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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

HAL HUBUSCHMAN, Derivatively on Behalf of FACEBOOK, INC., Plaintiff, vs. MARK ZUCKERBERG, DAVID A. EBERSMAN, SHERYL K. SANDBERG, DAVID M. SPILLANE, PETER A. THIEL, JAMES W. BREYER, MARC L. ANDREESSEN, DONALD E. GRAHAM, REED HASTINGS, ERSKINE B. BOWLES, and DOES 1-25, Inclusive Defendants, and FACEBOOK, INC., a Delaware corporation Nominal Defendant.	CV CASE NO. 12 3366 San Mateo County Superior Court Case No. CIV-514237 **NOTICE OF REMOVAL OF STATE COURT CIVIL ACTION** LHK

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

BACKGROUND

1. On or about May 30, 2012, Plaintiff Hal Hubuschman commenced a civil action in the Superior Court of the State of California for the County of San Mateo, captioned *Hubuschman v. Zuckerberg, et al.*, Case No. CIV 514287. True and accurate copies of the Summons and Complaint are attached as Exhibit A.

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

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

4. This case asserts state-law claims against certain of Facebook's directors and officers that are derived from Facebook's alleged violation of the Securities Act in connection with its May 18, 2012 initial public offering ("IPO") on the Nasdaq stock exchange. Two other purported shareholder derivative actions (*Cole v. Zuckerberg, et al.* No. CIV-514327 ("*Cole*"); and *Levy v. Zuckerberg, et al.*, No. CIV-514585 ("*Levy*")) asserting substantially the same claims were also filed in the Superior Court of the State of California for the County of San Mateo.

5. There are at least 33 securities and shareholder derivative actions already pending in the United States District Courts for the Northern District of California and the Southern District of New York that are based on substantially similar allegations. These cases name as defendants, in

various combinations, Facebook, certain officers and directors of Facebook, and the underwriters of Facebook's IPO. They all purport to challenge certain disclosures in advance of Facebook's IPO. Thirty of the lawsuits allege violations of the Securities Act.[1] One of the lawsuits pending in the Southern District of New York is styled a "derivative" action and also asserts claims that derive from Facebook's alleged violations of the Securities Act. Two lawsuits are pending in the Southern District of New York that assert insider trading claims against certain of the underwriters under Section 20A of the Securities Exchange Act of 1934.

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

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

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[1] Nine of the Securities Act lawsuits were initially filed in state court and were subsequently removed to this Court. Defendants have filed an administrative motion to mark these nine cases 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.

JURISDICTION

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

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

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

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

11. While the Complaint purports to be styled a "derivative" action and asserts state-law claims for breach of fiduciary duty, waste of corporate assets, and unjust enrichment, it is axiomatic that courts must examine the substance of the allegations to determine whether there is federal jurisdiction. *See D'Alessio v. New York Stock Exchange, Inc.*, 258 F.3d 93, 101 (2d Cir. 2001)

("[A]n examination of the allegations contained in the complaint establishes that D'Alessio's suit is rooted in violations of federal law, which favors a finding that federal question jurisdiction exists"); *Sparta Surgical Corp. v. National Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1212 (9th Cir. 1998) ("A plaintiff may not avoid federal jurisdiction … by casting in state law terms a claim that can be made only under federal law."). Where the essential prerequisite for a claim requires the application of substantial, disputed questions of federal law, there is federal question jurisdiction over the claim. Such is the case here.

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

13. Because resolution of Plaintiff's claims necessarily depends on whether there were violations of the federal securities statutes (and SEC regulations promulgated thereunder) in

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[2] Even if such violations were not disputed, this case would still fail for other reasons, including 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.

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

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

15. Furthermore, it is axiomatic that where federal question jurisdiction exists over any one of the claims in a removed action, the Court possesses federal supplemental jurisdiction over the

case as a whole. *See* 28 U.S.C. § 1367(a); *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 165-66 (1997). Therefore, insofar as there is a substantial federal question allowing for removal of any one of Plaintiff's claims, the case as a whole is properly removed. *See, e.g. Gamoran*, 2010 WL 4537056, at *3; *Landers*, 2009 WL 962689, at *11.

Removal Is Also Authorized By SLUSA

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

17. SLUSA's definition of removable "covered class actions" excludes "exclusively derivative action[s] brought by one or more shareholders on behalf of a corporation." 15 U.S.C. § 77p(f)(2)(B). An action is "exclusively derivative" only when the derivative claims are "[n]ot accompanied by others; single or sole." *Am. Heritage Coll. Dictionary* 486 (4th ed. 2004) (defining "exclusive"); *see also* www.thesaurus.com/browse/exclusively (defining "partially" as the opposite of "exclusively"). Whether a particular action is exclusively or only partially derivative requires case-by-case analysis, which is consistent with Congress's intention that SLUSA "be interpreted broadly to reach mass actions and all other procedural devices that might be used to circumvent the class action definition." S. Rep. No. 105-182, at 8 (1998). Accordingly, courts have repeatedly held that SLUSA is not so formalistic that a plaintiff can avoid removal of a case that is, at heart, a "covered class action." *See Bertram v. Terayon Comm. Sys., Inc.*, 2001 WL 514358, at *4 (C.D. Cal Mar. 27, 2001) ("[I]n defining a 'covered class action' under the Uniform Standards Act, Congress did not intend to allow artful pleading to circumvent its protections."); *see also Romano v. Kazacos*, 609 F.3d 512, 523 (2d Cir. 2010) ("SLUSA requires our attention to both the pleadings and the

realities underlying the claims."). Thus, although courts have remanded actions that are truly derivative, removal under SLUSA is proper where a plaintiff labels the complaint "derivative," but the plaintiff's claims depend upon a finding that the defendants violated federal securities laws designed to protect shareholders. *See In re H&R Block Inc.*, Civ. No. 06-236, Slip. Op. at 1-2 (W.D. Mo. Sept. 20, 2006) (unpub.) (denying motion to remand "even though Plaintiffs classify the actions here as 'derivative,'" because "all the claims depend upon a finding that Defendants violated the Securities Exchange Act of 1934.") (attached as Exhibit D).

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

19. That Plaintiff's claims are at least partially direct is further illustrated by the relief sought in the Complaint. Specifically, Plaintiff seeks various items that are plainly not for the alleged benefit of Facebook, but for its minority public shareholders, including the prayer that

Facebook be required to "place before shareholders for a vote" amendments to its articles and bylaws to, among other things, "implement procedures for greater shareholder input into the policies and guidelines of the Board," "permit the shareholders of Facebook to nominate at least three candidates for election to the Board," and "strengthen the internal controls within the Company in order to . . . avoid [Mark] Zuckerberg from continuing to independently run Facebook as a private company." (Compl. at 32, ¶ B(4)-(5).) Such relief, designed to increase the rights and power of Facebook's minority shareholders and reduce the alleged control of a specific class of shareholders, is a hallmark of a direct claim. *See Gentile v. Rossette*, 906 A.2d 91, 103 (Del. 2006) (finding shareholders' claim was direct where relief awarded "would benefit only the minority stockholders").[3]

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

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

22. All defendants join in removing this action.

CONCLUSION

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

[3] The allegations here of duties to, alleged harm to, and relief sought for the benefit of, Facebook's public "shareholders" make this case different from *Coykendall v. Kaplan*, 2002 WL 31962137 (N.D. Cal. Aug. 1, 2002), where the decision did not refer to any such allegations or relief. *See id.* at *3.

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