

No. 25-

IN THE
Supreme Court of the United States

SIX4THREE, LLC,

Petitioner,

v.

FACEBOOK, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case arises from a social media platform’s use of Section 230 of the Communications Decency Act to immunize itself from claims arising from the platform’s own actions, and from harms caused by the platform’s own product design choices and related speech.

In 2007, Facebook created a platform for third-party developers, including a set of application programming interfaces (APIs) allowing developers to access platform-generated content such as friends lists and “friends of friends” lists created by Facebook. By 2012, Facebook had turned its developer platform into a fraudulent scheme, telling developers to build their apps around Facebook’s APIs while secretly planning to privatize them for chosen developers in exchange for ad purchases, data deals, and competitive concessions.

In 2015, Petitioner Six4Three, a developer whose business was destroyed by Facebook’s API scheme, sued in California state court. The courts below—faced with splits across and within federal judicial circuits and a grab bag of contradictory case law from California appellate courts—held that Facebook’s own speech and product design decisions were immunized from liability under Section 230.

The question presented is:

Whether Section 230 of the Communications Decency Act immunizes an online platform for its own conduct, speech, and product design choices?

PARTIES TO THE PROCEEDING

Petitioner is the plaintiff-appellant below, Six4Three, LLC.

Respondents are the defendants-appellees below, Facebook, Inc. (now known as Meta Platforms, Inc.), Mark Zuckerberg, Christopher Cox, Javier Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar.

CORPORATE DISCLOSURE STATEMENT

Petitioner Six4Three, LLC, has no parent corporation, and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

Six4Three, LLC v. Facebook, Inc., et al., No. S290437, Supreme Court of California. Judgment entered June 11, 2025.

Six4Three, LLC v. Facebook, Inc., et al., Nos. A166007/A167416, Court of Appeal for the State of California, First Appellate District, Division Four. Judgment entered Mar. 12, 2025.

Six4Three, LLC v. Facebook, Inc., et al., No. CIV533328, Superior Court of the State of California, County of San Mateo. Judgment entered June 20, 2022.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a writ of certiorari to review the orders of the California Court of Appeal and California Supreme Court.

OPINIONS BELOW

The California Supreme Court's order denying the petition for review is unreported. Pet. App. 1a. The California Court of Appeal's opinion is reported at 109 Cal.App.5th 635, 330 Cal.Rptr.3d 661. Pet. App. 2a-39a. The California Superior Court's opinions are unreported. Pet. App. 40a-79a (Facebook anti-SLAPP motion); Pet. App. 80a-117a (individual defendants' anti-SLAPP motion).

JURISDICTION

The California Court of Appeal entered its order on March 12, 2025. The California Supreme Court denied Petitioner's petition for review on June 11, 2025. This Court has jurisdiction under 28 U.S.C. § 1257 to review the final judgment rendered by the California Supreme Court.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth in the appendix. Pet. App. 118a-124a.

INTRODUCTION

The proper scope and application of Section 230 of the Communications Decency Act has bedeviled courts at every level—in both the federal and State systems—for more than a decade. The past two years have seen this uncertainty metastasize, leading to unambiguous circuit splits and polarized decisions in State courts on a single, central question: does Section 230 immunize an online platform for its *own* conduct, speech, and product design choices?

Courts across the country split on the answer to this question, and as a result, whether (for example) an online platform is immune under Section 230 when its own AI chatbot leads a user to self-harm¹ could depend on where the platform is sued. In Pennsylvania (federal court), the answer seems to be “no.” See *Anderson v. TikTok, Inc.*, 116 F.4th 180 (3d Cir. 2024). In California (federal court), the answer may be “yes,” see *Doe 1 v. Twitter, Inc.*, __ F.4th __, No. 24-177, 2025 WL 2178534, at *2 (9th Cir. Aug. 1, 2025), but based on a cause of action-by-cause of action analysis. And in California state court, the answer seems to be “definitely yes,” based on a *sui generis* test of whether claims somehow touch on or relate to third-party content, even indirectly. See *Murphy v. Twitter, Inc.*, 60 Cal.App.5th 12, 26, 274

¹ See Kashmir Hill, *A Teen Was Suicidal. Chat GPT Was the Friend He Confided In*, N.Y. Times, Aug. 26, 2025, <https://perma.cc/PX6E-VVAT>.

Cal.Rptr.3d 360, 370 (2021). And, when a case is transferred across the country due to MDL formation—as the *Anderson* case recently was, from E.D. Pa. to N.D. Cal.—published federal appellate decisions on Section 230 can be rendered a nullity. See *In re Social Media Adolescent Addiction/Personal Injury Prods. Liab. Litig.*, MDL No. 3047 (J.P.M.L. June 2, 2025) (transfer order).²

This case presents a perfect vehicle to resolve this pressing question—against a serial defendant about whom Justice Thomas has explained: “It is hard to see why the protection §230(c)(1) grants publishers against being held strictly liable for third parties’ content should protect Facebook from liability for its *own* acts and omissions.” *Doe v. Facebook, Inc.*, 142 S.Ct. 1087, 1088 (2022) (statement of Thomas, J., respecting denial of certiorari) (internal quotation marks omitted).

Facebook—the company now called Meta Platforms—operates a number of large, heavily-trafficked websites, including its eponymous social network. In 2007, Facebook decided to increase traffic and user attention by creating a third-party developer

² As explained in the body of this petition, the circuit split is actually deeper—implicating varying tests and results in the Second, Fourth, and Fifth Circuits as well. See, *e.g.*, *United States v. EZ Lynk, SEZC*, __ F.4th __, No. 24-2386-cv, 2025 WL 2405273, at *2 (2d Cir. Aug. 20, 2025) (applying direct and material contribution test); *M.P. ex rel. Pinckney v. Meta Platforms Inc.*, 127 F.4th 516, 525 (4th Cir. 2025) (applying but-for test); *A.B. v. Salesforce, Inc.*, 123 F.4th 788, 795 (5th Cir. 2024) (rejecting but-for test).

platform, through which independent developers could build apps for Facebook, and Facebook would provide technological interconnections known as “APIs” (application programming interfaces) to integrate these apps with Facebook’s social media platform. For example, Facebook built APIs that provided apps with lists of “friends” and “friends of friends,” and invited developers to build their apps around these APIs—and the platform-generated content such as friends-of-friends lists that they provided.

At the same time that Facebook was luring developers onto its platform with promises—promises made by Mark Zuckerberg and other senior executives—about the value building apps around Facebook would provide, the company was secretly planning to privatize API access and to cut deals with chosen developers for advertising spend, data deals, and competitive concessions. Internal emails and messages reveal that for years, Facebook lied to developers about its platform APIs, and knew that developers would get “f***ed” by its scheme.

However, when Facebook was sued by Petitioner Six4Three (an app developer whose company was destroyed by Facebook’s platform scheme) in 2015 after the company abruptly privatized API access, Facebook asserted it was immune under Section 230 for its own fraud, and for the first-party product design decisions underlying it. This was a surprising claim, given that Section 230(c)(1) states only 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.” In fact, Facebook simultaneously asserted that the claims against it by Petitioner Six4Three—a third-party developer whose company was destroyed by Facebook’s platform scheme—arose from Facebook’s own protected speech (invoking California’s anti-SLAPP statute), yet were immunized under Section 230(c)(1).

The courts below faced a wall of confusing and contradictory precedent on whether Section 230 immunizes a social media platform’s own speech, design choices, and platform-generated content. The Second, Third, Fourth, Fifth, and Ninth Circuits—and the California state courts—each have their own bespoke test for evaluating Section 230 liability, and these tests have led to diametrically opposed decisions on this very issue *in just the past year*. Compare *Anderson*, 116 F.4th at 184 (TikTok not immune for algorithmically recommending the “Blackout Challenge”), with *Doe 1*, 2025 WL 2178534 at *4 (Twitter immune for algorithmically recommending child pornography); see also *EZ Lynk*, 2025 WL 2405273 at *2; *M.P. ex rel. Pinckney*, 127 F.4th at 525; *A.B. v. Salesforce, Inc.*, 123 F.4th at 795 (applying three different tests to evaluate this same issue). In Petitioner’s case, the court below held that Facebook was completely immune under Section 230 for its own

fraudulent speech and conduct, and for the harms caused by its own product design choices.

It is time for the Court to provide needed clarity to the scope of Section 230 immunity for an online platform's own speech, conduct, and design choices. Absent this Court's intervention, the legal constraints on some of the world's most powerful—and often pernicious—actors will depend on where a claim is filed, and the prevailing standards will defy statutory text and intent.

This case is an ideal vehicle to consider the question presented. The procedural posture is clean; the Section 230 issue was (and is) directly and clearly presented; and the disposition of Petitioner's appeal turns upon the answer to the question presented.

The Court should grant certiorari.

STATEMENT

A. Section 230 of the Communications Decency Act

1. Section 230(c)(1) 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). The provision appears under the heading “Protection for ‘Good Samaritan’ blocking and screening of offensive material” and includes two express subsections barring civil liability where a provider of an interactive computer service restricts

access to “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” content, or take actions that enable others to restrict such material. *Id.* §230(c)(2)(A)-(B).

Section 230(e) makes clear that Section 230 preempts state law, stating that “[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.” The provision thus preempts any state-law claims that are inconsistent with the mandate in Section 230(c)(1) that an interactive computer service provider shall not be treated as a publisher or speaker of third-party content.

2. Section 230(c)(1) only applies to “information provided by *another* information content provider,” *Id.* §230(c)(1) (emphasis added). Section 230(f)(3) defines “information content provider” as “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.” Together, subsections (c)(1) and (f)(3) prevent the application of Section 230 immunity if the information at issue belongs to the interactive computer service itself, rather than to a third party.

3. Section 230 of the CDA was passed following a state court case, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (unpublished), which held the Prodigy online service liable for voluntarily deleting messages from its message boards “on the basis of offensiveness and

‘bad taste.’” *Id.* at *4. The court reasoned that by self-policing its message board, Prodigy had acted akin to a newspaper publisher, which made the service liable for content on its message boards that defamed third parties. *Ibid.*

Section 230 was enacted to overrule *Stratton Oakmont* and was designed to prevent online services and early Internet service providers from being held liable for restricting third-party content posted by third parties. See H.R. Rep. No. 104-458 (1996) (Conf. Rep.), as reprinted in 1996 U.S.C.C.A.N. 10 (“[S]ection [230] provides ‘Good Samaritan’ protections from civil liability for providers . . . of an interactive computer service for actions to restrict . . . access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont* [sic] v. *Prodigy* and any other similar decisions which have treated such providers . . . as publishers or speakers of content that is not their own because they have restricted access to objectionable material.”).

4. The statutory provision was immediately broadened by early judicial interpretations of the statute. Most notably, in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), the Fourth Circuit broadened the statute’s effect, holding that Section 230(c)(1) went beyond merely overruling *Stratton Oakmont*, but immunized an interactive computer service provider’s “exercise of a publisher’s traditional editorial functions—such as deciding whether to

publish, withdraw, postpone or alter content.” *Id.* at 330. Moreover, *Zeran* extended Section 230(c) to preclude not only publisher liability but also distributor liability. *Id.* at 331-32.

The *Zeran* “opinion was cut-and-paste copied by courts across the country in the first few years after the statute arrived.” *Anderson v. TikTok, Inc.*, 116 F.4th 180, 190 (3d Cir. 2024) (Matey, J., concurring in the judgment in part and dissenting in part). As Judge Matey recently observed, “Today, § 230 rides in to rescue corporations from virtually any claim loosely related to content posted by a third party, no matter the cause of action and whatever the provider’s actions.” *Id.* at 191.

B. Factual Background

1. By the late 2000s, Facebook had become the world’s largest social network. Facebook was (and still is) built upon a “social graph,” a construct that maps the complex connections between and among Facebook users. In 2007, in order to increase Facebook’s value and the amount of time users spent interacting with it, Facebook CEO Mark Zuckerberg announced that the company would be launching a platform for third-party developers. That is, Facebook would provide code, technological interconnections, documentation, and support for outside developers to build apps designed for use with—and technologically integrated with—Facebook.

At the core of this new developer platform were a set of application programming interfaces (APIs): programmatic access points through which a third-party application could integrate with Facebook and traverse its social graph, for example by accessing a list of a user's friends or "friends-of-friends." Facebook's Graph APIs allowed an app built for Facebook to traverse the interconnected graph of users and to access content exchanged through the graph, including pictures, messages, and "likes."

These APIs were code created by Facebook, which allowed third-party applications to access data created by Facebook, including friends lists and friends-of-friends lists, as well as information created by Facebook users (*e.g.*, photos and status updates), programmatically arranged and contextualized by Facebook's own engineers and data scientists. Facebook is solely responsible for the creation, maintenance, design, deployment, and scope of its APIs—a fact that the company itself has repeatedly explained to users, developers, and courts, including the courts below. Facebook asserts copyright over its APIs, implying the company considers their design to implicate expressive choices attributable to the company, even as they select, arrange, and ultimately deliver content that is in part created by others.

Developers clamored to build for Facebook's new platform. Tens of thousands of developers built apps (and thereby businesses) based on Facebook's Graph APIs. Facebook, for its part, encouraged development

for the Graph APIs at the highest levels. Facebook’s senior executives, including Zuckerberg himself, touted the functionality of the Graph APIs and encouraged developers to build for Facebook’s Platform.

2. Petitioner Six4Three was one of these developers, creating an early image-recognition app named “Pikinis,” which used pattern recognition technology to identify swimsuits. The central functionality required for the app was the ability to traverse a user’s direct network of friends (or friends-of-friends) and to search within images from these subnetworks.

3. By 2012, as Facebook and its senior executives were still publicly evangelizing the developer platform, Facebook internally worried about competition from the third-party apps the company had invited onto its platform. At the same time, Facebook sought to increase flagging mobile advertising revenue amidst an initial public offering, and (then as now) had an insatiable appetite for more data. Facebook resolved to feed these beasts by turning its developer platform into a fraudulent scheme: despite continuing to invite developers to build their apps (and businesses) around the Graph APIs, Facebook internally decided to privatize them, allowing only chosen developers access. These access decisions, which were memorialized in a series of confidential “whitelist” agreements, gave chosen developers continuing access to core APIs in exchange

for large ad purchases, data deals, or competitive concessions. All other developers—including Six4Three—were secretly planned to be shut down by Facebook by a date certain, even though Facebook’s own executives and salespeople continued evangelizing the company’s platform and Graph APIs to these same developers.

4. On April 30, 2014, Facebook surprised developers (except for those it had chosen for secret whitelist negotiations) by announcing that it was discontinuing developer access to the friends and friends-of-friends APIs, making it impossible to traverse the Facebook social graph, let alone to analyze or gather user content. Facebook had internally determined that approximately 40,000 developers’ apps would break as a result of the change.

Six4Three’s app was rendered inoperable, and its business was destroyed by this decision. Facebook would over the next several years hone its own machine learning systems that gather and amplify swimwear pictures, including on an app Facebook acquired called Instagram.

C. Procedural Background

1. Six4Three filed suit in April 2015 in San Mateo County Superior Court in California, a forum selected by Facebook in its developer agreement. Facebook filed a demurrer, and in response, Six4Three amended the complaint. Pet. App. 4a. Facebook again

demurred, but the trial court sustained the complaint. *Ibid.* The case then proceeded to discovery. *Ibid.*

Six4Three later moved to file a third amended complaint, adding new causes of action and naming individual defendants. *Ibid.* The trial court granted leave to add new causes of action, but not new defendants. *Ibid.* Facebook demurred yet again, but the trial court again sustained the complaint. *Ibid.* Facebook then moved for summary adjudication on limitation of damages, which was granted in part as to certain causes of action. *Ibid.*

2. In November 2017, Six4Three filed its fourth amended complaint, asserting causes of action for (1) violation of California's unfair competition law (UCL) (Cal. Bus. & Prof. Code §17200 *et seq.*); (2) breach of contract; (3) concealment; (4) intentional misrepresentation; (5) negligent misrepresentation; (6) intentional interference with contract; (7) intentional interference with prospective economic relations; and (8) negligent interference with prospective economic relations. Pet. App. 4a-5a.

This time, Facebook filed a special motion to strike under California's anti-SLAPP law, arguing that the company's changes to its Graph APIs were an editorial decision and therefore Facebook's First Amendment-protected speech. Pet. App. 7a. Six4Three had also filed a Fifth Amended Complaint adding individual defendants, and the individual defendants likewise filed an identical anti-SLAPP motion. *Ibid.*

Facebook’s anti-SLAPP motion was one of the latest such motions ever filed since the inception of California’s anti-SLAPP law in 1992. Facebook’s motion came nearly three years after Six4Three had filed suit against it, and after several iterations of the complaint had been sustained against demurrers. Facebook had even moved for partial summary adjudication, and the parties had been engaged in discovery for years at the time of Facebook’s anti-SLAPP filing. See Pet. App. 4a, 13a.

3. The anti-SLAPP motions asserted—simultaneously—(i) that Facebook’s changes to its Graph APIs were an exercise of editorial judgment by Facebook, triggering the anti-SLAPP law, and (ii) that Facebook was immune from Six4Three’s claims under Section 230(c)(1) of the CDA. See Pet. App. 44a, 57a, 84a, 98a.

Put simply, Facebook contended that because some Graph APIs provided access to Facebook user data, Facebook’s decision to change them was “editorial”—first-party Facebook speech. When it came to the CDA, however, Facebook contended that claims challenging these same decisions arose from third-party content, immunizing Facebook under Section 230 from liability for its own fraudulent and tortious conduct surrounding the developer platform.

4. The trial court first held that Six4Three’s causes of action arose from activity protected by the anti-SLAPP statute, agreeing that Facebook’s scuttling of its developer platform was tantamount to an editorial

decision about whether to publish user content. Pet. App. 43a-56a, 83a-97a. It then reached the merits phase of the anti-SLAPP motion, and held that every cause of action except for breach of contract was barred by Section 230(c) of the CDA. *Id.* at 57a-72a, 97a-113a. The trial court held that the breach of contract claim failed as a matter of law for other reasons. *Id.* at 72a-79a, 113a-114a.

5. Six4Three appealed, and the California Court of Appeal affirmed the trial court. It agreed that the anti-SLAPP statute applied, and further agreed that Section 230(c) of the CDA barred every cause of action brought by Six4Three except breach of contract, which failed for other reasons. Pet. App. 9a-35a.

The Court of Appeal rejected the argument that Six4Three's claims could not simultaneously (1) arise from Facebook's first-party speech (required for the anti-SLAPP statute to apply) and (2) seek to hold Facebook liable for third-party content (the ostensible scope of §230(c)(1)), stating that "Facebook engaged in a 'bait-and-switch' scheme because it initially promised access (as a speaker), and then restricted that access (as a publisher)." Pet. App. 32a. The court also rejected arguments that Facebook's APIs were not user content and thus outside of Section 230's ambit. *Id.* at 33a. The court reasoned that because user photos were transmitted through the APIs, "the content at issue is content that originated from Facebook users." *Ibid.* Six4Three petitioned the

California Supreme Court for review, but the petition was denied. *Id.* at 1a.

REASONS FOR GRANTING THE WRIT

A. Federal Courts of Appeals and California Courts Are Fractured and Inconsistent as to Whether Section 230 Immunizes a Platform’s Own Conduct and Speech

Federal courts of appeals are split—not only on the substantive reach of Section 230 vis-à-vis an online platform’s own speech and conduct, but also on the applicable test to make such a determination. In addition, these federal courts are split with California state courts, which are the designated forum for most lawsuits against the largest and most pervasive online platforms and social networks in the world (including Facebook).

This fracturing of federal law affects the scope of liability for innumerable causes of action, leaving online platforms immune in some circuits and liable in others.

1. The Second Circuit test immunizes an online platform “unless the defendant directly and ‘materially’ contributed to what made the content itself ‘unlawful.’” *United States v. EZ Lynk, SEZC*, __ F.4th __, No. 24-2386-cv, 2025 WL 2405273, at *2 (2d Cir. Aug. 20, 2025) (quoting *Fed. Trade Comm’n v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016)).

In *EZ Lynk*, for example, the Second Circuit recently held that an online platform that hosted third-party automotive defeat device software was not immune under Section 230 for assisting with the testing of, and support for, the third-party products posted on its platform. *Id.* at *7. The Second Circuit reasoned that the defendant had not acted as a “neutral intermediar[y],” but had “instead ‘specifically encourage[d] development of what [was] offensive about the content.’” *Ibid.* (quoting *LeadClick*, 838 F.3d at 174; alterations in original).

2. The Third Circuit, in *Anderson v. TikTok, Inc.*, 116 F.4th 180 (3d Cir. 2024), recently held that TikTok’s recommendation algorithm was not entitled to immunity under Section 230. There, the social network was sued for recommending a “Blackout Challenge,” wherein participants asphyxiate themselves, to a ten-year-old girl, who inadvertently hanged herself while performing the challenge. *Id.* at 181.

The Third Circuit cited this Court’s decision in *Moody v. NetChoice, LLC*, 603 U.S. 707, 718 (2024), for the proposition that a platform’s recommendation algorithm “reflects ‘editorial judgments’ about ‘compiling the third-party speech it wants in the way it wants’” and is therefore “the platform’s own ‘expressive product’” for First Amendment purposes. *Anderson*, 116 F.4th at 183-84. The Third Circuit reasoned:

Given the Supreme Court’s observations that platforms engage in protected first-party speech under the First Amendment when they curate compilations of others’ content via their expressive algorithms, it follows that doing so amounts to first-party speech under § 230 too.

Id. at 184. Because TikTok’s algorithm decided on the third-party speech that would be “included in or excluded from a compilation,” Section 230 immunity could not apply, as it “immunizes only information ‘provided by another. . . .’” *Id.* (quoting 47 U.S.C. §230(c)(1)). The information at issue, however, was “TikTok’s own expressive activity.” *Id.*

3. The Fourth Circuit, in contrast, applies the test first articulated in *Zeran*—that is, it applies “a case-specific approach, examining what a plaintiff in a particular case must prove” to determine whether an asserted “claim ‘thrust[s]’ the interactive service provider ‘into the role of a traditional publisher.’” *M.P. ex rel. Pinckney v. Meta Platforms Inc.*, 127 F.4th 516, 525 (4th Cir. 2025) (quoting *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 119 (4th Cir. 2022)).

In *M.P.*, the Fourth Circuit held that Meta Platforms (*i.e.*, Facebook) was immune from suit for allegedly racist and radicalizing recommendations made by the Facebook product’s recommendation algorithm. *Id.* at 525. The Fourth Circuit reasoned that the plaintiff’s “state tort claims are inextricably

intertwined with Facebook’s role as a publisher of third-party content.” *Ibid.* The Fourth Circuit explained that the plaintiff could not “show that Facebook’s algorithm was designed in a manner that was unreasonably dangerous for viewers’ use without also demonstrating that the algorithm prioritizes the dissemination of one type of content over another.” *Ibid.*

4. The Fifth Circuit rejects the Fourth Circuit’s but-for test, meaning that the mere fact that a claim would not exist but-for the existence of third-party data is insufficient for Section 230 immunity to apply. See *A.B. v. Salesforce, Inc.*, 123 F.4th 788, 795 (5th Cir. 2024) (“This last point warrants some emphasis: the text of section 230 does not mandate a ‘but-for test that would provide immunity . . . solely because a cause of action would not otherwise have accrued but for the third-party content.’” (quoting *Force v. Facebook, Inc.*, 934 F.3d 53, 82 (2d Cir. 2019) (Katzman, J., concurring in part and dissenting in part) and cleaned up).

In *A.B.*, the Fifth Circuit confronted claims against Salesforce for having “knowingly assisted, supported, and facilitated sex trafficking by selling its tools and operational support to Backpage even though it knew (or should have known) that Backpage was under investigation for facilitating sex trafficking.” *Id.* at 797. The Fifth Circuit held, “To state the obvious: this duty does not derive from Salesforce’s status or conduct as a publisher or speaker and would not

require Salesforce to exercise publication or editorial functions to avoid liability.” *Ibid.*

5. The Ninth Circuit applies the standard articulated in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc). That is, it examines each individual cause of action to determine whether the asserted claim “obliges the defendant to ‘monitor third-party content’” in order to avoid liability. *Doe 1 v. Twitter, Inc.*, __ F.4th __, No. 24-177, 2025 WL 2178534, at *2 (9th Cir. Aug. 1, 2025).

In *Doe 1*, the Ninth Circuit recently determined whether Section 230 immunity applied to claims asserted by a 13-year-old who was induced into creating nude images and providing them to a trafficker on Snapchat. *Id.* at *2. The video sent to the trafficker later appeared on Twitter. *Ibid.* The plaintiff there alleged that Twitter had failed to use its tools to detect child pornography and had received significant advertising revenue from posts containing such content. *Id.* at *3.

Under the Ninth Circuit test, Twitter’s failure to police for child pornography as well as its own algorithm’s *promotion* of such material are immunized by Section 230. *See id.* at *4. The Ninth Circuit explained that the “theory for liability imposes a monitoring obligation.” *Ibid.* And “the only way for Twitter to avoid the unlawful benefit from hosting child pornography would be to remove third-party posts—a quintessential publishing activity.” *Ibid.*

Quoting *Roommates.com*, the Ninth Circuit explained that “any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230.” *Ibid.* (quoting *Roommates.com*, 521 F.3d at 1170-71).

6. California state courts, which preside over most of the largest and most impactful online platforms in the United States, apply their own standard for Section 230 immunity, which itself differs from the varying standards (and tests) in the assorted federal courts. For example, the Court of Appeal below applied a but-for style test for Section 230 immunity, so that the mere fact that the Graph APIs touched on third-party data—namely, images posted by Facebook users—meant that Facebook enjoyed immunity from suit under Section 230. It did not matter that Facebook was being sued for its own fraudulent and tortious conduct with respect to its platform, or that the Graph APIs were Facebook’s own first-party-designed products, which themselves not only selected, arranged, and amplified user content, but provided *Facebook-generated* content, such as the friends and friends-of-friends list.

Under the California courts’ approach, it is sufficient for Section 230 immunity to apply that the claims somehow touch on or relate to third-party data—even if indirectly. See, e.g., *Murphy v. Twitter, Inc.*, 60 Cal.App.5th 12, 26, 274 Cal.Rptr.3d 360, 370 (2021) (applying Section 230 immunity to breach of contract and promissory estoppel claims alleging

Twitter failed to abide by its own promises because these claims would treat Twitter as a publisher).

This but-for approach is in accord with the California Supreme Court’s mandate that Section 230 should be interpreted to have enacted a “broad scope” of immunity. *Hassell v. Bird*, 5 Cal.5th 522, 544, 420 P.3d 776, 791 (2018) (applying Section 230 to bar an injunction requiring the takedown of Yelp reviews, even though Yelp had not even been named as a defendant).

B. Section 230 Was Never Intended to Provide Broad Immunity to Online Platforms for their Own Conduct and Speech

Review by this Court is necessary to resolve the appropriate scope of Section 230 immunity, particularly where an online platform’s own conduct, speech, and content are at issue. Section 230 was never intended to sweep so broadly as to provide online platforms with immunity from suit for their own expressive content, such as the algorithmic compilation, selection, and arrangement of third-party content served on For You pages and newsfeeds by social networks, or the algorithmic graph data served to developers through the APIs at issue in this case.

1. Section 230 was enacted in view of a longstanding liability model wherein information carriers, such as telegraph operators, were not

responsible for the content they transmitted—that is, unless they were aware that the information they transmitted was harmful. *Anderson*, 116 F.4th at 187 (Matey, J., concurring in part and dissenting in part). As Judge Matey observed in *Anderson*:

This was the common-sense system throughout the twentieth century. Transmitters usually had little control over what rode their networks and rarely knew the circumstances that might make a statement harmful. Imposing liability for conduct that lacked culpability would unfairly punish beneficial industries and pin emerging networks under the weight of endless lawsuits. But the scale tipped in a different way when a transmitter of third-party information knew the content was harmful, a distinction that carried into the changes in communications technology during the back half of the twentieth century.

Id. at 187-88.

The online services of the early 1990s, which allowed users to communicate in chat rooms and on message boards, “resurrected the old legal questions familiar to common carriers.” *Id.* at 188. Early court decisions applied these old doctrines to the early Internet, culminating in the *Stratton Oakmont*

decision that Section 230 was intended to overrule. See *Anderson*, 116 F.4th at 189.

2. *Stratton Oakmont* and other pre-CDA decisions did not employ an expansive definition of “publisher” and drew a distinction between publishers and distributors. This distinction was largely eradicated in *Zeran* after the enactment of Section 230, and courts followed *Zeran* in interpreting Section 230’s immunity broadly. The statute, however, was not intended to provide immunity for conduct beyond the hosting of third-party data. As Judge Matey explained in his partial concurrence in *Anderson*:

But § 230(c)(1) does not immunize more. It allows suits to proceed if the allegedly wrongful conduct is not based on the mere hosting of third-party content, but on the acts or omissions of the provider of the interactive computer service. This is where *Zeran* went astray, wrongly reasoning that distributor liability “is merely a subset, or species, of publisher liability[.]” . . . Both *CompuServe* and *Stratton Oakmont* saw two distinct concepts. . . . So did the common law of common carriers. It is implausible to conclude Congress decided to silently jettison both past and present to coin a new meaning of “publisher” in § 230(c)(1).

116 F.4th at 191.

3. Put simply, Section 230 was not intended to enact broad immunity from suit for a website’s own unlawful, tortious, or otherwise harmful actions, but was instead meant to provide immunity for the passive hosting of third-party content. There is no evidence that Congress intended to provide online platforms, including algorithmically-driven social media platforms that make money from their compilation, selection, and amplification of online content, with immunity from their own conduct and for their own speech. See *Doe v. Facebook, Inc.*, 142 S.Ct. 1087, 1088 (2022) (statement of Thomas, J., respecting denial of certiorari) (“It is hard to see why the protection §230(c)(1) grants publishers against being held strictly liable for third parties’ content should protect Facebook from liability for its *own* acts and omissions.” (internal quotation marks omitted)).

The widespread (yet widely fractured) application of Section 230 immunity to apply broadly to any cause of action that somehow touches on third-party content requires review and correction by this Court. Otherwise, Section 230 will continue to drift unmoored from the legislative purpose of the statute—and from its straightforward text.

C. This Case Is a Good Vehicle for the Resolution of this Important Question

1. With the exception of the breach of contract claim, which is not appealed here, all of Petitioner’s causes of action were dismissed as a matter of law

under Section 230(c) of the CDA. The causes of action sought to hold Facebook liable for its own conduct—namely, the company’s fraudulent scheme to evangelize its developer platform to companies like Petitioner while secretly engineering that same platform’s demise. These causes of action were held to be barred by Section 230 simply because some of the APIs used to interact with the Facebook developer platform provided access to user content. It did not matter to the lower courts that no third-party content was alleged to be fraudulent, or tortious, or otherwise harmful to Petitioner; nor that the fraudulent scheme wholly planned and perpetrated by Facebook and its executives centered upon Facebook’s own first-party product design decisions and communications; nor that the Graph APIs themselves largely accessed *Facebook-generated* content (*e.g.*, friends-of-friends lists), and where they did access user-generated content, indisputably compiled, selected, and amplified it.

There are no factual issues to be resolved, and there is no alternative basis upon which Petitioner’s claims were dismissed. This makes this case an excellent vehicle to resolve the purely legal question of the appropriate scope of Section 230 immunity for an online platform’s own conduct, speech, and product design choices.

2. In addition, California courts are not bound by the decisions of federal courts, including the Ninth Circuit, as to their interpretations of Section 230.

California, however, is home to nearly every major online platform, including the world's largest and most impactful social networks and search engines. Many online platforms, including Facebook, contractually select California courts for dispute resolution, meaning California courts will often be the arbiters of the federal defense embodied in Section 230.

Absent a decision of this Court, the decisions of the California courts will remain unmoored from those of the federal courts. This makes this case an even more appropriate vehicle to decide the issue presented.

3. Moreover, online platforms and social networks are already exploiting inconsistencies in federal law to avoid liability. For example, TikTok recently tagged and transferred the *Anderson* case (in which TikTok received a relatively unfavorable Third Circuit opinion on Section 230) to an MDL pending in the Ninth Circuit, where TikTok's Section 230 defense will face a different standard than the one announced by the Third Circuit. See *In re Social Media Adolescent Addiction/Personal Injury Prods. Liab. Litig.*, MDL No. 3047 (J.P.M.L. June 2, 2025) (transfer order). Until this Court resolves the question presented by this petition, such procedural machinations by online platform defendants can be expected to continue.

4. Additionally, this case, which arises from an anti-SLAPP motion, presents a common tactic employed by social networks and online platforms.

Specifically, Facebook contended below that it was the speaker of the content provided through its APIs, which allowed it to trigger California’s powerful anti-SLAPP statute. Yet in the same breath, Facebook invoked Section 230 immunity by taking the position that it was merely a conduit for third-party speech, which it supposedly “de-published” through its APIs.

As Justice Thomas (joined by Justice Gorsuch) recently observed:

Social-media platforms have increasingly used §230 as a get-out-of-jail free card. Many platforms claim that users’ content is their own First Amendment speech. Because platforms organize users’ content into newsfeeds or other compilations, the argument goes, platforms engage in constitutionally protected speech. See *Moody v. NetChoice*, 603 U.S. [707] (2024). When it comes time for platforms to be held accountable for their websites, however, they argue the opposite. Platforms claim that since they are not speakers under §230, they cannot be subject to any suit implicating users’ content, even if the suit revolves around the platform’s alleged misconduct. See *Doe*, 595 U.S. at 1-2, 142 S.Ct. at 1088 (statement of Thomas J.). In the platform’s world, they are fully responsible for their websites

when it results in constitutional protections, but the moment that responsibility could lead to liability, they can disclaim any obligations and enjoy greater protections from suit than nearly any other industry. The Court should consider if this state of affairs is what §230 demands. I respectfully dissent from the denial of certiorari.

Doe ex rel. Roe v. Snap, Inc., 144 S.Ct. 2493, 2494 (2024) (Thomas, J., dissenting from denial of certiorari).

This case presents precisely the incongruence described by Justices Thomas and Gorsuch. Facebook and other online platforms should not be immune from suit for their own conduct, their own speech, and their own product design choices simply because they deal in third-party content. This is far from the “state of affairs” demanded by Section 230. *Ibid.* Indeed, there is no evidence that Congress intended any such result.

5. Finally, broad immunity under Section 230 cannot persist given the current pace of technological advancement. Social media platforms aggressively engineer machine learning and AI models to select and arrange content to serve. The content shown on For You pages and newsfeeds is tailored toward the individual user. These platforms do not passively display third-party content like a message board on a 1990s-era online network.

In addition, AI models are now ubiquitous and rapidly proliferating. There is no statutory basis to provide such companies broad immunity from suit simply because the AI models to which they provide access are trained on third-party content.

CONCLUSION

The petition for a writ of certiorari should be granted.

September 9, 2025

Respectfully submitted,

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APPENDIX

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**APPENDIX A — ORDER OF THE SUPREME
COURT OF CALIFORNIA, FILED JUNE 11, 2025**

S290437

IN THE SUPREME COURT OF CALIFORNIA

En Banc

SIX4THREE, LLC,

Plaintiff and Appellant,

v.

FACEBOOK, INC., *et al.*,

Defendants and Respondents.

Filed June 11, 2025

AND CONSOLIDATED CASE

The petition for review is denied.

GUERRERO
Chief Justice

**APPENDIX B — OPINION OF THE COURT OF
APPEAL FOR THE STATE OF CALIFORNIA,
FIRST APPELLATE DISTRICT, DIVISION FOUR,
FILED MARCH 12, 2025**

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

A166007, A167416
(San Mateo County Super. Ct. No. CIV533328)

SIX4THREE, LLC,

Plaintiff and Appellant,

v.

FACEBOOK, INC., *et al.*,

Defendants and Respondents.

Filed March 12, 2025

Plaintiff Six4Three, LLC (Six4Three), developed an application (app) called “Pikinis” that allowed users to search photos posted on Facebook of people in bathing suits. Six4Three sued Facebook, Inc. (Facebook), and six individuals,¹ alleging they had engaged in a “bait-and-

1. The individual defendants are Mark Zuckerberg, Christopher Cox, Javier Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar.

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switch” by initially providing developers with access to Facebook data, but later restricting that access.

In this consolidated appeal, Six4Three challenges the trial court’s orders granting defendants’ anti-SLAPP motions,² as well as its award of \$683,417.50 in attorney fees to defendants as the prevailing parties on the anti-SLAPP motions.

Six4Three argues that the trial court (1) abused its discretion in considering Facebook’s untimely anti-SLAPP motion; (2) erred in finding the commercial speech exception inapplicable; (3) erred in finding Six4Three had failed to carry its burden of showing a probability of prevailing on its claims; (4) erred in denying Six4Three’s discovery motion; and (5) abused its discretion in awarding attorney fees for time billed outside of the anti-SLAPP motions. We disagree and affirm.

BACKGROUND

We begin with a general overview of the factual and procedural background of this case. Additional background relevant to each of Six4Three’s specific arguments is contained in the respective discussion sections, *post*.

2. Code of Civil Procedure section 425.16. All further statutory references are to the Code of Civil Procedure unless otherwise stated.

*Appendix B***This Action**

Six4Three filed an action against Facebook alone in April 2015. Instead of filing an anti-SLAPP motion, however, Facebook demurred to the complaint. Six4Three responded by filing an amended complaint adding a cause of action. Facebook again demurred, and the trial court sustained the demurrer with leave to amend. Six4Three filed a second amended complaint and Facebook again demurred, but this time the trial court sustained the demurrer as to only one of the causes of action. The parties engaged in some initial discovery.

Six4Three then moved for leave to file a third amended complaint adding new causes of action and naming individual defendants. The trial court granted leave as to the new causes of action, but not the new defendants. Six4Three proceeded to file a third amended complaint, but also petitioned this court for a writ of mandate regarding the addition of individual defendants. Facebook demurred to the third amended complaint, which was sustained only as to some of the causes of action. Facebook moved for summary adjudication on limitation of damages, which was granted as to some causes of action.

Fourth Amended Complaint

Six4Three filed its fourth amended complaint in November 2017. It asserted eight causes of action against Facebook: (1) violation of California's unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.); (2) breach of contract; (3) concealment; (4) intentional

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misrepresentation; (5) negligent misrepresentation; (6) intentional interference with contract; (7) intentional interference with prospective economic relations; and (8) negligent interference with prospective economic relations.

The fourth amended complaint alleged as follows: Facebook operates a social network that enables users to connect and share information with their friends and family. In 2007, Facebook launched “Facebook Platform,” which made application program interfaces (APIs) available for developers to build apps that used Facebook data. Facebook and its CEO, Mark Zuckerberg, made various statements regarding Facebook Platform related to developer integration with Facebook data and the opportunity for developers to build apps for Facebook users.

In 2010, Facebook introduced “Graph API,” which “streamlined and formalized” developer access to Facebook data. Graph API permitted developers to build apps that could access Facebook data from not only users who downloaded the app, but also from those users’ friends (unless their privacy settings were set to block such access).

In 2012, Six4Three developed Pikinis using image recognition technology to allow its users to search for photos posted on Facebook of people in bathing suits. Pikinis required use of Facebook’s Graph API, as it enabled users to “reduce time” spent searching by “automatically finding” bathing suit photos accessible

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from friends through Facebook’s network. According to Six4Three, it relied on representations made by Facebook and Zuckerberg about data access in building Pikinis. Six4Three also entered into Facebook’s terms of service, titled “Statement of Rights and Responsibilities” (SRR).

Six4Three engaged contractors to develop a list of prospective customers, mostly students on college campuses. It also purchased advertising from Facebook to “test” various advertising campaigns. Six4Three conducted a “soft launch” or “trial period” for Pikinis, and ultimately received some paid subscriptions.

According to Six4Three, however, Facebook engaged in a “bait-and-switch” scheme by deciding to restrict access to Graph API data by “potentially competitive” apps in order to grow Facebook’s business and advertising revenue.

In January 2015, Facebook sent an e-mail to Six4Three stating that Facebook would be ending “third-party access to the full friends list and friends permissions,” including access to friend photos. Six4Three alleged that Pikinis could not function without such access. In April 2015, Facebook restricted developer access to Graph API data, including photos data.

The fourth amended complaint sought damages, declaratory relief regarding Facebook’s conduct, a permanent injunction prohibiting Facebook’s interference with Six4Three’s contracts or prospective economic relations, and a “permanent injunction requiring

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Facebook to restore Developer access to the Graph API data, including reading the full friends list, friends permissions and newsfeed APIs, and all other data and APIs available prior to Facebook’s removal of the data on April 30, 2015.”

Facebook’s Anti-SLAPP Motion

Facebook filed an anti-SLAPP motion to strike the fourth amended complaint. While this motion was pending, we issued a writ of mandate compelling the trial court to grant Six4Three leave to add the six individual defendants.

Fifth Amended Complaint

The fifth amended complaint asserted seven causes of action against the individual defendants—the same claims asserted against Facebook in the fourth amended complaint, except for the breach of contract claim. The fifth amended complaint also largely repeated the allegations of the fourth amended complaint, but added allegations regarding conspiracy by the individual defendants to direct and participate in Facebook’s “bait-and-switch” scheme to restrict access to its Graph API data.

The individual defendants filed an anti-SLAPP motion to strike the fifth amended complaint.

Trial Court’s Initial Rulings

The trial court initially denied Facebook’s anti-SLAPP motion as untimely, declining to exercise its discretion

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to consider the merits. But the trial court granted the individual defendants' anti-SLAPP motion, treating it as unopposed because Six4Three had incorporated by reference its briefs opposing Facebook's motion in violation of the 15-page limit under California Rules of Court, rule 3.1113, subdivision (d).

Facebook and Six4Three appealed.

Prior Appeal

We affirmed in part but reversed in part, concluding the trial court acted within its discretion in declining to consider Facebook's untimely motion but abused its discretion in granting the individual defendants' motion based on Six4Three's violation of the page-limit rule. (*Six4Three, LLC v. Facebook, Inc.* (Sept. 30, 2019, A154890) [nonpub. opn.])

We explicitly stated that if the trial court granted the individual defendants' anti-SLAPP motion on remand, it was not precluded from reconsidering its denial of Facebook's motion. (*Six4Three, LLC v. Facebook, Inc.*, *supra*, A154890.)

Trial Court's Subsequent Rulings

After remand, the trial court granted the individual defendants' anti-SLAPP motion and, upon reconsideration, granted Facebook's motion. It found that defendants had met their initial burden to demonstrate the causes of action arose from protected activity, and Six4Three had

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failed to sustain its ensuing burden to demonstrate a probability of prevailing on its claims. The trial court also denied Six4Three’s motion for certain discovery under the anti-SLAPP statute.

Six4Three appealed the orders granting both anti-SLAPP motions.

Attorney Fee Award

Defendants’ anti-SLAPP motions requested an order awarding them attorney fees under section 425.16, subdivision (c) as the prevailing parties on the motions. The trial court awarded defendants \$683,417.50 in attorney fees.

Six4Three appealed this order separately, but we granted its unopposed request to consolidate the appeals.

DISCUSSION

The anti-SLAPP statute is “designed to protect defendants from meritless lawsuits that might chill the exercise of their rights to speak and petition on matters of public concern.” (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 883–884 [249 Cal. Rptr. 3d 569, 444 P.3d 706].) Under the statute, a defendant may file a special motion to strike claims “arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue. . . .” (§ 425.16, subd. (b)(1).) The motion “may be filed

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within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." (*Id.*, subd. (f).)

Resolution of an anti-SLAPP motion requires the court to engage in the now familiar two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 [124 Cal. Rptr. 2d 507, 52 P.3d 685].) If the court finds a showing has been made under the first step, "it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Ibid.*)

Six4Three presents five challenges to the trial court's rulings in this appeal. First, it argues that the trial court abused its discretion in considering Facebook's untimely anti-SLAPP motion. Second, Six4Three argues that the trial court erred on the first step of the anti-SLAPP analysis in finding inapplicable the commercial speech exception to protected activity. Third, it argues the trial court erred on the second step of the anti-SLAPP analysis in finding that Six4Three failed its burden to show a probability of prevailing on its claims. Fourth, it argues that the trial court erred in denying its motion for discovery under the anti-SLAPP statute. Fifth, Six4Three argues that the trial court abused its discretion in awarding attorney fees for time billed outside of the anti-SLAPP motions. We address, and reject, each argument in turn.

*Appendix B***I. Consideration of Untimely Anti-SLAPP Motion****A. Additional background**

There is no dispute that Facebook’s anti-SLAPP motion was filed after the statutory deadline. And, as detailed above, the trial court initially declined to consider the untimely motion.

In the prior appeal, we concluded that the trial court had not abused its discretion by denying the motion based on untimeliness. (*Six4Three, LLC v. Facebook, Inc.*, *supra*, A154890.) Facebook claimed it did not file anti-SLAPP motions to strike prior versions of the complaint because it had relied on former precedent permitting such motions whenever a complaint was amended, even if the causes of action were not new. (*Ibid.*) That precedent had been recently overturned by *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637 [230 Cal. Rptr. 3d 408, 413 P.3d 650], but Facebook argued retroactive application of the new rule was unfair. (*Six4Three, LLC v. Facebook, Inc.*, *supra*, A154890.) We explained: “While it would have been within the trial court’s discretion to rely on such considerations to hear Facebook’s motion, the failure to do so was not an abuse of discretion.” (*Ibid.*) We thus affirmed the denial of Facebook’s anti-SLAPP motion, but reversed the ruling on the individual defendants’ motion and remanded the matter. (*Ibid.*) In so doing, we stated: “In the event that the court grants the individual defendants’ motion in whole or in part, we do not preclude the court from reconsidering its order with respect to Facebook’s motion.” (*Ibid.*)

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On remand, after the trial court found the individual defendants had met their burden to demonstrate protected activity and Six4Three had not sustained its burden of demonstrating a probability of prevailing on the merits of its claims, the trial court stated: “In light of the foregoing and in its discretion, the Court will reconsider, *sua sponte*, its order denying Defendant Facebook’s Inc.’s Special Motion to Strike . . . and will set the matter for a hearing on the merits.” It then quoted the statement in our opinion regarding reconsideration.

B. Analysis

Section 425.16, subdivision (f) provides that an anti-SLAPP motion may be filed within 60 days of the complaint or, “in the court’s discretion, at any later time upon terms it deems proper.” We review the trial court’s consideration of an untimely anti-SLAPP motion for abuse of discretion. (*Platypus Wear, Inc. v. Goldberg* (2008) 166 Cal.App.4th 772, 782 [83 Cal. Rptr. 3d 95] (*Platypus Wear*).) Here, Six4Three argues that the trial court abused its discretion in two respects.

First, Six4Three contends that the trial court “offered ***no explanation at all***” for its decision. The record refutes this contention. In granting the individual defendants’ anti-SLAPP motion, the trial court made clear why it was exercising its discretion to address Facebook’s motion on the merits: it found the individual defendants had met their threshold burden as to protected activity and that Six4Three failed its subsequent burden to establish the merits of its claims. These determinations were plainly

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relevant to Facebook’s motion, as Six4Three asserted many of the same allegations and seven of the eight causes of action against the individual defendants that it asserted against Facebook. The trial court also quoted the statement from our opinion that it would not be precluded from reconsideration of Facebook’s motion if it granted the individual defendants’ motion. The “‘grounds given by the court’” for considering Facebook’s motion are thus clear from the record. (*Platypus Wear, supra*, 166 Cal. App.4th at p. 787, quoting *Olsen v. Harbison* (2005) 134 Cal.App.4th 278, 285 [35 Cal. Rptr. 3d 909]; see also *W.L. Gore v. Internat. Medical Prosthetics Research* (Fed.Cir. 1992) 975 F.2d 858, 865 [no abuse of discretion for failure to make explicit findings where the “posture of the case and the factors justifying entry of judgment are apparent from the materials before us”].)

Second, Six4Three relies on *Platypus Wear* to argue that the trial court exceeded the bounds of its discretion because Facebook filed its anti-SLAPP motion years after the action was filed, and after Facebook elected to respond to the original and amended complaints by demurrers and a motion for summary adjudication. *Platypus Wear* is distinguishable on its facts.

In that case, the plaintiff filed a complaint in 2004 and the defendant answered the complaint two months later. (*Platypus Wear, supra*, 166 Cal.App.4th at p. 776.) The matter proceeded and in late 2006, the trial court set discovery cutoff and trial dates. (*Id.* at p. 777.) The parties completed a “substantial amount” of discovery. (*Id.* at p. 784.) Three months before the trial date, the

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defendant filed an ex parte application to allow him to file an anti-SLAPP motion and continue the trial. (*Id.* at p. 777.) *Platypus Wear* held that the trial court abused its discretion in granting the application. (*Id.* at p. 780.) It explained that, because the discovery cutoff date had already passed and trial was scheduled to begin a week after the hearing on the anti-SLAPP motion, “one of the basic purposes of the anti-SLAPP statute—to allow for the prompt resolution of disputes before significant pretrial discovery expenses are incurred—could not be met in this case.” (*Id.* at p. 784.)

Here, unlike *Platypus Wear*, Facebook did not file its motion after the discovery cutoff or on the cusp of trial. More importantly, the trial court exercised its discretion to consider Facebook’s untimely motion after it had granted the individual defendants’ timely motion based on largely the same allegations and same causes of action. That decision served “both judicial economy and the public policy behind the anti-SLAPP statute.” (*Platypus Wear*, *supra*, 166 Cal.App.4th at p. 784.)

Six4Three has thus failed to show the trial court abused its discretion in considering Facebook’s untimely anti-SLAPP motion. We turn next to Six4Three’s challenges to the anti-SLAPP rulings under the two-step framework outlined above.

*Appendix B***II. Anti-SLAPP First Step: Protected Activity****A. Additional background**

The first step of the anti-SLAPP analysis required defendants to demonstrate that the causes of action in the fourth and fifth amended complaints arose from activity protected by the anti-SLAPP statute. (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 67.) Here, however, Six4Three does not challenge defendants’ showing on this initial burden. Instead, Six4Three argues that the trial court erred in rejecting application of the “commercial speech” exception to defendants’ asserted protected activity.

Section 425.17, subdivision (c) provides that the anti-SLAPP statute “does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services . . . arising from any statement or conduct by that person” if certain conditions exist. The party seeking the benefit of this exception—here, Six4Three—bears the burden to show its applicability. (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 23 [109 Cal. Rptr. 3d 329, 230 P.3d 1117] (*Simpson Strong-Tie*).)

B. Analysis

In 2013, the Legislature enacted section 425.17 to exempt certain actions from the anti-SLAPP statute, in light of concerns with “a disturbing abuse” of the law. (§ 425.17, subd. (a).)

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The commercial speech exception has four elements: “(1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services; (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person’s or a business competitor’s business operations, goods, or services; (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person’s goods or services or in the course of delivering the person’s goods or services; and (4) the intended audience for the statement or conduct meets the definition set forth in section 425.17(c)(2).”³ (*Simpson Strong-Tie, supra*, 49 Cal.4th at p. 30.) “We review the applicability of the commercial speech exemption independently.” (*Id.* at p. 26.) And because section 425.17 is a statutory exception, it “should be narrowly construed.” (*Simpson Strong-Tie*, at p. 22.)

1. The Parties’ Preliminary Contentions

Six4Three asserts that the trial court erred by requiring Six4Three to present evidence of the elements of the commercial speech exception, rather than allowing Six4Three to rely on its allegations. We disagree. *Simpson Strong-Tie* makes clear that Six4Three has the burden to *prove*, not just *allege*, applicability of the commercial speech exception. (*Simpson Strong-Tie, supra*, 49 Cal.4th

3. Section 425.17, subdivision (c)(2) defines “intended audience” to include “an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer.”

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at p. 23.) The California Supreme Court explained that because the commercial speech exception is “essential” to opposing an anti-SLAPP motion, Evidence Code section 500 places on plaintiff the burden of proving the applicability of the exception.⁴ (*Simpson Strong-Tie*, at p. 24; see also *Rivera v. First DataBank, Inc.* (2010) 187 Cal.App.4th 709, 718 [115 Cal. Rptr. 3d 1] [concluding that plaintiffs had not met their burden to demonstrate commercial speech exception as they had “presented no evidence to support this claim and a mere allegation does not suffice”].)

None of the cases on which Six4Three relies supports a contrary conclusion. Those cases simply confirm that the commercial speech exception relates to whether activity is protected (the first anti-SLAPP step), and not whether a plaintiff is likely to prevail on the merits of its claims (the second anti-SLAPP step). (*Neurelis, Inc. v. Aquestive Therapeutics, Inc.* (2021) 71 Cal.App.5th 769, 786 [286 Cal. Rptr. 3d 631]; *JAMS, Inc. v. Superior Court* (2016) 1 Cal.App.5th 984, 993 [205 Cal. Rptr. 3d 307] (*JAMS*).) And although the appellate court in *Xu v. Huang* (2021) 73 Cal.App.5th 802, 815–816 [288 Cal. Rptr. 3d 558], considered some allegations in analyzing the third element of the commercial speech exception (purpose of the statement or conduct), that decision does not undermine the California Supreme Court’s direction that Six4Three bears the burden of establishing the four

4. Evidence Code section 500 provides that “a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.”

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elements with evidence, not allegations alone. (*Simpson Strong-Tie, supra*, 49 Cal.4th at p. 26.)

Facebook, for its part, attempts to characterize the commercial speech exception as a “comparative advertising” exception. In *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 147 [246 Cal. Rptr. 3d 591, 439 P.3d 1156] (*FilmOn*), the California Supreme Court stated that section 425.17, subdivision (c) “exempts ‘only a subset of commercial speech’—specifically, comparative advertising.” But in *FilmOn*, the parties agreed that the speech at issue did not fall within section 425.17, subdivision (c) and in commenting on the commercial speech exception, the court was simply clarifying that not all “commercially oriented statements” fall within section 425.17, subdivision (c) (and therefore outside the reach of the anti-SLAPP statute). (*FilmOn*, at pp. 147–148 & fn. 4.) Rather than narrowing application of the exception to the single context of comparative advertising, given “the Legislature’s decision to explicitly require consideration of certain contextual factors—like speaker, audience, and purpose,” application of the exception should be directed by its four statutory elements. (*Id.* at p. 148; see *Neurelis, Inc. v. Aquestive Therapeutics, Inc.*, *supra*, 71 Cal. App.5th at pp. 787–788 & fn. 5 [rejecting argument that commercial speech exception applies only to comparative advertising and noting that *FilmOn* “was not considering whether certain speech fell under subdivision (c)” when it mentioned comparative advertising in the context of “interpreting the ‘catchall’ provision of section 425.16, subdivision (e)(4)”].) We therefore reject Facebook’s “comparative advertising” gloss on the commercial

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speech exception and instead, in subsequent sections of this opinion, focus on the elements of the exception as set forth in *Simpson Strong-Tie, supra*, 49 Cal.4th at page 30.

We do, however, agree with Facebook’s preliminary contention that Six4Three has forfeited any argument that evidence regarding *Facebook’s* business can be imputed to the *individual defendants* for the purpose of establishing the elements of the commercial speech exception as to these individuals. Six4Three failed to include any such argument or authority in its opening appellate brief, instead including a single conclusory sentence that the evidence and arguments as to Facebook “fully apply” to the individual defendants. (Cal. Rules of Court, rule 8.204(a)(1)(B) [each brief must support each point with argument and, if possible, citation of authority]; *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 844, fn. 3 [68 Cal. Rptr. 3d 828] [contentions in opening appellate brief forfeited for failure to present argument and appropriate legal authorities].)

While the plain text of section 425.17, subdivision (c) makes clear that the commercial speech exception can apply to an individual “person,” not just a business entity, it also requires that the commercial speech be “*about that person’s or a business competitor’s business.*” (*Id.*, subd. (c)(1), italics added.) Six4Three has not presented any argument or authority that Facebook should be treated as each of the individual defendants’ own business here. (Cf. *FilmOn, supra*, 7 Cal.5th at p. 147, fn. 4 [no commercial speech exception where defendant had not made any

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representations about its own business or a competitor]; *Simpson Strong-Tie*, *supra*, 49 Cal.4th at p. 32 [same]; *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 676 [105 Cal. Rptr. 3d 98] [same].)

In any event, even if Six4Three had not forfeited the argument, we are not persuaded that the commercial speech exception is applicable to the individual defendants based on Six4Three's showing as to Facebook because, as explained below, we conclude that Six4Three failed to meet its burden on the second element of the exception. Because failure on this element is dispositive, we need not address the other elements of the exception.

2. Element Two—Representations of Fact

The second element of the commercial speech exception required Six4Three to demonstrate that its causes of action “aris[e] from” statements or conduct that consist of “representations of fact” about Facebook's business operations or services. (§ 425.17, subd. (c)(1).) Six4Three argues that its claims are based on representations of fact by Facebook regarding access it “purported to provide” developers for building apps that used Facebook data. The fourth amended complaint, for example, points to the Facebook Platform announcement that offered “‘access to deep integration’ into the site.”

We agree that these are representations of fact about Facebook's business, but the remaining question is whether Six4Three has demonstrated that each of its claims “aris[es] from” such representations. (§ 425.17, subd. (c)(1).)

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This question focuses on whether a defendant’s activity “gives rise to his or her asserted liability.” (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1063 [217 Cal. Rptr. 3d 130, 393 P.3d 905], quoting *Navellier v. Sletten* (2002) 29 Cal.4th 82, 92 [124 Cal. Rptr. 2d 530, 52 P.3d 703].) As the California Supreme Court has explained, the only means to satisfy this “arising from” requirement is “to demonstrate that *the defendant’s conduct by which plaintiff claims to have been injured* falls within one of the [statutory] categories.” (*Park*, at p. 1063.) Our Supreme Court has applied this principle to the “arising from” language in section 425.17, subdivision (c). (See *Simpson Strong-Tie*, *supra*, 49 Cal.4th at p. 30 [claims alleging liability and harm based on statements in lawyer advertisement “impl[ying] that [plaintiff’s products] are defective” and stating that a lawyer would investigate potential claims do not satisfy “arising from” requirement for commercial speech exception].)

Here, Six4Three repeatedly alleged that Facebook engaged in a “bait-and-switch” scheme—initially providing developer access to Facebook data, and later restricting that access—but its allegations of liability and harm rely solely on the “switch” part of any such scheme. Six4Three’s injury thus arises not from the above described factual representations about Facebook’s business, but on Facebook’s later conduct in restricting access to certain data. On its UCL cause of action, for example, Six4Three alleged that Facebook caused it substantial harm “when it decided to terminate Developers’ ability to build advanced

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photo-searching applications.” Six4Three alleged that Facebook was liable for breach of contract and at least \$25,000 in harm because it breached its purported agreement to provide developer access to data. And on its concealment claim, Six4Three alleged that Facebook did not disclose its decision to restrict such access and Six4Three was injured by continuing to invest in its business. None of this alleged injury-producing conduct—restriction of access, internal decisionmaking to restrict access, or concealment of that decision—constitutes a “representation of fact” about Facebook’s business.

In its appellate briefing, Six4Three relied exclusively on *Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294 [175 Cal. Rptr. 3d 131] (*Demetriades*) to argue otherwise. That case involved a restaurant operator who sued Yelp based on its allegedly false and misleading statements about its proprietary filter for customer reviews: that the filter gave consumers “the most trusted reviews,” that it was “remarkable” because it “takes the reviews that are the most trustworthy” and “keeps the less trustworthy reviews out,” and that Yelp was doing “as good a job as possible” to show “the most trustworthy and useful content out there.” (*Id.* at pp. 298–301.)

The restaurant operator alleged that these statements were misleading or untrue because Yelp’s filter in fact suppressed trustworthy reviews and did not filter out the untrustworthy ones, and thus its filter failed to do what Yelp had represented it could do. (*Demetriades, supra*, 228 Cal.App.4th at pp. 299, 301.) *Demetriades* correctly concluded that these claims arose from “representations

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of fact” about Yelp’s business. (*Id.* at p. 311.) But those representations were “bait” statements—there was no subsequent “switch” by Yelp. Here, unlike *Demetriades*, Six4Three’s claims were not based on alleged “bait” misrepresentations about the contemporaneous accuracy or accessibility of Facebook’s data, but on the purported “switch”: Facebook’s later decision to restrict access to its users’ data.

At oral argument, Six4Three cited *JAMS* for its position that a representation of fact need not be “an affirmative or positive representation,” but can also be “an omission or half-truth.” (*JAMS, supra*, 1 Cal.App.5th at p. 995.) Regardless of how Six4Three attempts to characterize the alleged representations of fact here, it has still failed to demonstrate that its causes of action *arise from* such representations. (§ 425.17, subd. (c)(1).)

Moreover, the representations of fact at issue in *JAMS* are a far cry from those alleged by Six4Three here. In that case, the plaintiff sued JAMS for deceptive representations made on its website in the biography of a private judge and in the description of its neutrals as having the ““highest ethical and moral standards”” and being ““dedicated to neutrality, integrity, honesty.”” (*JAMS, supra*, 1 Cal.App.5th at p. 991.) The appellate court concluded that these were representations of fact because “they are specific statements representing how JAMS conducts its operations with neutrality, integrity, honesty and accountability.” (*Id.* at p. 995.)

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Here, unlike *JAMS*, the fourth amended complaint recited statements and conduct by Facebook not for their allegedly false factual assertions, but for what they allegedly promised about the future. It alleged, for example, that Facebook’s Platform announcement in 2007 promised that developers “would have access to the ‘social graph.’” It also alleged that Facebook’s creation of a fund for developers in 2007 “implies a specific promise that it will support developers’ opportunity to ‘build a compelling business on Facebook Platform’ and that it is committed long-term to the stability of Facebook Platform.” But as the California Supreme Court has explained, a “promise” of what a party will do “is not a representation of fact, but an agreement to take certain actions in the future” and thus does not satisfy the second element of the commercial speech exception. (*Simpson Strong-Tie, supra*, 49 Cal.4th at p. 31.)

Nor are we persuaded by any argument that Six4Three’s claims arise from a representation of fact by Facebook that was an “omission” or “half-truth.” (*JAMS, supra*, 1 Cal.App.5th at p. 995.) Again, the fourth amended complaint alleged that Facebook made various statements in 2007 regarding developer access to Facebook Platform. It alleged that Facebook released a document in 2009 describing “success stories” of applications developed on Facebook Platform. Then, in 2010, Facebook’s Graph API permitted developers to build apps that could access Facebook data from not only users who downloaded the app, but also from those users’ friends. Six4Three also alleged that Zuckerberg made certain statements in 2011 regarding the graph and developer access.

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But nothing in the fourth amended complaint suggests that these representations about developer access were omissions or half-truths when made. On the contrary, Six4Three relied on this access to develop Pikinis in 2012. Between that time and Facebook's decision in 2015 to restrict such access, the fourth amended complaint alleges that Facebook had *internal* discussions and meetings about the restriction. Six4Three has not alleged, let alone proven, any representations of fact that satisfy this element.

In sum, Six4Three has failed to meet its burden to show its claims arose from representations of fact about Facebook's business operations or services. (§ 425.17, subd. (c)(1).) Because Six4Three cannot demonstrate applicability of the commercial speech exception, we conclude that the trial court did not err in finding that Facebook satisfied the first step of the anti-SLAPP analysis. We turn next to the second step.

III. Anti-SLAPP Second Step: Probability of Prevailing on Claims

A. Additional background

The second step of the anti-SLAPP analysis required Six4Three to demonstrate a probability of prevailing on its claims in the fourth (as to Facebook) and fifth (as to the individual defendants) amended complaints. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 [205 Cal. Rptr. 3d 475, 376 P.3d 604].)

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Defendants first argue that Six4Three was unable to meet this burden because its claims were barred by the Communications Decency Act of 1996 (47 U.S.C. § 230) (Section 230). Section 230(c)(1) states: “No 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.” As relevant here, section 230(e)(3) provides that “[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.”

Defendants alternatively argue that, even if section 230 did not bar the claims against them, Six4Three nonetheless failed to show a probability of prevailing on those claims. Six4Three’s breach of contract cause of action against Facebook, for example, was based on the 2012 SRR.

Section 9 of the 2012 SRR is titled “Special Provisions Applicable to Developers/Operators of Applications and Websites.” It begins: “If you are a developer or operator of a Platform application or website, the following additional terms apply to you.” It continues: “Your access to and use of data you receive from Facebook, will be limited as follows.” It lists ten provisions, one of which states: “We can limit your access to data.” Section 9 next includes various limitations regarding user content, customer support, and third party advertising. It then states: “We give you all rights necessary to use the code, APIs, data, and tools you receive from us.” Section 14 of the 2012 SRR is titled “Amendments.” It provides: “Your continued use of Facebook following changes to our terms constitutes your acceptance of our amended terms.”

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Facebook revised its SRR in January 2015. It no longer included the above provisions for developers and operators of the Facebook Platform. It did, however, contain similar language regarding amendments to the SRR, stating: “Your continued use of Facebook Services, following notice of the changes to our terms, policies or guidelines, constitutes your acceptance of our amended terms, policies or guidelines.”

B. Analysis

We independently review the trial court’s ruling on the second step of the anti-SLAPP framework. (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal. App.4th 688, 699 [61 Cal. Rptr. 3d 29].) Our determination follows a “summary-judgment-like procedure,” where we consider the pleadings as well as supporting and opposing affidavits stating the facts upon which the liability or defense is based. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192 [25 Cal. Rptr. 3d 298, 106 P.3d 958]; see § 425.16, subd. (b)(2).) “We do not weigh credibility, nor do we evaluate the weight of the evidence. Instead, we accept as true all evidence favorable to the plaintiff and assess the defendant’s evidence only to determine if it defeats the plaintiff’s submission as a matter of law.” (*Overstock.com, Inc.*, at pp. 699–700.)

While plaintiffs need only show a “minimum level of legal sufficiency and triability,” they must demonstrate that each claim is both legally sufficient and supported by a sufficient prima facie showing made with competent and admissible evidence. (*Hecimovich v. Encinal School*

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Parent Teacher Organization (2012) 203 Cal.App.4th 450, 469 [137 Cal. Rptr. 3d 455].) Plaintiffs must also overcome any “substantive defenses” to their claim. (*Comstock v. Aber* (2012) 212 Cal.App.4th 931, 953 [151 Cal. Rptr. 3d 589].) We begin with one such asserted defense: Facebook’s argument that section 230 bars Six4Three’s claims.

1. Section 230

“Congress enacted section 230 “for two basic policy reasons: to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material.”” (*Murphy v. Twitter, Inc.* (2021) 60 Cal.App.5th 12, 24 [274 Cal. Rptr. 3d 360] (*Murphy*), quoting *Hassell v. Bird* (2018) 5 Cal.5th 522, 534 [234 Cal. Rptr. 3d 867, 420 P.3d 776] (*Hassell*)). “The statute contains express findings and policy declarations recognizing the rapid growth of the Internet, the beneficial effect of minimal government regulation on its expansion, and the twin policy goals of ‘promot[ing] the continued development of the Internet and other interactive computer services’ and ‘preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” (*Murphy*, at p. 24.)

The California Supreme Court, California appellate courts, and federal courts have generally interpreted section 230 to confer “broad immunity” for providers who “use the Internet to publish information that originated from another source.” (E.g., *Barrett v. Rosenthal* (2006) 40

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Cal.4th 33, 39 [51 Cal. Rptr. 3d 55, 146 P.3d 510]; *Murphy, supra*, 60 Cal.App.5th at p. 17 [“Under [§] 230, interactive computer service providers have broad immunity from liability for traditional editorial functions undertaken by publishers—such as decisions whether to publish, withdraw, postpone or alter content created by third parties”]; *Carafano v. Metrosplash.com, Inc.* (9th Cir. 2003) 339 F.3d 1119, 1123 [describing section 230 immunity as “quite robust”].)

The three elements required to establish section 230 applicability are “(1) the defendant be a provider or user of an interactive computer service; (2) the cause of action treat the defendant as a publisher or speaker of information; and (3) the information at issue be provided by another information content provider.” (*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 830 [121 Cal. Rptr. 2d 703].) There is no dispute on the first element: Facebook is an “interactive computer service” provider.

On the second element, “what matters is whether the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.” (*Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1102 (*Barnes*).) “To put it another way, courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant’s status or conduct as a ‘publisher or speaker.’ If it does, section 230(c) (1) precludes liability.” (*Barnes*, at p. 1102.)

We agree with Six4Three that section 230 does not bar its breach of contract claim because that claim is not based

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on any duty derived from Facebook’s status or conduct as a publisher or speaker, but instead on an alleged duty owed under the 2012 SRR. (See *Calise v. Meta Platforms, Inc.* (9th Cir. 2024) 103 F.4th 732, 743 [declining to apply § 230 to contract claims because “Meta’s ‘[c]ontract liability’ would ‘come not from [its] publishing conduct, but from [its] manifest intention to be legally obligated to do something’”].)

We conclude, however, that Six4Three’s remaining claims inherently rest on Facebook’s status or conduct as a publisher of information. As detailed above, defendants’ purported liability under each cause of action is based on the decision to remove developer access to certain user content, which as the trial court explained, is “akin to the act of de-publishing.”

Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc. (N.D.Cal. 2015) 144 F.Supp.3d 1088 (*Sikhs for Justice*) is instructive on the point. In that case, the plaintiff alleged that access to its Facebook page had been blocked in India and that Facebook had acted “on its own or on the behest of the Government of India” because of discrimination against the organization and its members. (*Id.* at p. 1090.) Facebook argued that the plaintiff’s discrimination claim was barred by section 230. (*Sikhs for Justice*, at p. 1092.) In determining whether the claim treated Facebook as a publisher, the court relied heavily on *Barnes*. (*Sikhs for Justice*, at pp. 1094–1096.)

“[P]ublication involves reviewing, editing, and deciding whether to publish or to withdraw from

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publication third-party content.” (*Sikhs for Justice, supra*, 144 F.Supp.3d at p. 1094, quoting *Barnes, supra*, 570 F.3d at p. 1102.) And “removing 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 for Justice*, at p. 1095, quoting *Barnes*, at p. 1103.) Accordingly, section 230 protects from liability “any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online.” (*Sikhs for Justice*, at p. 1096, quoting *Barnes*, at p. 1103.) The court noted that the plaintiff had sought an injunction requiring Facebook to restore access to its page in India. (*Sikhs for Justice*, at p. 1096; see also *Hassell, supra*, 5 Cal.5th at p. 544 [§ 230 “conveys an intent to shield Internet intermediaries from the burdens associated with defending against state law claims that treat them as the publisher or speaker of third party content, and from compelled compliance with demands for relief that, when viewed in the context of a plaintiff’s allegations, similarly assign them the legal role and responsibilities of a publisher *qua* publisher”].) The court concluded that the discrimination claim was barred because Facebook’s blocking of access to the page in India constituted “publisher conduct immunized by [section 230].” (*Sikhs for Justice*, at pp. 1095–1096.)

Like *Sikhs for Justice*, Six4Three’s claims here challenge Facebook’s decision to restrict the scope of access to Graph API data—not block access for all or delete the data entirely. And as in *Sikhs for Justice*, Six4Three sought a permanent injunction requiring Facebook to expand access to content; specifically, Six4Three sought

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an order “requiring Facebook to restore Developer access to the Graph API data, including reading the full friends list, friends permissions and newsfeed APIs, and all other data and APIs available prior to Facebook’s removal of the data on April 30, 2015.” Six4Three’s noncontract claims, as exemplified by its allegations challenging Facebook’s decision to restrict Graph API data access and its related demands for relief, treat Facebook as a publisher.

Six4Three attempts to suggest that there is an inherent inconsistency with any treatment of Facebook as the *speaker* of statements regarding its provision of developer access, but then as the *publisher* of information from users when it restricted such access. But this framework is entirely consistent with the nature of the claims Six4Three has alleged here: that Facebook engaged in a “bait-and-switch” scheme because it initially promised access (as a speaker), and then restricted that access (as a publisher). Six4Three’s citation to *Demetriades* is not on point because, as explained above, it involved only “bait” statements by Yelp and no subsequent “switch.” (*Demetriades, supra*, 228 Cal.App.4th at p. 313.)

Six4Three also attempts to distinguish cases applying section 230 to claims brought by *users* challenging Facebook’s decisions to block (or not block) access to certain user content. (*Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 200 [222 Cal. Rptr. 3d 250] [“the clear gravamen of [the complaint] is Knight’s objection to the third party content on the pages and Facebook’s editorial decisions to not remove them”]; *Sikhs for Justice, supra*, 144 F.Supp.3d at p. 1095.) But Six4Three offers no basis

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for us to disregard the general language of section 230 and its broad interpretation by courts, and instead adopt some narrower rule that section 230 is inapplicable to claims by a *developer* challenging a publisher's decision to block access to certain user content. (*Hassell, supra*, 5 Cal.5th at p. 544; *Murphy, supra*, 60 Cal.App.5th at p. 17.)

Turning to the third element of section 230 immunity, we conclude that the information at issue was provided by another content provider: Facebook users. As Six4Three alleged, Pikinis enabled its users to search through photos posted by Facebook users. The app “could only access and display photos that Facebook users had chosen to share.”

We are not persuaded by Six4Three's citation to authority declining to apply section 230 where the interactive computer service provider had created the content at issue. In *Fair Housing Council, San Fernando v. Roommates.com* (9th Cir. 2008) 521 F.3d 1157, the plaintiffs sued a website operator because it required subscribers to answer a series of questions that allegedly violated housing discrimination laws. (*Id.* at pp. 1161–1162.) In *Lemmon v. Snap, Inc.* (9th Cir. 2021) 995 F.3d 1085, the plaintiffs sued Snapchat alleging that it was negligent in designing its smartphone application to record the moving speed of users. (*Id.* at p. 1087.) And in *Liapes v. Facebook, Inc.* (2023) 95 Cal.App.5th 910 [313 Cal. Rptr. 3d 330], the plaintiff alleged that Facebook's advertising tools required the setting of certain parameters that discriminated against women and older people. (*Id.* at p. 918.) Here, unlike these cases, the content at issue is content that originated from Facebook users.

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We conclude that the trial court did not err in finding section 230 applicable to Six4Three’s noncontract causes of action, thus establishing that Six4Three failed to show a probability of prevailing on these claims. We now turn to its contractual claim.

2. Breach of Contract Claim

Six4Three argues that it demonstrated a probability of prevailing on its breach of contract claim through the 2012 SRR. But Six4Three cherry-picks a single phrase from Section 9 of those terms—that Facebook would give it “all rights necessary to use the code, APIs, data, and tools you receive from us”—to contend that Facebook promised Six4Three access to Facebook’s code, APIs, data, and tools in perpetuity.

In so doing, Six4Three ignores language in the immediately preceding lines that limited developer access and explicitly stated that Facebook “can limit your access to data.” (Cf. Civ. Code, § 1641 [“The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other”].) Six4Three also ignores the 2015 SRR, which was in place before Facebook restricted Six4Three’s access to Graph API data and did not contain the phrase on which Six4Three now relies. (Cf. *id.*, § 1698, subd. (a) [“A contract in writing may be modified by a contract in writing”].) Six4Three offers no argument or authority to disregard the explicit limiting language of the 2012 SRR or the amendments reflected in the 2015 SRR. Six4Three thus has not shown a probability of prevailing on its breach of contract claim.

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In sum, given our conclusions regarding section 230 and the contractual cause of action, we conclude that the trial court did not err in finding Six4Three had failed its burden on the second anti-SLAPP step.

IV. Discovery Motion**A. Additional background**

Section 425.16, subdivision (g) provides, in relevant part, that discovery proceedings are generally stayed by the filing of an anti-SLAPP motion but “[t]he court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.”

While Facebook’s anti-SLAPP motion was pending, Six4Three filed a discovery motion seeking to take two depositions and obtain documents responsive to several dozen requests for production it had propounded before the anti-SLAPP motion was filed. It argued that “good cause” existed because the anti-SLAPP motion sought to strike all of its claims, and it would be “entirely prejudicial” for Six4Three to oppose the motion without “first reviewing” this discovery previously requested.

By the time of the hearing, the parties had already received the trial court’s tentative ruling on Facebook’s anti-SLAPP motion. Six4Three’s counsel noted that the tentative found Six4Three had not sufficiently demonstrated the commercial speech exception or opposed application of section 230. Counsel stated: “Now, we think

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that, look, either there's an absence of evidence on this or there isn't, but either way the evidence that we have sought is, in fact, directly pertinent towards areas that this Court has said were lighter . . . [and] would've helped you fill that specific evidentiary, or lack that the Court has stated is missing."

The trial court denied the discovery motion. As a preliminary matter, it found that Six4Three had contradicted any need for such discovery by claiming in its papers that it had sufficient evidence to defeat Facebook's anti-SLAPP motion. The court also found that Six4Three had not sufficiently stated why the discovery was necessary, instead arguing that "ongoing discovery was 'disrupted by the filing of' that motion."

B. Analysis

We review the trial court's ruling on Six4Three's discovery motion for abuse of discretion. (*Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 191 [118 Cal. Rptr. 2d 330] ["We may not disturb the trial court's ruling on such a discovery request absent an abuse of discretion"].)

Six4Three contends that it showed "good cause" under section 425.16, subdivision (g) because its counsel made "very clear" at the hearing "what specific, limited discovery was needed in connection with the not-yet-decided Facebook anti-SLAPP motion if the court were to follow its tentative from the Individual Defendants anti-SLAPP."

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To satisfy this “good cause” standard, a party must “*explain what additional facts [it] expects to uncover*” and why the discovery is necessary to carry its burden on the anti-SLAPP motion. (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 247 [83 Cal. Rptr. 2d 677], italics added.) Conclusory comments by counsel that the evidence requested—including two depositions and responses to dozens of requests for production—would somehow “fill” unspecified evidentiary gaps was not a sufficient explanation.

We conclude that the trial court did not abuse its discretion in denying Six4Three’s discovery motion.

V. Attorney Fee Award**A. Additional background**

Defendants’ anti-SLAPP motions included a request for attorney fees under section 425.16, subdivision (c) as the prevailing parties on the motions. After the trial court granted the anti-SLAPP motions, defendants sought a \$2.9 million lodestar for over 5,000 attorney hours.

Six4Three did not oppose the request in its entirety, but instead argued that the amount should be approximately \$357,000. Six4Three argued that defendants’ proposed lodestar included work not “directly pertinent” to the anti-SLAPP motions, such as fees incurred for the prior appeal.

The trial court concluded that an award of \$683,417.50 in attorney fees was reasonable “in light of the lengthy

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procedural history on Defendants’ anti-SLAPP motions.” At the hearing, the court explained that this amount included “appellate work related to the anti-SLAPP motion” and the “motions to seal portions of the corresponding papers.”

B. Analysis

Section 425.16, subdivision (c)(1) provides that “a prevailing defendant on a special motion to strike shall be entitled to recover that defendant’s attorney’s fees and costs.” Such entitlement includes fees and costs ““incurred in connection with”” the anti-SLAPP motion itself, but not “fees and costs incurred for the *entire* action.” (*569 East County Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) 6 Cal.App.5th 426, 433 [212 Cal. Rptr. 3d 304] (*569 East County*)). We review the trial court’s determination regarding the amount of such fees for abuse of discretion. (*Ibid.*)

Six4Three argues, without citation to supporting authority, that the trial court abused its discretion here because it “declined to excise time billed for, among other things, Defendants’ unsuccessful anti-SLAPP appeals and sealing motions.” But, as detailed above, the prior appeal led to the granting of the individual defendants’ anti-SLAPP motion, which led to the reconsideration (and ultimate granting) of Facebook’s anti-SLAPP motion. And Facebook’s motions to seal included requests to seal briefing, declarations, and evidence submitted by Six4Three in opposition to the anti-SLAPP motion. The trial court granted many of these requests, noting that the

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material contained confidential or competitively sensitive information regarding Facebook’s business strategies and objectives. Work related to both the prior appeal and sealing motions thus constituted ““expenses incurred *in extracting* [defendants] from a baseless lawsuit,”” which the fees provision of the anti-SLAPP statute is designed to reimburse. (*569 East County, supra*, 6 Cal.App.5th at p. 433.)

We conclude Six4Three has failed to show the trial court abused its discretion in awarding defendants \$683,417.50 in attorney fees.

DISPOSITION

The June 20, 2022 orders granting defendants’ anti-SLAPP motions and the February 17, 2023 attorney fees order are affirmed. Defendants are entitled to their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

BROWN, P. J.

WE CONCUR:

GOLDMAN, J.
SIMONDS, J.*

* Judge of the Sonoma Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution

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**APPENDIX C — ORDER OF THE SUPERIOR
COURT FOR THE STATE OF CALIFORNIA,
COUNTY OF SAN MATEO, FILED JUNE 20, 2022**

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF SAN MATEO

Case No. CIV 533328

SIX4THREE, LLC, A DELAWARE LIMITED
LIABILITY COMPANY,

Plaintiff,

v.

FACEBOOK, INC., A DELAWARE CORPORATION;
MARK ZUCKERBERG, AN INDIVIDUAL;
CHRISTOPHER COX, AN INDIVIDUAL; JAVIER
OLIVAN, AN INDIVIDUAL; SAMUEL LESSIN,
AN INDIVIDUAL; MICHAEL VERNAL, AN
INDIVIDUAL; ILYA SUKHAR, AN INDIVIDUAL;
AND DOES 1-50, INCLUSIVE,

Defendants.

Filed June 20, 2022

**---- COMPLEX CIVIL CASE ----
RE-ASSIGNED FOR ALL PURPOSES TO
HON. ROBERT D. FOILES, DEPT. 21**

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**[PROPOSED] ORDER GRANTING DEFENDANT
FACEBOOK’S SPECIAL MOTION TO STRIKE
AND FOR ATTORNEY’S FEES AND COSTS
PURSUANT TO C.C.P. § 425.16 (ANTI-SLAPP)**

Date: May 13, 2022
Time: 2:00 p.m.
Dept: 21 (Complex Civil Litigation)
Judge: Honorable Robert D. Foiles
FILING DATE: April 10, 2015

Defendant Facebook, Inc. (“Facebook” or “Defendant”) Special Motion to Strike and For Attorney’s Fees and Costs Pursuant to C.C.P. § 425.16 (Anti-SLAPP) to the Fourth Amended Complaint (“Motion”), filed on November 21, 2017, is GRANTED. (Code Civ. Proc. § 425.16.)

At the time Defendant filed the Motion, the operative pleading was the Fourth Amended Complaint (“4AC”). Plaintiffs then filed the Fifth Amended Complaint (“5AC”) in accordance with Case Management no. 9, issued on December 5, 2017, where the Court complied with the “command of the Court of Appeal granting an Alternative Writ in favor of Plaintiff Six4Three LLC on December 4, 2017 (A152116).” The Fifth Amended Complaint added Defendants Mark Zuckerberg, Christopher Cox, Javier Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar’s (collectively “Individual Defendants”) as defendants. Notwithstanding the pending amendment, the Court kept the Motion and Facebook’s demurrer on calendar “[f]or purposes of judicial economy and expense to the parties.” (CMO 9, p. 1.)

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The Court then denied the Motion as untimely. (Order, issued Jul. 16, 2018, p. 2:7-10.) The Court of Appeal found that “[t]he Court acted within its discretion in declining to consider Facebook’s motion” and affirmed the denial. (*Six4Three, LLC v. Facebook Inc.* (Cal. Ct. App., Sept. 30, 2019, No. A154890) 2019 WL 4784420, at *4 (“*Six4Three*”).) On February 4, 2022, the Court granted Individual Defendants’ Anti-SLAPP Motion and ordered it would reconsider, *sua sponte*, its order denying Defendant Facebook’s Inc.’s Special Motion to Strike and For Attorney’s Fees and Costs Pursuant to C.C.P. § 425.16 on the grounds of timeliness and would set the matter for a hearing on the merits. (See *Six4Three, supra*, 2019 WL 4784420, at *6, fn. 8 (“In the event that the court grants the individual defendants’ motion in whole or in part, we do not preclude the court from reconsidering its order with respect to Facebook’s motion.”).)

On March 4, 2022, the Court continued the Motion in order to hear Plaintiff’s Motion for Order That Certain Discovery Proceed Pursuant to Cal. Code. Civ. Proc. 425.16(g) and for Sanctions, filed on December 12, 2017, that was directed at Plaintiff’s opposition to the Motion. (See Min. Order, issued Mar. 4, 2022.) On March 18, 2022, the Court denied Plaintiff’s discovery motion. (See Min. Order, issued Mar. 18, 2022.)

The Court now considers the Motion on the merits.

Defendant moves to, strike “on the ground that the Fourth Amended Complaint arises from the exercise of the constitutional right of free speech in connection with

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an issue of public interest, and Six4Three cannot show a probability of success on its claim against Facebook” pursuant to Code of Civil Procedure section 425.16, subdivision (e)(4) (“Section 425.16” or “§ 425.16”). (Notice of Motion, filed Nov. 21, 2017, lines 7-9.)

A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the U.S. Constitution or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines the plaintiff establishes a probability of prevailing on the claim. (§ 425.16 subd. (b)(1).) A special motion to strike under section 425.16 is evaluated through a two-step process. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061.) In the first step, the Court decides whether the moving defendant made a threshold showing that the challenged cause of action arises from protected activity. (*Central Valley Hospitalists v. Dignity Health* (2018) 19 Cal. App.5th 203, 216 (“*Central Valley*”), citing *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450 (“*Hecimovich*”).) If the Court finds that defendant made this showing, then the Court determines in the second step whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Ibid.*)

a. First Prong – “Arising From Protected Activity”

i. Defendant Has Met Its Initial Burden

Defendant has met its initial burden of demonstrating that Plaintiff’s claims arise from Defendants’ exercise of

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free speech as defined by § 425.16. In evaluating whether the conduct involves protected activity,

We look for the principal thrust or gravamen of the plaintiff's cause of action. We do not evaluate the first prong of the anti-SLAPP test solely through the lens of a plaintiff's cause of action. The critical consideration is what the cause of action is based on.

(*Hecimovich, supra*, 203 Cal.App.4th at p. 465 (internal quotations, citations omitted).)

As argued by Defendant, the gravamen of the operative complaint is that Plaintiff “was harmed by Facebook’s editorial decision to de-publish certain categories of user-created content, including friends’ photos, newsfeed, and other content.” by means of its API. (MPA, filed Nov. 21, 2017, p. 2:25-27.)

Plaintiff argues that the gravamen of its claims are the misrepresentations, and that Defendants’ allegedly fraudulent speech is not protected activity. However, the Supreme Court has already rejected such an argument in *Navellier v. Sletten* (2002) 29 Cal.4th 82, 93. (“[C]ontract and fraud claims are not categorically excluded from the operation of the anti-SLAPP statute”). “[T]he statute does not bar a plaintiff from litigating an action that arises out of the defendant’s free speech or petitioning it subjects to potential dismissal only those actions in which the plaintiff cannot state and substantiate a legally sufficient claim.” (*Id.* (cleaned up).) Here, where the plaintiff alleges

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a “bait-and-switch” scheme (4AC, ¶ 1; 5AC, ¶ 1), the plaintiff cannot merely rely on the “bait,” here alleged misrepresentations, when the “switch” is protected speech. The Supreme Court in *Navellier* rejected the dissent’s view that the allegedly fraudulent statement – or the bait – should control whether the action arises from protected activity. (*Navellier, supra*, 29 Cal.4th at p. 99 (Brown, J. dissenting).) The Court instead held that “but for” the protected activity – the switch – plaintiff’s claims “would have no basis” and that the “action therefore falls squarely within the ambit of the anti-SLAPP” statute. (*Id.* at p. 90.)

The allegations of the Fourth Amended Complaint demonstrate the alleged conduct involves the exercise of the constitutional right of free speech in connection with an issue of public interest. Plaintiff alleges, *inter alia*,: (1) Facebook Developer Platform, including the Graph API, “is one of the world’s largest software economies globally and the economic activity it generates is larger than the GDP of many sovereign nations” (4AC, ¶ 28; SAC, ¶ 34); (2) Plaintiff and Facebook entered into an agreement providing, *inter alia*, third party user photos and videos (4AC, ¶¶ 87, 91; SAC, 93, 97); (3) “[t]he App enabled Facebook users to reduce time spent searching through their photos by automatically finding summer photos that their friends have shared with them through Facebook’s network, assuming their friends permitted [Plaintiff] to access the photos” (4AC, ¶ 98; SAC, ¶ 104); (4) “[i]f a photo were removed by Facebook for containing objectionable content, it would have [*sic*] simultaneously and automatically been removed from the App” (4AC,

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¶ 100; 5AC, ¶ 106); (5) “its decision to close access to the Graph API Data also arose from the fact that Facebook made public representations around its management of user data that enticed tens of thousands of companies to build businesses . . . ” (4AC, ¶ 230; 5AC, ¶ 237); and (6) “[b]ased in significant part upon the representations Facebook made from 2007 until 2014 that Facebook Platform was the most effective organic growth and distribution channel for applications, 643 decided to build its business on Facebook Platform . . . ” (4AC, ¶ 279; 5AC, ¶ 311). Accordingly, the Court finds the allegations against Facebook arise out of the constitutional right of free speech in connection with an issue of public interest.” (§ 425.16, subd. (e)(4).)

ii. Plaintiff has not Demonstrated the Commercial Speech Exception Applies to the Protected Activity

Plaintiff has not met its burden to demonstrate the commercial speech exception applies to the protected activity. (§ 425.16, subd. (c).)

If defendant meets its threshold burden and the plaintiff asserts its claims are exempt under the commercial speech exemption of section 425.17, subdivision (c), the plaintiff then has the burden to show the applicability of that exemption. (*See Simpson Strong – Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 22-26 (*Simpson*); *Rivera v. First DataBank Inc.* (2010) 187 Cal.App.4th 709, 717.) If the plaintiff does not meet that burden, he or she must then establish a probability of prevailing on the claims. (*See Rivera*, at pp. 714-718.)

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(*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 269 (“*Hawran*”). See Plaintiff’s Supplemental Opposition to Facebook’s Special Motion to Strike (Prong 1), filed on January 24, 2018, p. 1:3-4 (“The burden is on the plaintiff to demonstrate the exemption applies”) (“Pl. Suppl. Brief”))

“The commercial speech exemption, like the public interest exemption, is a statutory exception to section 425.16 and should be narrowly construed.” (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 22 (internal quotations, citations omitted) (affirming order granting anti-SLAPP motion on the grounds that the commercial speech exemption was inapplicable) (“*Simpson Strong-Tie Co.*”).)

[W]e interpret section 425.17(c) to exempt from the anti-SLAPP law a cause of action arising from commercial speech when (1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services; (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person’s or a business competitor’s business operations, goods, or services; (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person’s goods or services or in the course of delivering the person’s goods or services; and (4) the intended audience for the statement or conduct meets the definition set forth in section 425.17(c)(2).

(*Simpson Strong-Tie Co., supra*, 49 Cal.4th at p. 30.)

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In another context, our Supreme Court has observed that three elements distinguish commercial speech from noncommercial speech: the speaker, the intended audience, and the content of the message. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 960 (*Kasky*)). “In typical commercial speech cases, the speaker is likely to be someone engaged in commerce—that is, generally, the production, distribution, or sale of goods or services—or someone acting on behalf of a person so engaged, and the intended audience is likely to be actual or potential buyers or customers of the speaker’s goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers. . . . [¶] . . . [¶] Finally, the factual content of the message should be commercial in character. In the context of regulation of false or misleading advertising, this typically means that the speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker’s products or services.” (*Id* at pp. 960-961, italics omitted.)

(*Dean v. Friends of Pine Meadow* (2018) 21 Cal.App.5th 91, 103.)

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The plaintiff must establish both elements of the commercial speech exception. “The plain language of section 425.17 requires that a plaintiff establish all of the elements of the section 425.17 exemption. (§ 425.17, subd. (c)(1), (2) [exemption applies if ‘both of the following conditions exist’]; [citation].)” (*Hawran, supra*, 209 Cal. App.4th at p. 273.)

Element 1 – Selling or Leasing Goods or Services: Plaintiff has not demonstrated that Facebook is in the business of selling or leasing goods or services as Plaintiff has not raised any argument or cited evidence. Plaintiff merely recites Section 425.17.

[Its] claims arising out of conduct or statements consisting of representations of fact about a business’ operations, goods or services made for the purpose of promoting or securing commercial transactions in those goods or services so long as the intended audience of those statements was an actual or potential customer or a person likely to influence an actual or potential customer.

(Pl. Supp. Brief, p. 1:6-9.) In arguing the commercial speech exception applies, Plaintiff addressed the second (*id.* at p. 4:5 – 6:10), third (*id.* at p. 6:11-20) and fourth (*id.* at p. 7:1- 9:2) elements enumerated by the Supreme Court in *Simpson Strong-Tie Co.* Accordingly, Plaintiff has not met its burden.

Furthermore, the First District has found “while Facebook sells advertising, it is not ‘primarily engaged

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in the business of selling or leasing goods or services’ . . . as Facebook offers a free service to its users.” (*Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 203 (“*Cross*”). See Facebook Suppl. Brief, filed Feb. 16, 2018, p. 4:19 – 5:17 (“Def. Suppl. Br.”).) Plaintiff’s attempt to distinguish *Cross* is not well taken. (See Plaintiff Suppl. Reply Brief, filed Mar. 7, 2018, p. 7:11 – 8:2 (“Pl. Reply Supp.”).)

Unlike the public interest exception pursuant to § 425.17, subdivision (b), which may be determined on the allegations, the commercial speech exemption requires evidentiary support to demonstrate its applicability. (Compare *Tourgeman v. Nelson & Kennard* (2014) 222 Cal.App.4th 1447, 1463 (not required to present evidence demonstrating a public benefit) (Fourth Dist., J. Vargas); with *Taheri Law Group v. Evans* (2008) (“commercial speech exemption may not be applied to a lawyer’s conduct” where “Where is no evidence of any solicitation by mail or telephone or other media” and in “a case in which legal advice to a specific client on a pending matter has occurred contemporaneously with the alleged solicitation of the client”). See *Rivera v. First DataBank, Inc.* (2010) 187 Cal.App.4th 709, 717 – 718 (“plaintiffs presented no evidence to support this claim and a mere allegation does not suffice”).)

Here, Plaintiff has not posited any evidence that Facebook is in the business of selling or leasing goods or services.

Element 2 – Representations of Fact about Business Operations: Plaintiff has demonstrated that Facebook’s

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statements are representations of fact about its business operations. (Pl. Supp. Br., *supra*, at p. 4:5 – 5:17.) Facebook’s statements pertain to allowing access to its APIs to user data in order for developers to develop apps. Further, as explained *supra*, Facebook’s statements are not the only conduct at issue here. The “scheme” Plaintiff complains of consists of both Facebook’s statements (the alleged “bait”) and Facebook’s de-publication of user content previously available through the APIs (the alleged “switch”). (See *Navellier*, *supra*, 29 Cal.4th at p. 90.) But the alleged “switch” is the gravamen of Plaintiff’s claims – and the “switch” is not a representation of fact about Facebook’s business operations:

Element 3 – Purpose of Statements: Plaintiff has not demonstrated that Facebook’s statements were “made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person’s goods or services or in the course of delivering the person’s goods or services.” (*Simpson Strong-Tie Co.*, *supra*, 49 Cal.4th at p. 30.)

Plaintiff does not cite to evidence in support of its arguments and relies solely on its allegations. (Pl. Supp. Br., *supra*, at p. 5:4 – 6:10.)

Furthermore, the connection between the at-issue statements and Facebook’s advertising sales is distinguishable from *Demetriades v. Yelp, Inc.*

Yelp’s audience consists of reviewers, readers of reviews, and businesses that may or may not

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purchase advertising on Yelp's Web site. Although Yelp only receives direct revenue from those businesses that advertise, such businesses would not be advertising on Yelp without the potential benefit they could obtain from users' reviews and without assurances that potential patrons of their business establishments would be reading only reliable reviews. Further, as Yelp's revenue stream indicates, Yelp is primarily in the business of providing advertising to businesses; the user reviews of businesses are a device whereby prospective users and reviewers are attracted to Yelp's Web site. Thus, Yelp's statements about the accuracy and performance of its review filter are designed to attract users and ultimately purchasers of advertising on its site.

(*Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294, 312.) Plaintiff further argues, without citation to evidence, that:

Similarly, Facebook's statements and conduct giving rise to all of Plaintiffs causes of action concern the software APIs themselves, the performance of those APIs, and what expectations the public may have regarding those APIs, as opposed to any underlying content that may or may not be transmitted through those APIs. It is not disputed that such statements were made to induce people and businesses to patronize Facebook so it could generate more advertising revenues.

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(Pl. Supp. Br., *supra*, at p. 3:4-9.) However, in the Fourth Amended Complaint, Plaintiff concedes that access to the Facebook Platform to develop its app was free, but may not be free in the future. (4AC, ¶ 93; 5AC, ¶ 99.) Unlike in *Demetriades v. Yelp* where the statements pertaining to filters were directed at the very businesses affected by user reviews in order to induce those businesses to advertise. Plaintiff has not demonstrated a similar connection. (See Def. Supp. Br., *supra*, at p. 8:916.)

Moreover, as noted above, Facebook's statements are not the only conduct at issue here.

Unlike in *Demetriades*, the gravamen of Plaintiff's claims is the de-publication of user content. Plaintiff has not demonstrated that the de-publication was carried out in order to encourage sales of any Facebook goods or services.

Element 4 – Intended Audience (§ 425.17(c)(2)): Plaintiff has not demonstrated that Facebook's intended audience of the statements was actual or potential buyers of its goods or services or persons likely to influence actual or potential buyers of its goods or services.

Plaintiff primarily relies on the allegations and exhibits attached to the 4AC, which is not evidence. (See Pl. Supp. Br., *supra*, at p. 7:1 – 8:7) Furthermore, the evidence cited is not dispositive in demonstrating the intended audience of the statements.

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Facebook was actively implementing Zuckerberg's plan to privatize 54 different APIs and to offer this private access on entirely arbitrary and anti-competitive grounds to only a select number of companies, making it impossible for thousands of companies to continue to participate in arguably the largest software economy in the world. Supp. Godkin Dec., 7, Ex. F (FB-00521473).

(Pl. Supp. Br., *supra*, at p. 8:12-15.) Accordingly, Plaintiff's arguments are not supported by any evidence:

- "[T]he official Facebook Platform FAQ, makes clear that the intended audience of Facebook's representations consists of businesses and person who patronize Facebook's website or might patronize Facebook' Web site in the future" (Pl. Supp. Br., *supra*, at p. 7:2-5);
- "Facebook's statements were made to potential buyers of advertisements, potential developers, considering entering into [no cost] contract with Facebook [to develop apps using Facebook Platform APIs], and potential visitors to the www.facebook.com website, all of whom increased the potential to grow its advertising business" (Pl. Supp. Br., *supra*, at p. 7:16-18);
- "Moreover, it is not disputed that Plaintiff was an actual customer of Facebook, having purchased advertising directly from Facebook to promote the application it had developed using Facebook's

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APIs. *See, e.g.*, 4AC, ¶ 104; SAC, ¶ 110.” (Pl. Supp. Br., *supra*, at p. 8:1-3); and

- “It is a common practice for developers building applications on Facebook Platform to purchase advertisements from Facebook to promote their applications.” (Pl. Supp. Br., *supra*, at p. 8:2-4).

The Court notes that allegations in the Fourth Amended Complaint contradict Plaintiff’s arguments given Plaintiff alleges Facebook expressly represented that access to the Facebook Platform was not contingent on purchasing advertising.

Further, Facebook represented since 2007, and 643 relied on Facebook’s representations since that time, that certain Facebook users were prospective customers of any app built on Platform. *This is because a key purpose of Platform was to enable new apps to reach Facebook’s users with free, organic distribution through the newsfeed APIs and friends list APIs.* Facebook represented for years that this would enable companies like 643 to much more rapidly enter into contracts and secure purchases from new customers since any friend of any existing App user could enter into contract with 643 with a single tap of a button *and without 643 having to purchase advertisements.*

(4AC, p. 39:13-20; 5AC, p. 48:11-18 (emphasis added).) Plaintiff further alleges it separately engaged in purchasing advertising to promote its app, and Plaintiff

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has not demonstrated those purchases were related to the at-issue statements.

Finally, 643 engaged in other marketing activities in preparation for a public launch. For instance, 643 purchased advertising from Facebook to test various ad campaigns in Facebook’s new mobile advertising product. Facebook confirmed these purchases and ran 643’s various ad campaigns on its public website. *As a result of Facebook’s anti-competitive scheme, 643’s App was prevented from participating in Facebook’s advertising market since it had no functioning App to advertise.* Upon information and belief, tens of thousands of other software companies were prevented from participating in Facebook’s new mobile advertising market as a result of Facebook’s anti-competitive scheme.

(4AC, ¶ 104; 5AC, ¶ 110 (emphasis added).) Furthermore, Plaintiff does not assert a false advertising claim against Facebook. (*See* Def. Supp. Br., *supra*, at p. 2:7.)

Lastly, although not relied on in this Court’s findings above, this Court notes that in 2019, the Supreme Court narrowed the commercial speech exemption to comparative advertising after this motion was briefed. (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 147-148. *See Dziubla v. Piazza* (2020) 59 Cal. App.5th 140, 154 (“This added detail has aided courts in determining that the legislature intended to exclude only a subset of commercial speech specifically, comparative advertising” (cleaned up))).)

*Appendix C***b. Second Prong – Probability of Prevailing on the Merits**

Since Defendant has met its initial burden on the first prong, the burden shifts to Plaintiff to demonstrate the probability of prevailing on the merits.

While plaintiff's burden may not be "high," he must demonstrate that his claim is legally sufficient. (*Navellier v. Sletten, supra*, 29 Cal.4th at p. 93.) And the plaintiff must show that it is supported by a sufficient prima facie showing, one made with "competent and admissible evidence." (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1236; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1497.)

(*Hecimovich, supra*, 203 Cal.App.4th at p. 469 (parallel citations omitted).)

i. Communications Decency Act

Plaintiff has not met its burden to demonstrate the Communications Decency Act does not apply in order to demonstrate a probability of prevailing on the merits.

Section 230(c)(1) 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." The statute goes on to provide that causes of action

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inconsistent with it under state law are precluded:
 “Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. *No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.*” (§ 230(e)(3), italics added.)

(*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal. App.4th 790, 802 (original emphasis).)

The statute requires dismissal of state law claims if:

- defendant is a provider or user of an interactive computer service;
- the information for which plaintiff seeks to hold defendant liable is information provided by another content provider; and
- the complaint seeks to hold defendant liable as the publisher or speaker of that information.
[Caraccioli v. Facebook, Inc. (ND CA 2016) 167 F.Supp.3d 1056, 1065]

(Gaab & Reese, Cal. Prac. Guide: Civ. Proc. Trial Claims & Def. (Rutter, Oct. 2021 Update) ¶ 4:480.)

As the Ninth Circuit has explained, “Section 230 of the CDA immunizes providers of interactive computer services against liability arising from content created by third parties.” [Citation.] Section 230 was enacted to “protect[] websites from liability for material posted on the website by someone

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else.” [Citation.] Specifically, section 230 states: “No 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). Importantly, section 230’s “grant of immunity applies only if the interactive computer service provider is not also an ‘information content provider,’ which is defined as someone who is ‘responsible, in whole or in part, for the creation or development of the offending content.” [Citation.] CDA immunity, thus, does not apply to “the creation of content” by a website. [Citation.] Because a “website operator can be both a service provider and a content provider,” it “may be immune from liability for some of the content it displays to the public but be subject to liability for other content.” [Citation.]

(*Perkins v. LinkedIn Corp.* (N.D. Cal. 2014) 53 F.Supp.3d 1222, 1246-1247.)

Section 230(c)(1) thus immunizes providers of interactive computer services (service providers) and their users *from causes of action asserted by persons alleging harm caused by content provided by a third party*. This form of immunity requires (1) the defendant be a provider or user of an interactive computer service; (2) the cause of action treat the defendant as a publisher or speaker of information; and (3) the information at issue be provided by another information content provider.

(*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 830.)

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The CDA is an affirmative defense. (*Pirozzi v. Apple Inc.* (N.D. Cal. 2012) 913 F.Supp.2d 840, 848-849 (distinguished on other grounds in *Evans v. Hewlett-Packard Company* (N.D. Cal., Oct. 10, 2013, No. C 13-02477 WHA) 2013 WL 5594717, at *3; *La Park La Brea A LLC v. Airbnb, Inc.* (C.D. Cal. 2017) 285 F.Supp.3d 1097, 1103).)

There is some dispute in the case law as to which party bears the burden of proof on an affirmative defense in the context of an anti-SLAPP motion. Some cases state that “although section 425.16 places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense. [Citation.]” (*E.g., Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 676.) Others suggest that the [affirmative defense] presents “a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing. [Citations.] [Citation.]” (*E.g., Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1485.)

(*Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, 683.)

When evaluating an affirmative defense in connection with the second prong of the analysis of an anti-SLAPP motion, the court, following the summary-judgment-like rubric, generally should consider whether the defendant’s evidence in support of an affirmative defense is sufficient, and

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if so, whether the plaintiff has introduced contrary evidence, which, if accepted, would negate the defense.

(*Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 434.)

Plaintiff argues in opposition: (1) “the claims in this case in no way arise out of something a third party posted on Facebook” (Opp., filed Dec. 12, 2017, p. 10:1-10; *see also* Pl. Supp. Br., *supra*, at p. 9:2-21); (2) the CDA “concerns obscene, lewd, lascivious, filthy, or excessively violent content” (Opp., *supra*, at p. 10:11 – 11:3); (3) “Plaintiff does not allege that Facebook de-published the content . . . as the content remains published” (*id.* at p. 11:4-11); and (4) the CDA does not apply to breach of contract claims (*id.* at p. 11:12 – 12:2).

However, Plaintiff does not cite to evidence relevant to supporting these arguments, nor does Plaintiff cite to any evidence in support of its arguments in its supplemental brief. (*See* Opp., *supra*, at p. 10:1 – 12:2; Pl. Supp. Br., *supra*, at p. 9:2-21.)

“In making this assessment, the court must consider both the legal sufficiency of and evidentiary support for the pleaded claims, and must also examine whether there are any constitutional or nonconstitutional defenses to the pleaded claims and, if so, whether there is evidence to negate any such defenses. [Citation.]” (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 108.)

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(*Friends of Pine Meadow, supra*, 21 Cal.App.5th at p. 107. *See id.* at p. 109 (“[P]laintiffs failed to demonstrate that these complaint allegations are supported by evidence”); 110 (“Plaintiffs do not identify any evidence in this record supportive of their theory that defendants undertook their petitioning activity as an anticompetitive weapon”).)

Provider or User of An Interactive Service: Plaintiff admits “Facebook is an [internet service provider].” (Opp., *supra*, at p. 11:3. *See Cross, supra*, 14 Cal.App.5th at p. 197 (Facebook is an interactive computer service).)

Arising From Third Party Content: Plaintiff and Defendant both cite to Plaintiff’s allegations, and not evidence, in their arguments whether the claims arise from third party content (or “user content”). As pled, the Court finds the content at issue is third party user content and its publication/de-publication to developers via the Facebook Platform API. (*See MPA, supra*, at p. 10:17-23.) In opposition, Plaintiff argues,

Further, many of Facebook’s software APIs, tools and methods that Plaintiff used have nothing to do with the transmission of data uploaded by third parties to Facebook’s website. For instance, the Friends List API (the removal of which shut down Plaintiffs business) is a software product that Facebook created to provide access to data that Facebook itself created, compiled and maintained. No Facebook user has ever uploaded or posted a list of all their Facebook friends to the Facebook website; rather, Facebook created this list and

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chose to make it available under contract via certain software APIs.

(Opp., *supra*, at p. 1:18 – 2:4.)

However, this argument contradicts the allegations of the Fourth Amended Complaint where Plaintiff describes using third party content published by Facebook – Facebook user’s photos – to developers via the “Friends’ Photos Endpoint” API as the basis of Plaintiff’s app. (4AC, ¶¶ 62, 63, 98 – 100; 5AC, ¶¶ 68, 69, 104 – 106.)

Specifically, the basis of Plaintiff’s Pikinis app is the publication of user content where it “enabled Facebook users to reduce time spent searching through their photos by automatically finding summer photos that their friends have shared with them through Facebook’s network, assuming their friends permitted 643 to access the photos.” (4AC, p. 37:12-14; 5AC, p. 46:8-10.) “The App used 643’s image recognition technology to search through shared photos and identify the ones in a summer setting, which included friends at the beach or pool, on a boat, in their bathing suits and the like.” (4AC, p. 37:19-21; 5AC, p. 46:15-17.)

In other words, Plaintiff’s app depended on Facebook’s publication of third-party user’s photos to developers through Facebook’s Platform. When Facebook cut off access to its API, or de-published the third-party content, to developers, the developers no longer had access to the third-party content even though it would be available on Facebook to other end-users contingent on user

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controlled privacy settings. Accordingly, Plaintiff has not demonstrated that this action does not arise from third party content.

Furthermore, as pled, the Court finds that Friends List API is also based on user generated content based on users connecting as friends on Facebook. The 2012 Agreement defined the following terms:

Facebook defined “Platform” as “a set of APIs and services (such as content) that enable [643] to retrieve data from Facebook or provide data to [Facebook]. . . . By ‘content’ we mean anything . . . users post on Facebook. . . . By ‘data’ or ‘user data’ we mean any data, including a user’s content or information that you or third parties can retrieve from Facebook or provide to Facebook through Platform. . . .

(4AC, p. 61:6-10; 5AC, p. 70:20-24.) The Friends List content requires users to request and accept other users as friends. Thus, the acknowledgment of that “friend” relationship between two users and the dissemination of the Friends List to developers is user generated content that Facebook collected via its Platform.

CDA and Bad Content: The CDA is not limited to “obscene, lewd, lascivious, filthy, or excessively violent content” as argued by Plaintiff (Opp., *supra*, at p. 10:12-13), but includes material that it considers “harassing, or otherwise objectionable.” (47 U.S.C. § 230, subd. (c) (2). *See* Reply ISO Facebook Anti-SLAPP, filed Dec. 22,

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2017, p. 7:2-14 (“Reply”).) Furthermore, “Facebook relied on Section 230(c)(1) in its motion, not Section 230(c)(2).” (Reply, *supra*, at p. 7:1-2.) And Sections 230(c)(1) and 230(e)(3) “have been widely and consistently interpreted to confer broad immunity against defamation liability for those who use the Internet to publish information that originated from another source.” (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 39 (“*Barrett*”).)

De-Publishing: The Court finds Plaintiff brings this action against Defendants for Facebook’s role as a publisher of content given this action pertains to Plaintiff’s access to user content granted and then denied by Facebook. Here, Plaintiff seeks, *inter alia*, injunctive relief against Facebook.

A permanent injunction requiring Facebook to restore Developer access to the Graph API data, including reading the full friends list, friends permissions and newsfeed APIs, and all other data and APIs available prior to Facebook’s removal of the APIs on April 30, 2015.

(4AC, p. 92:23-26; SAC, p. 106:12-15 (emphasis added).) Moreover, Plaintiff also seeks a permanent injunction to prohibit Facebook from “interfering with 643’s contracts” and “prospective economic relations.” (4AC, p. 92:27-28; 5AC, p. 106:16-19.) In this regard, this action is similar to *Cross*, where “the clear gravamen of which is [Cross’s] objection to the third-party content on the pages and Facebook’s editorial decisions to not remove them.” (*Cross*, *supra*, 14 Cal.App.5th at p. 200.) Here,

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Plaintiff's objection is to Facebook's editorial decision to remove access to third-party content, which is akin to the act of de-publishing. The alleged interference again pertains to access to third party content. (4AC, ¶ 270; SAC, ¶ 286 ("intentionally interfered with and disrupted 643's contracts with its users when it did terminate 643's access to Graph API data on April 30, 2015"), 4AC, ¶ 286; SAC, ¶ 302 ("intentionally interfered and disrupted 643's relationships with its users and prospective users when it did terminate 643's access on April 30, 2015").)

Plaintiff argues that it "seeks an injunction to stop Facebook from continuing to engage in untrue and misleading representations by requiring it to make available the 54 graph APIs it represented would serve as the core of its platform economy." (Pl. Supp. Br., *supra*, at p. 8:15-20 (cleaned up). *See also id.* at p. 9:9-21.) However, Plaintiff does not seek to enjoin Facebook from making misrepresentations but rather to require Facebook to republish user content by providing access to it (e.g. photos) to Plaintiff. (4AC, p. 92:23-28; 5AC, p. 106:12-19.)

The Supreme Court's ruling in *Hassell v. Bird* is instructive where the plaintiff obtained an injunction through default judgment in which the trial court ordered non-party Yelp "to remove all reviews posted by AVA BIRD under user names "Birdzeye B." and "J.D." attached hereto as Exhibit A and any subsequent comments of these reviewers within 7 business days of the date of the court's order.'" (*Hassell v. Bird* (2018) 5 Cal.5th 522, 530 ("*Hassell*").) The trial court denied Yelp's motion to set aside default judgment. Yelp appealed and the First

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District affirmed the judgment on the finding it did not impose any liability on Yelp. The Supreme Court reversed.

[S]ection 230 immunity applies here. We therefore reverse the judgment of the Court of Appeal insofar as it affirmed the trial court's denial of Yelp's motion to set aside and vacate the judgment. That motion should have been granted to the extent that it sought to delete from the order issued upon entry of the default judgment any requirement that Yelp remove the challenged reviews or subsequent comments of the reviewers.

(*Hassell, supra*, 5 Cal.5th at p. 548.) The Supreme Court's findings are particularly instructive.

Plaintiffs also assert that Yelp cannot claim section 230 immunity because, under section 230(e)(3), no "cause of action" has been alleged directly against it as a defendant, and in their view making Yelp subject to an injunction does not amount to the imposition of "liability." This argument reads constraining force into the language within section 230(e)(3) that provides, "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." This phrasing does not provide strong support for, much less compel, plaintiffs' construction. Section 230(e)(3) does not expressly demand that a cause of action always must be alleged directly against an Internet intermediary as a named defendant for the republisher to claim immunity under the statute.

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And in common legal parlance at the time of section 230's enactment, "liability" could encompass more than merely the imposition of damages. (See Black's Law Dict. (6th ed. 1990) p. 914 [defining "liability" as "a broad legal term" that "has been referred to as of the most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent, or likely"].)

Even more fundamentally, plaintiffs' interpretation misses the forest for the trees. Section 230(e)(3) underscores, rather than undermines, the broad scope of section 230 immunity by prohibiting not only the imposition of "liability" under certain state-law theories, but also the pursuit of a proscribed "cause of action." (See *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.* (4th Cir. 2009) 591 F.3d 250, 254 [section 230 is not just a "defense to liability"; it instead confers "immunity from suit" (*italics omitted*)]; *Medytox Solutions, Inc. v. Investorshub.com, Inc.*, *supra*, 152 So.3d at p. 731.) *This inclusive language, read in connection with section 230(c)(1) and the rest of section 230, conveys an intent to shield Internet intermediaries from the burdens associated with defending against state-law claims that treat them as the publisher or speaker of third party content, and from compelled compliance with demands for relief that, when viewed in the context of a plaintiff's allegations, similarly assign them the legal role and responsibilities of a publisher qua publisher.* (See *Barrett, supra*, 40 Cal.4th at pp. 53, 56, 57;

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Barnes v. Yahoo!, Inc., *supra*, 570 F.3d at pp. 1101-1102; *Zeran*, *supra*, 129 F.3d at p. 330.) As evidenced by section 230's findings, Congress believed that this targeted protection for republishers of online content would facilitate the ongoing development of the Internet. (*See* § 230(a)(1), (a)(4), (b)(1), (b)(2).)

These interests are squarely implicated in this case. *An injunction like the removal order plaintiffs obtained can impose substantial burdens on an Internet intermediary.* Even if it would be mechanically simple to implement such an order, compliance still could interfere with and undermine the viability of an online platform. (*See Noah v. AOL Time Warner, Inc.*, *supra*, 261 F.Supp.2d at p. 540 [“in some circumstances injunctive relief will be at least as burdensome to the service provider as damages, and is typically more intrusive”].) Furthermore, as this case illustrates, a seemingly straightforward removal order can generate substantial litigation over matters such as its validity or scope, or the manner in which it is implemented. (*See Barrett*, *supra*, 40 Cal.4th at p. 57.) Section 230 allows these litigation burdens to be imposed upon the originators of online speech. *But the unique position of Internet intermediaries convinced Congress to spare republishers of online content, in a situation such as the one here, from this sort of ongoing entanglement with the courts.*

(*Hassell*, *supra*, 5 Cal.5th at p. 544-545 (emphasis added).) Accordingly, the Court finds even if the content remains

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published and available to some but not all, the CDA applies. (See MPA, *supra*, at p. 9:23 – 10:4; Reply, p. 6:13-16, 7:20-22.)

In *Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc.*, on a motion to dismiss, the Court contemplated whether the CDA applies where the plaintiff alleged the defendant “federal and state law by blocking access to Plaintiff’s Facebook page (the “SFJ Page”) in India.” (*Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc.* (N.D. Cal. 2015) 144 F.Supp.3d 1088, 1090 (“*Sikhs*”) (N.D. Cal., J. Koh).) The plaintiff asserted a federal law cause of action for violation of Title II of the Civil Rights Act and state law causes of action for violation of the Unruh Civil Rights Act, breach of contract, and breach of the implied covenant of good faith and fair dealing. (*Id.* at p. 1090 – 1091.) Plaintiff sought, *inter alia*, “a permanent injunction requiring Defendant to stop blocking access to the SFJ Page in India, as well as compensatory and punitive damages, costs, attorney’s fees. . . .” (*Id.* at p. 1091.) The court ruled that the CDA applied as to the federal causes of action.

Here, Plaintiff’s Title II claim alleges that Defendant engaged in “blatant discriminatory conduct by blocking Plaintiff’s content in the entire India.” Compl. at 9-12. Plaintiff additionally avers that Defendant denied Plaintiff “full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations” of Defendant’s social media site by removing the SFJ Page in India based on Plaintiff’s race, religion, ancestry, and national origin. *Id.* at 10, 12; *see*

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also 42 U.S.C. § 2000a(a) (“All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin.”). Defendant argues that this claim is entirely based on Defendant’s blocking of the SFJ Page in India, which is publisher conduct immunized by the CDA.

The Court agrees with Defendant. . . .

As in *Barnes*, *Riggs*, and *Levitt*, Plaintiff seeks to hold Defendant liable for Defendant’s decision “whether to publish” third-party content. *See Barnes*, 570 F.3d at 1102. In the instant case, Plaintiff argues that Defendant had a duty under Title II not to discriminate against Plaintiff. Compl. at 9-12; *see also* Opp. at 11 (“[Defendant’s] conduct was motivated solely by unlawful discrimination against the national identity of India and the minority religion of Sikhs in India.”). *However, the act that Defendant allegedly conducted in a discriminatory manner is the removal of the SFJ Page in India. See Barnes*, 570 F.3d at 1103 (examining the conduct underlying the plaintiff’s claim of negligent undertaking). “*But removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher.*” *See id.*

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Plaintiff responds that it merely seeks an explanation for why Defendant blocked the SFJ Page in India. However, Plaintiff cites no authority requiring such relief. Rather, the CDA bars all claims that seek to hold an interactive computer service liable as a publisher of third-party content. *See id.*; 47 U.S.C. § 203(c)(1). *Indeed, “[i]t is because such conduct is publishing conduct that we have insisted that section 230 protects from liability ‘any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online.’” Barnes*, 570 F.3d at 1103 (quoting *Roommates*, 521 F.3d at 1170-71). Further, *Plaintiff seeks not just an explanation for Defendant’s action, but damages and an injunction requiring Defendant to restore access to the SFJ Page in India. See Compl. at 14-15. Accordingly, the Court finds that the CDA precludes Plaintiff’s Title II claim. See Barnes*, 570 F.3d at 1102-03.

(*Sikhs, supra*, 144 F.Supp.3d at p. 1095-1096 (emphasis added)) In light of the foregoing, the Court finds Facebook’s decision to de-publish third party content from developers, but not end users, is protected by the Communications Decency Act.

ii. Other Claims

Plaintiff has not demonstrated the probability of prevailing on its remaining claims. (*See Opp.*, p. 12:15 – 14:2.)

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The Court finds that Plaintiff has not met its burden to demonstrate the probability of prevailing on the merits on the second cause of action for breach of contract.

To establish a probability of prevailing, 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.” [Citation.]

(*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291. *See also Navellier, supra*, 29 Cal.4th at p. 88-89 (“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’ (cleaned up).) Here, Plaintiff has not done so.

Plaintiff’s arguments that “Facebook violated the agreement by acting arbitrarily and maliciously in a host of ways to make it impossible for Plaintiff and other developers to obtain the benefit of the bargain,” “Plaintiff was harmed and Facebook’s breach was a substantial factor in Plaintiff’s harm,” and “Plaintiff has produced prima facie evidence demonstrating that it will meet all of the elements of breach of contract” are conclusory and not supported by the evidence cited. (Opp., *supra*, at p. 13:5-9.) Plaintiff does not provide any specific argument or cite to specific evidence to address the elements of the breach of contract claim but instead cites generally to “Godkin Dec. ¶¶ 8-12, Exs. G-K” in support of the

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aforementioned contentions. (*Id.*) However, Exhibits G – K are submissions and briefs to the Court in this action, and are not evidence that would support demonstrating the probability of prevailing on the merits of the breach of contract claim as follows: (1) Plaintiffs January 20, 2017 Discovery Proposal Pursuant to the Court’s December 13, 2016 Order (Godkin Dec. ISO Opp., filed Dec. 12, 2017, Ex. G (“Godkin Dec.”)); (2) Plaintiff’s Supplemental Memorandum In Support of Its Motion for Leave to File the Third Amended Complaint (*id.* at Ex. H); (3) Plaintiff’s Discovery Letter to the Court of September 5, 2017 (*id.* at Ex. I); (4) Plaintiff’s Discovery Letter to the Court of October 5, 2017 (*id.* at Ex. J); and (5) Plaintiff’s Separate Statement in Opposition to Facebook’s Motion for Summary Adjudication (*id.* at Ex. K). For this reason alone, Plaintiff has not demonstrated the probability of prevailing on the merits.

Moreover, in addressing Facebook’s arguments, Plaintiff concedes in a footnote,

Facebook’s remaining arguments are simply straw men. Facebook claims that it “never agreed to provide **all** of its code, APIs, data, and tools.” Motion, at 11. Plaintiff never alleges that Facebook, agreed to provide **all** of its code – only the code that Facebook **did in fact provide**. Facebook then claims it never agreed to provide the code “for free forever”. Motion at 12. Again, Plaintiff never alleges that Facebook agreed to provide its code for free forever. Plaintiff does allege that Facebook agreed if it ever decided to charge for access to APIs that

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it would make the APIs generally available at a fair published price, just like any other software-as-a-service. 4AC ¶ 93.

(Opp., *supra*, at p. 13:17-20, fn. 17 (original emphasis).) However, Plaintiff does not cite to any specific term in the SRR that supports its interpretation pled at 4AC, ¶ 93. (See Reply, *supra*, at p. 8:23.) Thus, Plaintiff has not demonstrated the probability of prevailing on the merits based on its contract interpretation.

The Court also notes that in opposition to the Individual Defendants' Anti-SLAPP motion, Plaintiff addressed its probability of prevailing on the merits of the breach of contract cause of action despite Plaintiff not asserting that claim against the Individual Defendants. (Compare Opp. to Individual Anti-SLAPP, filed May 18, 2018, p. 14:5-15 ("Opp. Individual"); with 5AC, p. 70:15-16.) Those arguments were not raised in opposition to the Motion. (See Opp., *supra*, at p. 13:1-13.) Given the extensive overlap between the two anti-SLAPP motions and the parties' treatment of the two motions in tandem, the Court *sua sponte*, takes judicial notice of the Individual Defendants' Anti-SLAPP motion, opposition and reply, but not for the truth of the matters asserted therein, and addresses those arguments here as to whether Plaintiff can demonstrate a probability of prevailing on the merits against Defendant.

Plaintiff identifies the 2012 SRR as the contract. (Opp. Individual, *supra*, at p. 14:5-7.) Plaintiff's argument that "Facebook failed to perform by refusing to provide

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‘all rights to APIs, data and code’ that Facebook made available and breached the contract by violating its representations of open, equal and fair access to its APIs that fraudulently induced Plaintiff and others to perform under the contract” is contradicted by the plain language of the 2012 SRR. (*Id.* at p. 14:9-12.) First, Plaintiff agreed to the terms of service. (2012 SRR, bates no. FB_0000017 (“By using or accessing Facebook, you agree to this [SRR]”).) Second, Facebook specifically reserved the right to limit the access to data. (2012 SRR, bates no. at FB_0000021 (“We can limit your access to data.”).) Third, the access provided by Facebook in the 2012 SRR provides a significant qualifier. Facebook did not agree to give “‘all rights to APIs, data and code’ that Facebook made available” (Opp. Individual, *supra*, at p. 14:9-10), but rather “all rights *necessary to use the code, APIs, data, and tools [developers] receive from [Facebook].*” (2012 SRR, bates no. FB_0000021 (emphasis added). *See also* Opp., *supra*, at p. 13:17-20, fn. 17 (arguing “Plaintiff never alleges that Facebook agreed to provide **all** of its code - only the code that Facebook **did in fact provide**” (original emphasis).) Fourth, the 2012 SRR allows Facebook to make changes through the amendment provision. (2012 SRR, bates no. FB_0000023.) Furthermore, as pled, Facebook provided greater than the requisite seven day notice of the change.

On January 20, 2015, Facebook sent an email to 643 stating that 643 must “upgrade” the App to Graph API v. 2.0 by April 30, 2015. The email stated that Facebook would end third-party access to the full friends list and friends permissions, including the Friends’ Photos Endpoint, on April 30, 2015. The

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App would not function at all without access to this Graph API Data, so Facebook’s suggestion that 643 “upgrade” the App to Graph API v. 2.0 was not realistic or possible, and Facebook knew it was not realistic or possible.

(4AC, 141; ¶ SAC, ¶ 147.) Based on this allegation, Facebook gave approximately 100 days’ notice of this change, and Plaintiff does not allege Facebook did not comply with the amendment procedures set forth in the 2012 SRR. Fifth, there is an integration clause and thus Plaintiff cannot rely on extrinsic statements made outside of the agreement. (2012 SRR, bates no. FB_000002 (“This Statement makes up the entire agreement between the parties regarding Facebook, and supersedes any prior agreements.”).) Furthermore, Plaintiff does not argue why the integration clause is not enforceable. Accordingly, Plaintiff’s attempt to rely on representations made outside of 2012 SRR pertaining “to open, equal and fair access to its. APIs” is barred by the integration clause. (Opp. Individual, *supra*, at p. 14:6-13.) Sixth, Plaintiff expressly consented to permitting Facebook to develop competing products.

17. We can analyze your application, content, and data for any purpose, including commercial (such as for targeting the delivery of advertisements and indexing content for search).

...

19. *We can create applications that offers similar features and services to, or otherwise compete with, your application.*

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(2012 SRR, bates no. FB 0000021 (emphasis added).) Lastly, Plaintiff points to no term in the 2012 SRR that requires Facebook to provide access to the API, data and code in perpetuity. Accordingly, Plaintiff has not demonstrated a probability of prevailing on the merits on its breach of contract claim.

The Court finds that Plaintiff has not met its burden to demonstrate the probability of prevailing on the merits of the third through eighth causes of action for concealment, intentional misrepresentation, negligent misrepresentation, intentional interference with contract, intentional interference with prospective economic relations, and negligent interference with prospective economic relations. (*Soukup, supra*, 39 Cal.4th at p. 291; *Navellier, supra*, 29 Cal.4th at p. 88-89. *Compare* Opp., *supra*, at p. 14:14 – 15:2; with 4AC, ¶¶ 201 – 237 (concealment), 238 - 254 (intentional misrepresentation), 255 - 265 (negligent misrepresentation), 266 - 274 (intentional interference with contract), 275 - 290 (intentional interference with prospective economic relations), 291 - 308 (negligent interference with prospective economic relations). *See also*, Opp. Individual, p. 14:16 – 15:55; SAC, ¶¶ 207 – 324.) Plaintiff cites to Godkin Declaration, Exhibits G – K and P in support of these arguments. As discussed *supra*, Exhibits G – K are Plaintiff's submissions and filings with the Court. Similarly, Exhibit P is Plaintiff's Letter to the Court of November 1, 2017. This is not evidence that would support demonstrating the probability of prevailing on the merits of any of these claims.

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Lastly, although not relied on in this Court’s findings, the Court notes that the parties do not address whether the issue or evidentiary sanctions affects Plaintiff’s probability of prevailing on the merits on any of the causes of action. In granting Facebook’s Motion for Sanctions Against Six4Three, the Court found that Plaintiff “ha[d] not acted in good faith in regard to the discovery surrounding the actual sales of the Pikinis App and ha[d] provided contradictory and evasive responses to the discovery requests” and made the issue or evidentiary sanction that “Plaintiff SIX4THREE is prohibited from introducing any evidence or any documents, records, or arguments that actual sales of the Pikinis App, from all possible sources, exceeded 276 units for a total of \$412 in revenue.” (Order, issued Apr. 26, 2017, p. 2-3.)

c. Additional Rulings

The Court OVERRULES Facebook’s Evidentiary Objections to Six4Three, LLC’s Opposition to Defendant Facebook’s Motion to Strike (Anti-SLAPP), filed December 22, 2017, nos. 1 – 3.

Date: 6/20/2022/s/

HON. ROBERT D. FOILES

Approved as to form by:

**WILMER CUTLER
PICKERING HALE
AND DORR LLP**

BATHAEE DUNNE LLP

/s/ Ari Holtzblatt
Ari Holtzblatt

/s/ Brian Dunne
Brian Dunne

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**APPENDIX D — ORDER OF THE SUPERIOR
COURT FOR THE STATE OF CALIFORNIA,
COUNTY OF SAN MATEO, FILED JUNE 20, 2022**

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF SAN MATEO

Case No. CIV 533328

SIX4THREE, LLC, A DELAWARE LIMITED
LIABILITY COMPANY,

Plaintiff,

v.

FACEBOOK, INC., A DELAWARE CORPORATION;
MARK ZUCKERBERG, AN INDIVIDUAL;
CHRISTOPHER COX, AN INDIVIDUAL; JAVIER
OLIVAN, AN INDIVIDUAL; SAMUEL LESSIN,
AN INDIVIDUAL; MICHAEL VERNAL, AN
INDIVIDUAL; ILYA SUKHAR, AN INDIVIDUAL;
AND DOES 1-50, INCLUSIVE,

Defendants.

Filed June 20, 2022

**---- COMPLEX CIVIL CASE ----
RE-ASSIGNED FOR ALL PURPOSES TO
HON. ROBERT D. FOILES, DEPT. 21**

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**[PROPOSED] ORDER GRANTING INDIVIDUAL
DEFENDANTS' SPECIAL MOTION TO STRIKE
AND FOR ATTORNEY'S FEES AND COSTS
PURSUANT TO C.C.P. § 425.16 (ANTI-SLAPP)**

Date: February 4, 2022
Time: 2:00 p.m.
Dept: 21 (Complex Civil Litigation)
Judge: Honorable Robert D. Foiles
FILING DATE: April 10, 2015

Defendants Mark Zuckerberg, Christopher Cox, Javier Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar's (collectively "Individual Defendants" or "Defendants") Special Motion to Strike and For Attorney's Fees and Costs Pursuant to C.C.P. § 425.16 (Anti-SLAPP), filed on May 3, 2018, ("Defendants' motion") is GRANTED. (Code Civ. Proc. § 425.16.)

On September 30, 2019, the Court of Appeal, First District reversed this Court's order "insofar as it grant[ed] the individual defendants' anti-SLAPP motion" and "remanded for further proceedings consistent with this opinion." (*Six4Three, LLC v. Facebook, Inc.* (Cal. Ct. App., Sept. 30, 2019, No. A154890) 2019 WL 4784420, at *6 ("*Six4Three*").) The First District found this Court abused its discretion in granting the Individual Defendants' motion where it "rejected Six4Three's opposition because, by incorporating some 37 to 39 pages of prior briefing, Six4Three's counsel circumvented the page limit set by rule 3.1113(d) without obtaining leave to exceed that limit" which "in the first instance, grant[ed] what in effect is a

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terminating sanction in response to the submission of such paper.” (*Id.* at *5.)

Based on this instruction and rather than striking and requiring Plaintiff to submit a rule conforming opposition (*see Six4Three, supra*, 2019 WL 4784420, at *6), the Court in its discretion will consider the arguments raised in Plaintiff’s prior filings cited and incorporated by referenced in footnote 1 of its opposition. (Corrected Opp. to Individual Anti-SLAPP, filed May 18, 2018, p. 1:2-5 (“Opp.”).) Specifically, Plaintiff incorporates by reference,

Plaintiff’s Opposition to Facebook’s Special Motion to Strike (Anti-SLAPP) filed on December 12, 2017, Plaintiff’s Supplemental Opposition to Facebook’s Special Motion to Strike (Prong I) filed on January 24, 2018, Plaintiff’s Reply to Defendant’s Supplemental Memorandum in Support of Anti-SLAPP Motion (Prong I) filed on March 7, 2018, and Plaintiff’s Supplemental Memorandum of Points and Authorities in Opposition to Special Motions to Strike (Newport Harbor) filed on May 3, 2018.

(Opp., *supra*, at p. 1:22-25, fn. 1.) The Court will also consider the corresponding filings by Defendants. However, this exception does not obviate Plaintiff from filing rule compliant papers and future failure to comply may result in the striking of the offending paper.

Defendants move to strike “on the ground that the Fifth Amended Complaint (“operative complaint” or “5AC”) arises from the exercise of the constitutional

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right of free speech in connection with an issue of public interest” pursuant to Code of Civil Procedure section 425.16, subdivision (e)(4) (“Section 425.16” or “§ 425.16”). (Notice of Motion, filed May 3, 2018, p. i:9.)

A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the U.S. Constitution or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines the plaintiff establishes a probability of prevailing on the claim. (§ 425.16 subd. (b)(1).) A special motion to strike under section 425.16 is evaluated through a two-step process. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061.) In the first step, the Court decides whether the moving defendant made a threshold showing that the challenged cause of action arises from protected activity. (*Central Valley Hospitalists v. Dignity Health* (2018) 19 Cal. App.5th 203, 216 (“*Central Valley*”), citing *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450 (“*Hecimovich*”).) If the Court finds that defendant made this showing, then the Court determines in the second step whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Ibid.*)

a. First Prong – “Arising From Protected Activity”

i. Defendants Met Their Initial Burden

Defendants have met their initial burden of demonstrating that Plaintiff’s claims arise from

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Defendants' exercise of free speech as defined by § 425.16. In evaluating whether the conduct involves protected activity,

We look for the principal thrust or gravamen of the plaintiff's cause of action. We do not evaluate the first prong of the anti-SLAPP test solely through the lens of a plaintiff's cause of action. The critical consideration is what the cause of action is based on.

(*Hecimovich*, *supra*, 203 Cal.App.4th at p. 465 (internal quotations, citations omitted).)

In this instance, Defendants move to strike “on the ground that the Fifth Amended Complaint “arises from the exercise of the constitutional right of free speech in connection with an issue of public interest” pursuant to § 425.16, subdivision (e)(4). (Notice of Motion, filed May 3, 2018, p. i:9.)

As argued by Defendants, the gravamen of the operative complaint is that Plaintiff “was harmed by Facebook’s editorial decision, allegedly made and implemented by the Individual Defendants, to de-publish certain categories of user-created content, including friends’ photos and other content” by means of its API. (MPA, filed May 3, 2018, p. 2:25-27.)

Plaintiff argues that the gravamen of its claims are the misrepresentations, and that Defendants’ allegedly fraudulent speech is not protected activity. However, the

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Supreme Court has already rejected such an argument in *Navellier v. Sletten* (2002) 29 Cal.4th 82, 93. (“[C]ontract and fraud claims are not categorically excluded from the operation of the anti-SLAPP statute”). “[T]he statute does not bar a plaintiff from litigating an action that arises out of the defendant’s free speech or petitioning it subjects to potential dismissal only those actions in which the plaintiff cannot state and substantiate a legally sufficient claim.” (*Id.* (cleaned up).) Here, where the plaintiff alleges a “bait-and-switch” scheme (5AC, ¶ 1), the plaintiff cannot merely rely on the “bait,” here alleged misrepresentations, when the “switch” is protected speech. The Supreme Court in *Navellier* rejected the dissent’s view that the allegedly fraudulent statement—or the bait—should control whether the action arises from protected activity. (*Navellier, supra*, 29 Cal.4th at p. 99 (Brown, J. dissenting).) The Court instead held that “but for” the protected activity—the switch—plaintiff’s claims “would have no basis” and that the “action therefore falls squarely within the ambit of the anti-SLAPP” statute. (*Id.* at p. 90.)

The allegations of the Fifth Amended Complaint demonstrate the alleged conduct involves the exercise of the constitutional right of free speech in connection with an issue of public interest. Plaintiff alleges, *inter alia*,: (1) Facebook Developer Platform, including the Graph API, “is one of the world’s largest software economies globally and the economic activity it generates is larger than the GDP of many sovereign nations” (5AC, ¶ 34); (2) Plaintiff and Facebook entered into an agreement providing, *inter alia*, third party user photos and videos (*id.* at ¶¶ 93, 97);

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(3) “[t]he App enabled Facebook users to reduce time spent searching through their photos by automatically finding summer photos that their friends have shared with them through Facebook’s network, assuming their friends permitted [Plaintiff] to access the photos” (*id.* at ¶ 104); (4) “[i]f a photo were removed by Facebook for containing objectionable content, it would have [*sic*] simultaneously and automatically been removed from the App” (*id.* at ¶ 106); (5) “its decision to close access to the Graph API Data also arose from the fact that Facebook made public representations around its management of user data that enticed tens of thousands of companies to build businesses . . . ” (*id.* at ¶ 237); and (6) “[b]ased in significant part upon the representations Facebook made from 2007 until 2014 that Facebook Platform was the most effective organic growth and distribution channel for applications, 643 decided to build its business on Facebook Platform . . . ” (*id.* at ¶ 311). Accordingly, the Court finds the allegations against Individual Defendants arise out of “the constitutional right of free speech in connection with an issue of public interest.” (§ 425.16, subd. (e)(4).)

ii. Plaintiff has not Demonstrated the Commercial Speech Exception Applies to the Protected Activity

Taking into consideration the papers incorporated by reference, Plaintiff has not met its burden to demonstrate the commercial speech exception applies to the protected activity. (§ 425.16, subd. (c).)

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If defendant meets its threshold burden and the plaintiff asserts its claims are exempt under the commercial speech exemption of section 425.17, subdivision (c), the plaintiff then has the burden to show the applicability of that exemption. (See *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 22-26 (*Simpson*); *Rivera v. First DataBank, Inc.* (2010) 187 Cal.App.4th 709, 717.) If the plaintiff does not meet that burden, he or she must then establish a probability of prevailing on the claims. (See *Rivera*, at pp. 714–718.)

(*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 269 (“*Hawran*”). See Plaintiff’s Supplemental Opposition to Facebook’s Special Motion to Strike (Prong 1), filed on January 24, 2018, p. 1:3-4 (“The burden is on the plaintiff to demonstrate the exemption applies”) (“Pl. Suppl. Brief”).)

“The commercial speech exemption, like the public interest exemption, is a statutory exception to section 425.16 and should be narrowly construed.” (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 22 (internal quotations, citations omitted) (affirming order granting anti-SLAPP motion on the grounds that the commercial speech exemption was inapplicable) (“*Simpson Strong-Tie Co.*”).)

[W]e interpret section 425.17(c) to exempt from the anti-SLAPP law a cause of action arising from commercial speech when (1) the cause of action is against a person primarily engaged in the business

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of selling or leasing goods or services; (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services; (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and (4) the intended audience for the statement or conduct meets the definition set forth in section 425.17(c)(2).

(*Simpson Strong-Tie Co.*, *supra*, 49 Cal.4th at p. 30.)

In another context, our Supreme Court has observed that three elements distinguish commercial speech from noncommercial speech: the speaker, the intended audience, and the content of the message. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 960 (*Kasky*)). “In typical commercial speech cases, the speaker is likely to be someone engaged in commerce—that is, generally, the production, distribution, or sale of goods or services—or someone acting on behalf of a person so engaged, and the intended audience is likely to be actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers. . . . [¶] . . . [¶] Finally, the factual

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content of the message should be commercial in character. In the context of regulation of false or misleading advertising, this typically means that the speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services." (*Id.* at pp. 960-961, italics omitted.)

(*Dean v. Friends of Pine Meadow* (2018) 21 Cal.App.5th 91, 103.)

The plaintiff must establish both elements of the commercial speech exception. "The plain language of section 425.17 requires that a plaintiff establish all of the elements of the section 425.17 exemption. (§ 425.17, subd. (c)(1), (2) [exemption applies if 'both of the following conditions exist']; [citation].)" (*Hawran, supra*, 209 Cal. App.4th at p. 273.)

Element 1 – Selling or Leasing Goods or Services: Plaintiff has not demonstrated that Facebook is in the business of selling or leasing goods or services as Plaintiff has not raised any argument or cited evidence. Plaintiff merely recites Section 425.17.

[Its] claims arising out of conduct or statements consisting of representations of fact about a business' operations, goods or services made for the purpose of promoting or securing commercial

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transactions in those goods or services so long as the intended audience of those statements was an actual or potential customer or a person likely to influence an actual or potential customer.

(Pl. Supp. Brief, p. 1:6-9.) In arguing the commercial speech exception applies, Plaintiff addressed the second (*id.* at p. 4:5 – 6:10), third (*id.* at p. 6:11-20) and fourth (*id.* at p. 7:1- 9:2) elements enumerated by the Supreme Court in *Simpson Strong-Tie Co.* Accordingly, Plaintiff has not met its burden.

Furthermore, the First District has found “while Facebook sells advertising, it is not ‘primarily engaged in the business of selling or leasing goods or services’ . . . as Facebook offers a free service to its users.” (*Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 203 (“*Cross*”). *See* Facebook Suppl. Brief, filed Feb. 16, 2018, p. 4:19 – 5:17 (“Def. Suppl. Br.”).) Plaintiff’s attempt to distinguish *Cross* is not well taken. (*See* Plaintiff Suppl. Reply Brief, filed Mar. 7, 2018, p. 7:11 – 8:2 (“Pl. Reply Supp.”). *See also* Plaintiff’s Suppl. Briefing filed Apr. 1, 2020; Plaintiff’s oral arguments Jan. 28, 2022.)

Unlike the public interest exception pursuant to § 425.17, subdivision (b), which may be determined on the allegations, the commercial speech exemption requires evidentiary support to demonstrate its applicability. (*Compare Tourgeman v. Nelson & Kennard* (2014) 222 Cal.App.4th 1447, 1463 (not required to present evidence demonstrating a public benefit) (Fourth Dist., J. Vargas); *with Taheri Law Group v. Evans* (2008) (“commercial

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speech exemption may not be applied to a lawyer's conduct" where "[t]here is no evidence of any solicitation by mail or telephone or other media" and in "a case in which legal advice to a specific client on a pending matter has occurred contemporaneously with the alleged solicitation of the client"). *See Rivera v. First DataBank, Inc.* (2010) 187 Cal.App.4th 709, 717 – 718 ("plaintiffs presented no evidence to support this claim and a mere allegation does not suffice").).

Here, Plaintiff has not posited any evidence that Facebook is in the business of selling or leasing goods or services.

Element 2 – Representations of Fact about Business Operations: Plaintiff has demonstrated that Facebook's statements are representations of fact about its business operations. (Pl. Supp. Br., *supra*, at p. 4:5 – 5:17.) Facebook's statements pertain to allowing access to its APIs to user data in order for developers to develop apps. Further, as explained above, Facebook's statements are not the only conduct at issue here. The "scheme" Plaintiff complains of consists of both Facebook's statements (the alleged "bait") and Facebook's de-publication of user content previously available through the APIs (the alleged "switch"). (*See Navellier, supra*, 29 Cal.4th at p. 90.) But the alleged "switch" is the gravamen of Plaintiff's claims—and the "switch" is not a representation of fact about Facebook's business operations.

Element 3 – Purpose of Statements: Plaintiff has not demonstrated that Facebook's statements were "made

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either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services." (*Simpson Strong-Tie Co.*, *supra*, 49 Cal.4th at p. 30.)

Plaintiff does not cite to evidence in support of its arguments and relies solely on its allegations. (Pl. Supp. Br., *supra*, at p. 5:4 – 6:10.)

Furthermore, the connection between the at-issue statements and Facebook's advertising sales is distinguishable from *Demetriades v. Yelp, Inc.*

Yelp's audience consists of reviewers, readers of reviews, and businesses that may or may not purchase advertising on Yelp's Web site. Although Yelp only receives direct revenue from those businesses that advertise, such businesses would not be advertising on Yelp without the potential benefit they could obtain from users' reviews and without assurances that potential patrons of their business establishments would be reading only reliable reviews. Further, as Yelp's revenue stream indicates, Yelp is primarily in the business of providing advertising to businesses; the user reviews of businesses are a device whereby prospective users and reviewers are attracted to Yelp's Web site. Thus, Yelp's statements about the accuracy and performance of its review filter are designed to attract users and ultimately purchasers of advertising on its site.

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(*Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294, 312.) Plaintiff further argues, without citation to evidence, that:

Similarly, Facebook's statements and conduct giving rise to all of Plaintiffs causes of action concern the software APIs themselves, the performance of those APIs, and what expectations the public may have regarding those APIs, as opposed to any underlying content that may or may not be transmitted through those APIs. It is not disputed that such statements were made to induce people and businesses to patronize Facebook so it could generate more advertising revenues.

(Pl. Supp. Br., *supra*, at p. 3:4-9.) However, in the Fifth Amended Complaint, Plaintiff concedes that access to the Facebook Platform to develop its app was free, but may not be free in the future. (5AC, ¶ 99.) Unlike in *Demetriades v. Yelp* where the statements pertaining to filters were directed at the very businesses affected by user reviews in order to induce those businesses to advertise. Plaintiff has not demonstrated a similar connection. (See Def. Supp. Br., *supra*, at p. 8:9-16.)

Moreover, as noted above, Facebook's statements are not the only conduct at issue here. Unlike in *Demetriades*, the gravamen of Plaintiff's claims is the de-publication of user content. Plaintiff has not demonstrated that the de-publication was carried out in order to encourage sales of any Facebook goods or services.

*Appendix D***Element 4 – Intended Audience (§ 425.17(c)(2)):**

Plaintiff has not demonstrated that Facebook’s intended audience of the statements was actual or potential buyers of its goods or services or persons likely to influence actual or potential buyers of its goods or services.

Plaintiff primarily relies on the allegations and exhibits attached to the 5AC, which is not evidence. (*See* Pl. Supp. Br., *supra*, at p. 7:1 – 8:7.) Furthermore, the evidence cited is not dispositive in demonstrating the intended audience of the statements.

Facebook was actively implementing Zuckerberg’s plan to privatize 54 different APIs and to offer this private access on entirely arbitrary and anti-competitive grounds to only a select number of companies, making it impossible for thousands of companies to continue to participate in arguably the largest software economy in the world. Supp. Godkin Dec., 7, Ex. F (FB-00521473).

(Pl. Supp. Br., *supra*, at p. 8:12-15.) Accordingly, Plaintiff’s arguments are not supported by any evidence:

- “[T]he official Facebook Platform FAQ, makes clear that the intended audience of Facebook’s representations consists of businesses and person who patronize Facebook’s website or might patronize Facebook’ Web site in the future” (Pl. Supp. Br., *supra*, at p. 7:2-5);

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- “Facebook’s statements were made to potential buyers of advertisements, potential developers considering entering into [no cost] contract with Facebook [to develop apps using Facebook Platform APIs], and potential visitors to the www.facebook.com website, all of whom increased the potential to grow its advertising business” (Pl. Supp. Br., *supra*, at p. 7:16-18);
- “Moreover, it is not disputed that Plaintiff was an actual customer of Facebook, having purchased advertising directly from Facebook to promote the application it had developed using Facebook’s APIs. *See, e.g.*, 4AC, ¶ 104; SAC, ¶ 110.” (Pl. Supp. Br., *supra*, at p. 8:1-3); and
- “It is a common practice for developers building applications on Facebook Platform to purchase advertisements from Facebook to promote their applications.” (Pl. Supp. Br., *supra*, at p. 8:2-4).

The Court notes that allegations in the Fifth Amended Complaint contradict Plaintiff’s arguments given Plaintiff alleges Facebook expressly represented that access to the Facebook Platform was not contingent on purchasing advertising.

Further, Facebook represented since 2007, and 643 relied on Facebook’s representations since that time, that certain Facebook users were prospective customers of any app built on Platform. *This is because a key purpose of Platform was to enable*

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new apps to reach Facebook's users with free, organic distribution through the newsfeed APIs and friends list APIs. Facebook represented for years that this would enable companies like 643 to much more rapidly enter into contracts and secure purchases from new customers since any friend of any existing App user could enter into contract with 643 with a single tap of a button and without 643 having to purchase advertisements.

(5AC, p. 48:11-18 (emphasis added).) Plaintiff further alleges it separately engaged in purchasing advertising to promote its app, and Plaintiff has not demonstrated those purchases were related to the at-issue statements.

Finally, 643 engaged in other marketing activities in preparation for a public launch. For instance, 643 purchased advertising from Facebook to test various ad campaigns in Facebook's new mobile advertising product. Facebook Confirmed these purchases and ran 643's various ad campaigns on its public website. *As a result of Facebook's anti-competitive scheme, 643's App was prevented from participating in Facebook's advertising market since it had no functioning App to advertise.* Upon information and belief, tens of thousands of other software companies were prevented from participating in Facebook's new mobile advertising market as a result of Facebook's anti-competitive scheme.

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(5AC, ¶ 110 (emphasis added).) Furthermore, Plaintiff does not assert a false advertising claim against Facebook. (*See* Def. Supp. Br., *supra*, at p. 2:7.)]

Lastly, although not relied on in this Court's findings above, this Court notes that in 2019, the Supreme Court narrowed the commercial speech exemption to comparative advertising after this motion was briefed. (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 147-148. *See Dziubla v. Piazza* (2020) 59 Cal. App.5th 140, 154 ("This added detail has aided courts in determining that the legislature intended to exclude only a subset of commercial speech specifically, comparative advertising" (cleaned up)).)

b. Second Prong – Probability of Prevailing on the Merits

Since Defendants have met their initial burden on the first prong, the burden shifts to Plaintiff to demonstrate the probability of prevailing on the merits.

While plaintiff's burden may not be "high," he must demonstrate that his claim is legally sufficient. (*Navellier v. Sletten, supra*, 29 Cal.4th at p. 93.) And the plaintiff must show that it is supported by a sufficient prima facie showing, one made with "competent and admissible evidence." (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1236; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1497.)

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(*Hecimovich, supra*, 203 Cal.App.4th at 469 (parallel citations omitted).)

i. Communications Decency Act

Taking into consideration the papers incorporated by reference, Plaintiff has not met its burden to demonstrate the Communications Decency Act does not apply in order to demonstrate a probability of prevailing on the merits.

Section 230(c)(1) 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.” The statute goes on to provide that causes of action inconsistent with it under state law are precluded: “Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” (§ 230(e)(3), *italics added*.)

(*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal. App.4th 790, 802 (original emphasis).)

The statute requires dismissal of state law claims if:

- defendant is a provider or user of an interactive computer service;
- the information for which plaintiff seeks to hold defendant liable is information provided by another content provider; and

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- the complaint seeks to hold defendant liable as the publisher or speaker of that information. [*Caraccioli v. Facebook, Inc.* (ND CA 2016) 167 F.Supp.3d 1056, 1065]

(Gaab & Reese, Cal. Prac. Guide: Civ. Proc. Trial Claims & Def. (Rutter, Oct. 2021 Update) ¶ 4:480.)

As the Ninth Circuit has explained, “Section 230 of the CDA immunizes providers of interactive computer services against liability arising from content created by third parties.” [Citation.] Section 230 was enacted to “protect[] websites from liability for material posted on the website by someone else.” [Citation.] Specifically, section 230 states: “No 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). Importantly, section 230’s “grant of immunity applies only if the interactive computer service provider is not also an ‘information content provider,’ which is defined as someone who is ‘responsible, in whole or in part, for the creation or development of the offending content.” [Citation.] CDA immunity, thus, does not apply to “the creation of content” by a website. [Citation.] Because a “website operator can be both a service provider and a content provider,” it “may be immune from liability for some of the content it displays to the public but be subject to liability for other content.” [Citation.]

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(*Perkins v. LinkedIn Corp.* (N.D. Cal. 2014) 53 F.Supp.3d 1222, 1246-1247.)

Section 230(c)(1) thus immunizes providers of interactive computer services (service providers) and their users from causes of action asserted by persons alleging harm caused by content provided by a third party. This form of immunity requires (1) the defendant be a provider or user of an interactive computer service; (2) the cause of action treat the defendant as a publisher or speaker of information; and (3) the information at issue be provided by another information content provider.

(*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 830.)

The CDA is an affirmative defense. (*Pirozzi v. Apple Inc.* (N.D. Cal. 2012) 913 F.Supp.2d 840, 848-849 (distinguished on other grounds in *Evans v. Hewlett-Packard Company* (N.D. Cal., Oct. 10, 2013, No. C 13-02477 WHA) 2013 WL 5594717, at *3; *La Park La Brea A LLC v. Airbnb, Inc.* (C.D. Cal. 2017) 285 F.Supp.3d 1097, 1103).)

There is some dispute in the case law as to which party bears the burden of proof on an affirmative defense in the context of an anti-SLAPP motion. Some cases state that “although section 425.16 places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense. [Citation.]” (*E.g., Peregrine*

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Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP (2005) 133 Cal.App.4th 658, 676.) Others suggest that the [affirmative defense] presents “a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing. [Citations.]’ [Citation.]” (*E.g., Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1485.)

(*Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, 683.)

When evaluating an affirmative defense in connection with the second prong of the analysis of an anti-SLAPP motion, the court, following the summary-judgment-like rubric, generally should consider whether the defendant’s evidence in support of an affirmative defense is sufficient, and if so, whether the plaintiff has introduced contrary evidence, which, if accepted, would negate the defense.

(*Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 434.)

Plaintiff argues in opposition: (1) “the claims in this case in no way arise out of something a third party posted on Facebook” (Opp. to Facebook, filed Dec. 12, 2017, p. 10:1-10 (“Opp. to Facebook”); *see also* Pl. Supp. Br., *supra*, at p. 9:2-21); (2) the CDA “concerns obscene, lewd, lascivious, filthy, or excessively violent content” (Opp. to Facebook, *supra*, at p. 10:11 – 11:3); (3) “Plaintiff does not allege that Facebook de-published the content . . . as the content remains published” (*id.* at p. 11:4-11); and (4) the

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CDA does not apply to breach of contract claims (*id.* at p. 11:12 – 12:2).

However, Plaintiff does not cite to evidence relevant to supporting these arguments, nor does Plaintiff cite to any evidence in support of its arguments in its supplemental brief. (*See* Opp. to Facebook, p. 10:1 – 12:2; Pl. Supp. Br., *supra*, at p. 9:2-21.)

“In making this assessment, the court must consider both the legal sufficiency of and evidentiary support for the pleaded claims, and must also examine whether there are any constitutional or nonconstitutional defenses to the pleaded claims and, if so, whether there is evidence to negate any such defenses. [Citation.]” (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 108.)

(*Friends of Pine Meadow, supra*, 21 Cal.App.5th at p. 107. *See id.* at p. 109 (“[P]laintiffs failed to demonstrate that these complaint allegations are supported by evidence”); 110 (“Plaintiffs do not identify any evidence in this record supportive of their theory that defendants undertook their petitioning activity as an anticompetitive weapon”).)

Provider or User of An Interactive Service: Plaintiff admits “Facebook is an [internet service provider].” (Opp. to Facebook, *supra*, at p. 11:3. *See Cross, supra*, 14 Cal. App.5th at p. 197 (Facebook is an interactive computer service); MPA, *supra*, at p. 8:26 – 9:18.)

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Arising From Third Party Content: Plaintiff and Defendants both cite to Plaintiff's allegations, and not evidence, in their arguments whether the claims arise from third party content (or "user content"). As pled, the Court finds the content at issue is third party user content and its publication/de-publication to developers via the Facebook Platform API. (*See* MPA, *supra*, p. 9:19-24.) In opposition, Plaintiff argues,

Further, many of Facebook's software APIs, tools and methods that Plaintiff used have nothing to do with the transmission of data uploaded by third parties to Facebook's website. For instance, the Friends List API (the removal of which shut down Plaintiffs business) is a software product that Facebook created to provide access to data that Facebook itself created, compiled and maintained. No Facebook user has ever uploaded or posted a list of all their Facebook friends to the Facebook website; rather, Facebook created this list and chose to make it available under contract via certain software APIs.

(Opp. to Facebook, *supra*, at p. 1:18 – 2:4.)

However, this argument contradicts the allegations of the Fifth Amended Complaint where Plaintiff describes using third party content published by Facebook – Facebook user's photos – to developers via the "Friends' Photos Endpoint" API as the basis of Plaintiff's app. (5AC, ¶¶ 68, 69, 104 – 106.).

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Specifically, the basis of Plaintiff's Pikinis app is the publication of user content where it "enabled Facebook users to reduce time spent searching through their photos by automatically finding summer photos that their friends have shared with them through Facebook's network, assuming their friends permitted 643 to access the photos." (5AC, p. 46:8-10.) "The App used 643's image recognition technology to search through shared photos and identify the ones in a summer setting, which included friends at the beach or pool, on a boat, in their bathing suits and the like." (*Id.* at p. 46:15-17.)

In other words, Plaintiff's app depended on Facebook's publication of third-party user's photos to developers through Facebook's Platform. When Facebook cut off access to its API, or de-published the third-party content, to developers, the developers no longer had access to the third-party content even though it would be available on Facebook to other end-users contingent on user controlled privacy settings. Accordingly, Plaintiff has not demonstrated that this action does not arise from third party content.

Furthermore, as pled, the Court finds that Friends List API is also based on user generated content based on users connecting as friends on Facebook. The 2012 Agreement defined the following terms:

Facebook defined "Platform" as "a set of APIs and services (such as content) that enable [643] to retrieve data from Facebook or provide data to [Facebook]. . . . By 'content' we mean anything . . .

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users post on Facebook. . . . By ‘data’ or ‘user data’ we mean any data, including a user’s content or information that you or third parties can retrieve from Facebook or provide to Facebook through Platform. . . .

(5AC, p. 70:20-24.) The Friends List content requires users to request and accept other users as friends. Thus, the acknowledgment of that “friend” relationship between two users and the dissemination of the Friends List to developers is user generated content that Facebook collected via its Platform.

CDA and Bad Content: The CDA is not limited to “obscene, lewd, lascivious, filthy, or excessively violent content” as argued by Plaintiff (Opp. to Facebook, *supra*, at p. 10:12-13), but includes material that it considers “harassing, or otherwise objectionable.” (47 U.S.C. § 230, subd. (c)(2). *See* Reply ISO Facebook Anti-SLAPP, filed Dec. 22, 2017, p. 7:2-14 (“Reply Facebook”).) Furthermore, “Facebook relied on Section 230(c)(1) in its motion, not Section 230(c)(2).” (Reply Facebook, *supra*, at p. 7:1-2.) And Sections 230(c)(1) and 230(e)(3) “‘have been widely and consistently interpreted to confer broad immunity against defamation liability for those who use the Internet to publish information that originated from another source.’” (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 39 (“*Barrett*”).)

De-Publishing: The Court finds Plaintiff brings this action against Defendants for Facebook’s role as a publisher of content given this action pertains to Plaintiff’s access to user content granted and then denied

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by Facebook. Here, Plaintiff seeks, *inter alia*, injunctive relief against Facebook.

A permanent injunction requiring Facebook to restore Developer access to the Graph API data, including reading the full friends list, friends permissions and newsfeed APIs, and all other data and APIs available prior to Facebook's removal of the APIs on April 30, 2015.

(5AC, p. 106:12-15 (emphasis added).) Moreover, Plaintiff also seeks a permanent injunction to prohibit Defendants from “interfering with 643’s contracts” and “prospective economic relations.” (*Id.* at p. 106:16-19.) In this regard, this action is similar to *Cross*, where “the clear gravamen of which is [Cross’s] objection to the third-party content on the pages and Facebook’s editorial decisions to not remove them.” (*Cross, supra*, 14 Cal.App.5th at p. 200.) Here, Plaintiff’s objection is to Facebook’s editorial decision to remove access to third-party content, which is akin to the act of de-publishing. The alleged interference again pertains to access to third party content. (5AC, 286 (“intentionally interfered with and disrupted 643’s contracts with its users when it did terminate 643’s access to Graph API data on April 30, 2015”), 302 (“intentionally interfered and disrupted 643’s relationships with its users and prospective users when it did terminate 643’s access on April 30, 2015”).)

Plaintiff argues that it “seeks an injunction to stop Facebook from continuing to engage in untrue and misleading representations by requiring it to make available the 54 graph APIs it represented would serve as

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the core of its platform economy.” (Pl. Supp. Br., *supra*, at p. 8:15-20 (cleaned up). *See also id.* at p. 9:9-21.) However, Plaintiff does not seek to enjoin Facebook from making misrepresentations but rather to require Facebook to republish user content by providing access to it (e.g. photos) to Plaintiff. (5AC, p. 106:12-19.)

The Supreme Court’s ruling in *Hassell v. Bird* is instructive where the plaintiff obtained an injunction through default judgment in which the trial court ordered non-party Yelp “to remove all reviews posted by AVA BIRD under user names “Birdzeye B.” and “J.D.” attached hereto as Exhibit A and any subsequent comments of these reviewers within 7 business days of the date of the court’s order.” (*Hassell v. Bird* (2018) 5 Cal.5th 522, 530 (“*Hassell*”).) The trial court denied Yelp’s motion to set aside default judgment. Yelp appealed and the First District affirmed the judgment on the finding it did not impose any liability on Yelp. The Supreme Court reversed.

[S]ection 230 immunity applies here. We therefore reverse the judgment of the Court of Appeal insofar as it affirmed the trial court’s denial of Yelp’s motion to set aside and vacate the judgment. That motion should have been granted to the extent that it sought to delete from the order issued upon entry of the default judgment any requirement that Yelp remove the challenged reviews or subsequent comments of the reviewers.

(*Hassell*, *supra*, 5 Cal.5th at p. 548.) The Supreme Court’s findings are particularly instructive.

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Plaintiffs also assert that Yelp cannot claim section 230 immunity because, under section 230(e)(3), no “cause of action” has been alleged directly against it as a defendant; and in their view making Yelp subject to an injunction does not amount to the imposition of “liability.” This argument reads constraining force into the language within section 230(e)(3) that provides, “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” This phrasing does not provide strong support for, much less compel, plaintiffs’ construction. Section 230(e)(3) does not expressly demand that a cause of action always must be alleged directly against an Internet intermediary as a named defendant for the republisher to claim immunity under the statute. And in common legal parlance at the time of section 230’s enactment, “liability” could encompass more than merely the imposition of damages. (*See* Black’s Law Dict. (6th ed. 1990) p. 914 [defining “liability” as “a broad legal term” that “has been referred to as of the most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent, or likely”].)

Even more fundamentally, plaintiffs’ interpretation misses the forest for the trees. Section 230(e)(3) underscores, rather than undermines, the broad scope of section 230 immunity by prohibiting not only the imposition of “liability” under certain state-law theories, but also the pursuit of a proscribed “cause of action.” (*See Nemet Chevrolet, Ltd. v.*

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Consumeraffairs.com, Inc. (4th Cir. 2009) 591 F.3d 250, 254 [section 230 is not just a “defense to liability”; it instead confers “immunity from suit” (*italics omitted*)]; *Medytox Solutions, Inc. v. Investorshub.com, Inc.*, *supra*, 152 So.3d at p. 731.) *This inclusive language, read in connection with section 230(c)(1) and the rest of section 230, conveys an intent to shield Internet intermediaries from the burdens associated with defending against state-law claims that treat them as the publisher or speaker of third party content, and from compelled compliance with demands for relief that, when viewed in the context of a plaintiff’s allegations, similarly assign them the legal role and responsibilities of a publisher qua publisher. (See Barrett, supra, 40 Cal.4th at pp. 53, 56, 57; Barnes v. Yahoo!, Inc., supra, 570 F.3d at pp. 1101-1102; Zeran, supra, 129 F.3d at p. 330.)* As evidenced by section 230’s findings, Congress believed that this targeted protection for republishers of online content would facilitate the ongoing development of the Internet. (See § 230(a)(1), (a)(4), (b)(1), (b)(2).)

These interests are squarely implicated in this case. *An injunction like the removal order plaintiffs’ obtained can impose substantial burdens on an Internet intermediary.* Even if it would be mechanically simple to implement such an order, compliance still could interfere with and undermine the viability of an online platform. (See *Noah v. AOL Time Warner, Inc.*, *supra*, 261 F.Supp.2d at p. 540 [“in some circumstances injunctive relief

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will be at least as burdensome to the service provider as damages, and is typically more intrusive”].) Furthermore, as this case illustrates, a seemingly straightforward removal order can generate substantial litigation over matters such as its validity or scope, or the manner in which it is implemented. (*See Barrett, supra*, 40 Cal.4th at p. 57.) Section 230 allows these litigation burdens to be imposed upon the originators of online speech. *But the unique position of Internet intermediaries convinced Congress to spare republishers of online content, in a situation such as the one here, from this sort of ongoing entanglement with the courts.*

(*Hassell, supra*, 5 Cal.5th at p. 544-545 (emphasis added).) Accordingly, the Court finds even if the content remains published and available to some but not all, the CDA applies. (*See MPA, supra*, at p. 10:18-21; Reply Facebook, p. 6:13-16, 7:20-22.)

In *Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc.*, on a motion to dismiss, the Court contemplated whether the CDA applies where the plaintiff alleged the defendant “federal and state law by blocking access to Plaintiff’s Facebook page (the “SFJ Page”) in India.” (*Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc.* (N.D. Cal. 2015) 144 F.Supp.3d 1088, 1090 (“*Sikhs*”) (N.D. Cal., J. Koh).) The plaintiff asserted a federal law cause of action for violation of Title II of the Civil Rights Act and state law causes of action for violation of the Unruh Civil Rights Act, breach of contract, and breach of the implied covenant of good faith and fair dealing. (*Id.* at p. 1090 – 1091.) Plaintiff sought,

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inter alia, “a permanent injunction requiring Defendant to stop blocking access to the SFJ Page in India, as well as compensatory and punitive damages, costs, attorney’s fees. . . .” (*Id.* at p. 1091.) The court ruled that the CDA applied as to the federal causes of action.

Here, Plaintiff’s Title II claim alleges that Defendant engaged in “blatant discriminatory conduct by blocking Plaintiff’s content in the entire India.” Compl. at 9-12. Plaintiff additionally avers that Defendant denied Plaintiff “full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations” of Defendant’s social media site by removing the SFJ Page in India based on Plaintiff’s race, religion, ancestry, and national origin. *Id.* at 10, 12; *see also* 42 U.S.C. § 2000a(a) (“All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin.”). Defendant argues that this claim is entirely based on Defendant’s blocking of the SFJ Page in India, which is publisher conduct immunized by the CDA.

The Court agrees with Defendant. . . .

As in *Barnes*, *Riggs*, and *Levitt*, Plaintiff seeks to hold Defendant liable for Defendant’s decision “whether to publish” third-party content. *See*

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Barnes, 570 F.3d at 1102. In the instant case, Plaintiff argues that Defendant had a duty under Title II not to discriminate against Plaintiff. Compl. at 9-12; *see also* Opp. at 11 (“[Defendant’s] conduct was motivated solely by unlawful discrimination against the national identity of India and the minority religion of Sikhs in India.”). *However, the act that Defendant allegedly conducted in a discriminatory manner is the removal of the SFJ Page in India. See Barnes*, 570 F.3d at 1103 (examining the conduct underlying the plaintiff’s claim of negligent undertaking). “But removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher.” *See id.*

Plaintiff responds that it merely seeks an explanation for why Defendant blocked the SFJ Page in India. However, Plaintiff cites no authority requiring such relief. Rather, the CDA bars all claims that seek to hold an interactive computer service liable as a publisher of third-party content. *See id.*; 47 U.S.C. § 203(c)(1). *Indeed, “[i]t is because such conduct is publishing conduct that we have insisted that section 230 protects from liability ‘any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online.’” Barnes*, 570 F.3d at 1103 (quoting *Roommates*, 521 F.3d at 1170-71). Further, *Plaintiff seeks not just an explanation for Defendant’s action, but damages and an injunction requiring Defendant to restore*

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access to the SFJ Page in India. See Compl. at 14-15. Accordingly, the Court finds that the CDA precludes Plaintiff's Title II claim. See Barnes, 570 F.3d at 1102-03.

(*Sikhs, supra*, 144 F.Supp.3d at p. 1095-1096 (emphasis added).) In light of the foregoing, the Court finds Facebook's decision to de-publish third party content from developers, but not end users, is protected by the Communications Decency Act.

ii. Other Claims

Plaintiff has not demonstrated the probability of prevailing on its remaining claims. (*See Opp.*, p. 14:4 – 15:15.)

The Court finds that Plaintiff has not met its burden to demonstrate the probability of prevailing on the merits of the third through eighth causes of action for concealment, intentional misrepresentation, negligent misrepresentation, intentional interference with contract, intentional interference with prospective economic relations, and negligent interference with prospective economic relations.

To establish a probability of prevailing, 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.” [Citation.]

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(*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291. *See also Navellier, supra*, 29 Cal.4th at p. 88-89 (“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” (cleaned up).) Here, Plaintiff has not done so. (*Compare* Opp., p. 14:16 – 15:15; *with* 5AC, ¶¶ 207 – 243 (concealment), 244 – 265 (intentional misrepresentation), 266 – 281 (negligent misrepresentation), 282 – 290 (intentional interference with contract), 291 – 306 (intentional interference with prospective economic relations), 307 – 324 (negligent interference with prospective economic relations).

Lastly, although not relied on in this Court’s findings, the Court notes that the parties do not address whether the issue or evidentiary sanctions affects Plaintiff’s probability of prevailing on the merits on any of the causes of action. In granting Facebook’s Motion for Sanctions Against Six4Three, the Court found that Plaintiff “ha[d] not acted in good faith in regard to the discovery surrounding the actual sales of the Pikinis App and ha[d] provided contradictory and evasive responses to the discovery requests” and made the issue or evidentiary sanction that “Plaintiff SIX4THREE is prohibited from introducing any evidence or any documents, records, or arguments that actual sales of the Pikinis App, from all possible sources, exceeded 276 units for a total of \$412 in revenue.” (Order, issued Apr. 26, 2017, p. 2-3.)

*Appendix D***c. Additional Rulings**

In light of the foregoing and in its discretion, the Court will reconsider, *sua sponte*, its order denying Defendant Facebook's Inc.'s Special Motion to Strike and For Attorney's Fees and Costs Pursuant to C.C.P. § 425.16 on the grounds of timeliness and will set the matter for a hearing on the merits. (See *Six4Three*, *supra*, 2019 WL 4784420, at *6, fn. 8 ("In the event that the court grants the individual defendants' motion in whole or in part, we do not preclude the court from reconsidering its order with respect to Facebook's motion.").)

The Court *sua sponte* reconsiders its prior orders striking portions of the Declaration of David Godkin and attached exhibits, filed May 17, 2018. This reconsideration is limited to the Court's prior orders insofar as they struck the Godkin Declaration and attached exhibits; this ruling does not affect the Court's prior rulings sealing the Godkin Declaration or the attached exhibits. Those materials either remain sealed or lodged under seal as set forth in the Court's October 31, 2018 Order on: (1) Facebook's Motions to Seal, filed January 8 and May 3 and 30; (2) The Guardian and CNN's Motion to Unseal Judicial Records; and (3) The New York Times, Associated Press, and Washington Post's Motion to Unseal.

The Court GRANTS Plaintiff's Request for Judicial Notice of Godkin Declaration, filed May 17, 2018, as to: (1) Exhibit nos. 1 – 27 (statements and representations published by Facebook); (2) 29, 33, 34 (FTC Statements);

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(3) Exhibit nos. 37 – 45 (Facebook press releases), (4) Exhibit no. 52, 53, 56, 58 – 60, 62, 66, 67 (Facebook keynote, Defendant Zuckerberg interviews); (5) Exhibit nos. 55, 57, 63 – 65, 68 – 71, 177 (Facebook financial reports, earning calls); (6) Exhibit nos. 83, 146 (Facebook web pages); (6) Exhibit no. 207 (statute); and (7) Exhibit nos. 210, 211 (appellate opinions); (8) Exhibit no. 219 (Facebook SRR).

The Court GRANTS, BUT NOT FOR THE TRUTH OF THE MATTER ASSERTED THEREIN, Plaintiff's Request for Judicial Notice of: (1) Exhibit nos. 28, 30 – 35, 174 (FTC press releases, complaint and exhibits, letters to commenters); (2) Exhibit nos. 36, 46, 54, 61, 72 - 82, 84 - 145, 147 – 173, 175, 176, 178 – 198, 200 (news articles, opinions, editorials); (3) Exhibit no. 199 (United Kingdom Parliament press release); and (4) Exhibit nos. 201 – 206, 208, 209, 211 - 218 (this action's filings, orders, records and transcripts).

The Court DENIES Plaintiff's Request for Judicial Notice of: (1) Exhibit nos. 48 – 51 (third party press releases/earnings reports); and (2) Fact nos. 1 – 7 pertaining to the December 2012 SRR (Pl. Req. Jud. Notice, p. 16:15 – 17:13, 27:1 – 28:2).

The Court DENIES Defendants' request to require Plaintiff seek leave of the court before requesting judicial notice in the future. (Opp. to Pl. Jud. Notice, filed May 31, 2018, p. 2:6-14.)

The Court DENIES Defendants' request to strike the declaration of David Godkin as improper. (Code Civ.

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Proc. §§ 435, 1005, subd. (b).) *See* Defendants' Objections, filed May 31, 2018, p. 1:1 – 2:23.)

The Court **OVERRULES** Defendants' Evidentiary Objections to Plaintiff's Opposition to Defendants' Special Motions to Strike (Anti-SLAPP), filed May 31, 2018, ("Defendants' Objections"), evidentiary objection nos. 1 – 70. The quoted language Defendants object to is from the arguments raised in Plaintiff's opposition, and not the evidence. To the extent that Defendants object to the string citations, those objections are **OVERRULED**; however, Plaintiff is admonished that citations to evidence must be specific. (Cal. Rules of Court, rule 3.1113(k).) To the extent that Defendants object to the exhibits in their entirety, those objections are **OVERRULED**. Separately filed objections should state: (1) "the language verbatim to which objection is made;" (2) "the page and line number and document where such language appears;" and (3) "the legal ground for objection with the same specificity as would be required at trial." (Weil & Brown, *supra*, at ¶ 9:102.6. *See, e.g.*, Defendants' Objections, p. 5:5 -6:3.)

Date: 6/17/2022

/s/ Robert D. Foiles
HON. ROBERT D. FOILES

APPENDIX E — 47 U.S.C. §230

47 U.S.C. §230. Protection for private blocking and screening of offensive material

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

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(b) Policy

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

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(c) Protection for “Good Samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker

No 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.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).¹

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer

1. So in original. Probably should be “subparagraph (A).”

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for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws**(1) No effect on criminal law**

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

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(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

(A) any claim in a civil action brought under section 1595 of title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

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(f) Definitions

As used in this section:

(1) Internet

The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term “information content provider” means 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.

(4) Access software provider

The term “access software provider” means a provider of software (including client or server

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software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

(June 19, 1934, ch. 652, title II, §230, as added Pub. L. 104–104, title V, §509, Feb. 8, 1996, 110 Stat. 137; amended Pub. L. 105–277, div. C, title XIV, §1404(a), Oct. 21, 1998, 112 Stat. 2681–739; Pub. L. 115–164, §4(a), Apr. 11, 2018, 132 Stat. 1254.)

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APPENDIX F — EXCERPT OF PETITION FOR
REVIEW, DATED APRIL 21, 2025

S _____

In the
Supreme Court of the State of California

SIX4THREE, LLC,

Plaintiff and Appellant,

v.

FACEBOOK, INC.,

Defendant and Respondent,

MARK ZUCKERBERG *et al.*,

Defendants and Respondents.

CALIFORNIA COURT OF APPEAL · FIRST APPELLATE
DISTRICT · No. A166007 C/W A167416 SUPERIOR COURT
OF SAN MATEO · HON. ROBERT D. FOILES · No. Civ533328

PETITION FOR REVIEW

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* * *

[33]III. The Court Should Resolve the Court of Appeal’s Divergence from Established Federal Law Interpreting Section 230 of the Communications Decency Act

The First District’s published opinion creates a split with both California courts and the Ninth Circuit as to the application of section 230 of the Communications Decency Act (47 U.S.C. § 230(c)). Notably, the First District’s opinion completes a dangerous anti-SLAPP playbook for online platforms to defeat meritorious claims, and does so based on a very flawed premise: section 230 provides immunity only when the content of “another” is at issue, but the first step of the First District’s inquiry was based on the falsity and misleading nature of Facebook and Individual Defendants’ *own* statements about the Facebook platform.

If the opinion below stands, online platforms will be immunized from fraud and tort claims for their own statements and conduct, so long as they somehow concern or impact access to the user data posted on their online platforms. Such immunity flies in the face of federal and California law on the subject—and most importantly, the plain text of section 230(c).

1. To begin with, the very text of section 230 contradicts the First District’s reasoning. Section 230(c) (1) provides that: “No provider or user of an interactive computer service shall be treated as the publisher

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or speaker of any information provided by **another** information content provider.” (*Ibid.* (emphasis added).) The word “another” in the statute means that immunity under this provision is unavailable to Facebook if it is *itself* acting as an “information content provider.” (47 U.S.C. § 230(f)(3).) In other words, to be immune, a cause of action must treat the online platform as the [34]speaker of another’s content, and the platform itself cannot be the provider of that content.

Both of these foundational principles are well understood by federal and California courts. (See, e.g., *Wozniak v. YouTube, LLC* (2024) 100 Cal.App.5th 893, 908-09 [“Notwithstanding that broad construction of section 230, ‘an interactive computer service provider only has immunity if it is not also the information content provider—that is, someone responsible, in whole or in part, for the creation or development of the content at issue.’”], internal quotation marks omitted and citing *Liapes v. Facebook, Inc.* (2023) 95 Cal.App.5th 910, 928, and *Fair Housing Council of San Fernando Valley v. Roommates.com* (9th Cir. 2008) 521 F.3d 1157 (en banc) (*Roommates.com*).)

The First District diverges from this plain-text reading of the statute in two important respects. *First*, Facebook is being sued for its own statements about its platform and its own technological changes to its platform. While this case implicates Facebook’s decision to change developer access to APIs that select, arrange, and transmit Facebook content, the causes of action arise from Facebook’s statements and omissions misrepresenting

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and lying to developers about its platform and the above-referenced decision—not the changes it made to its platform standing alone.

In fact, the First District analyzed *Facebook's* statements for the purposes of the commercial speech exception, but inexplicably pivoted to treating the claim as arising from *user* speech in its section 230 analysis. The causes of action do not, however, seek to hold Facebook or the Individual Defendants liable for the content [35] of Facebook's users' posts. Indeed, the technological change to Facebook's platform had no impact on user data posted on the Face-book platform—nothing was “published” or “depublished” on Facebook's social network as a result.

Second, Facebook's APIs fundamentally change the user content that flows through them. They do so by selecting and filtering data, depending on the API endpoint (*e.g.*, returning a list of users who are friends with an identified user); arranging the data in the response format designated by the API; and transmitting the data for algorithmic use by integrating applications. In many cases, the APIs transmit data that was never uploaded by any end user at all but was created in the first instance by Face-book itself. When Facebook makes changes to how it provides this functionality, it is not making a publication decision about third-party user content any more than the New York Times does when it changes its newspaper delivery route—which is not at all.

Rather, by selecting and arranging the data available through the APIs, Facebook is providing its own newly

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created content—it is not a passive conduit of user data. But immunity is only allowed when Facebook is “[p]assively displaying content ‘created entirely by third parties’” because in that case, Facebook is only a “service provider ‘with respect to that content.’” (*Roommates.com*, *supra*, 521 F.3d at p. 1162.)

2. The Courts of Appeal have in the past appropriately understood and applied this interpretation of section 230. However, the First District’s new reading of section 230 directly conflicts with that body of law—namely, the Fourth District’s *Demetriades* [36] decision, which confronted, and rejected, the precise anti-SLAPP / section 230 maneuver asserted by Facebook here. (*Demetriades*, *supra*, 228 Cal.App.4th at p. 313.) The court explained that Yelp’s argument “was misplaced” because plaintiff did not “seek to enjoin or hold Yelp liable for statements of third parties (*i.e.*, reviewers) on its Web site. Rather, plaintiff seeks to hold Yelp liable for its own statements regarding the accuracy of its filter.” (*Ibid.*)

3. Federal courts are also clear that online platforms do not enjoy immunity when they are being sued for their own statements or conduct concerning their algorithms, design decisions, or their structuring of user data posted on their platforms. All of this is the platform’s *own* speech and conduct. Indeed, beginning with *Roommates.com*, the Ninth Circuit has been clear on this point. There, the Ninth Circuit, sitting en banc, held that a claim against a web-site owner for the website owner’s *own* design and operation decisions was not immunized under section 230. (*Roommates.com*, *supra*, 521 F.3d at pp. 1169-70.)

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Federal courts since *Roommates.com* are in perfect accord—design or technical changes are not covered by section 230(c) when a cause of action seeks recovery or relief for the platform’s own statements and conduct. (See, e.g., *Lemmon v. Snap, Inc.* (9th Cir. 2021) 995 F.3d 1085, 1091 [denying section 230 immunity to Snap “because the [Plaintiffs’] claim turns on Snap’s design of Snap-chat”]; *Vargas v. Facebook, Inc.* (9th Cir. Oct. 13, 2023) 2023 WL 6784359, at *1-3 [Facebook not entitled to section 230 immunity for the design of its own Ad Platform and tools]; *Dangaard v. Instagram, LLC* (N.D. Cal. Nov. 30, 2022) 2022 WL 17342198 [37][Section 230 immunity denied where the “Meta defendants are alleged to have purposefully designed their platforms to filter posts and accounts in an anticompetitive manner”].) The First District’s opinion conflicts with all of this well-established federal precedent as to what a federal law means.

4. The First District’s conflation of Facebook’s users’ content with Facebook’s own false and misleading statements about its platform is not only wrong—it sets a dangerous precedent that is nearly impossible to correct absent intervention of this Court. This is because section 230 is uniquely situated as a federal defense to state claims. California courts, because they preside over virtually every major online platform, are responsible for routinely construing this part of federal law. These courts, however, are not bound by the Ninth Circuit’s precedent—only that of this Court and the United States Supreme Court.

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This Court should therefore grant review and correct the First District's erroneous interpretation. Otherwise, decisions throughout California will further diverge from established federal law without any prospect of reversion. Importantly, the effect of the divergence will be staggering, as the decision, if followed by trial courts, will provide any online platform with broad immunity from suit so long as what it does or says has any relation whatsoever to user content posted on the platform, which is necessarily true for any major online platform.

Indeed, in many cases, virtually anything a platform says or does that concerns the workings of its technology or its platform will somehow relate to user content—that is the core of their [38]business. The net effect is broad immunity from suit for California-based online platforms. Absent intervention by this Court, California's interpretation of section 230 will become permanently unmoored from federal law—and remain hopelessly in conflict given the divergent decisions of the California Courts of Appeal.

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CONCLUSION

The Court should grant Plaintiff's petition for review as to the three issues presented above.

Dated: April 21, 2025

Respectfully submitted,

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