Stuart G. Gross (#251019)
Benjamin H. Klein (#313922)
GROSS & KLEIN LLP
The Embarcadero, Pier 9, Suite 100
San Francisco, CA 94111
(415) 671-4628
sgross@grosskleinlaw.com
bklein@grosskleinlaw.com

Of counsel:

David S. Godkin (admitted *pro hac vice*)
James E. Kruzer (admitted *pro hac vice*)
BIRNBAUM & GODKIN, LLP
280 Summer Street
Boston, MA 02210
(617) 307-6100
godkin@birnbaumgodkin.com
kruzer@birnbaumgodkin.com

Attorneys for Plaintiff,
SIX4THREE, LLC, a Delaware
limited liability company

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO

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 through 50, inclusive, Defendants.	Case No. CIV 533328 **Assigned For All Purposes To Hon. V. Raymond Swope, Dept. 23** **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' SPECIAL MOTIONS TO STRIKE (ANTI-SLAPP)** UNREDACTED VERSION OF DOCUMENT SOUGHT TO BE LODGED UNDER SEAL HEARING DATE: July 2, 2018 HEARING TIME: 9:00 a.m. DEPARTMENT: 23 JUDGE: Hon. V. Raymond Swope FILING DATE: April 10, 2015 TRIAL DATE: April 25, 2019

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES .....

I. ARGUMENT .....

A. The Commercial Speech Exemption Applies .....

B. Plaintiff Is Likely to Prevail On Its Section 17200 Claim .....

C. Plaintiff Is Likely to Prevail On Its Remaining Claims .....

II. CONCLUSION .....

TABLE OF AUTHORITIES

CASES **Page**

Daugherty v. American Honda Motor Co., Inc.,
(2006) 144 Cal.App.4th 824 .....

In re Tobacco II Cases,
(2009) 46 Cal.4th 298 .....

Scripps Clinic v. Superior Court,
(2003) 108 Cal.App.4th 917, 940 .....

Smith v. State Farm Mutual Automobile Ins. Co.,
(2001) 93 Cal.App.4th 700 .....

STATUTES

Bus. & Prof. Code, § 16727 .....

Bus. & Prof. Code, § 17200 .....

Cal. Code Civ. Proc. § 425.17.....

OTHER AUTHORITIES

California Civil Jury Instructions (CACI) (2017) No. 303. .....

California Civil Jury Instructions (CACI) (2017) No. 1900 .....

California Civil Jury Instructions (CACI) (2017) No. 1901 .....

California Civil Jury Instructions (CACI) (2017) No. 1903 .....

California Civil Jury Instructions (CACI) (2017) No. 2201 .....

California Civil Jury Instructions (CACI) (2017) No. 3421 .....

I. ARGUMENT

A. The Commercial Speech Exemption Applies

Plaintiff incorporates the arguments raised in its oppositions to Facebook's Anti-SLAPP Motion, including the applicability of the commercial speech exemption of Cal. Code Civ. Proc. § 425.17(c) and the unprecedented untimeliness in asserting the Anti-SLAPP argument.[1]

B. Plaintiff Is Likely to Prevail on Its Section 17200 Claim

Plaintiff has demonstrated that Zuckerberg and Facebook baited tens of thousands of software companies with specific affirmative representations and partial disclosures of fact from 2007 to 2014 to induce them to invest capital and labor in building businesses on Facebook Platform, which was critical to Facebook's rapid growth from 20 million users in 2007 to over two billion users today, including representations that Facebook Platform would: (1) operate as an open and neutral platform to ensure a level competitive playing field for participating companies ("developers"), both with respect to one another and Facebook; (2) maintain controls and procedures that would ensure user privacy and enable developers who relied upon Facebook Platform to do the same; (3) enforce such policies around user data and privacy in a neutral manner and without regard for the amount of advertising a developer purchased from Facebook; (4) provide an opportunity for companies to build stable businesses; (5) provide equal and neutral access to Facebook's Graph APIs, including the APIs relied upon by Plaintiff (User ID API, Full Friends List API, Friends Permissions APIs and Newsfeed APIs), while at all times respecting the privacy of user data and the right of a user to own and control her own data; and (6) enable companies to grow their businesses by leveraging Facebook's graph for organic user growth.[2]

---

[1] *See* 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 1) filed on January 24, 2018, Plaintiff's Reply to Defendant's Supplemental Memorandum in Support of Anti-SLAPP Motion (Prong 1) 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. Declaration of David S. Godkin In Support of Plaintiff's Request for Judicial Notice ("Jud. Not. Dec."), ¶¶ 214-217, Exs. 213-216.

[2] Declaration of David S. Godkin In Opposition to Anti-SLAPP Motions ("Dec."), ¶ 2, Ex. 1, at 82:7-85:20; ¶ 3, Ex. 2, at 45:16-56:08, 75:21-79:20, 167:9-168:20; ¶ 4, Ex. 3, at 32:2-22, 73:7-74:20, 78:25-81:25; ¶ 5, Ex. 4, at 60:9-61:25; ¶¶ 11-14, Exs. 10-13; ¶ 181, Ex. 181. Jud. Not. Dec., ¶¶ 3-6, 9, 10, 13, 14, 54-61, 67, 68, 74, 75 (Exs. 2-5, 8, 9, 12, 13, 53-60, 66, 67, 73, 74) ("We're

These affirmative representations and partial disclosures were widely known in the consumer software industry, and because of these statements, many companies decided to build their businesses on Facebook Platform. Dec., ¶ 3, Ex. 2, at 90:6-92:14; ¶ 4, Ex. 3, at 21:1-22, 53:22-54:17; ¶ 7, Ex. 6, 360:2-25; ¶ 76, Ex. 75. Facebook made these representations and partial disclosures with the specific intent to induce companies to rely on Facebook Platform, which greatly benefited Facebook.[3] Plaintiff relied on these representations and partial disclosures when deciding to build its business on Facebook Platform. Dec., ¶ 9, Ex. 8, at 115-117; ¶ 10, Ex. 9, at 252. At no time did Facebook manage its Platform as a level competitive playing field that respected user privacy; instead, unbeknownst to Plaintiff, Facebook and its senior executives willfully, maliciously and arbitrarily violated these representations and failed to disclose facts that materially undermined them in order to leverage its Platform as a weapon to unjustly enrich Facebook and its senior executives by willfully violating the privacy of Facebook users and architecting a scheme to blame developers for Facebook's own repeated privacy violations.[4]

Facebook architected its Platform in a manner designed to violate user privacy as early as 2009, which entailed: (1) separating the privacy settings for data a user shared with friends in apps the user downloaded ("user data") with the privacy settings ("Apps Others Use" settings) for data the user shared with friends in apps the friends downloaded ("friend data") (Jud. Not. Dec., ¶ 32, Ex. 31, Federal Trade Commission Complaint, at 4-7); (2) hiding the Apps Others Use settings to ensure most Facebook users were not aware that these settings were distinct from the main privacy settings (*Id.*, at 4-9); (3) making the default setting for sharing data with Apps

---

very optimistic that if you were choosing to develop a service, you would choose to do with us. We really consider ourselves a partnership company. And that means that we want to take social companies and make them big, and big companies and make them social, because we think bringing what Facebook provides, which is your friends, makes every service better" (Sheryl Sandberg, July 26, 2012 Quarterly Earnings Call, Ex. 57)).

[3] Dec., ¶ 2, Ex. 1, at 125:7-130:14, 268:6-272:4; ¶ 3, Ex. 2, at 188:23-189:15; ¶ 4, Ex. 3, at 21:23-22:2, 28:8-22, 40:14-41:14, 59:2-61:4; ¶¶ 15-17, Exs. 14-16. Jud. Not. Dec., ¶¶ 54-61 (Exs. 53-60).

[4] Dec., ¶ 3, Ex. 2, at 99:11-120:4, 125:19-131:20; ¶ 18, Ex. 17; ¶ 139, Ex. 138; ¶ 172, Ex. 172; ¶¶ 177-180, Exs. 177-180; ¶ 188, Ex. 188; ¶ 197, Ex. 197.

Others Use set to "on" so Facebook could funnel more data to developers under the guise of user consent (*Id.*, at 7-11); and (4) deliberately failing to pass privacy settings for data transmitted to developers via Facebook's APIs, signaling to developers that all friend data was public and could be treated as such. Dec., ¶ 117, Ex. 116; ¶¶ 155-157, Exs. 155-157; ¶ 174, Ex. 174; ¶ 191, Ex. 191; ¶ 192, Ex. 192; ¶¶ 194-196, Exs. 194-196. Jud. Not. Dec., ¶¶ 29-36, 177 (Exs. 28-35, 176). Facebook did not comply with the FTC Order to eliminate this artificial distinction between "user data" and "friend data" that allowed Facebook to funnel friend data *en masse* to developers without concern for privacy restrictions. To address the FTC Order, all Facebook had to do was: (1) combine the privacy settings for apps downloaded by a user and apps downloaded by the user's friends in the main privacy page (instead of hiding the Apps Others Use page); (2) change the default data-sharing setting from "on" to "off"; and (3) include the privacy setting of a piece of data when sending that data to developers through its APIs. Instead, Facebook shirked the FTC order by expanding upon its intentionally flawed privacy design more urgently than ever to ensure Facebook had a valuable trading tool that would convince developers to make entirely unrelated purchases in Facebook's new mobile advertising product, which saved Facebook's business from collapsing in late 2012 and early 2013. In short, Zuckerberg weaponized the data of one-third of the planet's population in order to cover up his failure to transition Facebook's business from desktop computers to mobile ads before the market became aware that Facebook's financial projections in its 2012 IPO filings were false. Jud. Not. Dec., ¶¶ 37, 82, 96 (Exs. 36, 81, 95). The flawed design also enabled Facebook to state in 2014 that a user could not consent to share data with friends in any app other than Facebook – a remarkable claim since Facebook held the exact opposite position for seven years – but one that served as a convenient privacy-focused excuse to eliminate competitors to its new products in video, photo, messaging, contact management, e-commerce, payments, and now dating.[5]

Zuckerberg's scheme made it impossible for Plaintiff's business and thousands of other businesses to succeed on Facebook Platform and directly resulted in the widely reported scandal in which a developer, Cambridge Analytica, used Facebook data to influence the 2016

[5] Dec., ¶ 120, Ex. 119; ¶ 133, Ex. 132; ¶ 160, Ex. 160. Jud. Not. Dec., ¶ 53, 201 (Exs. 52, 200).

Presidential election allegedly on behalf of the Russian government.[6] The evidence uncovered by Plaintiff demonstrates that the Cambridge Analytica scandal was not the result of mere negligence on Facebook's part, but was rather the direct consequence of the malicious and fraudulent scheme Zuckerberg designed in 2012 to cover up his failure to anticipate the world's transition to smartphones. This scheme caused so much internal chaos at Facebook that Russian entities were able to access directly from Facebook's servers massive amounts of user data by using API access tokens of other companies; for instance, a Facebook engineer sent an urgent message in October 2014 that Russian entities had been accessing directly from Facebook 3 billion pieces of consumer data per day using Pinterest's API access tokens. Dec., ¶¶ 153, 154, Exs. 153, 154. Russian entities directly pulling 3 billion data points per day from Facebook's database constitutes a far greater abuse than the Cambridge Analytica matter being investigated by federal and state authorities in which 87 million consumers had their data transferred to Russian entities. This conduct implicates the rights of one-third of the world's population, and yet remains shrouded from public view. Jud. Not. Dec., ¶¶ 90, 111 (Exs. 89, 110).

At least by 2012, Zuckerberg personally oversaw a practice to weaponize Platform APIs, including a wide range of user and friend data, by inducing companies to rely on this data and then threatening to remove access unless these companies made exorbitant purchases in Facebook's nascent mobile advertising product, known internally as "Neko" ads and publicly as "Mobile App Install" ads. Jud. Not. Dec., ¶¶ 7, 8, 77, 78 (Exs. 6, 7, 76, 77). Zuckerberg blacklisted any companies that refused to buy these Neko ads in exchange for continued access to data that Facebook claimed for years was publicly available at no charge. This blacklisting practice also applied to companies that Zuckerberg in his sole discretion considered competitive with current or future Facebook products, even products Facebook had not yet built, and notwithstanding that most of these developers operated entirely within Facebook's rules.[7]

[6] Jud. Not. Dec., ¶¶ 24-28, 108, 110, 113, 114, 116, 134, 141, 143, 155, 158, 163, 164, 167-170, 175, 176, 181-186, 188, 190, 192, 194-198, 200, 201 (Exs. 23-27, 107, 109, 112, 113, 115, 133, 140, 142, 154, 157, 162, 163, 166-169, 174, 175, 180-185, 187, 189, 191, 193-197, 199, 200).

[7] Dec., ¶ 2, Ex. 1, at 177:14-181:20, 195:18-199:7, 231:25-233:18, 257:20-258:14; ¶ 5, Ex. 4, at 79:14-84:17, 139:13-145:13, 163:1-167:19; ¶¶ 19-26, Exs. 18-25; ¶¶ 42-45 Exs. 41-44; ¶ 165, Ex.

Zuckerberg's decision to weaponize a platform economy that Facebook represented for years as open, fair and neutral stemmed from a simple fact that by 2012 had devastating consequences for Facebook: people began accessing the Internet primarily from their phones, but Facebook had built its advertising business for desktop computers, which caused Facebook's revenues and stock price to plummet. Facebook lost over $200 million in the second and third quarters of 2012 because it had no mobile advertising business.[8] By mid-2012, Facebook's most senior executives[9] explored ways to leverage the fact that hundreds of thousands of companies relied on Facebook Platform in order to reboot its business for smartphones, presenting various options for restricting public Platform APIs to its Board of Directors in August 2012, including: (1) charge a published price for access to data based on API calls, like Twitter does with its platform; (2) implement a revenue share program, like Apple and Google do with their platforms, where Facebook would receive 30 percent of the developer's gross sales; or (3) implement formally a policy Zuckerberg had already been enforcing informally called "reciprocity," which weaponized user data, and in particular friend data, in order to maliciously force companies to make exorbitant purchases in Neko ads and feed all their data back to Facebook (or provide other valuable consideration like intellectual property rights) to keep Facebook from breaking their products and causing their businesses to fall off a cliff. Dec., ¶¶ 32-41, Exs., 31-40; ¶ 159, Ex. 159; ¶ 193, Ex. 193. In November 2012, after many months of discussion, Zuckerberg made his final decision to implement a version of the reciprocity policy called "full reciprocity," instead of implementing a public pricing program like Twitter or a revenue share model like the neutral platforms operated by Apple and Google - the top Platform

---

165.

[8] In mid-2012, mobile advertising accounted for 0% of Facebook's total revenues and yet today, as a direct result of the scheme at the heart of Plaintiff's complaint, mobile advertising makes up approximately 90% of Facebook's total revenues. This has been referred to as one of the most "mindblowing" growth trajectories of any business in history. Dec., ¶¶ 26-31, Exs. 25-30; ¶ 152, Exs. 151-152. Jud. Not. Dec., ¶¶ 37-43, 56, 58, 62-66, 69-72, 82, 96-98, 178, 197 (Exs. 36-42, 55, 57, 61-65, 68-71, 81, 95-97, 177, 196).

[9] The executives involved in these discussions in 2011 and 2012 include but are not limited to: Zuckerberg, Olivan, Cox, Lessin, Sandberg, Bosworth, Rose, Ebersman, Wehner, Stretch, Badros and Fischer. *See, e.g.*, Dec., ¶ 48, Ex. 47 (FB-00917792).

executive, Vernal, referred to this decision as "crazy" outside Zuckerberg's presence.[10] Zuckerberg's full reciprocity policy caused Facebook's privacy and policy apparatus to disintegrate in favor of an arbitrary enforcement environment in which Facebook offered user data, and in particular friend data, to certain developers that were willing to reciprocate with Facebook, typically by agreeing to purchase no less than $250,000 per year in unrelated Neko ads, while other developers that Facebook considered competitive were blacklisted from accessing this data even though they never broke any rules or violated anyone's privacy.

Numerous internal discussions of the reciprocity policy demonstrate that the API restrictions that shut down Plaintiff's business on April 30, 2015 were critical components of this "full reciprocity" decision and were implemented under the internal project name Platform 3.0 (P3.0), later renamed to Platform Simplification (PS12N). Dec., ¶¶ 50-52, Exs. 49-51. Facebook publicly announced an intentionally vague reciprocity policy in January 2013 that refused to define a "competitive" service or "core functionality" in order to mislead companies into thinking that only online social networks (e.g. MySpace, LinkedIn) would be considered competitive; but Facebook's internal definition of a competitive service included virtually every kind of consumer application, including those Facebook explicitly induced in its reciprocity announcement to continue using APIs it had already decided to shut down. Dec., ¶ 53, Ex. 52. Jud. Not. Dec., ¶¶ 10, 11, 12, 73 (Exs. 9, 10, 11, 72).[11] This enabled Facebook to use its policies as an excuse to eliminate any developer for any reason whatsoever. Dec., ¶¶ 53-54, Exs. 52-53.

[10] Dec., ¶ 2, Ex. 1, at 136:18-144:7, 148:11-149:16, 151:6-153:10, 168:5-169:1, 177:14-181:20; ¶ 5, Ex. 4, at 86:4-93:16, 102:7-103:14; ¶¶ 46-52, Exs. 45-51; ¶ 67, Ex. 66; ¶ 173, Ex. 173.

[11] Facebook has claimed in two sets of verified discovery responses that it never had a reciprocity policy and that no documents with the term "reciprocity" exist in its files, notwithstanding that its public announcement of the reciprocity policy is readily available on the Internet and Facebook has produced hundreds of emails that discuss this reciprocity policy. Jud. Not. Dec., ¶ 10, Ex. 9 (before the announcement of the reciprocity policy, section I.10 of Facebook Platform Policies, part of the adhesion contract Plaintiff entered into with Facebook, stated: "Competing social networks: (a) You may not use Facebook Platform to export user data into a competing social network"); ¶ 11, Ex. 10 (on January 25, 2013, Facebook announces the reciprocity policy as an update to section I.10, stating that "the vast majority of developers building social apps" should "keep doing what you're doing," and that this applies to "music, fitness, news and general lifestyle apps," but that a "much smaller number of apps" are trying to "replicate our functionality" and Facebook has "had policies against this that we are further clarifying today," linking to the new

Because Zuckerberg communicated that Facebook would start shutting off access to this data to force mobile ad purchases, Vernal assumed Facebook would announce that the data was no longer publicly available; so he directed his team to prepare a public announcement and was days away from releasing it in late 2012. Dec., ¶ 175, Ex. 175. However, Zuckerberg then instructed Vernal to cancel these plans and instead to start shutting off access quietly with just a small number of companies to force them to make large mobile ad payments or provide other valuable consideration (e.g., intellectual property, feeding user data back to Facebook without consent, or even forcing a company to sell to Facebook at a low price under threat of being shut down). Dec., ¶ 2, Ex. 1, at 204:12-209:16; ¶¶ 55-57, Exs. 54-56; ¶ 176, Ex. 176. Numerous subsequent statements of the senior employees involved in implementing PS12N make clear that they understood Zuckerberg's decision to weaponize this data to have been a final decision as of late 2012.[12] Although executives knew Facebook was secretly privatizing the most valuable APIs in its Platform as of 2012, and therefore that any developers continuing to rely on these APIs would be irreparably damaged, Zuckerberg prohibited any announcement of this fact and represented their continued availability publicly and to most Facebook employees for more than two years to gain leverage in future negotiations.[13] To achieve this, Facebook's senior executives made clear to employees who had become aware that they would be fired if they discussed the API privatizations. Dec., ¶ 2, Ex. 1, at 252:2-254:13; ¶ 62, Ex. 61. Had Zuckerberg not directed

---

I.10 section); ¶ 12, Ex. 11 (the new I.10 section reads: "Reciprocity and Replicating core functionality: (a) Reciprocity: Facebook Platform enables developers to build personalized, social experiences via the Graph API and related APIs. If you use any Facebook APIs to build personalized or social experiences, you must also enable people to easily share their experiences back with people on Facebook. (b) Replicating core functionality: You may not use Facebook Platform to promote, or to export user data to, a product or service that replicates a core Facebook product or service without our permission."); ¶ 203, Ex. 202, at 4-12 (Facebook's Supplemental Response to Plaintiff's Third Demand for Production: "Facebook states that it does not have a 'data reciprocity policy,' and no such documents and communications exist" that contain the terms "data reciprocity" or "reciprocity"); ¶ 73, Ex. 72 (media reports on Facebook's announcement of the reciprocity policy in January 2013).

[12] Dec., ¶ 2, Ex. 1, at 86:4-93:16, 151:6-153:10, 168:5-169:1, 204:12-209:16, 226:2-228:3; ¶ 46, Ex. 45; ¶¶ 58-60, Exs. 57-59.

[13] Dec., ¶ 4, Ex. 3, at 14:25-15:14, 65:3-25, 70:2-71:13, 82:8-94:1, 96:15-108:16; ¶¶ 60-61, Exs. 59-60; ¶¶ 202-204, Exs. 202-204. Jud. Not. Dec., ¶¶ 14-20, 56, 58 (Exs. 13-19, 55, 57).

Vernal to conceal the full scope of Platform changes, including the privatization of friend data, Plaintiff would not have built its business on Facebook Platform and Cambridge Analytica would not have used Facebook data to steer the election towards Donald Trump. Put simply, Zuckerberg did not anticipate how quickly people would start using phones to access the Internet, so he took desperate, fraudulent measures to save his failing ads business in 2012.

The "full reciprocity" policy was unworkable as an actual policy but was extremely effective as a 'get out of jail free' card by giving Facebook: (1) an excuse to threaten to or actually shut down certain developers unless they purchased mobile ads or provided other consideration Facebook deemed valuable in its sole discretion; (2) the ability to blame developers for privacy violations related to data Facebook chose to funnel to developers without any privacy controls; and (3) cover to continue to induce developers to rely on the very APIs Zuckerberg had decided to privatize in 2012 in order to gain more leverage.[14] Under cover of the full reciprocity policy, the Growth team (Olivan) illegally accessed non-public information about competitive applications in order to monitor their popularity and then directed the Platform team (Vernal) to shut down an application once it became widely used.[15] By early 2013, armed with an official reciprocity policy vague enough for Zuckerberg to consider any company a criminal, the initial pay-to-play tests began paying off as Neko ads grew faster than anyone's wildest expectations. Dec., ¶ 158, Ex. 158; ¶ 164, Ex. 164. In light of this success, it was time to expand the pay-to-play scheme and fully "lock in" developers, so executives ordered a "comprehensive review" of apps. Dec., ¶ 75, Ex. 74; ¶¶ 166-167, Ex. 166-167. By mid-2013, 'competitors' that replicated 'core functionality' included e-commerce, payment and gifting apps (e.g. Amazon), because Facebook decided it wanted to clear space to launch its own products in these markets, which it since has, notwithstanding that Facebook never publicly stated that these types of

[14] Dec., ¶ 2, Ex. 1, at 168:5-169:1, 214:13-217:11, 228:9-232:5; ¶¶ 63-68, Exs. 62-67; ¶¶ 168-171, Ex. 168-171; ¶ 173, Ex. 173.

[15] Olivan accomplished this by monitoring apps installed on the phones of 30 million people who had installed Onavo, a virtual private network app that Facebook bought in 2013; Olivan was able to track highly sensitive information about at least 82,000 software applications as a result of violating the privacy of these 30 million people. Dec., ¶ 2, Ex. 1, at 52:9-53:12; ¶¶ 69-73, Exs. 68-72; ¶¶ 147-150, Exs. 146-149. Jud. Not. Dec., ¶¶ 100, 139, 142 (Exs. 99, 138, 141).

companies would be considered competitors. Dec., ¶ 23, Ex. 22; ¶ 161, Ex. 161. By early fall 2013, Facebook expanded its definition of a 'competitor' to include newsfeed, contact management, messaging, photo, video, calendar, lifestyle, media, sharing economy, file storage, e-reader and fitness apps because they "present a significant overlap with [Facebook's] product roadmap." Dec., ¶ 74, Ex. 73.[16] Under these expanded definitions, which were never publicly announced, tens of thousands of applications had now become competitive with Facebook; the ongoing audits requested by Zuckerberg, Vernal and Lessin in fact revealed that over 40,000 applications would break as a result of the API privatizations.[17] This gave Facebook immense leverage over these companies to enter into contracts that funneled them friend data in exchange for exorbitant mobile ad purchases. In conducting the audits, Facebook employees recognized that the "apps in question are not spammy or crap, but apps users like and use a lot," but that they will be "shut down" because Facebook is "ultimately competitive with all of them." Dec., ¶ 5, Ex. 4, at 191:22-193:14, 222:23-226:16; ¶¶ 76-79, Exs. 75-78.

Beginning in September 2013, the defendants instructed employees involved in these audits to communicate to many of the audited companies that they must "spend on NEKO at least $250k a year to maintain access" to the APIs or Facebook will remove access "in one-go to all apps that don't spend," just like Zuckerberg and his top lieutenants had done in the pay-to-play tests with a smaller group of companies in late 2012 and early 2013. Dec., ¶ 5, Ex. 4, at 218:22-219:19; Dec., ¶¶ 80-82, Exs. 79-81; ¶¶ 189-190, Exs. 189-190.[18] By December 2013, this

[16] Facebook's PMQ testified that only Twitter and YouTube were ever restricted from accessing public Platform APIs for competitive reasons, but when confronted with evidence of numerous other competitive restrictions, she admitted to many more companies being restricted, including Snapchat, Amazon, Line, and about a "dozen" other applications, though she refused to name them. Dec., ¶ 5, Ex. 4, at 298:10-306:7.

[17] Dec., ¶ 4, Ex. 3, at 134:13-135:20, 145:03-150:12; Dec., ¶ 6, Ex. 5, at 153:14-154:24, 161:12-177:20; Dec., ¶¶ 75-76, Exs. 74-75.

[18] Dating apps were one of the few categories considered *not* to be competitive with Facebook in 2013, so instead of shutting them down, Facebook whitelisted seven dating apps in exchange for significant Neko purchases, effectively giving these seven apps control of the consumer dating market to the immense disadvantage of all other competitors. Interestingly, Zuckerberg indicates in 2014 that he is beginning to view Tinder as a competitor. Facebook broke Tinder's app as recently as April 2018, and then announced it was building its own dating apps to compete with Tinder on May 1, 2018. Dec., ¶ 85, Ex. 84; ¶ 98, Ex. 97; ¶ 103, Ex. 102; ¶ 190, Ex. 190; ¶ 192, Ex.

requirement was increased to $1,000,000 per year in Neko purchases for certain developers. Dec., ¶ 83, Exs. 82. From 2013 through 2015, Facebook whitelisted thousands of companies to continue to access restricted APIs in exchange for meeting this unrelated Neko purchasing requirement or, in certain cases, for providing other reciprocal value, like intellectual property or data feeds.[19] Ultimately, Facebook privatized 54 different APIs and supported 5,200 apps whitelisted to access one or more privatized APIs using Private Extended API Agreements (approximately two dozen of these 54 APIs are the ones Cambridge Analytica and Russia used to steer the 2016 Presidential election towards Donald Trump). Dec., ¶ 4, Ex. 3, at 187:13-188:16; ¶ 5, Ex. 4, at 183:11-184:16, 227:13-230:22; ¶ 101, Ex. 100. Facebook employees used three different internal online tools to grant developers special, unequal access to APIs, which included all of the APIs upon which Plaintiff's business depended. Dec., ¶ 4, Ex. 3, at 160:06-162:18; ¶ 81, Ex. 80; ¶ 102, Ex. 101. For the remaining 35,000 applications Facebook broke, including Plaintiff's app, Facebook closed its Platform entirely, refused to communicate with these companies, and provided no opportunity for them to meet the Neko spending requirement or enter into Private Extended API Agreements so their products could function, thereby restricting competition immensely. Dec., ¶ 10, Ex. 9, at 199:1-206:18; ¶¶ 103-104, Ex. 102-103.

As employees learned of Zuckerberg's bait and switch scheme in 2013, they became "livid" and "dumbfounded" and expressed deep concern that the scheme was "insane," "unethical," and ran contrary to the representations Facebook made for years regarding its commitment to manage a fair and neutral platform. Dec., ¶¶ 105-111, Ex. 104-110. They made impassioned arguments to their superiors that the scheme harms consumers and competition because Zuckerberg unilaterally determined that Facebook, not its users, owns the data they upload to Facebook. Dec., ¶¶ 112-113, Ex. 111-112. They expressed consternation at how impossible it will be to manage a platform where apps are categorized and given different levels of API access based on whether Facebook considers them "existing competitors, possible future

192; ¶¶ 199-201, Ex. 199-201. Jud. Not. Dec., ¶ 85, 86, 201 (Exs. 84, 85, 200).

[19] Dec., ¶ 4, Ex. 3, at 57:21-58:4, 167:25-178:05, 196:14-199:8, 201:10-203:13, 218:8-219:18; ¶ 5, Ex. 4, at 238:2-242:17, 243:7-252:5; ¶ 7, Ex. 6, at 121:3-127:1, 172:18-176:4; ¶¶ 84-100, Exs. 83-99.

competitors, [or] developers that we have alignment with on business models," meaning developers that purchase lots of mobile ads. Dec., ¶ 111, Ex. 110; ¶ 114, Ex. 113; ¶ 151, Ex. 150. They describe the user privacy narrative that Facebook was shopping internally and eventually announced publicly as its reasons for privatizing the APIs as "pablum" designed to place the blame for privacy violations on developers ("We've even pre-planned that…user hatred will be directed at our developers, not at us") and describe how employees are leaving because they don't want to be involved in implementing the scheme ("why should any of us work on a product that could be crippled at any time to benefit another team?"). Dec., ¶¶ 115-117, Ex. 114-116; ¶ 212, Ex. 212. In the second half of 2013, employees attempt to recruit Sukhar to fight back because "the contract with [developers] is so far from working;" but he gives up by November, agrees to carry Zuckerberg's water ("I'm done fighting the graph protection stuff"), and oversees the dissemination of a fraudulent narrative to explain the API privatizations to the public while Facebook's public relations machine kicks into gear to control the media narrative. Dec., ¶¶ 118-122, Ex. 117-121; ¶ 182, Ex. 182; ¶ 187, Ex. 187; ¶ 198, Ex. 198; ¶¶, 205-211, Exs. 205-211.

The fraudulent narrative was known internally as the "Switcharoo Plan" because it entailed concealing the API privatizations ("the 'bad stuff' of ps12n") behind an April 30, 2014 announcement of the revamp of Facebook's Login product, an entirely unrelated initiative, and because it enabled Facebook to "tell a story that makes sense."[20] Sukhar made one last attempt to mitigate the harm to consumers and competition, noting that he wanted to ask Zuckerberg directly if he is "comfortable killing the prospects of a lot of startups, some of which are good,"

[20] Senior Facebook executives had already decided to conceal the API privatizations behind this Login revamp by early 2013, more than a year prior to the announcement, but they felt that Facebook employees and eventually the public would be more likely not to notice the 'switcharoo' if Sukhar took responsibility for the message. Dec., ¶¶ 123-130, Ex. 122-129; ¶ 133, Ex. 132; ¶ 160, Ex. 160. Jud. Not. Dec., ¶ 53 (Ex. 52). Purdy, the number two executive in charge of Platform, serves initially as the conduit between Zuckerberg and Sukhar, telling Sukhar that they are going to use "login v4 [the new Login Review] as the launch vector for most of PS12N," to which Sukhar asks, "What does it actually mean to tie PS12N to login besides synchronized timing? Is it just the messaging? What's the bullshit that you refer to?" Purdy replies: "Mainly messaging." Sukhar, still confused, asks: "What problem are we solving by conjoining the two?" Purdy reiterates in a later thread that Login has to be the narrative that covers up PS12N because the "user trust message only really hangs together if we introduce the user model changes with the developer changes." Dec., ¶¶ 127-128, Exs. 126-127.

that he is concerned about "the perception that we can't hold our story together," and that he wants to see if Facebook can provide some guarantees regarding API access even to competitive apps (his proposal is rejected by Vernal as it "risks breaking into jail"). Dec., ¶¶ 131-132, Ex. 130-131.[21] Zuckerberg's April 30, 2014 public announcement of the API restrictions and Facebook's official blog post continued to misrepresent material facts and conceal facts that undermined the facts disclosed, including: (1) concealing the specific APIs being restricted and instead representing falsely that some "rarely used" APIs were being deprecated, when internal emails show that the APIs were in fact the most widely used APIs in Platform and they were not deprecated, but privatized. Dec., ¶ 4, Ex. 3, at 53:15-21, 61:11-62:13, 207:21-209:12; ¶ 5, Ex. 4, at 25:6-28:25; 119:7-16, 151:21-152:18; Dec., ¶¶ 133-135, Ex. 132-134; ¶ 162-163, Ex. 162-163; (2) concealing across 20 developer training sessions held on April 30, 2014 that developers' apps would break as a result of the APIs Facebook privatized. Dec., ¶ 136, Ex. 135; and (3) concealing, at Zuckerberg's request, that the newsfeed APIs were also being privatized. Dec., ¶¶ 137-138, Ex. 136-137. Facebook's defense that the API restrictions were implemented exclusively to protect user trust and privacy is plainly false as: (1) the Login revamp applied only to apps downloaded by *that user*, whereas the anti-competitive API restrictions applied to apps downloaded by that user's friends; (2) a user already had the ability for many years to control whether their friends could access the user's data in third-party applications, but Facebook hid these controls and set the default to "on" in order to fabricate consent; and (3) Facebook actively violated user trust and privacy in numerous projects during this time, including tracking calls and texts without user consent or even the consent of Facebook's own privacy department as early as 2012 and 2013; re-implementing call and text message tracking in 2014 and 2015 in a way that would "upgrade users without subjecting them to an Android permissions dialog at all" [i.e., without notifying users it was tracking their texts and calls]; deliberately ignoring privacy

[21] After shutting down many competitive apps, Facebook quickly begins to dominate a wide range of new markets, including video, local commerce, payments, messaging, and much more, such that 4 of the top 5 apps worldwide quickly become Facebook apps and venture capital funding in consumer software startups plummets. Jud. Not. Dec., ¶¶ 76, 79, 89, 99, 102, 105, 106, 109, 112, 117, 118, 120, 128-130, 138, 144-149, 165, 166 (Exs. 75, 78, 88, 98, 101, 104, 105, 108, 111, 116, 117, 119, 127-129, 137, 143-148, 164, 165).

settings for Facebook's "People You May Know" feature, the feature that suggests new friends; and tracking the texts and calls of people who never signed up for Facebook.[22] Zuckerberg's 2012 scheme to weaponize data as a way of gaining leverage over developers in order to force them to buy mobile ads resulted in countless privacy issues reported by the media, which Facebook remarkably used as cover to shut down developers that had always abided by the rules.[23] In other words, Facebook was able to unjustly enrich itself both from the 2012-2014 pay-to-play scheme that saved its advertising business *and* from the inevitable privacy violations the scheme caused! Facebook reaped the benefits of transitioning its ads business to phones *and* wiping out competition to make room for a wide range of new Facebook products.

Plaintiff has demonstrated that defendants' conduct violates all three prongs of Section 17200. Defendants' conduct violates the "unfair" prong under any of the three standards as defendants represented a fair and open platform and then enriched themselves by maliciously, unethically, oppressively and punitively operating a closed platform that took advantage of the reasonable reliance of millions of consumers and tens of thousands of companies to their substantial detriment and with no countervailing benefit.[24] Defendants' conduct violates the "unlawful" prong as the bait and switch scheme triggers a variety of predicate violations, including common law tort and fraud, California's misrepresentation and concealment statutes, California's false advertising law, and the July 27, 2012 FTC Order directing that defendants' "shall not misrepresent in any manner…the extent to which it maintains the privacy or security of covered information."[25] Plaintiff has also met its burden on the "fraud" prong. *See In re*

---

[22] Dec., ¶ 2, Ex. 1, at 64:22-76:10, 120:23-121:18; ¶ 4, Ex. 3, at 94:3-95:12, 123:20-125:08, 127:02-127:25, 128:01-128:10, 129:06-131:23; ¶ 139, Ex. 138; ¶ 172, Ex. 172; ¶¶ 177-180, Exs. 177-180; ¶ 188, Ex. 188.

[23] Jud. Not. Dec., ¶¶ 23, 76, 79, 87, 88, 100, 101, 104, 107, 115, 116, 123-125 131, 136, 139, 140-143, 153-157, 159-162, 172-174, 179, 180, 189, 193, 199 (Exs. 22, 75, 78, 86, 87, 99, 100, 103, 106, 114, 120, 122-124, 130, 135, 138, 139-142, 152-156, 158-161, 171-173, 178, 179, 188, 192, 198).

[24] *See Daugherty v. American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 824, 839; *Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 719; *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 940.

[25] Jud. Not. Dec., ¶ 30, Ex. 29, at 3. Further, Zuckerberg's bait and switch scheme violates the Cartwright Act as Facebook maliciously tied its Platform APIs (the tying product) to its Neko

Tobacco II Cases (2009) 46 Cal.4th 298, 312. An injunction is required as Facebook still induces developers to build on its Platform by representing it as open and fair and has even extended its Platform to Messenger using the same fraudulent playbook.[26]

C. Plaintiff Is Likely to Prevail on Its Remaining Claims

Plaintiff has met its burden to prevail on its breach of contract action. CACI (2017) 303. Facebook and Plaintiff entered into a standard adhesion contract, Facebook's December 2012 Statement of Rights and Responsibilities (SRR). Dec., ¶ 146, Ex. 145; ¶ 4, Ex. 3, at 35:2-23; ¶ 6, Ex. 5, at 22:17-23:12; ¶ 7, Ex. 6, at 45:4-21, 57:4-63:5. Plaintiff performed all of its obligations. Dec., ¶ 5, Ex. 4, at 17:15-21, 19:1-20:8, 23:15-25:5, 37:19-25. Facebook failed to perform by refusing to provide "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. Dec., ¶ 146, Ex. 145 (Section 9.8); ¶ 5, Ex. 4, at 38:13-40:21; ¶ 7, Ex. 6, at 45:4-21, 219:23-222:1. Plaintiff and many others were harmed, and Facebook's breach was a substantial factor in the harm. Dec., ¶ 8, Ex. 7, at 205:17-25; ¶ 7, Ex. 6, at 67:8-83:3, 98:10-99:4, 103:10-107:24; ¶ 3, Ex. 2, at 121:5-123:11.

Plaintiff has met its burden to prevail on its fraud claims. CACI (2017) 1900, 1901, 1903. Defendants made numerous representations of fact to Plaintiff they knew to be false around managing a level competitive playing field while intentionally and systematically tilting that playing field in its favor to the detriment of tens of thousands of startups and small businesses.[27]

---

advertising product (the tied product), which are entirely unrelated and distinct products. Facebook refused to offer the Platform APIs unless companies purchased Neko advertising. Facebook had sufficient economic power in the market for Platform APIs (it was the sole provider of these APIs) to coerce companies into purchasing Neko advertising, and the tying arrangement prohibited an estimated 40,000 companies from purchasing advertising (the tied product) as they no longer had products to advertise. CACI (2017) 3421 (Bus. & Prof. Code, § 16727); Dec., ¶¶ 140-144, Ex. 139-143.

[26] Dec., ¶ 6, Ex. 5, at 26:1-29:4, 42:17-45:10; ¶ 145, Ex. 144; ¶¶ 183-186, Ex. 183-186. Jud. Not. Dec., ¶¶ 2, 21, 22, 80, 81, 83-86, 91-94, 103, 119, 122, 126, 127, 132, 133, 137, 138, 150-152, 171 (Exs. 1, 20, 21, 79, 80, 82-85, 90-93, 102, 118, 121, 125, 126, 131, 132, 136, 137, 149-151, 170).

[27] Dec., ¶¶ 11-14, Exs. 10-13; ¶ 2, Ex. 1, at 82:7-85:20, 177:14-181:20, 195:18-199:7, 231:25-233:18, 257:20-258:14; ¶ 3, Ex. 2, at 45:16-56:08, 75:21-79:20, 99:11-120:4, 125:19-131:20, 167:9-168:20; ¶ 4, Ex. 3, at 32:2-22, 73:7-74:20, 78:25-81:25; ¶ 5, Ex. 4, at 60:9-61:25.

Defendants intended that Plaintiff rely on the representations.[28] Plaintiff reasonably relied on the representations.[29] Further, Facebook and Plaintiff were in a business relationship.[30] Facebook disclosed some facts but intentionally failed to disclose others known only to Facebook while preventing Plaintiff from discovering certain facts.[31] Plaintiff did not know the concealing facts and if they had been disclosed, Plaintiff would not have built its business on Facebook Platform. Dec., ¶ 8, Ex. 7, at 162:13-163:16, 223:6-15. Plaintiff was harmed by this conduct.[32]

Plaintiff has met its burden to prevail on its intentional tort action. CACI (2017) 2201. Plaintiff maintained contracts with its users. Dec., ¶ 8, Ex. 7, at 181:23-183:9, 195:25-196:16. Facebook knew of these contracts as its SRR required them. Dec., ¶ 6, Ex. 5, at 49:18-50:5. Facebook knew it would disrupt and intended to disrupt Plaintiff's contracts because Plaintiff was included in the list of 40,000 apps audited in 2013 and 2014 that would break as a result of Zuckerberg's scheme. Dec., ¶ 6, Ex. 5, at 174:7-177:20; Dec., ¶ 4, Ex. 3, at 55:21-56:17, 122:14-123:06, 231:18-233:24; Dec., ¶ 7, Ex. 6, at 108:1-111:13. Facebook's conduct prevented Plaintiff from performing in its contracts with its users. Dec., ¶ 8, Ex. 7, at 162:13-163:16, 223:6-15. Plaintiff was harmed by this conduct. Dec., ¶ 8, Ex. 7, at 205:17-25; ¶ 10, Ex. 9, at 269:5-25.

II. CONCLUSION

For the foregoing reasons, Defendants' Anti-SLAPP Motions should be denied on the grounds of Cal. Code Civ. Proc. § 425.17 to ensure Facebook cannot further stay discovery and jeopardize the trial date once again by appealing the Court's Order.

---

[28] Dec., ¶ 2, Ex. 1, at 125:7-130:14, 268:6-272:4; ¶ 3, Ex. 2, at 188:23-189:15; ¶ 4, Ex. 3, at 14:25-15:14, 21:23-22:2, 28:8-22, 40:14-41:14, 59:2-61:4, 65:3-25, 70:2-71:13, 82:8-94:1, 96:15-108:16; ¶¶ 15-17, Exs. 14-16; ¶¶ 60-61, Exs. 59-60.

[29] Dec., ¶ 3, Ex. 2, at 90:6-92:14; ¶ 4, Ex. 3, at 21:1-22, 53:22-54:17; ¶ 7, Ex. 6, 360:2-25; ¶ 9, Ex. 8, at 115-117; ¶ 10, Ex. 9, at 252.

[30] Dec., ¶ 146, Ex. 145; ¶ 4, Ex. 3, at 35:2-23; ¶ 6, Ex. 5, at 22:17-23:12; ¶ 7, Ex. 6, at 45:4-21, 57:4-63:5.

[31] Dec., ¶ 2, Ex. 1, at 204:12-209:16; ¶ 4, Ex. 3, at 14:25-15:14, 21:23-22:2, 28:8-22, 40:14-41:14, 59:2-61:4, 65:3-25, 70:2-71:13, 82:8-94:1, 96:15-108:16; Dec., ¶¶ 53-57, Exs. 52-56.

[32] Dec., ¶ 8, Ex. 7, at 205:17-25; ¶ 10, Ex. 9, at 199:1-201:1, 252, 269:5-25.

DATED: May 17, 2018

GROSS & KLEIN LLP

BIRNBAUM & GODKIN, LLP

By: */s/ David. S. Godkin*

Stuart G. Gross, Esq.
David S. Godkin (admitted *pro hac vice*)
James E. Kruzer (admitted *pro hac vice*)
Attorneys for Plaintiff
Six4Three, LLC

PROOF OF SERVICE

I, Cheryl A. McDuffee, declare:

I am a citizen of the United States and employed in Suffolk County, Massachusetts. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 280 Summer Street, Boston, MA 02210. On May 17, 2018, I served a copy of the within document(s):

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' SPECIAL MOTIONS TO STRIKE

☒ by electronic service, per the agreement of the parties, by emailing a true and correct copy through counsel's email address to Defendant's counsel of record at the email addresses set forth below.

Joshua H. Lerner (jlerner@durietangri.com)
Sonal N. Mehta (smehta@durietangri.com)
Laura Miller (lmiller@durietangri.com)
Catherine Kim (ckim@durietangri.com)
Durie Tangri (service-six4three@durietangri.com)
217 Leidesdorff Street
San Francisco, CA 94111
P (415) 376 - 6427
Attorney for Defendant
FACEBOOK, INC.

and

Judge V. Raymond Swope (By hand)
Department 23
Complex Civil Litigation

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed May 17, 2018, at Boston, Massachusetts.

/s/ Cheryl A. McDuffee

Cheryl A. McDuffee