FACEBOOK WINS DISMISSAL OF IPO DERIVATIVE ACTION

Earlier today, in a noteworthy decision (*In re Facebook, Inc. IPO Sec. & Derivative Litig.*, No. 12-md-2389 (S.D.N.Y. Feb. 13, 2013)), the shareholder derivative actions that have been brought against Facebook and its Board of Directors in the aftermath of the Company's May 18 initial public offering were dismissed on several grounds.[1]

First, the court concluded that the plaintiffs, who did not make a demand to the Board, failed to rebut the presumption that the majority of Facebook's Board was disinterested and did not plead sufficient facts to demonstrate the Board's conscious inaction. Significantly, the court found that plaintiffs' breach of fiduciary duty claims premised on the nondisclosure of internal projections prior to the IPO were without support. The court stated that the Company "repeatedly made express and extensive warnings in the Company's Registration Statement, drafts of the Registration Statement and in its final Offering Documents about the trend of increased use of mobile applications." Thus, "even if internal projections could be considered material to the IPO, Derivative Plaintiffs have not demonstrated that the Facebook projections would have 'significantly altered the total mix of information in the marketplace' considering that these disclosures [regarding increased mobile use] were publicly disseminated." The court went further commenting that prior rulings "throughout the country have uniformly agreed that 'internal calculations and projections are not material facts that are require[d] to be disclosed' in a registration statement. . . . These courts have followed the lead of the SEC, which has consistently refused to adopt a rule that would 'require projections or other forward-looking information to be included in [IPO] registration statements.'" The decision also noted that plaintiffs failed to allege any facts with specificity suggesting that defendant Mark Zuckerberg engaged in any wrongdoing.

In addition, the court held that the named plaintiffs did not have standing to pursue their claims. The court accepted defendants' argument that investors — who admitted that they acquired shares during the Facebook IPO — are not permitted to bring derivative actions based on defendants' allegedly wrongful conduct that took place prior to the IPO. That is, these investors lack standing to pursue a derivative action given the theory of the Complaints. Next, the court concluded that plaintiffs' claims were not ripe, noting that plaintiffs' claim of damages is contingent on the outcome of the securities class action. As a result, plaintiffs cannot yet demonstrate that the alleged costs incurred by the Company resulted from an actual corporate wrong. The court provided plaintiffs with the customary opportunity to replead their claims within 20 days.

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[1] Willkie Farr & Gallagher LLP is serving as co-counsel with Kirkland & Ellis LLP for the Facebook defendants in the Facebook IPO-related litigation.

If you have any questions regarding this memorandum, please contact Richard D. Bernstein (202-303-1108, rbernstein@willkie.com), Todd G. Cosenza (212-728-8677, tcosenza@willkie.com), or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099 and has an office located at 1875 K Street, NW, Washington, DC 20006-1238. Our New York telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our Washington, DC telephone number is (202) 303-1000 and our facsimile number is (202) 303-2000. Our website is located at www.willkie.com.

February 13, 2013

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