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 ANDREESSEN, DONALD E. GRAHAM,
 9 REED HASTINGS, ERSKINE B. BOWLES and
 FACEBOOK, INC.

10
 11 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

12 WILLIAM COLE, Derivatively on Behalf of
 13 FACEBOOK, INC.,

14 Plaintiff,

15 vs.

16 MARK ZUCKERBERG, DAVID A. EBERSMAN,
 SHERYL K. SANDBERG, DAVID M. SPILLANE,
 17 PETER A. THIEL, JAMES W. BREYER,
 MARC L. ANDREESSEN, DONALD E. GRAHAM,
 18 REED HASTINGS, ERSKINE B. BOWLES, and
 DOES 1-25, Inclusive

19 Defendants,

20 and

21 FACEBOOK, INC., a Delaware corporation

22 Nominal Defendant.

CASE NO. CV 12 3367

San Mateo County Superior Court
Case No. CIV-514327

NOTICE OF REMOVAL OF STATE
COURT CIVIL ACTION

PHH

1 Pursuant to 28 U.S.C. §§ 1331, 1367, 1441, and 1446, and 15 U.S.C. § 77p(c), defendants
2 hereby remove this case, and all claims and causes of action therein, from the Superior Court of the
3 State of California for the County of San Mateo to the United States District Court for the Northern
4 District of California. The Court has subject matter jurisdiction, and the matter is therefore
5 removable, for two independently sufficient reasons: First, because the purported derivative claims
6 are explicitly based on alleged violations of the Securities Act of 1933 (“Securities Act”), they
7 “necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may
8 entertain.” *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 312-14
9 (2005). Second, because the complaint on its face also depends on a finding that the defendants
10 violated federal securities laws, it should be regarded as a “covered class action” and is removable
11 under the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”), 15 U.S.C. § 77p(c).

12 BACKGROUND

13 1. On or about May 31, 2012, Plaintiff William Cole commenced a civil action in the
14 Superior Court of the State of California for the County of San Mateo, captioned *Cole v. Zuckerberg,*
15 *et al.*, Case No. CIV 514327. True and accurate copies of the Summons and Complaint are attached
16 as Exhibit A.

17 2. Defendants have not pled, answered, or otherwise appeared in this case.

18 3. This Notice of Removal is being filed before the expiration of 30 days after service of
19 the Summons and Complaint, and is thus timely filed under 28 U.S.C. § 1446(b).

20 4. This case asserts state-law claims against certain of Facebook’s directors and officers
21 that are derived from Facebook’s alleged violation of the Securities Act in connection with its May
22 18, 2012 initial public offering (“IPO”) on the Nasdaq stock exchange. Two other purported
23 shareholder derivative actions (*Hubuschman v. Zuckerberg, et al.* No. CIV-514237
24 (“*Hubuschman*”); and *Levy v. Zuckerberg, et al.*, No. CIV-514585 (“*Levy*”)) asserting substantially
25 the same claims were also filed in the Superior Court of the State of California for the County of San
26 Mateo.

27 5. There are at least 33 securities and shareholder derivative actions already pending in
28 the United States District Courts for the Northern District of California and the Southern District of

1 New York that are based on substantially similar allegations. These cases name as defendants, in
2 various combinations, Facebook, certain officers and directors of Facebook, and the underwriters of
3 Facebook's IPO. They all purport to challenge certain disclosures in advance of Facebook's IPO.
4 Thirty of the lawsuits allege violations of the Securities Act.¹ One of the lawsuits pending in the
5 Southern District of New York is styled a "derivative" action and also asserts claims that derive from
6 Facebook's alleged violations of the Securities Act. Two lawsuits are pending in the Southern
7 District of New York that assert insider trading claims against certain of the underwriters under
8 Section 20A of the Securities Exchange Act of 1934.

9 6. On June 18, 2012, Facebook, certain of its officers and directors, and certain of the
10 underwriter defendants filed with the Judicial Panel on Multidistrict Litigation a Motion to Transfer
11 Actions to the Southern District of New York Pursuant to 28 U.S.C. § 1407 for Coordinated and/or
12 Consolidated Pretrial Proceedings (the "MDL Motion"). On June 22, these parties amended the
13 MDL Motion to also identify the nine securities cases that were removed to this Court from state
14 court in San Mateo County, one recently filed case in the Western District of Missouri, and three
15 recently filed cases in the Southern District of New York. Defendants intend to notify the Judicial
16 Panel on Multidistrict Litigation that this case should also be considered subject to the MDL Motion.

17 7. This case is related to the other securities and shareholder derivative actions already
18 pending in other federal courts. Indeed, plaintiff in the *Levy* case has already filed a Notice of
19 Related Actions acknowledging as much. (*See* Exhibit B). Removal and transfer of this case would
20 serve the interests of judicial efficiency and facilitate uniform application of the exclusive forum
21 provision in Facebook's articles of incorporation. That clause provides all derivative actions or
22 other actions raising claims alleging breach of fiduciary duty or implicating the internal affairs
23 doctrine must be litigated in the Delaware Court of Chancery. (*See* Exhibit C at Art. IX.)
24 Defendants intend to ask the appropriate federal district court to enforce the exclusive forum
25

26 ¹ Nine of the Securities Act lawsuits were initially filed in state court and were subsequently
27 removed to this Court. Defendants have filed an administrative motion to mark these nine cases
28 related to four Securities Act cases that were originally filed in the Northern District of
California and that have already been deemed related to one another.

1 provision. That enforcement decision should occur after the Judicial Panel on Multidistrict
2 Litigation assigns the putative derivative cases to a federal district court.

3 JURISDICTION

4 8. This Court has jurisdiction over this case under 28 U.S.C. §§ 1331 and 1367, and
5 SLUSA, 15 U.S.C. § 77p(c). This case is therefore removable under 28 U.S.C. § 1441 and 28
6 U.S.C. § 1446.

7 **This Court Has Federal-Question Jurisdiction Under 28 U.S.C. § 1331**

8 9. It is well established that federal courts have “arising under” jurisdiction over state-
9 law claims that implicate significant federal issues. *See Grable & Sons Metal Products, Inc. v.*
10 *Darue Engineering & Mfg.*, 545 U.S. 308, 312-14 (2005) (federal-question jurisdiction lies over “a
11 state-law claim [that] necessarily raise[s] a stated federal issue, actually disputed and substantial,
12 which a federal forum may entertain without disturbing any congressionally approved balance of
13 federal and state judicial responsibilities”).

14 10. The Complaint is expressly premised on specific alleged violations of federal
15 securities statutes and regulations. The Complaint alleges that, in violation of federal securities
16 laws, the Individual Defendants made or caused Facebook to make misleading statements in the
17 Registration Statement filed in connection with Facebook’s IPO. (*See Exhibit A ¶¶ 6, 32.*) For
18 example, the Complaint alleges that “[t]he shares sold in the IPO were artificially inflated because
19 the Registration Statement and Prospectus contained improper statements and were not prepared in
20 accordance with the *rules and regulations* governing their preparation.” (*See Exhibit A ¶ 41*
21 (emphasis added).) The Complaint accordingly alleges that the Individual Defendants are named in
22 numerous securities class actions that allege that they violated the Securities Act in connection with
23 these allegedly improper statements. (*See Exhibit A ¶¶ 14-23.*) The Complaint further alleges that
24 “[a]s a direct result of [this] unlawful course of conduct, [Facebook] is now the subject of multiple
25 securities class action lawsuits filed on behalf of investors who purchased Facebook shares” that
26 “have exposed the Company to potentially billions of dollars in damages.” (*See Exhibit A ¶ 8.*)

27 11. While the Complaint purports to be styled a “derivative” action and asserts state-law
28 claims for breach of fiduciary duty, waste of corporate assets, and unjust enrichment, it is axiomatic

1 that courts must examine the substance of the allegations to determine whether there is federal
2 jurisdiction. *See D'Alessio v. New York Stock Exchange, Inc.*, 258 F.3d 93, 101 (2d Cir. 2001)
3 (“[A]n examination of the allegations contained in the complaint establishes that D’Alessio’s suit is
4 rooted in violations of federal law, which favors a finding that federal question jurisdiction exists”);
5 *Sparta Surgical Corp. v. National Ass’n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1212 (9th Cir. 1998)
6 (“A plaintiff may not avoid federal jurisdiction ... by casting in state law terms a claim that can be
7 made only under federal law.”). Where the essential prerequisite for a claim requires the application
8 of substantial, disputed questions of federal law, there is federal question jurisdiction over the claim.
9 Such is the case here.

10 12. The breach of fiduciary duty claim depends on the allegation that the Individual
11 Defendants breached duties imposed by the federal securities laws, duties that include, *inter alia*, the
12 disclosure obligations of issuers and others under the federal securities laws (and SEC regulations
13 promulgated thereunder). Plaintiff acknowledges as much by stating, for example, that “the
14 Individual Defendants and Does 1-25 breached their fiduciary duties of good faith and due care . . .
15 by allowing, approving, or disseminating to Facebook shareholders and the public improper
16 statements through the Company’s Registration Statement.” (Exhibit A ¶ 94.) These questions of
17 federal law will be highly disputed as a matter of law and fact in the multiplicity of lawsuits pending
18 in federal court. (*See* Exhibit A ¶¶ 94, 96.) The waste of corporate assets claim likewise depends
19 upon the premise that the Individual Defendants caused Facebook to violate the federal securities
20 laws, and thereby wasted its assets “by forcing it to defend itself in the ongoing litigation, in addition
21 to any ensuing costs from a potential settlement or adverse judgment.” (Exhibit A ¶ 99.) And the
22 unjust enrichment claim turns on the alleged wrongful acts and omissions that Individual Defendants
23 made or caused Facebook to make in violation of the federal securities laws. (*See* Exhibit A ¶¶ 103-
24 104.) In other words, a necessary (but not sufficient) condition for Plaintiff to prevail in this case is
25 establishing that federal securities laws were violated.²

26
27 ² Even if such violations were not disputed, this case would still fail for other reasons, including
28 the failure to make a demand on the company’s board of directors, the absence of bad faith on
the part of directors, and SLUSA preemption, among others.

1 13. Because resolution of Plaintiff's claims necessarily depends on whether there were
2 violations of the federal securities statutes (and SEC regulations promulgated thereunder) in
3 connection with the IPO, which are substantial (and, in this case, disputed) questions of federal law,
4 this case should be heard in federal court. *See D'Alessio*, 258 F.3d at 100-102 (upholding federal
5 question jurisdiction over claims labeled as state-law claims because "the interpretation and
6 application of the federal securities laws . . . [are] areas of undisputed strong federal interest");
7 *Sparta*, 159 F.3d at 1212 (finding jurisdiction because "although Sparta's theories are posited as
8 state law claims, they are founded on the defendants' conduct in suspending trading and de-listing
9 the offering, the propriety of which must be exclusively determined by federal law"); *Opulent Fund*
10 *v. Nasdaq Stock Market, Inc.*, No. C-07-03683, 2007 WL 3010573, at *3 (N.D. Cal. Oct. 12, 2007)
11 (holding that claim labeled as a state-law claim "raises a substantial federal question" because the
12 conduct in this case can only be judged in relation to an SEC approved rule").

13 14. Where a shareholder sues derivatively, claiming that directors and officers breached
14 fiduciary duties by exposing a company to liability under federal law, "the questions of federal law
15 are necessarily substantial, and are appropriately resolved in a federal forum." *Prince v. Berg*, No. C
16 10-4233, 2011 WL 9103, at *2-3 (N.D. Cal. Jan. 3, 2011) (denying remand in shareholder derivative
17 suit alleging directors and officer breached fiduciary duty by subjecting company to False Claims
18 Act liability); *see also Fried v. Lehman Bros. Real Estate Assocs. III, L.P.*, No. 11 Civ. 4141, 2012
19 WL 252139, at *3 (S.D.N.Y. Jan. 25, 2012) (holding that federal removal jurisdiction under *Grable*
20 existed where standard of care for shareholder derivative claim for breach of fiduciary duty was set
21 by federal statute that provides a private right of action); *Gamoran v. Neuberger Berman Mgmt.,*
22 *LLC*, No. 10-CIV-6234, 2010 WL 4537056, at *3 (S.D.N.Y. Nov. 8, 2010) (exercising removal
23 jurisdiction under *Grable* in shareholder derivative suit because "Plaintiff's common law waste
24 claim has a necessary and dispositive federal element, and a single claim can constitute sufficient
25 basis for subject matter jurisdiction."); *Landers v. Morgan Asset Mgmt.*, No. 08-2260, 2009 WL
26 962689, at *6-7 (W.D. Tenn. Mar. 31, 2009) (exercising removal jurisdiction under *Grable* where
27 derivative claims for breach of fiduciary duty were predicated on violations of federal securities
28 law).

1 15. Furthermore, it is axiomatic that where federal question jurisdiction exists over any
2 one of the claims in a removed action, the Court possesses federal supplemental jurisdiction over the
3 case as a whole. *See* 28 U.S.C. § 1367(a); *City of Chicago v. Int'l College of Surgeons*, 522 U.S.
4 156, 165-66 (1997). Therefore, insofar as there is a substantial federal question allowing for
5 removal of any one of Plaintiff's claims, the case as a whole is properly removed. *See, e.g.*
6 *Gamoran*, 2010 WL 4537056, at *3; *Landers*, 2009 WL 962689, at *11.

7 **Removal Is Also Authorized By SLUSA**

8 16. SLUSA provides an independent, alternative ground for removal. SLUSA authorizes
9 the removal of a "covered class action" that contains any allegation of "a misrepresentation or
10 omission of a material fact ... in connection with the purchase or sale of a covered security." 15
11 U.S.C. § 77p(c). This case is premised on such allegations. (*See* Exhibit A.) This case also should
12 be deemed a "covered class action," which SLUSA defines as a private, state-law-based suit
13 involving a "covered security" (*i.e.*, a nationally traded security) in which damages are sought either
14 on behalf of traditional representative classes or "on behalf of more than 50 persons" where
15 "questions of law or fact common to those persons ... predominate over any questions affecting only
16 individual persons...." 15 U.S.C. §§ 77p(f)(2)(A)(i), 77p(f)(3).

17 17. SLUSA's definition of removable "covered class actions" excludes "exclusively
18 derivative action[s] brought by one or more shareholders on behalf of a corporation." 15 U.S.C. §
19 77p(f)(2)(B). An action is "exclusively derivative" only when the derivative claims are "[n]ot
20 accompanied by others; single or sole." *Am. Heritage Coll. Dictionary* 486 (4th ed. 2004) (defining
21 "exclusive"); *see also* www.thesaurus.com/browse/exclusively (defining "partially" as the opposite
22 of "exclusively"). Whether a particular action is exclusively or only partially derivative requires
23 case-by-case analysis, which is consistent with Congress's intention that SLUSA "be interpreted
24 broadly to reach mass actions and all other procedural devices that might be used to circumvent the
25 class action definition." S. Rep. No. 105-182, at 8 (1998). Accordingly, courts have repeatedly held
26 that SLUSA is not so formalistic that a plaintiff can avoid removal of a case that is, at heart, a
27 "covered class action." *See Bertram v. Terayon Comm. Sys., Inc.*, 2001 WL 514358, at *4 (C.D. Cal
28 Mar. 27, 2001) ("[I]n defining a 'covered class action' under the Uniform Standards Act, Congress

1 did not intend to allow artful pleading to circumvent its protections.”); *see also Romano v. Kazacos*,
2 609 F.3d 512, 523 (2d Cir. 2010) (“SLUSA requires our attention to both the pleadings and the
3 realities underlying the claims.”). Thus, although courts have remanded actions that are truly
4 derivative, removal under SLUSA is proper where a plaintiff labels the complaint “derivative,” but
5 the plaintiff’s claims depend upon a finding that the defendants violated federal securities laws
6 designed to protect shareholders. *See In re H&R Block Inc.*, Civ. No. 06-236, Slip. Op. at 1-2 (W.D.
7 Mo. Sept. 20, 2006) (unpub.) (denying motion to remand “even though Plaintiffs classify the actions
8 here as ‘derivative,’” because “all the claims depend upon a finding that Defendants violated the
9 Securities Exchange Act of 1934.”) (attached as Exhibit D).

10 18. That is the case here. This case is properly deemed a “covered class action,” rather
11 than an “exclusively derivative” action. As discussed above, it is premised on whether Individual
12 Defendants or Facebook violated the federal securities laws designed to protect shareholders. As
13 important, it expressly alleges harms that flow *directly* to shareholders individually. Indeed, the
14 Complaint alleges that Facebook’s shareholders suffered harm from securities violations, just as the
15 myriad putative federal securities lawsuits that have been filed against defendants also allege. (*See*,
16 *e.g.*, Exhibit A ¶¶ 6-7 (alleging that defendants “breached their duties to the Company *and its*
17 *shareholders*” and that defendants “line[d] their pockets at the expense of hundreds of thousands of
18 unsuspecting *shareholders*” because defendants breached their “obligation to ensure the Registration
19 Statement did not contain an untrue statement of material fact or omitted to state a material fact
20 required to be stated therein or necessary to make the statements therein not misleading”); *id.* ¶ 40
21 (“[H]undreds of thousands of unsuspecting *investors*, who bought into the hype the Individual
22 Defendants created, were left with artificially inflated *shares*.”); *id.* ¶ 42 (“Facebook’s unsuspecting
23 *investors* relied on the Registration Statement’s assurances”); *id.* ¶ 62 (alleging that the selling
24 defendants “signed the improper Registration Statement which helped artificially inflate Facebook’s
25 stock, just in time for these wayward fiduciaries to line their pockets at the expense of hundreds of
26 thousands of unsuspecting *shareholders*”) (emphases added).) Those alleged direct and individual
27 harms show that the action is not “*exclusively derivative*” of harms to the corporation.
28

1 19. That Plaintiff's claims are at least partially direct is further illustrated by the relief
2 sought in the Complaint. Specifically, Plaintiff seeks various items that are plainly not for the
3 alleged benefit of Facebook, but for its minority public shareholders, including the prayer that
4 Facebook be required to "place before shareholders for a vote" amendments to its articles and
5 bylaws to, among other things, "implement procedures for greater shareholder input into the policies
6 and guidelines of the Board," "permit the shareholders of Facebook to nominate at least three
7 candidates for election to the Board," and "strengthen the internal controls within the Company in
8 order to . . . avoid [Mark] Zuckerberg from continuing to independently run Facebook as a private
9 company." (Compl. at 32, ¶ B(4)-(5).) Such relief, designed to increase the rights and power of
10 Facebook's minority shareholders and reduce the alleged control of a specific class of shareholders,
11 is a hallmark of a direct claim. *See Gentile v. Rossette*, 906 A.2d 91, 103 (Del. 2006) (finding
12 shareholders' claim was direct where relief awarded "would benefit only the minority
13 stockholders").³

14 20. Insofar as any one of the claims in this case is properly removable under SLUSA, this
15 Court possesses jurisdiction over all claims in the action because "SLUSA provides for the removal
16 of 'any covered class action,' not just individual claims." *Proctor v. Vishmay Intertech. Inc.*, 584
17 F.3d 1208, 1221 (9th Cir. 2009) (internal citation omitted).

18 21. Defendants will promptly serve a copy of this Notice on counsel for Plaintiff and
19 will file a copy of this Notice with the Clerk of the Superior Court of the State of California for the
20 County of San Mateo, pursuant to 28 U.S.C. § 1446(d).

21 22. All defendants join in removing this action.
22
23
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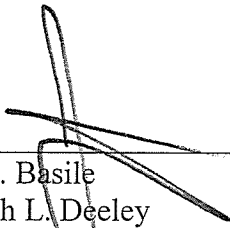
26 ³ The allegations here of duties to, alleged harm to, and relief sought for the benefit of, Facebook's
27 public "shareholders" make this case different from *Coykendall v. Kaplan*, 2002 WL 31962137
28 (N.D. Cal. Aug. 1, 2002), where the decision did not refer to any such allegations or relief. *See*
id. at *3.

1 **CONCLUSION**

2 23. WHEREFORE, defendants, pursuant to 28 U.S.C. §§ 1331, 1367, 1441 and 1446, and
3 15 U.S.C. § 77p(c), remove this action in its entirety from the Superior Court of the State of
4 California, County of San Mateo, to the United States District Court for the Northern District of
5 California, San Francisco Division.

6
7 DATED: June 28, 2012

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21 *and Facebook, Inc.*

1 **CERTIFICATE OF SERVICE**

2 I, Rosie U. Tejada, am employed in the County of San Francisco, State of California. I am
3 over the age of 18 and not a party to the within action; my business address is 555 California Street,
San Francisco, California 94104.

4 On June 28, 2012, I served a copy of the following document(s) described as:

5 **NOTICE OF REMOVAL OF STATE COURT CIVIL ACTION**

6 on the interested parties in this action as follows:

7 **By Facsimile**

8 By transmitting via facsimile, the document(s) listed above to the fax number set forth below
9 on this date before 5:00 p.m. I am aware that service is presumed invalid unless the
10 transmission machine properly issues a transmission report stating the transmission is
complete and without error.

11 **By U.S. Mail**

12 By placing the document(s) listed above in a sealed envelope with postage thereon fully
13 prepaid, in the United States mail at San Francisco, California, to the addressee(s) set forth
below.

14 I am "readily familiar" with the firm's practice of collection and processing correspondence
15 for mailing. Under that practice, it would be deposited with the U.S. postal service on that
16 same day with postage thereon fully prepaid at San Francisco, California in the ordinary
course of business. I am aware that on motion of the party served, service is presumed
invalid if postal cancellation date or postage meter date is more than one day after date of
deposit for mailing.

17 **By Overnight Mail**

18 By causing the document(s) listed above to be delivered to the addressee(s) set forth below
19 on the following business morning by Federal Express Corporation or Express Mail.

20 **By Personal or Messenger Service**

21 By causing the document(s) listed above to be personally served in such envelope by hand to
22 the person at the address(s) set forth below:

23 **See Attached Service List**

24 I declare under penalty of perjury that the foregoing is true and correct.

25 Executed on June 28, 2012, at San Francisco, California.

26 
27 _____
28 Rosie U. Tejada

SERVICE LIST

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