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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE FACEBOOK, INC.
SHAREHOLDER DERIVATIVE
PRIVACY LITIGATION

Case No. 18-cv-01792-HSG

**ORDER ON MOTIONS TO DISMISS,
MOTION TO STAY, AND MOTION TO
INTERVENE**

This Document Relates To:

ALL ACTIONS

Re: Dkt. Nos. 69, 70, 71, 72, 84

Plaintiffs Jeremiah F. Hallisey, Ronald Martin, Natalie Ocegueda, James Karon, and the Gloria Stricklin Trust (collectively, "Plaintiffs") bring this shareholder derivative action against nominal Defendant Facebook, Inc. ("Facebook") and individual Defendants Mark Zuckerberg, Sheryl Sandberg, Marc Andreessen, Peter Thiel, Reed Hastings, Erskine B. Bowles, Dr. Susan D. Desmond-Hellmann, and Jan Koum (collectively, "Individual Defendants," and with Facebook, "Defendants"). Christopher Leagre ("State Plaintiff"), plaintiff in a separate derivative litigation in Delaware state court, also filed a motion to intervene in this action. Dkt. No. 84.

Pending before the Court are Facebook's motion to dismiss under Federal Rule of Civil Procedure ("FRCP") 23.1, Dkt. No. 69; the Individual Defendants' motion to dismiss under FRCP 12(b), Dkt. No. 70; Facebook's motion to dismiss based on *forum non conveniens*, Dkt. No. 71; Facebook's motion to stay, Dkt. No. 72; and State Plaintiff's motion to intervene, Dkt. No. 84. For the reasons articulated below, the Court **GRANTS IN PART** Facebook's motion to dismiss on *forum non conveniens* grounds as to the derivative state claims and dismisses those claims without leave to amend, **GRANTS** Facebook's motion to dismiss under FRCP 23.1 as to the remaining derivative federal claims and dismisses those claims with leave to amend, **DENIES AS MOOT** Individual Defendants' motion to dismiss under FRCP 12(b) and Facebook's motion to stay, and **DENIES** State Plaintiff's motion to intervene.

I. BACKGROUND

1 Plaintiffs filed a consolidated shareholder derivative complaint on July 2, 2018 against
2 Defendants, Dkt. No. 56 (“Complaint” or “Compl.”), for claims related to Facebook’s data privacy
3 protection policies and practices in the wake of the revelation that Cambridge Analytica was
4 misappropriating millions of Facebook users’ information for use in political campaigns. *See*
5 Compl. ¶¶ 1–15. For the purpose of deciding the motions to dismiss, the following allegations are
6 taken as true.

7 Facebook is a Delaware corporation with its headquarters in Menlo Park, California. *Id.*
8 ¶ 26. It was founded in 2004, and as of March 2018, it was one of the biggest social networking
9 services with approximately 1.45 billion daily active users and 2.2 billion monthly active users.
10 *Id.* ¶ 42. Users can interact with each other through their social profiles by messaging, joining
11 groups, and posting status updates; users also can interact with a wide range of other applications
12 that are integrated with Facebook. *Id.* ¶ 44. The “Facebook Platform” allows third-party
13 developers to integrate their own apps with Facebook, and through the use of Facebook “features”
14 implemented on their apps (such as the “Like” and “Share” buttons), these third-party developers
15 have access to user information. *Id.* ¶¶ 46–48. In return, Facebook also obtains more information
16 about users’ activities, such as purchasing behavior. *Id.* at ¶ 48. Facebook’s core revenue is based
17 on advertising, which is carefully targeted based on the information that Facebook gathers about
18 its users. *Id.* ¶ 52.

19 At the time this action was filed, Facebook’s Board of Directors (the “Board”) had nine
20 members. *Id.* ¶ 380. Defendants are former and current Facebook directors and officers and are
21 named as follows: Mark Zuckerberg (Director, Founder, Chairman, and CEO), Sheryl Sandberg
22 (Director and Chief Operating Officer), Marc Andreessen (Director), Peter Thiel (Director), Reed
23 Hastings (Director), Erskine B. Bowles (Director), Dr. Susan D. Desmond-Hellman (Director),
24 and Jan Koum (former Director). *Id.* ¶¶ 28–34.

25 In 2011, in an effort to protect user and consumer privacy, the Federal Trade Commission
26 (“FTC”) entered into a consent decree with Facebook and required Facebook to establish and
27 maintain a comprehensive privacy program to address privacy risks and protect user data. *Id.* ¶¶ 2,
28

1 40. One of Facebook’s obligations was to obtain third-party audits every two years certifying it
2 had a privacy program in place that met or exceeded the requirements of the FTC order. *Id.* ¶ 40.
3 The Board is responsible for overseeing Facebook’s compliance with the FTC consent decree. *Id.*
4 ¶ 197.

5 **A. Cambridge Analytica Scandal and Plaintiffs’ Allegations**

6 Cambridge Analytica is a political consulting firm that impermissibly gathered and
7 analyzed data from millions of Facebook users in order to influence U.S. elections. *Id.* ¶ 3. This
8 was first reported in 2015, and Defendants were aware then that Cambridge Analytica was
9 engaging in the unauthorized use of Facebook’s user data. *Id.* ¶¶ 3, 121. After this discovery,
10 Facebook stated that it had obtained written certifications from the third parties responsible
11 “declaring that all such data they had obtained was accounted for and destroyed.” *Id.* ¶ 126.
12 However, in March 2018, it was reported that Cambridge Analytica may not actually have deleted
13 the data and was still misappropriating information to “target political advertising and manipulate
14 voters.” *Id.* ¶¶ 7–8. Facebook hired a forensic auditor to uncover whether that information indeed
15 had been destroyed. *Id.* ¶ 126.

16 In the wake of the Cambridge Analytica scandal, multiple lawsuits against Facebook and
17 its Board were filed in courts around the U.S., including this derivative action brought by
18 Plaintiffs on March 22, 2018. *See* Dkt. No. 1. While Plaintiffs’ Complaint contains a host of
19 allegations, the main crux of their claims is as follows:

- 20 • Facebook’s 2016, 2017, and 2018 proxy statements failed to disclose the Cambridge
21 Analytica incident, or the “seriously deficient internal controls and privacy policies”
22 Facebook maintained, which “allowed and perpetuated Facebook’s violations of user
23 privacy and other laws” in violation of Section 14(a) of the Securities and Exchange
24 Act (“Exchange Act”). *Id.* ¶¶ 336–338, 342–347.
- 25 • Facebook’s 2018 proxy statement contained a misrepresentation concerning the
26 Board’s role in risk oversight and misled shareholders to “vote against ‘Stockholder
27 Proposals’ meant to improve the Board’s governance,” in violation of Section 14(a) of
28 the Exchange Act. *Id.* ¶¶ 339–341.

- 1 • Defendants “knowingly or recklessly” made materially false or misleading statements
2 and/or omissions regarding Facebook’s privacy practices and internal controls,
3 including misleading statements in the risk disclosures section of Facebook’s 2015,
4 2016, and 2017 annual reports, in breach of their fiduciary duties and in violation of
5 Section 10(b) of the Exchange Act. *Id.* ¶¶ 348–355. Defendants’ alleged
6 misrepresentations boosted the stock price, “causing the Company to repurchase shares
7 at artificially inflated prices.” *Id.* ¶ 348.
- 8 • Facebook repurchased 13 million Class A common shares for approximately \$2.07
9 billion in 2017. *Id.* ¶¶ 348, 350. The Board approved these securities repurchases. *Id.*
10 ¶ 351. However, when Defendants’ “prior misrepresentations and fraudulent conduct
11 were disclosed,” the stock price fell. *Id.* ¶ 367. Were it not for the material
12 misstatements, Facebook “would not have repurchased Facebook stock at artificially
13 inflated prices” and would not have suffered damages when the stock price fell. *Id.* ¶¶
14 362, 367.
- 15 • During the time when Facebook’s stock price was artificially inflated, Individual
16 Defendants Zuckerberg, Sandberg, and Koum collectively sold \$1.5 billion worth of
17 their personally-held Facebook shares, while in possession of material, non-public
18 information, in violation of their fiduciary duties of loyalty and good faith and
19 California Corporations Code § 25402. *Id.* ¶¶ 368, 473–477.
- 20 • Because Defendants were “aware of” the insider trading and had the ability and
21 knowledge “to control and influence” the selling Defendants, all Defendants are liable
22 under California Corporations Code § 25403. *Id.* ¶¶ 485–487.
- 23 • Defendants failed to ensure Facebook maintained adequate internal controls in
24 compliance with the FTC consent decree and other applicable privacy laws, thereby
25 breaching their fiduciary duties of candor, good faith, loyalty, and reasonable inquiry.
26 *Id.* ¶ 491.
- 27 • Defendants implemented and oversaw “Facebook’s illegal business strategy of
28 pursuing profits and revenue growth through violation of various laws” in order to

1 achieve an improper result that was not in Facebook’s best interest, in breach of the
2 Individual Defendants’ fiduciary duties. *Id.* ¶ 493.

3 Plaintiffs bring this derivative action alleging the following eight causes of action: (1) violation of
4 Section 14(a) of the Exchange Act and SEC Rule 14a-9, against the Individual Defendants; (2)
5 violation of Section 10(b) of the Exchange Act and SEC Rule 10b-5, against Defendants;
6 (3) misappropriation of information and breach of fiduciary duty for insider sales, against
7 Individual Defendants Zuckerberg, Sandberg, and Koum; (4) violation of California Corporations
8 Code § 25402, against Individual Defendants Zuckerberg, Sandberg, and Koum; (5) violation of
9 California Corporations Code § 25403, against Defendants; (6) breach of fiduciary duty, against
10 Defendants; (7) contribution and indemnification, against Defendants; and (8) aiding and abetting
11 breaches of fiduciary duty, against Defendants. *Id.* ¶¶ 464-517.

12 **II. REQUEST FOR JUDICIAL NOTICE**

13 In support of Defendants’ motions to dismiss and motion to stay, Defendants have
14 requested that the Court take judicial notice of, or consider under the incorporation by reference
15 doctrine, the following documents: published articles, Exs. 2–4;¹ a blog post and white paper from
16 the Facebook Newsroom, Exs. 5, 7; excerpts from Facebook’s June 29, 2018 Congressional
17 Hearing, Ex. 6; and Facebook’s publicly-filed Securities and Exchange Commission (“SEC”)
18 filings, Exs. 8–16. Dkt. Nos. 73, 74. Plaintiffs object to Defendants’ request as to all of the
19 exhibits. Dkt. No. 82.

20 The Ninth Circuit has recently addressed the overuse of the judicial notice rule and
21 incorporation by reference doctrine. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988 (9th
22 Cir. 2018). Under Federal Rule of Evidence 201, a court may take judicial notice of a fact “not
23 subject to reasonable dispute because it ... can be accurately and readily determined from sources
24 whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). Accordingly, a court
25 may take “judicial notice of matters of public record,” but “cannot take judicial notice of disputed
26 facts contained in such public records.” *Khoja*, 899 F.3d at 999 (citation and quotations omitted).

27 _____
28 ¹ All exhibits referenced herein are attached to the Declaration of Brian M. Lutz in support of
Defendants’ motions, filed on August 10, 2018. Dkt. No. 74.

1 The Ninth Circuit has clarified that if a court takes judicial notice of a document, it must specify
2 what facts it judicially noticed from the document. *Id.* at 999. Separately, the incorporation by
3 reference doctrine is a judicially-created doctrine that allows a court to consider certain documents
4 as though they were part of the complaint itself. *Id.* at 1002. This is to prevent plaintiffs from
5 cherry-picking certain portions of documents that support their claims, while omitting portions
6 that weaken their claims. *Id.* However, it is improper to consider documents “only to resolve
7 factual disputes against the plaintiff’s well-pled allegations in the complaint.” *Id.* at 1014.

8 The Court here takes judicial notice of Defendants’ Exhibit 9 (Facebook’s Restated
9 Certificate of Incorporation dated May 22, 2012, which was attached to Facebook’s Form 10-Q,
10 filed with the SEC on July 31, 2012). *See* Dkt. Nos. 74, 74-9. Specifically, the Court takes
11 judicial notice of the undisputed fact that Article VII is Facebook’s provision governing director
12 liability and indemnification, and Article IX is Facebook’s choice of forum provision. “Courts
13 routinely consider a company’s certificate of incorporation and bylaws in assessing a motion to
14 dismiss a derivative suit.” *Foss on Behalf of Quality Sys. Inc. v. Barbarosh*, No.
15 SACV1400110CJCJPRX, 2018 WL 5276292, at *4 n.8 (C.D. Cal. July 25, 2018) (citing cases).
16 “A document which [] itself affects the legal rights of the parties is not introduced for the truth of
17 the matter asserted because the significance of [the] offered statement lies solely in the fact that it
18 was made.” *Id.* (citation and quotations omitted). Accordingly, because Facebook’s Certificate of
19 Incorporation is a governing corporate document that affects the legal rights of Defendants, and
20 the provisions have independent legal significance, Defendants’ request for judicial notice is
21 **GRANTED** as to Exhibit 9.²

22 The Court does not consider the remaining documents, Exs. 2–8 and 10–16, in resolving
23 the motions, and thus **DENIES AS MOOT** Defendants’ request for judicial notice as to those
24 documents. *See Sgarlata v. PayPal Holdings, Inc.*, No. 17-CV-06956-EMC, 2018 WL 6592771,
25

26 ² Plaintiffs do not dispute the authenticity of this corporate governing document but instead claim
27 generally in their opposition that “[t]he SEC filings are precisely what Plaintiffs allege are
28 misleading, which forms the very basis of Plaintiffs’ Complaint.” Dkt. No. 82 at 3. However,
Plaintiffs point to no allegations in the Complaint that the Certificate of Incorporation was
misleading or inaccurate in any way. *See* Dkt. No. 82 at 3; *see generally* Compl. (only references
to certificate of incorporation do not allege that it is misleading).

1 at *6 (N.D. Cal. Dec. 13, 2018) (denying as moot request for judicial notice of documents not
2 considered by the court).³

3 **III. FORUM NON CONVENIENS**

4 The Court first addresses Facebook’s *forum non conveniens* argument. See Dkt. No. 71
5 (“Mot. FNC”). Because Facebook argues that a forum selection clause governs this action, see
6 Mot. FNC at 1–2, the Court begins by addressing its enforceability.

7 **A. Legal Standard**

8 A forum selection clause is appropriately enforced through the doctrine of *forum non*
9 *conveniens*. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 61
10 (2013). Generally, “[t]o prevail on a motion to dismiss based upon *forum non conveniens*, a
11 defendant bears the burden of demonstrating an adequate alternative forum, and that the balance of
12 private and public interest factors favors dismissal.” *Carijano v. Occidental Petroleum Corp.*, 643
13 F.3d 1216, 1224 (9th Cir. 2011). However, when “the parties’ contract contains a valid forum-
14 selection clause,” that clause “[should be] given controlling weight in all but the most exceptional
15 cases.” *Atl. Marine*, 571 U.S. at 63 (citation and quotations omitted and brackets in original). The
16 Court “must enforce a forum-selection clause unless the contractually selected forum affords the
17 plaintiffs no remedies whatsoever.” *Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d
18 1081, 1092 (9th Cir. 2018). In evaluating such a case, “the plaintiff’s choice of forum merits no
19 weight. Rather, as the party defying the forum-selection clause, the plaintiff bears the burden of
20 establishing that transfer to the forum for which the parties bargained is unwarranted.” *Atl.*
21 *Marine*, 571 U.S. at 63. Additionally, the Court “should not consider arguments about the parties’
22 private interests,” including whether the chosen forum is “inconvenient or less convenient for
23 themselves or their witnesses, or for their pursuit of the litigation.” *Id.* at 64. Therefore, “a district
24 court may consider arguments about public-interest factors only. Because those factors will rarely
25 defeat a transfer motion, the practical result is that forum-selection clauses should control except
26

27 ³ The Court also does not consider Exhibit 1, a summary document created by Defendants’
28 counsel purporting to categorize the allegations in the Complaint. Defendants offer no appropriate
basis for the Court to consider a party’s selective summary of some of the Complaint’s allegations.

1 in unusual cases.” *Id.*

2 **B. Discussion**

3 Facebook argues that Article IX of its Restated Certificate of Incorporation contains an
4 exclusive forum selection clause, making the Delaware Court of Chancery the exclusive forum for
5 this action. Mot. FNC at 3. Specifically, Article IX states that:

6 Unless the corporation consents in writing to the selection of an
7 alternative forum, the Court of Chancery of the State of Delaware
8 shall, to the fullest extent permitted by law, be the sole and
9 exclusive forum for (1) any derivative action or proceeding brought
10 on behalf of the corporation, (2) any action asserting a claim of
11 breach of a fiduciary duty owed by, or other wrongdoing by, any
12 director, officer, employee or agent of the corporation to the
13 corporation or the corporation’s stockholders, (3) any action
14 asserting a claim arising pursuant to any provision of the General
15 Corporation Law or the corporation’s Restated Certificate of
16 Incorporation or Bylaws, (4) any action to interpret, apply, enforce
17 or determine the validity of the corporation’s Restated Certificate of
18 Incorporation or Bylaws or (5) any action asserting a claim
19 governed by the internal affairs doctrine, in each such case subject
20 to said Court of Chancery having personal jurisdiction over the
21 indispensable parties named as defendants therein. Any person or
22 entity purchasing or otherwise acquiring any interest in shares of
23 capital stock of the corporation shall be deemed to have notice of
24 and consented to the provisions of this ARTICLE IX.

25 Dkt. No. 74-9, Ex. 9 at 12. Under Article IX, any action that falls within one of the five
26 enumerated categories shall be litigated in the Delaware Court of Chancery, unless Facebook
27 consents in writing to the selection of an alternative forum. *See id.* Plaintiffs do not dispute the
28 *prima facie* validity of the forum selection clause, nor do they dispute that the Delaware Court of
Chancery has jurisdiction over the state claims, that the action is brought as a shareholder
derivative complaint on behalf of Facebook, that the action involves a claim of breach of a
fiduciary duty owed by an officer of Facebook, or that the action asserts a claim governed by the
internal affairs doctrine. *See* Dkt. No. 83 (“Opp. FNC”). Instead, Plaintiffs argue that the forum
selection clause should not be enforced because: (1) the Delaware Court of Chancery is not an
adequate alternative forum and does not have jurisdiction over Plaintiffs’ Exchange Act claims;
(2) Plaintiffs are not signatories to the Restated Certificate of Incorporation and the inclusion of
the forum selection clause was the result of “overreaching”; and (3) the public interest factors,
including the local interest in having localized controversies decided at home, weigh against

1 enforcing the clause. *See id.* The Court addresses each argument below.

2 **i. Suitability of Alternative Forum**

3 Plaintiffs have not carried their burden of showing that the selected forum “is so gravely
4 difficult and inconvenient that the complaining party will for all practical purposes be deprived of
5 its day in court.” *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir. 1996) (citation and
6 quotations omitted). Plaintiffs argue that the Delaware Court of Chancery is not a suitable
7 alternative forum for the following reasons: the Delaware Court of Chancery does not have
8 jurisdiction over Plaintiffs’ federal claims, *Opp. FNC* at 6; it cannot exercise personal jurisdiction
9 over certain parties who are not yet in the case, *id.* at 9; a pending motion to dismiss in a similar
10 action before the Delaware Court of Chancery would leave Facebook “with no remedy if this
11 Action is dismissed,” *id.* at 14; the Delaware Court of Chancery cannot provide the same remedies
12 as a federal court, *id.*; and the Delaware Court of Chancery is less familiar with the California
13 Corporations Code sections asserted than this Court is, *id.* at 15. The Court does not find any of
14 these arguments persuasive.

15 “Courts must enforce a forum-selection clause unless the contractually selected forum
16 affords the plaintiffs *no remedies whatsoever.*” *Sun*, 901 F.3d at 1091–1092 (emphasis added).
17 Those remedies need not stem from the same statutes originally asserted. *Id.* Although the
18 Delaware Court of Chancery does not have jurisdiction to hear Plaintiffs’ federal claims, the Court
19 has discretion to sever the federal claims and dismiss the remaining claims to be brought in the
20 prescribed forum. Fed. R. Civ. P. 21. This path is appropriate here, as the Delaware Court of
21 Chancery “unquestionably has a well-recognized expertise in the field of state corporation law.”
22 *In re Countrywide Fin. Corp. Derivative Litig.*, 542 F. Supp. 2d 1160, 1173 (C.D. Cal. 2008)
23 (citation and quotations omitted).

24 Plaintiffs’ other arguments fail because the convenience of witnesses and Plaintiffs’
25 preferred venue are not factors that the Court considers in deciding the enforceability of a valid
26 forum selection clause. *See Atl. Marine*, 571 U.S. at 64. Even so, the Court fails to see how the
27 outcome of a pending motion to dismiss in a similar derivative lawsuit deprives Plaintiffs of *any*
28 remedy. Instead, this seems to support Facebook’s argument that Plaintiffs could pursue identical,

1 or substantially similar, remedies in the Delaware Court of Chancery. *See* Opp. FNC at 14; Dkt.
2 No. 88 (“Reply FNC”) at 7–8.

3 Finally, Plaintiffs claim that this Court has “more interest and expertise” than the Delaware
4 Court of Chancery in adjudicating California’s insider trading statutes (California Corporations
5 Code §§ 25402 and 25403). Opp. FNC at 15. However, Plaintiffs fail to consider that under
6 California’s internal affairs doctrine, California Corporations Code § 2116, Plaintiffs are barred
7 from bringing these claims in a derivative lawsuit when a company’s place of incorporation is not
8 California. *See In re Wells Fargo & Co. S’holder Derivative Litig.*, 282 F. Supp. 3d 1074, 1111–
9 12 (N.D. Cal. 2017) (claims under § 25402 in derivative action are barred by internal affairs
10 doctrine and must be brought under Delaware law, the corporation’s state of incorporation); *In re*
11 *Sagent Tech., Inc., Derivative Litig.*, 278 F. Supp. 2d 1079, 1092 (N.D. Cal. 2003) (same).

12 Plaintiffs thus have not shown that the Delaware Court of Chancery would be unable to
13 provide an adequate remedy for their shareholder derivative claims.

14 **ii. Applicability of Forum Selection Clause to Plaintiffs**

15 Plaintiffs cite *Technology Credit Corporation* for the proposition that the forum selection
16 clause cannot be enforced against parties who are non-signatories. Opp. FNC at 10 (citing *Tech.*
17 *Credit Corp. v. N.J. Christian Acad., Inc.*, 307 F. Supp. 3d 993 (N.D. Cal. 2018)). *Technology*
18 *Credit Corporation* is not on point and does not stand for this proposition. *Technology Credit*
19 *Corporation* addressed two forum selection clauses in the context of a § 1404 transfer analysis.
20 307 F. Supp. 3d at 1003–10. In evaluating the choice of forum factor, the court found that the
21 forum selection clause to which one of the parties was a non-signatory did not “subsume” a
22 second forum selection clause to which both parties were signatories. *Id.* at 1009–10.

23 Plaintiffs’ argument also has been rejected by the courts in Delaware and elsewhere. The
24 “argument that stockholders must approve a forum selection bylaw for it to be contractually
25 binding is an interpretation that contradicts the plain terms of the contractual framework chosen by
26 stockholders who buy stock in [the corporation:] when stockholders have authorized a board to
27 unilaterally adopt bylaws, it follows that the bylaws are not contractually invalid simply because
28 the board-adopted bylaw lacks the contemporaneous assent of the stockholders.” *Boilermakers*

1 *Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 956 (Del. Ch. 2013). Where, as here, “a
2 corporation’s board . . . unilaterally adopt[s] a forum-selection bylaw that binds shareholders who
3 bought stock before the bylaw’s adoption,” that forum selection provision is nonetheless still
4 valid. *See In re: CytRx Corp. Stockholder Derivative Litig.*, No. CV146414GHKPJWX, 2015 WL
5 9871275, at *4 (C.D. Cal. Oct. 30, 2015).

6 Plaintiffs also argue that the forum selection clause is a product of fraud and overreaching
7 because it was adopted “after the wrongdoing had commenced.” Opp. FNC at 12. “For a party to
8 escape a forum selection clause on the grounds of fraud, it must show that ‘the *inclusion of that*
9 *clause in the contract* was the product of fraud or coercion.” *Richards v. Lloyd’s of London*, 135
10 F.3d 1289, 1297 (9th Cir. 1998) (affirming grant of motion to dismiss based on forum selection
11 clause) (emphasis in original). Plaintiffs have not so alleged. First, there are no allegations in the
12 Complaint that the inclusion of the forum selection provision was a result of fraud: this argument
13 was raised for the first time in Plaintiffs’ opposition. *See generally* Compl.; Opp. FNC at 12.
14 Second, in their opposition, Plaintiffs ask the Court to infer, based on timing only, that Defendants
15 adopted the clause to “ensure that any actions against them for the wrongdoing that had already
16 occurred would be brought in the far more director-friendly Delaware Chancery Court.” Opp.
17 FNC at 12. Absent any allegation to support this speculative inference, the Court will not infer
18 fraud based on this fact. *See Richards*, 135 F.3d at 1297 (finding that fraud claims failed in the
19 absence of allegations going to the basis for inclusion of choice clauses). Further, “a forum-
20 selection bylaw does not become unenforceable simply because it was adopted after the purported
21 wrongdoing.” *CytRx Corp.*, 2015 WL 9871275 at *5 (citation and quotations omitted). Plaintiffs
22 have not shown that the adoption of the forum selection clause was a result of overwhelming
23 bargaining power, fraud, or overreaching.⁴

24 _____
25 ⁴ Plaintiffs assert that there are “multiple factual disputes” relating to the forum selection clause
26 itself that cannot be resolved at the motion to dismiss stage. Opp. FNC at 3, 13. Yet Plaintiffs
27 only point to one such purported dispute, concerning the forum selection clause’s relationship to
28 Facebook’s Terms of Service. *Id.* at 13. This is not a “factual dispute.” Facebook’s Terms of
Service states that “any claim, cause of action, or dispute that arises out of or relates to these
Terms or the Facebook Products . . . will be resolved exclusively in the U.S. District Court for the
Northern District of California or a state court located in San Mateo County.” *Id.* at 13. However,
Facebook’s Terms of Service apply to Facebook *users*, whereas this is a derivative action brought

1 **iii. Public Interest Factors**

2 Plaintiffs contend that California has an interest “in having a local business’s claim
3 decided here,” and that California is also “at home with the law.” Opp. FNC at 16. For similar
4 reasons as discussed above, the Court does not find these assertions compelling enough to make
5 this an “exceptional” and “unusual” case so as to justify overriding the forum selection clause.
6 *See Atl. Marine*, 571 U.S. at 63–64. Facebook is a Delaware corporation, this is a derivative
7 action, the substantive state claims are governed by Delaware law, and “forum-selection bylaws
8 help avoid inefficient multi-forum derivative litigation.” *CytRx Corp.*, 2015 WL 9871275, at *5.

9 **C. Conclusion**

10 For the foregoing reasons, Facebook’s motion to dismiss based on *forum non conveniens* is
11 **GRANTED IN PART** as to Plaintiffs’ derivative state law claims. Those claims are dismissed
12 without leave to amend but without prejudice to their reassertion in the Delaware Court of
13 Chancery.

14 **IV. MOTION TO DISMISS UNDER TO FRCP 23.1**

15 The Court next addresses Facebook’s motion to dismiss for failure to plead demand futility
16 under FRCP 23.1 for Plaintiffs’ remaining federal claims. *See* Dkt. No. 69 (“Mot.”).

17 Plaintiffs concede that they did not make a demand on the Board before filing suit, but
18 allege that demand would have been futile. Compl. ¶ 378. In support, Plaintiffs allege that the
19 Individual Defendants were interested because they “affirmatively adopted, implemented, and
20 condoned a business strategy based on deliberate and widespread violations of applicable law ...
21 and/or consciously disregarded numerous red flags of misconduct throughout the relevant period,
22 subjecting them to a substantial likelihood of liability as to Plaintiffs’ claims against them in this
23 action.” *Id.* ¶ 379. Plaintiffs also allege that because Defendant Zuckerberg “dominates and

24
25 by Facebook *shareholders* on behalf of Facebook. The Terms of Service have no applicability
26 here. Plaintiffs also fare no better by citing the Court’s July 19, 2018 order denying Plaintiffs’
27 request to lift the discovery stay as support for their assertion that factual disputes regarding
28 contract interpretation require deferral of this issue. *See Id.* at 3. In that order, the Court stated
“Plaintiffs’ request [to lift the discovery stay] anticipates a motion that *may or may not raise a*
contract interpretation issue, for which discovery may or may not be warranted,” but “[n]o such
factual controversy exists in this case at the time.” Dkt. No. 65 at 3 (emphasis added). As already
discussed, Plaintiffs have shown no factual controversy regarding the forum selection clause.

1 controls the Board,” a majority of the Individual Defendants are “beholden to Zuckerberg and lack
2 independence from him.” *Id.*

3 **A. Legal Standard**

4 It is a long-held “basic principle of corporate governance that the decisions of a
5 corporation—including the decision to initiate litigation—should be made by the board of
6 directors or the majority of shareholders.” *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 101
7 (1991) (citation and quotations omitted). However, a “derivative form of action permits an
8 individual shareholder to bring suit to enforce a *corporate* cause of action against officers,
9 directors, and third parties.” *Kamen*, 500 U.S. at 95 (emphasis in original). The purpose of such
10 an action is “to place in the hands of the individual shareholder a means to protect the interests of
11 the corporation from the misfeasance and malfeasance of faithless directors and managers.” *Id.*
12 Because this effectively wrests control from the board of directors, a “shareholder seeking to
13 vindicate the interests of a corporation through a derivative suit must first demand action from the
14 corporation’s directors or plead with particularity the reasons why such demand would have been
15 futile.” *In re Silicon Graphics Inc. Secs. Litig.*, 183 F.3d 970, 989 (9th Cir.1999).

16 FRCP 23.1 likewise articulates the pleading standard for assessing allegations of demand
17 futility: a shareholder plaintiff must either “demand action from the corporation’s directors before
18 filing suit, or plead with factual particularity the reasons why such a demand would have been
19 futile.” *In re PayPal Holdings, Inc. S’holder Derivative Litig.*, No. 17-CV-00162-RS, 2018 WL
20 466527, at *2 (N.D. Cal. Jan. 18, 2018); *see* Fed. R. Civ. P. 23.1(b)(1). “Because of the
21 extraordinary nature of a shareholder derivative suit, Rule 23.1 establishes stringent conditions for
22 bringing such a suit.” *Quinn v. Anvil Corp.*, 620 F.3d 1005, 1012 (9th Cir. 2010). The substantive
23 law of the state of incorporation establishes the circumstances under which demand would be
24 futile. *See Silicon Graphics*, 183 F. 3d at 990. Because Facebook is a Delaware corporation,
25 Compl. ¶ 26, Delaware law regarding demand futility applies here.

26 Under Delaware law, “directors are entitled to a *presumption* that they were faithful to
27 their fiduciary duties,” and “the burden is upon the plaintiff in a derivative action to overcome that
28 presumption.” *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040,

1 1048–49 (Del. 2004) (emphasis in original). Demand is excused only “if Plaintiffs’ particularized
 2 allegations create a reasonable doubt as to whether a majority of the board of directors faces a
 3 substantial likelihood of personal liability for breaching the duty of loyalty.” *See In re Impax*
 4 *Labs., Inc. S’holder Derivative Litig.*, No. 14-CV-04266-HSG, 2015 WL 5168777, at *4 (N.D.
 5 Cal. Sept. 3, 2015) (quoting *Rosenbloom v. Pyott*, 765 F.3d 1137, 1150 (9th Cir. 2014)).⁵ Demand
 6 futility is assessed on a director-by-director basis, and a derivative complaint must “plead facts
 7 *specific to each director*, demonstrating that at least half of them could not have exercised
 8 disinterested business judgment in responding to a demand.” *Desimone v. Barrows*, 924 A.2d
 9 908, 943 (Del. Ch. 2007) (emphasis in original). Further, where “directors are contractually or
 10 otherwise exculpated from liability for certain conduct, then a serious threat of liability may only
 11 be found to exist if the plaintiff pleads a non-exculpated claim against the directors based on
 12 particularized facts.” *Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008) (quotations and emphasis
 13 omitted).

14 Because Article VII in Facebook’s Restated Certificate of Incorporation includes an
 15 exculpatory provision that shields Facebook’s directors from liability for breaches of fiduciary
 16 duty to the fullest extent permitted by the Delaware General Corporation Law, Dkt. No. 74-9, Ex.
 17 9 at 11, Plaintiffs must “plead particularized facts that demonstrate that the directors acted with
 18 scienter, *i.e.*, that they had actual or constructive knowledge that their conduct was legally

19
 20 ⁵ Under Delaware law, there are two relevant tests for when demand can be excused: *Aronson* and
 21 *Rales*. *Rosenbloom*, 765 F.3d at 1149–50. *Aronson* applies when plaintiffs challenge a specific
 22 board decision, and requires plaintiff to plead particularized facts that create a reasonable doubt
 23 that either “(1) the directors are disinterested and independent,” or “(2) the challenged transaction
 24 was a valid exercise business judgment.” *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984),
 25 *overruled in part on other grounds, Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). The *Rales* test
 26 applies to allegations of board *inaction*—specifically, that the board failed to act when it knew, or
 27 should have known, about illegal conduct—and essentially requires plaintiff to allege only the first
 28 prong of *Aronson*. *See Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993). Defendants argue that
 the Court should apply the *Rales* test because Plaintiffs’ principal theory of liability is that
 Defendants failed to ensure that Facebook implemented adequate controls and reporting systems
 that would prevent data privacy violations. Mot. at 10. The Court tends to agree with Defendants,
 because the conclusory allegations that Defendants “perpetuat[ed] Facebook’s illegal business
 practices” are “insufficiently particularized to allege a specific board decision.” *See In re Morgan*
Stanley Derivative Litig., 542 F. Supp. 2d 317, 322 (S.D.N.Y. 2008). However, the Court will
 follow the Ninth Circuit’s approach in *Rosenbloom*, since there is both alleged action and inaction
 by the Board. Under either test, the Court finds the outcome would be the same.

1 improper.” *Wood*, 953 A.2d at 141 (quotations omitted).⁶ A plaintiff may plead a bad faith claim
 2 by alleging particularized facts that show that a company’s Board failed “to act in the face of a
 3 known duty to act, thereby demonstrating a conscious disregard for their responsibilities.” *Stone*
 4 *ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

5 **B. Discussion**

6 Plaintiffs must allege particularized facts sufficient to show that a majority of the directors
 7 were interested or lacked independence. Plaintiffs proffer two main arguments as to the Individual
 8 Defendants’ alleged interestedness: (1) the Individual Defendants consciously “disregarded
 9 numerous red flags of misconduct throughout the relevant period,” and (2) the Individual
 10 Defendants “affirmatively adopted, implemented, and condoned a business strategy based on
 11 deliberate and widespread violations of applicable law.” Compl. ¶ 379.

12 As to whether the Individual Defendants are independent, Plaintiffs do not dispute
 13 Defendants’ assertion that all but two of Facebook’s nine directors are independent, meaning that
 14 they are not members of Facebook’s management. *See* Mot. at 5. Instead, Plaintiffs claim that a
 15 majority of directors are not independent because they are “beholden to Zuckerberg.” Compl.
 16 ¶ 379. For the reasons articulated below, the Court finds that Plaintiffs fail to plead particularized
 17 facts demonstrating that demand would be futile.

18 **i. Failure to Act**

19 To adequately plead that a director has a disqualifying interest based on corporate inaction,
 20 Plaintiffs must plead that a “majority of the Board had actual or constructive knowledge of
 21 violations of the law at [the corporation] involving [the alleged illegal conduct] and did nothing.”
 22 *Rosenbloom*, 765 F.3d at 1151. This claim “essentially turns on whether Plaintiffs have
 23 adequately alleged scienter.” *Id.* As to what constitutes a red flag, evidence of illegality is the
 24 “proverbial red flag.” *South v. Baker*, 62 A.3d 1, 15 (Del. 2012). “Under Delaware law, red flags
 25 ‘are only useful when they are either waved in one’s face or displayed so that they are visible to
 26

27 ⁶ Under Delaware General Corporation Law Section 102(b)(7), an exculpatory provision cannot
 28 limit liability of a director for any breach of the duty of loyalty or claims based on bad faith,
 fraudulent, or illegal misconduct. 8 Del. C. § 102(b)(7).

1 the careful observer.” *Wood*, 953 A.2d at 143 (citation omitted). The “corporate trauma” must be
 2 “sufficiently similar to the misconduct implied by the ‘red flags,’ such that the board’s bad faith,
 3 ‘conscious inaction’ proximately caused the trauma.” *Melbourne Mun. Firefighters’ Pension Tr.*
 4 *Fund on Behalf of Qualcomm, Inc. v. Jacobs*, No. 10872-VCMR, 2016 WL 4076369, at *8 (Del.
 5 Ch. Aug. 1, 2016), *aff’d*, 158 A.3d 449 (Del. 2017).

6 Although Plaintiffs consistently refer to generalized privacy deficiencies at Facebook, *see*,
 7 *e.g.*, Compl. ¶ 382 (“Defendants’ misconduct at the heart of this case constitutes direct facilitation
 8 of violations of federal, state, and international laws, including knowingly and consciously
 9 presiding over the Company’s systematic deficiencies and unsound user privacy practices and
 10 concealing [sic]”), the “corporate trauma” appears to be Defendants’ alleged failure to adequately
 11 protect user data from being misappropriated by Cambridge Analytica or other third parties. *See*,
 12 *e.g.*, Compl. ¶¶ 11, 110, 114–17; Opp. at 11 (“Facebook’s path leading up to the Cambridge
 13 Analytica scandal was paved with numerous red flag warnings of similar wrongdoing”). Plaintiffs
 14 identify a host of purported “red flags” in their Complaint, including litigation and regulatory
 15 matters, Compl. ¶¶ 184–90, 317–35; information from former Facebook employees and investors,
 16 *id.* ¶¶ 118–20, 212–15, 220–23; and the FTC consent decree and FTC warning letters to third-
 17 party app developers, *id.* ¶¶ 249–50, 258, 398–401.

18 One of Plaintiffs’ most prominent “red flag” allegations is based on the various litigation
 19 and regulatory matters related to privacy that Facebook has been involved in over a period of
 20 years. *See id.* ¶¶ 184–90, 317–35. However, while these matters all relate to user privacy,
 21 Plaintiffs fail to show how knowledge of these matters would have imposed a duty for the
 22 Individual Defendants to act with respect to potential unauthorized *third-party* access to and use of
 23 Facebook users’ personal data.⁷ For example, Plaintiffs allege that the 2010 “Beacon” litigation
 24 and various European Union audits and investigations were “red flags,” but these were related to

25 _____
 26 ⁷ Aside from Defendant Zuckerberg, Plaintiffs’ Complaint fails to allege with particularity that any
 27 Individual Defendant knew about these matters. *See* Compl. ¶ 187. Nonetheless, the Court finds
 28 that it is a reasonable inference that the Board knew about these regulatory and litigation matters.
See Rosenbloom, 765 F.3d at 1154. But the pivotal inquiry remains whether these alleged red
 flags are “sufficiently similar” to the “corporate trauma” underlying this action. *See Melbourne*
Mun., 2016 WL 4076369, at *8.

1 Facebook’s unauthorized tracking of users’ and non-users’ online activities, the policies and
2 procedures of Facebook’s data collection, and the sharing of user data with acquired apps. *See id.*
3 ¶¶ 187, 317–35. While these allegations all concern significant privacy issues, the Court finds that
4 they are not particularized enough to support the inference that the majority of the Board knew of
5 sufficiently similar violations and consciously ignored them, such that this “corporate inaction”
6 proximately caused the Cambridge Analytica scandal. *See Melbourne Mun.*, 2016 WL 4076369,
7 at *8.

8 For similar reasons, the Court finds that the FTC warning letters to third-party app
9 developers do not constitute red flags that raised a duty for Defendants to act, because they were
10 not even issued to Facebook. *See Compl.* ¶¶ 249–50, 258. As to the complaints raised by former
11 Facebook employees and a Facebook investor, *id.* ¶¶ 118–20, 212–15, 220–23, Plaintiffs fail to
12 plead particularized facts showing that a majority of the Board was even aware of these
13 complaints.

14 *In re Abbott Labs. Derivative S’holder Litig.*, 325 F.3d 795 (7th Cir. 2003), *In re Pfizer*
15 *Inc. S’holder Derivative Litig.*, 722 F. Supp. 2d 453 (S.D.N.Y. 2010), and *Rosenbloom*, cases
16 heavily relied upon by Plaintiffs, *see Opp.* at 8–14, involved more pertinent facts than those
17 alleged here, and involved red flags that were clearly waved in the director’s faces. *See Wood*,
18 953 A.2d at 143. In *Rosenbloom*, the FDA sent the Allergan board several letters, from 2001 to
19 2010, notifying them that Allergan’s Botox promotional activities and materials were misleading.
20 *Rosenbloom*, 765 F.3d at 1146–47. Significantly, the “corporate trauma” was that Allergan was
21 breaking federal law through its off-label promotion of Botox. *Id.* Similarly, in *Abbott*, the FDA
22 sent warning letters to the directors about the violations that the FDA eventually fined Abbott for.
23 325 F.3d at 798–800. Finally, in *Pfizer*, there were settlement reports made and FDA warning
24 letters and violation notices sent to the board, all concerning the off-label marketing issues and
25 kickbacks Pfizer ultimately was fined for. 722 F. Supp. 2d at 460–61. Plaintiffs fail to show how
26 general and broad allegations related to privacy concerns and violations should have been used to
27 “detect fraud” involving, specifically, a third party’s unauthorized use of user data after certifying
28 that the data had been destroyed. *See Compl.* ¶ 126; *see also Oklahoma Firefighters Pension &*

1 *Ret. Sys. v. Corbat*, No. CV 12151-VCG, 2017 WL 6452240, at *20 (Del. Ch. Dec. 18, 2017)
 2 (“Even assuming that these fraud-related incidents were brought to the attention of the Defendants
 3 [], they could not have served as red flags [because] the collateral at issue was different in the two
 4 frauds”).

5 As to the FTC consent decree, Compl. ¶¶ 398–401, even assuming for purposes of the
 6 Court’s analysis that the consent decree was a red flag, Plaintiffs have not sufficiently alleged a
 7 failure to act. In fact, as Defendants argue, the Complaint shows that Defendants did affirmatively
 8 act. Mot. at 11–12. There is no dispute that after the entry of the consent decree, Facebook had
 9 internal controls and monitoring practices in place to detect deficiencies in Facebook’s user
 10 privacy and data security practices. Compl. ¶¶ 241–47. Plaintiffs simply allege that the
 11 Cambridge Analytica leak proves that these were inadequate. *Id.* ¶ 130. Plaintiffs cannot “rely on
 12 hindsight inferences instead of pleading specific actions or inactions that demonstrate similar
 13 levels of wrongdoing on the part of the Director Defendants.” *Impax*, 2015 WL 5168777, at *7.
 14 The Complaint acknowledges that, in response to the FTC consent decree, PwC, an external
 15 auditing firm, audited Facebook’s privacy controls and certified that the controls were operating
 16 with “sufficient effectiveness to provide reasonable assurance to protect the privacy of covered
 17 information.” Compl. ¶ 241. These reports were submitted to the FTC. *Id.* The allegations of the
 18 Complaint thus suggest that Facebook did have internal controls in place and that the Individual
 19 Defendants were not turning a blind eye to the FTC consent decree and its requirements. *See, e.g.,*
 20 *id.* ¶¶ 243 (according to the audit report, “Facebook constantly enhances or updates its program to
 21 protect individual users / information”), 245 (“PwC assessed Facebook’s privacy program and
 22 found the Company’s internal controls were effective to detect and prevent similar wrongdoing”),
 23 246 (“PwC stated there were no material weaknesses in Facebook’s internal controls and
 24 determined that Facebook’s privacy program was sufficient to comply with the FTC Consent
 25 Decree.”). Plaintiffs write off PwC’s findings with conclusory allegations that PwC “acted
 26 unreasonably” when conducting these audits, but plead no particularized allegations substantiating
 27 those claims. *See id.* ¶¶ 242, 244, 247.

28 Based on the above, the Court finds that Plaintiffs have failed to allege particularized facts

1 that establish the Individual Defendants consciously ignored red flags and therefore had a
2 disqualifying interest that would have made demand futile. *See Wood*, 953 A.2d at 140. The
3 Court recognizes that Facebook’s alleged privacy issues are a serious matter. But the standard for
4 demand futility is strict, and requires a particularized showing. *See Impax*, 2015 WL 5168777, at
5 *6 (“Simply put, when it comes to ‘red flags,’ Plaintiffs’ approach is little more than to catalog the
6 ongoing investigations into [Facebook’s] alleged wrongdoing, and then assert that the thickness of
7 the catalog demonstrates that [Facebook’s] conduct was so egregious and widespread that the
8 [Individual Defendants] certainly must now face at least a ‘substantial likelihood’ of personal
9 liability for having ignored the ‘red flags.’”).

10 **ii. Evidence of Wrongdoing**

11 Plaintiffs do not plead any particularized factual allegations to support their conclusory
12 assertions that the Individual Defendants “perpetuat[ed] Facebook’s illegal business practices” of
13 “pursuing profits and revenue growth through violations of various laws.” *See* Compl. ¶¶ 384,
14 493. Nor do they adequately plead that the Individual Defendants caused “materially false or
15 misleading statements and omissions, including in Facebook’s 2017 and 2018 Proxy Statements
16 filed with the SEC.” *Id.* ¶ 382.

17 As to the “illegal business practices,” it is far from clear in the Complaint what exactly
18 these illegal business practices were, let alone that any Individual Defendant knew of and
19 participated in these practices. *See* Compl. ¶¶ 488–94. This overlaps with Plaintiffs’ theory that
20 the Individual Defendants *failed* to oversee and prevent violations of the law, but does nothing to
21 adequately plead that there in fact was a business scheme that the Individual Defendants knew of
22 and participated in. *See Impax*, 2015 WL 5168777, at *8. For example, one theory is that the
23 Board’s executive compensation practices “encouraged” unlawful activity: because executive
24 compensation is based in part on contributions to the number of advertisers, this allegedly
25 encouraged advertising practices based on “violating user privacy and other laws.” Compl. ¶ 388.
26 But the Complaint does not specify exactly what the Individual Defendants did to “encourage”
27 these unlawful advertising practices, or why it must be that the Individual Defendants knew they
28 were engaging in an unlawful scheme.

1 Plaintiffs’ allegations that Defendants caused materially false or misleading statements to
 2 be disseminated, *id.* ¶ 382, also fails for the same reason. Plaintiffs fail to allege any
 3 particularized facts demonstrating how each Individual Defendant was involved in, prepared, or
 4 even knew about the alleged misstatements and omissions. *See id.* ¶¶ 336–367; *see also Impax*,
 5 2015 WL 5168777, at *8 (“For example, Plaintiffs do not allege that the Director Defendants
 6 condoned any allegedly false statements made at investor conferences or on conference calls, or
 7 that they knew about any alleged misrepresentations or omissions merely as a result of signing
 8 financial reports.”) Instead, Plaintiffs cite several lengthy paragraphs from the proxy statement in
 9 the Complaint, *see, e.g.*, Compl. ¶ 340, and make generalized allegations that Facebook’s proxy
 10 statements and annual reports were misleading, *id.* ¶ 353, yet fail to say exactly which statements
 11 were false or misleading by omission, or why that misstatement or omission was material. “A
 12 litany of alleged false statements, unaccompanied by the pleading of specific facts indicating why
 13 those statements were false, does not meet this standard.” *Metzler Inv. GMBH v. Corinthian*
 14 *Colleges, Inc.*, 540 F.3d 1049, 1070 (9th Cir. 2008).

15 **iii. Independence**

16 Plaintiffs’ final argument for demand futility goes to director independence. To adequately
 17 plead that the Individual Defendants were not independent, Plaintiffs must “show that the directors
 18 are ‘beholden’ to the [other directors] or so under their influence that their discretion would be
 19 sterilized.” *Rales*, 634 A.2d at 936. Plaintiffs’ main theory for lack of independence is that
 20 because Defendant Zuckerberg controls a majority of the Board, and because he was “personally
 21 involved in the policies relating to the data privacy issues at Facebook,” *Opp.* at 15, he cannot
 22 consider a litigation demand, and the other Board members cannot either, because Zuckerberg
 23 “dominates and controls the entire Board.” Compl. ¶ 423; *Opp.* at 15. The Court rejects these
 24 arguments.

25 The mere fact that Zuckerberg is a controlling shareholder is not enough to establish his
 26 lack of independence, because that would “eviscerate” the disinterested prong of the demand
 27 futility test and “would find any director involved in the day-to-day running of company to be
 28 ‘interested’ under any set of facts.” *In re Google, Inc. S’holder Derivative Litig.*, No. C 11-4248

1 PJH, 2013 WL 5402220, at *5 (N.D. Cal. Sept. 26, 2013). And, for the reasons set forth above,
2 Plaintiffs have not sufficiently pled that any of the Individual Defendants, including Zuckerberg,
3 were interested. Further, the fact that Zuckerberg is a controlling shareholder does not
4 automatically mean that the other Individual Defendants are incapable of exercising judgment:
5 “[a] stockholder’s control of a corporation does not excuse presuit demand on the board without
6 particularized allegations of relationships between the directors and the controlling stockholder
7 demonstrating that the directors are beholden to the stockholder.” *Beam ex rel.*, 845 A.2d at 1054.

8 To show that the Individual Defendants are “beholden” to Zuckerberg, Plaintiffs make a
9 host of conclusory (and at times irrelevant) allegations. *See* Compl. ¶¶ 424–63. Courts have
10 routinely dismissed these types of arguments, which can be summed up as follows: Individual
11 Defendants have “past connections,” *id.* ¶ 432, “close relationship[s],” *id.* ¶ 433, business
12 ventures, *id.* ¶¶ 436–38, and “well-established connections,” *id.* ¶ 448, with Zuckerberg;
13 Individual Defendants were “funders” and “first friends,” with him, *id.* ¶ 439; they are
14 “sympathetic to” him, *id.* ¶ 442; and they are afraid to “protest his decisions,” *id.* ¶¶ 458–59.
15 Plaintiffs also allege that Defendant Bowles is “beholden” to the Board, because the Board granted
16 him a waiver (in compliance with Facebook’s Corporate Governance Guidelines) so that he could
17 continue his service beyond the retirement age. *Id.* ¶¶ 455–57. All of these allegations fail,
18 because Plaintiffs fail to show that these Individual Defendants were “dominated or controlled by
19 these relationships.” *See In re Accuray, Inc. S’holder Derivative Litig.*, 757 F. Supp. 2d 919, 930
20 (N.D. Cal. 2010) (rejecting claims because shared work or educational experiences, without more,
21 are insufficient to raise a doubt as to a director’s independence); *see also Beam ex rel.*, 845 A.2d at
22 1051–52 (“Mere allegations that [the directors] move in the same business and social circles, or a
23 characterization that they are close friends, is not enough to negate independence for demand
24 excusal purposes.”).

25 In sum, Plaintiffs have not alleged that the Individual Defendants’ relationships with
26 Zuckerberg make them so “beholden” to him that they could not be independent in considering a
27 demand. *See Rales*, 634 A.2d at 936.

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C. Conclusion

Accordingly, the Court finds that Plaintiffs have not pled demand futility with sufficient particularity and therefore, demand was not excused. As such, the Court **GRANTS** Facebook's motion to dismiss under FRCP 23.1 with leave to amend as to the federal claims only.

V. MOTION TO DISMISS UNDER FRCP 12(B)

The Individual Defendants also filed a motion to dismiss under FRCP 12(b). Dkt. No. 70. Because Plaintiffs' Complaint must be dismissed on *forum non conveniens* grounds as to the derivative state claims and dismissed on demand futility grounds as to the derivative federal claims, the Court does not consider the Individual Defendants' Rule 12(b)(6) arguments and **DENIES** the motion as moot without prejudice.

VI. MOTION TO STAY

Facebook moves to stay this litigation pending the resolution of (1) the securities class action cases against Facebook, pending in this district before the Honorable Edward J. Davila; (2) the consumer class action cases against Facebook, pending in this district before the Honorable Vince Chhabria; and (3) the FTC investigation of Facebook, all arising from the same allegations as brought here. Dkt. No. 72. Because Plaintiffs' Complaint is dismissed, the Court **DENIES** the motion as moot without prejudice.

VII. MOTION TO INTERVENE

On October 11, 2018, State Plaintiff, the plaintiff in a shareholder derivative action pending in the Delaware Court of Chancery, filed a motion to intervene to file a limited opposition to Facebook's motion to dismiss under FRCP 23.1. Dkt. No. 84 ("Mot. Int."). State Plaintiff claims that he would be unduly prejudiced if the motion to dismiss is granted with prejudice and requests that if the Court does so, it should dismiss without prejudice as to him. Mot. Int. at 2. Both Plaintiffs and Defendants oppose State Plaintiff's motion to intervene. *See* Dkt. Nos. 96, 97. On November 9, 2018, the City of Birmingham Relief and Retirement System, Construction and General Building Laborers' Local Union No. 79 General Fund, and Lidia Levy filed to join State Plaintiff's motion to intervene, stating that they are pursuing a consolidated books and records inspection of Facebook in Delaware and would also be potentially prejudiced if the Complaint is

1 dismissed with prejudice. Dkt. 104. For the following reasons, the Court **DENIES** the motion to
2 intervene.

3 **A. Legal Standard**

4 FRCP 24(a) governs intervention as of right. The rule is “broadly interpreted in favor of
5 intervention,” and requires a movant to show that

6 (1) the intervention application is timely; (2) the applicant has a
7 significant protectable interest relating to the property or transaction
8 that is the subject of the action; (3) the disposition of the action may,
9 as a practical matter, impair or impede the applicant’s ability to
protect its interest; and (4) the existing parties may not adequately
represent the applicant’s interest.

10 *Citizens for Balanced Use v. Mont. Wilderness Ass’n*, 647 F.3d 893, 897 (9th Cir. 2011) (citation
11 omitted). Courts deciding motions to intervene as of right are “guided primarily by practical
12 considerations, not technical distinctions.” *See id.* (citation and quotations omitted); *see also U.S.*
13 *v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002) (stating that “equitable considerations”
14 guide determination of motions to intervene as of right) (citation omitted).

15 FRCP 24(b) governs permissive intervention. The Ninth Circuit has held that:

16 [A] court may grant permissive intervention where the applicant for
17 intervention shows (1) independent grounds for jurisdiction; (2) the
18 motion is timely; and (3) the applicant's claim or defense, and the
main action, have a question of law or a question of fact in common
19 . . . As with motions for intervention as of right, [a] finding of
untimeliness defeats a motion for permissive intervention.

20 *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997) (citation and
21 quotations omitted and brackets in original). “A motion for permissive intervention pursuant to
22 Rule 24(b) is directed to the sound discretion of the district court.” *San Jose Mercury News, Inc.*
23 *v. U.S. Dist. Court--N. Dist. (San Jose)*, 187 F.3d 1096, 1100 (9th Cir. 1999).

24 **B. Intervention as of Right**

25 **i. Significant Protectable Interest**

26 State Plaintiff’s stated “significantly protectable” interest is that he asserts claims that
27 contain “more particularized allegations than those alleged by” Plaintiffs in this action, because he
28 already made a books and records demand pursuant to Delaware law. Mot. Int. at 2. Dismissal of

1 this action with prejudice, State Plaintiff claims, “could have a preclusive effect on State
2 Plaintiff’s action.” *Id.*

3 Because this is a derivative action, the real party in interest is the corporation, and the
4 shareholder plaintiff is “at best the nominal plaintiff.” *Ross v. Bernhard*, 396 U.S. 531, 538
5 (1970). Any remedies resulting from the action “belong to the corporation and it is bound by the
6 result of the suit.” *Id.* Therefore, State Plaintiff and Plaintiffs in this action by definition have the
7 same interest. *See Tansey v. Rogers*, No. CV121049RGACONSL, 2016 WL 3519887, at *3 (D.
8 Del. June 27, 2016); *see also Arduini v. Hart*, 774 F.3d 622, 627–28 (9th Cir. 2014) (finding that
9 plaintiffs in a shareholder derivative action are in privity because the corporation is “the true party
10 in interest”); *In re Ambac Fin. Grp., Inc., Deriv. Litig.*, 257 F.R.D. 390, 393 (S.D.N.Y. 2009)
11 (“Plaintiffs and other shareholders who seek to join a derivative action as plaintiffs share an
12 identity of interest almost by definition, since the true party in interest is the corporation itself.”).
13 As such, State Plaintiff has no significant protectable interest in Facebook’s motion to dismiss or
14 in the outcome of the cases before this Court.

15 **ii. Adequacy of Representation**

16 Moreover, even if State Plaintiff could establish a significant protectable interest, he cannot
17 show inadequacy of representation. State Plaintiff contends that because he has made a demand
18 for books and records pursuant to Title 8, Section 220 of the Delaware General Corporation Law,
19 State Plaintiff will be able to file a “more fulsome pleading” than Plaintiffs, and therefore “the
20 claims in [this action] are weaker and not supported by the same facts uncovered by State
21 Plaintiff.” *Mot. Int.* at 7.

22 State Plaintiff’s contentions reflect a difference in how to strategically pursue a derivative
23 action, and do not rise to the level “of antagonism that would preclude adequate representation,”
24 because conclusory allegations and hypothetical disagreements are insufficient. *Ambac*, 257
25 F.R.D. 390 at 393. Mere differences in strategy “are not enough to justify intervention as a matter
26 of right.” *City of Los Angeles*, 288 F.3d at 402–03. In a derivative action, courts have granted
27 intervention when the original plaintiff was not able to bring a claim because “the original plaintiff
28 never had proper standing or lost standing due to the continuous and contemporaneous ownership

1 requirement.” *Tansey*, 2016 WL 3519887, at *3. Plaintiffs’ standing is not in dispute here, and
 2 the Court finds that the State Plaintiff has not made a showing of inadequate representation.

3 C. Permissive Intervention

4 “District courts have discretion to permit an entity to intervene if the entity raises a claim
 5 that has a legal or factual issue or issues in common with the underlying action. In exercising their
 6 discretion, courts must consider whether intervention will unduly delay or prejudice the existing
 7 parties.” *In re Benny*, 791 F.2d 712, 722 (9th Cir. 1986) (citation omitted).

8 The Court declines to exercise its broad discretion to grant permissive intervention in this
 9 action. State Plaintiff’s main argument is that he believes he has a better strategy for pursuing this
 10 derivative litigation, but that is not a sufficient reason to allow him and the other proposed
 11 intervenors to join now and potentially delay this litigation.


12 VIII. CONCLUSION

13 The Court **GRANTS IN PART** Facebook’s motion to dismiss based on *forum non*
 14 *conveniens*, Dkt. No. 71, and dismisses Plaintiffs’ derivative state claims without leave to amend
 15 and without prejudice to reassertion of these claims in the Delaware Court of Chancery; **GRANTS**
 16 Facebook’s motion to dismiss under FRCP 23.1, Dkt. No. 69, and dismisses Plaintiffs’ remaining
 17 derivative federal claims with leave to amend; **DENIES AS MOOT** Individual Defendants’
 18 motion to dismiss under FRCP 12(b), Dkt. No. 70; **DENIES AS MOOT** Facebook’s motion to
 19 stay, Dkt. No. 72; and **DENIES** State Plaintiff’s motion to intervene, Dkt. No. 84.

20 Plaintiffs may amend their complaint if they are able to plead particularized allegations, on
 21 a director-by-director basis, that demonstrate that demand was futile as to the federal claims. The
 22 Court will consider only factual, rather than conclusory, allegations when assessing the viability of
 23 any amended complaint. Plaintiffs shall file any amended complaint within 28 days of the date of
 24 this Order.

25 **IT IS SO ORDERED.**

26 Dated: 3/22/2019

27 
 28 HAYWOOD S. GILLIAM, JR.
 United States District Judge