No. 2020-J-0148

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

ATTORNEY GENERAL,

Plaintiff-Respondent,

v.

FACEBOOK, INC.,

Defendant-Petitioner.

On Appeal from a Decision of the
Superior Court for Suffolk County

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-PETITIONER FACEBOOK, INC.'S EMERGENCY MOTION FOR STAY PENDING APPEAL

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March 11, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, Chamber of Commerce of the United States of America, by its undersigned counsel, hereby discloses the following:

1. Parent Corporation(s) of Chamber of Commerce of the United States of America: None.

2. Publicly-Held Corporation(s) Owning More Than 10% of Chamber of Commerce of the United States of America Stock: None.

/s/ *Kevin P. Martin*
Kevin P. Martin

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INTEREST OF THE AMICUS CURIAE [1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every economic sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

This case is significant to the Chamber because its members regularly engage counsel to conduct internal investigations into the members' compliance with regulatory and contractual obligations. These investigations often have some "business" purpose, even as they are intended to guide members' efforts to avoid or minimize litigation risk. The Superior Court's underlying decision—that corporate internal investigations are not protected by the attorney client privilege or work

[1] The Chamber declares, in accordance with Mass. R. App. P. 17(c)(5), that: (1) no party, nor any party's counsel, has authored this brief in whole or in part; (2) no party, nor any party's counsel, has contributed money that was intended to fund preparing or submitting this brief; (3) no person or entity—other than the Chamber or its counsel—has contributed money that was intended to fund preparing or submitting this brief; and (4) neither the Chamber nor its counsel represents or has represented one of the parties to this case in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

product doctrine unless litigation risk was a "but for" cause of the investigation—is wrong as a matter of law, and risks disincentivizing the Chamber's members from conducting such investigations. The Superior Court's ruling that Facebook, Inc. must produce the materials in question *even while Facebook's appeal is pending* magnifies that risk considerably. For these reasons, the Chamber has a considerable interest in the Court's resolution of Facebook's motion for a stay pending appeal.

INTRODUCTION

The Chamber is submitting this *amicus* brief in support of Facebook's request for an emergency stay of the Superior Court's order that it comply, pending appeal, with a civil investigative demand from the Attorney General for Facebook's internal investigation materials. For the reasons given in Facebook's memorandum in support of its emergency motion, and herein, the Superior Court's order denying Facebook's requested stay sets an extraordinarily dangerous precedent. This Court therefore should exercise its own authority to grant Facebook a stay pending appeal.

The Chamber currently is preparing another *amicus* brief, to be submitted in support of Facebook's anticipated application for direct appellate review, explaining why the Superior Court's underlying decision ordering Facebook to produce its internal investigation materials was wrong on the merits. But to obtain a stay pending appeal, Facebook need only show some strong "likelihood of success" on the merits, and that that likelihood of success, weighed against the equitable factors, favors a stay. The Superior Court applied the wrong standard, asking only whether Facebook was

"likely to prevail on appeal," and denying Facebook a stay for the sole reason that the Superior Court believed that its earlier decision was "correctly decided and is likely to be affirmed." The Superior Court never even considered the equitable factors.

The equitable factors governing stays pending appeal strongly favor a party that has been ordered to produce privileged and work product internal investigation materials in response to a civil investigative demand. The Attorney General can show no prejudice from a delay in production while an appeal is considered. On the other hand, the prejudice to a party ordered to produce privileged and work product materials would be profound—the genie cannot be put back into the bottle. That is particularly true for a nationwide corporation, such as Facebook, facing litigation and investigations over the same subject matter in other jurisdictions. There is a serious risk that a premature production of the internal investigation materials in Massachusetts could prejudice Facebook's ability to withhold those materials from production in other jurisdictions—even if, as the Chamber believes is likely, Facebook should ultimately prevail on its appeal here in Massachusetts.

Accordingly, for the reasons given by Facebook and herein, the Chamber urges the Court to grant Facebook's emergency motion for a stay pending appeal.

I. THE SUPERIOR COURT MISAPPLIED THE STAY FACTORS BY FAILING TO WEIGH THE EQUITABLE FACTORS, WHICH WEIGH HEAVILY IN FAVOR OF A STAY

This Court will ultimately make an independent decision on Facebook's motion to this Court for a stay pending appeal. Because it is important to provide guidance to

the Superior Court on this subject, however, the Chamber notes that the Superior Court misapplied the factors governing stays pending appeal. In this case, for the reasons given by Facebook and below (*see infra*, Part II), Facebook certainly has some "likelihood of success." The Superior Court therefore should have weighed the equitable factors, which weigh heavily in support of a stay pending appeal.

In its order denying Facebook's stay motion, the Superior Court framed the question as whether Facebook is "likely to prevail," and denied Facebook's motion for the sole reason that the court "remains of the humble opinion that the January 2020 Order was correctly decided and is likely to be affirmed—rather than overturned—on appeal." Add. 40.[2] The Superior Court therefore ignored the equitable factors altogether. But that is not the test. "Likelihood of success" just means *some* reasonably strong possibility of prevailing on appeal; appellant must "cast a serious doubt on the correctness of the decision below," not convince the trial court that its underlying decision was wrong. 7 Mass. Prac. Rules Practice § 62.3 (2d ed.). Once appellant crosses that threshold, the trial court should balance that likelihood of success against the three equitable factors governing stays on appeal. "[B]ecause the request for a stay addresses the court's discretion, the judge must in a very real sense 'balance the equities' and consider each factor not only by itself, but in relation to all the others." *Id.*

[2] "Add." refers to the Addendum filed by Facebook in connection with its emergency motion to stay.

In a case such as this one, in which the government is seeking privileged and work product internal investigation materials from a company pursuant to a civil investigative demand, appellant is likely to have reasonably strong arguments to protect the materials. Indeed, the Chamber believes that Facebook has an overwhelmingly strong case on the merits. *See infra*, Part II.

At the same time, the equitable factors weigh heavily in support of a stay. The consequences to a company if it is required to produce internal investigation materials *even while an appeal from the order compelling their production is pending* are profound. The Supreme Judicial Court has recognized that "[a] construction of the attorney-client privilege that would leave internal investigations wide open to third-party invasion would effectively penalize an institution for attempting to conform its operations to legal requirements by seeking the advice of knowledgeable and informed counsel." *In re Grand Jury Investigation*, 437 Mass. 340, 351 (2002). By their very nature, internal investigatory materials represent a company's effort to ensure compliance with its legal obligations and to avoid the risk of litigation. To be meaningful, they *must* contain candid assessments not only of the strengths, but also of the potential weaknesses, of a company's compliance efforts, and are likely to highlight areas in which a company may face litigation exposure. *See Chambers v. Gold Medal Bakery, Inc.,* 464 Mass. 383, 395 (2013) (referring to "the policy rationale underlying the attorney-client privilege: it promotes candid communications between attorneys and organizational clients."). They will almost certainly identify the key

facts and documents pertinent to the subject matter of the investigation, as determined by counsel in consultation with its client (or vice versa). Internal investigation materials might also identify the names of a company's employees, and/or customers or contractual counterparties, that are suspected of wrongdoing—or against whom the company might have wronged. Internal investigation materials, in other words, can serve as a roadmap for litigation against the company, identifying vulnerabilities that may never have occurred to an adversary and, in any case, greatly simplifying the adversary's task. *See Chambers*, 464 Mass. at 395 (noting the "unfair disadvantage that would result" if a party "with adverse interests, and who seeks to vindicate those interests against a corporation, could access the corporation's confidential communications with counsel"); *Fleet Nat. Bank v. Tonneson & Co.*, 150 F.R.D. 10, 14 (D. Mass. 1993) ("to the extent such disclosure [of work product materials] is actually mandated, less conscientious opponents, who are unable or unwilling to invest the time or money to prepare as thoroughly, will gain a windfall").

Once internal investigation materials have been produced, the damage can never be fully undone, *even if* the company ordered to produce the materials should ultimately prevail in its appeal from the order compelling the materials' production—as the SJC has observed, "disclosure is not remedied merely because a disclosed confidence is not used against the holder in a particular case." *Preventive Med. Assocs., Inc. v. Commonwealth*, 465 Mass. 810, 823 & n. 25 (2013) (internal quotation marks and citation omitted). Having already seen the internal investigation materials,

counsel for the requesting party can now target new requests for production directly to the company's areas of potential vulnerability. If the materials were not produced subject to a protective order foreclosing their further distribution, they may have been shared with other government bodies or potential private litigants. Enterprising litigants in one case might submit requests for production specifically seeking materials produced in related litigations or government investigations. *See* Memorandum in Support of Defendant-Petitioner Facebook, Inc.'s Emergency Motion for Stay Pending Appeal ("FB Mem.") at 15–16. And premature production of a company's internal investigation materials while its appeal is pending could undermine its efforts to claim privilege or work product protection over the same materials in other jurisdictions. *See id*. at 16.

Altogether, the risk that a company could be forced to produce internal investigation materials based on a ruling by a single trial court judge, even while an appeal remains pending, serves as a disincentive for companies to conduct thorough and candid internal investigations in the first place. The work product doctrine "facilitates zealous advocacy in the context of an adversarial system of justice by ensuring that the sweat of an attorney's brow is not appropriated by the opposing party." *In re Grand Jury Subpoena*, 274 F.3d 563, 574 (1st Cir. 2001). "Without this assurance, attorneys and clients might be inhibited from engaging in the free, complete and candid exchange of information that is the cornerstone of an effective attorney-client relationship." *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287, 289

(D. Mass. 2000) (internal quotation marks and citation omitted); *see also Fleet Nat. Bank*, 150 F.R.D. at 14 ("To the extent there is any risk that they will have to deliver to those opponents their ideas, theories and analyses and those of their consultants, they will be far more circumspect in what they put down or permit their consultants to put down on paper, assuming they remain willing to retain consultants at all. Without the privilege, efficiency and effectiveness will, thus, inevitably decline."). Companies should be provided the assurance that they will not lose that valuable protection for their internal investigation materials, at least until the company has had an opportunity to vindicate its rights on appeal.

Finally, it bears emphasis that a ruling that disincentivizes companies from conducting internal investigations is in nobody's interest. Today, "[i]nvestigations are a fact of life at any large corporation." Carl Jenkins & Norman Harrison, *Standard Issues in Corporate Investigations: What GCs Should Know*, in *Corporate Investigations 2018* 8 (2d ed.). Indeed, experienced practitioners in the field estimate that "a typical multinational company may have dozens of probes under way at any given time." *Id*. Regulatory and criminal agencies now often encourage, sometimes require, and frequently depend upon companies conducting internal investigations. Government contractors and businesses in closely-regulated industries often must institute compliance programs and self-report violations to these agencies. *See, e.g.*, 48 C.F.R. § 52.203–13 (contracting regulations); 12 C.F.R. § 44.20(a) (Federal Bank Act); 12 C.F.R. § 21.21 (Bank Secrecy Act); 42 C.F.R. § 423.504 (Medicare Part D

providers). Similarly, prosecutors encourage and consider compliance measures in charging decisions. *See, e.g.*, United States Sentencing Guidelines Manual § 8B2.1 cmt. n.3 (2018); Dep't of Justice, Criminal Div., and Sec. & Exch. Comm'n, Enforcement Division, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* 52–54 (Nov. 2012); Dep't of Justice, Criminal Division, *Evaluation of Corporate Compliance Programs* (Apr. 2019). These regulations and policies recognize the social value of internal compliance programs, including internal investigations. That societal value should not be undermined by denying companies stays while their attorney client and work product claims over internal investigation materials are considered on appeal.

II. FACEBOOK HAS A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS

For the reasons given by Facebook in its memorandum in support, the company has at least a strong "likelihood of success" in its appeal from the Superior Court's underlying decision ordering production of Facebook's internal investigation materials. The Superior Court's decision constituted an unprecedented and aggressive application of applicable Massachusetts law concerning the attorney client privilege and work product doctrine. *See* FB Mem. at 10–14. Other courts around the country, confronting similar situations, have consistently reached the opposite result from that which the Superior Court reached here.

The contours of the attorney client privilege and the work product doctrine under Massachusetts law are the same as under federal law in this context. *See Comm'r of Revenue v. Comcast Corp.*, 453 Mass. 293, 316 n.25 (2009) (Massachusetts work product rule mirrors federal rule); *In re Grand Jury Investigation*, 437 Mass. 340 at 350–51 (relying on *Upjohn Co. v. United States*, 449 U.S. 383 (1981) to conclude that attorney client privilege applies to corporate investigations). And the decision below is irreconcilable with the federal authority on privilege to which the Supreme Judicial Court and this Court have long looked for guidance.

The Superior Court concluded that the investigation could not be privileged as a matter of law—*despite* acknowledging the undisputed facts that the investigation was a "lawyer driven effort" that was "born amid and because of the Cambridge Analytica incident"—because it arguably had a mixed purpose and because Facebook would have engaged in *some* sort of more routine compliance review regardless. Add. 30 & n.4 (internal quotation marks omitted). Authoritative federal opinions have come to the exact opposite conclusion. In *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014) (*"KBR I"*), the D.C. Circuit, in an opinion by then-Judge Kavanaugh, granted the extraordinary remedy of issuing a writ of mandamus to vacate a district court opinion that relied on the same reasoning that the Superior Court employed in this case. The district court had held that the results of an internal investigation led by counsel for Kellogg Brown & Root ("KBR") was not privileged, because the investigation was undertaken pursuant to an internal corporate policy and helped

ensure compliance with relevant Department of Defense regulations. *KBR I*, 756 F.3d at 758–59. The district court reasoned that "if there was any other purpose behind the communication [other than the provision of legal advice], the attorney-client privilege apparently does not apply." *Id.* at 759.

The D.C. Circuit emphatically rejected this as "the wrong legal test." *KBR I*, 756 F.3d at 759. Withdrawing the protections of the privilege simply because an internal investigation also fulfills a compliance purpose would punish corporations in a variety of heavily regulated industries. *Id*. And attempting to divine the *one* determining purpose of an investigation "can be an inherently impossible task." *Id*. The court held instead that:

> In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy.

Id. at 760.[3]

[3] The rule articulated by then-Judge Kavanaugh in *KBR I* has been cited favorably and applied by courts across the country. *See, e.g.*, *SEC v. Navellier & Assocs., Inc.*, 2018 WL 6727057, at *3 (D. Mass. Dec. 21, 2018); *Pitkin v. Corizon Health, Inc.*, 2017 WL 6496565, at *4 (D. Or. Dec. 18, 2017); *In re Smith & Nephew Birmingham Hip Resurfacing Hip Implant Prod. Liab. Litig.*, 2019 WL 2330863, at *2 (D. Md. May 31, 2019); *Edwards v. Scripps Media, Inc.*, 2019 WL 2448654, at *1–2 (E.D. Mich. June 10, 2019); *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 529–30 (S.D.N.Y. 2015); *Todd v. STAAR Surgical Co.*, 2015 WL 13388227, at *6 (C.D. Cal. Aug. 21, 2015); *Smith-Brown v. Ulta Beauty, Inc.*, 2019 WL 2644243, at *2–3 (N.D.

That holding applies with full force to the Attorney General's request for Facebook's internal investigation materials. To hold otherwise "would eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs, which is now the case in a significant swath of American industry." *KBR I*, 756 F.3d at 759.[4]

The Superior Court's conclusion that the internal investigation materials are not protected by the work product doctrine is similarly contrary to the federal authority the SJC and this Court have long relied on. The Superior Court agreed with the Attorney General that the materials could not be work product because their "primary motive" was not preparation for litigation. Add. 28–31. But that is not the test—indeed, it is precisely the test that the Supreme Judicial Court has *rejected*. In *Comcast*, the SJC expressly declined to adopt a "primary, ultimate, or exclusive purpose" test for work product, and instead adopted a "because of" test. *Comcast*, 453 Mass. 293 at 316–17 (2009). The SJC, following the lead of the majority of federal Courts of Appeals,

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Ill. June 27, 2019); *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.*, 331 F.R.D. 218, 231 (E.D.N.Y. 2019) .

[4] *Cf. In re Cty. of Erie*, 473 F.3d 413, 420 (2d Cir. 2007) ("The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable . . . the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice."); *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d at 530 ("Rare is the case that a troubled corporation will initiate an internal investigation solely for legal, rather than business, purposes; indeed, the very prospect of legal action against a company necessarily implicates larger concerns about the company's internal procedures and controls, not to mention its bottom line.").

reasoned that the "because of" test was most consistent with the doctrine, because "work product protection should not be denied to a document that analyzes expected litigation *merely because it is prepared to assist in a business decision*." *Id.* at 316 (emphasis added) (quoting *United States v. Adlman*, 134 F.3d 1194, 1199 (2d Cir. 1998)).[5] The decision below goes against this broad consensus.

Likewise, the Superior Court's aggressive holding that Facebook waived any privilege over its internal investigation materials is directly contrary to well-established principles. The Superior Court held that materials could not be privileged because Facebook had "touted" the internal investigation and provided "updates" regarding it to the public. Add. 33. In other words, the court found that Facebook had put the entire investigation at issue merely by describing it generally to the public.

That is not the law—and once again, an authoritative federal opinion demonstrates that it is not. In a follow-on to the *KBR I* decision, the D.C. Circuit again granted a writ of mandamus to correct another erroneous privilege decision in the same case. This time, the district court had held that KBR had put its internal investigation

[5] As the *Comcast* Court observed, at least seven federal circuit courts have adopted the "because of" test. *Comcast*, 453 Mass. at 317 n.26; *see also Adlman*, 134 F.3d at 1199; *State v. United States Dep't of the Interior*, 298 F.3d 60, 68 (1st Cir. 2002); *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979); *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992); *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1118–19 (7th Cir. 1983); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987); *Senate of the Commonwealth of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 586 n. 42 (D.C. Cir. 1987); Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 Fed. Prac. & Proc. Civ. § 2024 (3d ed.) (endorsing "because of" test).

at issue, and therefore waived privilege over it by, among other things, representing in a footnote to its summary judgment papers that it had conducted the investigation and reported no wrongdoing from it, and that it does report wrongdoing when discovered. *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 146 (D.C. Cir. 2015) (*"KBR II"*). The district court reasoned that this was meant to create an inference that the investigation found no wrongdoing occurred. *Id*. The D.C. Circuit disagreed, finding that because KBR "neither directly stated that the [internal] investigation had revealed no wrongdoing nor sought any specific relief because of the results of the investigation . . . [they had] not based a claim or defense upon the attorney's advice." *Id.* at 146. The same logic applies here: The Superior Court did not find that Facebook has raised the findings of its investigation as a defense to liability or proof that no wrongdoing has occurred.

In short, the decision below repeatedly runs afoul of established principles of privilege law. Facebook has a strong likelihood of success on the merits, further supporting its motion for a stay pending appeal.

CONCLUSION

The Court should grant Facebook's motion for a stay pending appeal.

Respectfully submitted,

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March 11, 2020

CERTIFICATE OF COMPLIANCE

I, Kevin P. Martin, counsel for *Amicus Curiae*, certify pursuant to Rule 17(c)(9) of the Massachusetts Rules of Appellate Procedure, that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 17 and 20. This brief contains 3,736 words, excluding the parts of the brief exempted by Mass. R. App. P. 20(a)(2)(D). The brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman font, using Microsoft Word 2010.

/s/ Kevin P. Martin
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CERTIFICATE OF SERVICE

I, Kevin P. Martin, counsel for *Amicus Curiae*, hereby certify this 11th day of March, 2020, that I have served a copy of this Brief by causing it to be delivered by eFileMA.com to counsel of record for Plaintiff-Respondent who are registered users of eFileMA.com:

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