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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation and DOES 1-50, inclusive,

Defendant.

Case No. CIV 533328

Assigned for all purposes to Hon. Marie S. Weiner, Dept. 2

NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE AND FOR ATTORNEY'S FEES AND COSTS PURSUANT TO C.C.P. § 425.16 (ANTI-SLAPP); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: January 9, 2018
Time: 9:00 a.m.
Dept: 2 (Complex Civil Litigation)
Judge: Honorable Marie S. Weiner

FILING DATE: April 10, 2015
TRIAL DATE: April 25, 2019

TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:

YOU ARE HEREBY NOTIFIED THAT on January 9, 2018 at 9:00 a.m., or as soon thereafter as the matter may be heard, in the Complex Civil Litigation Department of the above-titled court, located at 400 County Center, Redwood City, CA 94063, Defendant Facebook, Inc. ("Facebook") will and hereby does move the Court, pursuant to California Code of Civil Procedure section 425.16, to Strike (Anti-SLAPP Motion) Plaintiff Six4Three, LLC's ("Six4Three") Fourth Amended Complaint.

This Special Motion to Strike is made on the ground that the Fourth Amended Complaint arises from the exercise of the constitutional right of free speech in connection with an issue of public interest, and Six4Three cannot show a probability of success on its claims against Facebook.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities in Support thereof, the Declaration of Laura E. Miller, and the files and records in this action, all matters of which judicial notice can be taken, and any further evidence or argument that the Court may properly receive at or before the hearing.

Dated: November 21, 2017

DURIE TANGRI LLP

By: _____

LAURA E. MILLER

Attorneys for Defendant
Facebook, Inc.

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I. INTRODUCTION

This case is an attack on Facebook's free speech rights and should be stricken pursuant to the anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16. Facebook brings this motion because Plaintiff Six4Three, LLC ("Six4Three") is taking its fifth shot at an ever-expanding set of claims, and all of its claims turn on ***one*** decision, which is absolutely protected: Facebook's editorial decision to stop publishing certain user-generated content via its Platform to third-party app developers.

Six4Three was a two-man company that developed one app: Pikinis. Pikinis accessed and analyzed a user's friends' photos on Facebook to find pictures of women in bikinis. As reported in the Huffington Post, this "creepy" app was tested by frat boys. Declaration of Laura E. Miller in Support of Motion to Strike ("Miller Decl.") Ex. 1. Gizmodo reported "This Creepy iPhone App Finds Pictures of Your Facebook Friends in Bikinis." Miller Decl. Ex. 2. Unsurprisingly, Pikinis made little more than $400 in sales. But when Facebook decided to stop publishing users' friends' photos via its Platform, Six4Three sued. Now, Six4Three's single investor is bankrolling this lawsuit and seeking a windfall of $100M. Six4Three challenges Facebook's decision regarding what third-party content it publishes to developers, and seeks to force Facebook to publish all of its users' friends' photos to all app developers.

The fatal flaw is that Facebook has a right (and need) to make editorial decisions as to what third-party content is available through its Platform. The Facebook Platform is a free service available to millions of third-party app developers that lets them access certain Facebook user data and content via its APIs, when authorized by a user. Facebook made—and needs to continue to make—editorial decisions about what third-party content is available through its Platform to protect its users' experience. To that end, on April 30, 2015, one year after it gave app developers notice of the pending change, Facebook elected to not publish via its Platform APIs content that an app user's friends had shared with the user on Facebook. As a result, Pikinis could no longer access friends' photos via the Facebook Platform. (Pikinis is free to seek direct permission from its users' friends to access and analyze their photos).

Six4Three's claims, ***all of which fault Facebook for deciding to de-publish friends' photos and other third-party content***, fall squarely within the anti-SLAPP statute because each implicates Facebook's conduct in furtherance of its constitutional right to free speech on issues of public concern. Each of the eight causes of action challenges Facebook's editorial decisions about what third-party

content to allow or not allow to be disseminated to third-party app developers through its Platform, and Facebook's public statements regarding those decisions. As Six4Three alleges, due to Facebook's position as the largest social media company in the world, its determination of what user-generated content to publish via its Platform to third-party app developers "greatly implicates the public interest."

Six4Three cannot meet its burden to offer actual evidence demonstrating a probability of success on the merits of its claims. ***First***, Six4Three's claims are barred by the Communications Decency Act, 47 U.S.C. § 230 et seq. ("CDA"), as Six4Three seeks to hold Facebook, an interactive computer service, liable as the publisher or speaker of content provided by third-party users. ***Second***, Six4Three's breach of contract claim is based on a facially-implausible reading of a provision not even found in the operative contract. ***Third***, Six4Three's Section 17200 theory is untethered to any antitrust law, as required under controlling authority. ***Finally***, Six4Three's tort and fraud claims all fail on multiple additional grounds.

II. FACTUAL BACKGROUND

The Facebook Platform is a free service that Facebook makes available to third parties that register as Facebook developers. 4AC ¶¶ 1, 28. The Facebook Platform allows developers to, among other things, access certain third-party content that Facebook has decided to publish via its Platform, subject to user consent. *Id.* This user-created content includes photos, videos, events, and news stories. *Id.* ¶¶ 60–62. By using the Facebook Platform and accessing this content, developers can build mobile and web-based applications with enhanced user experiences. *Id.* App developers like Six4Three pay ***nothing*** for access to the user-created content that Facebook decides to publish through its Platform. *Id.*

Six4Three tried to get rich by building an app that utilized the user-created content published through the Facebook Platform. 4AC ¶¶ 1, 25. Six4Three set up a Facebook developer account in December 2012, agreed to Facebook's Statement of Rights and Responsibilities ("SRR"), and in return was given access to the content Facebook made available at the time (when authorized by a Facebook user), which included Facebook users' friends' photos and users' newsfeeds. *Id.* ¶¶ 87, 99–100. Using that content, Six4Three developed Pikinis.

Facebook announced on April 30, 2014 that it would update the Platform APIs on April 30, 2015 to de-publish certain third-party content, including content that an app user's friends had shared with the user, like a user's friends' photos or newsfeed. 4AC ¶ 118. Facebook implemented this change in April

2015 for all developers. *Id.* ¶ 152. Six4Three claims that Facebook's decision to de-publish this content through its Platform APIs caused Pikinis to stop working. *Id.* ¶ 141.

Six4Three filed and served its Fourth Amended Complaint on November 1, 2017. The same alleged conduct by Facebook forms the basis for each of Six4Three's eight causes of action: breach of contract, violation of Section 17200, concealment, intentional and negligent misrepresentation, intentional interference with contract, and intentional and negligent interference with prospective economic relations. For each claim, Six4Three alleges that it was harmed by Facebook's editorial decision to de-publish certain categories of user-created content, including friends' photos, newsfeed, and other content. As to each of the claims, Six4Three seeks an injunction requiring Facebook to re-publish this user-generated content via its Platform APIs. *Id.* ¶ 92.

III. ARGUMENT

A. This Motion Is Timely.

Under Section 425.16(f), an anti-SLAPP motion may be filed "within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." Service of an amended complaint resets the 60-day deadline to file. *See, e.g.*, *Lam v. Ngo*, 91 Cal. App. 4th 832, 835 (2001) ("Because the Legislature has specified that the anti-SLAPP suit law . . . is to be construed broadly, the provision in the law that a special motion to strike 'may be filed within 60 days of the complaint' includes amended as well as original complaints.") (internal citations omitted). In *Yu v. Signet Bank/Virginia*, the First District Appellate Court held that an anti-SLAPP motion was timely because it was filed within 60 days of service of the third amended complaint, even though the motion could have been filed earlier and "nothing that implicated the anti-SLAPP law" was added in the amendments. 103 Cal. App. 4th 298, 315 (2002); *see also Country Side Villas Homeowners Ass'n v. Ivie*, 193 Cal. App. 4th 1110, 1115 (2011) (holding that an anti-SLAPP motion on the first amended complaint was timely, even though it was filed after 60 days of service of the original complaint, and the amendments were unrelated to anti-SLAPP issues).

The only case to the contrary that Facebook is aware of, *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism*, 6 Cal. App. 5th 1207 (2016), follows dicta in a footnote in *Hewlett-Packard Co. v. Oracle Corp.*, 239 Cal. App. 4th 1174 (2015). As that case that is currently before the

California Supreme Court, it is no longer good authority. Cal. Rules of Court, rule 8.1115(e) ("Pending review and filing of the Supreme Court's opinion . . . a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only."). Furthermore, although the California Supreme Court has not yet directly addressed this issue, its prior decisions support an inference that it views the 60-day deadline as resetting after service of an amended complaint. In *DuPont Merck Pharm. Co. v. Superior Court*, the Supreme Court directed an appellate court to reconsider a summary denial of a petition for a writ of mandate seeking to compel the trial court to grant a special motion to strike. 78 Cal. App. 4th 562, 565 (2000), *as modified* (Jan. 25, 2000). The summary denial was based on the fact that the special motion was untimely because the 60 days began running from the original, as distinct from the amended, complaint. In other words, the Supreme Court, by asking the appellate court to reconsider, saw nothing wrong in considering an anti-SLAPP motion directed against an amended complaint, even though more than 60 days had elapsed since the service of the original complaint. *Lam*, 91 Cal. App. 4th at 842.

Six4Three filed the Fourth Amended Complaint on November 1, 2017. Facebook brings this motion on November 21, 2017, within the 60-day statutory time frame.[1]

B. Legal Standard for Special Motion to Strike.

California favors summary resolution of First Amendment cases because of the special burden they place on free speech. *See, e.g., Good Gov't Grp. v. Superior Court*, 22 Cal. 3d 672, 685 (1978). Section 425.16 provides "a mechanism through which complaints that arise from the exercise of free speech rights 'can be evaluated at an early stage in the litigation process' and resolved expeditiously." *Simmons v. Allstate Ins. Co.*, 92 Cal. App. 4th 1068, 1073 (2001) (citation omitted). The statute was amended in 1997 to mandate that it "shall be construed broadly" to achieve its ends. Cal. Civ. Proc. Code § 425.16(a); *Equilon Enterprises, LLC v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 60 (2002).

Section 425.16 involves a two-part, burden-shifting test. *Navellier v. Sletten*, 29 Cal. 4th 82, 88

[1] Even if the Court determines that Facebook's motion is untimely as to Six4Three's causes of action that were not amended with new allegations in the Fourth Amended Complaint, Facebook's motion remains timely as to Count III (concealment), Count VII (intentional interference with prospective economic advantage), and Count VIII (negligent interference with prospective economic advantage).

(2002). First, the defendant must show that the plaintiff's claims arise from the defendant's activities in furtherance of the constitutional right of free speech in connection with an issue of public interest, as defined by Section 425.16(a). These activities include "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." *Id.* at § 425.16(e)(4). "A defendant's burden on the first prong is not an onerous one. A defendant need only make a prima facie showing that plaintiff's claims arise from defendant's constitutionally protected free speech or petition rights." *Okorie v. Los Angeles Unified School District*, 14 Cal. App. 5th 574, 590 (2017), *review filed* (Oct. 2, 2017) (citation omitted).

To determine whether a defendant has met its burden, the court focuses on the "defendant's *activity* that gives rise to his or her asserted liability." *Navellier*, 29 Cal. 4th at 92. Section 425.16 "plainly applies to *any* cause of action that meets the statutory requirements." *Hupp v. Freedom Commc'ns, Inc.*, 221 Cal. App. 4th 398, 402 (2013) (finding breach of contract claim fell within the scope of Section 425.16) (citation omitted). "In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." *Kronemyer v. Internet Movie Data Base, Inc.*, 150 Cal. App. 4th 941, 946 (2007) (citation omitted); *see also Ingels v. Westwood One Broad. Servs., Inc.*, 129 Cal. App. 4th 1050, 1064 (2005) ("a court must consider the actual objective of the suit and grant the motion if the true goal is to interfere with *and burden* the defendant's exercise of his free speech and petition rights") (citation omitted).

If the defendant meets its prima facie burden of showing that the claim is within the scope of Section 425.16, then the burden shifts to the plaintiff to show a probability of success on the merits of its claims. The plaintiff must "demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Navellier*, 29 Cal. 4th at 88–89 (internal quotations and citation omitted). If the plaintiff cannot show a probability of prevailing on a claim, the claim is stricken. *Id.* at 89.

C. Six4Three's Claims Are Subject to a Special Motion to Strike.

All of Six4Three's claims arise from Facebook's exercise of its speech rights in connection with issues of public interest: Facebook's editorial decision to de-publish to certain categories of content created by its billions of users that it previously published through its Platform, and public statements

regarding those decisions. Six4Three's claims must be stricken pursuant to Section 425.16(e)(4).

1. Six4Three's Claims Arise From Facebook's Speech and Conduct in Furtherance of the Exercise of Its First Amendment Rights.[2]

Facebook's decision to de-publish certain categories of content created by its users was an exercise of editorial discretion taken in furtherance of its constitutional right to free speech, and each of Six4Three's claims arises from that exercise of editorial discretion. Lawsuits, such as this one, that target a platform operator's editorial discretion in the maintenance of its forum are indisputably "based on conduct in furtherance of free speech rights [on matters of public concern] and must withstand scrutiny under California's anti-SLAPP statute." *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 424–25 (9th Cir. 2014); *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 438 (S.D.N.Y. 2014) (holding decisions by search engines regarding which results to publish protected by First Amendment). The decision to de-publish content is afforded the exact same constitutional protection as the decision to publish it in the first place. *See, e.g.*, *Kronemyer*, 150 Cal. App. 4th at 947 ("It is, of course, well established that the constitutional right of free speech includes the right not to speak.") (citations omitted). And the method by which Facebook publishes or de-publishes content—either through its APIs or on its website—cannot alter the conclusion that it is doing so in furtherance of the exercise of its First Amendment rights.

2. Facebook's Decision to De-Publish Content Is an Issue of Public Interest.

Facebook's editorial decision to limit third-party developers' access to Facebook's user-created content is a matter of public interest. Although the anti-SLAPP statute "does not define a 'public issue' or an 'issue of public interest[,]' [c]ourts have considered the statute's explicit provision that it 'shall be construed broadly' and found that 'an issue of public interest . . . *is any issue in which the public is interested.*'" *Maloney v. T3Media, Inc.*, 94 F. Supp. 3d 1128, 1134 (C.D. Cal. 2015), *aff'd*, 853 F.3d 1004 (9th Cir. 2017) (quoting *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042 (2008)); *see*

[2] For the reasons set forth here, Six4Three's claims are also barred by the First Amendment because Facebook's editorial discretion regarding what user-created content to publish is constitutionally protected free speech. The remedy sought by Six4Three—an injunction mandating that Facebook publish certain content—would be compelled speech, in violation of Facebook's First Amendment rights.

also Rivero v. Am. Fed'n of State, Cty., & Mun. Employees, AFL-CIO, 105 Cal. App. 4th 913, 924 (2003) (public issue includes "conduct that could directly affect a large number of people beyond the direct participants").

Six4Three does not and cannot dispute this point. Six4Three itself alleges that the Facebook Platform is utilized by hundreds of thousands of third-party software developers to improve the functionality and user experience of their mobile and web-based applications. Six4Three expressly alleges that Facebook's "decision to close access to the Graph API Data" affected "tens of thousands of companies" that had built their businesses on the Facebook Platform. 4AC ¶ 231. These "tens of thousands" of developers that "relied on Facebook Platform for organic growth" were allegedly "h[e]ld hostage" by Facebook's editorial decisions regarding which categories of user-generated content to provide through the Platform. *Id.* ¶ 279. Thus, according to Six4Three's own theory, Facebook's decisions regarding how it publishes the content provided by its users is of concern to the public.

D. Six4Three Cannot Establish a Likelihood of Success on Its Claims.

Because Six4Three's claims fall within the scope of Section 425.16, the burden shifts to Six4Three to show a probability of success on the merits. *Navellier*, 29 Cal. 4th at 88–89.

1. The Communications Decency Act Bars All of Six4Three's Claims.

The CDA immunizes Facebook from liability. Section 230 of the CDA establishes a "broad statutory immunity," *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321–22 (11th Cir. 2006), which "protects from liability any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1103 (9th Cir. 2009), *as amended* (Sept. 28, 2009) (internal quotations and citation omitted). This protection includes decisions to withdraw content: "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, ***withdraw***, postpone, or alter content—are barred.'" *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (emphasis added).

Under CDA Section 230, online platforms are protected from liability related to the selection and removal of content created by third parties. Section 230 states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). An "information content provider" is

"any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(f)(3). Section 230 creates broad immunity from an array of claims that might arise from content created by a platform's users. *See id.* § 230(e)(3) ("***[n]o cause of action may be brought and no liability may be imposed*** under any State or local law that is inconsistent with this section") (emphasis added).

By its plain language, Section 230(c) "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service . . ." *Zeran*, 129 F.3d at 330. Under Section 230(c)(1), a defendant is entitled to immunity if (1) the defendant provides an "interactive computer service," (2) plaintiff's claim treats the defendant as the "publisher" of the content at issue, and (3) the content was "provided by another information content provider." 47 U.S.C. § 230(c)(1). Each prong is satisfied.

a. Facebook Is an Interactive Computer Service Provider.

The first prong of the CDA-immunity test is easily met: Facebook is a "provider" of an "interactive computer service." 47 U.S.C. § 230(c)(1). The CDA broadly defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." *Id.* § 230(f)(2). Every court to consider whether Facebook meets this definition has rightly concluded it does, including this Court. *See, e.g.*, *Cross v. Facebook*, 14 Cal. App. 5th 190 (2017), *review denied* (Oct. 25, 2017); *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1066 (N.D. Cal. 2016), *aff'd*, No. 16-15610, 2017 WL 2445063 (9th Cir. June 6, 2017) (holding that "immunity bestowed on interactive computers service providers" applies to Facebook); *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1093 (N.D. Cal. 2015) ("*Sikhs*"), *aff'd sub nom. Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017); *Klayman v. Zuckerberg*, 910 F. Supp. 2d 314, 318 (D.D.C. 2012), *aff'd*, 753 F.3d 1354 (D.C. Cir. 2014) (quoting *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 801 (N.D. Cal. 2011)); *Young v. Facebook, Inc.*, No. 5:10-CV-03579-JF/PVT, 2010 WL 4269304, at *5 (N.D. Cal. Oct. 25, 2010) (same); *Finkel v. Facebook, Inc.*, No. 102578-09, 2009 WL 3240365 (N.Y. Sup. Sept. 15, 2009).

b. Six4Three's Claims Seek to Hold Facebook Liable for the Exercise of a Publisher's Traditional Editorial Functions.

The second prong of the CDA-immunity test also is met: Facebook's decisions to de-publish certain categories of user-generated content previously published through its Platform are unequivocally a publisher's decision. Deciding what content to make available is a traditional publisher function. "[R]emoving content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher." *Sikhs*, 144 F. Supp. 3d at 1095 (quoting *Barnes*, 570 F.3d at 1103); *id.* at 1094 ("publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content" (quoting *Barnes*, 570 F.3d at 1102)); *see also Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) ("the very essence of publishing is making the decision whether to print or retract a given piece of content"). Section 230(c)(1) bars any and all claims "relating to the monitoring, screening, and deletion of content from [a covered service's] network—actions quintessentially related to a publisher's role." *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2002); *see also Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) (Section 230 "forbid[s] the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.").

In determining whether a theory of liability treats a defendant as a publisher, "what matters is not the name of the cause of action," but rather "whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided to another."[3] *Barnes*, 570 F.3d at 1101. Because Six4Three's claims rely on allegations that Facebook inappropriately de-published certain categories of user-generated content, it impermissibly seeks to impose liability on Facebook, as a "publisher," for exercising its publisher functions of limiting the dissemination of user-created content. Facebook's decision—"whether to print ***or retract*** a given piece of content"—goes to "the very essence of publishing." *Klayman*, 753 F.3d at 1359 (emphasis added); *see also Sikhs*, 144 F. Supp. 3d at 1095–

[3] Courts have extended CDA immunity to all of Six4Three's claims. *See, e.g., Cross*, 14 Cal. App. 5th at 206 (finding CDA immunity as to claims for breach of contract, negligent misrepresentation, and negligent interference); *Caraccioli*, 167 F. Supp. 3d at 1066 (finding CDA immunity as to a Section 17200 claim); *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1122–23 (E.D. Cal. 2010) (finding CDA immunity for interference with contract and prospective economic relations and fraud).

96. Courts have invoked Section 230(c)(1) to reject claims against Facebook for removing content from its platform, *Sikhs*, 144 F. Supp. 3d at 1094–96, and against YouTube for taking down the plaintiffs' videos, *Lancaster v. Alphabet Inc.*, No. 15-CV-05299-HSG, 2016 WL 3648608, at *2–3 (N.D. Cal. July 8, 2016). That Facebook's editorial decision not to publish certain user content was implemented through its APIs, rather than removing the content from its website, is irrelevant. The situation is no different than a newspaper publisher choosing to include different content in its paper version as compared to its online version. Here, Facebook is exercising the core publishing function of deciding to remove content, and the mechanism by which Facebook chooses to implement that decision has no bearing on the CDA analysis.

Finally, Six4Three's baseless allegations as to Facebook's intent are irrelevant. Even if there were any doubt about the legitimacy of Facebook's concerns about how developers like Six4Three were utilizing the content Facebook published at the time (which there should not be, as numerous websites described Pikinis as "creepy", Miller Decl. Exs. 1 & 2), CDA Section 230(c)(1) has no good faith requirement and applies regardless of defendants' alleged motive. *See, e.g.*, *Sikhs*, 144 F. Supp. 3d at 1095 (finding discrimination claim precluded even where allegations were that conduct "was motivated solely by unlawful discrimination").

c. The Content Was Provided by Someone Other Than Facebook.

The third prong of the CDA-immunity test is met: the content that Six4Three claims Facebook wrongfully de-published was created and posted by Facebook users. *See, e.g.*, 4AC ¶ 190 ("By 'content' we mean anything . . . users post on Facebook."). Thus, Facebook's users are the "information content providers" of the content at issue. *See, e.g.*, *Sikhs*, 144 F. Supp. 3d at 1093–94 (finding that the creator of a Facebook page that Facebook allegedly blocked was the "information content provider" for purposes of CDA immunity) (citation omitted). All three prongs of the CDA-immunity test are met, and it bars all of Six4Three's claims.

2. Six4Three Cannot Show a Likelihood of Success on Its Contract Claim.

California adheres to "the objective theory of contracts," under which it is the objective intent, as evidenced by the words of the contract, that controls interpretation. *See, e.g.*, *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, 109 Cal. App. 4th 944, 956 (2003)

(citation omitted); *see also* Cal. Civ. Code § 1639 ("When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible[.]"). "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." Cal. Civ. Code § 1643. Six4Three cannot show a likelihood of success on its breach of contract claim for at least two reasons.

First, Six4Three's breach of contract claim is based on its allegation that Facebook breached the provision of the December 2012 SRR in which Facebook agreed to give Six4Three "all rights necessary to use the code, APIs, data, and tools you receive from us." 4AC ¶ 190. The fundamental problem is that the operative SRR does not include this provision. Miller Decl. Ex. 3 at Exhibit B. That contract does not include and is not alleged to include the provision that Six4Three relies on for its breach claim. *Id.* To be sure, earlier versions of the SRR include the provision that Facebook will give developers "all rights necessary to use the code, APIs, data, and tools you receive from us." *See, e.g.*, *id.* at Exhibit A § 9.2.8. But the contract was amended to remove that provision prior to the alleged breach in April 2015. *Id.* at Exhibit B. And Six4Three accepted the amendments. *See, e.g.*, *id.* at Exhibit A § 14.3. This is fatal to Six4Three's breach of contract claim.

Second, even if the Court were to find that the earlier, non-operative version of the SRR controls Six4Three's claim, Six4Three's claim is based on a facially-invalid interpretation of the relevant clause in the earlier SRR. The plain language of the clause makes clear that Facebook agreed to provide the legal rights necessary for developers to ***use*** the content Facebook publishes to developers, but only to the extent a developer ***receives*** such content from Facebook. 4AC ¶ 190. When Facebook publishes certain types of content through the Facebook Platform, it ensures that developers have the necessary rights to use that content. Facebook never agreed to provide ***all*** of its "code, APIs, data, and tools" in perpetuity. Any such interpretation would be inconsistent with the clear and explicit language of the SRR and the objective intent of the parties.

In addition to being contrary to the plain language of the provision, Six4Three's implicit interpretation is also at odds with how the SRR uses the phrase "all rights necessary" in other provisions of the SRR. For example, in a mirrored provision, Six4Three agreed to provide Facebook with "all rights necessary to enable [Pikinis] to work with Facebook, including the right to incorporate content and

information you provide to us into streams, timelines, and user action stories." Miller Ex. 3 at Exhibit A § 9.15. Just as Facebook did not agree always to provide all of its data to Six4Three, Six4Three similarly did not agree to provide all of its "content and information" to Facebook forever. Rather, both parties agreed to give the other the legal rights necessary to use the information actually provided to the other.

Six4Three's interpretation, that Facebook was obligated to continue to publish this content via its Platform to Six4Three and hundreds of thousands of other developers for free forever, is inconsistent with the objective intent evidenced by the words of the contract, is objectively unreasonable, and would render the contract indefinite and incapable of being carried into effect. *See* Cal. Civ. Code § 1643.

3. Six4Three Cannot Show a Likelihood of Success on Its Section 17200 Claim.

Unlawful Prong. Six4Three does not and cannot state a claim under the "unlawful" prong of Section 17200. "By proscribing 'any unlawful' business practice, section 17200 'borrows' violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Belton v. Comcast Cable Holdings, LLC*, 151 Cal. App. 4th 1224, 1233 (2007) (citation omitted). Six4Three does not allege that Facebook violated any other law; it merely asserts that Facebook's alleged conduct was "unlawful." 4AC ¶ 183. Because Six4Three has failed to identify any specific law allegedly violated by Facebook, it has failed to state a claim under the unlawful prong. *See, e.g., Khoury v. Maly's of California, Inc.*, 14 Cal. App. 4th 612, 619 (1993) (sustaining demurrer where "complaint identifies no particular section of the statutory scheme which was violated and fails to describe with any reasonable particularity the facts supporting violation").

Unfair Prong. Six4Three's complaint that Facebook's alleged conduct was "unfair" is insufficient to allege a claim under the Unfair Competition Law. In a case involving alleged competitors and competition, "the word 'unfair' . . . means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999).

For over two years, Six4Three's Section 17200 claim was based on a theory of unilateral monopoly. According to Six4Three, Facebook engaged in a scheme to restrict access to its user data so that it could "monopolize[] for itself the ability to create applications capable of searching or sorting

photos." Miller Decl. Ex. 4 (SAC) ¶ 116. But to avoid federal jurisdiction, Six4Three unequivocally disavowed its monopoly antitrust theory earlier this year. So now Six4Three advances its Section 17200 claim by transforming it into one of an allegedly illegal "oligopoly." 4AC ¶¶ 4, 19, 85, 165, 168, 177.

But Six4Three does not and cannot allege facts to support its claim. At best, it alleges that Facebook entered into agreements with some third-party developers that gave those developers access to certain categories of user-created content, but did not enter into such an agreement with Six4Three. *See, e.g., id.* ¶ 168. Even if this were true, a refusal to deal is not a cognizable antitrust violation under California law. *See, e.g., Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1478 (9th Cir. 1986), *opinion modified on denial of reh'g*, 810 F.2d 1517 (9th Cir. 1987) ("A manufacturer may choose those with whom it wishes to deal and unilaterally may refuse to deal with a distributor or customer for business reasons without running afoul of the antitrust laws.") (citation omitted).

To the extent that Six4Three alleges that Facebook entered into prohibited tying arrangements with third parties—a claim not explicitly made in Six4Three's complaint—that also fails. "A tying arrangement under antitrust laws exists when a party agrees to sell one product (the tying product) on the condition that the buyer also purchases a different product (the tied product), thereby curbing competition in the sale of the tied product." *Belton*, 151 Cal. App. 4th at 1234 (quoting *Freeman v. San Diego Ass'n of Realtors*, 77 Cal. App. 4th 171, 183–94 (1999)). The concern with unlawful tying arrangements is harm to competition in the alleged ***tied*** product market, not the alleged tying product market.

The closest that Six4Three comes to alleging a tying arrangement prohibited by the Cartwright Act is this conclusory allegation:

> Facebook and certain of its executives [] combined and conspired with other large companies to oligopolize specific vertical markets by providing unequal access to the Social Graph in exchange for these companies providing unrelated advertising payments or other in-kind consideration to the extreme detriment of all other market participants.

4AC ¶ 168. Even if Facebook had conditioned access to its user-created content on "unrelated advertising" payments, this does not state an antitrust tying claim. Here, the "tying product" is allegedly the unequal access to the user-generated content, and the "tied product" is "unrelated advertising payments or other in-kind consideration" that other companies, but not Six4Three, allegedly paid Facebook to get "unequal" access to user-created content. But Six4Three does not and cannot claim that

Facebook's alleged conduct harmed competition in the alleged tied product market, which is the "advertising" market. *See Belton*, 151 Cal. App. 4th at 1240 ("In the absence of some restraint upon competition, the mere practice of packaging services together is not inherently anticompetitive or harmful to consumers.") (citations omitted). This is fatal to Six4Three's claim.

Finally, Six4Three has not pled that the alleged conduct "violates the policy or spirit" of any antitrust law. "[A]ny finding of unfairness to competitors under section 17200 [must] be tethered to some ***legislatively declared policy or proof of some actual or threatened impact on competition***." *Cel-Tech*, 20 Cal. 4th at 186–87 (emphasis added). But Six4Three has not identified any "legislatively declared policy" Facebook violated, nor has it alleged any actual or threatened impact on competition.[4]

4. Six4Three Cannot Show a Likelihood of Success on Its Fraud Claims.

Six4Three cannot show a likelihood of success on its negligent and intentional misrepresentation claims, because its two principals did not view or receive the alleged misrepresentations identified in the Fourth Amended Complaint, let alone rely upon them.[5] Six4Three claims that the alleged misrepresentations that supposedly induced it to register as a developer in 2012 include (1) statements made by Facebook at the launch of the Facebook Platform in 2007, *see, e.g.*, 4AC ¶¶ 29–42, and (2) statements made by Facebook at the launch of Graph API in 2010, *see, e.g.*, *id.* ¶¶ 64–72.

Six4Three's two principals confirmed in sworn deposition testimony that they did not review the statements at issue before the anticipation of litigation. Six4Three's founder and managing member, Ted Kramer, testified that he was not aware of any presentations given during Facebook's developer conferences before January 2015—well after Six4Three contemplated bringing this lawsuit—and did not recall reviewing any documents on the Facebook developers website before then. Miller Decl. Ex. 5 at 232:23–233:9, 234:3–25. Tim Gildea, Six4Three's other member, testified that, with the possible exception of parts of Mr. Zuckerberg's 2014 F8 speech, he had not seen any presentations. Miller Decl.

[4] Six4Three does not allege the fraud prong in its Section 17200 claim. A business practice is "fraudulent" within the meaning of Section 17200 if "members of the public are likely to be deceived." *In re Ins. Installment Fee Cases*, 211 Cal. App. 4th 1395, 1416 (2012). Six4Three makes no such allegation in the Fourth Amended Complaint.

[5] In addition, Six4Three cannot show a likelihood of success on its concealment claims for the reasons set forth in Facebook's Demurrer to Six4Three's Fourth Amended Complaint, incorporated herein.

Ex. 6 at 116:2–10. Six4Three has not produced any documents or evidence showing that Six4Three was aware of these public statements. Six4Three has confirmed, under oath, that neither of its principals ever saw the alleged misrepresentations, so Six4Three could not have relied upon them.

5. Six4Three Cannot Show a Likelihood of Success on Its Interference Claims.[6]

For an intentional interference with contract claim, the plaintiff must prove that the defendant had knowledge of the contract and took intentional steps designed to induce a breach or disrupt the contractual relationship. *Quelimane Co. v. Steward Title Guar. Co.*, 19 Cal. 4th 26, 55 (1998), *as modified* (Sept. 23, 1998). Six4Three claims that Facebook interfered with Six4Three's license agreements with its users by de-publishing certain categories of user-generated content that the Pikinis app used to function, including friends' photos. 4AC ¶¶ 267–271. The problem is that Facebook announced this decision on April 30, 2014, well before Pikinis was even available for sale on the iOS App Store. *See* Miller Decl. Exs. 7 & 8. Facebook could not have known of Six4Three's ***future*** agreements when it announced its policy change. And Six4Three was in fact aware of the changes to the Platform as early as May 2014, but chose to go ahead and enter into agreements with its users in the summer of 2014 anyway. *See* Miller Decl. Ex. 9. Six4Three cannot prevail on its intentional interference with contract claim in the face of this undisputed evidence.

IV. FACEBOOK SHOULD BE AWARDED ITS ATTORNEYS' FEES AND COSTS.

Facebook requests an order awarding its reasonable attorneys' fees and costs. "[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." Civ. Proc. Code § 425.16(c). The California Supreme Court has interpreted this to mean that "any SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees." *Ketchum v. Moses*, 24 Cal. 4th 1122, 1131 (2001).

V. CONCLUSION

For the foregoing reasons, Facebook requests that Six4Three's Fourth Amended Complaint be dismissed with prejudice, and that Facebook be awarded its attorney's fees and costs.

[6] Six4Three also cannot show a likelihood of success on its intentional and negligent interference with prospective economic relations claims for the reasons set forth in Facebook's Demurrer to Six4Three's Fourth Amended Complaint, incorporated herein.

Dated: November 21, 2017

DURIE TANGRI LLP

By: 

LAURA E. MILLER

Attorneys for Defendant
Facebook, Inc.

PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On November 21, 2017, I served the following documents in the manner described below:

NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE AND FOR ATTORNEY'S FEES AND COSTS PURSUANT TO C.C.P. § 425.16 (ANTI-SLAPP); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

[X] BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from jcotton@durietangri.com to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 21, 2017, at San Francisco, California.

Janelle Cotton