EFiled: Mar 15 2021 04:23PM EDT
Filing ID 66423372
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,<br><br>Plaintiff Below,<br>Appellant,<br>v.<br><br>MARK ZUCKERBERG, MARC ANDREESSEN, PETER THIEL, REED HASTINGS, ERSKINE B. BOWLES, and SUSAN D. DESMOND-HELLMANN,<br><br>Defendants Below,<br>Appellees,<br><br>- and -<br><br>FACEBOOK, INC.,<br><br>Nominal Defendant Below,<br>Appellee | No. 404, 2020<br><br>Court Below: Court of Chancery of the State of Delaware, C.A. No. 2018-0671-JTL |

# APPELLANT'S REPLY BRIEF

OF COUNSEL:

Robert C. Schubert
Willem F. Jonckheer
SCHUBERT JONCKHEER & KOLBE LLP
Three Embarcadero Center,
Suite 1650
San Francisco, California 94111
(415) 788-4220

P. Bradford deLeeuw (#3569)
DELEEUW LAW LLC
1301 Walnut Green Road
Wilmington, DE 19807
(302) 274-2180
Email: brad@deleeuwlaw.com

*Counsel for Plaintiff-Below/Appellant United Food and Commercial Workers Union and Participating Food Industry Employers Tri-State Pension Fund*

Dated: March 15, 2021

OF COUNSEL (Cont.):

James E. Miller
SHEPHERD FINKELMAN MILLER
& SHAH, LLP
65 Main Street
Chester, Connecticut 06412
(860) 526-1100

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CASES

STATUTES



RULES

## PRELIMINARY STATEMENT

In their Answering Brief, Defendants-Appellees ("Defendants") do not offer much of a defense for the reclassification. They do not address the Court's assumptions that: (a) the reclassification was subject to entire fairness review; (b) director Marc Andreessen's subversion of the Special Committee process "prevented [it] from functioning effectively" and the burden would remain with Defendants to prove that the reclassification was entirely fair; (c) there was a "substantial likelihood" that the Court would conclude after trial that it was *not* entirely fair; and (d) Defendants Mark Zuckerberg and Andreessen each faced a substantial risk of personal liability for loyalty violations and/or non-exculpated claims. Op. at 48-49.[1] Nor do they dispute that the failed reclassification cost the corporation tens of millions of dollars before it was finally abandoned.

Defendants' silence on these issues is understandable, because they all voted to *approve* this disastrous transaction, either as members of the Special Committee or as directors. As such, the particularized facts alleged show that the transaction was the product of fiduciary violations by each director involved. Demand is therefore excused. In a transaction subject to entire fairness where the controlling stockholder breached his fiduciary duty and orchestrated an unfair transaction, a

[1] The Court's Opinion, attached as Exhibit A to Appellant's Corrected Opening Brief, is cited as "Op."

majority of the board breached their fiduciary duties in approving it. Pre-suit demand should therefore be excused under the second prong of the demand futility test in *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), even if a board majority is covered by an exculpation provision.

That result is compelled by *Aronson*. Irrespective of whether the transaction is analyzed under the business judgment rule (as it was in *Aronson*) or the entire fairness standard (as it should be here), the prospect of personal liability of a board majority is not part of the inquiry. *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*.") Defendants' brief ignores *Parfi*.

The plain language of *Aronson's* second prong focuses on the challenged transaction and whether there is reason to doubt it was "the product of the valid exercise of business judgment." *Aronson*, 473 A.2d at 814. Where there is reason to believe that a board majority violated its fiduciary duties in approving the transaction, *Aronson* recognizes that those same directors may not decide whether to prosecute claims arising from that transaction. This inquiry is, and should remain, separate from whether a majority faces a threat of financial liability.

To hold otherwise, as the Court did, upends decades of Delaware precedent, renders illusory the concept that directors have a fiduciary duty to act carefully in approving transactions with controlling stockholders, and risks undermining the entire fairness standard. In its Opening Brief, Plaintiff-Appellant ("Plaintiff") cited numerous Delaware decisions emphasizing the special structural risks to corporations and shareholders posed by controlling stockholder transactions, supporting the need for rigorous standards governing them. Defendants' brief ignores these arguments. This Court should hold controlling stockholders accountable for self-interested transactions by finding demand excused here.

Defendants' arguments in support of the independence of directors Erskine Bowles, Susan Desmond-Hellmann, Peter Thiel, and Reed Hastings fare no better. Recent decisions by this Court demonstrate that Delaware law mandates a practical, common sense approach to director bias, not deference to well-worn invocations of independence that ignore the reality of personal and professional relationships. Plaintiff's allegations are more than sufficient to show that at least two additional directors (in addition to Andreessen and Sheryl Sandberg, whom the Court already held were not independent or disinterested) lack impartiality as to Zuckerberg, rendering a majority of the board disabled. Under these circumstances, the Court erred by failing to find demand excused.

## ARGUMENT

### I. Pre-Suit Demand Is Excused under Aronson's Second Prong Where There Is a Reasonable Doubt That The Challenged Conduct Was A Valid Exercise of Business Judgment.

#### A. The Court Erased *Aronson*'s Second Prong Thereby Upending Delaware Law.

In its Opening Brief, Plaintiff demonstrated that the Court eliminated the second prong from the *Aronson* test by substituting the inquiry of whether the challenged transaction was a valid exercise of business judgment with a standard requiring a substantial likelihood of liability of a board majority. Realizing the Court's departure from settled Delaware law, Defendants counter that, instead, the Court's analysis "fully incorporated" the second prong. Not true.

According to Defendants, a reasonable doubt regarding whether the challenged transaction was a valid exercise of business judgment can still be a basis for demand excusal under the Court's reasoning—as long as the allegations also establish the board's bad faith or the corporation does not have an exculpatory clause for duty of care violations. Defendants' argument doubles down on the central flaw animating the Opinion, namely that personal liability has anything to do with the application of *Aronson's* second prong. It does not.

Neither party disputes that the two prongs of *Aronson* are disjunctive, and that the second prong focuses on whether the disputed transaction was a valid exercise of business judgment. *Aronson's* second prong extends to boards the protections of

the business judgment rule while recognizing that the doctrine is a rebuttable presumption. The question presented, therefore, is whether the business judgment rule has been rebutted. "To rebut the rule, a shareholder plaintiff assumes the burden of providing evidence that directors, in reaching their challenged decision, breached any one of the triads of their fiduciary duty--good faith, loyalty or due care." *Cede & Co. v. Technicolor*, 634 A.2d 345, 361 (Del. 1993) (emphasis in original).

Defendants criticize Chancellor Chandler's reasoning in *McPadden v. Sidhu*, 964 A.2d 1262 (Del. Ch. 2008), and try to isolate the decision as an outlier, but the Court did exactly what *Aronson* requires in cases challenging corporate transactions. The Court properly focused on the transaction itself. The Court held that the manner in which the transaction was approved raised an inference that the board breached the duty of care, based on particularized allegations about the negotiation and approval process. "Plaintiff has ably pleaded that the [directors] quite clearly were not careful enough in the discharge of their duties--that is, they acted with gross negligence or else reckless indifference." *McPadden*, 964 A.2d at 1275. The business judgment presumption was rebutted on the pleadings, demand was excused, and non-exculpated claims proceeded.

Defendants cast the decision in *McPadden* as unjustly prying away from the board its "default authority" over corporate litigation. But in reality, the ruling draws the logical conclusion—and represents sound policy—that where a majority of the

board breaches their fiduciary duties in connection with a challenged transaction, that same board should not be trusted to determine whether to pursue claims arising from their own misconduct, exculpated or not. It would make no sense to keep the decision of whether to prosecute in the hands of the very directors who breached their fiduciary duties in the first place, given the likely financial and reputational fallout they would face for their failures.

The application of this approach is even more compelling here, where the standard of review is not business judgment, but entire fairness—where the burden is on the *defendants* to show that the transaction was entirely fair. The Court recognized in *Parfi* that where entire fairness applies, and a complaint pleads particularized facts that suggest the transaction might *not* be entirely fair, "the complaint satisfies the second prong of *Aronson*." *Parfi*, 794 A.2d at 1231 n.47. Consistent with *Parfi*, Plaintiff here alleged with particularity that the substance and process of the reclassification was not entirely fair, and the Court agreed. *Parfi* requires reversal.

Instead, Defendants cite *Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44 (Del. Ch. 2015). But in that case, the plaintiff argued that demand was excused "as a matter of law" where entire fairness applies, regardless of the pleaded facts. *Baiera*, 119 A.3d at 65. That is not Plaintiff's argument. Rather, Plaintiff argues that where the complaint alleges with particularity that a transaction

fails to meet entire fairness, and the complaint also pleads non-exculpated claims against one or more fiduciaries, demand is excused. This is entirely consistent with *Aronson*, which requires an inquiry into "the substantive nature of the challenged transaction and the board's approval thereof." *Aronson*, 473 A.2d at 814. This Court should reaffirm the vitality of *Aronson's* second prong so that it remains an effective check on exploitation and abuse in controlling stockholder transactions.

### B. The Court's Demand Futility Test Conflicts with Precedent from this Court and Other Chancery Court Opinions.

In its Opening Brief, Plaintiff acknowledged that certain Chancery opinions have applied a demand futility test similar to the one applied below, but argued that they run counter to the test applied by Chancellor Chandler in *McPadden* and echoed in *Parfi*. *See Lenois v. Lawal*, 2017 Del. Ch. LEXIS 784, at **35-44 (Del. Ch. Nov. 17, 2017) (decisions requiring a substantial likelihood of director liability under the second prong are "weight of authority" compared with *McPadden*). Not surprisingly, Defendants devote much of their argument to *Lenois*, but a careful review of the decision shows that it too is based on an incorrect analysis of *Aronson*. Indeed, *Lenois* exemplifies the problem with the Chancery decisions upon which it relies.

In *Aronson*, this Court held that demand is excused where a reasonable doubt is created that "(1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." *Aronson*, 473 A.2d at 814. But in *Lenois*, the Court held that for demand

to be futile, "plaintiff must allege that a majority of the board faces a substantial likelihood of liability for non-exculpated claims in order to raise a reason to doubt that the challenged decision was a valid exercise of business judgment under the second prong of *Aronson*." *Lenois*, 2017 Del. Ch. LEXIS 784, at 5. This holding conflates the two prongs of *Aronson* and effectively eliminates the second prong. It improperly blends whether a director is interested due to potential personal liability (reserved for the first prong) with whether the transaction is a valid exercise of business judgment (reserved for the second prong), collapsing the two tests into one. This dramatically departs from *Aronson*, which makes clear that the second prong is focused squarely on the *bona fides* of the transaction.

That is illustrated by this Court in *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000), which *Lenois* mentions but does not follow. In that case, the plaintiffs brought derivative claims against a board for approving an allegedly wasteful employment agreement, and the complaint was dismissed under Del. Ch. Ct. R. 23.1. On appeal, this Court applied the second prong of *Aronson*, stating as follows: "We now turn to the primary issues in this case that implicate the second prong of *Aronson:* whether the Complaint sets forth particularized facts creating a reasonable doubt that the decisions of the Old Board and the New Board were protected by the business judgment rule." *Brehm*, 746 A.2d at 258.

According to this Court, demand is excused in a case where "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 material information reasonably available." *Id.* at 259. The Court affirmed the dismissal below, holding that the board had justifiably relied on a compensation expert, as authorized under 8 Del. Code §141(e). "That is not to say, however, that a rebuttal of the presumption of proper reliance on the expert under Section 141(e) cannot be pleaded consistent with Rule 23.1 in a properly framed complaint setting forth particularized facts creating reason to believe that the Old Board's conduct was grossly negligent." *Id.* at 261-262.

This Court's formulation in *Brehm* makes clear that the inquiry is focused squarely on business judgment principles. The Court stated that a well-pled duty of care claim is sufficient to satisfy the second prong of *Aronson*. Indeed, if the duty of care were immaterial to the demand futility analysis, there would be no second prong, nor any reference to the business judgment rule. Defendants attempt to distinguish *Brehm* on the basis that this Court "did not consider the effect of an exculpation provision on the proper analysis under *Aronson*." But that is likely because exculpation was *irrelevant* to the analysis. Indeed, *Brehm* was rendered well after the adoption of 8 Del. Code §102(b)(7), and subsequent rulings in the same

litigation indicate that the company had an exculpatory clause at the relevant time. *See In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 290 (Del. Ch. 2003).

Defendants' attempts to distinguish Plaintiff's other cases are similarly ineffective. Defendants argue that the facts in *McPadden* were more extreme, but the opposite is true. Unlike in *McPadden*, here the Court assumed that (a) two board members (Zuckerberg and Andreessen) engaged in disloyal and bad faith conduct, (b) board approval was subverted by a Special Committee member, and (c) based on the pleadings alone, the transaction would *fail at trial*.

Defendants also misstate the holding in *Disney*. The Court there ruled that the board's intentional misconduct raised a "reason to doubt business judgment protection" for the transaction, excusing demand, and then "also" ruled that the same facts supported bad faith claims sufficient to overcome exculpation. *Disney*, 825 A.2d at 289-290. Thus, demand excusal was not due to the board's exposure, but because the business judgment rule had been rebutted. *Id.*

Defendants likewise mischaracterize *H&N Mgmt. Grp. v. Couch*, 2017 Del. Ch. LEXIS 140 (Del. Ch. August 1, 2017). Prior to considering whether a claim had been stated, the Court held that "[t]he Complaint alleges particularized facts sufficient to raise a reason to doubt that the board was adequately informed in its consideration of the Renewals. Thus, demand on the board is futile under *Aronson*." *Couch*, 2017 Del. Ch. LEXIS 140, at *12.

Defendants also seize on *Aronson's* language that "where officers and directors are under an influence which sterilizes their discretion, they cannot be considered proper persons to conduct litigation on behalf of the corporation." *Aronson*, 473 A.2d at 815. And, in the aftermath of 8 Del. Code §102(b)(7), they claim that the sterilizing "influence" on directors must now be a well-pled, non-exculpated claim. This argument lacks merit. The plain language of *Aronson*—the standard applied by Delaware courts for almost 40 years—holds that "[t]he Court of Chancery in the exercise of its sound discretion must be satisfied that a plaintiff has alleged facts with particularity which, taken as true, support a reasonable doubt that the challenged transaction was the product of a valid exercise of business judgment." 473 A.2d at 815. That test remains valid, and Plaintiff's allegations easily satisfy it.

Defendants' other cases are also unavailing. They cite *Guttman v. Huang*, 823 A.2d 492 (Del. Ch. 2002), also relied on in *Lenois*, for the proposition that exposure to liability must be considered in connection with *Aronson's* second prong. That reliance is misplaced. In *Guttman*, plaintiff alleged unlawful insider trading and oversight violations, not (like here) the wrongful approval of a transaction based on particularized facts. Indeed, *Guttman* was decided not under *Aronson*, but rather under *Rales v. Blasband*, 634 A.2d 927 (Del. 1993), which governs cases *not* involving board decisions. *Guttman*, 823 A.2d at 507. In addition, *Guttman*'s discussion of *Aronson*'s second prong is merely dicta intended to illuminate its

decision under the *Rales* test. *Id.* at 501. Finally, as the Court did here, the Court in *Guttman* misapplied the disjunctive *Aronson* test by applying to the second prong a holding related to the first prong. *Id.*

Defendants' citation to *Wood v. Baum*, 953 A.2d 136 (Del. 2007), is also misplaced. *Wood* involved allegations against the board of a limited liability company with a contractual limitation on liability. The plaintiff did not challenge the board's conduct with respect to a specific transaction, but instead alleged that the directors breached their fiduciary duties by causing the company to engage in fraud and accounting manipulation, and breaching their oversight duties. It incorrectly framed the arguments of intentional misconduct under *Aronson's* second prong. *Wood*, 953 A.2d at 141-142. Thus, it was the plaintiff who made personal liability the crux of his demand argument. The Court necessarily analyzed the claim within that framework and dismissed the complaint for failure to plead intentional misconduct. *Wood*'s holding is irrelevant here.

### C. The Second Prong Is Vital to Derivative Cases Involving Controlling Shareholder Transactions.

In its Opening Brief, Plaintiff described numerous Delaware cases discussing the inherent risks presented by controlling stockholder transactions, which came to pass here in the form of exploitation and abuse by Zuckerberg and his confidant Andreessen. Plaintiff also described the framework set out by this Court in *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014), whereby a corporation may

deescalate the standard of review in controlling stockholder transactions to business judgment, such as by requiring the transaction to be approved by a "majority of the minority." Defendants did not do so here because they wanted to protect Zuckerberg against the minority shareholders who overwhelmingly voted down the reclassification. And Defendants offer no response to Plaintiff's argument about the unfairness that would result from the elimination of *Aronson*'s second prong, even though it would be especially acute in the context of self-interested transactions executed by controlling stockholders (as Zuckerberg was and did here).

Instead, Defendants downplay Plaintiff's position that the ruling below, if allowed to stand, would lead to poor policy outcomes and frustrate shareholder rights. They argue that Plaintiff can just make a demand and leave matters to the board. But that argument cannot be squared with how this board performed in connection with the reclassification, the extent of the wrongdoing that pervaded the process, and the unlawful result, which the Court (while not excusing demand) pointedly recognized. Indeed, the board showed that it was acting against the interests of the minority shareholders by making their vote against the transaction irrelevant. This Court should apply existing law, which mandates accountability and protects minority stockholders in conflicted controller transactions.

In sum, reversal is appropriate under *Aronson* on the narrow ground that, in this conflicted controlling stockholder transaction subject to entire fairness, Plaintiff

has pleaded (a) particularized fiduciary breaches by a board majority, excusing demand; and (b) bad faith and/or disloyal conduct by Zuckerberg and Andreessen, such that non-exculpated claims should proceed. Given the limited universe of transactions and claims of this type, such a ruling will properly balance the prerogatives of controlling stockholders and their boards with the interests of shareholders, without expanding the scope of liability under Delaware law.

## II. A Majority of the Board Lacks Independence.

### A. The Special Committee Members Lack Independence.

This case presents a unique and extreme set of facts with respect to the three members of the Special Committee who purported to negotiate with Zuckerberg. If a reasonable doubt is raised as to the independence of each committee member, as Plaintiff contends, a majority of the operative board (five out of nine) would be disqualified, providing an alternative basis for demand futility under *Aronson's* first prong. The Court properly held that one committee member (Andreessen) committed disloyal acts in furtherance of Zuckerberg's personal objectives and "subverted" the negotiation process, and excused demand on him. The same result must follow for the other two members, Desmond-Hellmann and Bowles.

That Andreessen behaved with such impunity strongly supports the broader inference that the entire committee process, for which all three of its members were directly responsible (with Desmond-Hellmann as Chair), was as a practical matter a charade. Defendants attempt to deflect from Plaintiff's argument that the committee operated in a "controlled mindset." They attempt to reframe the issue by claiming that Plaintiff is merely engaged in impermissible "second-guessing" of the Special Committee's work. But the allegations of the Complaint detail far more. As Plaintiff showed in its Opening Brief, the inference is overwhelming that the committee's

work, and the transaction options they considered, were "hemmed in" by Zuckerberg's goals and desires:

- The Special Committee failed to create a committee charter. ¶28.[2]
- The Special Committee's counsel was hired by Facebook management, not the Special Committee. ¶28.
- The Special Committee hired its financial advisor in the "second inning" of the negotiation process when the deal terms had already been dictated by Zuckerberg. ¶34.
- The Special Committee stood by as Zuckerberg publicly announced his plans in late 2015 to sell 99% of his stock, even while negotiations on the terms of reclassification were still ongoing. ¶¶40-42, 77.
- Zuckerberg engaged in numerous informal communications with Special Committee members regarding his philanthropic goals, bypassing the committee's deliberative process. ¶¶40, 43, 47-50, 58, 83.
- The Special Committee members privately praised Zuckerberg for his philanthropic goals when he publicly announced them. ¶40.

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

- The Special Committee acquiesced to Zuckerberg's proposed deal framework of corporate governance terms only, and remained uninformed regarding key topics. ¶¶33, 35-38, 42, 45-46, 53, 77.
- The Special Committee wrongly believed that it lacked the ability to meaningfully reject Zuckerberg's demands because he would have "figured out [another] way to be philanthropic while retaining control of the company." ¶53.
- The Special Committee members internally acknowledged that the consideration they obtained was illusory. ¶58.
- The Special Committee declined to negotiate under the entire fairness framework by not requiring a minority shareholder vote. ¶37.

Any evaluation of the Special Committee's independence must also take into account the actual results of the committee's work—an objectively one-sided transaction in favor of Zuckerberg that a majority of the minority shareholders overwhelmingly rejected in a shareholder vote, and which was abandoned by the board before it could be tested at trial. All of this occurred in the context of a transaction requested by Zuckerberg, in which he, as the controlling stockholder, "occupie[d] a uniquely advantageous position for extracting differential benefits from the corporation at the expense of minority stockholders." *In re EZCorp Inc. Consulting Agreement Deriv. Litig.*, 2016 Del. Ch. LEXIS 14, at *35 (Del. Ch. Jan.

25, 2016). Yet under Defendants' analysis, these same directors are now sufficiently independent from Zuckerberg to consider a demand about the transaction's process and substance. This defies common sense.[3]

Independent directors must show "the care, attention and sense of individual responsibility" required in their performance. *Aronson*, 473 A.2d at 816. This Court should reverse because the allegations create a reasonable doubt as to the Special Committee members' independence. This would strengthen board adherence to proper processes in controlling stockholder transactions.

Defendants' cases are easily distinguishable. *In re Alloy, Inc.*, 2011 Del. Ch. LEXIS 159 (June 6, 2011), did not involve a controlling stockholder transaction, the most important fact driving the analysis here. Instead, it involved class action claims concerning a disputed going-private transaction. The plaintiff complained that the special committee that negotiated the transaction lacked independence from, and was dominated by, two interested management directors who held only 15% of the stock, an allegation the Court rejected. *Alloy*, 2011 Del. Ch. LEXIS 159, at **29-30. The Court further thoroughly analyzed and rejected allegations that the committee's

[3] Plaintiff's argument is further supported by Bowles' statement to Zuckerberg that he was "proud to be a small part of your life," made even as Bowles was tasked with negotiating a multibillion-dollar transaction across the table from Zuckerberg. ¶40. This remarkable statement illustrates Bowles' clear deference to Zuckerberg, cementing his lack of independence, but the Court incorrectly discounted it as mere evidence of a "collegial relationship." Op. at 61.

process had otherwise been improper or deficient. *Id.* at 45. These allegations are not comparable to those presented here, involving a controlling stockholder and a deeply flawed committee process.

*In re CompuCom Sys. Stockholders Litig.*, 2005 Del. Ch. LEXIS 145 (Del. Ch. Sept. 29, 2005), was a class action in which a parent company sought to sell a subsidiary at an alleged fire-sale price. Plaintiff alleged that the board committee of the subsidiary appointed to negotiate the sale lacked independence from the parent because a majority of its members served as directors and executives in companies in which the parent company formerly held an equity interest, a connection far too tenuous for the Court. *CompuCom*, 2005 Del. Ch. LEXIS 145, at *33. In addition, the complaint "[did] not discuss the committee's efforts" during the negotiations and "[did] not allege any specific defect in the sale process pursued by the Special Committee. In fact, the complaint makes no allegations at all about any deficiencies in the actions" of the directors. *Id.* at *8. That is in stark contrast to the allegations here, which detail such deficiencies from start to finish.

**B. Desmond-Hellmann Lacks Independence.**

In its Opening Brief, Plaintiff cited cases standing for the proposition that where an interested director has made philanthropic contributions solicited by another director, or redounding to the benefit of that director or an organization with which that director has ties, such allegations suffice to raise a reasonable doubt

regarding that director's independence. It is hard to imagine a more compelling example of this rubric than the instant case. At the relevant time, Desmond-Hellmann was a senior executive in philanthropy, yet was tasked, as committee chair, to negotiate against an interested party (Zuckerberg) with announced intentions to spend billions of dollars in her line of work, and who had partnered with her employer. Desmond-Hellmann had even solicited a large gift from Zuckerberg in a previous role as a university administrator. These facts further underscore the structural failure of the Special Committee. ¶¶87-90.

Defendants claim that a more direct personal benefit to the director must be shown from the interested party's philanthropy, but they fail to distinguish Plaintiff's cases, both of which excused demand based on large philanthropic contributions made by an interested director without any such showing. In *In re Goldman Sachs Group, Inc. S'holder Litig.*, 2011 Del. Ch. LEXIS 151 (Oct. 12, 2011), cited by Defendants, the Court rejected allegations that a director lacked independence—not from any one director, but presumably from the corporation generally—because the corporation had contributed to charities associated with the director. Those are not analogous facts and do not establish the acute personal conflict here between a controlling stockholder and an individual director. And in the instant case, the allegations show just how the conflict played out, with Desmond-Hellmann conceding that the committee she chaired went along with Zuckerberg's demands

because if it did not, he would have "figured out [another] way to be philanthropic while retaining control of the company." ¶53.

### C. Thiel Lacks Independence.

Defendants also fail to address this Court's precedent dealing with the precise issue at stake here, namely that while serving on a controlled company's board may not be outcome determinative as to director independence, "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) (joint ownership of aircraft among controlling stockholder and outside director raised a reasonable doubt regarding the outside director's independence)

Other recent opinions from this Court have shown that director independence must be evaluated in a realistic way, taking into account the nature and extent of personal relationships. In *Del. Cty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1019 (Del. 2015), this Court held that friendships and outside business ties among an interested party and the subject director must be viewed together, not separately. And in *Marchand v. Barnhill*, 212 A.3d 805, 818 (Del. 2019), this Court recognized that the inquiry must "not ignore the social nature of humans," citing *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 938 (Del. Ch. 2003).

These holdings compel a finding that Thiel lacks independence based on his business and personal connections with Zuckerberg, which far exceed the scope of those in *Pincus*. Notably, the Court held that all of the facts Plaintiff *did* allege "could support a reasonable inference that Thiel is beholden" to Zuckerberg, but "only if serving on the Board was material to Thiel." Op. at 60. Yet the Court declined to draw an inference that the Facebook directorship *was* financially material to Thiel, even though Thiel, himself a technology investor, was an early investor in and the longest-serving director of Facebook (one of the largest technology corporations in the world), features his Facebook investment on his investment fund's website, does venture capital business with Facebook, and continues to receive benefits from Facebook stock sales. ¶¶93-98. The Court erred by not drawing the proper inferences in Plaintiff's favor regarding materiality. The Court further erred by finding that Plaintiff failed to allege there was sufficient "cachet" to serving on Facebook's board to suggest that Thiel would risk it, notwithstanding Facebook's unsurpassed profile in the technology industry within which Thiel operates. Op. at 60.

The Court also overlooked this Court's recent guidance in *Marchand* that "social" considerations concerning directors must be part of the inquiry. The Court failed to do so even while observing that Thiel (like Zuckerberg) "inhabits the rarified realms of the *uber*-rich and belongs to the Silicon Valley aristocracy," putting the spotlight squarely on "social norms" that would constrict any motivation

for Thiel to act. Op. at 60. *Oracle,* 824 A.2d at 938 ("To be direct, corporate directors are generally the sort of people deeply enmeshed in social institutions. Such institutions have norms, expectations that, explicitly and implicitly, influence and channel the behavior of those who participate in their operation" and courts should not assume that directors are "persons of unusual social bravery."). Indeed, in addition to material financial motivations, this is yet another reason Thiel lacks independence under this Court's recent decisions, creating a reasonable inference that Thiel would never become adverse to Zuckerberg.

### D. Hastings Lacks Independence.

In *Oracle*, the Court recognized that directors may be unable to be adverse to each other based on their joint standing in the community. *Oracle*, 824 A.2d at 942. Defendants attempt to minimize *Oracle* as limited to the university setting, but this reads the decision far too narrowly. Zuckerberg and Hastings are both prominent founders, their corporations share substantial business ties, and they also share philanthropic interests. ¶¶99-101. In a corporation with a controlling stockholder, these facts raise a reasonable doubt regarding Hastings' impartiality and objectivity as to Zuckerberg, which is the central inquiry as to independence. *Id.* at 920.

## CONCLUSION

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


**DELEEUW LAW LLC**
*/s/ P. Bradford deLeeuw*
P. Bradford deLeeuw (#3569)
1301 Walnut Green Road
Wilmington, DE 19807
(302) 274-2180
Email: brad@deleeuwlaw.com

OF COUNSEL:

Robert C. Schubert
Willem F. Jonckheer
SCHUBERT JONCKHEER & KOLBE LLP
Three Embarcadero Center,
Suite 1650
San Francisco, California 94111
(415) 788-4220

James E. Miller
SHEPHERD FINKELMAN MILLER & SHAH, LLP
65 Main Street
Chester, Connecticut 06412
(860) 526-1100

*Counsel for Plaintiff-Below/Appellant United Food and Commercial Workers Union and Participating Food Industry Employers Tri-State Pension Fund*


Dated March 15, 2021