COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court
Suffolk, SS. No. SJC-12946

ATTORNEY GENERAL,

Petitioner-Appellee

v.

FACEBOOK, INC.,

Respondent-Appellant

ON DIRECT APPELLATE REVIEW FROM AN ORDER OF THE SUPERIOR COURT

BRIEF OF *AMICUS CURIAE*, ASSOCIATION OF CORPORATE COUNSEL, SUPPORTING RESPONDENT-APPELLANT, FACEBOOK, INC.

Thomas O. Bean, BBO #548072
Anuj Khetarpal, BBO #679163
Verrill Dana LLP
One Federal Street, 20th Floor
Boston, MA 02110
(617) 309-2600
tbean@verrill-law.com
akhetarpal@verrill-law.com

Attorneys for Amicus Curiae,
Association of Corporate Counsel

CORPORATE DISCLOSURE STATEMENT

Association of Corporate Counsel ("ACC") is the leading global bar association that promotes the common professional and business interests of in-house counsel. ACC has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Association of Corporate Counsel ("ACC") is the leading global bar association that promotes the common professional and business interests of in-house counsel. ACC has over 42,000 members who are in-house lawyers employed by over 10,000 organizations in more than 85 countries. ACC has long sought to aid courts, legislatures, regulators, and other law or policy-making bodies in understanding the role and concerns of in-house counsel.

ACC members serve in the legal office at more than 400 charitable, non-profit, and for-profit organizations in Massachusetts. ACC members serve as the General Counsel or in leadership legal roles at the following Massachusetts institutions, among others:

Mass. General Brigham Incorporated f/k/a Partners Healthcare
Massachusetts Institute of Technology
Boston Medical Center
Woods Hole Oceanographic Institute
Perkins School for the Blind
Joslin Diabetes Center
Dana Farber Cancer Institute
Vertex Pharmaceuticals Incorporated
State Street Bank and Trust Company

The ACC is concerned that if the decision of the Superior Court is affirmed by this Court, the conduct of "best practices" internal investigations by in-house

counsel in Massachusetts will be chilled. In-house counsel, particularly those in heavily regulated industries—including those critical to the Massachusetts economy such as health care and financial services—will be faced with an untenable choice: either conduct sound internal investigations in compliance with both good legal and business practices and U.S. Department of Justice incentives—at the risk of having to turn over historically privileged investigative materials to the Massachusetts Attorney General—or limit the thoroughness of or cease to conduct investigations altogether.

The Superior Court's decision conflicts with this Court's and federal courts' decisions concerning the attorney-client privilege and work product doctrine, undermines critical Department of Justice policies designed to protect public health, safety, and fisc, and disincentivizes public charities, such as hospitals, from conducting internal investigations to prevent breaches of trust in the administration of charitable funds—a preventive mission the Attorney General has a statutory obligation to ensure. Therefore, this Court should vacate the Superior Court's decision and render a decision that encourages routine internal investigations managed by in-house counsel by reaffirming the applicability to them of the attorney-client privilege and work product doctrine.

MASS. R. APP. P. 17(C)(5) STATEMENT

No party, party's counsel, or person or entity other than amicus curiae and its counsel authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting this brief. Neither amicus curiae or its counsel represents or has represented one of the parties to the present appeal 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.

INTRODUCTION

I. The Centrality of In-house Counsel in Managing Routine Internal Investigations as Part of an Effective Compliance Program

Chief Legal Officers ("CLOs") in the United States play important and varied roles in the legal and business operations of the organizations they serve. Eighty-five percent of those U.S. CLOs who responded to a recent survey conducted by the ACC report directly to the Chief Executive Officer of the organization.[1] More than half of those CLOs have a reporting line to the Board of Directors of the organization.[2] The responsibilities of CLOs today cut across responsibilities that, in the past, may have been characterized separately as "legal" functions and "business" functions. CLOs serve as legal advisor, compliance officer, investigator into potential legal issues within the organization, risk manager, transactions facilitator, company advocate in litigation and with governmental authorities, corporate ethics officer, manager of law department and of outside legal resources, management committee member, strategic planner, legal services marketer, ethics counselor, and crisis manager.[3]

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[1] Association of Corporate Counsel, ACC Chief Legal Officers Survey at 6 (2020) https://www.acc.com/clo2020.

[2] Id. at 9.

[3] Id. See also Duggin, The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility, 51 St. Louis U. L.J. 989, 1003-20 (2007) (CLOs are the "Swiss army knife" of the profession.").

"Compliance" is by far the single most important issue CLOs face.[4] In heavily regulated industries such as health care and financial services – two of the key drivers of the Massachusetts economy[5] – compliance is probably even more important to CLOs than it is to in-house counsel in less heavily regulated industries. For example, one think tank reports that health systems, hospitals and post-acute care providers must comply with 629 discrete regulatory requirements promulgated by the Centers for Medicare & Medicaid Services, the Office of Inspector General, the Office for Civil Rights, and the Office of the National Coordinator for Health Information Technology.[6] These include, without limitation:

> The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and HHS regulations promulgated thereunder that establish boundaries on the use and release of patient health records, and impose civil and criminal penalties for violations.[7]
>
> The Stark Law, which prohibits a physician from referring a patient covered by Medicare if the provider to whom the referral is made has a financial relationship with the physician, unless the relationship

[4] Id. at 19.

[5] McLaughlin & Sherouse, The Impact of Federal Regulation on Massachusetts, Mercatus Center at Geo. Mason Univ. (Jan. 21, 2016), https://www.mercatus.org/publications/regulation/impact-federal-regulation-massachusetts.

[6] American Hospital Association, Regulatory Overload Report: Assessing the Regulatory Burden on Health Systems, Hospitals, and Post-acute Care Providers at 3 (Oct. 2017), https://www.aha.org/guidesreports/2017-11-03-regulatory-overload-report.

[7] 42 U.S.C. § 1320d *et seq*.; 45 C.F.R. subt. A, subch. C, parts 160, 164

satisfies an exception. The Stark Law is a strict liability statute: any violation requires refunding payments to the government for the services provided pursuant to that self-referral and may include harsher penalties.[8]

The Anti-Kickback Enforcement Act, as amended, which makes it a crime for any person to knowingly and willfully exchange anything of value in return for or to influence the referral of individuals for items or services covered by a federal health care program, including Medicare and Medicaid.[9]

The False Claims Act, which imposes penalties on entities that knowingly submit false claims for reimbursement to the Medicare or Medicaid programs. Examples of false claims include: upcoding, misrepresenting the services that were rendered, submitting claims for services that were not performed, unbundling, and submitting claims for unreasonable costs. [10]

The Patient Safety and Quality Improvement Act (PSQIA) of 2005, which is designed to encourage the reporting of medical errors; it protects health care workers who report unsafe conditions.[11] To ensure patient privacy, the HHS levies fines for confidentiality breaches.[12]

II. Department of Justice Incentives for Maintaining Effective Compliance Programs

Not only do CLOs want to maintain effective compliance programs to competently advise their employer-client, ensure good business practices, and avoid potential criminal and civil penalties for violating the above and other

[8] 42 U.S.C. § 1395nn.

[9] 41 U.S.C. §§ 51 to 58.

[10] 31 U.S.C. §§3729-3733.

[11] 42 U.S.C. § 299b-21 *et seq.*

[12] Id. § 299b-22(f).

statutes, but Department of Justice ("DOJ") policies expressly encourage health care and other entities to adopt, maintain, and implement effective compliance programs. Those policies direct DOJ prosecutors to consider, in deciding whether to investigate a company, bring charges, and negotiate plea and other agreements, "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision," and the corporation's remedial efforts "to implement an adequate and effective corporate compliance program or to improve an existing one."[13]

To aid in making such decisions, the DOJ's Justice Manual asks the following questions about internal investigations as a component of an organization's compliance program:

- Investigation Response – Does the company apply timing metrics to ensure responsiveness? Does the company have a process for monitoring the outcome of investigations and ensuring accountability for the response to any findings or recommendations?

- Resources and Tracking of Results – Are the reporting and investigating mechanisms sufficiently funded? How has the company collected, tracked, analyzed, and used information from its reporting mechanisms? Does the company periodically analyze the reports or investigation findings for patterns of misconduct or other red flags for compliance weaknesses? Does the company periodically test the effectiveness of the hotline, for example by tracking a report from start to finish?[14]

[13] U.S. Dep't of Justice, Justice Manual ("JM") § 9-28.300 (revised and renamed 2018), citing JM §§ 9-28.800, JM 928.1000.

[14] U.S. Dep't of Justice Criminal Division, Evaluation of Corporate Compliance Programs, at 7 (Updated June 2020).

Thus, funding, conducting, and monitoring internal investigations, and encouraging accountability for the response to them, are integral parts of what the DOJ believes is an effective compliance program. CLOs are therefore encouraged, not only by the desire to implement good business practices, but by the assurance that their client will receive "credit" from the DOJ in the event of a statutory violation, to conduct investigations as part of routine operations, and not only when they are advised of a potential or actual problem.[15]

The Justice Manual specifically encourages organizations to conduct routine internal investigations by rewarding those who report statutory violations voluntarily.[16] With respect to violations of the False Claims Act, the Justice

[15] The United States Sentencing Guidelines also provide that consideration be given to whether the corporation had in place at the time of the misconduct an effective compliance program for purposes of calculating the appropriate organizational criminal fine. See U.S.S.G. §§ 8B2.1, 8C2.5(f), 8C2.8(11).

[16] JM, § 4-4.112, Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters. See also, e.g., Office of the Inspector General, U.S. Dep't of Health & Human Services, OIG's Provider Self-Disclosure Protocol at 2 (updated April 17, 2013) (providing benefits of voluntary self-disclosure, including mitigation of potential exposure under section 1128J(d) of the Social Security Act, 42 U.S.C. § 1320a-7k(d)); Military Health System, Voluntary Self-Disclosure Reporting, https://www.health.mil/Military-Health-Topics/Access-Cost-Quality-and-Safety/Quality-And-Safety-of-Healthcare/Program-Integrity/Fraud-SelfDisclosure-Program (last viewed Oct. 23, 2020), ("[Defense Health Agency, Program Integrity office] endeavors to work cooperatively with disclosing parties who are forthcoming, thorough, and transparent in their disclosures . . . [and] consults with [the Department of Justice and other Federal agencies], as appropriate, regarding resolution of [self-disclosure program] matters"); Patient Protection and Affordable Care Act, 42 U.S.C. § 18001, Pub. L. 111-148, Title VI, Subtitle E § 6409(b) (March 23, 2010) (allowing Secretary of

Manual provides, "[*v*]*oluntary* self-disclosure of such misconduct benefits the government by revealing, and enabling the government to make itself whole from, previously unknown false claims and fraud, and may also enable the government to preserve and gather evidence that would otherwise be lost." (emphasis added).[17] As a result, the DOJ provides that entities that make proactive, timely, and voluntary self-disclosures to it will receive credit during the resolution of a False Claims Act case.[18] This policy benefits the public fisc and encourages best compliance practices by incentivizing health care organizations to self-report violations.

The Attorney General of the Commonwealth also presumably wants CLOs of organizations operating in the state to take affirmative steps as a matter of routine business practice to comply with state laws. This is particularly true with charitable organizations, of which the Commonwealth enjoys numerous world-renowned health care and higher education institutions. The Attorney General is statutorily required to "enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the

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Health and Human Services to reduce amount owed under Social Security Act for self-disclosure); 19 U.S.C § 1592(c) (2020); 42 C.F.R. § 423.504(b)(4)(vi)(G)(3) (2018).

[17] JM, § 4-4.112, Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters.

[18] Id.

administration thereof." G.L. c. 12, § 8. See Degiacomo v. City of Quincy, 476 Mass. 38, 45–46 (2016), quoting Ames v. Attorney Gen., 332 Mass. 246, 250 (1955) (Attorney General has "[t]he duty of taking action to protect public charitable trusts and to enforce proper application of their funds . . ."). CLOs of charitable organizations are thus encouraged to conduct routine internal investigations not only to preserve their funds and prevent breaches of trust in the administration thereof, but because they know that if they do not preserve their funds, the Attorney General has a statutory duty to ensure that they do so.

Given the complex regulatory framework, the broad investigatory and prosecutorial portfolios of the DOJ and the state's Attorney General, the incentives offered to regulated entities by the DOJ for maintaining effective compliance programs, and the prospect of civil suits by private parties, it is fair to conclude that virtually every internal investigation managed by in-house counsel—even the routine "business as usual" investigation called for by good business practices—serves multiple and overlapping legal and business purposes, with litigation as a looming possibility. As such, it would be difficult, if not impossible, to identify a single or primary purpose for an investigation.

III. The Effect of the Superior Court's Decision on the Initiation and Conduct of Internal Investigations Managed by In-House Counsel

The following two hypotheticals demonstrate that the Superior Court's decision would discourage CLOs from conducting routine, thorough, well-documented investigations that "best compliance practices" and concern for patient safety would otherwise demand.

A. Background of Hypotheticals

Hospitals maintain "hotlines" that enable staff anonymously to report possible violations of law, institutional policies, and/or professional practice standards. Legal officers in local hospitals report that it took years for staff to gain the confidence to use these hotlines without fear of retaliation. According to these legal officers, compliance programs are more effective when staff use these lines frequently because: (1) it is better to err on the side of over-reporting potential issues than under-reporting them; (2) many compliance problems come to light only through confidential, bottom-up reporting; and (3) over time, a recognized and robustly utilized reporting hotline shapes and reinforces an organizational culture of compliance. As a matter of course, CLOs follow-up on every complaint made on the hotline. Sometimes the follow-up reveals that no further action is appropriate; other times, preliminary information obtained warrants further investigation. In any event, CLOs are responsible for the conduct of the vast

majority of internal investigations at hospitals, particularly in lean financial times, and must make these investigatory decisions using their best legal judgment.

B. Federal Law Hypothetical

Suppose a hospital staff member uses the hotline to report a provider's possible violation of the Federal False Claims Act arising from treatment of a patient receiving Medicare benefits. Because the hospital's policy is to follow-up on all calls to the hotline, the CLO, or persons acting at the behest of the CLO, reviews a sample of the Medicare billing records of the provider; they conclude that there is cause to investigate the matter further.

The CLO now has a decision to make. If, by its nature, there is no reason to believe the potential problem was confined strictly to services delivered to Medicare patients, the CLO might be impelled, as a matter of good compliance practice, to conduct an internal investigation that extends to the provider's Medicaid and private payer claims. Ordinarily, such an investigation would comprise detailed reviews of billing records and internal communications that the CLO has identified as relevant to the investigation, as well as interviews with staff whom the CLO believes might have relevant knowledge. In addition, the DOJ policies described above encourage the CLO to complete such an internal investigation with respect to Medicare and Medicaid patients because the hospital would receive "credit" for self-reporting any violations of the False Claims Act.

The CLO knows, however, that there is a possibility that the state Attorney General will issue a civil investigative demand ("C.I.D.") to the hospital for records concerning the internal investigation. The CLO recognizes that the billing records themselves, along with most communications and other records created in treating the patient, are not subject to the attorney-client or work product privileges. The CLO is concerned, however, that under the Superior Court's decision, the methods and decision-making about which staff to interview, which documents to analyze (and how), and internal conversations among lawyers or those working under their direction in conducting the investigation, may not be privileged.

The CLO is even more concerned about whether information concerning the billing of private payers might not be privileged given that there is little plausible argument that litigation is "in prospect" with respect to such bills. The CLO worries that the interviewer will no longer be able to assure staff interviewees that their comments are subject to the hospital's attorney-client privilege, with the result that staff will be less candid and forthcoming in those interviews. This is troubling because obtaining candid information from staff is critical to the CLO's maintenance of an effective compliance program, even if the information is "not what the hospital wants to hear." Indeed, the CLO is concerned that if staff

members learn their comments are or may not be privileged, they will become reluctant to use the hotline to report concerns.

The CLO needs to plan the investigation. The plan will include a decision concerning the scope of the investigation, i.e., whether it will be limited to Medicare claims or also include Medicaid and private payer claims, and determination of the documents to review, the people to interview, and the written work product, if any, to be produced. The CLO weighs whether to have someone review only the provider's billing records and provide the CLO with an oral report of the results so there is no written summary of the analysis.

She also considers whether to conduct something less than a thorough investigation by interviewing some but not all potential staff members/fact witnesses. Conducting a limited investigation would enable the CLO to report that an investigation was completed, but it could result in a "false negative," or a conclusion that there was no False Claims Act violation when there was one. This could lead to the hospital not receiving "credit" if the DOJ investigates when "credit" could have been obtained by a thorough investigation and voluntary disclosure. The CLO wonders whether the interviewer should avoid taking notes of the staff interviews and deliver only an oral report to the CLO.

Finally, the CLO evaluates whether to investigate only the Medicare billing records because that was the only issue raised on the hotline call, or whether also

to investigate the Medicaid billing records that are subject to the False Claims Act but were not the subject of the call, and/or the billing records for private payers because the Federal False Claims Act does not apply to bills issued to private payers.

C. State Law Hypothetical

The Massachusetts Department of Public Health ("DPH") hospital licensure regulations establish numerous requirements for a hospital to become and remain licensed to operate in the Commonwealth. 105 Code Mass. Regs. §§ 130.00, *et seq*. (2020). Many, if not most, of these regulations are designed to protect patient safety.

For example, 105 Code Mass. Regs. §§ 130.1401-1413 prescribe the requirements for a hospital to be designated as a Primary Stroke Service. To be so designated, a hospital must, among other things, "develop and implement written care protocols for acute stroke." 105 Code Mass. Regs. § 130.1405(A). "These protocols shall address issues such as stabilization of vital functions, initial diagnostic tests, and use of medications (including but not limited to intravenous tissue-type plasminogen activator (t-PA) treatment), as applicable." Id. The same regulation provides that "[t]he hospital shall treat eligible patients according to its written care protocols . . . ." Id.

Suppose a hospital staff member calls the hotline anonymously with the name of a patient who was treated for acute stroke, but who did not receive the treatment required by the hospital's written protocols, thus violating not only the protocols but also 105 Code Mass. Regs. § 130.1405(A). The staff member reports that, fortunately, the patient nevertheless obtained a reasonable outcome.

Because the patient obtained a reasonable outcome, the hospital is not obliged to report the matter as a "serious incident" or "serious reportable event" under 105 Code Mass. Regs. §§ 130.331 or 130.332. Similarly, given the outcome, there is also little or no risk of a medical malpractice action by the patient. Nevertheless, given the alleged failure to comply with written protocols with respect to the most important aspect of health care—patient safety—the CLO wants to conduct an internal investigation into the allegations to ascertain the cause of the lapse and to determine whether it is isolated or recurring.

The Superior Court's decision, however, gives the CLO pause. Again, the CLO needs to plan the investigation. The CLO is concerned that: (a) staff will be reluctant to be interviewed if they cannot be assured that their communications with the CLO's staff will be subject to the attorney-client privilege; (b) in-house counsel's notes of the interviews that will almost certainly contain facts and staff members' opinions concerning the incident will not be subject to the attorney-client or work product privileges; and (c) any written report, as well as the

foregoing, could be discoverable in response to a C.I.D. from the Attorney General or a discovery request in a malpractice action brought by a different and subsequent stroke victim who obtained an unfavorable outcome. Everything in the CLO's training on best practices says that a thorough internal investigation should be conducted—one that would be "business as usual" in the hospital with respect to such hotline allegations, particularly when patient safety is at issue—but the CLO is uncertain whether and, if so, how to proceed with the investigation because of the Superior Court's decision.

D. Conclusion

In both of the foregoing hypotheticals, the Superior Court's decision has created uncertainty as to the applicability of the attorney-client privilege and work product doctrine to materials developed during an internal investigation by in-house counsel. As the Supreme Court noted, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying application by the courts, is little better than no privilege at all." Upjohn Co. v. United States, 449 U.S. 383, 393 (1981). Such uncertainty has put the CLO in the untenable position of weighing best compliance practices and the objectives they serve against the risk of an order requiring disclosure of materials created during an internal investigation. The second hypothetical is even more troubling than the first because it puts the CLO in the position of weighing patient safety against the risks

arising from an Attorney General C.I.D. or third-party discovery. In both scenarios, as DOJ policy suggests, the law of attorney-client and work product privileges should encourage—not discourage—thorough, "business as usual," internal investigations.

In fact, such privileges helped lead hospitals in Massachusetts in the late 20th century to dramatically improve patient care. CLOs during that period debated whether efforts to identify issues in quality of care could lead to more malpractice litigation.[19] To help alleviate concerns about future litigation, the Massachusetts Legislature adopted the "peer review privilege" in 1986.[20] That statute encourages candor and aggressive critiquing of medical care by a provider's peers, and protects the proceedings, reports, and records of a medical peer review committee from subpoena. Just as it was in the public interest for hospital providers in the 1990s to learn from their patient care mistakes, it is in the public interest for all organizations to have effective compliance programs to learn from their mistakes and improve the quality of their work.

The irony of the Attorney General's position in this case is that it runs counter to the State's interest in protecting public safety, as illustrated by the state

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[19] See Fine, The Medical Peer Review Privilege in Massachusetts: A Necessary Quality Control Measure or an Ineffective Obstruction of Equitable Redress?, 38 Suffolk L. Rev. 811, 812 (2005)

[20] Id.; G.L. c. 111, § 204 (2007); see also G.L. ch. 111, § 205 (2020).

law hypothetical. There can be little doubt that the Department of Public Health would want the CLO to conduct a thorough investigation into the hospital's alleged failure to comply with its written acute stroke protocols. Given that one of the Attorney General's responsibilities is to protect the public safety, it is fair to expect that she, too, would want the CLO to conduct thorough, "business as usual" investigations. Indeed, if a CLO and hospital administration persistently declined to conduct investigations in such circumstances, she would arguably have a statutory duty under G.L. c. 12, § 8, to investigate the hospital's breach of the public trust. Yet, for the reasons set forth above and below, if this Court adopts the Attorney General's position in this case and affirms the Superior Court's decision, many hospital CLOs—even if they anticipate litigation—will be hesitant to conduct thorough, "business as usual," investigations, and many hospital employees may be reluctant to cooperate in those investigations. Rather, the CLOs may elect not to follow best compliance practices—a result that would be contrary to the public interest, safety, and fisc. Good public policy demands that such investigations not be discouraged.

SUMMARY OF ARGUMENT

In ruling that the fruits of Facebook's App Developer Investigation ("ADI") were not protected from disclosure by the work product doctrine, the Superior Court not only applied the incorrect legal standards and misconstrued the reason for the ADI (pp. 31-33, 35-37), but also drew an impractically rigid distinction between the multiple purposes for "business as usual" internal investigations (pp. 33-35). The Superior Court's ruling discourages organizations from conducting routine internal investigations for fear of required disclosure of in-house counsel's work (p. 34-35). Moreover, the Superior Court decision fails to recognize that an attorney's categorizing of factual information reflects that attorney's inner thoughts and strategy (pp. 36-37), and allows the Attorney General to piggyback on these mental processes without her having made any showing of undue hardship in obtaining substantially equivalent information (pp. 38-41).

The Superior Court's decision also contravenes state and federal law by failing to protect from disclosure confidential attorney-client communications made for the purpose of obtaining legal advice, because those communications relayed factual information necessary to provide that advice (pp. 43-46). Although it is unclear whether the Superior Court determined that Facebook waived the attorney-client privilege by making public statements, or whether the privilege never attached, neither theory has merit. An organization's public statements about

the existence and purpose of an internal investigation do not render the investigation's purpose non-legal, and do not negate the expectation that internal communications concerning the investigation will be privileged. (pp. 47-50). And finding that those public announcements constitute a waiver of the privilege would discourage companies from providing information to the public even when the public interest would be better served by disclosure. (pp. 50-53).

ARGUMENT

I. The Superior Court Erroneously Concluded that the Fruits of Facebook's App Developer Investigation ("ADI") were not Protected by the Work Product Doctrine

The work product doctrine is a discovery rule designed to "protect against disclosure the mental impressions, conclusions, opinions, or legal theories of an attorney," Mass. R. Civ. P. 26(b)(3); it "functions 'to enhance the vitality of an adversary system of litigation by insulating counsel's work from intrusions, inferences, or borrowings by other parties.'" Commissioner of Revenue v. Comcast Corp., 453 Mass. 293, 311 (2009), quoting Ward v. Peabody, 380 Mass. 805, 817 (1980). The work product doctrine is intended to "to prevent one party from piggybacking on the adversary's preparation." Id. at 311-12 (citation and internal quotation marks omitted). The doctrine is codified in Mass. R. Civ. P. 26(b)(3), which protects from discovery documents "prepared in anticipation of litigation" by a party's representative.

The Superior Court held that the names of the specific group of apps and developers that Facebook's attorneys selected for further review in the ADI were not protected by the work product doctrine. Its decision was in error for two reasons: first, the Superior Court applied the incorrect standard for determining whether the names were protected by the work product doctrine; second, it erroneously relied entirely on the Attorney General's unsupported assertion that she could not obtain the names any other way, without testing that assertion or even considering other means of discovery available to her.

A. The Superior Court applied the incorrect standard because it assumed that a "business as usual" internal investigation was not initiated because of the prospect of litigation.

The Superior Court concluded from Facebook's public statements that Facebook launched the ADI "not for reasons of litigation or trial, but rather because the Company has made a commitment, and has a corresponding obligation to protect the privacy of its users." A2/192. It determined that because the goal of the ADI was not "materially different" from the app enforcement efforts Facebook had pursued since 2012, the ADI was simply another iteration of such efforts such that the work product created during the ADI would have been created "irrespective of the prospect of litigation." A2/191, 192 & n.4. To the Superior Court, this meant that the materials were not created "in anticipation of litigation" and thus were not protected by the work product doctrine. A2/191-92 & n.4. The

Superior Court's decision is not only incorrect on the facts of this case, but its approach would chill the conduct of routine internal investigations managed by in-house counsel.

This Court in Comcast decided that the trial court had employed the incorrect test when it asked whether the prospect of litigation was the "primary motivating purpose" for the creation of the documents. 453 Mass. at 317 n. 28. The appropriate test, the Comcast Court articulated, was whether, "in light of the nature of the document and the factual situation of the particular case, the document can be fairly said to have been prepared *because of* the *prospect* of litigation" (second emphasis added). Id. at 317, quoting United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998). The Court used the phrase "prospect of litigation" interchangeably with the phrase "the reasonable possibility of litigation." Id. at 319, citing Ward, 380 Mass. at 817. Applying this "because of" standard in that case, the Comcast Court concluded that "a litigation analysis prepared so that a party can make an informed business decision is afforded the protection of the work product doctrine" Id. at 318 (citation and internal quotation marks omitted).

Here, despite acknowledging that the ADI was designed to "gather the facts needed to provide legal advice to Facebook *about litigation*, compliance, regulatory inquiries, and *other legal risks* facing the Company" (emphases added),

A2/183, the Superior Court concluded that "the fruits of th[e ADI] investigative and enforcement program do not qualify for work product protection because they "would have been undertaken by the Company irrespective of the prospect of litigation" (internal quotation marks omitted). A2/192. But, as noted above, the proper test is whether a document was prepared "because of" the "prospect" or "reasonable possibility" of litigation.

The record here demonstrates both that the ADI was not "business as usual" for Facebook, and that Facebook had the prospect or reasonable possibility of litigation in mind when it launched the ADI in response to the Cambridge Analytica incident. See Facebook Br. at 43-48; see also A2/183 (noting that the ADI was designed to gather facts needed to provide legal advice to Facebook about litigation). Indeed, had this been a continuation of normal business operations for Facebook, it is unlikely that Facebook would have retained an outside law firm to design and direct an investigation distinct from its ongoing internal app-compliance efforts. Compare A2/180 (describing Facebook's Platform Enforcement Program) and A2/182-83 (describing ADI). That should be the end of the inquiry.

But more importantly for internal investigations generally, even if the ADI were "business as usual," routine internal investigations managed by in-house counsel with the reasonable possibility of litigation in mind are protected by the

work product doctrine. In almost all industries, and particularly those heavily regulated health care and financial services industries that help drive the economy in Massachusetts, internal investigations that ensure regulatory compliance are the norm and essential. "In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law, particularly since compliance with the law is hardly an instinctive matter" (internal quotations marks and citations omitted). Upjohn, 449 U.S. at 392. And a "significant swath of American industry" is "required by law to maintain these compliance programs." In re Kellogg Brown & Root, Inc. ("KBR 1") 756 F.3d 754, 759 (D.C. Cir. 2014). Assessment of the possibility of government enforcement and other potential litigation action is a driving force for conducting internal investigations. For this reason, the participation of in-house counsel is essential. And internal investigations often follow promptly after a report of potential misconduct, as illustrated by the Federal and State law hypotheticals discussed above. That these in-house investigations are conducted in the ordinary course of business and inform a company's subsequent risk assessment decisions does not make those investigations any less subject to the work product privilege.

To conclude that work product generated by in-house counsel during a "business as usual" internal investigation would have been created "irrespective of

the prospect of litigation," as the Superior Court found in this case, also draws an impractically "rigid distinction between a legal purpose on the one hand and a business purpose on the other." KBR 1, 756 F.3d at 759. "[T]rying to find the *one* primary purpose for [an internal investigation] motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task." Id. "It is often not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B." Id.

To say that the fruits of an internal investigation would have been produced irrespective of the reasonable possibility of litigation misapprehends the typically overlapping rationale for conducting internal investigations and is contrary to this Court's guidance in Comcast. Adopting the Superior Court's holding as it pertains to "normal business" internal investigations would discourage organizations from conducting routine internal investigations, a policy that is contrary to the public interest and the goal of the DOJ's policy of awarding "credit" to companies that maintain effective compliance programs.

B. The Attorney General failed to satisfy her burden of proving that she was unable, without undue hardship, to obtain the substantial equivalent of the materials by other means.

The Superior Court found that even if the fruits of the ADI were work product, the fruits were "indisputably factual information" that was entitled to "'far less' work product protection." A2/193, quoting Cahaly v. Benistar Prop.

Exchange Trust Co., Inc., 85 Mass. App. Ct. 418, 425 (2014). It then summarily concluded that because "only Facebook knows the identity of the apps . . . and there was no other way for the Attorney General to obtain this information on her own," the Attorney General had demonstrated a "substantial need" for the ADI materials and that she is "unable without undue hardship to obtain the substantial equivalent of the materials by other means," therefore overcoming the qualified work product protection. A2/193.

The Superior Court erred.

1. The names of the apps and developers are not "indisputably factual information"

Although the names of the apps that Facebook subjected to a "detailed background check" or "technical review" are factual information, the *decisions* as to which apps to subject to further checks and reviews are not: rather, the names and groupings of apps and developers are based on the legal opinions of Facebook's lawyers. See Lumber v. PPG Industries, Inc., 168 F.R.D. 641, 646 (D. Minn. 1996) ("[W]hile historical facts are not privileged, when those facts are collated or categorized by legal counsel they may well be entitled to protection from disclosure under the work product doctrine."). It is attorneys' mental processes, the ones that led Facebook to place the individual apps into the groupings, which are being sought in Contested Requests 1-5. Requiring Facebook to reveal the names of apps that its attorneys chose to investigate further would

require it to disclose the strategic decisions of its attorneys. See DaRosa v. City of New Bedford, 471 Mass. 446, 462 (2015) ("[F]act work product [is protected from discovery] . . . if it is . . . interwoven with opinions or analysis leading to opinions."); cf. Hickman v. Taylor, 329 U.S. 495, 512-13 (1947) (an attorney's decision about what to write down tends to reveal an attorney's mental processes). It is these very "mental impressions," "conclusions" and "opinions" that the work product doctrine is intended to protect.

Demanding the names of the apps that Facebook's attorneys decided to subject to a more exacting review is not materially different from asking a deponent which documents her lawyer selected for her to review in preparation for her deposition. Although those documents contain "facts," the decision as to which documents the attorney selected for review would reveal her thoughts, mental impressions, and legal theories of the case. See Lumber, 168 F.R.D. at 646.

Likewise, in an internal investigation, in-house counsel is called upon to use legal judgment to identify the fact witnesses to interview and the documents to review and, after making those decisions, which witness statements and documents require further review and legal analysis. The names of the witnesses interviewed and the substance of the documents reviewed are facts, but the decisions as to which witnesses in-house counsel chooses to meet with and which documents require further examination reveals counsel's opinions and thought processes.

2. The Attorney General has not shown that she is unable to obtain the substantial equivalent of the materials without undue hardship.

That only Facebook knows the names of the apps and developers does not mean that the Attorney General would be "unable without undue hardship to obtain the substantial equivalent of the materials by other means," as the Superior Court concluded. A2/193. To obtain work product, the Attorney General bears the burden of proving that "the materials sought encompass, in a wholly unique unduplicatable manner, the information sought." Harris v. Steinberg, 1997 WL 89164, at *4 (Mass. Super. Ct. Feb. 10, 1997); see also Diaz v. Devlin, 2018 WL 1610541, at *9 (D. Mass. April 3, 2018) ("If the party asserting the privilege meets this initial burden, the burden shifts to the opposing party to prove 'substantial need' and 'undue hardship' to obtain those materials [internal quotation marks and citation omitted]).

The Attorney General has not even begun to try to meet this burden. As a threshold matter, she has yet to proffer a reason, let alone one the Superior Court tested, that she could not use her robust investigatory resources—resources beyond those of the ordinary civil litigant—to obtain this information. See Harris, 1997 WL 89163, at *4. In addition, the Attorney General has not even attempted to use the customary tools of civil litigation to obtain this information, let alone proven that these tools have been or would likely be unsuccessful. See Clean Harbors Env't Servs., Inc. v. Sheppard, 2018 WL 7437046, at *1 (Mass. Super. Ct. Dec. 20,

2018) (defendant failed to overcome work product qualified privilege where he had access to witnesses and could conduct his own inquiry); Abramian v. Pres. and Fellows of Harvard Coll., 2001 WL 1771985, at *5 (Mass. Super. Ct. Dec. 4, 2001) (finding as to some documents that plaintiff had failed to show that he could not "make what he can" of other materials being produced); Harris, 1997 WL 89164, at *4 (plaintiff had failed to show substantial need and inability without hardship to obtain documents where it had not even attempted to discover the information sought by interviewing, deposing or serving interrogatories on individuals with knowledge of the circumstances). Instead, she simply parrots the Superior Court's finding of her inability to obtain the requested names. Attorney General Br. at 41. Perhaps that is because the names of potential fact witnesses, or the factual information contained in documents responsive to the Contested Requests, are *not* beyond the reasonable acquisition of the Attorney General.

The Attorney General could, based on the names in the thousands of pages of documents she has already received from Facebook in response to prior C.I.D.'s,[21] select witnesses in a non-legal department at Facebook to question about the facts underlying the ADI's fruits (such as the apps that had access to Facebook's platform prior to 2014 and the number of installing users of each app, see Contested Request 1, A2/185), and ask them the names of other people who

[21] Facebook Br. at 30.

might have knowledge of the sought-after-facts. While it would be more convenient and less expensive for the Attorney General to obtain this information by simply demanding the work product of Facebook's counsel, "such considerations of convenience do not overcome the policies served by the [work product doctrine]." Upjohn, 449 U.S. at 396; Hickman, 329 U.S. at 516 (Jackson, J. concurring) ("Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."); Bryan Corp. v. Chemwerth, Inc., 296 F.R.D. 31, 43 (D. Mass. 2013) (citation and internal quotation marks omitted) ("Neither inconvenience nor expense constitute sufficient cause to find undue hardship."); Colonial Gas Co. v. Aetna Cas. & Sur. Co., 139 F.R.D. 269, 275 (D. Mass. 1991) ("Discovery of work product will . . . be denied where the party seeking discovery can obtain the information by taking deposition of witnesses.").

By seeking attorney work product rather than conducting her own fact-finding investigation, the Attorney General is seeking to do precisely what the work product doctrine is designed to prevent: "piggybacking on the adversary's preparation." Comcast, 453 Mass. at 311–12. "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." Upjohn, 449 U.S. at 396 (quoting Hickman, 329 U.S. at 515 (Jackson, J., concurring)).

II. The Superior Court Incorrectly Concluded that the Attorney-Client Privilege Did Not Prevent Disclosure of the Fruits of the ADI Investigation.

The Superior Court held that the attorney-client privilege did not apply to Facebook's responses to Requests 1-5 for two reasons: first, it held that the "facts" contained in communications by Facebook to its attorneys were not protected by the privilege; and second, it concluded that the privilege either never attached to such communications or that Facebook waived the privilege by making public statements concerning the investigation. A2/194-95. Neither conclusion has merit.

A. Facts contained in communications between a client and an attorney are protected from disclosure by the attorney-client privilege

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981), citing 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Id. The privilege is of such great importance that, although "it may appear to frustrate the investigative or fact-finding process . . . the social good derived from the proper performance of the functions of lawyers acting for their clients . . . outweighs the harm that may come from the suppression of evidence" (internal quotations marks, brackets, and

citations omitted). Hanover Ins. Co. v. Rapo & Jepson Ins. Sers., Inc., 449 Mass. 609, 615-16 (2007).

The attorney-client privilege protects from disclosure to third parties "all confidential communications between a client and its attorney undertaken for the purpose of obtaining legal advice." Suffolk Constr. Co. v. Division of Capital Asset Mgt., 449 Mass. 444, 448 (2007). It allows clients to make full disclosure of all relevant facts to their counsel "so that counsel may render fully informed legal advice" without the threat of exposure of those damaging facts. Id. at 449; Upjohn, 449 U.S. at 390 (the attorney-client privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.").

The Superior Court correctly noted that Upjohn holds that the attorney-client privilege applies only to *communications* and not to the underlying facts. A2/194, citing Upjohn, 449 U.S. at 395. It erred, however, in deciding that (1) "the attorney-client privilege does not extend to any underlying facts or other information learned by Facebook during the ADI, including the identity of the . . . apps," and (2) "Facebook cannot conceal such facts from the Attorney General simply by sharing them with its attorneys." A2/194.

1. The Attorney General's Requests Seek More than "Facts"; They Seek the Results of Strategic Decisions Made by Attorneys.

The Superior Court acknowledged that, "from the beginning, Gibson, Dunn and Facebook in-house counsel have designed, managed, and overseen all stages of the ADI . . ." A2/183 (emphasis added). Because "[t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts," Upjohn, 449 U.S. at 390, it is fair to infer from the Superior Court's finding that, in response to receiving the C.I.D. with the Contested Requests, Facebook's attorneys requested information from its non-legal staff, non-legal staff communicated information to Facebook's attorneys in response to its attorneys' requests, and Facebook's attorneys decided, or at least participated in deciding, which apps and developers to include in the ADI investigation.

The Attorney General's requests expressly seek the results of Facebook's attorneys' decisions and, at least implicitly, seek the information communicated to and by non-legal Facebook employees to enable the attorneys to make those strategic decisions. For example, she has asked for:

> The group of apps and/or developers on which, to date, Facebook has conducted a "detailed background check . . . to gauge whether the app or developer has engaged in behavior that may pose a risk to Facebook user data or raise suspicions of data misuse, to identify connections with other entities of interest, and to search for any other indications of fraudulent activity . . .
>
> The group of apps on which, to date, Facebook has conducted a "technical review" to analyze "available technical information about the

> apps derived from Facebook's available internal usage records in order to gauge data collection practices -- such as the disproportionate collection of data and broad data requests -- which may suggest data misuse . . .

A2/185-86.

It cannot be disputed that the Attorney General is not entitled to the results of Facebook's attorneys' strategic decisions. See generally Comcast, 453 Mass. at 303. It also cannot be disputed that the Attorney General is not entitled to communications to and from those attorneys that led to their strategic decisions. Upjohn, 449 U.S. at 390-91 ("[T]he privilege exists to protect not only the giving of professional advice to those who act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."). Yet, when the Attorney General seeks the names of the apps and the developers on which Facebook has conducted detailed background checks and technical reviews, she is seeking the results of Facebook's attorneys' strategic decision because those attorneys made, or at least participated in, the decision to determine which apps and developers to investigate. She is also implicitly seeking the communications that led to those decisions. The Attorney General is not entitled to such information.

While it is likely that communications to and from Facebook's attorneys contain "facts," this Court has held that "information contained within a communication need not itself be confidential for the communication to be deemed

privileged; rather the communication must be made in confidence – that is, with the expectation that the communication will not be divulged." Comcast, 453 Mass. at 305; see also Upjohn, 449 U.S. at 295 ("[a] fact is one thing and a communication concerning that fact is an entirely different thing.").[22] Moreover, the Superior Court's decision that Facebook is required to produce documents responsive to Contested Requests 1-5 suggests that there is a clear line between "non-privileged facts" and "communications containing or concerning non-privileged facts," and that all documents responsive to those five requests fall on the "non-privileged fact" side of the line – a line the Superior Court is apparently able to discern even without reviewing the documents at issue. That decision lacks credulity.

The Superior Court's decision has also created confusion and uncertainty about whether confidential attorney-client communications made during the fact-gathering phase of in-house counsel's internal investigation will be protected from disclosure. As noted above, the Supreme Court has observed that [a]n uncertain

[22] See Comcast, 453 Mass. at 316 n.25 (looking to Second Circuit analysis of work-product doctrine and quoting Rollins Envtl. Servcs., Inc. v. Superior Court, 368 Mass. 174, 179-80 (1975) ("This court having adopted comprehensive rules of civil procedure in substantially the same form as the earlier Federal Rules of Civil Procedure, the adjudged construction theretofore given to the Federal rules is to be given to our rules, absent compelling reasons to the contrary or significant differences in content")).

privilege . . . is little better than no privilege at all." Upjohn, 449 U.S. at 393. Finding that such communications are not privileged undermines the very purpose of the attorney-client privilege: to encourage clients—in this case employees—to be forthcoming with their attorneys to enable their attorneys to provide legal advice to Facebook.

In KBR1, the D.C. Circuit wrote, "The [Supreme] Court explained that the attorney-client privilege for business organizations was essential in light of "the vast and complicated array of regulatory legislation confronting the modern corporation," which required corporations to "constantly go to lawyers to find out how to obey the law, . . . particularly since compliance with the law in this area is hardly an instinctive matter." Id. at 757, quoting Upjohn, 449 U.S. at 392. The bottom line is, "[f]actual investigations performed by attorneys *as attorneys* falls comfortably within the protection of the attorney-client privilege." Sandra T.E. v. S. Berwyn Sch. Dist. 100, 600 F.3d 612, 619 (7th Cir. 2010).

2. Facebook is not Seeking to Conceal Facts by Sharing them with its Attorneys

By stating, "Facebook cannot conceal [] facts from the Attorney General simply by sharing them with its attorneys," A2/194, the Superior Court seems to be suggesting that Facebook and its attorneys are necessarily separate. In making this statement, the Court ignores the role of in-house counsel in the ADI investigation. As noted above, the Superior Court acknowledged that "from the beginning,

Gibson, Dunn *and Facebook in-house counsel* have designed, managed, and overseen all stages of the ADI . . .” (emphasis added). A2/183. Facebook’s in-house counsel *are* its attorneys, attorneys who participated actively at all stages of the ADI investigation. See A2/194. They are not separate from Facebook.

As discussed above, communicating facts to in-house counsel is necessarily part of the investigatory process. Moreover, “a lawyer's status as in-house counsel “does not dilute the privilege. . . . Inside legal counsel to a corporation or similar organization . . . is fully empowered to engage in privileged communications.” KBR1, 756 F.3d at 386. As such, the Superior Court erred in implying that Facebook was improperly seeking to conceal facts by sharing them with its attorneys.

B. Facebook’s Public Statements Did Not Obviate the Protections of the Attorney-Client Privilege

The Superior Court’s decision is ambiguous as to whether it concluded that the attorney-client privilege never attached to the ADI because Facebook had no expectation of confidentiality or because Facebook’s public statements concerning the investigation constituted a waiver of the privilege.[23] A2/194-95. Neither basis has merit.

[23] To the extent the Superior Court’s relied on In re Grand Jury Investigation, 437 Mass. 340 (2002) (A2/195), for its conclusion that no attorney-client privileged attached to documents responsive to Requests 1-5, its decision is inconsistent with its finding that the privilege might attach to some of the documents responsive to

1. *Facebook had a Reasonable Expectation that its Communication Would Remain Confidential Because it had no Legal Duty to Disclose the Results of Its Investigation.*

The Superior Court found that the ADI was designed "to gather facts needed to provide legal advice to Facebook about litigation, compliance, regulatory inquiries, and other legal risks facing the Company as a result of potential data misuse and other activities of third-party app developers." A2/183. It nevertheless concluded that the attorney-client privilege did not apply to five of the six Contested Requests because Facebook had publicly stated that the goal of the ADI was to "bring problems to light so we can address them quickly, stay ahead of bad actors and make sure that people can continue to enjoy . . . Facebook while knowing their data will be safe." A2/194-95. Probably the only way the Court could have concluded that the attorney-client privilege did not apply notwithstanding the first finding was by applying a test that required Facebook to prove that the attorney-client communications at issue would not have been made

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Request 6. In In re Grand Jury Investigation, this Court held that the attorney-client privilege did not attach to the results of an internal investigation by a private school into potential child abuse at the school. Id. at 352. The Court reasoned that because the teachers and school officials were obliged to report possible child abuse to the Massachusetts Department of Social Services under G.L. c.119, § 51A, they could not have had a reasonable expectation that the results of that investigation would be confidential. Id. at 353. If the Superior Court concluded that the privilege did not attach to documents responsive to Requests 1-5, the Court should have concluded that the privilege did not attach to documents responsive to Request 6.

"but for" the need to provide legal advice to Facebook about litigation, compliance, etc.

The D.C. Circuit in KBR1 properly and expressly rejected such a test. It observed that "in a key move, the District Court . . . said that the primary purpose of a communication is to obtain or provide legal advice only if the communication would not have been made 'but for' the fact that legal advice was sought. . . . In other words, if there was any other purpose behind the communication, the attorney-client privilege apparently does not apply." 756 F.3d at 759.

Then-Judge Kavanaugh wrote:

> The but-for test articulated by the District Court is not appropriate for attorney-client privilege analysis. Under the District Court's approach, the attorney-client privilege apparently would not apply unless the sole purpose of the communication was to obtain or provide legal advice. That is not the law. . . . And the District Court's novel approach 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. In turn, businesses would be less likely to disclose facts to their attorneys and to seek legal advice, which would 'limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.'

Id., quoting Upjohn, 449 U.S. at 392. The proper test, the D.C. Circuit stated, was whether obtaining or providing legal advice was *"a* primary purpose of the communication, meaning *one of the significant purposes* of the communication" (latter emphasis added). Id. at 760.

Applying the "one of significant purposes" test demonstrates that the attorney-client privilege applies to the ADI. As noted, the Superior Court found that Facebook retained counsel "to gather facts needed to provide legal advice to Facebook about litigation, compliance, regulatory inquiries, and other legal risks facing the Company as a result of potential data misuse and other activities of third-party app developers operating on Version 1 of the Facebook Platform." A2/183. Given that counsel "designed, managed, and overs[aw] all stages of the ADI," id., there can be no doubt that *one* of the purposes of the investigation was to enable counsel to provide legal advice to Facebook. Facebook's public statements about other purposes of the investigation does not obviate the purpose of providing legal advice to Facebook or the expectation that communications made concerning the investigation will remain privileged. See United States v. Windsor Capital Corp., 524 F. Supp. 2d 74, 81 (D. Mass. 2007) ("[T]he privilege is not merely lost by reason of the fact that it also dealt with nonlegal matters."). Accordingly, the attorney-client privilege applies, and the Superior Court's determination to the contrary, is in error.

2. Facebook's general public statements about the ADI Investigation do not constitute a waiver of the attorney-client privilege.

Facebook has articulated the reasons general public statements disclosing the existence of an internal investigation but which do not disclose any confidential communications does not constitute a waiver of the attorney-client privilege. See

Facebook Br. at 37-38. The ACC will not repeat those arguments here. Rather, the ACC will highlight the adverse impact on internal investigations of a holding that public statements concerning the existence and purpose of an investigation would constitute a waiver of the privilege.

Organizations regularly announce to the public the existence and purpose of an internal investigation. For example, Major League Baseball ("MLB") created an investigations unit to eradicate the use of anabolic steroids by players after an independent investigation in 2006-2007 revealed widespread use of these drugs by MLB players.[24] MLB regularly made at that time, and continues to make, public statements about its investigations and the results thereof.[25] If this Court were to find that an organization's public statements about the existence and purpose of an investigation constituted a waiver of the attorney-client privilege in relation to that specific investigation, organizations such as MLB would be disincentivized from publicly announcing that it was conducting an investigation to discover and eradicate players' use of substances banned by the game for fear that such public

[24] See Mitchell, Report to the Commissioner of Baseball of an Independent Investigation into the Illegal Use of Steroids and Other Performance Enhancing Substances by Players in Major League Baseball (Dec. 13, 2007); Eder & Schmidt, Baseball Shakes Up Its Investigative Unit, The New York Times (May 1, 2014).

[25] Eder, M.L.B. Suspends Rodriguez and 12 Others for Doping, The N.Y. Times (Aug. 5, 2014); Nightengale, Investigation into Astros Cheating Allegations is 'Most Thorough' Ever, MLB Commissioner Says, USA Today (Dec. 11, 2019).

statements could result in disclosure of sensitive internal communications. That would encourage MLB to leave the public in the dark about its efforts to protect the integrity of America's national pastime.

Similarly, in 2017, the credit bureau Equifax suffered a massive data breach in which hackers stole personal identifying information of 147.7 million Americans.[26] Equifax announced that it would conduct a "privileged" internal investigation; it hired an independent cybersecurity firm to assist.[27] The then-CEO said in a video, "[t]ogether we will serve our customers, support consumers and strengthen our data security capabilities. . . . In the process, we will build a stronger company, with many great days ahead."[28] Equifax publicly provided specific details of the incident and general information as to how the cyber-breach occurred.[29] A year later, the company announced: "In the past year, we have undertaken a host of security, operational and technological improvements."[30]

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[26] Ng, How the Equifax Hack Happened, and What Still Needs to Be Done, CNET (Sept. 7, 2018), https://www.cnet.com/news/equifaxs-hack-one-year-later-a-look-back-at-how-it-happened-and-whats-changed/.

[27] Equifax Releases Details on Cybersecurity Incident, Announces Personnel Changes (Sept. 15, 2017), https://investor.equifax.com/news-and-events/press-releases/2017/09-15-2017-224018832.

[28] Id.

[29] See supra n. 26.

[30] Id.

Equifax's initial announcement was essential for the public to know what had happened, that measures were being taken to discover the scope and cause of the breach, and to provide a basis for the public to believe that there would be no additional breaches. Its statement a year later that it had instituted a host of improvements was designed to reassure the public. A finding that these public statements waived the protection of the company's confidential attorney-client communications: (a) would allow a consumer suing Equifax as a result of the breach to recover the fruits of Equifax's investigation; and (b) likely would have dissuaded Equifax from disclosing the existence and purpose of its investigation, thus providing little comfort, instead of reassurance, to those whose personal information had been stolen.

As a matter of policy, it should not be the case that the announcement of the existence and purpose of an internal investigation constitutes a waiver of the attorney-client privilege. Organizations that serve the public and the public interest such as hospitals, universities, and many businesses, must be able to assure the public that they are taking efforts to ascertain the cause of any problem without facing the risk of potential disclosure of its internal confidences. Accordingly, this Court should find that the Superior Court's conclusion that Facebook's public statements resulted in a waiver of the attorney-client privilege was in error.

CONCLUSION

For the foregoing reasons, this Court should vacate the decision of the Superior Court.

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Respectfully submitted,

/s Thomas O. Bean

Thomas O. Bean, BBO #548072
Anuj Khetarpal, BBO #679163
Verrill Dana LLP
One Federal Street, 20th Floor
Boston, MA 02110
(617) 309-2600
tbean@verrill-law.com
akhetarpal@verrill-law.com

Attorneys for Amicus Curiae, *Association of Corporate Counsel*

CERTIFICATE OF COMPLIANCE

I, Thomas O. Bean, counsel for ACC, certify pursuant to Massachusetts Rule of Appellate Procedure 17(c)(9) that, except perhaps as provided below, this amicus brief complies with the rules of the court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 17 and 20.

The "Introduction" to this brief contains 3,676 words; the ACC maintains that this section is not required by Mass. R. App. P. 16(a)(5)-(11), and thus should not be contained toward the 7,500 words limit established by Mass. R. App. P. 20(a)(2)(C). The parts of the brief ACC believes are required by Mass. R. App. P. 16(a)(5)-(11) contain 5,980 words.

Because the ACC recognizes that the Court may conclude that the "Introduction" is required by Mass. R. App. P. 16(a)(5)-(11), and that if it does so, the length of the brief would exceed the word limit established by Mass. R. App. P. 20(a)(2)(C), the ACC has filed herewith a motion entitled, "Protective Motion to Enlarge Word Limit for Amicus Brief," to permit it to file a brief of 9,656 words.

This brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman font, using Microsoft Word 2016.

/s/ Thomas O. Bean

Thomas O. Bean

CERTIFICATE OF SERVICE

I, Anuj Khetarpal, certify that on November 10, 2020, I filed with the Supreme Judicial Court and served a true and accurate copy of the foregoing by electronic filing via the Massachusetts Odyssey File & Serve site, and by electronic mail, upon the following counsel of record:

Felicia Ellsworth, Esq.
Rachel L. Gargiulo, Esq.
Eric L. Hawkins, Esq.
Ivan Panchenko, Esq.
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109

Anjan Sahni, Esq.
(admitted *pro hac vice*)
Wilmer Cutler Pickering Hale and Dorr LLP
250 Greenwich Street
New York, NY 10007

Alexander H. Southwell, Esq.
(admitted *pro hac vice*)
Amanda M. Aycock, Esq.
(admitted *pro hac vice*)
Gibson, Dunn & Crutcher
200 Park Avenue
New York, NY 10166

Steven Lehotsky
U.S. Chamber of Commerce
1615 H. Street N.W.
Washington, DC 20062

Kevin P. Martin
Goodwin Proctor LLP
100 Northern Avenue
Boston, MA 02210
Sara E. Cable, Esq.
Peter N. Downing, Esq.

Jared Rinehimer, Esq.
Office of the Attorney General
One AshburtonPlace
Boston, MA 02108

Marissa Elkins
Elkins, Auer, Rudof & Schiff, LLC
31 Trumbull Road, Suite B
Northampton, MA 01060

Charles Dell'Anno, Esq.
Hannah Ruth Bornstein, Est.
David A. Vicinanzo
(admitted *pro hac vice*)
Nixon Peabody LLP
Exchange Place
53 State Street
Boston, MA 02109

Mark Tyler Knights
Nixon Peabody LLP
900 Elm Street
Manchester, NH 03101

/s/ Anuj K. Khetarpal
Anuj K. Khetarpal, BBO # 679163
Verrill Dana LLP
One Federal Street, 20th Floor
Boston, MA 02110
(617) 309-2600
akhetarpal@verrill-law.com