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By ________
DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation; 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.

Case No. CIV 533328

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

~~[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 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 Plaintiffs 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 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 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 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); (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).)

> 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 l), 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

1 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 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 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 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 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.

(*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.

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);
- "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 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.

(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.)

(*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
> — 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.]

(*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 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 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.)

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.).

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...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 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 the core of its platform economy." (Pl. Supp. Br., *supra*, at p. 8:15-20

1 (cleaned up). *See also id.* at p. 9:9-21.) However, Plaintiff does not seek to enjoin Facebook from
2 making misrepresentations but rather to require Facebook to re-publish user content by providing
3 access to it (e.g. photos) to Plaintiff. (5AC, p. 106:12-19.)

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

11 > [S]ection 230 immunity applies here. We therefore reverse the judgment of the Court of
12 > 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
13 > from the order issued upon entry of the default judgment any requirement that Yelp remove the challenged reviews or subsequent comments of the reviewers.

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

15 > Plaintiffs also assert that Yelp cannot claim section 230 immunity because, under section
16 > 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
17 > "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
18 > 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
19 > 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.
20 > And in common legal parlance at the time of section 230's enactment, "liability" could
21 > 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
22 > most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent, or likely"].)
23
24 > 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
25 > 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.*
26 > *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*
27 > *Solutions, Inc. v. Investorshub.com, Inc.*, *supra*, 152 So.3d at p. 731.) *This inclusive*
28 > *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 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, *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 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 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.]

(*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.)

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); (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. 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

HON. ROBERT D. FOILES