



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: FACEBOOK, INC. : CONSOLIDATED
DERIVATIVE LITIGATION : C.A. No. 2018-0307-JRS
:
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RHODE ISLAND GROUP'S LEADERSHIP APPLICATION

Glossary Of Defined Terms

Term	Definition
Alford	Peggy Alford
Andreessen	Marc Andreessen
B&L	Block & Leviton LLP
CalSTRS	California State Teachers’ Retirement System
California Law Firms	Cotchett and Berman Tabacco
Cotchett	Cotchett Pitre & McCarthy LLP
Dilworth Paxon	Dilworth Paxson LLP
ERSRI	Employees’ Retirement System of Rhode Island
Facebook	Facebook, Inc.
FOIA	Freedom of Information Act
FTC	Federal Trade Commission
HEGH	Heyman Enerio Gattuso & Hirzel LLP
Kaplan Fox	Kaplan Fox & Kilsheimer LLP
Kimmitt	Robert Kimmitt
Legacy Local 79 Group	The Legacy Local 79 Plaintiffs and the Legacy Local 79 Law Firms
Legacy Local 79 Law Firms	Prickett, Scott+Scott, Hach Rose Schirripa & Cheverie LLP, Robbins LLP, Gainey McKenna & Egleston, and Andrews & Springer LLC
Legacy Local 79 Plaintiffs	Local 79, City of Birmingham Retirement and Relief System, and Lidia Levy
Legacy Sbriglio Group	The Legacy Sbriglio Plaintiffs and the Legacy Sbriglio Law Firms
Legacy Sbriglio Law Firms	Dilworth Paxson and Kaplan Fox

Term	Definition
Legacy Sbriglio Plaintiffs	Sbriglio, CalSTRS, and St. Louis
Local 79	Construction and General Building Laborers' Local No. 79 General Fund
Prickett	Prickett, Jones & Elliott, P.A.
R.I. Group or Rhode Island Group	ERSRI, Warwick, B&L, and HEGH
Sandberg	Sheryl Sandberg
Sbriglio	Karen Sbriglio
Sbriglio/Local 79 Law Firms	The Legacy Local 79 Law Firms, the Legacy Sbriglio Law Firms, and the California Law Firms
Sbriglio/Local 79 Plaintiffs	The Legacy Sbriglio Plaintiffs and the Legacy Local 79 Plaintiffs
Scott+Scott	Scott+Scott Attorneys at Law LLP
Sbriglio/Local 79 Group	The Sbriglio/79 Plaintiffs and the Sbriglio/79 Law Firms
St. Louis	Firemen's Retirement System of St. Louis
Thiel	Peter Thiel
Warwick	City of Warwick Retirement System
WilmerHale	Wilmer Cutler Pickering Hale and Dorr LLP
Zuckerberg	Mark Zuckerberg

The R.I. Group moves for the appointment of ERSRI and Warwick as lead plaintiffs, B&L as lead counsel, and HEGH as additional Delaware counsel.

I. PRELIMINARY STATEMENT

In any leadership dispute, the Court must “put itself in the position of a hypothetical client and ask who it would choose to litigate this case[.]”¹ Here, the Court can resolve that question on a threshold issue. Two of the three firms leading the Sbriglio/Local 79 Group—Kaplan Fox and Scott+Scott—represent clients that are currently suing Facebook directly.² And “there is a conflict” when a law firm seeks to represent “both ... a derivative plaintiff and ... a class plaintiff in [direct] litigation” against the same company.³

Scott+Scott itself recently lost a leadership role in a direct action against Genworth Financial because it was (and still is) prosecuting a derivative action here on behalf of Genworth.⁴ Then, earlier this year, Scott+Scott won a lead role in the *In re Altria Group Derivative Litigation* because the other firm that sought

¹ *City of Riviera Beach Police Pension Fund v. Musk*, 12711-VCS (Del. Ch. Oct. 10, 2016) (Transcript) (Ex. A) at 33 (cleaned up).

² Ex. B (Kaplan Fox is counsel to a putative class of consumers in *In re Facebook Internet Tracking Litigation*, 5:12-MD-2314-EJD (N.D. Cal.)); Ex. C (Scott+Scott is interim class counsel for putative class of advertisers in *Klein v. Facebook, Inc.*, 20-CV-08570-LHK (N.D. Cal.)).

³ *Brandin v. Deason* (“*Affiliated Computer Services*”), 2123-VCL (Del. Ch. May 9, 2007) (Transcript) (Ex. D) at 54.

⁴ *Rice v. Genworth Fin. Inc.*, 2017 WL 3699859, *11 (E.D. Va.).

leadership was also prosecuting direct claims against Altria.⁵ As Scott+Scott argued in *Altria*, this conflict is “disqualifying” because it puts the lawyers in a “compromised position,” with “divided loyalties,” “evidenc[ing] an antagonism between [the lawyers] and [the company] that certainly should preclude” them from leading a derivative case.⁶

The R.I. Group also prevails under a standard *Hirt* analysis. It has done better work and filed a better complaint. To be sure, the Sbriglio/Local 79 Group’s latest complaint is 167 pages longer. But “a complaint under our law is scaled not by its physical heft in the hand but rather by the legal substance of its well-pled allegations.”⁷ Despite its length, the Sbriglio/Local 79 Group’s operative complaint omits not only facts that are significant to the entire-fairness claim (that it belatedly added), but also critical demand-futility allegations. The R.I. Group will also provide effective representation going forward: its lawyers have an impressive track record of success in Delaware and ERSRI is a well-respected state pension fund with a history of active engagement as a Facebook stockholder.

II. BACKGROUND

There is insufficient space for a complete summary of the procedural history.

⁵ 2021 WL 2566758, *3 (E.D. Va.).

⁶ Ex. E (Scott+Scott’s *Altria* brief) at 4, 7, 8.

⁷ *In re GGP, Inc. S’holder Litig.*, 2021 WL 2102326, *3 n.5 (Del. Ch.).

Suffice to say, the various members of the Sbriglio/Local 79 Group pursued a variety of approaches before banding together as a last-ditch play. But not one of the eleven law firms in the Sbriglio/Local 79 Group identified the entire-fairness theory until the R.I. Group filed its 220 action:

- Risking a “*Wal-Mart-ing*,”⁸ Cotchett ignored Facebook’s Delaware-forum clause and filed in California—just five days after the Cambridge Analytica news broke.⁹
- Sbriglio and her lawyers later attacked Cotchett’s approach as demonstrating inadequacy.¹⁰ Yet Sbriglio herself filed just days after Cotchett without any books-and-records investigation.¹¹

Sbriglio later amended her complaint, adding St. Louis as a plaintiff and Kaplan Fox as a law firm. The new complaint added a handful of allegations gleaned from 220 documents produced to St. Louis but still relied largely on public information.

In August 2019—after the FTC settlement was announced—CalSTRS moved to intervene, adopting the allegations of the then-operative Sbriglio complaint, which did not include an entire-fairness claim.¹²

- Meanwhile, the Legacy Local 79 Group attacked the Legacy Sbriglio Group for “inadequately representing” Facebook by filing a “rushed” complaint “without conducting a full inspection.”¹³

The Legacy Local 79 Group litigated a books-and-records action through trial and filed its own plenary complaint, which did not include an entire-fairness claim. It then sought to have the Court decide leadership before

⁸ Ex. F (Transcript of Dec. 17, 2018 hearing) at 59.

⁹ Ex. G.

¹⁰ Ex. H (Sbriglio motion) at 5; Ex. I (Sbriglio reply) at 4.

¹¹ Trans. ID 61956909.

¹² Trans. ID 64113557 ¶¶15-16.

¹³ Ex. F (Transcript of Dec. 17, 2018 hearing) at 26.

the R.I. Group could complete its 220 investigation,¹⁴ arguing that the R.I. Group’s entire-fairness claim was only “tangentially related” to the Legacy Local 79 Group’s *Caremark* claim and should be severed.¹⁵

Only when that failed, did the Legacy Local 79 Group join with the Legacy Sbriglio Group and the California Law Firms to file a new complaint, adding the entire-fairness claim it had previously derided.

The R.I. Group took a different approach. Through ERSRI’s books-and-records investigation and B&L’s FOIA action,¹⁶ the R.I. Group carefully built a strong entire-fairness claim arising from Facebook’s negotiations with the FTC.

III. ARGUMENT

A. The Sbriglio/Local 79 Group Is Fatally Conflicted

The Court need not even reach the *Hirt* factors because Kaplan Fox and Scott+Scott represent clients suing Facebook directly and, so, cannot represent Facebook derivatively.¹⁷ As then-Vice-Chancellor Strine put it, “when it comes to ... third-party suits against your company ... you cannot simultaneously be a

¹⁴ Motion for Consolidation (Oct. 28, 2020).

¹⁵ Ex. O (Transcript of Feb. 16, 2021 hearing) at 16-17.

¹⁶ B&L obtained three separate district court orders requiring the FTC to produce documents related to the Facebook negotiations. *Block & Leviton LLP v. Fed. Trade Comm’n*, 2020 WL 6082657 (D. Mass. Oct. 15, 2020); 2021 WL 822500 (D. Mass. Feb. 22, 2021); 2021 WL 1038254 (D. Mass. Mar. 5, 2021).

Facebook intervened and appealed, twice, to the First Circuit. After expedited appellate briefing and shortly before a scheduled oral argument, Facebook agreed to produce the documents to ERSRI through its 220 action in exchange for B&L agreeing to dismiss the FOIA action.

¹⁷ Exs. B, C.

derivative plaintiff and then be rooting for the third party to win.”¹⁸

In *In re Oracle Corp. Derivative Litigation*, “Milberg Weiss withdrew from the derivative actions because its federal suit seeking damages against Oracle conflicted with its ability to represent plaintiffs seeking damages on behalf of Oracle.”¹⁹ In *Affiliated Computer Services*, Kaplan Fox successfully opposed another law firm’s leadership motion because that firm was simultaneously litigating derivative claims for the company and direct claims against it.²⁰ And in *Police and Fire Retirement System of The City of Detroit v. Yahoo!, Inc.*, this Court rejected a firm’s application to lead a derivative action because the same firm represented clients suing the company directly in California.²¹

While these conflicts justify disqualification, the Court need not go so far. “Potential conflicts” are enough.²² And they are legion. Defendants could resist

¹⁸ *In re Duke Energy Corp. Deriv. Litig.*, 7705-CS (Del. Ch. Dec. 21, 2012) (Transcript) (Ex. J) at 27-28.

¹⁹ 808 A.2d 1206, 1207 (Del. Ch. 2002).

²⁰ *Affiliated Computer Services*, Tr. at 54.

²¹ 3561-CC (Del. Ch. Mar. 4, 2008) (Transcript) (Ex. K) at 41-42 (“The other thing that troubles me, frankly, is the California litigation and whether or not that puts the ... firm in a bind being out there[.]”).

Federal courts apply the same rule. *See, e.g., Tatintsian v. Vorotyntsev*, 2018 WL 2324998, *1 (S.D.N.Y.); *Ahn v. Hanil Dev. Corp.*, 2008 WL 11340365, *3 (C.D. Cal.); *St. Clair Shores Gen. Employees Ret. Sys. v. Eibeler*, 2006 WL 2849783, *7 (S.D.N.Y.).

²² *In re Towers Watson & Co. S’holder Litig.*, 2018-0132-TMR (Del. Ch. June 5, 2018) (Transcript) (Ex. L) at 63 (rejecting leadership role for applicants whose share

producing *Garner* documents to lawyers suing the Company directly. They could raise adequacy challenges at summary judgment or trial. Most importantly, the conflict could affect settlement talks. Defendants might try to force a cheap settlement by threatening disqualification.²³ Or Defendants could try the same tactic that worked with the FTC: offering to overpay with Facebook’s money (in the other actions) in exchange for letting Zuckerberg off cheaply (in this action).²⁴

The Court should not subject Facebook and its stockholders to these risks.

B. The R.I. Group Also Wins Under The *Hirt* Factors

The R.I. Group also prevails under the typical factors. “What [the Court is] supposed to do at this stage is pick the people ... [it] thinks can best represent” the company.²⁵ In making that decision, the Court is guided by the *Hirt* factors,²⁶ which can be grouped as: (1) “factors relating to counsel’s performance in the litigation to

count was 33 times larger than competing applicants’ because of conflicts; “[w]hile the potential conflicts raised here may well not amount to disabling conflicts, with two such equally matched choices, I’m going to pick the counsel and the plaintiff that minimizes the potential for distracting motion practice in the future.”).

²³ Facebook recently obtained disqualification of another plaintiffs’ firm in Scott+Scott’s *Klein v. Facebook* action. 2021 WL 3053150, *1 (N.D. Cal.).

²⁴ *Cf. Krim v. pcOrder.com, Inc.*, 210 F.R.D. 581, 589 (W.D. Tex. 2002) (“Conflicts of interest may exist for class counsel if they are involved in multiple lawsuits ... against the same defendants.”).

²⁵ *In re Columbia Pipeline Group Inc. S’holder Litig.*, 12152-VCL (Del. Ch. May 25, 2016) (Transcript) (Ex. M) at 18.

²⁶ *Hirt v. U.S. Timberlands Service Co., LLC*, 2002 WL 1558342 (Del. Ch.).

date;” (2) “factors relating to counsel’s track record and ability to litigate going forward”; and (3) “factors relating to the lead plaintiffs.”²⁷

1. The R.I. Group Has Performed Better

The Court has seen both groups try a 220 action. The Court concluded that the Legacy Local 79 Group litigated with a “lack of precision” and “lack of focus” that “provoked justified frustration and ... prompted questions regarding possible abuse of the Section 220 process[.]”²⁸ But the Court “commend[ed]” the R.I. Group (and Facebook) for a “focus[ed]” approach that stood “in marked contrast to the tactics that have prompted expressions of concern by this court” in other 220 actions.²⁹

That pattern continues. The R.I. Group is trying to win a money judgment. It pled a tight complaint focused on three critical areas: (i) demand futility; (ii) an entire-fairness claim arising from the FTC negotiations; and (iii) duty-of-care/oversight claims against Zuckerberg and Sandberg as officers.³⁰

²⁷ *Ryan v. Mindbody, Inc.*, 2019 WL 4805820, *2 (Del. Ch.).

²⁸ *In re Facebook, Inc. Section 220 Litig.*, 2019 WL 2320842, *18 (Del. Ch.).

²⁹ *Employees’ Ret. Sys. of Rhode Island v. Facebook, Inc.*, 2021 WL 529439, *2 n.1 (Del. Ch.).

³⁰ Compare with *Kirby Family Partnership, LP v. Muilenburg* (“*Boeing*”), 2020 WL 4504307, *2 (Del. Ch.) (selecting the lead plaintiff whose complaint was “more cogently focuse[d]” and had stronger demand-futility allegations); *In re Kraft Heinz Co.*, 2020 WL 1248471, *2 (Del. Ch.) (superior pleading weighed “heavily in ... favor” of plaintiff whose complaint pled the most “factually detailed and coherent narrative in support of the key claim in the case ... and contain[ed] significantly more factual allegations relevant to demand futility.”).

The other group seems more focused on winning a leadership contest. So its members spent months attacking the entire-fairness claim as meritless³¹ and “at best, a damages issue,”³² that was only “tangentially related” to their *Caremark* claim and should be severed.³³ Only after the Court rejected this attempt did the Legacy Local 79 Group and the Legacy Sbriglio Group join together to file a 380-page complaint on behalf of six plaintiffs represented by eleven law firms—which, begrudgingly, added the once-scorned entire-fairness claim.

“The bigger complaint is not always the better complaint.”³⁴ The R.I. Group’s complaint is superior in three critical respects:

Demand Futility. Demand-futility will likely be the key issue at the pleadings stage—particularly as the Court recently dismissed an unrelated Facebook derivative matter on demand-futility grounds.³⁵ But the Sbriglio/Local 79 Group’s operative

³¹ *Compare* Trans. ID 66079482 at 11 (arguing the FTC negotiations did not give rise to an entire-fairness claim), *with In re SFX Entertainment, Inc. S’holder Litig.*, 11082-VCG (Del. Ch. July 9, 2015) (Transcript) (Ex. N) at 10 (“I was somewhat surprised to see that the Blair group disparages one of the arguments that it will later be making, if it’s appointed lead counsel, on behalf of its class, in order to advance the possibility of its being appointed lead counsel. That doesn’t seem ... to be a particularly helpful tactic[.]”).

³² Trans. ID 65657691 at 5.

³³ Ex. O (Transcript of Feb. 16, 2021 hearing) at 16-17.

³⁴ *In re Investors Bancorp, Inc. Stockholder Litig.*, 2016 WL 4257503, *4 (Del. Ch.).

³⁵ *United Food & Commercial Workers Union v. Zuckerberg*, 2020 WL 6266162 (Del. Ch.).

complaint is missing significant demand-futility allegations.

Only the R.I. Group's complaint alleges that:

- *Kimmitt* (who is on two of the three demand boards pled by the Sbriglio/Local 79 Group)³⁶ is a partner at WilmerHale, which advised Zuckerberg and continues to advise Facebook in Cambridge-Analytica-related matters as well as in high-profile antitrust litigation.³⁷
- *Thiel* leverages his relationship with Facebook and Zuckerberg to obtain deal flow through the Thiel Fellowship program and to increase his political power.³⁸
- *Alford* is subject to conflicts arising from her role at PayPal.³⁹
- *Andreessen* and his spouse are long-time personal friends with Zuckerberg and his spouse.⁴⁰

Entire Fairness. The Sbriglio/Local 79 Group dutifully added the entire-fairness allegations that had previously been made public via the R.I. Group's 220 action. But it missed significant allegations that were not previously made public in that action, including:

- Commissioner Chopra's statement that the FTC "traded getting more money, so that [Zuckerberg] did not have to submit to sworn testimony";⁴¹

³⁶ Sbriglio/Local 79 Compl. ¶559.

³⁷ R.I. Compl. ¶¶356-64.

³⁸ *Id.* ¶¶399-402, 407-09.

³⁹ *Id.* ¶¶349-50.

⁴⁰ *Id.* ¶381.

⁴¹ *Id.* at 1 (epigraph), ¶¶18, 325.

- A similar statement by the FTC’s lead staff attorney;⁴²
- Briefs filed by the FTC and Facebook stating that the \$5 billion fine was more—per Facebook: an “order of magnitude” more—than the FTC could have obtained at trial;⁴³
- An order by a federal judge agreeing with that analysis;⁴⁴
- Conflicts related to the Special Committee’s counsel;⁴⁵
- Problems with the Special Committee’s mandate;⁴⁶ and
- Comparable FTC settlements as well as instances where CEOs and founders were held personally responsible.⁴⁷

Caremark/Oversight. The overwhelming majority of the Sbriglio/Local 79 Group’s complaint is devoted to its *Caremark* claim. Like the plaintiffs in *Horman v. Abney*,⁴⁸ the Sbriglio/Local 79 Group took an all-of-the-above approach and pled *both* a prong one claim (of no oversight system or controls)⁴⁹ and a prong two claim (of a failure to oversee once controls are in place).⁵⁰ The result is an often-inconsistent pleading that sacrifices coherence for volume.

⁴² *Id.* ¶324.

⁴³ *Id.* ¶¶327-28.

⁴⁴ *Id.* ¶¶329-30.

⁴⁵ *Id.* ¶290.

⁴⁶ *Id.* ¶¶288-89.

⁴⁷ *Id.* ¶¶335-36.

⁴⁸ 2017 WL 242571, *7 (Del. Ch.).

⁴⁹ *See, e.g.*, Sbriglio/Local 79 Compl. ¶¶333-34, 337.

⁵⁰ *See, e.g., id.* ¶¶335-36.

Again, the R.I. Group took a different approach. Rather than stretching the record in an attempt to plead a prong one claim or reach outside directors, the R.I. Group's complaint tells the single, coherent story that the documents reveal: Zuckerberg and Sandberg are hands-on managers⁵¹ who were intimately involved in the details of Facebook's data-sharing⁵² and personally responsible for the Company's violations of the consent decree.⁵³ There was critical information that didn't make it to the Board.⁵⁴ But that was not because there was no oversight system; it was because Zuckerberg and Sandberg withheld important information anyway.⁵⁵

If subsequent discovery justifies oversight claims against other directors, the R.I. Group can amend to bring those claims. But there is no reason to risk having those claims dismissed with prejudice now, given the strength of the other demand-futility allegations.⁵⁶

⁵¹ R.I. Compl. ¶¶62-74.

⁵² *Id.* ¶¶76-91.

⁵³ *Id.* ¶¶122-35.

⁵⁴ *Id.* ¶¶136-83.

⁵⁵ *Id.*

⁵⁶ *Towers Watson*, Tr. at 60-61 (“The California Plaintiffs ... do not name the nonexecutive board members as defendants. I can imagine several reasons that the plaintiffs could have chosen to make [that] strategic decision[.] Therefore, [that difference does] ... not tilt this factor[.]”).

2) The R.I. Group Will Perform Well Going Forward

Most of the lawyers seeking a leadership role are repeat players. In the last three years alone, B&L (with HEGH) has achieved over \$90 million worth of settlements in representative actions in the Court of Chancery.⁵⁷ The law firms in the other group also have fine records and we trust that the Court is familiar with the caliber of counsel's work from other actions. Appendix A provides the profiles of the specific lawyers who will represent the R.I. Group.

3) The Rhode Island Plaintiffs Will Provide Excellent Oversight

ERSRI owns over 150,000 Facebook shares; Warwick owns over 10,000. The Sbriglio/Local 79 plaintiffs have not yet disclosed how many shares they own. Given the size of CalSTRS, it is fair to assume that the Sbriglio/Local 79 Group will own more shares in total than the R.I. Group. But “*Hirt* stands for the proposition that *relative* economic stakes are given great weight, not simply economic stakes.”⁵⁸

All of the institutional investors in this case presumably own diversified portfolios that are not disproportionately weighted toward Facebook. And “the weight given to the size of a plaintiffs’ holding is not used to generate a formalistic ranking,” the question is whether the “plaintiff owns a sufficient stake to provide an

⁵⁷ See App’x A.

⁵⁸ *Wiehl v. Eon Labs*, 2005 WL 696764, *3 (Del. Ch.); *Towers Watson*, Tr. at 61-62 (losing applicant owned 33 times more total shares but “economic stake” factor did not “tip the scale” because its relative economic stake was smaller).

economic incentive to monitor counsel and play a meaningful role in conducting the case.”⁵⁹ Both groups own more than enough shares to satisfy this test.

The Court does not need to speculate about the R.I. Group’s interest in this Action because ERSRI has a public track record of pushing for better governance at Facebook.⁶⁰ The Court can be confident that both ERSRI and Warwick will provide active oversight.⁶¹

IV. CONCLUSION

The Court should appoint the R.I. Group.

Dated: August 3, 2021

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⁵⁹ *In re Revlon, Inc. S’holders Litig.*, 990 A.2d 940, 955 (Del. Ch. 2010)

⁶⁰ Crane Dec. ¶3.

⁶¹ Crane Dec.; Marciano Dec.

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CERTIFICATE OF SERVICE

I hereby certify that, on August 10, 2021, I caused a true and correct copy of the foregoing *Rhode Island Group's Leadership Application (Public Version)* to be served electronically upon the following counsel:

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