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10
11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**

13
14 IN RE FACEBOOK, INC. SHAREHOLDER
15 DERIVATIVE PRIVACY LITIGATION

LEAD CASE NO. 4:18-CV-01792-HSG

ASSOCIATED CASES: NOS. 4:18-CV-
01834-HSG, 4:18-CV-01893-HSG, 4:18-CV-
01929-HSG, 4:18-CV-02011-HSG

16
17 This Document Relates To:
18 ALL ACTIONS

**FACEBOOK, INC.’S REPLY
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS PLAINTIFFS’
FIRST AMENDED CONSOLIDATED
SHAREHOLDER DERIVATIVE
COMPLAINT PURSUANT TO FED. R.
CIV. P. 23.1 OR, IN THE ALTERNATIVE,
TO STAY**

Hearing:

Date: June 25, 2020
Time: 2:00 P.M.
Location: Courtroom 2, 4th Floor
Judge: Hon. Haywood S. Gilliam, Jr.

Date First Action Filed: March 22, 2018

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I. PRELIMINARY STATEMENT

1
2 Plaintiffs' Opposition confirms that they have utterly failed to meet the strict requirement for
3 pleading that they were excused from making a demand on Facebook's Board of Directors before
4 filing this lawsuit. Plaintiffs argue first that demand is futile because Facebook's Chairman and
5 CEO, Mr. Zuckerberg, is an "interested" director, and the other directors are so beholden to him that
6 they cannot impartially consider a demand to assert claims against him. But this Court already held
7 that the identical allegations in Plaintiffs' previous complaint failed to establish that *any* of the
8 directors are incapable of considering a demand to bring claims against Mr. Zuckerberg. ECF No.
9 113 (the "Order") at 20-21.

10 Plaintiffs fare no better on their only other theory: that a majority of the Facebook directors at
11 the time Plaintiffs filed their amended complaint (the "Demand Board") faced a substantial likelihood
12 of liability for defrauding Facebook under the federal securities laws. Plaintiffs ask this Court to
13 credit the head-scratching argument that Facebook, acting through its directors, was deceived by
14 allegedly false statements the directors supposedly caused Facebook to make. This theory not only
15 defies common sense; it lacks any supporting facts, let alone the particularized facts required under
16 Rule 23.1 and the PSLRA to plead that Facebook's directors are substantially likely to be held liable
17 under the securities laws. Plaintiffs have no response to the fact that the vast majority of the
18 allegedly false statements are not even claimed to have been made or approved by a majority of
19 Facebook's Directors. And Plaintiffs do not contest that their pleading fails to satisfy the heightened
20 standard for pleading scienter under the PSLRA for each director, let alone a majority of the Demand
21 Board.

22 Recognizing that they cannot plead, as they must, that a majority of the Demand Board faces
23 a substantial likelihood of liability for their perplexing "derivative securities" claims, Plaintiffs
24 devote most of their Opposition to arguing that the Demand Board faces liability for a breach of
25 fiduciary duty claim not even at issue in this case. Plaintiffs' attempt to distract the Court from their
26 own pleading should be rejected. The relevant question is whether it would have been futile for
27 Plaintiffs to make a demand on the Facebook Board because a majority of the Board faces a
28 substantial likelihood of liability for the claims asserted in Plaintiffs' complaint. Whether the Board

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