benefited Zuckerberg, provided little to no benefit to the company or its stockholders, and was eventually abandoned (¶¶56-63). These allegations more than suffice to establish that the Board's approval of the Reclassification Plan failed to satisfy the

standard of review and was, at the very least, grossly negligent, and not "otherwise the product of a valid exercise of business judgment." *Aronson*, 473 A.2d at 814.

In addition, the Court disqualified Zuckerberg and Andreessen from considering a demand based on allegations that non-exculpated claims were stated against them. As to Zuckerberg, "as the controlling stockholder of Facebook, he received a material personal benefit from the Reclassification, and he would face a substantial risk of liability on a claim challenging it. Zuckerberg would not be entitled to exculpation because (i) he stood on both sides of the transaction and (ii) the plain language of Section 102(b)(7) does not extend to controlling shareholders." As to Andreessen, he "would face a substantial risk of liability on a claim challenging the Reclassification. He would not be entitled to exculpation because he acted disloyally and in bad faith." Op. at 49.

These assumptions are likewise substantiated by Plaintiff's allegations that Zuckerberg orchestrated the approval of Reclassification Plan in pursuit of a personal benefit, and that Andreessen subverted the committee process. Thus, Plaintiff alleges (1) breaches of the duty of care by the Special Committee directors and the full Board who approved the reclassification, along with (2) non-exculpated claims against the controlling shareholder (Zuckerberg) and another fiduciary who engaged in bad faith conduct (Andreessen). Under *Aronson* and the analytical framework illustrated in *McPadden* and other cases, demand is therefore excused.

4. The Court's Test Would Weaken Shareholder Remedies in Controlling Stockholder Transactions.

By imposing an onerous pleading standard on plaintiffs in challenges to controlling stockholder transactions, the Court's new demand futility test would undermine shareholder rights.

Delaware courts recognize that controlling stockholder transactions carry inherent risks. *Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (Del. 1997) (in transactions with controlling stockholders, the "specter of impropriety can never be completely eradicated" because "the controlling shareholder will continue to dominate" and may engage in "retaliation" if transaction fails); *In re EZCorp Inc. Consulting Agreement Deriv. Litig.*, 2016 Del. Ch. LEXIS 14, at *57 (Del. Ch. Jan. 25, 2016) ("Delaware Supreme Court decisions have recognized the risk that directors laboring in the shadow of a controlling stockholder face a threat of implicit coercion"); *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 800 (Del. Ch. 2011) (directors may fall victim to "narrow prism" where "the only options to be considered are those proposed by the controlling stockholder").

This case presents a textbook example of a transaction process that, as a practical matter, had a preordained outcome due to the Board's acquiescence to the controlling shareholder's desires and the Special Committee's hapless representation of the interests of the company and the minority stockholders. The allegations clearly establish that the Special Committee accommodated

Zuckerberg's demands. Affirmance of the decision below would provide unwarranted, additional "cover" for controlling shareholders to structure board committees, processes, and transactions to produce personally desired outcomes. By stripping from the demand futility inquiry whether the directors complied with their fiduciary duties, the Opinion, if affirmed, would weaken accountability.

That is particularly important where, as here, defendants could have employed the framework of *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*"). There, this Court held that for controlling stockholder transactions subject to entire fairness, the corporation may de-escalate the standard of review to business judgment where the transaction is (1) negotiated by a special committee and (2) put to a minority shareholder vote. *MFW* at 644. But here, defendants did *not* employ this device because they knew that an affirmative shareholder vote could not be obtained. ¶37. Having chosen this path, defendants should not be heard to complain that their approval of a controlling stockholder transaction should be subject to meaningful judicial review through *Aronson*'s second prong.

5. Restoring the Vitality of *Aronson*'s Second Prong Will Not Cause Increased Litigation.

This case presents unique circumstances involving a controlling stockholder transaction and an extreme set of facts. In addition, the availability of the *MFW* framework described above already reduces the number of controlling shareholder transactions likely to become the subject of dispute, given the protections it provides

for all parties. Thus, reversal will not precipitate increased litigation. Only where, as here, plaintiffs can make particularized allegations that the subject board breached its fiduciary duties in connection with the underlying transaction, that the underlying transaction was not entirely fair, and that a non-exculpated claim has been stated against one of more fiduciaries will demand be excused. These requirements would limit the cases subject to review under *Aronson*'s second prong to only the most serious offenses.

II. THE COURT ERRED BY HOLDING THAT A BOARD MAJORITY WAS INDEPENDENT.

A. Question Presented.

Whether Plaintiff's allegations create a reasonable doubt that directors Desmond-Hellmann, Bowles, Thiel, and Hastings were independent of Zuckerberg, the controlling shareholder and an interested director. Plaintiff does not appeal from the Opinion concerning the independence of Jeffrey Zients and Kenneth Chenault. This issue was preserved for appeal (A104-115, A216-227).

B. Scope of Review.

The Court's review of decisions under Rule 23.1 is *de novo*. *Brehm,* 746 A.2d at 253-54.

C. Merits of Argument.

As the Court observed, Plaintiff must make sufficient demand futility allegations against five directors to establish a majority. Op. at 49. The Court concluded that directors Zuckerberg, Andreessen, and Sandberg were interested or lacked independence, such that demand will be excused if two more directors are disqualified. The Court should have sustained Plaintiff's allegations that Demond-Hellmann, Bowles, Thiel, and Hastings lacked independence.

Under Delaware law, "independence means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences." *Aronson*, 473 A.2d at 816. To raise doubts about

independence, a plaintiff "must allege particularized facts manifesting 'a direction of corporate conduct in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling.'" *Id.* (citing *Kaplan v. Centex Corp.*, 284 A.2d 119, 123 (Del. Ch. 1971)). The issue of independence "turns on whether the director is, for any substantial reason, incapable of making a decision with only the best interests of the corporation in mind." *In re Oracle Corp. Derivative Litig.,* 824 A.2d 917, 920 (Del. Ch. 2004) (citations omitted). The independence test ultimately focuses on a particular director's "impartiality and objectivity." *Id.*

Unique issues are raised in the instant case because it involves a controlling stockholder, also an interested party. While the presence of a controlling stockholder, "standing alone, is not dispositive, it is not necessarily irrelevant" either. *EZCorp*, 2016 Del. Ch. LEXIS 14, at *132-133. Indeed, a controlling stockholder "occupies a uniquely advantageous position for extracting differential benefits from the corporation at the expense of minority stockholders. There is also an obvious fear that even putatively independent directors may owe or feel a more-than-wholesome allegiance to the interests of the controller, rather than to the corporation and its public stockholders." *Id.* at 35.

Thus, while sitting on a controlled company's board may not be outcome determinative, "our courts cannot blind themselves to that reality when considering whether a director on a controlled company board has other ties to the controller

beyond her relationship at the controlled company." *Sandys v. Pincus*, 152 A.3d 124, 133 (Del. 2016). The test is whether the director has relationships with the interested party that "*might* have a material effect on the parties' ability to act adversely toward each other." *Pincus*, 152 A.3d at 134 [emphasis supplied]. As this Court observed in *Pincus*, "[c]ausing a lawsuit to be brought against another person is no small matter, and is the sort of thing that might plausibly endanger a relationship." *Id.*

1. Desmond-Hellmann and Bowles Demonstrated Lack of Independence by Their Service on the Special Committee.

Even if a director is facially independent, to actually *be* independent, he or she "must act independently." *Telxon Corp v. Meyerson*, 802 A.2d 257, 264 (Del. 2002); *see also In re Tesla Motors, Inc. S'holder Litig.*, 2018 Del. Ch. LEXIS 102, at *41, 46 (Del. Ch. Mar. 28, 2018) ("Even an independent, disinterested director can be dominated in his decision-making by a controlling stockholder"). Independence does not solely turn on structural issues such as personal dealings or intertwined business relationships. Rather, an independent director must demonstrate "the care, attention and sense of individual responsibility to the performance of one's duties . . . that generally touches on independence." *Aronson*, 473 A.2d at 816.

As two of the three members of the Special Committee, Desmond-Hellmann and Bowles had full responsibility for the Special Committee's work. Even if they did not know of Andreessen's subversion of the Special Committee process, it is evident that Desmond-Hellmann and Bowles utterly failed to perform with the

"sense of individual responsibility" that would be required of a member of an independent committee. Plaintiff details a litany of governance failures by the Special Committee, even while its members were tasked with negotiating a highly consequential stock reclassification transaction with a controlling stockholder at one of the country's largest and most high-profile corporations. ¶¶28-55.

As such, the failed result was the direct responsibility of Desmond-Hellmann and Bowles, and brings their lack of independence from Zuckerberg into sharp relief. These directors just went along and *demonstrated* that they were incapable of acting independently. It is clear that "from inception, the Special Committee fell victim to a controlled mindset" and was "hemmed in by the controlling stockholder's demands." *Southern Peru*, 52 A.3d at 798, 801. Common sense dictates that Desmond-Hellmann and Bowles lack independence to consider a demand.

2. Desmond-Hellmann Lacks Independence.

Even apart from her Special Committee service, Desmond-Hellmann lacks independence based on her personal and professional dealings with Zuckerberg.

At the time this action was filed, Desmond-Hellmann served as the Chief Executive Officer of the Gates Foundation, a partner with Zuckerberg's CZI on a range of philanthropic endeavors. ¶¶30-31, 52, 87. Prior to CZI coming into existence, Desmond-Hellmann had cultivated Zuckerberg's philanthropy as UCSF Chancellor. ¶¶31, 87. As a result, Desmond-Hellmann had a direct and personal

interest in the Reclassification because the Gates Foundation would benefit by future joint collaborations with CZI. ¶87. Her professional success in philanthropy depended, in part, on her continued collaborations with Zuckerberg. *Id.*

The Court signaled it would find that Desmond-Hellmann lacked independence when it stated that the issue "presents a comparatively close call." Op. at 64. This Court should rule that Desmond-Hellmann lacks independence from Zuckerberg based on Zuckerberg's past and future philanthropic endeavors, which redounded to Desmond-Hellmann's professional benefit. *See In re The Limited, Inc. Shareholder Litigation*, 2002 Del. Ch. LEXIS 28, at *27 (Del. Ch. March 27, 2002) (large gift from company founder solicited by a director created "positive reflection on him and his fundraising efforts as university president" and sense of "owingness" raising reasonable doubt regarding independence); *Off v. Ross*, 2008 Del. Ch. LEXIS 175, at *42 n.41 (Del. Ch. Nov. 26, 2008) ("This Court has found that serious issues of director independence can exist where interested directors have made charitable contributions to an organization to which other directors have significant ties."). This reasoning applies to disqualify Desmond-Hellmann. That Desmond-Hellman was appointed Special Committee Chair in the first place underscores the Board's deference to Zuckerberg and its lack of independence.

3. Bowles Lacks Independence.

The Court erred by ruling that Plaintiff failed to create a reasonable doubt regarding Bowles's independence. Even apart from the failings of his Special Committee service, Bowles lacks independence based on his deferential treatment of Zuckerberg and his demonstrated conduct of using his relationship with Zuckerberg to further his personal interests.

For example, when Zuckerberg circulated the draft announcement of his giving pledge in November 2015, Bowles told Zuckerberg he was "proud to be a small part of your life," (¶40), hardly a sign of director independence, and a harbinger of Bowles's flawed tenure on the Special Committee. Notably, the Court disqualified Andreessen in part based on his "self-professed fealty" to Zuckerberg. Op. at 49. Bowles also used the committee process to advance his personal relationships with Evercore and Morgan Stanley. ¶¶34, 92.

Independence turns on the "constellation of facts," including allegations showing that a director "might be too deferential" to an interested party. *In re Oracle Corp. Derivative Litig.*, 2018 Del. Ch. LEXIS 92, at **48-58 (Del Ch. March 19, 2018) (analyzing three outside directors and finding they lacked independence from co-founder Larry Ellison). Plaintiff's allegations viewed in their totality cement the inference that Bowles lacks independence from Zuckerberg.

4. Thiel Lacks Independence.

The Court erred by ruling that Plaintiff failed to create a reasonable doubt regarding Thiel's independence. Thiel has an abundance of ties with Zuckerberg and would never act adversely to him.

Thiel was one of the early investors in Facebook and is its longest-tenured director besides Zuckerberg. ¶93. By all accounts, Thiel is Zuckerberg's close friend and mentor. *Id.* Thiel's Founders Fund's website touts Facebook as a primary example of founder control, stating that "we have often tried to ensure that founders can continue to run their businesses through voting control mechanisms, as Peter Thiel did with Mark Zuckerberg and Facebook." *Id.* Thiel has greatly benefited from his relationship with Zuckerberg and his seat on Facebook's Board. *Id.* Thiel's Founders Fund gets "good deal flow" from this high-profile association. *Id.* In addition, Zuckerberg has stood by Thiel in the face of controversy. *Id.*

The Court opined that these allegations could support a reasonable inference that Thiel is beholden to Zuckerberg "only if serving on the Facebook board was material" – that is, whether Thiel's board seat is "financially material" to him. Op. at 60. But Plaintiff alleges Thiel's long-standing material and mutually beneficial relationship with Facebook. ¶¶93-97. These are enough. *See Oracle*, 2018 Del. Ch. LEXIS 92, at *51 (reasonable doubt regarding independence where director "has multiple layers of business connections with Oracle: he is affiliated with two venture

capital firms that operate in areas dominated by Oracle, he has an important role at a company whose CTO serves at Oracle's pleasure, and he has held high-level positions at another company that does substantial business with Oracle."). In any event, the Court's singular focus on Thiel's financial benefit was too narrow.

As the Court observed in *Oracle*, 824 A.2d at 938, "Delaware law should not be based on a reductionist view of human nature that simplifies human motivations on the lines of the least sophisticated notions of the law and economics movement." Indeed, the Court continued, "[s]ome things are 'just not done,' or only at a cost, which might not be so severe as a loss of position, but may involve a loss of standing in the institution. In being appropriately sensitive to this factor, our law also cannot assume -- absent some proof of the point -- that corporate directors are, as a general matter, persons of unusual social bravery, who operate heedless to the inhibitions that social norms generate for ordinary folk." *Id.*

In this regard, the Court observed that Thiel "inhabits the rarified realms of the *uber*-rich and belongs to the Silicon Valley aristocracy." Op. at 60. A reasonable doubt is raised regarding Thiel's ability to independently consider a litigation demand against Zuckerberg, undoubtedly a member of the same "aristocracy" and its "social norms." In addition, Thiel rubber-stamped the reclassification which the Court held was likely unfair, an additional fact bearing on Thiel's independence. This Court should find a reasonable doubt regarding Thiel's independence.

5. Hastings Lacks Independence.

The Court erred by ruling that Plaintiff failed to create a reasonable doubt regarding Hastings's independence. Like Thiel, Hastings has an abundance of ties with Zuckerberg and would never act adversely to him.

Hastings, the co-founder, Chief Executive Officer, and Chairman of Netflix, Inc., is biased in favor of founders maintaining control of their companies, like Thiel. ¶99. In addition, Hastings and Zuckerberg's philanthropy are interconnected. *Id.* They both have made significant contributions to the Silicon Valley Community Foundation, which solicits and obtains large contributions from company founders. *Id.* Also, Facebook and Netflix also have a business relationship whereby Netflix enjoys valuable marketing advantages through Facebook's platform. ¶100. Hastings would not jeopardize his relationship with Zuckerberg by investigating claims against him, which could prompt termination of Netflix's data sharing plan with Facebook or jeopardize future joint ventures. *Id.*

Plaintiff acknowledges that Hastings is not subject to Zuckerberg's "domination and control," but as the Court held in *Oracle*, focusing on such a rigid standard would be "at the cost of denuding the independence inquiry of its intellectual integrity." *Oracle*, 824 A.2d at 937. In that case, the Court held that a special litigation committee failed to demonstrate that one of its members, a professor, was sufficiently independent to investigate another professor at the same

university for insider trading: "What I infer is that a person in Grundfest's position would find it difficult to assess Boskin's conduct without pondering his own association with Boskin and their mutual affiliations." *Id.* at 943.

The same principle applies here. Zuckerberg and Hastings share substantial business and philanthropic undertakings that Hastings "might plausibly" endanger by investigating Zuckerberg, another prominent founder. *Pincus*, 152 A.3d at 134. In addition, Hastings rubber-stamped the reclassification that the Court held was likely unfair, which also compromises his independence. This Court should find reasonable doubt regarding Hastings's independence.

CONCLUSION

The Opinion granting Defendants-Appellees' motion to dismiss should be reversed.

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Dated January 28, 2021