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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

EMPLOYEES' RETIREMENT SYSTEM OF RHODE ISLAND, Plaintiff,
v.
FACEBOOK, INC., Defendant.

C.A. No. 2020-0085-JRS
|
Date Submitted: December 10, 2020
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MEMORANDUM OPINION

SLIGHTS, Vice Chancellor

***1** This decision marks the second time in two years this Court has been asked to adjudicate the scope of documents stockholders of Facebook, Inc. ("Facebook" or the "Company") are entitled to inspect under Section 220 of the Delaware General Corporation Law for the purpose of investigating Facebook's data privacy practices. In May 2019, this Court ordered Facebook to produce documents to certain stockholders that were deemed "necessary and essential to [their] investigation of *Caremark*-based claims" arising from an unauthorized release of confidential Facebook user data to a data analytics firm called Cambridge Analytica. [1] In determining that stockholders had stated a proper purpose for inspection, the Court took note of the fact that the Cambridge Analytica data breach likely represented a violation by Facebook of a 2012 consent decree it had entered with the Federal Trade Commission ("FTC") to settle investigations of previous data privacy breaches. [2]

The FTC revived its investigation of Facebook following the Cambridge Analytica data breach. That investigation led Facebook to agree to a record-breaking $5 billion settlement with the FTC in 2019 (the "2019 Settlement"). Plaintiff, Employees' Retirement System of Rhode Island ("ERSRI"), decided to investigate whether Facebook overpaid in its settlement with the FTC to protect its Chief Executive Officer, Mark Zuckerberg, from substantial personal liability. [3]

Plaintiff served its demand to inspect nine designated categories of Facebook's books and records on September 20, 2019 (the "Demand").[4] As required by statute, the Demand stated ERSRI's purposes for inspection, which included an intent to investigate wrongdoing relating to the 2019 Settlement and an intent to communicate with other stockholders regarding "changes in management policies."[5] After an agreed-upon extension, Facebook responded to the Demand on October 14, 2019, indicating it would produce some, but not all, of the requested documents.[6]

Following Facebook's response, ERSRI and Facebook engaged in extensive meet-and-confer discussions.[7] As a result of those discussions, Facebook agreed to produce 2,931 documents consisting of 30,266 pages.[8] Facebook refused, however, to produce documents responsive to Categories 5 and 6 of the Demand (the "Disputed Documents") where ERSRI sought certain Board-level hard-copy and electronic communications concerning Facebook's negotiations with the FTC.[9] ERSRI filed its Verified Complaint to Compel Inspection on February 12, 2020.[10]

***2** After suit was filed, the parties conferred further and narrowed the Disputed Documents to two discrete categories: (i) electronic communications concerning the FTC negotiations; and (ii) privileged documents (including both electronic communications and unredacted copies of Board and Special Committee minutes) concerning the FTC negotiations.[11] Facebook objects to producing these documents on two grounds.[12] First, it argues the Disputed Documents are not necessary and essential to ERSRI's stated purposes for inspection.[13] Second, it argues that inspection of certain of the Disputed Documents is precluded under the attorney-client privilege or the work product immunity.[14]

After carefully reviewing the evidence presented on a "paper record" and the arguments of counsel, I am satisfied ERSRI has demonstrated that limited non-privileged electronic communications identified in Category 6 are necessary and essential to pursue its purposes for inspection. But it has not demonstrated good cause under the *Garner* fiduciary exception to the attorney-client privilege to justify compelling the Company to produce privileged documents for inspection.[15] My reasons follow.

I. BACKGROUND

I have drawn the facts from the parties' pretrial stipulation, evidence admitted during the "paper record" trial and those matters of which the Court may take judicial notice. The following facts were proven by a preponderance of the competent evidence.[16]

A. The Parties

ERSRI is the largest public employee retirement system in the state of Rhode Island.[17] It is the beneficial owner of over 163,000 shares of Facebook common stock and has continuously been a stockholder of Facebook since at least March 31, 2017.[18]

Facebook is a Delaware corporation headquartered in Menlo Park, California.[19] Facebook was founded in 2004 by Mark Zuckerberg, who serves as Facebook's Chief Executive Officer and Chairman of the Facebook Board of Directors (the "Board").[20] In addition to Zuckerberg, at times relevant to the Demand, the Board comprised directors Peggy Alford, Marc Andreessen, Kenneth Chenault, Drew Houston, Nancy Killefer, Robert Kimmitt, Sheryl Sandberg (Facebook's COO), Peter Thiel, Tracey Travis, Jeffrey Zients and Susan Desmond-Hellman.[21]

B. The Cambridge Analytica Data Breach

In December 2015, the British daily newspaper, The Guardian, reported that Global Science Research had sold certain confidential Facebook user data to Cambridge Analytica.[22] Cambridge Analytica, in turn, used the data to create psychological

profiles of voters in the United States.[23] Facebook investigated and believed it had addressed the issue.[24] It had not. On March 17, 2018, The New York Times and The Guardian reported that Cambridge Analytica still possessed Facebook users' confidential data.[25] The reports prompted one of the sharpest single-day market value declines in history when Facebook's stock price fell 19%, wiping out approximately $120 billion of shareholder wealth.[26]

C. The FTC Inquiry and Settlement

***3** In March 2018, the FTC opened an investigation into whether Facebook's most recent data privacy problems had violated a 2011 Consent Decree with the FTC whereby Facebook resolved other data privacy issues.[27] The FTC ultimately concluded Facebook had violated the 2011 Consent Decree and filed a complaint to that effect against both Facebook and Zuckerberg personally on February 6, 2019.[28] Over the following six months, Facebook and the FTC engaged in extensive negotiations to settle the litigation. On July 24, 2019, the FTC announced it had approved the 2019 Settlement, whereby Facebook agreed to pay $5 billion in exchange for a release of claims against both the Company and Zuckerberg.[29] Following numerous reports suggesting that Facebook paid more than its share of the settlement to protect Zuckerberg from personal liability, ERSRI decided to investigate.[30]

As noted, ERSRI sent its Demand to Facebook on September 20, 2019.[31] The Demand stated three purposes related to the 2019 Settlement: (1) "[t]o investigate potential wrongdoing, mismanagement, and/or breaches of fiduciary duty by" both (a) "all current members of the Board in their capacity as directors of the Company," and (b) Mr. Zuckerberg, Ms. Sandberg, and Mr. Stretch "in [their] capacity as [ ] officer[s] of the Company"; (2) "[t]o investigate the independence and disinterest of the Board, to determine whether a pre-suit demand is necessary or would be excused prior to commencing any derivative action"; and (3) "[t]o gather information for purposes of communicating with other stockholders in order to effectuate changes in management policies."[32]

The Demand identified nine categories of documents for inspection:

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

2. Facebook's formally adopted policies and procedures respecting data privacy and access to user data, including those promulgated following the entry of the 2011 FTC Consent Decree;

3. Facebook's Atlas (SOC1 & SOC 2/3), Custom Audience (SOC 2/3) and Workplace (SOC 2/3) audits performed on behalf of the Company, and any other formal internal audits regarding compliance with Facebook's formal data privacy policies and procedures or with the 2011 FTC Consent Decree;

4. Electronic communications, if coming from, directed to or copied to a member of the Board, concerning Facebook's post-2011 FTC Consent Decree whitelist practices, post-2011 FTC Consent Decree government investigations into Facebook's data privacy practices and compliance with the 2011 FTC Consent Decree, to be collected from the following custodians: Erskine B. Bowles, Sheryl Sandberg, Alex Stamos and Mark Zuckerberg;

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

6. Electronic communications from, to, or copied to a member of the Board or to Stretch, concerning Facebook's negotiations with the FTC concerning the Second FTC Agreement (memorializing the 2019 Settlement), to be collected from the following custodians: Erskine B. Bowles, Sheryl Sandberg, Mark Zuckerberg, Colin Stretch, Paul Grewal and Ashlie Beringer;

7. All draft versions of the Second FTC Agreement;

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

9. Documents concerning the independence of Facebook's directors and committees of the Board including, specifically, the Board disclosure questionnaires. [33]

***4** Facebook responded to the Demand on October 14, 2019. [34] In its response, Facebook's objections focused on the Demand's failure to articulate a credible basis to suspect wrongdoing and the overbroad scope of the requested books and records. [35] After receiving the response, ERSRI and Facebook engaged in extensive meet-and-confer discussions. [36] As a result of those discussions, the parties entered into a Confidentiality Agreement and Facebook agreed to produce certain documents responsive to ERSRI's request. [37] Facebook's production did not include documents responsive to categories 5 and 6 of the Demand, including the report and recommendation regarding the 2019 Settlement prepared by the Board's Special Committee ("Special Committee Report"). [38]

On February 12, 2020, ERSRI filed a complaint under 8 *Del. C.* § 220 to compel inspection of Facebook's books and records. [39] After ERSRI filed its opening brief, Facebook produced the Special Committee Report, narrowing the scope of the dispute for trial to whether Facebook must also produce the Demand's document categories (5) and (6), specifically (i) electronic communications concerning the FTC negotiations and (ii) privileged documents (including both electronic communications and unredacted copies of Board and Special Committee minutes) concerning the FTC negotiations. [40]

D. Procedural History

In advance of trial, the parties agreed that the trial would focus on the scope of documents Facebook must produce in response to the Demand, with the understanding that Facebook's defense regarding the failure to state a proper purpose would be preserved. [41] Trial was held on June 24, 2020. [42]

II. ANALYSIS

To prevail on a demand to inspect books and records under Section 220, a stockholder "bears the burden of proving that each category of books and records is essential to accomplishment of the stockholder's articulated purpose for the inspection." [43] Books and records satisfy this standard "if they address the crux of the shareholder's purpose and if that information is unavailable from another source." [44] That determination is "fact specific and will necessarily depend on the context in which the shareholder's inspection demand arises." [45]

While ERSRI's Demand covered nine categories of documents, the parties commendably have narrowed the dispute to two of those categories: (1) non-privileged internal electronic communications; and (2) certain Board-level hard-copy documents and electronic communications protected by the attorney-client privilege and the attorney work product doctrine. [46] Facebook resists inspection of these documents on two grounds. First, Facebook contends that Plaintiff cannot establish that either of the two categories of documents are "necessary and essential" for it to pursue its stated purpose. [47] Second, Facebook argues

ERSRI cannot carry its burden of demonstrating it is entitled to access Facebook's privileged documents under the fiduciary exception to the attorney-client privilege as recognized in the seminal *Garner v. Wolfinbarger*. [48] I address each defense in turn.

A. The Non-Privileged Electronic Communications Are Necessary and Essential

***5** As our Supreme Court explained in *Wal-Mart Stores, Inc. v. Indiana Electrical Workers Pension Trust Fund IBEW*, "in a Section 220 proceeding, the necessary and essential inquiry must precede any privilege inquiry because the necessary and essential inquiry is dispositive of the threshold question—the scope of document production to which the plaintiff is entitled under Section 220." [49] Because Section 220 inspections are not tantamount to "comprehensive discovery," the court must tailor its order for inspection to cover only those books and records that are "essential and sufficient to the stockholder's stated purpose." [50] In this regard, "[t]he plaintiff bears the burden of proving that each category of books and records is essential to accomplishment of the stockholder's articulated purpose for the inspection." [51] "To meet this burden, Plaintiff must 'make specific and discrete identification, with rifled precision, of the documents sought.' " [52]

The only non-privileged material withheld from inspection by Facebook are documents in Category 6—electronic communications sent from, to, or copied to a member of the Board concerning Facebook's negotiations of the 2019 Settlement with the FTC, collected from a subset of Board members identified as custodians in *Facebook I*, as well as from certain custodians in the office of the Company's general counsel. [53] According to ERSRI, the emails and text messages it seeks are necessary to assess the process undertaken by the Board to reach the 2019 Settlement and to determine the extent to which the Board deliberately caused Facebook to pay more in the settlement in order to protect Zuckerberg from personal liability. [54]

Our Supreme Court has made clear that "the Court of Chancery should not order emails to be produced when other materials (e.g., traditional board-level materials, such as minutes) would accomplish the petitioner's proper purpose." [55] "[B]ut if non-email books and records are insufficient, then the court should order emails to be produced." [56] And, as relates to emails, "[Section] 220 does not require the petitioner to meet an unrealistic 'compelling evidence' standard just to obtain [a] discrete set of documents. Instead, a petitioner meets her burden to prove necessity by identifying the categories of books and records she needs and presenting some evidence that those documents are indeed necessary." [57]

Facebook objects to producing electronic communications concerning the FTC negotiations because ERSRI already possesses sufficient documents to assess the 2019 Settlement's overall fairness and the Board's deliberative process. [58] Facebook points out it has to date produced: (i) materials produced to the plaintiffs in *Facebook I*; (ii) minutes of the Special Committee (redacted for privilege) related to the 2019 Settlement; (iii) the Special Committee Report; (iv) minutes of the Board concerning the 2019 Settlement (redacted for privilege); and (v) a privilege log which contains almost 300 entries referring to electronic communications regarding negotiations with the FTC. [59] Facebook argues these materials enable ERSRI to assess:

> ***6** (1) the membership of the Special Committee, (2) the Committee's mandate, (3) the legal advisors to the Committee, (4) the number of times the Board and Special Committee met, (5) what senior management told Special Committee members about the negotiations with the FTC, (6) what alternatives to settlement the Board considered, and (7) the final terms of the settlement to which Facebook agreed. [60]

According to Facebook, the documents produced prior to this litigation, coupled with Plaintiff's own trumpeting of confidence that it could survive a motion to dismiss in a plenary action by pleading the facts it already possesses, reveals that Plaintiff has

received more than "sufficient" information to fulfill its stated purposes for inspection.[61] Indeed, as Facebook notes, ERSRI has already alleged with some detail that the 2019 Settlement resulted from a flawed process that produced an unfair price.[62]

After reviewing the materials Facebook has produced, and the arguments presented at trial, I am satisfied the requested non-privileged electronic communications are necessary and essential for ERSRI's stated purpose. As an initial matter, ERSRI does not forfeit its statutory inspection rights by candidly describing the strength of its potential claims. That a stockholder plaintiff believes it has a basis in facts already known to pursue claims of wrongdoing against company fiduciaries does not mean the stockholder should be denied use of the "tools at hand" to develop those facts further so that it can well-plead its claims in a complaint, particularly a derivative complaint.[63]

The materials Facebook has provided thus far do not allow ERSRI to engage in the kind of investigation contemplated by Section 220. To be sure, documents produced in *Facebook I* were responsive to that plaintiff's stated purpose to investigate the Board's oversight failures in the time leading up to the Cambridge Analytica data breach.[64] In this case, however, the Cambridge Analytica data breach is background to the alleged wrongdoing ERSRI seeks to investigate: the Board's conduct leading up to and at the time of the 2019 Settlement. Indeed, in *Facebook I*, the Court declined to order production of documents related to negotiations with the FTC as "those documents [were] far removed" from the *Caremark* claims those plaintiffs sought to investigate.[65] And the date range for the *Facebook I* documents ended in May 2019, months before the 2019 Settlement was finalized. Those documents, therefore, are predictably of little probative value to ERSRI's investigatory purpose in this action.

***7** The Special Committee Report likewise provides little by way of substantive information. The report states in succinct terms the Special Committee's purpose and its rationale for the settlement, explaining summarily that the settlement was not a "perfect outcome" but that the benefits of accepting the FTC's settlement proposal outweighed the costs and risks of fighting the FTC's claims.[66] This does not address ERSRI's stated purposes for inspection, namely to discern what informed the Board's decision to bargain to protect Zuckerberg or to pay $5 billion, and what alternatives to the ultimate settlement agreement, if any, were available.

The privilege log, for its part, contains multiple entries referring to electronic communications regarding the status of the negotiations with the FTC. It also contains dozens of entries referring to legal advice received by the Board in connection with the FTC investigation. Not surprisingly, however, it offers no substantive insight into the Board's decision-making.[67] Thus, the privilege log "raise[s], but does not resolve" the issues described in ERSRI's Demand, leaving ERSRI's purposes unaddressed.[68]

Given the gaps in the *Facebook I* documents and the Special Committee Report, it is no wonder Facebook's showcase argument is that the Board and Special Committee minutes already produced provide ERSRI with sufficient information to assess the Board's decision-making process.[69] But the Board and Special Committee minutes are heavily redacted, providing only a basic outline of the Board's process and the resulting negotiations with the FTC leading to the 2019 Settlement. These documents "reveal" Facebook was negotiating a settlement with the FTC, the status of the settlement discussions, management's views on the FTC settlement position and directions from the Board to management regarding the negotiations.[70] They are bereft of any information concerning the substance of Facebook's non-privileged discussions with the FTC. It remains unclear, for instance, whether the FTC offered Facebook the option of paying less on behalf of the Company in exchange for a limited Company-only release, or if the Board considered whether to negotiate on behalf of the Company alone, leaving Zuckerberg to interact with the FTC on his own.

The lack of information regarding these issues is particularly curious given Gibson Dunn's "white paper"—a document sent by Facebook's outside counsel to the FTC outlining their view that, under the controlling statute (15 U.S.C. § 45(1)), Facebook's maximum exposure was well below the $5 billion Facebook ultimately agreed to pay.[71] The documents already produced provide no insight into why Facebook would pay more than its (apparently) maximum exposure to settle a claim, and Plaintiff

is right to question whether internal communications among Facebook fiduciaries might shed light on the Board's thinking in this regard.

***8** There is also no information or even a hint as to why Facebook conditioned any settlement with the FTC on the FTC's agreement to release Zuckerberg from liability. As ERSRI has proven, it was a matter of public record that Zuckerberg's personal liability was a central focus of the negotiations between Facebook and the FTC. [72] And the FTC commissioners ultimately split on whether to accept the recordsetting $5 billion settlement, with the dissenters expressing the view that the FTC could and should hold Zuckerberg personally accountable for his company's repeated privacy violations. [73]

Contrary to Facebook's characterization, this is not a case like *Espinoza v. Hewlett-Packard Co.*, where additional books and records were deemed nonessential because the plaintiff already had "a lot of information" and "can match [that information] up and draw [its] own conclusions." [74] Here, ERSRI has little or no information from which it can draw conclusions regarding the existence of available alternatives to the 2019 Settlement or the Board's negotiations with the FTC. The fact that Facebook's more traditional Board materials reveal little or nothing of the Board's thinking with respect to the negotiations and decision to enter the 2019 Settlement indicate strongly that, if such information exists, it will be in the non-privileged electronic communications covered in Category 6. Indeed, the roughly 300 entries described in Facebook's privilege log suggest the Board was regularly communicating via email and text messages about the FTC litigation. [75] I am satisfied, therefore, that non-privileged electronic communications concerning the FTC negotiations are necessary and essential to Plaintiff's proper purpose. [76] I address the specific scope of that production below.

B. The Privileged Documents are not Necessary and Essential

ERSRI also seeks production of attorney-client privileged and work product documents, including unredacted copies of Board minutes, plus the privileged electronic communications identified in Appendix A to Rhode Island's Opening Brief. [77] ERSRI's request for privileged documents under both Categories 5 and 6 is motivated by the same purposes as its non-privileged request, namely to discern the information available to the Board as it weighed its alternatives to settlement, and to acquire some insight into the Board's deliberations regarding whether the Company should cover Zuckerberg's personal exposure.

"While the attorney-client privilege may be asserted by a corporation that has sought legal advice, the privilege is not absolute and an oft-invoked exception applies in suits by minority shareholders." [78] "[W]here the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show 'good cause' why the privilege should not apply." [79] Our Supreme Court has described the *Garner* exception as "narrow, exacting, and intended to be very difficult to satisfy." [80]

***9** Under the *Garner* exception, the stockholder seeking disclosure of privileged communications bears the burden of establishing "good cause" to overcome the assertion of the privilege. [81] While *Garner* identifies multiple factors the court might consider when assessing whether the stockholder has demonstrated "good cause," this court typically focuses the good cause inquiry on three factors: "(i) whether the claim is colorable, (ii) the necessity or desirability of information and its availability from other sources and (iii) the extent to which the information sought is identified as opposed to a blind fishing expedition." [82]

Whether the privileged information sought "is both necessary to prosecute the action and unavailable from other sources" [83] has been described as "the most important" of the *Garner* factors. [84] Although the colorability of the claim and the extent to which the communication is specifically identified have been similarly flagged as "particular[ly] significan[t]," [85] Delaware courts have been especially reluctant to apply *Garner* where the stockholder failed to satisfy the necessity/unavailability factor. [86] The

dispositive nature of this factor makes sense in the context of a Section 220 action, as courts have considered "the necessary and essential prong for Section 220 to be similar, if not identical, to this aspect of the *Garner* analysis." [87]

To determine whether the necessity/unavailability factor is satisfied, as noted, "the question is whether Plaintiffs 'have exhausted every available method of obtaining the information they seek.' " [88] To meet this burden, ERSRI argues the privileged documents in question are not available from other sources because communications about settlement negotiations are likely to be privileged. [89] ERSRI admits, however, that it cannot demonstrate the privileged information it seeks is unavailable elsewhere because it has not seen the responsive, non-privileged electronic communications that Facebook is withholding. [90] At trial, ERSRI's counsel acknowledged that the non-privileged communications may well satisfy Plaintiff's purposes. [91]

***10** For reasons already explained, it is likely that non-privileged electronic communications among Board members can provide ERSRI insight into why the Board decided to enter the 2019 Settlement without exposing the advice of counsel upon which, at least in part, that decision was based. Because Section 220 inspections must give the stockholder what is "essential, but stop at what is sufficient," and Plaintiff will receive further non-privileged documents responsive to its Demand, I am satisfied Plaintiff has not carried its heavy burden to justify a court order compelling the production of documents protected by the attorney-client privilege. [92]

III. CONCLUSION

For the foregoing reasons, judgment shall be entered for Plaintiff that directs Facebook to allow inspection of the books and records designated in this Memorandum Opinion. The parties shall confer regarding the scope of this limited production, including the number of appropriate (non-duplicative) custodians and appropriate (targeted) search terms, and submit a joint proposed implementing order and final judgment within fifteen (15) days. If the parties cannot agree on a form of implementing order and final judgment, they shall submit separate proposals with brief transmittal letters explaining the differences and reasons the Court should adopt and enter one proposal over the other.

All Citations

Not Reported in Atl. Rptr., 2021 WL 529439

Footnotes

1 *In re Facebook, Inc. Section 220 Litig.*, 2019 WL 2320842, at *19 (Del. Ch. May 31, 2019) ("*Facebook I*").
2 *Id.*
3 Verified Compl. Under 8 *Del. C.* § 220 to Compel Inspection of Books and Records ("Compl.") ¶¶ 1–8 (Docket Item ("D.I.") 1). I cite to Joint Trial Exhibits as "JX __," the Section 220 Trial Transcript as "Tr.__" (D.I. 44) and the Joint Pre-Trial Stip. and Order as "PTO ¶ __" (D.I. 40).
4 PTO ¶ 4.
5 JX 89 at 2–3.
6 PTO ¶ 5.
7 *Id.* ¶ 6.
8 Def.'s Answering Pre-Trial Br. ("AB") at 20 (D.I. 26). ERSRI does not dispute the number of documents and pages Facebook claims to have produced to date.
9 PTO ¶ 10.

10 D.I. 1; PTO ¶ 7.
11 PTO ¶¶ 12–17. The Court commends the parties for attempting to narrow the issues for resolution at trial. Specifically, they agreed to focus trial on the scope of documents to be produced for inspection rather than litigate the propriety of Plaintiff's stated purposes at the outset. *Id.* Their conduct stands in marked contrast to the tactics that have prompted expressions of concern by this court regarding "overly aggressive" Section 220 litigation. *See, e.g.*, *Pettry v. Gilead Scis., Inc.*, 2020 WL 6870461, at *30 (Del. Ch. Nov. 24, 2020) (collecting cases).
12 PTO ¶¶ 14–17.
13 *Id.*
14 *Id.*
15 *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert denied*, 401 U.S. 974 (1971); *see also Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1278–79 (Del. 2014) (adopting the *Garner* doctrine in both plenary proceedings and summary Section 220 proceedings).
16 *Kosinski v. GGP, Inc.*, 214 A.3d 944, 950 (Del. Ch. 2019) (reiterating that a stockholder must prove by a preponderance of the evidence all the elements of a Section 220 claim).
17 Compl. ¶ 11.
18 JX 99.
19 PTO ¶ 2.
20 Compl. ¶ 18.
21 JX 124 at 10–13; Compl. ¶¶ 20–21, 73.
22 JX 101.
23 *Id.*
24 JX 29; JX 103.
25 JX 26.
26 *Facebook I* at *1.
27 JX 32; *see also Facebook I* at *1, *3–4 (detailing in more depth the reasons for, and contours of, the Consent Decree).
28 JX 48.
29 PTO ¶ 3.
30 *Id.* ¶ 4.
31 *Id.*
32 JX 89 at 2–3.
33 *Id.* at 17–18.
34 PTO ¶ 5; JX 90.
35 JX 90.
36 PTO ¶ 6.
37 *Id.* ¶¶ 6–11. Facebook asserts, and ERSRI does not contest, that Facebook produced 2,931 documents comprising 30,266 pages. AB at 1.
38 PTO ¶ 10.
39 *Id.* ¶ 7; D.I. 1.
40 PTO ¶¶ 12–17.
41 *Id.* ¶¶ 11–17; AB at 3 n.1; Tr. 52:17–53:21.
42 D.I. 44.
43 *Pettry*, 2020 WL 6870461, at *23 (internal quotations and citation omitted).
44 *Id.* (internal quotations and citations omitted).
45 *Id.*
46 PTO ¶¶ 12–17.
47 AB at 23.
48 430 F.2d 1093; *see also Wal-Mart*, 95 A.3d at 1278–79 (adopting the *Garner* doctrine in both plenary proceedings and summary Section 220 proceedings); AB at 24.
49 *Wal-Mart*, 95 A.3d at 1278.

50 *Id.*; *see also AmerisourceBergen Corp. v. Lebanon Cty. Emps. Ret. Fund*, —— A.3d ——, 2020 WL 7266362, at *15 (Del. 2020) (noting that Section 220 inspection is not tantamount to plenary litigation discovery).
51 *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1035 (Del. 1996).
52 *Bucks Cty. Emps. Ret. Fund v. CBS Corp.*, 2019 WL 6311106, at *8 (Del. Ch. Nov. 25, 2019) (quoting *Brehm v. Eisner*, 746 A.2d 244, 266 (Del. 2000)).
53 JX 89 at 17–18.
54 Compl. ¶ 7; Pl.'s Opening Pre-Trial Br. ("OB") at 57–59 (D.I. 15).
55 *KT4 P'rs LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 752–53 (Del. 2019).
56 *Id.*
57 *Id.* at 755 (citation omitted); *see also AmerisourceBergen,* 2020 WL 7266362, at *15 (noting that "*Palantir* did not establish any bright-line rules regarding discovery to be applied in all Section 220 actions").
58 AB at 25.
59 *Id.* at 25–27.
60 *Id.* at 28.
61 *Id.* at 29.
62 *Id.* at 28–29 (citing JX 89 at 12; Compl. ¶ 66 (stating ERSRI has documents "prov[ing] an express quid pro quo."); Compl. ¶ 3 ("[T]he Board agreed to pay this massive penalty from the corporate treasury as part of an express quid pro quo to protect [Zuckerberg] ....").
63 *AmerisourceBergen*, 2020 WL 7266362, at *5 (emphasizing the utility of utilizing the "tools at hand," like Section 220 inspection rights, to investigate and prepare a well-pled derivative complaint); *Mudrick Cap. Mgmt., L.P. v. Globalstar, Inc.*, 2018 WL 3625680, at *1, *5–8, *11 (Del. Ch. July 30, 2018) (ordering company in Section 220 action to produce board-level emails on top of the 1,300 core documents already produced, even though the stockholder plaintiff had identified at trial a litany of troubling issues with the board's process that were "strongly support[ed]" by the existing documentary record).
64 *See Facebook I* at *18–19 (outlining the scope of production).
65 *Id.* at *19.
66 JX 117.
67 *See* JX 1.
68 *Globalstar*, 2018 WL 3625680, at *8.
69 Tr. 93:6–94:6 (citing board minutes and special committee minutes at JX 43, JX 53, JX 54, JX 56, JX 74 and JX 117 as the key exhibits from which ERSRI could assess the Board's decision-making process).
70 JX 43; JX 53; JX 54; JX 56; JX 74; JX 82; JX 117.
71 JX 52; Compl. ¶¶ 203–04. The draft FTC complaint alleged that the relevant misconduct began in December 2012 and was ongoing. JX 48 ¶ 196. There were 2,463 days between December 1, 2012 and August 30, 2019, the outside date of the settlement. [Redacted] multiplying those 2,463 days by a maximum statutory penalty of $42,530 per day yields a maximum monetary exposure for Facebook of $104,751,390—about $4.9 billion less than it agreed to pay.
72 JX 75; JX 79.
73 JX 87 at 19.
74 Oral Arg. on Pl.'s 220 Request, *Espinoza v. Hewlett-Packard Co.*, C.A. No. 6000-VCP, at 30 (Del. Ch. Mar. 25, 2011) (TRANSCRIPT) (D.I. 106).
75 JX 1.
76 *See Palantir*, 203 A.3d at 752–53.
77 App. A to OB.
78 *Grimes v. DSC Commc'ns Corp.*, 724 A.2d 561, 568 (Del. Ch. 1998) (internal quotations and citation omitted).
79 *See Garner*, 430 F.2d at 1102–04; *Wal-Mart*, 95 A.3d at 1278–79.
80 *Wal-Mart*, 95 A.3d at 1276.
81 *In re lululemon athletica inc. 220 Litig.*, 2015 WL 1957196, at *10.
82 *In re Oracle Corp. Deriv. Litig.*, 2019 WL 6522297, at *18 (Del. Ch. Dec. 4, 2019) (citation omitted).
83 *Buttonwood Tree Value P'rs, LP v. R.L. Polk & Co., Inc.*, 2018 WL 346036, at *4 (Del. Ch. Jan. 10, 2018).

84 *See id.* at *5 n.24 (citations omitted); *see also In re Fuqua Indus., Inc. S'holders Litig.*, 1999 WL 959182, at *3 (Del. Ch. Sept. 17, 1999) (holding that stockholders may not invoke *Garner* unless they have "exhausted every available method of obtaining the information they seek"); *Buttonwood*, 2018 WL 346036, at *6 (same).

85 *Salberg v. Genworth Fin., Inc.*, 2017 WL 3499807, at *5 (Del. Ch. July 27, 2017) (internal quotations and citations omitted).

86 *See, e.g.*, *Buttonwood*, 2018 WL 346036, at *3, *5 n.24 (collecting cases and emphasizing that the stockholder cannot employ *Garner* to compel production of privileged information where similar non-privileged information is available from other sources); *Express Scripts*, 2018 WL 2110946, at *2 (same).

87 *lululemon*, 2015 WL 1957196, at *12.

88 *Buttonwood*, 2018 WL 346036, at *6 (quoting *Fuqua*, 1999 WL 959182, at *3).

89 OB at 60–61.

90 Pl.'s Reply Pre-Trial Br. at 25 (D.I. 35). ERSRI urges the Court not to "reward" Facebook for declining to produce non-privileged electronic communications as a strategic tactic to undermine Plaintiff's *Garner* argument. *Id.* It asserts Facebook's decision not to produce the non-privileged materials should be interpreted by the Court to mean such materials will not be responsive to ERSRI's Demand. *Id.* I disagree. Not only is this position in tension with ERSRI's argument that the non-privileged electronic communications are necessary and essential, it also contradicts the privilege log, which indicates the Board regularly communicated about the FTC investigation electronically. *See* JX 1.

91 Tr. 106:23–107:17 (acknowledging that it is "perhaps likely" that "the non[-]privileged electronic communications will shed light" on "aspects of the [Board's] process" pertinent to ERSRI's purposes.).

92 *Palantir*, 203 A.3d at 752; *Buttonwood*, 2018 WL 346036, at *6.

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