IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

EMPLOYEES' RETIREMENT SYSTEM OF RHODE ISLAND,	:	
Plaintiff,	:	
v	:	C. A. No. 2020-0085-JRS
FACEBOOK, INC.,	:	
Defendant.	:	

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Chancery Court Chambers
417 South State Street
Dover, Delaware
Wednesday, June 24, 2020
9:15 a.m.

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BEFORE: HON. JOSEPH R. SLIGHTS III, Vice Chancellor

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SECTION 220 TRIAL TRANSCRIPT VIA ZOOM

CHANCERY COURT REPORTERS
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THE COURT: Good morning, Counsel.

I gather that we are ready to proceed. Just a couple of quick things before we get started. Then we can take up any housekeeping and start into the arguments.

First, I want to thank you for joining by Zoom. This would be a matter that we would typically bring you all into court. It would be good to see you personally. I think that's always a more pleasant and, frankly, effective way to present argument. But we're not yet at a point where we can do that, so I appreciate very much your willingness to give this Zoom platform a try. Because by now, we're all probably at least somewhat familiar with the platform. And I will tell you, it works well enough to get the job done. So I do want to thank you for that.

I didn't want to delay this for a couple of reasons. One, 220 matters are summary and expedited by their nature. And secondly, as most of you on the line know, this is all part of a bigger group of cases, and we're trying to figure out how to stage them, sequence them, and figure out where each fits with the other. And this matter, at least in my

view, is one that we need to get resolved so that we can figure out the bigger question of what we're going to do with the larger bundle of Facebook cases. So I didn't want to delay. I appreciate, again, your willingness to accommodate us as we try to keep moving here.

Just by way of Zoom protocol, I do not mind if you're not speaking if you want to go off camera. That's fine with me. It's not that I don't want to see you, but I appreciate that there may be things that you need to do off camera that you would prefer the rest of us not see. So I am happy for you to do that. Obviously, if you are speaking to me or think that you may have an objection or some need to intervene as we're proceeding, then please do remain on camera. I will do the same.

If I go off camera, it's because there is some crisis occurring within my house, where I'm coming to you from, that I need to jump off camera. I will probably let you know that before I do. But if you see me off camera, that means there's a problem. Otherwise, I intend to stay on.

Do mute throughout if you're not speaking. Even if you are sort of on point to be on

the other side, I'd appreciate that you keep your lines muted unless you are speaking. I think that's our best bet of getting a good record with the court reporter here.

The hand-raising function, I know that has been used by some in some hearings. I don't find that effective because it requires me to keep looking for a hand raise. So if you have something to say or want to intervene, please just say so. Jump in verbally. That is certainly, at least in my view, preferable to using the Zoom emojis, thumbs up and the rest. That's just not terribly effective, at least from my perspective.

I think that's it. I'm ready to go. I've read the briefs. I did receive some slides this morning, so I thank you for that. I've got those teed up too.

I think there is a means, Mr. Ross, for you to display that for the rest of the group, if you wish. Otherwise, I am assuming you have distributed the slides to those who need to see them; and, therefore, if you want to just go through them in that fashion, I have them and can follow along. I will leave that to you.

Any housekeeping matters before we begin with introductions? Everybody connected okay and no logistical issues?

All right. Then, Mr. Cook, why don't you take us away with some introductions of your team.

MR. COOK: Thank you, Your Honor. Good morning.

THE COURT: Good morning.

MR. COOK: For the record, this is Nathan Cook of Block & Leviton on behalf of plaintiff, Employees' Retirement System of Rhode Island. With me today from Block & Leviton is Jason Leviton, Joel Fleming, Lauren Godles Milgroom, and Amanda Crawford. Also present today for Rhode Island are Kurt Heyman and Aaron Nelson of Heyman Enerio Gattuso & Hirzel.

And Mr. Fleming has been admitted pro hac vice. With Your Honor's permission, Mr. Fleming will be making today's presentation on behalf of Rhode Island.

THE COURT: Of course. Welcome.

All right. Mr. Ross, do you want to introduce your team, please.

MR. ROSS: Sure. Thank you, Your Honor. Good morning. David Ross of Ross Aronstam &

Moritz on behalf of Facebook. With me today are my colleagues Garrett Rice and Elizabeth Taylor. Our co-counsel from Gibson Dunn, Brian Lutz, Vivek Gopalan, and Colin Davis. And with us from Facebook are Sandeep Solanki and Ian Chen.

THE COURT: All right. Thank you.

Mr. Ross, I don't know, I was hearing you okay, but I think there is a possibility that you may fade in and out as you go on. So perhaps as Mr. Fleming is giving his presentation, if you want to get positioned a little closer to your microphone, that might be helpful.

All right. Then with that, Mr. Fleming, why don't you take us away.

MR. FLEMING: Thank you, Your Honor. And I see Mr. Ross has figured out a way to do this standing up. I hope the Court won't view it as any disrespect if I do it seated so that you can see me and hear me appropriately.

Good morning, Your Honor. This is the time set for trial of the Employees' Retirement System of Rhode Island books and records action against Facebook. I recognize that this is the third 220 action involving Facebook that Your Honor has tried in

the last couple of years, and for Mr. Ross as well, so I will try to get straight to the point.

We read Your Honor's order in the prior Facebook case involving Cambridge Analytica specifically very carefully. We took particular note of the frustration that Your Honor had expressed with the way that the other plaintiff's demand had expanded and contracted with no apparent pattern, which confounded the Court's analysis and justifiably frustrated Mr. Ross and the company. We have been careful not to do that here. Our initial demand to Facebook was carefully drafted, with the benefit of Your Honor's prior opinion, and it was narrowly targeted. After receiving and reviewing an initial production from Facebook in response to our books and records demand, we narrowed our demand even further.

Today, Rhode Island is asking the Court to order Facebook to produce documents, including privileged documents, that are responsive to categories 5 and 6 of our demand. Category 5 is board minutes and other hard-copy documents that were provided to or generated by a member of the board relating to Facebook's negotiations with the FTC. As a shorthand today, I will call those formal board

materials, borrowing from the three-level hierarchy the Vice Chancellor laid out in the *AmerisourceBergen* decision.

Category 6 is electronic communication sent from, to, or copied to a member of the board concerning Facebook's negotiations with the FTC concerning the settlement. So we proposed that they be collected from a subset of board members, the same custodians that Your Honor identified in the previous Facebook 220 action, as well as certain custodians in the office of the company's general counsel. I will call those the informal board materials.

To its credit, Facebook has also done its part to narrow the issues before the Court today. It has always conceded that our demand complied with the form and manner requirements of Section 220. After we filed our opening brief, Facebook decided to concede on credible basis. So what's left for the Court to decide today is whether Rhode Island has all of the documents that are necessary and essential to its purpose or whether more are needed, including whether Rhode Island has shown good cause to obtain privileged or work product material.

I know the Court is obviously familiar

with the facts of the Cambridge Analytica matter which is the subject of the prior 220 action. There, stockholders sought documents in support of traditional *Caremark*-type claims. This case is obviously related, but we focus on different facts, a different time period, and a different legal theory.

The *Caremark* plaintiff investigation was focused on the board's oversight failures in the years leading up to the Cambridge Analytica revelations. Here, Rhode Island is seeking documents to investigate what the board did after the Cambridge Analytica news broke when it came time to negotiate and settle with the FTC.

The *Caremark* plaintiff's demand was not seeking to investigate this type of claim or theory, and negotiations between Facebook and the FTC were still ongoing at the time of trial and not yet public when this Court tried the previous 220 action.

As we now know, the end result of those negotiations was a settlement in which Mr. Zuckerberg received a broad release but escaped any personal liability, while Facebook paid a record-setting $5 billion penalty. That $5 billion penalty, one of the largest -- it is the largest fine

in FTC history, one of the largest fines the U.S. government has ever imposed on any company, and it's significantly larger than the figure that Gibson Dunn argued was the largest fine that the FTC could impose in the white paper, which is Joint Exhibit 52.

Given the Court's guidance at the pretrial conference, and following discussions with the company, we've agreed, at Facebook's insistence, not to say more about what Gibson Dunn concluded or exactly what that resulting number would be, but we have quoted the analysis. It's on page 25 and 26 of our opening brief. And we have done the math in the footnote at the bottom of page 26.

Facebook's briefing didn't question that math. It didn't offer a different number, nor did Facebook disavow Gibson Dunn's analysis or suggest that it was only advocacy. To the contrary, I think the minutes of the March 19th meeting, Joint Exhibit 53, show that when Mr. Stretch was advising the full board about the statutory basis for the commission's initial demand, he reached a very similar conclusion to Gibson Dunn.

Despite what that analysis showed, the board was apparently less concerned about the

corporate treasury and more concerned about Mr. Zuckerberg. The full board instructed management to make certain monetary offers to the FTC on the express condition that Mr. Zuckerberg not be held personally liable. We have agreed, at Facebook's insistence, not to disclose the specific numbers that the company offered, but they are in Joint Exhibit 53, 54, and 56 and summarized on page 45 of our opening brief.

Facebook has conceded on credible basis. So, at least for the moment, it doesn't dispute that this is a settlement that provided a significant nonratable benefit to a controlling stockholder. It doesn't dispute that the company paid $5 billion, when its maximum exposure may have been significantly less -- that number from the Gibson Dunn white paper. It is not disputed that the special committee process was badly flawed. It is not disputed that there was no stockholder approval.

Yet, the only documents Facebook has produced are redacted board and special committee minutes, a three-page special committee report, which is long on boilerplate but contains almost no meaningful analysis, and the emails and other

documents that were produced to the *Caremark* plaintiff. And that's a production that was responding to a books and records demand that was not focused on the FTC negotiation, and it cuts off completely at the end of May 2019, which is months before the FTC settlement was finalized. For June and July of 2019, the last two months leading up to the conclusion of the settlement with the FTC, we have no electronic communications, no privileged communications, but also not even nonprivileged communications.

I'd ask the Court to imagine for a moment a $5 billion merger transaction that provided a nonratable benefit to a controller, where there was evidence of overpayment, no stockholder vote, no special committee until halfway through the negotiations, when significant concessions had already been made. And when that committee was formed, it was given a weak mandate, at least one member with a demonstrated history of loyalty to the controller and disloyalty to public stockholders when serving on a prior special committee, advised by a team of lawyers led by a senior partner whose niece works for the controller. I don't think anyone would seriously

contend that a stockholder investigating that transaction should be content with board minutes, a three-page report, and some documents that were given to other stockholders investigating other related, but different issues in a production with a cutoff date that was months before the transaction was finalized.

THE COURT: Can I stop you there. So the scenario you have just outlined sounds like a prima facie, at least, breach of fiduciary duty, if you pled it. And so what I'm struggling with here is you've outlined what you contend to be a conflicted controlling stockholder transaction. A twist, but certainly a transaction where a controller receives a nonratable benefit that other stockholders don't get, the company doesn't get. You've laid that out. You've got the white paper that gives you some basis to suggest that the company was paying consideration for Mr. Zuckerberg, not for the company.

With all of that laid out, I'm just trying to understand what else is needed to do what we're trying to do here, which is to allow you to investigate enough information to determine if there's wrongdoing. My sense is that you've already concluded that there was wrongdoing, and then enough to plead a

complaint that's going to get you off the starting line in a plenary action. Where are the gaps?

MR. FLEMING: Sure.

THE COURT: That's where I'm struggling. Usually, in a 220 case, a plaintiff will say, "We've got this, we've got this, we've got this. That gives us some evidence of wrongdoing. But we don't have this yet. And without this, there is exposure. There is a concern that if we file a complaint, we're going to get nailed on a motion to dismiss."

You're not looking for board materials. You're not looking for information about board-level conflicts to get you over a futility hurdle. Where is the gap here?

MR. FLEMING: Sure. And so this is, obviously, Facebook's primary argument, is "Rhode Island, you have concluded that there's enough." But I think Facebook also makes clear in its papers that its concession on credible basis is only for today. It does intend to move to dismiss, I'm sure. I suspect its officers and directors feel the same way and would also file a motion. So I think the fact that Rhode Island has made that conclusion isn't

enough as long as there's still some question that there will be a motion to dismiss.

But to answer more directly what I think is the fundamental question, which is what are the gaps, what do we need to know, it's a few things. I think we have the analysis going from Gibson to the FTC. And, again, we didn't see a response from Facebook here because they are conceding credible basis, but I have to imagine that the response that we will see at the motion to dismiss phase is, well, that was advocacy. You know, everyone takes a firmer line in advocacy, and it may be a very different position than what you see going to the board itself.

So we don't know what the company was told, what the board was told by its advisors about what its actual odds of success were on liability, if the FTC filed suit. In the event that the company was found liable, what was it told about its likely exposure? We have the Gibson Dunn white paper. We have a vague statement that Mr. Stretch --

THE COURT: Let me stop you there. Play this out for me. You plead that white paper, and maybe you plead some from the special committee report that you have. So that is in your verified complaint.

That is accepted as true at the 12(b)(6) stage and at the 23.1 stage.

Because Facebook is saying you have all that you need now, that's their position in 220, it's not as if they are going to be able, in prosecuting a motion to dismiss, to drop a whole bunch of new stuff on you to contextualize or to alter the substance of what is in this white paper. So what you can plead is, look, this is what the company was telling the FTC, and apparently what they believed, which is the demand that they were making as directed to the company was not justified; and, therefore, the extra consideration paid had to have been paid to obtain a release for Mr. Zuckerberg.

Where is the gap there? If you can plead that, and Facebook is saying you've gotten everything that there is so they can't drop a whole bunch of new stuff on you at the pleadings stage in your plenary action, I'm just trying to play this out and see where your exposure is, if we assume that the point of all of this is to get you the information you need, A, to determine if there's wrongdoing and, B, to get you off the starting line in the action that you filed to get remedies for that wrong.

MR. FLEMING: Yes. And so it's a funny sort of -- this doesn't come up very often. In a 220, usually you are arguing to try to get past the credible basis. I think it's less common to be in this position. So I think this is the same argument that the defendant tried to make in the *Globalstar* case, which we have cited a couple times in our papers. There, you also had an entire fairness transaction, very clear process flaws. I think Vice Chancellor Montgomery-Reeves expressly found in her decision that some of those process flaws were already strongly supported by the evidence. Nonetheless, she still ordered additional -- I'm sorry, now-Justice Montgomery-Reeves, then-Vice Chancellor Montgomery-Reeves -- still ordered electronic communications so that plaintiff could have the full picture of those issues.

And here, specifically -- and it's tricky, because I think we do have enough to survive a motion to dismiss. But, again, Mr. Zuckerberg's separately represented, we know from the production here, and will presumably be separately represented in the plenary action. So he hasn't conceded that we have enough and may have some arguments.

The argument I would likely expect that I think additional documents will be helpful in addressing is this question about would the FTC have taken less money if Zuckerberg took personal responsibility or had been held personally liable. I think the argument you could see from the company is, well, perhaps there's this gap between what the Gibson Dunn analysis was and what Facebook agreed to pay, but you, plaintiff, haven't showed that the FTC would have been willing to take a dollar less if Mr. Zuckerberg had agreed to fall on his sword and take personal liability. I don't think we have a document that clearly shows that.

I think we can make arguments from common sense. I think we can point to the fact that the FTC commissioners who dissented from the decision were very focused on Mr. Zuckerberg and personal liability for executives. But I do think that it is likely that in the documents that are being withheld, whether it's the redacted portions of the board minutes, where we see references to Mr. Stretch, or the people from Gibson Dunn discussing the risks of litigation, I do think we may see references to this question about, well, what if Mr. Zuckerberg does

agree to personal liability? What if he does agree to some sort of finding, what would the impact be for the company? And I think if we could show, if there are documents showing that there was an analysis -- did anyone ask? Did anyone say, "Go ask the FTC, would you take less money if Mr. Zuckerberg is personally liable?" I think that document certainly strengthens our complaint.

And, I mean, if the -- I'm prepared to lose the battle to win the war, if the Court is going to conclude today that what we already have is definitively enough to get past a motion to dismiss in a plenary action. I recognize demand futility is a different question. But at least an entire fairness action that survives 12(b)(6), we are prepared to do that. But I do think that these are the types of arguments that we would expect to see, and I think we should have the opportunity to plead the strongest complaint possible, knowing that we're going to be facing motions to dismiss, not just from Facebook, but also Mr. Zuckerberg will be separately represented. I anticipate other defendants may be separately represented by highly qualified counsel who will come up with creative arguments based on the record we have

now.

And there are just still these large gaps about what was the board actually told about the company's odds of success in the FTC-filed suit, what was its exposure if it was found liable? Was there the possibility for a trade-off where the company could pay less money in exchange for Mr. Zuckerberg accepting personal liability? These are the kind of questions that go to the heart of the fairness analysis. There are hints in the existing documents. We can argue from inferences. But I think if there are documents that are either behind the redactions in the formal board materials or in the informal board materials, both privileged and nonprivileged that are being withheld, I think it's fair that we have access to those.

It's sort of -- I mean, the Court, right, obviously deals with evaluating the fairness of a -- the fairness of settlements in the context of representative litigation all the time. And it's not enough, as Facebook suggests, to just know what are the terms of the settlement. You have to weigh the give against the get. So in evaluating what Facebook actually agreed to and what the process actually was,

what were the other alternatives that were available? What was the course of dealing? I think at this point we have a very bare bones sort of record where we know what the final terms were, we know who the members of the special committee were, we have the bid-ask going back and forth. But that's the same sort of, you know, very basic information that you get from the proxy and maybe a four-documents production in a merger transaction.

And in other actions where plaintiffs have been able, in an entire fairness, like conflicted transaction scenario, where they have been able to identify process flaws already that might well be enough to get them past a motion to dismiss, I think this Court has regularly ordered additional productions.

In the *CBS* case, that was a conflicted transaction. I recognize that motion to dismiss is before Your Honor and there are some questions about whether it's truly nonratable, given the controller's ownership. But at least facially, it appears to be a nonratable transaction with process flaws that, on the existing record prior to the Court's ruling on the 220, seemed like a case that would probably survive a

motion to dismiss. But there were these outstanding issues that the Court appropriately ordered that additional electronic communications be produced.

Here, for the last two months of negotiations, we have no electronic communication, privileged or nonprivileged. I think that's a huge gap that makes it very difficult to tell the full story and to fully evaluate our claim.

THE COURT: So, as I understand the credible basis narrative, which I understand has now, at least for purposes of 220, not been contested, but as I understand the narrative, you've been able to determine, from what you have already in the public documents and what Facebook has given you, that throughout the negotiations, Facebook's position with the FTC was "We cannot agree to a resolution that leaves Mr. Zuckerberg exposed." And so there were gives and gets going back and forth. Numbers were creeping up. And what I gather your argument is, at some point we've moved beyond settling for Facebook into around where Facebook was now negotiating on behalf of Mr. Zuckerberg to get a release for him. And that you've been able to trace that almost chronologically in the back and forth with the FTC.

Presumably, you would now plead that, if you've pled it here, you've argued it in your briefs. So you want more information that suggests, hopefully the smoking gun that says, look, this is what we have to do in order to get Mr. Zuckerberg off the hook, and we're prepared to do it, even though we acknowledge that that's not really creating any benefit for the company.

Is that what we're missing here? Because otherwise, you've stated the narrative that seems to get us to a point where you're able to say we have a basis to allege that at some point the company stopped negotiating for the company and started to negotiate for the controller to the detriment of the company. I'm still struggling to see why that doesn't get you where you want to go with the next stage.

MR. FLEMING: Let me try to answer that in two ways.

First, I would say it's not -- the argument is not we don't have the smoking gun yet, so please let us continue to fish around for it. I think it's this very fundamental question about did anyone ever consider the opposite trade. Rather than offering X amount of money provided that

Mr. Zuckerberg not be held personally liable, was there ever any consideration or discussion at the board level of how much money can we save if Mr. Zuckerberg is willing to agree to something that -- because we know that at the end of March, when the special committee is adopted, the company has put X dollars on the table. We have agreed with Facebook not to say the number, but it's a number where there is a gap between what the final number was, and it's a pretty big gap.

So there's then this period of negotiation from the time the special committee is formed at the beginning of April through when the settlement gets finalized at the end of July, where there's a pretty large monetary gap that has to be bridged. There's still negotiations about these government claims that have a significant, real-world impact on the way the company does business day to day.

As part of those negotiations, it would seem to me that a fully independent, arm's-length person negotiating on behalf of the company would look at all the various elements and negotiations and say, is there a way that executives

taking personal responsibility here could help bridge that gap? Is there a way that we could gain value for the company by giving the FTC something that clearly at least two commissioners felt very strongly about? The two dissenting commissioners felt very strongly about the issue of personal responsibility.

It's not clear from the record that we have, particularly because the nonprivileged electronic communications stop at the end of May. So we have two months where all we have are some redacted board minutes. It's just not clear whether that conversation about what can executives do in terms of personal responsibility, personal liability, whether that ever entered the picture, whether the board considered it, whether the special committee considered it, whether there were discussions with the FTC. I think that's an important piece of the story.

THE COURT: Is the claim not, though, that either the board didn't consider that possibility, and that's a problem; or the board did consider that possibility, meaning that Mr. Zuckerberg could stand up on his own and account for his own responsibility, but nevertheless did not pursue that, did not require that outcome? Either way, it seems to

me, from the narrative as I understand it in your brief, the board has a problem. So do we really care at this stage? I mean, in the plenary action, you're going to find out.

MR. FLEMING: I mean, we're going to find out if we get into discovery. And I don't want to talk the Court out of a view that what we have is already strong enough to get past a motion to dismiss. But I do think there's a difference in terms of a complaint that -- as Vice Chancellor Laster put it in *Primedia* -- blows by a motion to dismiss versus a complaint that sort of squeaks by a motion to dismiss. And I think there's a difference. If we know that the board never considered it, that's stronger. If the board did consider this option, went to the FTC and the FTC said, "No, the number has to be 5 billion. It doesn't really matter whether -- you know, all else being equal, we would prefer to have Mr. Zuckerberg named in this, but if you are not willing to come to 5 billion, then we have nothing to talk about," that's a different story.

So I think we don't have that in either direction. I don't think the existing record is adequate to allow us to say that. And I think, you

know, I think there have been actions -- and I recognize the Court wants to get this case resolved and that there are other cases hanging out there. There have been actions -- I'm thinking of *Keryx* and Vice Chancellor McCormick's decision in *GGP* -- where a lot of documents have been withheld and there was maybe only a small core-documents production. So after finding a credible basis, there was an initial production. So if the Court is very uncomfortable about privileged documents, it's possible that giving us those nonprivileged electronic communications from the two-month period leading up to this settlement, that the answers may be in there. And at that point, perhaps those answer our questions and we no longer have good cause or we don't need the privileged or *Garner* documents. That's a possibility.

I think it's more likely that we are going to see these kind of answers. It just sort of necessarily seems to be the case that this discussion about, well, should we ask the FTC if they'd take less money if Mr. Zuckerberg fell on his sword, seems almost necessarily the kind of conversation that's going to be going through counsel and that's going to be reflected in either the privileged electronic

communications that are being withheld or in those redacted portions of the board minutes that have been produced. And that just seems like such a fundamental part of the story.

Again, if the Court thinks, whatever the outcome is, we're going to get past a motion to dismiss, I'm not too sad about that outcome. But I do think that it makes a meaningful difference in the strength of our complaint versus sort of a viable, squeaks past a motion to dismiss, but we're all, you know, crossing our fingers, feel that sort of sinking feeling in the pit of our stomach when the decision comes into our email versus a complaint that just blows by a motion. I think that's important.

The other thing I will say on this is I think -- and, again, I'll go back to *AmerisourceBergen* -- I think Rhode Island is not, you know, a nuisance plaintiff that is trying to squeak past a motion to dismiss and trashing a decent settlement. It's a state pension fund. It's a state pension fund that has fiduciary obligations to its beneficiaries: state employees, municipal employees, police, firefighters in Rhode Island. And it filed a plenary complaint. It's taking on a fiduciary

obligation to Facebook and its stockholders. My client takes that seriously.

So in evaluating the next move, in evaluating the next decision, it's a decision that is more than just can we plead a complaint on the record that hits the various elements and, under existing Delaware law, because of the way the entire fairness doctrine works at the pleadings stage, we'll get past. It wants to evaluate the claim in full. What is this case going to look like when we get to the merits stage? Is this a case where we're going to be able to invest state resources and time and energy and focus for this state pension fund in litigating this action? Is it the case where we're actually going to be able to achieve something meaningful for the company and its stockholders?

So I think when you see it through that lens -- and this is what Vice Chancellor Laster was talking about in *AmerisourceBergen* -- it's not means plus end, it's just means. When you look at it through that lens, I think Rhode Island is entitled to be able to have information that will allow it to fairly evaluate the claim in its entirety, not just evaluate do we have the pieces we need to put together

a complaint that would survive a 12(b)(6) motion on a reasonably conceivable standard.

So I think that's the other important piece of this, that it's not just getting the documents we need to beat a motion to dismiss. It's my client really does want to fully evaluate the claim and make a decision, exercising its fiduciary obligations to its own beneficiaries as well as to -- as well as to the company.

THE COURT: So draw the line for me, as explicitly as you can, between what you get in a 220 action in order to fulfill that mission that you've just outlined versus what you would get once you file your complaint alleging wrongdoing and now we're in discovery. Where is the line here that you are willing to embrace and say, you know, this is the cutoff at 220, with the understanding that more will come if we can get past a motion to dismiss in the later action?

MR. FLEMING: Sure. So, again, I think it's obviously hard, you can't write a one-line fact that's going to apply to every 220 action. They're necessarily fact dependent. But I'm not going to dodge. Let me answer it.

I'll go back to *AmerisourceBergen*, that hierarchy, as you start with formal board materials, if those aren't enough, you move to informal materials. If those aren't enough, you move to officer-level materials.

THE COURT: So, importantly, though, enough for what?

MR. FLEMING: Enough to know what the board knew when it approved the settlement. And for that I refer the Court to *Saito v. McKesson*. This is the second decision by the Court of Chancery following remand. The Court found the documents were necessary and essential and that good cause had been established under *Garner* because plaintiff's purpose in investigating mismanagement, investigating a breach of fiduciary duty action meant it needed to "determine what the board knew when approving the merger. The legal advice given to the board in conjunction with the merger is relevant and necessary in determining what information the board relied upon." That decision then went up to the Supreme Court and was affirmed for the reasons given by the Court of Chancery.

THE COURT: All right. So can I stop

you there? And the gap, then, that you are identifying that you need in 220 before we can move to the next step is what did the board know when it approved this settlement. You believe you do not yet have adequate information to be able to state, perhaps in a complaint, what the board knew at the time it approved this settlement. Is that the gap?

MR. FLEMING: Yes, I think that's fair. We know bits and pieces of it. We know what the board -- we know the board was told, "We made this offer, this monetary offer to the FTC." But we don't know what the board knew about these other alternatives, whether they were considered, whether they were suggested. And I think that falls right in line with the discussion in *Saito*.

Again, going back to the merger analogy, boards rely on their advisors. In the merger analogy, you get the banker presentation. If it's a 13E-3 transaction, they're filed with the proxy. If you submit a 220 in an entire fairness transaction with no *MFW* protection, you're probably going to get, at minimum, the core documents and see what the bankers were telling the board. How did they value the company? What alternative transaction structures

did they evaluate?

Here, that was all given to the board by lawyers. It was lawyers who were doing the back and forth of the negotiating. It was lawyers who were advising the board on how to value the claim against the company, how to value the claim against Mr. Zuckerberg. It was lawyers who were advising the board about what potential alternatives could be pursued.

We have only the very smallest bits and pieces. We have unredacted portions saying, in this respect, advised the board that we told the FTC X. But that's all. We don't have, here are some other things we could tell the FTC next time. Here are what we think the FTC is thinking. Here is the likely outcome if we pursue this path versus that path. It's just very hard to fully evaluate, maybe not in the sense of get some facts that will get you past a rule 12(b)(6) motion, but fairly evaluate what is this case going to look like at trial. Is this a good use of investing state resources to litigate the case?

I think Section 220 fairly encompasses board-level and informal board materials that will

show you what the board knew about these kind of critical questions. And, again, we're not asking for all board members. We have identified a subset of custodians, the same ones that Your Honor had identified in the prior action. So Mr. Bowles, Ms. Sandberg, and Mr. Zuckerberg; and then three custodians in the office of the general counsel, Colin Stretch, the general counsel, and his two chief deputies, who we know were involved in this process.

So it's significantly more limited than what we would be seeking in plenary discovery. We are not seeking officer-level materials. We are not even seeking all of the communications back and forth with the FTC. Just if a communication went to the FTC and then it was forwarded to a board member by one of these people in the general counsel's office, we get it there. So we're getting a picture of what the board knew, not the kind of mundane, back-and-forth scheduling, et cetera, to the FTC. Maybe we get some of that through the FOIA action. Who knows? But for purposes of this, it's very tightly focused on board knowledge.

I guess, briefly, I know the Court is familiar with the *Palantir* case from the arguments,

but that's a case about not -- companies that are sloppy with their recordkeeping are the only ones who have to produce electronic communications. Your Honor heard the same arguments from the same company in the prior action and rejected it because there was evidence that board members weren't saving their communications about data privacy for the boardroom. We have that same evidence here. We have a privilege log, Appendix A to our opening brief, showing that there are about 300, approximately, communications to board members about communications with the FTC.

I think it's fair to infer from that that there are also nonprivileged electronic communications. Probably fewer, you know. Given the subject, it seems very likely that most of board members' communications about this will be privileged. But, again, I could envision a communication to or from the FTC that then gets forwarded to a board member. You know, whatever is said in the cover email forwarding might be privileged, but certainly the communication down below with the FTC wouldn't be.

You could also imagine communications between board members, Mark Zuckerberg, and Sheryl Sandberg talking about the FTC negotiations. Possibly

they will say things that are reflecting legal advice of counsel, but I think it's also reasonable to expect that they might have had conversations about this that would be nonprivileged. Again, we have nothing in that bucket of nonprivileged electronic communications from the two months leading up to the settlement, which makes it very difficult to understand sort of how that gap that we see when the special committee is formed, how it ultimately gets narrowed.

Unless the Court -- one last point on the broader 220 analysis before I'll turn to the *Garner*-specific questions.

There's this argument from Facebook's briefing that it's possible somehow to segregate documents that are relevant to the pleadings stage defenses from documents that are relevant to affirmative defenses. Fundamentally, I think there's just a practical problem with this. I don't think real-world documents are going to come packaged and neatly categorized like that. I don't think it's realistic to expect that contract lawyers, or even junior associates at Gibson Dunn, are going to be able to sort of reliably call balls and strikes.

So I do worry that any order that

would permit Facebook to exclude documents relevant only to affirmative defenses would end up excluding a lot of documents and lead to a significantly underinclusive production. I don't think the language from *Kaufman* that they cite can bear the weight that's placed on it. *Kaufman* had nothing to do with the distinction between documents that are relevant at the pleadings stage versus documents relevant to affirmative defenses.

In subsequent cases, the Court has recognized that documents relevant to affirmative defenses can be necessary and essential at the Section 220 stage. And we cited a couple cases where the Supreme Court has seemed to suggest that you might apply 141(e) at the pleadings stage. I don't know that we agree with that. I don't think that's proper. But there are cases that can be read that way, that suggest even at the pleadings stage the Court could -- should consider whether the actions that the board took were taken in reliance on the advice of counsel. And if that's fair game at the pleadings stage, I think it's fair game for us to know what counsel actually told -- actually told the board.

THE COURT: As I understand your

argument, though, it's not so much a 141(e) need for the documents to sort of affirmatively rebut an affirmative defense; but, instead, you believe that this would be part of the affirmative pleading that you are going to offer to demonstrate what the board knew and when, and some of that fund of knowledge is advice that it was receiving from its attorneys.

MR. FLEMING: That's a fair summary, yes.

If the Court has other questions on the necessary and essential or electronic communications, I'm happy to answer them.

THE COURT: I don't. Thank you.

MR. FLEMING: Let me turn to other aspects of the *Garner* analysis. And I'm using *Garner* as a shorthand. When I say "*Garner*," I mean good cause for privileged communications or good cause under Rule 26(b)(3). I think the arguments apply equally to either type of document.

Garner is obviously a lengthy, multifactor test. Unless the Court has particular questions about some of the --

THE COURT: I do have one. And you don't have to answer it now. Just if you can weave it

into your discussion of *Garner*. The interplay between necessary and essential and *Garner*, and particularly that element of *Garner*, if I find necessary and essential on the 220 side, is that tantamount to a finding that you've met that element of *Garner*, or is there more to it than that? Is it more nuanced than that? And if you don't understand the question, I'm happy to explain.

MR. FLEMING: No; I do understand it. So I think *Lululemon* suggests -- and Facebook quoted this in its own brief -- that there's a pretty strong overlap between 220 necessary and essential and *Garner* necessity of shareholders having the information. I would argue that they overlap so much that a finding of necessary and essential for 220 purposes should be dispositive for *Garner*.

I think what Facebook will argue -- and so let me address this argument -- is that there is an additional test for *Garner*, which is, okay, this document may be necessary and essential, but can you get it from other sources. I don't think that there is as much consideration of can you get this document that is necessary from other sources outside the *Garner* context. I don't know that anyone has actually

held that way, but I think you could read the cases that way. So when I get to that section -- and I will get there pretty quickly because I think that's where Facebook spends most of its time -- I'll address the "exhaustion of other methods available from other sources" argument, which I think might be an argument at least that leads to *Garner*.

Does that answer the Court's question?

THE COURT: It does. Thank you.

MR. FLEMING: So the three most important elements -- and the parties agree on this -- are the colorability of the claim; the extent to which the communication is specifically identified versus the extent to which it's sort of a fishing expedition; and then this last one that we were just discussing, the necessity or desirability of shareholders having the information and availability of it from other sources.

On the first element, as it does with credible basis, Facebook concedes that our claim is colorable. Again, an unusual tactical choice. You don't see this very often. Many of these *Garner* decisions focus on the colorability analysis, just as many 220 decisions spend a lot of time on credible

basis. I think it's one that speaks volumes.

On the second element, Facebook doesn't dispute that we have identified the specific documents that we're seeking, unredacted copies of the board and special committee minutes that have been produced. Plus we've identified specific communications from the privilege log, and as a small subset of the privilege log, where based on Facebook's description, they appear to be communications about the FTC negotiations. We're left with the descriptions that Facebook has given. It's hard for us to tighten it even further because Facebook's descriptions are pitched at a pretty high level of generality. But, again, they're on Appendix A to our opening brief, and it's a number in the low hundreds.

Facebook's argument is that's too high. It points to some *Garner* cases where the production was, you know, in the double digits, as opposed to triple digits, for a *Garner* production. But I don't think Section 220 or *Garner* actually imposed any hard quantitative limits. The defendant in *Wal-Mart* made this argument in the *Wal-Mart* decision that there was sort of a quantitative limit, and the Supreme Court definitively rejected that

argument. In both *Wal-Mart* and *Saito*, the Court of Chancery ordered significantly broader production of privileged communications than we're asking for here, and the Supreme Court affirmed both those decisions.

Facebook spends most of its time on this third element, the necessary and essential, plus other methods. The first, it argues that we should be forbidden from obtaining *Garner* documents because my firm filed a FOIA action against the FTC seeking related documents. Obviously, a little harder to reconcile with Facebook's position in the FOIA litigation, where it has intervened and moved for summary judgment, arguing that we are not entitled to any more documents. Also inconsistent with Delaware law. In *Wal-Mart* the -- there was the government investigation. There were documents that were potentially available through FOIA. My colleague, Mr. Cook, and his friends decided not to do a FOIA in that case. They only pursued documents through Section 220. And then-Vice Chancellor Strine ordered the production of *Garner* documents, and the Supreme Court affirmed.

There was another plaintiff who filed a 10b-5 in Federal Court who was pursuing FOIA

documents. It took years and years for that decision even to reach the summary judgment phase.

The only thing Facebook cites on this FOIA argument is *Champlain Enterprises*. That's a Federal District Court case. There, the Court held it was enough to make a FOIA request and have it denied. If that's the test, we passed.

Finally, as I discussed a minute ago, there's a difference. The FTC doesn't have documents showing what Facebook's board was told. It has the back and forth between Facebook. That's helpful. That's relevant. We have already received some documents from the FTC that will no doubt end up in a plenary complaint. But it doesn't go to the core of our question, which is board knowledge, what the board considered, what alternative they considered. And it's just hard to imagine that these are the kind of documents that would be shared with the government.

The other method Facebook suggests is filing a plenary litigation and taking depositions. At this point, we have kind of come full circle to the discussion that we had at the beginning of the argument. I think to say that you need to file plenary litigation and try depositions before seeking

Garner documents, if that was the test, you could never get documents in a Section 220 action. But, again, *Saito*, *Wal-Mart*, the Supreme Court affirms Chancery Court orders with broad production of privileged materials in Section 220 actions. I don't think you can square the "you have to take depositions" argument with that authority.

And finally, Facebook argues the settlement wasn't lawyer driven in the same sense as the internal investigation at *Wal-Mart* because the ultimate decision to approve the settlement was made by directors, not lawyers. That doesn't make a lot of sense. The ultimate decision to approve the settlement was made by the board, but as this Court knows, board members rely on their advisors. And here, the minutes show that the directors were acting on the advice of their lawyers at every step and negotiations themselves were conducted amongst lawyers.

So I think this case falls squarely within the scenario of what then-Vice Chancellor Strine was describing in *Loral*, where he said, "[t]he point of *Garner* is, if directors wrap their conduct so tightly around their interaction with counsel that

it's in fact impossible to really explore why -- what the board did and why it did it without access [to privileged documents], then *Garner* justifies production of the documents sufficient for that purpose." If that description doesn't apply here, I don't think it applies anywhere.

Thank you for your time, Your Honor. If the Court has additional questions or areas of concern, I'm happy to cover them. Otherwise, we would rest on our papers for any other points.

THE COURT: My only question is whether you discern in the case law any distinction in how the Court should view *Garner* in the 220 context versus in a plenary proceeding. In other words, we know that *Garner* is an exception that should be invoked sparingly and that the Court should permit production of privileged information under a *Garner* exception only in rare instances. Should it be more rare in the 220 context than in a plenary proceeding, from what you've read in the cases?

MR. FLEMING: No. I think there's this weird doctrinal wrinkle, because I do think that you see, when people are seeking *Garner* documents in plenary actions, I do think there are cases

suggesting, no, why don't you go take some depositions. So I think in that one sense, it's actually a little easier in a 220 action because you can't take depositions in a 220. You can't take that type of plenary discovery in a 220. So I think in that one unusual context, it's actually an easier showing in 220 just because of the procedural limitations that are imposed on summary proceedings.

I do think, and there's this kind of background argument that is not the holding of the case, but you see this argument that *Wal-Mart* was kind of sui generis because it was extreme facts, and, you know, you need a showing of extreme facts to get *Garner* in a Section 220 action. I don't think that's the law. I don't think that's what the Supreme Court was saying. But even if that is the test, even if you do need extreme facts, this case satisfies that.

If you look at what ultimately happened in *Wal-Mart*, it's bad conduct at a Mexican subsidiary. Less of a showing of board involvement at the 220 phase than we have here. The ultimate fine that *Wal-Mart* paid was $282 million. Here, it's a $5 billion fine, the largest fine in FTC history. And I think, again, finishing where we started, if you

compare the fine that Facebook paid to the number that you get if you follow the thread of the Gibson Dunn white paper, the disproportion between those two numbers, I think, and the disproportion between the previous record FTC fine, which was Google paying about $122 million, the sheer disproportion between those numbers suggests that this is an extreme case. So if that's the test for *Garner* documents in a 220 action, I think we clear that bar.

THE COURT: Thank you.

MR. FLEMING: I don't have anything further. Thank you.

THE COURT: All right. Mr. Ross.

MR. ROSS: Your Honor, before I get into the substance, is the audio any better?

THE COURT: It is a little better. It's certainly fine for me, but I'm only one person that that's important for. The other is our court reporter. So I'll ask Debi if, as we go, the audio is not adequate, we'll address it.

MR. ROSS: I apologize, Your Honor. If it would be easier and Your Honor would prefer to take about five minutes, I can switch to a different computer. We're using phone audio because the

computer audio in here was having a problem. I would say in five minutes we could be ready to go off a different computer with a different camera and a microphone, if that would be preferable either to Your Honor or to Debi.

THE COURT: So far for me it's good.

Debi, are you good?

THE COURT REPORTER: I think I'm fine so far.

MR. ROSS: Thank you, Your Honor. May it please the Court. What we're here today fundamentally about is the plaintiff's request to obtain via Section 220 the assessment by company counsel of the merits, the likely outcome, and the litigation risks associated with potential claims by the FTC. We are here, fundamentally, because the plaintiff wants core privileged information. And I thought it was telling when Your Honor was asking counsel for clarity as to what they needed, the very first thing that counsel said was really the internal analysis of the strength of the claim. So we're talking about core privileged information that the plaintiff does not dispute is properly protected by privilege.

Now, the plaintiff said they need this to investigate the terms of a public settlement and the process by which it was reached. Now, as we have laid out in our papers, and as I will talk about in greater detail today, the plaintiff has voluminous information regarding the underlying events resolved by the settlement, regarding the negotiation of the settlement and the final terms.

If we were to go back to the days of banker boxes, because it's easier sometimes to get a sense of volume in that way than when we talk about electronic data, the company's production would be somewhere in the range of 12 to 15 bankers boxes of information. There is also, of course, substantial public information about the events at issue.

Now, the plaintiff has waffled in their papers on what they know about the settlement. On one hand, they have said repeatedly that they are unable to evaluate the settlement, and, on the other hand, and at times in the same document, they declared the terms and the process fundamentally flawed.

Now, there's no doubt the plaintiff wants this information, no doubt they would find it interesting. But that's not the standard of a 220 and

particularly not the standard with respect to privileged documents or emails.

The question is: Are these necessary and essential for 220 purposes? And then, considering the rest of the *Garner* factors, has the plaintiff carried its heavy burden? And the plaintiff has not.

I'm going to spend today talking briefly about the plaintiff's purposes, about the extensive information that the plaintiff has. It is important both for the 220 analysis, which if Your Honor were to find is not necessary and essential, you could simply dispose of this on Section 220 grounds without getting to *Garner*. There is, to go back to Your Honor's question, unquestionably overlap between the necessary and essential considerations in the 220 context and in *Garner*. But *Garner* does introduce some additional considerations that do need to be factored in, even if you were to find that this information was necessary for the plaintiff. I'll then talk about *Garner* and I'll talk about email.

And while we heard some new discussion today about why plaintiff wants the emails and what they think it will show, as we see when we get to it, as we see in the briefing, even the request for

emails, at least to date, has fundamentally been about getting to the same privileged information that they're seeking under *Garner*. So, in large part, we think that the email analysis really merges into the *Garner* analysis.

Now, I'm not going to spend a long time on the merits, but given some of the things that plaintiffs said about the fact that we're not disputing credible basis, I do just want to make a few points for the record.

THE COURT: Can I stop you before you do that. It would be helpful for me, as I characterize your position on credible basis in whatever decision I have to render here, if you could tell me precisely what you would want me to say about that.

What I think I would say -- and then perhaps you can correct me if you think I should say it differently -- is that for purposes of this 220 action, without acknowledging any liability, you are conceding credible basis in order to focus the argument on necessary and essential. Is that a correct statement of your client's position here? So that we don't have to dwell on that. We move to the

next phase of the analysis without admitting liability for the underlying claims.

MR. ROSS: Your Honor, I think that's exactly right. As Your Honor well knows, the standard for credible basis in 220 is far lower than even to state a claim. And what we are saying for today is, given that incredibly low standard, we are not going to dispute it. It is not, contrary to what counsel suggested, remarkable. I have litigated multiple cases where we have not focused on the credible basis, and we focused on issues of scope or things like *Garner*.

But the fact that we're not disputing that the plaintiff has enough to satisfy the really incredibly minimal standard under 220 is not remarkable at all, and does not suggest anything along the lines of what the plaintiff suggested in their discussion, to suggest that this was truly a remarkable position, that there are significant inferences that should be drawn from the fact that we're not focusing on it.

It's not remarkable at all. It is an acknowledgment of the incredibly low standard and a decision to focus on, really, what is the core issue

here, which is the plaintiff's attempt to invade core privileged information. Of course, there are many valid reasons that have nothing to do with the merits of a claim for why a company might settle. There are lots of factors that go into settlement negotiations. This is not the time and the place for it. We recognize the low standard, and so we are focusing today on what really is the important issue in this case, which is the plaintiff's attempt to invade significantly the deepest and most protected parts of privileged information.

Now, as we think about the plaintiff's desire for these documents, it's useful to start by looking briefly at why the plaintiff wants them. So I'm going to go to Slide 2 of my deck. And we have distributed this. We have distributed this to counsel at the same time we provided it to chambers, so I'm not going to put it up on the screen. I will use the slide numbers so that Your Honor and everyone else can follow along.

And what we see here is, on Slide 2, plaintiff's explanation of why they want this information. And what they want is, as I have alluded to, is to evaluate the fairness of the settlement and

the process that led to it. That's in paragraph 8 of the complaint in the upper left. They explain in their pretrial brief they want to look at both the process and the terms.

And then if we look on the lower left side, I do want to put a marker down and call this out. I am going to return to it at various points today because I think it's instructive. And Your Honor asked counsel during his argument what it was that their theory was and what it is that they're looking for. And they have provided a quite clear answer in paragraph 85 of the complaint. This is on the lower left, the highlighted portion. The plaintiff's core claim, the essence of what they are seeking to investigate is that through the settlement with the FTC, they allege Mr. Zuckerberg "received a non-ratable benefit - without *MFW* protections in place." And we will come back to that repeatedly because I think, as Your Honor thinks about necessary and essential, both for 220 purposes and certainly in the *Garner* context, it is critically important to think about it in terms of what the plaintiff needs to evaluate what it itself has called its "core claim."

Now, Your Honor is obviously

incredibly familiar with the case law on necessary and essential, and I'm really not, unless Your Honor has questions, going to spend much time on it because of Your Honor's familiarity and the number of times that this Court, and Your Honor specifically, has dealt with it. But it does bear reminding that, as this Court has said in *Lululemon*, really to satisfy necessary and essential, the plaintiff has to show that they cannot accomplish their purpose without access to the documents.

And what documents did the plaintiff have?

Now, before I get into the detail, I do want to offer an apology to the Court and a clarification. As we were preparing for argument, I realized that the figure that we had provided in our April 30th update letter to the Court of having produced, at the time we thought, 27,895 pages appears to be slightly off. The figure we got from the vendor this time when we asked was 27,770. I think part of the problem is, of course, the inherent challenge in converting electronic data to pages. It is obviously still a voluminous amount of information, still in that 12 to 15 bankers boxes. We certainly apologize.

We were not attempting to at all mislead the Court. But having gotten a revised number in preparation for today's argument, I did want to at least advise the Court that we did receive most recently a slightly revised figure.

So what does the plaintiff know about the settlement? And let's start on Slide 3. Because if you read their pleadings in this case, they would have you believe that they know almost nothing about the process that led to the settlement. We have various quotes here from the complaint and the pretrial brief.

You see in the upper left -- I'm not going to read them all -- complaint paragraph 14 they say, "[I]t is likely that the privileged documents are the only documents that can shed light on the process used to reach [the settlement with the FTC]."

In the lower right-hand corner, on page 61 of the pretrial brief, they make the same claim. They say again in that paragraph 85, which is on the lower left that has that core claim discussion that we looked at just a few moments ago, they say in the second highlighted part there is simply no way for them to evaluate properly the fairness of the process

and the price negotiated in the settlement without privileged documents.

And I must say, I find those claims to be rather surprising. This is not a situation where the plaintiffs lack information regarding either the terms of the settlement or the process used to reach it.

If we go to Slide 4, we have a listing here of what information the plaintiff currently has regarding the settlement. 2,931 documents produced by the company. The FTC settlement. Board minutes. Special committee minutes and materials. The special committee's report. A legal analysis -- two legal analyses presented to the government. Exchanges with the government. Audit and risk oversight committee materials. That's just material from the company. They have government materials. They have press reports. And, of course, to evaluate the terms of the settlement, the plaintiff has the settlement itself. It can see what the gives and the gets were.

Now, I want to break down a little bit what it is that the plaintiffs have, compartmentalizing a little bit different steps and types of information. So if you look at Slide 5,

let's start simply with what it is that the plaintiff has regarding the board of directors. They have minutes from five meetings. Those JXs are listed on the left. And they reflect information about -- and I'm not going to read all of these points, but they have, critically, updates to the board in multiple sets of minutes regarding the ongoing settlement discussions, discussion about what it was that was being presented to the FTC, what the FTC was saying in response. They have management's views on the settlement positions. They have direction given by the board to management regarding negotiations. Specific proposals that were made both to and from the FTC. And other factors that were considered by the board in evaluating whether or not to enter into the settlement.

THE COURT: Can I stop you there?

MR. ROSS: Certainly, Your Honor.

THE COURT: I think, at bottom -- and I don't mean to oversimplify -- but what I gather Mr. Fleming's main point is here, what we don't know, they say, is whether or not the board ever considered the option of resolving with the FTC without eliminating exposure to Mr. Zuckerberg. We do not

know whether they considered that option, what that option would look like, what savings the company might have been able to achieve in the settlement, had it gone down that road, as opposed to the road it went down, which is global resolution.

Do they have information that would allow them to assess whether the board considered that option, the option of settling just on behalf of the company, leaving Mr. Zuckerberg to negotiate on his own?

MR. ROSS: Well, Your Honor, they have, from the board documents, extensive discussion of what it was that was considered. What is redacted from the board minutes, for example, is the analysis of claims. But there is extensive discussion about what consideration of options was given.

Now, I can't say to Your Honor -- I have not been through all of the privileged documents and can't say whether or not in the privileged documents there might be a reference to any of that. But they do have extensive information in well-documented minutes about various options that were considered.

And although that's what we've heard

today, I do think that does not look at all like what it is, at least to date. If that was really all they were seeking, that would represent a significant narrowing and, frankly, a change from what it is that the plaintiff has said to date they need. Because what they've said to date they need is to understand the evaluation of the strength of the claims, the litigation risks.

Your Honor is asking -- and this question raised a very discrete, specific question, which was basically was consideration ever given to this topic. That suggestion, that is not anywhere near the scope of what they are seeking or even the very argument they've made. Because the argument they've made, at least to date in their complaint and in their brief, is that they can't evaluate whether or not this was a reasonable action by the board without understanding what the likely litigation outcomes were.

So I apologize that I can't say whether or not there would be anything in the documents that would indicate whether or not, you know, and the extent to which that was considered. But I will say that -- and, Your Honor, we have the

references in our deck. If you go look at the deck -- and I'm sure Your Honor has already looked at the joint exhibits -- you will see that there is substantial information in there about what is being considered and talked about.

What's been redacted, and the plaintiffs point this out in their brief, they complain about things like the fact of what's redacted is an update from outside counsel about the likely timeline and risk of litigation. That, at least to date, has been the focus of what they've been concerned about. And the articulated theory they have offered on why they need it is because they say we can't assess whether or not this was a reasonable compromise without understanding what the outcome would have been had there been litigation.

THE COURT: Can I stop you there? I'm going to ask you to do with me what I asked Mr. Fleming to do, which is to sort of play this out into the next phase.

If the plaintiff pleads facts that it draws out of the white paper that outlines counsel's assessment of strengths and, more directly, weaknesses in the FTC complaint, and their proposed resolution,

and they say this is the assessment, this is the company's assessment of strengths and weaknesses of the claims, as reflected in this document that Facebook has now produced to us in response to our demand, they plead that, I assume that what can't happen in a motion to dismiss is the company to attach a bunch of information to its motion that says, actually, the assessment was different than that. So they have pled that this was the company's assessment, but, in actuality, the company's assessment was different. And here's why. Here are documents that support a different spin.

I assume that can't happen; right? If this is all that's been produced to them in response to the inquiry: how did the company assess strengths and weaknesses of the FTC's claim? and they get this white paper, that, at least for now, until discovery in the plenary action might suggest otherwise, that for now is it. And if they plead it, the company can't come in and say something different on a motion to dismiss.

Is that a fair assessment of how this would play out?

MR. ROSS: I think it is. I want to

just put a little bit of nuance on that. There's no question, and we understand, that even had there not been the 220 case, the defendant, on a motion to dismiss, does not get, in the context of a motion to dismiss, to come in and provide a whole bunch of evidence beyond the pleadings and try to offer a different counterfactual narrative generally. That's, obviously, not a motion to dismiss, and we wouldn't seek to do that.

THE COURT: Well, let me stop you, because we're now in this realm of a 220, though. And what we all know is that things tend to expand beyond the pleadings pretty rapidly when there has been a 220 production, even at the motion to dismiss stage, where the defendant says, "Look, they had access to this information. They didn't plead it, but here it is. And when you look at this information, that tells you they don't have a claim."

And so what I'm wondering is, fast forward to motion to dismiss. They have pled their complaint. And what they say factually is the company assessed the strengths and weaknesses of the FTC's claims, as reflected in this white paper that they have received in 220. The company can't come in and

say, "Well, actually, that was then, but by the time they approved the settlement, the assessment had changed." Or they can't say that's one document that reflects, but internally they were actually talking about other things, and they were actually acknowledging that the claims were stronger than they were representing to the FTC in this advocacy paper.

Do you see where I'm coming from? And if I was a plaintiff here, I would say, look, we have to account for that risk that what they have told us in this one document is not the definitive statement of the company's position. So if we stick our neck out in a complaint and plead that, we don't want to get our head chopped off because there was more, and now the company is going to bring it forward prosecuting a motion to dismiss. That can't happen; right?

MR. ROSS: Yes, Your Honor. And I understand that. The one caveat I wanted to give you is around 220 generally, and not on this specific issue -- because, of course, now we're talking about privileged information; right? What is the company's assessment? And we have not been providing them -- this is why we're having the fight -- the company's

privileged information. And so on this issue, there wouldn't be a way for us to do that without suddenly introducing privileged information that we haven't produced. We understand that.

The one thing I did want to note -- and I don't think it's sideways from what Your Honor said, but I do want to just point it out, and I am happy to answer questions -- in the information that they have, in the minutes that they have, we don't agree, for example, with how they read what's on the pages. Okay? So on this information, we don't agree, for example, on how they read some of the chronology of the settlement in the pages they have, and that they would rely upon, and we might say that we don't read it the same way and we don't think that some of what they say is the correct reading.

But on this issue, Your Honor, on this, is there going to be a different, you know, assessment of the claims at the motion to dismiss stage that we're going to come in and argue, no, the case should be dismissed because, in fact, there was a fundamentally different assessment of the claims, Your Honor, that's just not in the documents we have provided. That is the core privileged information we

are seeking to protect, and we would not at the motion to dismiss stage be coming in to move to dismiss on the grounds that there's a different privileged assessment of the claims that was the later position of the company, for example.

Did that answer Your Honor's question?

THE COURT: It did, and I thank you.

I don't need an answer now if it's going to come later in your presentation. But the other fundamental premise of the plaintiff's argument, as I understand it, is, at bottom, what we want is what the board knew and what the board based its decision on. So in any other context, say a merger context, fundamentally, if we have stated a credible basis to suspect wrongdoing, based on a board decision, then that should entitle us to documents that reflect the board's decision and what animated that decision.

So here, I think what they're saying is, once we get past the point where you are no longer questioning whether we have a credible basis to suspect wrongdoing, based on the board decision to settle with the FTC at this extraordinary number, we are now entitled to know what the board considered in

making that decision. Unfortunately, in this instance, it so happens that the nature of the decision was a decision driven by legal considerations, the strengths and weaknesses of the claim, risk of exposure. And, therefore, fundamentally, in order for us to understand what the board knew and considered, we've got to hear what the lawyers were telling them.

That, I think, fundamentally is the argument. And at some point as you go, if you could address that. Because I think that's really, at the end of the day, the essence of the dispute.

MR. ROSS: Sure. Well, why don't I jump ahead and do that and then figure out, after we've gone through that, what else I would have covered leading up to it that we need to go back on.

THE COURT: And for what it's worth, to be helpful for you in timing, I think we're going to take about a ten-minute break in about five minutes. So that will give you time to organize and figure out how to go back.

MR. ROSS: Sure. Well, why don't I start, then, with this question and see how much of it I can knock out before we take our break.

Your Honor is absolutely right. Repeatedly in the papers, and at least three times today, we heard, gosh, if this was a merger, we would just get the banker materials. And this is a settlement, and so we need it and we get it.

It's a false equivalency, Your Honor. And it's a false equivalency because what it does not do at all is account for the important role served by privilege. This Court said in *Oracle* that the attorney-client privilege is fundamental to the administration of justice. Banker decks are not.

And the plaintiff's theory, if that argument is adopted, right, then what's going to happen is that in every case -- and I want to return to sort of orient ourselves to what I was talking about in terms of why we're not fighting credible basis, right -- it is an incredibly low threshold. It is lower than the motion to dismiss threshold. And under the plaintiff's reasoning, any time you have enough to get over that minimal threshold, in the context of a settlement, the privilege, which often a plaintiff who has survived a motion to dismiss is unable to penetrate because of *Garner*, now gets the information. It takes the *Garner* analysis, right --

and this Court and other courts have said that in the *Garner* context, right, that the credible basis of the theory is really just a gating issue to get to the core considerations of necessary and essential, availability from other sources, and things like that.

But if plaintiff is correct in their argument that by saying once you've gotten over the credible basis standard in 220, if it involves anything, frankly, where legal advice was involved in the decision -- it would be true in every case that involves a settlement. It would be true in many merger cases. Anything where there was any legal advice given -- it takes the *Garner* analysis, displaces it entirely and replaces it with the minimal standard required to establish credible basis under Section 220.

There wouldn't be, and the plaintiff has not articulated, a limiting principle. And it would really turn *Garner* and privilege on its head to say -- and I'll come back to this because the plaintiff's argument about the need to exhaust does the same thing, for reasons we'll get to -- but it really takes a plaintiff who hasn't filed a merits complaint, may not even survive a motion to dismiss,

or a plaintiff who could survive a motion to dismiss but, as many plaintiffs have done, and we have listed them in our brief, has said -- has not been entitled to obtain *Garner* information even after surviving a motion to dismiss, now simply by establishing the minimal credible basis standard and saying that part of what led to the challenged action was legal advice, we need to see it. And now all of the *Garner* law is really displaced. In getting over the first Section 220 hurdle, then in any context where legal advice is a factor, that opens the door to the plaintiff.

And that, I suggest, Your Honor, is not possible to reconcile with the substantial case law from this Court, the Supreme Court, and other courts on how difficult it is to get to *Garner*. This Court has said, and the Supreme Court, it's very rare, frankly, that you actually satisfy *Garner*. The fact that a plaintiff doesn't get *Garner* material in many circumstances, and in circumstances where it might be interesting, or even useful, but not necessary, is not a flaw in the design of the system; it is the design of the system.

The very point, because of the significant protection afforded to privilege, the

mirror image of that, the necessary result of that is that to get through privilege, it requires a rather extraordinary showing. The plaintiff said in their brief, you know, the Court regularly requires the production of *Garner* information. And, in fact, they have, really, only a very small number of cases. There are very few where a plaintiff has gotten that sort of information. Most of their cases don't involve the production of *Garner* materials.

But under the argument that the plaintiff has made here, if that is adopted, that because the Court took an act on which legal advice was a consideration, and an important consideration, as is every legal settlement, every one of those cases now the plaintiff will be entitled to all the privileged information. There's nothing unique about our case from any other case where you get over a credible basis standard.

THE COURT: Let me stop you there, because I think we're going to take our recess.

And I apologize. It seems that my conducting a hearing at home is a magnet for our lawn service to come and cut our grass right outside my window, because I can't recall a hearing that I've had

recently where my grass wasn't being cut at the same time. So I apologize if you hear that in the background.

Here is what I would like you to think about over the break. We know the concept of back-door hearsay, where both say, okay, the conversation itself we're not going to talk about. But as a result of that conversation, what did you understand the facts to be or what did you do? So we're not going to talk about the hearsay conversation because that's impermissible. But we are going to talk about what you did.

What about here, where the board is getting inputs, maybe principally from its attorneys, but perhaps other sources, to make a decision. At some point, it has to weigh options, and then it has to make a decision. Is there a way to provide information to these plaintiffs about the options that the board considered, and then the decision it made to ultimately settle with the FTC on the terms that it agreed to, without getting into, at least at this stage, the substance of the specific advice it was getting from counsel?

And I don't need you to respond to

that now. But if you could think about that and, at some point, weave that into your presentation, I'd appreciate it.

With that, let's take a ten-minute recess. By my clock -- and I think I am a little slow -- I've got 10:46. But just measure it out at ten minutes. In the meantime, don't disconnect, but you can go off video. And please, everyone, ensure that you are muting your line so we don't hear things that we are not all supposed to hear.

And with that, I will see you back here in ten minutes.

(A brief recess was taken from 10:49 a.m. to 11:00 a.m.)

THE COURT: All right. Is everybody ready to go?

MR. ROSS: Yes, Your Honor.

THE COURT: All right. Mr. Ross, take us away.

MR. ROSS: Sure. And why don't I start where Your Honor ended, with the question of, you know, is there a way to give the plaintiff information about what was considered by the board without invading privilege. And I would suggest, Your

Honor, that is precisely what we did here. We did provide, for example, voluminous information from the board and special committee. There were limited redactions on the legal analysis, but the fundamental factual narrative is reflected in there.

And I would return, for example, to Slide 5, where we see some of the things. I will discuss these, but I'll just highlight them. The updates on the discussions with the FTC. Management's views on an FTC settlement. Direction from the board to management and the proposals that went back and forth.

If we go to Slide 6, we have information about the special committee. And updates provided on the discussions with the FTC is one of the things, and the special committee's position on negotiations, those are two of the points that are actually reflected in the unredacted material that we provided. And so we attempted to differentiate in what we produced between the factual representation of what happened and what was considered and the legal advice that was given, and that has to date been what has animated the plaintiff's request for information.

And, in fact, if we jump to Slide 8 --

I'm going to skip over Slide 7. This is all covered in our brief. I'm going to jump to Slide 8. The plaintiff says in their opening pretrial brief at page 58, "They [have] the basic outlines of what happened in the negotiations with the FTC." And I think it's useful on the left side on the bottom to look at their table of contents. They have nearly 20 pages in which they allege in their 220 brief that the second FTC agreement was negotiated in an unfair manner. They have enough information to spend nearly 20 pages. And in those 20 pages, they have 35 citations to 15 different -- I'm sorry. In the actual 15 pages, they have 27 different documents that we produced that they cite. In the totality of the opening pretrial brief, they have 35 different citations, and they cite 15 different sets of minutes. In their reply brief, they cite 14 different sets of minutes.

So they have voluminous information regarding what happened. And I would be remiss if I didn't note that in the recent derivative complaint that was filed, the plaintiffs there, who had the same information, make 30 pages of allegations concerning the settlement and negotiations. And so there is voluminous insight into the facts of what happened

differentiated from the legal analysis that animated or was at least a factor in the consideration by the board.

Now, again, I think it's useful -- and we do this on Slide 9 -- as we think about the need for information to think about even this question in the context of plaintiff's core claim; right? Their core claim is a nonratable benefit without *MFW* protections in place. They don't need any privileged information for that. They don't need it on the nonratable benefit. They have the terms of the settlement, and they have already concluded in their pretrial brief that the settlement provided a nonratable benefit. And they also don't need it to determine if the *MFW* protections were in place. Now, obviously, we disagree with, and I have noted this -- we are not going to spend time here -- the suggestion of wrongdoing. But we are not required to relent and acknowledge wrongdoing in order to shut off access to privileged information.

Plaintiff attacks at length the idea -- and Your Honor, I think, started with this in one of his first questions to counsel, where you said, "Look, you guys have come in and said you've got

enough to state a claim. Why doesn't that -- why isn't that an important and potentially dispositive consideration?" And even in Section 220, before we get to the heightened standards that are involved in *Garner*, it is unquestionably, at a minimum, a significant consideration; right?

This Court has said repeatedly, most recently, I think, in the *CHC Investments* case, for example, that one factor, and a reason that a plaintiff who has filed a lawsuit doesn't get to use 220 except for some limited circumstances, is because by filing the lawsuit they have represented they have sufficient information to support the allegations. And that's inconsistent with the idea that it's necessary. Now, this plaintiff has not yet filed a complaint, but they have certainly represented repeatedly in briefs that they have enough.

And, again, we are not resting on this to say that it's dispositive, although the Court could do that. But, again, particularly where we're talking about privileged information -- and I will talk specifically some more about *Garner* now -- that fact, the fact that they have represented repeatedly that they have concluded that they have a claim, that they

have a core claim in which they don't need this information, these are critical considerations.

I think it is useful, as we think about *Garner* -- and this ties back to Your Honor's question -- to go to Slide 10, because this question of what it is that the plaintiffs are seeking, we did hear today, we need to know if there was consideration of a different alternative. This is not, as I have alluded to, how they have alleged or what they claimed they need to date. If that was really what they were seeking, it would certainly represent a substantial narrowing of their request; right?

We look on the left side, and we see in their complaint what they said they need to understand is what the board was told about the strength of the claims and the likely outcome. They point out in their pretrial brief that what was redacted is the related litigation and regulatory risk, the timeline and outcomes of litigation alternative.

In the middle slide, what they complain about, what they say they don't have is what the board members were told about the strength of the claims and the likely results. That is what they

have, at least to date, fundamentally been seeking, core privileged information.

This is not a case where the directors' actions are so wrapped in interaction with counsel that you can't explore what the board did and why. I fundamentally disagree. It is hardly surprising that when dealing with a regulator, a company acts through counsel. And it's hardly surprising that when negotiating with regulators, lawyers are the primary source of information about the negotiations. But, again, let's focus on the fact they have significant information about those interactions. JX 53, 54, 56, 74, 82, and 117 include board updates, board directives on settlement negotiations, and proposals that went back and forth. What the plaintiff does not have is the privileged analysis of the claims; and if that is discoverable here, there is no limiting principle, and the plaintiff has not articulated one.

It is also important to remember, this Court has recognized in *Espinoza* and *Lululemon* that they have voluminous information regarding the underlying events and talented counsel who is able to evaluate the merits of the claims themselves and to

make allegations regarding whether or not this was too much to give and too much to get. While not necessary, they do have here information regarding what the company and Mr. Zuckerberg's counsel told the FTC. It's not necessary for us to win, but it is an additional important consideration.

I'm not going to spend too much time on the affirmative defense issue, unless Your Honor has questions. I do want to highlight, though, that while the plaintiff suggests that this sort of injection of the idea of the affirmative defense is an issue that we have created and we have somehow tried to inject this issue, it's the plaintiffs who brought this issue into the case in their pretrial brief. Pages 3 to 4, they specifically said they seek "to evaluate Board members' potential affirmative defenses to a potential breach of fiduciary duty claim ...," which presumably includes defenses based on 141 and advice of counsel. They are the ones that introduced the idea that they would like to investigate the affirmative defenses, and they have no case that has ever said you can investigate an affirmative defense.

Now, they cite *AmerisourceBergen* on page 53 and note 206 in their pretrial brief for the

idea that -- I'm sorry. The citation in the reply brief -- excuse me -- note 62, they say that under *AmerisourceBergen* the Court authorized the 220 production to address a potential affirmative defense, and they cite page 23 of that opinion. And that's not so. If Your Honor looks at it, it was not about investigating a potential affirmative defense. What the Court said is it was not going to allow a potential affirmative defense to defeat a proper purpose. It was not actually about investigating an affirmative defense.

I've touched on this idea that a banker gets, which plaintiffs really anchor their argument and are fundamentally different, and for that reason their reliance upon *SmartPill* and *AmerisourceBergen* is fundamentally flawed. Those were not cases involving privileged documents. Neither has a *Garner* analysis. And, in fact, in the *AmerisourceBergen* case, what the plaintiff said in its pretrial brief is that there may be a *Garner* issue later after it gets documents, but no one was arguing for privileged information or arguing that they were entitled to this information under *Garner*.

Now, in Saito, which counsel refers to

in their briefs and talked about today, it is true that they did get limited privileged information; but *Saito* was a very different case and they got it for a different purpose. So the claim in *Saito* was that the board learned of the fraudulent scheme during due diligence on the merger. And that comes from the reported opinion at 30 Del. J. Corp. L. 650. So they got the privileged material for a factual purpose, which was knowledge. What did they know at the time? It was not to invade privilege and second-guess a decision. It was because that information would bear upon a discrete factual question of knowledge, which was the foundation of the plaintiff's claim.

Saito doesn't help, and nor do the demand review cases. The demand review cases are obviously, as this Court knows, a unique type of case where a plaintiff, in order to state a claim, needs to allege particularized facts that raise a reasonable doubt as to the board's decision to refuse the demand and whether that was the product of valid business judgment. And, of course, the very acts at issue, the factual investigation -- again, not the lead-on, the factual investigation -- requires understanding to some degree what it was that was done. And even in

that context, even in the demand refusal context, the plaintiff generally only gets limited information like the minutes and the report. And, of course, this is a very different claim.

And if the plaintiff can use this claim, this type of claim to say, "Well, you have a settlement. We need to understand whether or not this was a reasonable assessment," in order to obtain core privileged information, there is no limiting principle, and in every case any plaintiff in a credible -- if it gets over that minimal credible basis will be able to invade the privilege, fundamentally disrupting the protection afforded by privilege.

This case is very different from the very few cases where the plaintiff has been able to get privileged information under *Garner*. In *de Vries*, for example, the Court noted that it was undisputed that the company's nonprivileged documents do not provide any information -- any information -- about the events or decision-making process that ultimately led to the challenged decision. It's at page 1 of the opinion.

This plaintiff has voluminous

information. And, indeed, in that case, on page 6 of the opinion, the defendant didn't even argue that the plaintiffs had access to information about this process in the nonprivileged documents, making this fundamentally different. And even there, the Court found that *Garner* was only satisfied as to one of three categories of documents, even where there was no information in the nonprivileged context.

So we think you could end the analysis there under the *Garner* case law, as we have discussed more thoroughly in our brief. But I do think it's important to also touch on a separate *Garner* ground, which is the fact that the plaintiff has not exhausted other available opportunities to get this information.

Now, our argument is not, contrary to -- plaintiff tried to characterize it that if you file a FOIA action, you can never get it. They've really gone to lengths to try to paint our position as an extraordinary one. Our position is rather ordinary. It's one that's been adopted repeatedly by this Court, which is that when there are other avenues available to get at relevant information, the plaintiff should exhaust those before invading privilege.

THE COURT: Can I stop you there? What does it say if the Court adopts your position in this 220 action, knowing that Facebook has intervened in the FOIA action to resist any production of information in that context? So here you're saying, "Oh, you haven't exhausted your remedy." And in the FOIA action you are saying, "You don't get the information you are seeking here." If Facebook was on the sideline saying let's let FOIA play out as it plays out, that might be a little more palatable. But that's not what's happening. So it's a little like a shield and sword kind of scenario, it seems.

MR. ROSS: Well, Your Honor, I think the plaintiff -- FOIA isn't even actually the focus of our exhaustion argument. And the plaintiff is trying to make it the focus. It's really not; right? The focus is on the fact that the plaintiff hasn't attempted to undertake any merits discovery; right? There hasn't been a single merits deposition, for example. So take FOIA, if you want, and put it to the side. Take out the FOIA assertion. It was one example of an avenue that exists to seek information. It was not the focus of our exhaustion point.

And let's just focus on the fact that

they haven't pursued any depositions, okay. They haven't done anything yet to ask the directors, for example, why it is that they made their decision to figure out the extent to which they need privileged information after that. Let's just focus on that to address Your Honor's concern. You get to the same outcome.

Now, the plaintiff has only one answer as to why it is that the Court shouldn't follow, for example, what it said in *Buttonwood*, which is "when depositions may allow the stockholder-plaintiff to obtain the information without intruding on the attorney-client privilege," the plaintiff cannot establish that the information is not otherwise unavailable under *Garner*.

Same in *Facebook*. In *Facebook*, there had actually been a deposition, the reclassification litigation. And the Court said, nope, you don't satisfy the standard under *Garner*.

Same in *Fuqua*. It denied the motion where the plaintiff hadn't yet deposed any witnesses, and later, after depositions, came back and said now we've made a sufficient showing.

So how do they distinguish those

cases? They say, "Well, those are merits cases, Your Honor. You could do the discovery now. And so the exhaustion rule applies in those cases because there's other opportunities available for discovery. But it doesn't apply in the 220 context because we can't do those depositions."

And I would suggest sort of returning to what we talked about before about the idea that *Garner* means less in 220 than it does in regular litigation. I would suggest, Your Honor, that that is a fundamentally flawed basis on which to distinguish those cases. Because, once again, what it does, right, it now affords less protection to privileged information in a proceeding that has a lower standard. And that doesn't make any sense; right?

So let's take two plaintiffs. And these two plaintiffs have claims on different issues, and we would all agree that the first plaintiff has objectively a stronger claim than the second plaintiff. And so the first plaintiff decides, I'm going to go file my complaint, my merits complaint. And the second plaintiff says, I don't have enough to survive a motion to dismiss yet. I'm going to file under Section 220. So now that second plaintiff with

a weaker claim who can't survive a motion to dismiss gets access, doesn't have to face the exhaustion argument that the stronger plaintiff who, let's assume, files their complaint and survives a motion to dismiss faces.

And so now we have a scenario where the level of protection provided to privileged information varies depending upon the nature of the proceeding. And, in fact, not only does it vary, but it provides less protection in cases that the Court has said repeatedly has a lower standard to establish. And that doesn't make any sense. I mean, I think there's a fundamental question whether the standard should ever be different. Certainly, if it is, the idea that we give less protection to privileged information in a context in which the plaintiff has a lower standard than we would give to privileged information in a plaintiff where -- in a case where a plaintiff has a higher standard, at a minimum, is backwards and makes no sense.

Now, the plaintiff says our position proves too much. They said it in their briefing. They said it again today. They said if you adopt this exhaustion idea, you're never going to get *Garner*

documents in a Section 220 case. And that is not correct. *Garner* is a balancing test; right? Exhaustion is a factor to be considered. And when exhaustion can't matter, for example, then there would be no reason to apply exhaustion in the 220 context and the plaintiff can get 220 documents.

So let's take *Wal-Mart*. So plaintiff's purpose was to investigate the handling of the Walmex investigation and whether a coverup had taken place. The Court of Chancery found a colorable basis that part of the wrongdoing was the way the investigation itself was conducted. The plaintiff noted that in page 61 and 62 of their opening brief. They were investigating the investigation. You could not do it without getting into privileged information.

Grimes, again, because of the nature of the claim, they need some privileged information -- albeit limited, some privileged information.

Now, to be sure, it will be rare -- not never, but rare -- that in the 220 context you would get *Garner* documents. But as I've said, that's not a flaw in the design; that is the design. That is the balance to protect an important role that privileged information plays.

Now, the *Garner* analysis, I'll shift now, unless Your Honor has questions, from *Garner* to email.

THE COURT: I guess I do in this sense. And it may be broader than *Garner*, but I still want to understand the company's position on this question. The plaintiff says, look, at the end of the day, the claim that we're investigating and may well bring is a claim about board-level decision-making and a claim that rests on the premise that the board had options.

One option was for the board to negotiate a settlement with the FTC that did not include Mr. Zuckerberg. And if they explored that option, our sense is that the company would have paid less to settle, versus an option where they negotiate a global settlement that achieves a release for Mr. Zuckerberg, even though he paid nothing personally. They made a decision at one point to go down that later road.

Okay. If it's not privileged information, then where can we find in the nonprivileged information the basis for the board's decision to go down one road versus the other?

Or is it the company's position that the board didn't consider those two roads and, instead, went down the one road from beginning to end without considering the other option of settling with the FTC without achieving a release for Mr. Zuckerberg?

If your concern is privilege, okay, where is the nonprivileged information that we can assess the board decision-making? Forget process leading to it. We know their process. They had outside counsel. They had a special committee. We have enough information to see how the board went about deciding what to do.

Now we are at the point, sort of the money point here of, all right, you made a decision. How did you make it? What did you consider? What were your options? And then what was the basis for your decision to go one way versus the other in the realm of nonprivileged information that has been produced?

And I guess if I was to write this decision, what I'm envisioning is a footnote that would say, here are the exhibits. Here is the information in the record that the plaintiffs have

that allows them to assess that decision, which road to take, and why the board went down one road versus another.

MR. ROSS: Sure, Your Honor. Several points, I think.

So I think that in assessing -- in sort of getting to the board's decision, right, the first thing you need to do is understand how you got there. So I think that you can't evaluate a decision without understanding, in a situation like this, the chronology, how it was that the settlement discussions unfolded. So that would include giving you specific document numbers: JXs 54, 56, 74, and 117, which include the board updates on the status of settlement discussions. It would include JX 53, which includes management's views on the FTC settlement positions. It would include JX 53, 54, and 56 for the sections that include the directions from the board to management regarding negotiations. So what did the board tell management to do in the negotiations? It would include JX 54 and 56, which includes the discussion of proposals to the FTC and from the FTC. It would include JX 74 and 117, which have discussion of key terms. That's all at the board level. You

would include JX 67, 70, 71, and 81, which are special committee minutes which include updates on discussions with the FTC. It would include JX 43, which has the special committee's position. They have JX 117, the special committee's report. And they have the settlement itself, where they have the terms.

Now, it is true they don't have the legal analysis that was given to the board. And they don't have the legal analysis of the claims, okay. But that is privileged. And we believe that the appropriate thing to do -- and they also, by the way, have -- I shouldn't have shortchanged it, because there -- that's just in the information provided by the company. They also have -- and I skipped over this, but I do think, in light of Your Honor's question, it's important to come back to Slide 7, right, where they have analyses from Gibson Dunn and Munger Tolles, settlement exchanges with the government. Those JX numbers are noted on the left side. They have information from the government itself. All of those JXs are reflected on the right side. And, of course, this has been a topic of significant reporting.

So they have a voluminous amount of

information from which they can write a chronology as to how the parties got to the settlement and where the settlement wound up.

And what they don't have, then, is the privileged analysis underlying the claims. But that, we believe, is properly protected under *Garner*.

Does that address Your Honor's question?

THE COURT: It does. And we will study those exhibits carefully. I mean, I guess it takes me back to where I was when we broke, which is it would seem to me, at least, conceivable that there would be a way to give information regarding what the board decided and why, without exposing directly the advice of counsel upon which, at least in part, that decision was based.

And I guess what I'm hearing you say is, look, we're not giving you the specific communications back and forth between counsel, but within the exhibits that you've just identified, you have enough to see what the board considered, how the board deliberated, and how the board ultimately reached its decision and why.

MR. ROSS: And beyond that, we

believe, Your Honor, and I think it's important to note this, cases like *Espinoza* have said that they have voluminous information from which they can make their own conclusion as to whether or not this was a reasonable settlement. They have more than ten boxes of documents and countless government documents, public documents regarding the settlement -- regarding Cambridge Analytica and what was settled. They have statements from various government entities.

So this is not a situation where they were powerless to form a view as to whether or not under the circumstances this was reasonable. It's not the core claim, as they have described it. For the core claim they, of course, don't need the privileged information. They don't need it for the core claim that they have articulated of nonratable benefit without *MFW*. But if they want to move from that core claim, we suggest they still don't need it.

Just so we're clear with Your Honor, I cannot -- I have not looked, for example, through all of the privileged documents on the log. I know we have precisely tried to, in what's been produced, shield the legal analysis and provide the facts. I haven't been through all of the emails myself and

can't say there wouldn't be a line in an email that may have some factual statement divorced from the privileged information. I do have to acknowledge that.

But we tried to do, I think, exactly what Your Honor is suggesting you are trying to figure out how to get to, which is to take the voluminous number between the special committee and board documents and differentiate between the factual discussion and the privileged analysis, which is why, for example, what plaintiff complains about is that we have redacted the litigation analysis and likely outcomes.

That's been what the issue has been. And that's been the issue because they actually have, as they have said, that what they've gotten has provided them with the basic outlines of the settlement negotiations. They just don't have the information regarding the gives and the gets, sort of the legal analysis behind the settlement. And they think that would be useful for that.

So with that, unless there are more questions in this area, I would turn to email, if that's useful.

THE COURT: Yes, it is. Thank you.

MR. ROSS: Thank you.

Now, as I said at the outset, we think, really, there is basically near complete overlap between the email analysis and the *Garner* analysis. And we base that on what the plaintiff has said. So if you look, for example, at paragraphs 8 and 9 of the complaint, what the plaintiff says is that there are undoubtedly electronic communications that are necessary to answer what the board members were told about the strength of the FTC's potential claims.

If you look at page 13 of the reply pretrial brief, the plaintiff says "that additional documents (including electronic [documents]) are needed because the documents produced so far do not reveal what [the] 'Board members were told about the strength of the FTC's potential claims against both the Company and Mr. Zuckerberg and the likely results if those claims were litigated.'" So it's really all just a different way to try to get at the privileged information. But even if you were to now sort of, in light of what counsel has said, shift to say that what they really are seeking are nonprivileged emails, we

still do not believe that under this Court's case law the production of emails is appropriate.

It is recognized that the production of emails still remains the exception. The plaintiff has gone on at length about the fact that there are emails that exist. You can see that from the privilege log and, therefore, they need access to them. But that goes too far and would really render *Palantir* meaningless. Because the Court acknowledged in *Palantir* that emails and electronic communications do much of the work that paper correspondence used to do. That's at page 754 of the Supreme Court's opinion. And even acknowledging that, the Court said that you still don't get emails by default.

And, of course, if the existence of emails was enough to say that you get emails, if the very fact that there are email communications on a topic is by itself enough, then there is no analysis under *Palantir* or any of the Court's other cases. If the emails exist, you produce them. But the very fact that you don't always get them is an acknowledgment that there are cases in which they exist and you still don't get them.

I'm not going to spend a long time

trying to pull out quotes from different cases. I think what would probably make more sense -- obviously, I'm happy to answer any questions Your Honor has -- is to talk about why this case doesn't look like other cases, including the ones the plaintiff relies on, where there has been a production of emails and why this case is different. So let's take *Palantir*.

Palantir, the Supreme Court noted that the company did not provide "any evidence that other materials would be sufficient to accomplish [the plaintiff's] purpose." And to the contrary -- that was at page 754 of the Supreme Court's decision.

At page 757, the Court noted that the company had conceded there are no board-level documents regarding the events, although it also acknowledged "there may ... be emails." And that absent the production of emails, the plaintiff would have gotten "no documents," no documents that get into the rationale for why the challenged actions were taken. And I'm not going to go back through the list. We've gone through it many times today. But that's obviously fundamentally different than what we see here. In Your Honor's prior 220 opinion, your Court

observed in note 185 that the board minutes "contain essentially no information regarding the relevant subjects." Again, that's not the case here.

And also, of course, that would be a very different claim. That was a *Caremark* claim where there's an issue of director knowledge and red flags, and what the directors are told by management is relevant. This isn't a red flag issue. The plaintiff made that point. This is an issue of a public settlement and a process for which they do have substantial information.

Let's talk about *Globalstar*. We've heard about that. Counsel suggested that's probably the most analogous case. It's not analogous. The issue in *Globalstar* was an issue of controller influence on a process. The Court noted, right -- and the nature of certain contacts between a controller and special committee members; right? The Court noted at page 8 that during the time the special committee was doing its work, the controller had contacted all of the special committee members; that the controller had spoken -- also on page 8 -- with each member of the special committee about the transaction. The Court also noted on page 8 that there were two reasons

to be very concerned about the nature of the contacts. There had been a proposal by the controller for a share award to the special committee during the deliberations, and the company had hired the special committee's chair during the deliberations.

So the Court said these documents raise but do not resolve questions. And they were, of course, not the sort of thing you would expect to see in formal board minutes. So what did the plaintiff get there? He got a very limited scope of emails. The Court said that the plaintiff had met its burden of showing that emails between January 1st, 2017, and May 1st, 2018, between the chair and the committee members were necessary to investigate that limited purpose. And, of course, there was no *Garner* issue there. But it was to investigate the nature of those contacts. That was all the email the plaintiff was entitled to.

And I would end by I've been talking about the other email case that the plaintiff said is really controlling here, which is *CBS*. Plaintiff said that's really analogous. And this goes to Slide 11, which is my final slide. And I would submit, respectfully, that *CBS* strongly supports our position

and not the plaintiff's.

Now, plaintiff cites *CBS* on page 10 of its reply for the proposition that the Court ordered the production of electronic documents where the plaintiff claimed a conflicted controller transaction, and that the Court had ordered the production of emails concerning multiple flaws and red flags. And that's in the box on the lower left side of Slide 11.

Now, up above, at the top of these two slides, I have on the left the electronic communication request in our case, and on the right the electronic communication request in *CBS*. And you see on the left side you have a fairly broad request for electronic communications in our case for anything regarding the negotiations with the FTC concerning the settlement. That is actually strikingly similar to what the plaintiff was seeking in paragraphs 9 and 10 of the demand in *CBS*. Electronic documents sent to or received from NAI, Shari Redstone. Electronic documents exchanged between Ms. Redstone and members of the special committee concerning the merger. They wanted all the documents concerning the merger.

What did the Court hold in *CBS*? Page 9 of the *CBS* opinion: The request for broad

electronic communications between Redstone, CBS, Viacom and their directors and advisors "is far more appropriate for discovery in a plenary action ..." and lacked the requisite rifled precision. It permitted only a production of what it called a narrow set of electronic documents, covering 28 days, concerning one committee meeting attended by the controller, who was not on the committee, after the general counsel had taken the unusual step of resigning this Court said raised flags. The actual scope of what was ordered and produced in *CBS*, this very narrow window of 28 days, 14 days on either side of one meeting, looks nothing like what the plaintiff is asking for here.

It looks like what the plaintiff is asking for here is the requests in paragraphs 9 and 10 of *CBS*, not 11. And the Court said that those requests, 9 and 10, were not appropriate email production in a 220 context.

So unless Your Honor has questions, I would close by noting, as we've done, we have tried to provide the plaintiff with the factual information regarding the board's consideration of options and negotiations back and forth with the FTC. They have said they need the core privileged information, the

legal analysis. That is not something which we believe is properly producible here. We believe that if it is produced here, there is absolutely no limiting factor. It will result in a substantial expansion of *Garner* -- certainly *Garner* in the 220 context and, frankly, even *Garner* in the plenary litigation context, which, for the reasons we've discussed, certainly does not make sense to see a substantial expansion here in a context in which there is a far lower standard that needs to be shown to begin to get entitlement to documents than you would face in plenary litigation.

I'm certainly happy to answer any questions Your Honor has. But, otherwise, I do not have anything further at this time.

THE COURT: I don't have any questions, but thank you. I appreciate it.

Mr. Fleming, rebuttal.

MR. FLEMING: Yes, Your Honor. And I will proceed in two parts. First, I will address the question that the Court asked going into the break, this back door, the same question about if the Court is inclined to reach a split decision, let me suggest how I think that decision could be. And then let me

give you my best pitch for why it shouldn't be a split decision and we should also get the privileged materials.

If the Court is inclined to go this route and try to give us more information that might answer some of these key questions without treading into privileged information, I think there are a couple ways to do it.

First, starting with the nonprivileged electronic communication -- and I will pick up with what Mr. Ross was saying about *Globalstar*. This idea that *Globalstar* was different because there was a suggestion of some impropriety between the controller, Mr. Monroe, and the members of the special committee. We have showed similar facts here. We have shown that Mr. Andreessen was put on the special committee, and we know from the Facebook reclassification litigation that Mr. Andreessen was on that special committee, and he and Mr. Zuckerberg engaged in back-channel text message communications literally during a phone call while Mr. Zuckerberg was trying to negotiate the Class C reclassification litigation.

So I think it's possible that if we -- if the Court orders what we're asking for in terms of

the nonprivileged electronic communications related to discussions with the FTC, we will see who Mr. Zuckerberg was talking to. Was he having communications, again, with Mr. Andreessen? Was he talking to the other members of the special committee? The fact that we don't know that yet is because, as Mr. Ross suggests, we don't have any of those electronic communications yet, and it's the kind of thing that tends not to show up in board minutes.

So I do think it's not just -- our credible basis showing is not just nonratable transaction, lack of a majority of a minority vote. We have done a hard look at the process and pointed to specific aspects of the process that should raise eyebrows. It's possible, and perhaps likely, that the -- even the nonprivileged electronic communication will shed light on some of those questions.

And in *Globalstar*, it wasn't a production of, you know, 14 days on either side. Then-Vice Chancellor Montgomery-Reeves ordered the production of "emails from January 1, 2017, to May 4, 2018," almost a year and a half, to or from Monroe, the controller, Ponder and McIntyre, the special committee members.

So I do think that that's similar to what we've asked for, which is not all electronic communications from all board members relating to the settlement. We have focused on particular custodians, including Mr. Zuckerberg, who I think would be significant.

Shifting gears, and for why I think the Court should go beyond a split decision, the next level down would be unredacting the board minutes that we have. That does contain privileged information, but I think it's fair to expect that even the recitation of privileged materials in the board minutes is still going to be crafted and drafted with an eye that perhaps one day this might see the light of day. It's less unvarnished than what you might see in privileged communications. So I think that's another half-step down, another turn of the dial to carefully measure this.

And I point the Court to Joint Exhibit 74, which Mr. Ross mentioned on a number of occasions. And on page 5, you see this discussion, and Mr. Ross mentioned it, where it says that Mr. Snyder from Gibson Dunn "provided an overview of potential outcomes if the Company declined to settle and instead

pursued litigation of the Commission's claims. [He] described the estimated duration of such a trial and provided his assessment of the potential for achieving a dismissal of the claims."

The last time I was in front of Your Honor, Mr. Heyman was presenting at the fairness hearing in our settlement in *Tango*. And I would suggest that's exactly what he was presenting to the Court and exactly what the Court was considering in deciding whether that settlement was fair. What were the potential outcomes if we had declined to settle and, instead, pursued litigation further? What was the potential that that case would have survived through summary judgment and through a trial? The questions that the Court asked when considering the fairness of the settlement in representative litigation, these are the questions that Rhode Island is asking in evaluating the fairness of this settlement.

So Mr. Ross makes this argument about floodgates, that if we get *Garner* documents here, privileged documents are going to rain from the sky on every plaintiff in every one of these 220s. And I don't think that's right. In a merger context, I

think that's very distinguishable. I apologize if there are any transactional lawyers listening, but I think we litigators know that lawyers in mergers are often playing a secondary role and that the primary advisors are the bankers. So I think it would be the rare merger -- and there may be some -- but it would be the rare merger where it is legal analysis or litigation conclusions that are the primary driver of negotiations. So I think that's an entire category that we can put to the side.

Even in the settlement context, Mr. Ross suggests that credible basis is a very low threshold that anyone can get over. I don't think that's right. Your Honor has a number of 220 opinions declining to find a credible basis. And to find a credible basis to go in and investigate a settlement, it wouldn't be enough to show this company settled a government claim. That's something where -- it's sort of a core exercise of business judgment, in most instances. What makes this settlement different is that the company was settling a claim in a way that extinguished highly material liability, potential liability claims against a controller. That is a very small subset of cases.

I was trying to think before the argument today how many other examples I could even think of where you had that same scenario. The only one I could come up with, something Your Honor is familiar with, is Tesla's settlement of the SEC action involving complaints that Mr. Musk made. And there, the company paid half and Mr. Musk paid half. So that could be the type of settlement that would be subject to a similar analysis. But I think it's a very small subset where you have a controller who is personally involved, personally faces liability, and the settlement is structured in such a way that it's releasing the controller with the company paying -- with the company paying money.

And I would suggest that this is a scenario that is close to the demand review context, where you are evaluating a settlement, so it's necessary that you are evaluating the strengths and weaknesses of the claim. It reminds me of Your Honor's decision in *Genworth*. In *Genworth*, plaintiff brought a derivative claim. During the pendency of that action, the company entered into a sale transaction that would cause plaintiff to extinguish the derivative claim. They brought a 220 claim asking

for *Garner* documents. Your Honor concluded that three important elements had been met.

The reason the *Garner* documents weren't produced there is it was the same plaintiff. It was information -- it was a question of giving privileged information to people who were still litigating a derivative action that had not yet been extinguished, the merger hadn't yet closed, giving them privileged information analyzing that litigation. That is a core privilege claim.

Mr. Ross keeps repeating that we're seeking core privileged documents. No, core privileged documents is when you are giving privileged documents about a litigation to the people that you are litigating against. This is one step back from that, which is giving privileged documents about a litigation that Rhode Island was not involved in, and was not a party to, in its capacity as a stockholder. If that doesn't mean that privilege is being waived, there is a 510(f) order in place. The company already produced special committee reports subject to the 510(f) report. So this doesn't mean that privilege is going to be waived as to other people, as to the government, as to consumers who may be litigating

consumer privacy actions -- related consumer privacy actions against Facebook.

The company's privilege is still protected. It's being produced to a sophisticated institutional stockholder of the company who will have fiduciary obligations to the company and its stockholders and will have to protect and, you know, respect that privilege. So I think it's different than the sort of core invasion of privilege.

In terms of the exhaustion of other methods, I think Mr. Ross made a stirring policy argument for why the Supreme Court got it wrong in *Wal-Mart*. But I still don't think it can be squared. If the Court orders the production of *Garner* documents here and the company appeals and wants to ask the Supreme Court to reconsider *Wal-Mart*, it can. But I'm not convinced by this distinction, again, that somehow the *Wal-Mart* process was more lawyer driven than this one, when it was lawyers advising the board every step of the way and lawyers conducting all of the negotiation.

And I guess I will close -- and it was -- it was challenging for me to respond to the Court's initial questions about, "Well, are you saying

you might not win a motion to dismiss?" I think you saw Mr. Ross have that same struggle. But, ultimately, the choice that he made was to say we see what the documents say. We don't agree with how plaintiff reads them. We think plaintiff's reading of the documents is wrong. So what do we do in other contexts when a document is ambiguous or potentially susceptible to multiple readings? We look to parol evidence. If Facebook is going to argue that we don't have the goods, based on what's in the four corners of the document, I think there is other evidence out there that would potentially shed light on that.

THE COURT: Can I stop you there? I mean, that, I think, is where we have to focus on what we're doing now and what the next step is.

So your reading of the documents, as you plead your reading, is the reading at either a motion to dismiss under Rule 12 or a motion to dismiss under Rule 23.1. Later in that litigation, we might debate whether you are reading it correctly or not. But if you plead it as fact in your complaint, then when the company comes to move to dismiss it, your reading is the reading. They don't get to say dismiss the complaint because they've read it wrong. Right?

At least not that I'm aware of in our jurisprudence. So if you say, "Look, here is the information we have that's been given to us and that we've uncovered in our own investigation. These are the facts that we're pleading based on that." In addition to those facts, you get inferences flowing from those facts. Facebook doesn't get to come in and say, "Well, actually, they've read it wrong." Do they? I mean, that --

MR. FLEMING: I agree. Every plaintiff's lawyer in Delaware agrees that that's how it's supposed to be done. But I think in these 220 actions -- and we did agree to an incorporation condition here -- the way the cases get argued is these inferences do get argued. And I hope and accept that the Court will agree with our reading, but you did hear Mr. Ross say that even for motion to dismiss purposes, they won't agree that the analysis in the Gibson Dunn white paper is Facebook's position on what the claim was really worth. So I'm not sure what other documents in the 220 production they plan to rely on to challenge that or what statutory analysis they might offer.

Because it's not just documents. They could -- there may be other decisions by federal

courts analyzing these same statutory questions that they are going to rely on. So it's possible that they could make this argument in a way that isn't simply fighting the inference, fighting the well-pled allegations of the complaint. It's possible they may come up with some other avenue of attack to suggest, no, this isn't really the company's position. No, that isn't really what the claim is worth. I can't anticipate that.

You heard Mr. Ross say that he's not willing to accept, even for motion to dismiss purposes, that that's the company's position. So that's why I think we need these additional documents.

Then I will close on -- and it was a vivid metaphor that Your Honor had, and I wish I had said it first, about this idea that we get our head chopped off when the company's true position comes forward. And this goes back to the point that Rhode Island did not just try to plead a minimally viable complaint and get past a motion to dismiss. It's a state pension fund, fiduciary obligations. If we're going to get our head chopped off 30 seconds after the motion to dismiss is denied, I think it's fairly within our purpose that we would get the documents

telling us that. And we don't have the documents today that squarely show what the company's actual position is going to be, what the board was actually told about the strength of the complaint. We just have these inferences from the communications to the FTC.

I don't have anything else, Your Honor.

THE COURT: I just want to clarify. Did you say that you did or did not agree to an incorporation?

MR. FLEMING: We did. We did agree.

THE COURT: I thought that was the case. All right. Thank you.

Is there anything further, Mr. Ross, at this stage that we need to discuss?

MR. ROSS: Could I have just one minute to respond to one thing that was said?

THE COURT: Sure. And, Mr. Fleming, you get the last word.

MR. ROSS: The only observation I would make, Your Honor, is that although counsel tried to avoid it, the reality is that he could not articulate a limiting principle on this idea of

getting privileged information if there is credible basis. Your Honor knows the standard of credible basis, so I'm not going to spend time on that.

Plaintiff said, well, perhaps it's really only in this controller context. That happens to be what they claim the credible basis is here. But there is simply no principle basis for distinguishing, if you adopt a rule that, with a credible basis, where there is legal analysis that's relevant, that you get it today because here their articulated theory is it's for the benefit of a controller. To draw a different line where there's a different credible basis for whatever the theory is that calls into question some aspect of a decision on which there's legal advice. And once you have established credible basis, the plaintiff said here, because of the controller context, that's enough.

And if that is the rule, that establishing credible basis is enough for *Garner*, there is simply no principle basis to distinguish that from whatever the next set of facts is, if a board, as a plaintiff alleges, did not receive adequate consideration in a transaction for a claim. Okay? That when selling an asset, the company didn't receive

adequate consideration for a claim which was an asset and distinguished in the transaction. Not a controller situation, but for whatever reason, that's the claim. Legal analysis there. Again, if it is discoverable here on the principle, it's discoverable there, and there is no limiting principle.

If I was longer than 60 seconds, I apologize, but that's all I wanted to note.

THE COURT: Appreciate it.

Mr. Fleming, last word.

MR. FLEMING: The limiting principle is this: If you can show that there is a credible basis to investigate a board decision, a plaintiff is entitled to learn what the board knew and what the basis for the board's decision was. If the primary basis for the board's decision was legal advice on a difficult legal question, then, yes, *Garner* documents are necessary and essential.

THE COURT: All right. Well, thank you, Counsel. Excellent arguments, as always. I expected nothing less, but you delivered. So thank you. Very helpful.

I think it's fairly well known that I tend to write on 220 matters. Some say maybe too

much. I'm not sure I'm going to do that here, only because we are a bit stacked up in the queue. I have a law clerk turnover. So, as a practical matter, I'm going to lose my clerk in the not-too-distant future. And I'm also concerned, as I mentioned at the outset, with the other issues that flow from what we do here.

So it is possible -- I'm not sure yet -- we're going to kick it around, but it is possible that at some point in the not-too-distant future you will get a call from Cher asking you to jump on a call where I give you my ruling orally over the phone with, obviously, the court reporter there to take it down. You will know if you get that call. Otherwise, you will get my decision in due course. I know this is summary. We are going to turn to it as quickly as possible. So you should be hearing from us sooner than the typical 90 days that we would have.

If we have questions as we go, you might hear from us in that regard, as well, as we deliberate the evidence. Probably by letter, potentially with a brief call to flesh some things out. But otherwise, you should consider the matter submitted now, as of today. And, again, you will hear from us as soon as we can get back to you.

Is there anything else we should take up for the good of the order while we're together?

MR. FLEMING: Not from plaintiff, Your Honor.

THE COURT: Mr. Ross?

MR. ROSS: Not from the company, Your Honor.

THE COURT: All right. Well, again, many thanks for your excellent briefs and arguments. And with that, we are adjourned.

Have a good day. Stay safe and stay sane.

VARIOUS COUNSEL: Thank you, Your Honor.

(Trial adjourned at 12:03 p.m.)

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CERTIFICATE

I, DEBRA A. DONNELLY, RMR, CRR, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 121 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, Delaware, this 29th day of June, 2020.

/s/ Debra A. Donnelly

Debra A. Donnelly, RMR, CRR
Official Chancery Court Reporter
Registered Merit Reporter
Certified Realtime Reporter