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**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

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| IN RE FACEBOOK, INC. CLASS C RECLASSIFICATION LITIGATION | ) ) | CONSOLIDATED C.A. No. 12286-VCL |

# FACEBOOK, INC.'S BRIEF IN OPPOSITION TO CO-LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

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## PRELIMINARY STATEMENT

Since before its 2012 initial public offering, Facebook has had a dual-class capital structure. Facebook advised stockholders who purchased shares in the IPO of both the existence of the structure and the possibility that founder and CEO Mark Zuckerberg could pass control to his heirs. Facebook adopted this structure because it offers many benefits, including permitting the Company to focus on creating long-term value. That model has proven extraordinarily successful.

In April 2016, Facebook announced a proposed reclassification. In exchange for the creation of a class of non-voting stock that he desired, Mr. Zuckerberg agreed to demands from a special committee of the board that tied his continued control to his active involvement with the Company and ensured that the dual-class structure would end no later than his passing.

Although it obtained the requisite stockholder vote, at Plaintiffs' Counsel's request, the reclassification did not become effective pending resolution of this litigation. In September 2017, the board agreed to a request by Mr. Zuckerberg to terminate the reclassification. Stockholders did not receive any money in connection with the termination.

Plaintiffs' Counsel now seek the second highest fee award in the history of this Court, and (by an order of magnitude) the highest fee award in any case not involving a certain and quantifiable monetary benefit. Plaintiffs' Counsel's request

rests on the unequivocal proposition that the reclassification "would have extended [Mr. Zuckerberg's] voting control of Facebook . . . for decades." Co-Lead Counsel's Brief in Support of Their Motion for an Award of Attorneys' Fees and Expenses at 1 (filed Feb. 2, 2018) (the "Brief"). Dkt. 243.

But it is not that simple. Mr. Zuckerberg has no intention of surrendering control of Facebook in the foreseeable future, with or without a reclassification. Moreover, Plaintiffs' Counsel do not even acknowledge that as a result of the termination of the reclassification and resulting loss of its governance changes, control may not pass from Mr. Zuckerberg to Facebook's Class A stockholders, or the passage of control may occur later than it would have had the reclassification occurred.

As a result, Plaintiffs' Counsel cannot establish any benefit to stockholders, the primary factor in determining an appropriate award.[1] Because (1) Plaintiffs' Counsel does not account for the possibility that as a result of the termination of the reclassification, the passage of control may be delayed or not occur, and (2) the effect of termination cannot be reasonably estimated using empirical data, they cannot establish that they conferred any benefit on Facebook's stockholders.

[1] Facebook does not take issue with Plaintiffs' Counsel's analysis of the other *Sugarland* factors. *See* Brief at 44-47.

And even if Plaintiffs' Counsel could do so, they lack a reliable valuation of any benefit. Each of the valuation methodologies offered by Plaintiffs' Counsel—which produce a spread of more than twenty times between the lowest and highest valuations—suffers from fundamental flaws. The use of untested methodologies and incomplete models render the resulting valuations inadmissible and, in any event, inadequate to support an award.

Plaintiffs' Counsel's claims regarding the benefits they purportedly conferred are also contrary to the market evidence. Most tellingly, after rising on the announcement of the reclassification, the market *fell* 4.5% on the announcement of its termination. Plaintiffs' Counsel's expert concedes that this "is inconsistent with the view that the stockholders saw a net benefit from the abandonment of the reclassification." Ex. 1 (Sacks Dep.) at 349:6-22.[2]

Despite this, Plaintiffs' Counsel request $129 million (reflecting a nearly 16x lodestar multiple and an implied hourly rate of $9,146). Plaintiffs' Counsel's request exceeds the fees awarded in all but one case (which involved an extraordinary monetary benefit) in the history of the Court. Moreover, most of Plaintiffs' Counsel's precedents involve certain, readily quantifiable, monetary

[2] Unless otherwise noted, all exhibit references are to exhibits to the Transmittal Affidavit of David E. Ross, filed contemporaneously herewith. Citations to the "Christensen Aff. Ex." refer to the Transmittal Affidavit of Joseph L. Christensen, Esq. In Support of Co-Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses. Dkt. 243.

benefits. Here, by contrast, the value of any non-monetary benefit is speculative and not quantifiable.

Under these circumstances, *quantum meruit* is the proper method for determining an appropriate fee. This Court consistently awards fees based on that basis where either the existence or value of any benefit is uncertain. Here, both are uncertain. Using this approach, the Court bases a fee award on the time expended by counsel. Although a modest contingency multiplier can be appropriate, the Court has consistently awarded *quantum meruit* fees of no more than twice counsel's lodestar. Using that framework, and accounting for out-of-pocket expenses, the Court should award no more than $19,882,371.27.

## BACKGROUND[3]

### A. Facebook's capital structure and historical performance

Facebook is a social media and technology company. In November 2009, while closely held, Facebook created Class B Common stock with ten votes each. *See, e.g.*, Ex. 2 (Brad Stone, *Facebook Will Form 2 Classes of Stock*, N.Y. TIMES (Nov. 24, 2009) ("Stone N.Y. Times Article"). The dual-class structure and its potential effects—including that it "would increase the voting power of Mr. Zuckerberg"—were widely reported at the time. Ex. 3 (Jessica Vascellaro, *Facebook Holders Tighten Their Grip*, WALL ST. J. (Nov. 25, 2009)); *see also*, *e.g.*, Ex. 2 (Stone N.Y. Times Article) ("Such dual-class stock structures" permit founders "to preserve control of the company while selling shares to the public").

In February 2012, Facebook announced its initial public offering. Throughout its Prospectus, including in bold on the cover, Facebook disclosed the effects of its dual-class structure, including that Mr. Zuckerberg would own approximately 23% economically but control approximately 56% of the voting power. Ex. 4 (Facebook, Inc., Prospectus (Rule 424(B)(4)) (May 17, 2012)) at Cover, 140, 141. Facebook also warned potential investors that "[t]his

[3] At this juncture, the Court "does not consider how the challenged [actions] might have fared [at trial]" because those issues are moot. *In re Compellent Techs. Inc., S'holder Litig.*, 2011 WL 6382523, at *1 (Del. Ch. Dec. 9, 2011). As such, Facebook focuses on facts relevant to the issue before the Court. Facebook refers to Defendants' Pre-Trial Brief for a more complete narrative. Dkt. 229.

concentrated control could delay, defer, or prevent a change of control . . . that our other stockholders support," and that "[i]n the event of his death, the shares of our capital stock that Mr. Zuckerberg owns will be transferred to the persons or entities that he designates." *Id.* at 22.

Class B shares convert into Class A shares in three ways. First, a stockholder can elect to convert the shares. Christensen Aff. Ex. 5 (Facebook, Inc. Restated Certificate of Incorporation ("Current Charter")) at Art. IV, § 3.8(a). Second, holders of a majority of the outstanding Class B shares can vote to convert all Class B shares. *Id.* at Art. IV, § 3.8(b). Third, Class B shares automatically convert upon transfer to a third party, but not if transferred (including by inheritance) to family members, or to entities exclusively owned by the holder or her family members. *Id.* at Art. IV, §§ 3.8(b), 4.8-4.11.

By August 2015, Facebook shares had increased by more than 150 percent, substantially outperforming both the market and industry indices, and increasing the Company's market capitalization by several hundred billion dollars. Christensen Aff. Ex. 40 (Fischel Opening Report) at Ex. 7.

### B. Mr. Zuckerberg proposes a reclassification, and the Special Committee secures concessions ensuring the collapse of the dual-class structure.

By April 2015, Mr. Zuckerberg held 15.2% of the Company's outstanding stock and more than 60% of its voting power. Christensen Aff. Ex. 8 (Facebook, Inc., Definitive Proxy Statement (Form 14A) (Apr. 24, 2015)) at 35-36.

At the Company's August 20, 2015 board meeting, Mr. Zuckerberg observed that his voting control, which allowed the Company to focus on creating long-term value, "will likely be diluted by future issuances of stock by the Company . . . as well as by potential sales or philanthropic contributions by him of his stock." Christensen Aff. Ex. 15 (Aug. 20, 2015 Board Minutes) at 2. As a result, Mr. Zuckerberg had considered whether Facebook would benefit from changes to its capital structure. *Id.* Mr. Zuckerberg's lawyer (Mr. Hinman) explained that other dual-class, controlled companies recently distributed shares of a new class of non-voting stock as dividends to preserve their founders' voting control and proposed that Facebook consider doing the same. *Id.* at 2-3.[4]

[4] Plaintiffs' Counsel claims that "Hinman . . . did not inform the Board that he was Zuckerberg's personal lawyer." Brief at 7. But the minutes indicate that Mr. Zuckerberg "introduced Mr. Hinman, his personal legal counsel." Christensen Aff. Ex. 15 (Aug. 20, 2015 Board Minutes) at 2. Plaintiffs' Counsel likewise claims that the "Board was not told that the real reason for the Reclassification was to facilitate Zuckerberg's personal plans while preserving his voting control." Brief at 7. While there were many reasons for the reclassification, as discussed above, Mr. Zuckerberg told the Board in that same meeting that he was concerned

Facebook's board unanimously resolved to appoint a special committee comprised of the audit committee members—Marc Andreessen, Erskine Bowles, and Susan Desmond-Hellmann (the "Special Committee"). *Id.* at 3-4. The board authorized the Special Committee to retain advisors, to evaluate and negotiate any proposal to alter the Company's capital structure, and to evaluate and negotiate alternatives. *Id.* at 10. The board also unanimously resolved not to approve any proposal to alter the Company's capital structure without the Special Committee's prior recommendation to do so. *Id.*

The Special Committee engaged Wachtell, Lipton, Rosen & Katz as its legal advisor and Evercore as its financial advisor. Ex. 5 (Facebook, Inc., 2016 Definitive Proxy Statement (Form DEF 14A) (June 2, 2016) ("2016 Proxy")) at 59. Over several months, the Special Committee met repeatedly with its advisors. Ex. 6 (Oct. 20, 2015 Special Committee Minutes); Ex. 7 (Nov. 9, 2015 Special Committee Minutes); Christensen Aff. Ex. 30 (Jan. 11, 2016 Special Committee Minutes).[5]

While the Special Committee was negotiating with Mr. Zuckerberg, he and his wife, who previously took the Giving Pledge, pledged to "give 99% of [their]

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about the effect of "potential sales or philanthropic contributions by him" on his voting control. Christensen Aff. Ex. 15 (Aug. 20, 2015 Board Minutes) at 2.

[5] A detailed discussion of the negotiations can be found at pages 12-43 of Defendants' Pre-Trial Brief. Dkt. 229.

Facebook shares—currently about $45 billion—during [their] lives to advance th[e] mission" of the newly created Chan Zuckerberg Initiative ("CZI"). Christensen Aff. Ex. 29 (Mark Zuckerberg & Priscilla Chan, "A letter to our daughter," Dec. 1, 2015). In the same announcement, Mr. Zuckerberg confirmed his intention to remain CEO "for many, many years to come." *Id.*

Later that day, Facebook filed a Form 8-K which noted Mr. Zuckerberg's intention, "during his lifetime," either to sell shares or otherwise to use them to support CZI. Ex. 8 (Facebook, Inc., Current Report (Form 8-K) (Dec. 1, 2015) ("Dec. 1, 2015 8-K")) (discussing Mr. Zuckerberg's intention to "gift or otherwise direct substantially all of his shares of Facebook stock, or the net after-tax proceeds from sales of such shares" to further the mission of CZI).

The 8-K also explained that Mr. Zuckerberg would "control the voting and disposition of any shares held by [CZI]," and that he "intends to retain his majority voting position in our stock for the foreseeable future." *Id.* Shortly thereafter, Mr. Zuckerberg contributed 99% of his Facebook shares to CZI. Ex. 9 (Defendant Zuckerberg's Responses and Objections to Plaintiffs' First Set of Interrogatories) at ¶ 30.

By March 2016, following several additional meetings, the Special Committee had secured terms that guaranteed the collapse of Facebook's dual-class structure. Ex. 10 (March 4, 2016 Special Committee Minutes); Ex. 11

(March 10, 2016 Special Committee Minutes); Ex. 12 (March 24, 2016 Special Committee Minutes).

On April 13, 2016, the Special Committee determined, among other things, that the proposed reclassification "increased the likelihood that the Company would continue to benefit from Mr. Zuckerberg's leadership and management influence," "reduced the risk that, in the absence of that benefit, the Company would remain controlled by Mr. Zuckerberg or his family," and "served the interests of the Company's minority stockholders by imposing governance safeguards and prohibiting differential consideration in the context of specified corporate transactions." Ex. 13 (Apr. 13, 2016 Special Committee Minutes) at 1-2. The Special Committee also concluded that the proposed reclassification "represented the most favorable set of terms they could obtain" and "was in the best interests of the Company and its stockholders and was superior to maintaining the status quo." *Id.* at 2. Accordingly, the Special Committee unanimously recommended proceeding on the terms it had negotiated. *Id.*

The next day, the board's independent directors unanimously voted to proceed. Ex. 14 (Apr. 14, 2016 Board Minutes) at 4. On April 22, the independent directors unanimously approved the resolutions and documents necessary to effect the reclassification. Ex. 15 (Apr. 22, 2016 Board Minutes) at 3-4.

### C. The terms of the Reclassification

The proposed reclassification would have created Class C non-voting stock with the same economic rights as the existing classes of stock. Ex. 5 (2016 Proxy) at 55. The Class C stock would have been distributed as a dividend of two shares for every share of Class A or B stock. *Id.* The creation and dividend of the Class C stock was conditioned on terms designed to benefit Facebook's minority stockholders (collectively, the "Reclassification"), including[6]:

***Automatic Conversion Provision.*** Facebook's charter would have been amended to provide that Class B and Class C shares would automatically convert into Class A shares after a transition period following Mr. Zuckerberg's departure from a leadership role at Facebook, with a limited exception for government service. Mr. Zuckerberg's departure could have resulted from either (1) his death or permanent disability; or (2) with certain exceptions, his voluntary resignation as an "Approved Executive Officer." Ex. 16 (Proposed Charter) at Art. IV, § 3.8(b). These provisions could not have been amended or eliminated without the approval of a majority of the holders of each class of stock, voting separately. *Id.* at § 3.10.

***Mandatory Conversion Provision.*** Mr. Zuckerberg would have been required to convert all Class B and Class C stock into Class A stock before any transfer that would cause him to own less than a majority of the outstanding Class

[6] A detailed discussion of the provisions and their benefits can be found at pages 43-47 and 77-83 of Defendants' Pre-Trial Brief. Dkt. 229.

B stock. Ex. 17 (Founder Agreement attached to the Definitive Proxy Statement ("Founder Agreement")) at ¶ 2. That requirement would have been contained in a Founder Agreement, and could not have been amended without the approval of a majority of Facebook's independent directors. *Id.* at ¶ 11(c).

***Equal Treatment Provisions***. Facebook's charter requires ratable treatment of Class A and Class B stock for any dividend, liquidation, or distribution upon a merger of the Company or similar transaction, absent majority approval by both classes of stock, voting separately. Christensen Aff. Ex. 5 (Current Charter) at Art. IV, §§ 3.3, 3.5, 3.6; Ex. 16 (Proposed Charter) at Art. IV, § 3.6(b). That provision would have been expanded to cover Class C stock and to require equal treatment in tender or exchange offers by third parties that are agreed to or recommended by the Company. Ex. 16 (Proposed Charter) at Art. IV, § 3.6(b). The amended provision also would have eliminated the ability of stockholders to approve differential consideration. *Id.* at § 3.6(a); Christensen Aff. Ex. 5 (Current Charter) at Art. IV, § 3.6. The approval of each class of stock, voting separately, would have been required to amend or eliminate these provisions. Ex. 16 (Proposed Charter) at Art. IV, § 3.10.

Additionally, the Founder Agreement would have prohibited Mr. Zuckerberg from selling or transferring any shares for differential

consideration in transactions covered by the expanded equal treatment provisions. Ex. 17 (Founder Agreement) at ¶ 3.

***Independent Compensation Committee.*** Facebook's corporate governance guidelines would have been amended to require an independent compensation committee. Ex. 18 (Apr. 14, 2016 Special Committee Report) at 9.

**D. Facebook announces the Reclassification.**

Facebook announced the Reclassification, along with its first quarter earnings, following the close of the market on April 27, 2016. Ex. 19 (Facebook, Inc., Current Report (Form 8-K) (Apr. 27, 2016)). Facebook stock rose 7.2% the next day. Christensen Aff. Ex. 40 (Fischel Opening Report) at ¶ 55 n.118.

In June 2016, Facebook presented the required charter amendments as four stockholder proposals. The governance changes, including the automatic and mandatory conversion provisions, were contained in Proposals 7C and 7D. Ex. 5 (2016 Proxy) at 55-56. Stockholders (including Mr. Zuckerberg) approved all four proposals. More than 60% of all outstanding Class A shares, excluding shares beneficially owned by Mr. Zuckerberg, voted in favor of Proposals 7C and 7D. Ex. 20 (Facebook, Inc., Current Report (Form 8-K) (June 20, 2016) ("June 20, 2016 8-K")) at 5-6; Ex. 5 (June 2016 Proxy) at 59.

### E. The litigation

Various stockholder plaintiffs filed thirteen lawsuits challenging the Reclassification. On May 17, 2016, the Court appointed lead plaintiffs and lead counsel. Dkt. 42.

Plaintiffs' consolidated complaint alleged that they would be harmed by the trading spread between the Class A and Class C shares. Consolidated Verified Class Action Compl. at ¶ 11 (June 6, 2016) (the "Complaint"). The primary relief sought by Plaintiffs was to enjoin the Reclassification permanently. *Id.* at p. 45. Dkt. 45. Facebook agreed, at Plaintiffs' request, not to effectuate the Reclassification pending trial. Order Governing Case Schedule at ¶ 5 (June 24, 2016). Dkt. 56.

***Plaintiffs' Economic Expert***: Plaintiffs retained Benjamin Sacks and asked him "to figure out damages, or if there were damages." Ex. 21 (Sacks Dep.) at 82:14-20. Because Mr. Sacks thought that "it would be hard to" do, and he was "not even sure if one could narrow them down," Plaintiffs' Counsel changed Mr. Sacks' assignment to determining "whether losses are likely." *Id.* at 82:14-83:7.

On June 23, 2017, Mr. Sacks submitted his opening expert report. Christensen Aff. Ex. 41 (Sacks Opening Report). Mr. Sacks rejected the Complaint's theory that stockholders would be harmed by any trading spread

between the Class A and Class C shares. Ex. 22 (Sacks Rebuttal Report) at ¶ 49 n.56 ("The potential trading discount does not measure the impact of the issuance of Class C stock on Facebook's value."). Instead, Mr. Sacks offered a new theory. Mr. Sacks assumed that the Reclassification would increase the "wedge" between Mr. Zuckerberg's economic interest and his voting power. Christensen Aff. Ex. 41 (Sacks Opening Report) at ¶ 14. And he inferred from certain studies that an increase in a controlling stockholder's "wedge" causes a decline in firm value. *Id.* This relationship purportedly exists because the market expects a controlling stockholder to pursue more "private benefits at shareholders' expense" as his share of the costs declines. *Id.* at ¶ 15 (citation omitted).

Mr. Sacks did not contend that Mr. Zuckerberg had extracted or would likely extract private benefits. Rather, Mr. Sacks contended only that Mr. Zuckerberg's extraction of private benefits "could happen," and that this possibility would reduce Facebook's market capitalization. Christensen Aff. Ex. 41 (Sacks Opening Report) at ¶¶ 26-27.

Whether the Reclassification "was or likely could be value destroying would depend upon a valuation of all [of] its components, including the corporate governance changes." Ex. 21 (Sacks Dep.) at 701:1-7. But because it "wasn't in the scope of what [he] was asked to address," Mr. Sacks did not value the

governance changes. *Id.* at 67:1-14. Indeed, Mr. Sacks is "not sure [he] was specifically aware of" those provisions when he prepared his report. *Id.* at 87:6-14.

Mr. Sacks nevertheless extrapolated that the Reclassification would reduce Facebook's value by between 1.2% and 7.2%, or roughly $3 billion to $19 billion. Christensen Aff. Ex. 41 (Sacks Opening Report) at ¶ 7. "[J]ust to make the analysis go through," Mr. Sacks made "a stylized assumption" that Mr. Zuckerberg would have immediately sold all of his Class C shares, which maximized the potential loss. Ex. 21 (Sacks Dep.) at 449:7-450:4; *see also* Christensen Aff. Ex. 41 (Sacks Opening Report) at ¶ 34. Mr. Sacks did so despite lacking (1) any evidence suggesting that Mr. Zuckerberg would have done so, or (2) any idea what Mr. Zuckerberg thinks of diversification or Facebook's prospects. Ex. 21 (Sacks Dep.) at 166:13-16, 472:6-13.

Under Mr. Sacks' theory, this wedge has long depressed the Company's value. Although Mr. Sacks never performed such an analysis, using his model, between the IPO and the proposal of the Reclassification (when its market capitalization rose from approximately $82 billion to approximately $311 billion), Facebook allegedly suffered as much as $2.26 billion in harm. Ex. 23 (IPO to Reclassification Wedge Calculation).

Mr. Sacks also purported to analyze comparable precedent transactions. Of the 39 transactions identified by Evercore and Morgan Stanley (the Company's

financial advisor), Mr. Sacks eliminated 38 based upon various criteria, including size and industry. Mr. Sacks admits that no relevant academic studies use those criteria, and he does not know if they affect the impact of the wedge. Christensen Aff. Ex. 41 (Sacks Opening Report) at ¶¶ 61, 66; Ex. 21 (Sacks Dep.) at 559:12-561:10, 569:20-570:1, 597:9-14.

Application of these "criteria" led Mr. Sacks to identify Google as the only comparable transaction—even though that reclassification (as modified by a settlement) involved a stapling provision that would have mitigated or eliminated any increase in the wedge. The announcement of the Google reclassification resulted in an abnormal negative stock price movement that was well within the relevant margin of error. Christensen Aff. Ex. 41 (Sacks Opening Report) at ¶ 72 ("Google's reclassification reduced its market value of 6.2% to 7.1% with a margin of error of about +/- 12% to 13%."). Nevertheless, Mr. Sacks claimed that this response "*strongly support[ed]* [his] conclusion that the announcement of the reclassification had a negative impact on Google's stock price." *Id.* at ¶ 73 (emphasis added). Elsewhere in his report, Mr. Sacks dismissed a positive stock price response to a more analogous reclassification (Under Armour) that was within a much smaller margin of error (3.2%), claiming that "[t]he margin of error is so large relative to the measured effect that the true effect of the reclassification could actually be negative." *Id.* at ¶ 76.

***Facebook's Economic Expert*:** Facebook offered the expert opinion of Professor Daniel Fischel, who "concluded that the economic evidence does not support Plaintiffs' claim that the Reclassification proposal w[ould] harm Facebook's minority Class A shareholders." Christensen Aff. Ex. 40 (Fischel Opening Report) at ¶ 8.

Professor Fischel explained that "minority shareholders w[ould] benefit from the Reclassification." *Id.* Under the optimal contracting hypothesis, "the issuance of restricted voting common stock w[ould] have a beneficial impact on shareholder wealth" by, among other things, freeing managers to make decisions based upon value creation. *Id.* at ¶ 34. Moreover, the Reclassification was likely to have increased Facebook's value because, among other things, it would have created a closer link between Mr. Zuckerberg's control and leadership of the Company. *Id.* at ¶¶ 35-44.

Professor Fischel noted that the directly relevant empirical studies concern how a firm's stock price reacts to the announcement of a reclassification creating a new class of stock with inferior voting rights. Both those studies and Professor Fischel's own empirical study of precedent transactions supported his conclusion that stockholders would have benefitted from the Reclassification. *Id.* at ¶¶ 48-56.[7]

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[7] In addition, Facebook offered the expert opinion of Professor Guhan Subramanian, who opined that the Reclassification's governance modifications benefited Facebook's minority stockholders by mitigating governance risks that

### F. The market reacts adversely to the termination of the Reclassification.

In the year-and-a-half that the litigation was pending, Facebook's stock price increased nearly 60%. As a result, even without the Reclassification, Mr. Zuckerberg determined that he could fund his philanthropic goals and retain voting control "for 20 years or more."[8] Christensen Aff. Ex. 39 (Zuckerberg Facebook Post). In September 2017, Mr. Zuckerberg asked the board to withdraw the Reclassification. Acting on the unanimous recommendation of the Special Committee, the board did so.

Facebook announced the termination following the close of the market on September 22, 2017. In a post the same day, Mr. Zuckerberg explained his intention to sell between 35 and 75 million shares over the next eighteen months to accelerate his funding of philanthropy, while "retain[ing] voting control of Facebook for 20 years or more." Christensen Aff. Ex. 39 (Zuckerberg Facebook Post).

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controlled companies faced. Ex. 24 (Subramanian Report) at ¶¶ 64-79. Professor Lucian Bebchuk, Plaintiffs' rebuttal witness, opined that absent the Reclassification, there was a "substantial likelihood" that Mr. Zuckerberg would likely surrender control within a decade, if not sooner. Christensen Aff. Ex. 38 (Bebchuk Rebuttal Report) at 34. Professor Bebchuk further claimed that the governance provisions lacked appreciable value, although he admitted that "there could be some future circumstances in which the [governance changes] could provide public investors with material benefits." *Id.* at 103.

[8] Although these changed circumstances caused the termination, Facebook is not disputing causation for purposes of this motion.

Facebook's stock price *fell* 4.5% the next trading day (September 25). Ex. 25 (Fischel Supp. Report) at Ex. 1. This resulted in a loss of more than $22 billion in market capitalization.

**G. Plaintiffs' Counsel seek a record fee.**

After negotiations and mediation proved unsuccessful, Plaintiffs' Counsel filed their motion seeking $129 million in attorneys' fees and expenses. Brief at 49.

***Mr. Sacks' Supplemental Report.*** Plaintiffs' Counsel submitted a supplemental expert report from Mr. Sacks, who values the purported benefit from the termination at between $1.29 billion and $27.59 billion using three methods. Christensen Aff. Ex. 4 (Sacks Supp. Report) at 2.

***Control Value Approach*:** Starting from his assumption that "[i]f the Reclassification had closed . . ., th[e] transfer of control [to Class A stockholders] would likely have been delayed," Mr. Sacks performs a sample calculation of the present value of avoiding delaying a change of control. *Id.* at 2-3.

Mr. Sacks does not know when control will or would have passed and has no way to predict it. He is "not aware of any . . . studies" on the issue. Ex. 1 (Sacks Dep.) at 131:18-22. As a result, contrary to Plaintiffs' Counsel's claims, Mr. Sacks does not "modif[y] his analysis to account for the timing of when control would pass to the Class A stockholders." Brief at 32. Instead, Mr. Sacks uses

"simplistic," "representative simplifying assumptions." Ex. 26 (Sacks Supp. Rebuttal Report) at ¶¶ 6, 10; *see also* Ex. 1 (Sacks Dep.) at 118:10-22 ("I used . . . simplifying assumptions"). Mr. Sacks "assume[s] that if the Reclassification had been consummated, Zuckerberg would have maintained voting control of Facebook for another 40 years." Christensen Aff. Ex. 4 (Sacks Supp. Report) at 4. Mr. Sacks likewise "assume[s]" that absent the Reclassification, control will pass "all at once – in either 10 or 30 years." *Id.* at 5. Using those assumptions, Mr. Sacks values the termination of the Reclassification at between $1.29 billion and $5.21 billion. *Id.* at 2.

***"Corrected" Fischel Approach*****:** Starting with the companies that Professor Fischel used for his precedent transaction analysis in the merits phase of the litigation, Mr. Sacks applies three criteria selected by Plaintiffs' Counsel to eliminate 16 of the 26 transactions—including all but two with positive excess returns (and the five with the largest positive excess returns). *Compare* Christensen Aff. Ex. 4 (Sacks Supp. Report) at Table L1, *with id.* at Workpaper L at 11. Mr. Sacks' report identified only three companies as being removed on the basis of a "Client Instruction." Christensen Aff. Ex. 4 (Sacks Supp. Report) at Table L1. At his deposition, however, he acknowledged that all sixteen companies were "absolutely" removed at Plaintiffs' Counsel's instruction. Ex. 1 (Sacks Dep.) at 247:1-5 (Q: "Shouldn't every one of these companies also have had an X in the

column under client instruction?" A: "Yes. Yes. Yes, they should have, absolutely.").

Using the remaining ten transactions, Mr. Sacks estimates the benefit from termination of the Reclassification at between $5.26 and $6.34 billion. Christensen Aff. Ex. 4 (Sacks Supp. Report) at 2.

***Wedge Analysis*****:** Mr. Sacks also updated his wedge analysis from the merits phase of the litigation. Ex. 1 (Sacks Dep.) at 275:16-20. Because he uses the same methodology, it suffers from the same flaws as the original analysis. *See supra* at 15-16; *infra* at 32-35; Ex. 25 (Fischel Supp. Report) at ¶¶ 38-46; Ex. 26 (Fischel Rebuttal Report) at ¶¶ 7-15. Although his updated analysis suggests a benefit of between $3.87 billion and $27.59 billion, Mr. Sacks believes that the true figure is between $8 billion and $11 billion. Ex. 1 (Sacks Dep.) at 358:8-359:11.[9]

In his opening report, Mr. Sacks relied upon the stock market's reaction to various announcements by Facebook, including to the announcement of the Reclassification. *See* Christensen Aff. Ex. 41 (Sacks Opening Report) at § V (discussing "stock price response to the Reclassification announcement"), § VII (discussing "stock price response to Zuckerberg's announcement of charitable giving"). He also acknowledges that the market's reaction to the termination

[9] Mr. Sacks also refers to analyses by Evercore, but he does not rely upon those valuations. Ex. 27 (Sacks Supp. Rebuttal Report) at ¶ 14.

"ultimate[ly] . . . determines whether there's a harm or a benefit." Ex. 1 (Sacks Dep.) at 25:5-26:18. Nevertheless, Mr. Sacks' supplemental report ignores the market's negative reaction to the termination.

In addition, while Mr. Sacks believes that the relevant question is "the net benefit" to stockholders of the termination, his supplemental report does not consider the effect of losing the governance changes. *Id.* at 77:9-20.

***Professor Fischel's Supplemental Report.*** Professor Fischel explains that Mr. Sacks' claim that the Reclassification's termination benefitted the Class A stockholders is flawed for several reasons.

First, the market reactions to the announcement of both the Reclassification and its termination contradict Mr. Sacks' claims. Ex. 25 (Fischel Supp. Report) at Section II. Second, Mr. Sacks' analyses are "fundamentally flawed." *Id.* at Sections III-V. Among other things, Mr. Sacks' assumptions concerning when Mr. Zuckerberg will cede control and his extraction of private benefits of control are baseless for various reasons, including his failure to consider the governance changes. *Id.* at ¶¶ 14-21.

Professor Fischel also explains that the academic studies on which Mr. Sacks relies do not support his assumption that Class A stockholders would benefit from Mr. Zuckerberg's loss of control. *Id.* at ¶¶ 23-30. In addition, the

previously identified factual and methodological problems with Mr. Sacks' wedge approach continue to exist. *Id.* at Sections IV, V.

For all of these reasons, "the economic evidence does not support the claim that the termination of the Reclassification . . . benefitted Facebook's minority Class A stockholders, and . . . none of Mr. Sacks' methods provides a reasonable or reliable estimate of the value of any . . . [b]enefit." *Id.* at ¶ 5.

## ARGUMENT

Plaintiffs' Counsel have the burden of establishing both that they conferred a benefit and the "the value of the claimed benefit." *In re Am. Real Estate Partners, L.P. Litig.*, 1997 WL 770718, at *6 (Del. Ch. Dec. 3, 1997). In evaluating valuations of benefits conferred, the Court has "a healthy dose of skepticism," particularly where "the benefits conferred to . . . shareholders are speculative." *Rovner v. Health-Chem Corp.*, 1998 WL 227908, at *5 (Del. Ch. Apr. 27, 1998).

### I. PLAINTIFFS' COUNSEL CANNOT ESTABLISH THAT THE TERMINATION OF THE RECLASSIFICATION BENEFITTED STOCKHOLDERS.

Plaintiffs' Counsel claim repeatedly that "[o]ne of the key benefits conferred by this litigation is the elimination of the Reclassification's extension of Zuckerberg's control of Facebook." Brief at 30; *see also id.* at 9 (the Reclassification "would [have] prevent[ed] control from shifting from Zuckerberg to the class A stockholders"); *id.* at 25 ("The Reclassification would have prolonged Zuckerberg's voting control of Facebook and prevented the Class A stockholders from getting the voting control . . . ."); *id.* at 30 ("The value of control of Facebook . . . will pass to the Class A stockholders due to Plaintiffs' efforts[.]").

This claim ignores Mr. Zuckerberg's intention to "retain his majority voting position . . . for the foreseeable future." Ex. 8 (Dec. 1, 2015 8-K); *see also* Christensen Aff. Ex. 39 (Zuckerberg Facebook Post) (stating his intention to retain

voting control "for 20 years or more."). It likewise ignores that Mr. Zuckerberg's rate of giving "will be determined, in large part, by . . . how much [he] can give to charity and philanthropy without fundamentally altering the governance of Facebook." Ex. 28 (Zuckerberg Dep.) at 90:5-14. In the absence of the Reclassification, Mr. Zuckerberg could "slow down [his] rate of giving" and "mak[e] sure that [he] do[es]n't lose control of Facebook and that the governance there doesn't change." *Id.* at 90:15-19, 292:25-294:5.

As such, the termination of the Reclassification may not accelerate the passage of control to the Class A stockholders. It may instead alter Mr. Zuckerberg's giving while he remains in control.

Moreover, the Reclassification could have *accelerated* the passage of control to the Class A stockholders. With the exception of resignation in connection with government service, the Reclassification required the collapse of Facebook's multi-class share structure if Mr. Zuckerberg stopped serving in a leadership role. Without that protection, Mr. Zuckerberg may retain his voting control if he leaves his executive position for any reason. Mr. Zuckerberg may also bequeath voting control of Facebook to his heirs, who may bequeath it to their heirs. Had the Reclassification been implemented, these possibilities would have been eliminated,

and the stockholders would have been assured that control would shift not later than Mr. Zuckerberg's passing.[10]

The Reclassification thus addressed controlling-stockholder scenarios likely to reduce stockholder value: controllers who are absent from corporate management; controllers who have disengaged from the corporate leadership; controllers freed from accountability for misconduct; and the intergenerational transfer of corporate control.[11] Without the Reclassification, those protections no longer exist.

Mr. Sacks acknowledges that to determine whether termination conferred any benefit on stockholders, one must account for the loss of provisions that could have caused control to pass sooner. Ex. 1 (Sacks Dep.) at 76:18-77:20 ("[W]hen you're considering the benefit of the termination you would want to consider the net benefit, net of any harm that it caused."). But he did not do that. He did not consider the impact of the governance changes or attempt to assess the relative likelihood that the provisions of the Reclassification would have been implicated by future events.

[10] *See supra* at 11-12.

[11] Moreover, without the Reclassification, stockholders lost other governance improvements, which would have conferred separate benefits on stockholders. *See supra* at 12-13.

Moreover, the analyses that Mr. Sacks did undertake rely on numerous assumptions. This is necessary because they depend upon many unknown and unknowable variables that do not lend themselves to empirical analysis. *See, e.g.*, *id.* at 131:18-22 (he is "not aware of any . . . studies" on the timing of passing of control); *id.* at 130:18-131:17 (he does not "know that any such analysis is even really possible").

In light of the foregoing, it is unclear whether the Class A stockholders are better off as a result of the termination of the Reclassification. What will happen in the future, and what would have happened had the Reclassification occurred, depend upon numerous variables that cannot be known or predicted. As a result, there is no analytical basis on which to determine the likely impact of the termination of the Reclassification.

This is different from other situations in which the Court awards a fee for a potential benefit—most notably deal protection cases. In those cases, the plaintiffs unquestionably are better off. Stockholders get the benefit of an increased likelihood of a topping bid, with no downside risk. *See, e.g.*, *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 842 (Del. Ch. 2011) (structuring injunction to avoid "caus[ing] the deal to fail because a closing condition cannot be met"). Here, whether stockholders benefitted from the termination is uncertain.

Moreover, assessing the likelihood of a topping bid involves a recurring situation that is the subject of numerous empirical studies. *In re Compellent*, 2011 WL 6382523, at *22 ("[E]mpirical studies published in financial journals . . . provide[] helpful data on the market-wide incidence of topping bids."); *In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *15, *16 (Del. Ch. June 27, 2011) (using similar "empirical data" to value benefit). As a result, in those cases—unlike here—it is possible to make reliable, probabilistic assessments.

## II. MR. SACKS' OPINIONS ARE NOT THE PRODUCT OF A RELIABLE METHODOLOGY AND, AS A RESULT, ARE INADMISSIBLE.

Even if it was clear that the termination benefitted stockholders, numerous flaws prevent the Court from basing a fee award upon any of Mr. Sacks' valuations. Indeed, his methodologies are so flawed and contrary to the market evidence that his opinion must be excluded.

### A. Mr. Sacks' opinions are not the product of generally accepted methodologies.

"The party seeking to introduce the expert testimony bears the burden of establishing its admissibility by a preponderance of the evidence." *Bowen v. E.I. DuPont de Nemours & Co.*, 906 A.2d 787, 795 (Del. 2006). Under Delaware Rule of Evidence 702, an expert's methodology must be generally accepted in the relevant community. *See, e.g.*, *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 522 (Del. 1999) (affirming exclusion of opinion because defendant failed to

establish that expert's methodology "is generally accepted in [relevant] community"); *In re TMI Litig.*, 193 F.3d 613, 703-04 & n.144 (3d Cir. 1999) (affirming decision excluding opinion; "for expert testimony to meet *Daubert*'s reliability standard, it must be based on the methods and procedures of science, not on subjective belief and unsupported speculation").[12]

Mr. Sacks' three methodologies produce a valuation spread of $1.29 billion to $27.59 billion. That spread, by itself, underscores the unreliability of his analyses. *See Lake Treasure Holdings, Ltd. v. Foundry Hill GP LLC*, 2014 WL 5192179, at *12 (Del. Ch. Oct. 10, 2014) (finding that "plaintiffs failed to provide a basis for a responsible estimate of damages" where expert's "wide range of potential results provides little guidance, essentially inviting the court to pick a number between $2.3 million and $29 million").

Each of Mr. Sacks' valuations is also unreliable for the reasons set forth below.

***Control Value Approach***. Mr. Sacks did not utilize this approach, which involved a sample calculation of the present value of avoiding delaying a change of control, in the merits phase because it lacked the required "rigor." Ex. 1 (Sacks Dep.) at 31:11-32:10. The value suggested by this approach rests entirely upon

[12] Because Rule 702 is identical to the corresponding Federal Rule of Evidence, federal decisions interpreting Federal Rule of Evidence 702 are persuasive authority. *Bowen*, 906 A.2d at 794 (citing federal cases).

"simplifying assumptions" as to when Mr. Zuckerberg would surrender control. *Id.* at 129:24-130:17; Ex. 27 (Sacks Supp. Rebuttal Report) at ¶¶ 6, 10. But Mr. Sacks did not utilize any methodology or "do any rigorous mathematics" to select these dates. Indeed, Mr. Sacks does not "know that any such analysis is even really possible." Ex. 1 (Sacks Dep.) at 130:18-131:17. Instead, Mr. Sacks simply "pose[d] . . . assumptions representing the actual uncertainty that exists." *Id.* at 129:24-130:17; *see also id.* at 118:10-22.

The use of arbitrary "simplifying assumptions" renders this analysis unreliable. *See Cole v. Kershaw*, 2000 WL 1206672, at *9 (Del. Ch. Aug. 15, 2000) (concluding that methodology that required expert "to make assumptions that were speculative and unreliable . . . was not the most appropriate or reliable of the available valuation approaches").

***"Corrected" Fischel Approach***. In this approach, Mr. Sacks followed Plaintiffs' Counsel's instructions to exclude transactions, knowing that doing so was methodologically flawed.

For example, Plaintiffs' Counsel directed Mr. Sacks to remove three transactions because Plaintiffs' Counsel claimed that confounding factors may have existed. Mr. Sacks did so, even though "the best most-accurate thing to do would be to see if you could control for [any confounding factors] and if you could

control for them well enough to do so," which he could have attempted to do (but did not do). Ex. 1 (Sacks Dep.) at 214:8-216:4, 205:3-8.

Even Mr. Sacks does not believe that this methodology is reliable. He "would not put any weight" on this approach, "would not advocate the Court put weight on it," and "do[es]n't think the . . . corrected Fischel method . . . is a good method to use." *Id.* at 190:14-21, 233:13-234:14.

***Wedge Approach***. Mr. Sacks' wedge approach suffers from multiple flaws.

*First*, this analysis assumes (incorrectly) that wedges are always value destroying. Ex. 21 (Sacks Dep.) at 154:9-155:2. But academic studies indicate that "[a]mong dual-class firms, the wedge between voting rights and cash flow rights increases market valuation for high growth firms." Ex. 29 (Bradford D. Jordan, Soohyung Kim, & Mark H. Liu, *Growth Opportunities, Short-Term Market Pressure, and Dual-Class Share Structure*, 41 J. CORP. FIN. 304 (2016)) at 306.

*Second,* the studies on which Mr. Sacks bases his theory do not purport to establish a causal relationship between changes in wedge size and firm value. Instead, the studies consider "the relation between firm value and wedge size across different companies at a particular point in time." Ex. 26 (Fischel Rebuttal Report) at ¶ 12. As a result, these studies do not provide a basis to predict a stock price reaction to the announcement of a reclassification. *Id.* Indeed, Mr. Sacks has

not seen any suggestion that he could use these studies to do so. Ex. 21 (Sacks Dep.) at 214:16-215:9.

Mr. Sacks does not recall ever "do[ing] a similar analysis, attempting to predict the impact of a wedge on the market price of a stock or firm value." *Id.* at 240:19-241:5. Nor does Mr. Sacks know of anyone else who has done one. *Id.* at 216:12-15 (Q: "[H]ave you seen anyone who was done an analysis similar to what you did in this case with regard to the wedge?" A: "As – no."). And Mr. Sacks has never seen any valuation or analyst apply a discount because of a dual-class capital structure and a wedge. *Id.* at 26:7-18. In short, Mr. Sacks' wedge analysis is unprecedented, not "generally accepted."

*Third*, this analysis depends entirely upon Mr. Sacks' subjective beliefs regarding the market's expectation about Mr. Zuckerberg's extraction of private benefits of control. *Id.* at 200:13-17. But Mr. Sacks is not aware of any claim by any analyst or stockholder that Mr. Zuckerberg has ever extracted any private benefits of control. *Id.* at 338:7-14. Indeed, although "excess compensation" is "a major form of private benefits," Mr. Zuckerberg's annual salary is $1. *See* Ex. 30 (Ronald W. Masulis, Cong Wang & Fei Xie, *Agency Problems at Dual-Class Companies*, 64 J. FIN. 1697 (2009)) at 1699; Ex. 31 (Facebook, Inc., 2018 Definitive Proxy Statement (Form 14A) (Apr. 13, 2018)) at 23.

Moreover, Mr. Sacks cannot explain how the market estimates private benefits of control or how stockholders estimate the purported reduction in value based upon an anticipated extraction of private benefits of control. Ex. 21 (Sacks Dep.) at 325:14-24, 338:2-6, 338:23-339:3. Indeed, in the merits phase, when confronted with the fact that no analyst agreed with his claim "that Google's reclassification reduced its market value by between 6.2% and 7.1%," Mr. Sacks attributed this "big miss" to the fact that analysts were unfamiliar with the issue. Christensen Aff. Ex. 41 (Sacks Opening Report) at ¶ 72; Ex. 21 (Sacks Dep.) at 660:6-661:8 ("this is a pretty unusual kind of thing. It's not sort of the kind of thing an analyst will deal with on a routine basis").

The claim that no analyst covering Google was familiar with wedges and their purported impact on value cannot be reconciled with the foundation on which Mr. Sacks' wedge analysis rests: that the market "go[es] about estimating [private benefits of control that will be extracted as wedges increase] and then reduc[ing] the value of the company by them." Ex. 21 (Sacks Dep.) at 338:2-6.

*Fourth*, Mr. Sacks relies upon a counterfactual "stylized assumption": that Mr. Zuckerberg would have sold all of his Class C stock immediately after the Reclassification became effective. *Id.* at 449:7-450:4. Mr. Sacks concedes that Mr. "Zuckerberg will . . . likely sell his [Class A and B shares] over a period of time, rather than in a single transaction." Christensen Aff. Ex. 4 (Sacks Supp.

Report) at 5. And Mr. Sacks did not consider the costs associated with selling all at once or the effect on the market of doing so. Ex. 21 (Sacks Dep.) at 449:7-450:4, 470:23-471:4.

*Fifth*, Mr. Sacks suggests that Mr. Zuckerberg may engage in "quasi-tunneling"—a term Mr. Sacks invented—and seek to extract private benefits of control for entities Mr. Zuckerberg is aligned with or controls. *Id.* at 359:8-11 (Q: "The term 'quasi-tunneling,' have you seen that used by anyone else?" A: "No."); Christensen Aff. Ex. 41 (Sacks Opening Report) at ¶ 26. Mr. Sacks cites no evidence of "quasi-tunneling," and he does not know how Mr. Zuckerberg would engage in the practice. Ex. 21 (Sacks Dep.) at 363:21-364:9. He just thinks "it's reasonable to think that he could do this and might do this." *Id.*

* * *

To the extent he does not disclaim the methodologies in his report, Mr. Sacks relies upon arbitrary assumptions (the control value analysis) and flawed, untested theories (the wedge analysis). Neither approach reflects a rigorously tested and generally accepted methodology, as Rule 702 requires.

**B. Mr. Sacks' methodologies fail to account for all relevant factors.**

Even if Mr. Sacks employed a generally accepted methodology to value any potential benefits to stockholders, his model is incomplete. Mr. Sacks

acknowledges "that when you're considering the benefit of the termination you would want to consider the net benefit." Ex. 1 (Sacks Dep.) at 77:9-20. But Mr. Sacks never accounts for factors that would lower or eliminate the purported benefit to Facebook's public stockholders from the termination. Mr. Sacks never accounts for the possibility that the Reclassification could have caused control to pass sooner, and that only the Reclassification ensures that control would pass. *Id.* at 15:2-16:18. Moreover, Mr. Sacks has not evaluated whether the Reclassification's governance changes would have made the extraction of private benefits of control more or less likely. Ex. 21 (Sacks Dep.) at 328:9-20.

Mr. Sacks justifies his failure to do so on the ground that studies concerning wedges do not discuss governance changes. *Id.* at 704:22-706:3. But he does not know whether the transactions in these studies involved governance changes. *Id.* at 706:4-12.

By looking only at the potential benefits, Mr. Sacks' analysis is akin to looking at gross profits, not net profits. Such analysis fails to establish a cognizable measure of benefit. *See*, *e.g.*, *Deaktor v. Fox Grocery Co.*, 475 F.2d 1112, 1116-17 (3d Cir. 1973) (finding that plaintiffs did not prove damages because their expert "fail[ed] to produce evidence concerning the factors essential to establish net profit as opposed to gross profit").

Indeed, courts regularly exclude experts whose models do not account for other relevant factors. For example, in *Saavedra v. Eli Lilly & Co.*, 2014 WL 7338930 (C.D. Cal. Dec. 18, 2014), plaintiffs sought "to prove injury by proving that each class member received a drug that the average consumer subjectively values less than the average consumer subjectively values the drug he expected to purchase." *Id.* at *4. The plaintiffs' expert's methodology was "inadequate to calculate damages" and "highly flawed" because it "look[ed] only to the demand side of the market equation" and "ignor[ed] supply." *Id.* at *5, *7. By using a one-sided method, the expert's calculation turned from an "objective evaluation" into a "seemingly subjective inquiry." *Id.* at *5.

Likewise, in *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000), the Eighth Circuit found that the trial court should have excluded the opinion of a damages expert whose work "did not incorporate all aspects of the [relevant] market," "failed to account for market events," and "did not incorporate all aspects of the economic reality." *Id.* at 1056-57.

Although not decided under Rule 702, Mr. Sacks' opinion suffers from the same flaws as the fee request in *Korn v. New Castle County*, 2006 WL 588041 (Del. Ch. Mar. 2, 2006), *rev'd in part*, 922 A.2d 409 (Del. 2007). There, the taxpayer plaintiff forced New Castle County to abandon a planned $80 million bond sale. Nevertheless, the Court rejected the plaintiff's argument that this

constituted a quantifiable benefit for purposes of a fee award, recognizing that the bond sale's abandonment could have offsetting costs for taxpayers. Because "the financial consequences of the actions taken by the County are open to speculation," the Court could not credit the plaintiff's calculation that he saved the county money. 2006 WL 588041, at *2. On appeal, the Supreme Court agreed that "the bond sale 'savings' are too speculative" such that "the abandonment of the original $80 million bond sale cannot be considered a monetary benefit for purposes of a fee award." *Korn v. New Castle Cty.*, 922 A.2d 409, 413 (Del. 2007).

Plaintiffs' Counsel cite various cases in which the Court has relied upon expert analyses and studies to value settlements. Brief at 28-30. Those cases only support the uncontroversial premise the Court can rely upon an expert opinion in valuing any benefit. None speaks to whether this work, by this expert, in this case, is reliable. Indeed, to the extent these cases involve contested fee petitions, they note that non-monetary benefits are "difficult to price," *In re Emerson Radio S'holder Derivative Litig.*, 2011 WL 1135006, at *5 (Del. Ch. Mar. 28, 2011), and reject the plaintiff's expert's opinion as neither "a statistically valid study, nor . . . a precise calculation," *In re Compellent*, 2011 WL 6382523, at *22.

**C. The "real-world evidence" confirms the unreliability of Mr. Sacks' opinions.**

Courts regularly use "real-world evidence" as a check on the reliability of an expert's opinion. *See Chesapeake Corp. v. Shore*, 771 A.2d 293, 336, 340 (Del.

Ch. 2000) (noting that it was "quite doubtful" expert's testimony was admissible where "no real-world evidence supports" the conclusion); *In re Appraisal of Dole Food Co.*, 114 A.3d 541, 558-59 (Del. Ch. 2014) (using "real-world evidence" as a cross-check against valuation expert's opinion). The conflicts between Mr. Sacks' opinions and the real world evidence underscore the unreliability of his opinions.

**1. The market's reaction to the announcement of the Reclassification is inconsistent with Mr. Sacks' opinions.**

Using the same methodology that forms the basis for his termination benefit analysis, Mr. Sacks claimed in the merits phase that the Reclassification caused substantial damages, and that "a large part" of those damages were inflicted upon announcement. Ex. 21 (Sacks Dep.) at 185:10-20.

But Facebook's stock price *rose* on announcement of the Reclassification.[13] No analyst suggested a decrease in value or adjusted price targets in response to the Reclassification. Ex. 21 (Sacks Dep.) at 150:10-151:21. And although Facebook simultaneously announced favorable-first quarter results, Mr. Sacks could not identify any statistically significant decline attributable to the announcement of the Reclassification Plan. Christensen Aff. Ex. 41 (Sacks Opening Report) at ¶¶ 39, 49, 51. Indeed, as Professor Fischel explained, in light

[13] *Supra* at 13; *see also Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.,* 855 A.2d 1059, 1080 (Del. Ch. 2003) ("In the real world, market prices matter and are usually considered the best evidence of value."), *aff'd*, 840 A.2d 641 (Del. 2003).

of the margin of error, Mr. Sacks' study also supported the conclusion that "the Reclassification announcement may have caused Facebook's stock price to increase." Ex. 26 (Fischel Rebuttal Report) at ¶ 25.

**2. The market's reaction to the termination of the Reclassification is inconsistent with Mr. Sacks' opinions.**

Absent confounding events, the stock market's reaction "reflect[s] the market's value of the net benefit or loss that results from the abandonment of the reclassification and the governance changes." Ex. 1 (Sacks Dep.) at 316:20-317:4. And Mr. Sacks concedes that Facebook's 4.5% drop (and loss of $22.25 billion in market capitalization) upon the termination of the Reclassification "is inconsistent with the view that the stockholders saw a net benefit from the abandonment of the reclassification." *Id.* at 349:6-22. It is also inconsistent with Mr. Sacks' prediction during the litigation that if the Reclassification did not occur, "it would . . . undo whatever fall happened." Ex. 21 (Sacks Dep.) at 180:3-7. Indeed, "*[t]he only way* to reconcile Facebook's stock price movement . . . with [his] view . . . is if, in fact, there are other [confounding] factors." Ex. 1 (Sacks Dep.) at 393:11-24 (emphasis added).

Mr. Sacks identified two factors that "could have caused Facebook's stock to decline on September 25": (1) "news reports regarding Russia's use of Facebook to interfere in the 2016 U.S. Presidential election;" and (2) Mr. Zuckerberg's announcement of his plan to sell 35-75 million shares to fund

charitable initiatives. Ex. 27 (Sacks Supp. Rebuttal Report) at ¶ 75. Neither factor, however, supports his theory that these announcements caused $30 billion in losses that allegedly swallowed $8 billion to $11 billion in value injected into the market by the termination of the Reclassification. Ex. 1 (Sacks Dep.) at 375:1-378:4; *supra* at 19-20.

***News Regarding Russia.*** Mr. Sacks thinks that reports "[o]ver the weekend . . . that Obama had specifically warned Zuckerberg about Russia interference in the U.S. election" "could have" caused Facebook's stock price decline on September 25. Ex. 1 (Sacks Dep.) at 335:22-336:8, 364:3-8; *see also* Ex. 32 (Adam Entous, Elizabeth Dwoskin & Craig Timberg, *Obama Tried to Give Zuckerberg a Wake-Up Call Over Fake News on Facebook*, WASH. POST (Sept. 24, 2017)) ("There has been rising bipartisan clamor . . . for new regulation . . . ."). According to Mr. Sacks, this report is potentially significant because it "start[s] to touch on things . . . like Congressional regulation and investigations," which "can be really bad news." Ex. 1 (Sacks Dep.) at 345:6-346:18.

Mr. Sacks believes that Facebook trades in an efficient market. *Id.* at 326:21-327:6; *see generally Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 2018 WL 2315943, *6 (Del. Ch. May 21, 2018) ("Under the semi-strong version [of the efficient capital markets hypothesis], information concerning a company is quickly impounded into the company's stock price . . . ."). As such,

Mr. Sacks believes that "whatever information was already known to the market prior to September 22nd would already be priced into the share price by September 22nd." Ex. 1 (Sacks Dep.) at 339:6-340:6.

But the risk of "Congressional regulation and investigations" "was already known to the market prior to September 22nd." Those reports began at least two weeks earlier. Ex. 33 (Matea Gold, *Did Facebook Ads Traced to a Russian Company Violate U.S. Election Law*, WASH. POST (Sept. 7, 2017)) ("The news that a Russian company was behind 3,000 politically themed Facebook ads that appeared in the United States during the 2016 campaign has spurred calls for investigations and demands for better regulation of social media advertising."). And several leading news sources—including the *Wall Street Journal*, the *New York Times*, and *Bloomberg*—discussed these possibilities repeatedly before September 22, including reports:

- that Senate Intelligence Committee Chairman Richard Burr "has said a public hearing is more likely than not," and that ranking member Mark Warner "wants a public hearing to force Facebook to account for what happened on its platform during the election," Ex. 34 (*Facebook Said to be Cooperating with Probe*, BLOOMBERG (Sept. 17, 2017));

- that "[h]earings could lead to new regulations on the company," Ex. 35 (*Facebook May Be Facing an 'Era of Accountability'*, AP BUS. NEWS (Sept. 19, 2017));

- that "disclosure of the ads also raised the possibility of future regulation of political advertising on social media platforms," Ex. 36 (Scott Shane & Mike Isaac, *Facebook to Turn Over Russian-Linked Ads to Congress*, N.Y. TIMES (Sept. 21, 2017));

- suggesting that "Facebook [could] find[] itself a central figure in the investigation," Ex. 37 (Ryan Grenoble, *Facebook to Turn Over Data After Begrudgingly Admitting Russians Used Platform to Influence Election*, HUFFINGTON POST (Sept. 21, 2017)); and,

- concerning potential legislation and regulatory reaction, Ex. 38 (Natasha Bertrand, *Democrats Urge FEC to Regulate Online Political Ads Following Facebook's Russia Bombshell*, BUS. INSIDER (Sept. 20, 2017)); Ex. 39 (Deepa Seetharaman & Byron Tau, *Russian-Bought Ads on Facebook Spur Lawmakers to Call for Tighter Rules*, WALL ST. J. (Sept. 21, 2017)) (discussing potential legislation and regulatory action).

As a result, by Mr. Sacks' admission, the possibility of Congressional regulation and investigations was factored into the price of Facebook stock before September 25.

***Share Sale Announcements.*** Mr. Sacks speculates that the September 22 announcement of share sales to fund Mr. Zuckerberg's charitable initiatives "could have caused" the September 25 price decline. Ex. 27 (Sacks Supp. Rebuttal Report) at ¶ 75. Mr. Sacks surmises that the market may have perceived the announcement as evidence of "substantial undisclosed problems at Facebook." Ex. 1 (Sacks Dep.) at 110:7-111:8. His only support for this is general studies regarding sales by executives—none of which involved sales undertaken pursuant to a publicly stated intention to fund charitable initiatives. *Id.* at 367:6-369:4.

Mr. Sacks is not aware of any stock analyst who interpreted Mr. Zuckerberg's September 22 statement—in which Mr. Zuckerberg also stated intention to retain control for more than two decades—as cause for concern. *Id.* at

364:23-365:4. This is not surprising. Mr. Sacks believes that the market *would not* be concerned about sales when "everyone knows" Mr. Zuckerberg is "donating his money to charity." Ex. 21 (Sacks Dep.) at 311:10-313:3.

Nevertheless, Mr. Sacks speculates that the announced sales were "larger and quicker than the market was expecting." Ex. 1 (Sacks Dep.) at 385:15-22. Mr. Sacks has no evidence of this, did no analysis to test it, and does not know what scale or pace the market supposedly was expecting. *Id.* at 385:23-386:2, 406:8-407:23. And in any event, Mr. Sacks acknowledges that Mr. Zuckerberg's intention to "maintain voting control of Facebook for 20 years or more" is "entirely consistent" with Mr. Sacks' speculation that the market expected Mr. Zuckerberg to maintain control "somewhere between 10 and 30 years." *Id.* at 408:20-409:12.[14]

**3. The stockholder vote is inconsistent with Mr. Sacks' opinions.**

Facebook's stockholders overwhelmingly favored the Reclassification's governance changes. More than 60% of the outstanding Class A shares (excluding those held by Mr. Zuckerberg) were voted in favor of the Reclassification's governance provisions. *See* Ex. 20 (June 20, 2016 8-K) at 5-6; Ex. 5 (June 2016

[14] Mr. Sacks also speculates that "the market *may* have been trading based on an expectation of a settlement in this action." Ex. 27 (Sacks Supp. Rebuttal Report) at ¶ 75 (emphasis added). But Mr. Sacks does not claim that this materially affected the price of Facebook stock. Ex. 1 (Sacks Dep.) at 58:4-14. And even if true, it would not have caused a price drop; it would only have muted any price increase. *Id.* at 319:20-320:6.

Proxy) at 59. Mr. Sacks admits that the fact that stockholders "voted overwhelmingly in favor of [those provisions is] supportive of a view that they expected the [governance] provisions would enhance the value of their Facebook stock." Ex. 21 (Sacks Dep.) at 538:6-11.

Mr. Sacks claims that the opposition of major stockholder advisory services to the Reclassification "support[s] [his] opinion that the Reclassification will reduce the value of Facebook's Class A stock." Christensen Aff. Ex. 41 (Sacks Opening Report) at ¶ 54. Not so. No stockholder advisory service suggested that the Reclassification would be value destroying. To the contrary, Glass Lewis observed that "few would begrudge the Company (especially Mark Zuckerberg, who is almost universally acknowledged as a technology visionary) the benefit of the doubt when it comes to setting the Company's strategic direction and creating shareholder value over the long-term." Ex. 40 (Glass Lewis, *Proxy Paper, Facebook, Inc., 2016 Annual Meeting*).

Instead, these services generally find such proposals "to be, from a governance perspective, detrimental to shareholders." *Id.* at 8. Their opposition to the Reclassification was based on the idea that "shareholders should have the power to speak and the opportunity to be heard." *Id.* at 21. And even while opposing the Reclassification, Glass Lewis recognized that the governance changes were a "key concession." *Id.* at 22.

#### 4. Mr. Sacks' disagreements with "real-world evidence" extend beyond his analysis of Facebook.

This is not the only instance in which Mr. Sacks' opinions conflict with real-world evidence. In the merits phase, Mr. Sacks claimed that the Google reclassification caused the company to lose between 6.2% and 7.1% of its value. Christensen Aff. Ex. 41 (Sacks Opening Report) at ¶ 72. While analysts disagreed, Mr. Sacks dismissed them as "wrong." Ex. 21 (Sacks Dep.) at 660:6-15; *see also supra* at 34.

Mr. Sacks' regular disagreements with the market (whether with respect to Facebook or otherwise) further undermine the reliability of his analyses. *See generally*, *e.g.*, *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 373 (Del. 2017) (finding market pricing "informative of fair value" because, among other things, it reflects the knowledge and analysis of equity analysts).

* * *

Mr. Sacks' analysis is not the product a reliable methodology and fails to account for all relevant factors. It is therefore not surprising that his conclusions are inconsistent with numerous pieces of real-world evidence.

## III. EVEN IF MR. SACKS' OPINIONS ARE ADMISSIBLE, *QUANTUM MERUIT* IS THE APPROPRIATE MEANS FOR DETERMINING PLAINTIFFS' COUNSEL'S FEE.

An award based upon a percentage of any benefit conferred requires that the benefit be "'capable of some realistic financial valuation.'" Brief at 41 (quoting

*Feldman v. Donegal Grp., Inc.*, C.A. No. 18786-VCJ, at 29 (Del. Ch. Aug 8, 2001) (Transcript)). That is not possible here.

This is not an issue of lacking a "[p]recise [m]athematical [c]alculation" or a "down-to-the-penny" valuation. Brief at 27, 43. Unlike the cases Plaintiffs' Counsel rely upon, this case involves an uncertain, non-monetary benefit. As a result, both the claimed benefit and its claimed value are "highly speculative." *Thorpe v. CERBCO, Inc.*, 1997 WL 67833, at *4 (Del. Ch. Feb. 6, 1997), *aff'd*, 703 A.2d 645 (Del. 1997). And non-monetary benefits can be "difficult to quantify," even where the benefit "is easy to conceive." *See In re Compellent*, 2011 WL 6382523, at *19.

Where the likelihood or magnitude of any benefit is uncertain, "an award expressed as a percentage [of the benefit] is inappropriate." *In re Anderson Clayton S'holders Litig.*, 1988 WL 97480, at *5 (Del. Ch. Sept. 19, 1988); *see also Friedman v. Baxter Travenol Labs., Inc.*, 1986 WL 2254, at *4-5 (Del. Ch. Feb. 18, 1986) (declining to award fee based upon benefit conferred where "there [wa]s substantial room to dispute the validity of" the claimed benefit and "there [wa]s no basis by which the benefit c[ould] be meaningfully valued in quantitative terms"); *Siegman v. Palomar Med. Techs., Inc.*, 1998 WL 409352, at *6 (Del. Ch. July 13, 1998) (*quantum meruit* is the appropriate approach when "the benefit is not precisely quantifiable"). This can occur because a benefit is "speculative" or

"contingent." *Am. Real Estate Partners*, 1997 WL 770718, at *6-7 ("adopt[ing] a *quantum meruit* approach" when "any benefit conferred . . . [wa]s speculative"); *In re Diamond Shamrock Corp.*, 1988 WL 94752, at *2, *4 (Del. Ch. Sept. 14, 1988) (applying *quantum meruit* where empirical data concerning benefit conferred was "at worst nonexistent, and at best, inconclusive"). It can also occur where the plaintiff "has not been shown [the benefit] to be quantifiable." *In re Diamond Shamrock Corp.*, 1988 WL 94752, at *4. Regardless of the reasons, where "the benefit conferred by the fee applicant cannot be quantified, the *quantum meruit* approach is often the only method that, as a practical matter, will enable the Court adequately to perform its fee-awarding function." *Robert M. Bass Grp., Inc. v. Evans*, 1989 WL 137936, at *4 (Del. Ch. Nov. 16, 1989).

In *Louisiana State Employees' Retirement System v. Citrix Systems, Inc.*, 2001 WL 1131364 (Del. Ch. Sept. 19, 2001), the plaintiff challenged an amendment to Citrix's stock option plan. After the company abandoned the plan, counsel sought $2 million in fees and $60,000 in expenses, claiming that the litigation had "resulted in a $183,000,000 benefit." *Id.* at *1. The Court noted that "the only reason why [it] must even consider valuing the benefit . . . is, of course, because the . . . stockholder class will receive no direct monetary benefit as a result of this lawsuit," and that "any attempt to accurately value the net economic benefit conferred . . . is at best an inexact science." *Id.* at *8.

The plaintiff's valuation of the benefit suffered from several fundamental flaws. As here, the plaintiff's expert "ignore[d] any benefits that may have accrued" from the challenged action. *Id.* at *7. Moreover, as here, the market evidence belied the claim of a substantial benefit. If the plaintiff was "correct in its contention that [the] withdrawal actually resulted in a [substantial] benefit to . . . shareholders, one would clearly expect the stock market to reflect this large benefit." *Id.* at *8. But, as here, there was no evidence that the market reacted negatively to the challenged conduct or positively to the announcement of the termination of the challenged conduct. *Id.* As a result, the Court declined to "engage in complicated and highly speculative intellectual exercises in attempting to quantify what is, in essence, the non-quantifiable benefit achieved by this litigation." *Id.* at *9. Instead, the Court awarded twice counsel's lodestar amount on a *quantum meruit* basis. *See id.* at *10 n.56.

In *San Antonio Fire & Police Pension Fund v. Bradbury*, 2010 WL 4273171 (Del. Ch. Oct. 28, 2010), counsel sought an award for "disabling" continuing director provisions in a credit agreement and an indenture. *Id.* at *6. Rather than award fees based on a percentage of a speculative and abstract purported benefit, the Court explained that "a *quantum meruit* standard 'gives the Court a more equitable means of determining a reasonable fee'" and awarded fees equal to 1.93x

counsel's lodestar. *Id.* at *12, *13 (quoting *In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *8 (Del. Ch. Nov. 27, 1990)).

Likewise, in *In re First Interstate Bancorp Consolidated Shareholder Litigation*, 756 A.2d 353 (Del. Ch. 1999), *aff'd sub nom. First Interstate Bancorp v. Williamson*, 755 A.2d 388 (Del. 2000), the defendants mooted a class action lawsuit when they dropped their opposition to a hostile proposal, abandoned a proposed white knight agreement, and agreed to merge. Because the Court could not "ascertain, with any degree of confidence, even an approximate amount reflecting the value conferred" by the litigation, it "refused to award a fee based on a percentage of the benefit claimed to have been conferred" and used "*quantum meruit* as the standard for calculating fees." *Id.* at 358-59. The Court's award equaled a 1.71x multiple of counsel's lodestar. *Id.* at 365.

*Off v. Ross*, 2009 WL 4725978 (Del. Ch. Dec. 10, 2009), is also instructive. There, stockholders challenged a convertible preferred stock offering. *Id.* at *2. The parties negotiated a settlement which extended the offering to all shareholders—"a specific and substantial, but unquantifiable benefit." *Id.* at *7. As a result, "the Court lack[ed] 'any yardstick against which to measure the reasonableness' of a fee request." *Id.* (quoting *In re Diamond Shamrock*, 1988 WL 94752, at *4). Because the lawsuit "achieved a specific and substantial, but unquantifiable benefit," the Court awarded fees "based on *quantum meruit*." *Id.*

Similarly, *American Real Estate Partners* involved a challenge to an initial rights offering, which defendants mooted. Plaintiffs' Counsel offered an expert opinion that they conferred a $3.25 million benefit based on assumptions as to which unitholders would have exercised their rights. 1997 WL 770718, at *6. The Court found the value "speculative" in light of uncertainty regarding the value of the units and the number of unitholders that would have exercised their rights. *Id.* at *6-7. As a result, the Court awarded fees based on "the work the attorneys performed to achieve the benefit." *Id.* at *7.

Finally, in *Siegman*, the plaintiff challenged the validity of ten series of preferred stock. 1998 WL 409352, at *1. In response, the company "cured the invalidity of, and retroactively validated, the series preferred stock." *Id.* Counsel then sought a fee based upon the value of the stock issuances—$50 million. Although "fully satisfied that this lawsuit conferred a significant benefit," the benefit was "intangible and incapable of precise quantification." *Id.* at *5-6. Therefore, the Court awarded fees on a *quantum meruit* basis. *Id.* at *6.

* * *

Like these cases, any non-monetary benefit conferred by the termination of the Reclassification is speculative and not quantifiable.[15] As a result, *quantum meruit* is the appropriate means of determining an award.

## IV. PLAINTIFFS' COUNSEL'S REQUESTED FEE IS INCONSISTENT WITH PRIOR FEE AWARDS.

### A. Plaintiffs' Counsel's requested award is inconsistent with their own authority.

In assessing a request for attorneys' fees, the Court "consider[s] the amount of the award requested as it compares to previous awards made by Delaware courts." *Boyer v. Wilmington Materials, Inc.*, 1999 WL 342326, at *2 (Del. Ch. May 17, 1999).[16]

Every case Plaintiffs' Counsel cite that resulted in a fee award of more than $11 million involved a substantial, certain monetary benefit. And five of the six cases involved common funds. Although this case does not involve an identifiable monetary benefit, Plaintiffs' Counsel's requested fee (or anything approaching it) substantially exceeds the awards in every case except *Southern Peru*.

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[15] Plaintiffs' Counsel claim that "[t]his case had industry-wide implications." Brief at 44. Facebook disagrees; regardless, its stockholders should not pay for any benefit to stockholders of other companies.

[16] *See also In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1136 (Del. Ch. 2011) (using other awards as guidance when determining fee); *Dow Jones & Co. v. Shields*, 1992 WL 44907, at *3 (Del. Ch. Mar. 4, 1992) (same).

***In re Southern Peru Copper Corp. Shareholder Derivative Litigation***.[17] The only case with a fee larger than the fee requested by Plaintiffs' Counsel is not even remotely analogous, much less "one of the best comparable cases." Brief at 49. *Southern Peru* was "a common fund case" that conferred a substantial, "quantifiable financial benefit" on stockholders: a "$2.031 billion judgment." *S. Peru*, Tr. at 30, 68; *Ams. Mining*, 51 A.3d at 1253. Indeed, less than a year after deciding *Southern Peru*, then-Chancellor Strine emphasized that this made the case exceptional: "What was most unique about *Southern Peru* that people keep continuing to lose sight of was two billion dollars of uniqueness . . . ." *In re Barnes & Noble Stockholder Derivative Litig.*, C.A. No. 4813-CS, at 81 (Del. Ch. Sept. 4, 2012) (Transcript).

***In re Activision Blizzard, Inc. Stockholder Litigation***.[18] The *Activision* plaintiffs obtained "the largest cash recovery ever achieved on stockholder derivative claims"—a $275 million settlement. *Id.* at 1064. They also secured significant governance changes, including the addition of two independent directors. *Id.* at 1067. For the 7,363 hours and $1,182,375 in out-of-pocket expenses invested, counsel negotiated a fee of $72.5 million. *Id.* at 1075.

[17] C.A. No. 9612-CS (Del. Ch. Dec. 19, 2011) (Transcript), *aff'd sub nom. Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).

[18] 124 A.3d 1025 (Del. Ch. 2015).

***In re Genentech, Inc. Shareholders Litigation***.[19] *Genentech* arose from litigation challenging a squeeze out of minority stockholders. In awarding attorneys' fees, the Court emphasized the "pretty valuable" "obvious economic benefits to the plaintiff class," for which counsel deserved "substantial credit." *In re Genentech*, Tr. at 42, 43, 49. Specifically, the Court identified "nearly a billion bucks" in benefits conferred by plaintiffs through an increase in the price. *Id.* at 46-47. "[T]hat was big, big bucks," for which the Court awarded, at most, 2.26% of the benefit achieved. *Id.* at 49. In approving a "very hefty" $24.5 million fee, the Court noted the "eyebrow-raising" 11.3x multiplier (and implied hourly rate of $5,445) as "the high end of the range." *Id.* at 51, 53, 55.

***In re American International Group, Inc. Consol. Derivative Litigation***.[20] *AIG* resulted in a "$90 million cash settlement." *Id.* at 5. Plaintiff filed an unopposed petition seeking $20.25 million in fees, plus expenses, which was paid from the common fund. *Id.* at 11. The fee resulted in a lodestar multiplier of 2.22x and an implied hourly rate of $1,138.[21]

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[19] C.A. No. 3911-VCS (Del. Ch. July 9, 2009) (Transcript).

[20] C.A. No. 769-VCS (Del. Ch. Jan. 25, 2011) (Transcript).

[21] Dkt. 954 at 19 (Plaintiffs' Brief in Support of their Motion for Approval of Settlement and an Award of Attorneys' Fees and Expenses).

***In re Telecorp PCS, Inc. Shareholder Litigation***.[22] This fee award was based upon a $47.5 million "cash settlement[]." *Id.* at 91. The Court noted that "[i]t's rare, in my experience, to see . . . $47 ½ million of cold, hard cash be the basis for settlement." *Id.* at 54. The Court awarded a $14.25 million in fees out of the common fund, *id.* at 110, which amounted to an implied hourly rate of $2,611. *Id.* at 69.

***In re Digex, Inc. Shareholders Litigation***.[23] *Digex* resulted in the creation of a "$165 million settlement fund," *id.* at 4, along with "various commercial agreements and various corporate governance changes, which collectively had been valued at over $400 million." *Id.* at 140. The Court awarded $12.3 million, roughly half of the $25 million sought, for "the extraordinary results achieved." *Id.* at 146-48. The Court emphasized that the lodestar multiple of 9x (and resulting blended hourly rate of approximately $2,825, after reimbursement of expenses) was justified, in part, by "the expedited nature of this case." *Id.* at 141.[24]

***In re Clear Channel Outdoor Holdings Inc. Derivative Litigation***.[25] Pursuant to the settlement, Clear Channel received a $200 million repayment on an

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[22] C.A. No. 19260-VCS (Del. Ch. Aug. 20, 2003) (Transcript).

[23] C.A. No. 18336-CC (Del. Ch. Apr. 6, 2001) (Transcript).

[24] Dkt. 212 at 31 (Plaintiffs' Response to Special Committee's Objections to Plaintiffs' Fee Application).

[25] C.A. No. 7315-CS (Del. Ch. Sept. 9, 2013) (Transcript).

existing note and immediately declared a $200 million dividend, of which $22 million was distributed to public stockholders, a result that "clearly would not have occurred absent the litigation." *Id.* at 39. For their 1,046.2 hours, counsel received a negotiated award of $6 million in fees and expenses, reflecting an implied hourly rate of $5,702.55 (and a multiplier of 10.5) after reimbursement of expenses.[26]

* * *

Unlike this case, each of those cases produced tens, if not hundreds of millions of dollars of concrete, quantifiable monetary benefits. They therefore provide no support for Plaintiffs' Counsel's request for an award that is as much as 21.5 times the awards in those cases.

### B. Plaintiffs' Counsel's requested award would dwarf awards in other cases involving substantial monetary benefits.

As the chart below makes clear, Plaintiffs' Counsel's requested fee also would be much larger than other cases—which Plaintiffs' Counsel did not cite—involving quantifiable monetary benefits of $39 million to $154 million. As such, these awards further underscore the impropriety of the requested fee.

[26] Dkt. 91 at 36-37 (Plaintiffs' Brief in Support of Proposed Settlement and Application for Attorneys' Fees and Reimbursement of Expenses).

| Case | Benefit | Fee | Hours | Lodestar | Mult. |
|---|---|---|---|---|---|
| *In re Freeport-McMoRan Copper & Gold Inc. Derivative Litig.*, C.A. No. 8145-VCN[27] | $153.75 million special dividend; $6.25 million credit for banking services; governance changes | $32,693,175.06 (including $693,175.06 in expenses) | 17,712 | $10,954,195 | 2.62 |
| *In re News Corp. S'holders Derivative Litig.*, C.A. No. 6285-VCN[28] | $139 million monetary recovery; governance changes | $28 million (including $517,000 in expenses) | 17,271 | $7,668,984.75 | 3.58 |
| *Teachers' Ret. Sys. of La. v. Greenberg*, C.A. No. 20106-VCS[29] | $115 million monetary recovery | $28,063,959.97 (including $2,188,959.97 in expenses) | 17,754 | $7,709,620.25 | 3.36 |
| *In re El Paso Corp. S'holder Litig.*, C.A. No. 6949-CS[30] | $110 million common fund | $26 million (including $700,000 in expenses) | 10,243 | $5,336,573 | 4.74 |
| *In re Rural Metro Corp. S'holders Litig.*, C.A. No. 6350-VCL[31] | Damages of $75,798,550.33 plus $17,479,822.16 in interest | $25,226,183.44 (including $1,683,081.89 in expenses), plus $5,826,607.39 in interest | 8,972 | X[32] | X |
| *In re Primedia, Inc. Stockholders Litig.*, C.A. No. 6511-VCL[33] | $39 million monetary recovery | $9.75 million (including $118,186.06 in expenses) | 6,779 | X | X |

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[27] *See* Dkt. 227, Exhibits 3-7 (hours and lodestar); Dkt. 265 (fee).

[28] *See* Dkt. 105, Exhibits C-K (hours and lodestar); Dkt. 117 (fee).

[29] *See* Dkt. 699, Affidavit of Cynthia A. Calder (hours and lodestar); Dkt. 702 (fee).

[30] *See* Dkt. 203, Opening Brief (hours and lodestar); Dkt. 222 (fee).

[31] *See* Dkt. 391, Opening Brief (hours); Dkts. 403, 408 (fee).

[32] An "X" reflects unavailable data.

### C. Plaintiffs' Counsel's requested fee dwarfs awards in other cases that did not produce quantifiable monetary benefits.

Plaintiffs' Counsel's requested fee award is likewise substantially larger than awards in cases that do not involve quantifiable monetary benefits. Under any metric, the requested fee would be many times the highest fee awarded in any such case.

The largest fee in any case Plaintiffs' Counsel cite (or that Facebook is aware of) that does not involve a quantifiable monetary benefit is the $10.63 million fee and expense award in *In re Loral Space and Communications, Inc. Consolidated Litigation*, C.A. No. 2808-VCS (Del. Ch. Dec. 22, 2008) (Transcript), *aff'd sub nom. Loral Space & Communications, Inc. v. Highland Crusader Offshore Partners, L.P.*, 977 A.2d 867 (Del. 2009). There, the plaintiffs challenged a $300 million preferred stock transaction. Following trial, the Court "reformed the . . . transaction" and converted the unfairly issued preferred shares into common shares. *Loral Space & Commc'ns*, 977 A.2d at 869. The Court had "no doubt that the benefit is at least a hundred million or so, probably more." *In re Loral*, Tr. at 73. The Court awarded $8.66 million in fees and nearly $2 million in expenses (resulting in a lodestar multiplier of 4x and an implied hourly rate of $1,831). *Id.* at 77. Although the existence and valuation of any benefit is far less

[33] *See* Dkt. 181 (hours and fee).

certain here, Plaintiffs' Counsel seek $129 million in attorneys' fees and expenses, a nearly 16x lodestar multiple, and an implied hourly rate of $9,146.

### D. Saxena White should not receive $1,609,091.30 in fees and expenses.

A footnote in the Brief reveals that Plaintiffs' Counsel seek an award of fees and expenses for Saxena White. Brief at 1 n.1. Although not specified in the Brief, using the requested lodestar, Plaintiffs' Counsel appears to seek $1,609,091.30. *See* Dkt. 243, Exhibit C to the Affidavit of Cynthia A. Calder, at 2.

Saxena White was not part of the leadership structure ordered by Court. Saxena White did file a lawsuit with Grant & Eisenhofer challenging the Reclassification. *See Westchester Putnam Ctys. Heavy & Highway Laborers Local 60 Benefits Fund v. Zuckerberg*, C.A. No. 12319-VCL (filed May 11, 2016). But the order establishing the leadership structure did not grant counsel the right to add additional lawyers to the leadership structure. *See* Order Appointing Lead Counsel and Lead Plaintiff. Dkt. 42.

While Plaintiffs' Counsel claim Saxena White "participated in the litigation by reviewing documents," Brief at 1 n.1, Saxena White's affidavit does not describe their work. And the time spent by Saxena White—including two directors (one of whom is a named director) and a senior counsel—as well as their request for reimbursement of research fees appear more consistent with time spent on their complaint than "reviewing documents."

Regardless of the work performed, the Court did not appoint Saxena White counsel in this case, and it should not be paid anything (much less a multiple of its fees), regardless of the work for which it seeks payment. *See In re Indep. Energy Holdings PLC Sec. Litig.*, 302 F. Supp. 2d 180, 182 (S.D.N.Y. 2003) (denying fees to firm that was not lead counsel).

### E. Consistent with prior cases awarding fees on a *quantum meruit* basis, Plaintiffs' Counsel's fee should not exceed $19,882,371.27.

As Plaintiffs' Counsel's authority makes clear, "where fees are awarded on a *quantum meruit* basis," "[t]he average hourly rates . . . will usually be regarded as amply compensating counsel." *First Interstate*, 756 A.2d at 364 n.6. Indeed, *quantum meruit* awards are often a fraction of counsel's lodestar. *See*, *e.g.*, *Zimmerman v. Crothall*, 2013 WL 5630992, at *12 (Del. Ch. Oct.14, 2013) (awarding fee "below TWF's purported lodestar"), *rev'd in part on other grounds*, 94 A.3d 733 (Del. 2014); *Rovner*, 1998 WL 227908 (awarding 0.44x lodestar).

Defendants acknowledge that a contingency multiplier of up to 2x is sometimes appropriate. *See, e.g.*, *Citrix*, 2001 WL 1131364 (awarding 2x fees); *Bradbury*, 2010 WL 4273171 (awarding 1.93x fees); *First Interstate*, 756 A.2d 353 (awarding 1.71x fees). And because Plaintiffs' Counsel's out of pocket expenses equal 54% of their lodestar, reimbursement of those may be appropriate. *See*, *e.g.*, *City of Daytona Beach Police & Fire Pension Fund v. Examworks Grp., Inc.*, C.A. No. 12481-VCL, at 26 (Del. Ch. Sept. 12, 2017) (Transcript).

As a result, Plaintiffs' Counsel's fee should not exceed double their lodestar (less Saxena White's fees) plus unreimbursed expenses (less Saxena White's expenses):

| | |
|---|---|
| Lodestar | $ 7,907,565.25 |
| Saxena White Lodestar | - $ 101,668.75 |
| Net Lodestar | $ 7,805,896.50 |
| | x 2 |
| *Quantum Meruit* Fee | $15,611,793.00 |
| | |
| Unreimbursed Expenses | $ 4,276,353.38 |
| Saxena White Expenses | - $ 5,775.11 |
| Net Expenses | $ 4,270,578.27 |
| | |
| *Quantum Meruit* Fee | $15,611,793.00 |
| Net Expenses | + $ 4,270,578.27 |
| **Total Award** | **$19,882,371.27** |

Such an award would hardly be "a consolation prize." Brief at 52. More than 16% of all time was billed by non-lawyer staff, and nearly 40% was billed by associates and one senior counsel. Yet in addition to full reimbursement of their expenses, Plaintiffs' Counsel would receive a blended hourly rate for all timekeepers of $1,178.46. This is nearly 80% of the *highest* billing rates charged by the nation's largest firms in 2016 (when Plaintiffs' Counsel would have entered into any fee agreement). *See* Ex. 41 (Sara Randazzo & Jacqueline Palank, *Legal Fees Cross New Mark: $1,500 an Hour*, WALL ST. J. (Feb. 9, 2016)) (noting that "senior partners" "specializing in corporate restructuring, as well as . . . tax,

litigation and corporate law" "routinely charge between $1,200 and 1,300 an hour," while at some firms the top hourly rate is between $1,425 and $1,475).

Such a "blended hourly rate . . . provides a premium to induce monitoring behavior and compensate . . . [c]ounsel for their risk." *In re Orchard Enters., Inc. Stockholder Litig.*, 2014 WL 4181912, at *9 (Del. Ch. Aug. 22, 2014) (approving award reflecting an effectively hourly rate of $658.59). Indeed, a larger award would constitute an improper windfall. *See*, *e.g.*, *In re Mosaic Co. S'holder Litig.*, C.A. No. 6228-VCL, at 48-50 (Del. Ch. Sept. 15, 2011) (Transcript) ("our goal is not to confer upon plaintiffs socially unhealthful windfalls").

Plaintiffs' Counsel claim that a fee award "should properly incentivize plaintiffs' counsel to fight hard for the best possible result." Brief at 52. Nearly $20 million, including a 2x lodestar, should do so. *See Bradbury*, 2010 WL 4273171, at *12 (finding that 1.93x counsel's lodestar "should incentivize stockholders (and their attorneys) to file meritorious lawsuits and prosecute such lawsuits efficiently without generating any unnecessary windfall"); *Berger v. Pubco Corp.*, 2008 WL 4173860, at *2 (Del. Ch. Sept. 8, 2008) (finding award equating to $953 per hour "sufficient to encourage future meritorious lawsuits"); *Digex*, Tr. at 147 (finding award of "approximately $12.3 million . . . will clearly provide . . . incentives" "to bring meritorious suits"). If Plaintiffs' Counsel would not have taken this case knowing they would "only" get $15.6 million in fees (at a

blended hourly rate of $1,178), plus full reimbursement of expenses, they should say so.

## CONCLUSION

For the foregoing reasons, Facebook respectfully requests that the Court award no more than $19,882,371.27.


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