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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability
company,

Plaintiff,

v.

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

Defendant.

Case No. CIV 533328

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

**DEFENDANT FACEBOOK, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF ITS
MOTION FOR SUMMARY ADJUDICATION
OF ISSUES**

Date: September 11, 2017
Time: 9:00 a.m.
Dept: 2 (Complex Civil Litigation)
Judge: Honorable Marie S. Weiner

FILING DATE: April 10, 2015
TRIAL DATE: Vacated

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1 **I. INTRODUCTION**

2 In late 2012, Ted Kramer created Six4Three, LLC (“Six4Three”) to develop an iPhone
3 application that would take advantage of data that Facebook provided to the developer community,
4 subject to user privacy settings, free of charge to enhance the user experience in their mobile
5 applications. While access to the data was free, it did not come without limitations. Rather, to access
6 this data through the Facebook Platform, developers had to agree, as Six4Three concedes it did here, to
7 Facebook’s terms of use—referred to as its Statement of Rights and Responsibilities (“SRRs”). Included
8 in the SRRs is a standard limitation of liability provision that is often included in the terms of service
9 when a company is providing its users something at no cost. The limitation expressly prohibits the
10 recovery of damages, including lost profits, that exceed \$100 or the amount that a party paid Facebook.

11 After registering as a developer and agreeing to the SRRs and other developer terms, Six4Three
12 was allowed access to the data Facebook made available to developers at the time, which included
13 information about Facebook users’ friends, including photos those friends shared on Facebook. Using
14 that data, Six4Three built an application that allowed users to search through all of the photos that their
15 friends had shared with them on Facebook to identify pictures of women in bikinis. After spending
16 months offering the app for free in an attempt to attract customers, Six4Three only ever managed \$412 in
17 total sales.

18 Notwithstanding that it agreed to the limitation of liability included in Facebook’s SRRs,
19 Six4Three is seeking nearly *\$100 million* in lost profits and lost enterprise value. But as to Six4Three’s
20 breach of contract, negligent interference, and Section 17200 claims, there is no escaping the limitation
21 of liability that Six4Three agreed to in exchange for access to Facebook’s data. California courts have
22 long enforced this type of limitation as to these claims, particularly where it relates to a free service. To
23 be clear, Facebook is not attempting to apply the limitation to all of Six4Three’s many claims. Rather,
24 Facebook seeks a narrow ruling that the limitation caps liability for Six4Three’s breach of contract,
25 negligent interference, and Section 17200 claims.

26 Any argument by Six4Three that the limitation is unconscionable or barred by Section 1668 fails
27 as a matter of law. The limitation is not unconscionable. It is clearly and conspicuously presented in all
28 caps within the SRRs. And the term was indisputably understood by Six4Three, as it included a similar

1 limitation of liability in its terms of service with its own users. Facebook is not aware of a single case
2 that has held such a limitation unconscionable under circumstances like these. Nor does Section 1668
3 render the limitation of liability unenforceable. Section 1668 is a narrow exception to the general rule
4 that contractual limits on liability are to be enforced—it prohibits such limitations only with regard to
5 *intentional* torts, and Facebook is not moving on any of the intentional torts alleged by Six4Three.

6 For these reasons, Facebook requests summary adjudication that the limitation of liability
7 contained in the SRRs—a contract Six4Three concedes it agreed to—caps all damages for Six4Three’s
8 breach of contract claim, negligent interference claim, and Section 17200 claim.

9 **II. PROCEDURAL BACKGROUND**

10 At the July 10, 2017 case management conference and hearing in this case, Facebook requested
11 leave to move for summary adjudication based on the limitation of liability contained in the SRRs that
12 Six4Three acknowledges it agreed to in exchange for access to Facebook’s data. Six4Three had no
13 objection, and the Court ruled to allow Facebook to file the motion and set a briefing schedule in
14 consultation with the parties. After the hearing, the Court issued its Case Management Order No. 3 and
15 set a briefing schedule for Facebook’s motion for summary adjudication of issues “based upon the
16 contractual limitation of liability clause.” This motion is filed pursuant to the Court’s order.

17 As the court-directed filing date for this motion, July 28, 2017, is the same day that Six4Three is
18 to file its Third Amended Complaint, Facebook references the proposed Third Amended Complaint,
19 attached as Exhibit A to Six4Three’s motion for leave to amend, filed on March 20, 2017, throughout.
20 Facebook expects that the Third Amended Complaint, filed on July 28, 2017, will contain the same
21 allegations and claims against Facebook as those in the proposed Third Amended Complaint, as the
22 Court granted Six4Three leave to modify the proposed Third Amended Complaint only to remove the
23 references to the proposed six individual defendants and substitute “Facebook” in the allegations
24 regarding the individual defendants.

1 **III. UNDISPUTED BACKGROUND FACTS¹**

2 **A. The Facebook Platform Allows Developers to Integrate Their Applications With**
3 **Facebook’s Social Graph.**

4 The Facebook Platform is a set of application programming interfaces (“APIs”) and services that
5 Facebook makes available to third-parties that register as a Facebook developer. Declaration of Laura E.
6 Miller in Support of Defendant Facebook, Inc.’s Motion for Summary Adjudication of Issues (“Miller
7 Decl.”), Ex. 1 at FB-01347168; Ex. 3 at FB_0000025; Ex. 2 ¶¶ 2, 26. The APIs and services allow
8 developers to, among other things, retrieve data from Facebook. *Id.*, Ex. 1 at FB-01347168; Ex. 3 at
9 FB_0000025. This data enables developers to build more useful applications with enhanced user
10 experiences. *Id.*, Ex. 2 ¶¶ 2, 26.

11 The Facebook Platform is free for users as well as app developers like Six4Three. *Id.* Ex. 2 ¶¶ 2,
12 86–88, 90. App developers like Six4Three paid—and pay—nothing for access to data that Facebook
13 agrees to provide. *Id.* Facebook does, however, require that users and app developers agree to the SRRs.
14 *Id.*, Ex. 1 at FB-01347166; Ex. 3 at FB_0000017; Ex. 2 ¶¶ 2, 85. The SRRs contain, among other
15 provisions, a limitation of liability, which provides in pertinent part:

16 WE WILL NOT BE LIABLE TO YOU FOR *ANY* LOST PROFITS OR
17 OTHER CONSEQUENTIAL, SPECIAL, INDIRECT, OR INCIDENTAL
18 DAMAGES *ARISING OUT OF OR IN CONNECTION WITH THIS*
19 *STATEMENT OR FACEBOOK*, EVEN IF WE HAVE BEEN ADVISED
20 OF THE POSSIBILITY OF SUCH DAMAGES. OUR AGGREGATE
LIABILITY ARISING OUT OF THIS STATEMENT OR FACEBOOK
WILL NOT EXCEED THE GREATER OF *ONE HUNDRED DOLLARS*
(\$100) OR THE AMOUNT YOU HAVE PAID US IN THE PAST
TWELVE MONTHS.

21 *Id.*, Ex. 1 at FB-01347168 (emphasis added); Ex. 3 at FB_0000024 (emphasis added).

22 **B. Six4Three Hoped to Build a Successful Application Utilizing Data That Facebook**
23 **Made Available.**

24 Six4Three was a startup funded with approximately [REDACTED]
25 [REDACTED]. Miller Decl., Ex. 4; Ex. 5 at 68:10–18, 276:21–277:8.

27 ¹ The issue presented by this motion is a narrow one. Accordingly, Facebook limits its discussion of the
28 background facts to only those relevant to the present motion.

1 Like many other companies, Six4Three sought to make money by building an application that
2 utilized the data offered through the Facebook Platform. Six4Three set up a Facebook developer account
3 in December 2012, agreed to Facebook's SRRs, including the limitation of liability included in the SRRs,
4 and in return, was given access to the data Facebook made available at the time, which included
5 Facebook users' friends' photos. *Id.*, Ex. 2 ¶¶ 85, 96–97; Ex. 6 at 87:16–88:17, 93:6–8; Ex. 7 at 38:5–7,
6 41:17–21, 44:9–13. Using that data, Six4Three developed an application called "Pikinis," which allowed
7 users to automatically find their friends' swimsuit photos on Facebook. *Id.*, Ex. 8; Ex. 6 at 147:9–22.
8 Six4Three's promotional material, which can be viewed in part at this archived web address,
9 <https://web.archive.org/web/20141004095225/http://www.pikinis.com/>, show what it offered:



17 Miller Decl. ¶ 13.

18 By agreeing to Facebook's SRRs, [REDACTED]
19 [REDACTED]. Miller Decl., Ex. 6 at 87:16–18, 156:12. Although
20 Six4Three had access to and utilized this friends' data [REDACTED], it cannot show more than
21 \$412 in sales. *Id.*, Ex. 9 at 3. Nonetheless, Six4Three now seeks nearly [REDACTED] in alleged lost
22 profits and "enterprise value." *Id.*, Ex. 2 ¶¶ 179, 193; Ex. 10 at 89–90 (claiming [REDACTED])
23 [REDACTED]

24 **C. There Is No Dispute That Six4Three Agreed to Facebook's Terms of Service,**
25 **Including the Limitation of Liability Contained in the SRRs.**

26 There is no dispute that Six4Three agreed to Facebook's terms, including the SRRs. Miller Decl.,
27 Ex. 2 ¶ 85 ("On December 11, 2012, 643 entered into Facebook's Statement of Rights and
28 Responsibilities."); *see also* Ex. 5 at 188:14–21, 189:4–9; 192:3–5, 192:24–194:7, 198:16–25; Ex. 7 at

1 44:9–13, 110:3–17. In fact, Tim Gildea, a member of Six4Three and the primary developer of Pikinis,
2 testified that [REDACTED]
3 [REDACTED]. *Id.*, Ex. 7 at 44:9–13, 110:3–17. He also [REDACTED]
4 [REDACTED].² *Id.* at 110:23–111:1. In short, there is
5 no dispute that Six4Three was aware of, reviewed, and agreed to the SRRs, including the limitation of
6 liability, at the time it registered as a developer with Facebook.

7 **D. Six4Three Included a Similar Limitation of Liability Provision in Its Own Terms of**
8 **Service.**

9 Six4Three included a limitation of liability—which was similar to Facebook’s—in its own terms
10 of use for Pikinis:

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 *Id.*, Ex. 11 at Six4Three 000001100–01; Ex. 6 at 116:16–117:10.

20 **IV. ARGUMENT**

21 **A. Limitations of Liability Provisions Like That Contained in Facebook’s SRRs Are**
22 **Valid and Enforceable in California.**

23 Limitation of liability clauses “have long been recognized as valid in California” as a legitimate

24 _____
25 ² Scaramellino is an experienced tech entrepreneur with a degree from Yale Law School and about a
26 decade of experience [REDACTED] Miller Decl., Ex. 5 at 27:7–9,
27 29:15–22. [REDACTED] *Id.* at 29:15–22. Furthermore, as he
28 did with Six4Three, [REDACTED] *Id.* at 95:3–6.

1 part of private, voluntary transactions between parties. *Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.*,
2 209 Cal. App. 4th 1118, 1126 (2012) (citation omitted); *see also Nat'l Rural Telecommunications Coop.*
3 *v. DIRECTV, Inc.*, 319 F. Supp. 2d 1040, 1048 (C.D. Cal. 2003) (“Under California law, parties may
4 agree by their contract to the limitation of their liability in the event of a breach.”) (citation omitted).
5 Limitation of liability provisions are particularly appropriate where, as here, one party is offering a
6 service for free. *See Markborough Cal., Inc. v. Superior Court*, 227 Cal. App. 3d 705, 714 (1991)
7 (“limitation of liability provisions are particularly important where the beneficiary of the clause is
8 involved in a ‘high-risk, low-compensation service’”) (citation omitted).

9 **B. Six4Three’s Breach of Contract, Negligent Interference, and Section 17200 Claims**
10 **All “Arise Out of or in Connection With” Its Contract With Facebook and Are**
11 **Therefore Subject to the Limitation of Liability.**

12 The limitation of liability that Six4Three agreed to specifically prohibits recovery of “any lost
13 profits or other consequential, special, indirect or incidental damages *arising out of or in connection*
14 *with* this statement or Facebook.” Miller Decl., Ex. 1 at FB-01347168 (emphasis added); Ex. 3 at
15 FB_0000024 (emphasis added). The limitation of liability thus unquestionably applies to Six4Three’s
16 breach of contract claim, which specifically alleges that Six4Three “was injured *as a result of*
17 *Facebook’s breach of the agreement*,” and Facebook is therefore liable for 643’s damages *as a result of*
18 *the breach of contract*.” *Id.*, Ex. 2 ¶ 193 (emphasis added). Six4Three’s other claims³ turn on exactly
19 the same alleged breach—Facebook’s decision to limit developer access to certain types of data.
20 Specifically, Count I, the Section 17200 claim, alleges that Facebook’s breach of the SRR “terminate[d]
21 Developers’ ability to build advanced photo-searching applications,” which Six4Three claims was a
22 breach of the SRRs. *Compare id.* ¶ 166 *with id.* ¶ 185. Similarly, Count VIII, for negligent interference,
23 claims that Facebook’s alleged breach of the SRRs interfered with Six4Three’s economic relationships
24 with its users because it “end[ed] 643’s access to Graph API data.” *Id.* ¶¶ 241, 250, 257–59. The
25 gravamen of each of these claims is that Facebook breached the SRRs and Six4Three was harmed as a

26
27 ³ For the sake of clarity, Facebook is only moving for summary adjudication as to the breach of contract
28 claim (Count II), the negligent interference claim (Count VIII), and the Section 17200 claim (Count I).

1 result. The claims thus “arise out of or in connection with” the SRRs and the limitation of liability must
2 therefore be enforced as to these claims.

3 **C. Six4Three’s Attempts to Escape the Consequences of the Limitation of Liability It**
4 **Agreed to Are Unavailing.**

5 Attempting to avoid the consequences of the limitation of liability to which it agreed, Six4Three
6 asserts, without basis, that the provision is unconscionable, or otherwise unenforceable under California
7 Civil Code Section 1668. Miller Decl., Ex. 2 ¶¶ 190–192. Both of these arguments fail as a matter of
8 well-established California law.

9 **1. The Limitation of Liability Is Not Unconscionable.**

10 “A finding of unconscionability requires ‘a procedural and a substantive element, the former
11 focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-
12 sided results.’” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340 (2011) (quoting *Armendariz v.*
13 *Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000)).

14 **a. There Is No Procedural Unconscionability.**

15 With respect to procedural unconscionability, the traditional analysis looks at oppression or
16 surprise. “Oppression occurs where a contract involves lack of negotiation and meaningful choice,
17 surprise where the allegedly unconscionable provision is hidden within a prolix printed form.” *Pinnacle*
18 *Museum Tower Ass’n v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 247 (2012) (citation omitted).
19 But Six4Three does not claim to have been oppressed or surprised by the limitation of liability. Nor
20 could they. The provision was not surprise—it appears clearly and conspicuously in all caps. *See* Miller
21 Decl., Ex. 1 at FB-01347168; Ex. 3 at FB_0000024. In fact, Six4Three admits that it reviewed
22 Facebook’s SRRs when registering as a developer. *Id.*, Ex. 7 at 44:9–13. And furthermore, Six4Three
23 admits that its primary investor and business advisor, who graduated from Yale Law School, [REDACTED]

24 [REDACTED]
25 [REDACTED] *Id.*, Ex. 5 at 27:7–9, 192:24–194:7 (sworn testimony from Scaramellino
26 that, [REDACTED]
27 [REDACTED]
28 [REDACTED]).

1 The evidence is undisputed that [REDACTED]
2 [REDACTED] *Id.* at 192:24–194:7, 198:16–25; Ex. 7 at 110:23–111:1. And
3 Six4Three does not claim that the term was vague or ambiguous, or that its meaning or consequences
4 were a surprise. Nor could they, as Six4Three includes [REDACTED]
5 [REDACTED]. *Id.*, Ex. 11 at Six4Three 000001100–01; Ex. 6 at 116:16–117:10. Neither the provision nor its
6 meaning were a surprise to Six4Three.

7 Nor was the limitation of liability the result of oppression. It is not enough, as Six4Three would
8 have it, that Facebook does not negotiate the terms of its SRRs. A finding of oppression requires a
9 showing of lack of meaningful choice, which includes the choice to reject an agreement altogether, or
10 seek another contractual partner. *Song fi, Inc. v. Google Inc.*, 72 F. Supp. 3d 53, 62 (D.D.C. 2014)
11 (applying California law and upholding YouTube’s terms of service, including the limitation of liability,
12 because, among other things, the plaintiffs had a “meaningful choice as to whether to upload their video
13 to the YouTube website and agree to the conditions set forth by YouTube”); *see also Wayne v. Staples,*
14 *Inc.*, 135 Cal. App. 4th 466, 482 (2006) (“There can be no oppression establishing procedural
15 unconscionability, even assuming unequal bargaining power and an adhesion contract, when the
16 customer has meaningful choices[.]”). Here, Six4Three has not alleged and cannot prove that it did not
17 have a “meaningful choice” or a “legitimate opportunity” to “negotiate *or reject the terms*” of the SRRs.
18 *Darnaa, LLC v. Google, Inc.*, Case No. 15-cv-03221-RMW, 2015 WL 7753406, at *2 (N.D. Cal. Dec. 2,
19 2015), *on reconsideration in part*, No. 15-CV-03221-RMW, 2016 WL 6540452 (N.D. Cal. Nov. 2, 2016)
20 (emphasis added) (citation omitted); *see also Song fi, Inc.*, 72 F. Supp. 3d at 63 (finding no procedural
21 unconscionability in YouTube’s Terms of Service because they were not “obscured or hidden” and
22 plaintiffs “had a clear opportunity to understand the terms” and “did not lack a meaningful choice.”). It
23 indisputably did. Six4Three did not have to register with Facebook as a developer and develop a bikini-
24 photo-finding app. It was free to reject the SRRs entirely and seek to partner with another social network
25 or photo sharing site for purposes of developing its application. In fact, Six4Three considered
26 developing its app to [REDACTED], but
27 ultimately chose to agree to the SRRs and integrate with Facebook. Miller Decl., Ex. 6 at 69:11–25,
28 70:1–6; Ex. 7 at 27:7–19. Unable to prove either surprise or oppression, Six4Three cannot establish

1 procedural unconscionability, which ends the inquiry, as a showing of both procedural and substantive
2 unconscionability are necessary to invalidate the clause. *See AT&T Mobility LLC*, 563 U.S. at 340.

3 **b. There Is No Substantive Unconscionability.**

4 As for substantive unconscionability, it is not enough that the limitation of liability protects
5 Facebook. *See Pinnacle Museum Tower Ass'n*, 55 Cal. 4th at 246 (“A contract term is not substantively
6 unconscionable when it merely gives one side a greater benefit; rather, the term must be ‘so one-sided as
7 to shock the conscience.’”) (citation omitted). In order to show substantive unconscionability, the
8 plaintiff must prove that the contract terms are *unreasonably* favorable to one party such that they
9 “shock the conscience.” *Id.* Indeed, California courts have consistently held that damage limiting
10 clauses are not substantively unconscionable just because they benefit a party, particularly where, as
11 here, the defendant allows for some recovery up to and including the amount of money it received from
12 the plaintiff. *See Simulados Software, Ltd. v. Photon Infotech Private, Ltd.*, 40 F. Supp. 3d 1191, 1199
13 (N.D. Cal. 2014) (“Many contracts contain . . . limitation-of-liability clauses and courts have not found
14 these clauses to be substantially unconscionable as a matter of law. The contract does not, as Simulados
15 argues, prevent Simulados from recovery in the event of a breach. The limitation-of-liability clause
16 expressly allows for recovery of the total amount received by Photon. As such, the Contract is not
17 unconscionable and not a contract of adhesion.”).

18 Six4Three paid Facebook nothing for access to the data it sought. It built an application that
19 achieved no more than \$412 in sales. Capping its damages according to the limitation it agreed to can
20 hardly be considered overly harsh or one-sided, especially in light of Six4Three’s inclusion of a similar
21 term in its own user contracts. And Six4Three’s continued claim that this case involves the “public
22 interest” is of no moment. This is a business dispute between two companies that voluntarily entered into
23 a private agreement. Six4Three cannot show that the limitation of liability should be set aside based on
24 some perceived conflict with public policy or the public interest because, among other reasons, the
25 services provided through the Facebook Platform are not the type of “essential” services that are a
26 “practical necessity for some members of the public.” *Tunkl v. Regents of Univ. of Cal.*, 60 Cal. 2d 92,
27 98–101 (1963).

1 2. **Section 1668 Does Not Prevent Application of the Limitation of Liability to**
2 **Six4Three’s Breach of Contract, Negligent Interference, or Section 17200**
3 **Claims.**

3 Section 1668 of the California Civil Code provides: “All contracts which have for their object,
4 directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the
5 person or property of another, or violation of law, whether willful or negligent, are against the policy of
6 the law.” Cal. Civ. Code § 1668. By its plain terms, it does not prohibit enforcement of limitations of
7 liability to breach of contract or negligence claims. In fact, “[w]ith respect to claims for breach of
8 contract, limitation of liability clauses are enforceable unless they are unconscionable, that is, the
9 improper result of unequal bargaining power or contrary to public policy.” *Food Safety Net Servs.*, 209
10 Cal. App. 4th at 1126 (applying section 1668) (citation omitted). As discussed in detail above, the
11 limitation of liability provision in Facebook’s SRRs is not unconscionable. Thus Section 1688 is no bar
12 to enforcement of the limitation of liability as to Six4Three’s breach of contract claim.

13 Nor does Section 1668 prohibit the enforcement of the limitation as to Sxi4Three’s negligent
14 interference claim. *See Farnham v. Superior Court (Sequoia Holdings, Inc.)*, 60 Cal. App. 4th 69, 71
15 (1997) (“contractual releases of future liability for ordinary negligence . . . are generally enforceable”).
16 In cases with limitations of liability like the one we have here, courts have applied the limitation to
17 negligent interference claims as well as breach of contract. *See, e.g., Darnaa, LLC*, 2015 WL 7753406,
18 at *4–5. That is because Section 1668 operates to invalidate only those provisions that insulate a party
19 from *intentional torts* and negligent interference is not an intentional tort for the purposes of this
20 analysis. *Farnham*, 60 Cal. App. 4th at 71; *see also McQuirk v. Donnelley*, 189 F.3d 793, 796 (9th Cir.
21 1999) (quoting the rule from *Farnham*); *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith,*
22 *Inc.*, 68 Cal. App. 4th 445, 482 (1998), *as modified on denial of reh’g* (Jan. 6, 1999) (“What
23 distinguishes actionable fraudulent deceit is the element of knowing intent to induce someone’s action to
24 his or her detriment with false representations of fact. Fraud is an intentional tort; it is the element of
25 fraudulent intent, or intent to deceive, that distinguishes it from actionable negligent misrepresentation
26 and from nonactionable innocent misrepresentation. It is the element of intent which makes fraud
27 actionable, irrespective of any contractual or fiduciary duty one party might owe to the other.”) (citation
28

1 omitted). Therefore the limitation of liability also caps Six4Three's damages as to its negligent
2 interference claim.

3 Finally, courts also have enforced limitation of liability provisions as to Section 17200 claims
4 that, like this one, turn on an alleged breach of contract. In *Nat'l Rural Telecommunications Coop.*, 319
5 F. Supp. 2d at 1056-57, the parties agreed to a limitation of liability that capped recovery. Nevertheless,
6 the plaintiff asserted a Section 17200 claim alleging that DIRECTV wrongfully denied it the rights to
7 certain channels. The court granted summary judgment for DIRECTV on the claim, and noted that
8 "[u]nder California law, such broadly-worded provisions encompass more than contract disputes." *Id.* at
9 1056. The court observed that the Section 17200 claim "stem[med] from the relationship of the parties
10 as embodied" in their contract. *Id.* Therefore, the court found "as a matter of law"
11 the limitation of liability provisions under the parties' agreement applied to the Section 17200 claim.
12 The same is true here: Six4Three's Section 17200 claim stems from the relationship of the parties as
13 embodied by the SRRs that Six4Three claims Facebook breached. *See supra* at IV.B. As such, the
14 limitation applies to Six4Three's Section 17200 claim as a matter of law.

15 **V. CONCLUSION**

16 For the foregoing reasons, summary adjudication that the limitation of liability contained in the
17 SRRs limits all damages for Six4Three's first (Section 17200), second (breach of contract), and eighth
18 (negligent interference) causes of action to the greater of \$100 or the amount Six4Three paid Facebook is
19 proper.

20 Dated: July 28, 2017

DURIE TANGRI LLP

21
22 By: _____


LAURA E. MILLER

23
24 Attorney for Defendant
Facebook, Inc.

1 **PROOF OF SERVICE**

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

6 On July 28, 2017, I served the following documents in the manner described below:

7 **DEFENDANT FACEBOOK, INC.'S MEMORANDUM OF POINTS AND**
8 **AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY ADJUDICATION**
9 **OF ISSUES (REDACTED PUBLIC VERSION)**

- 10 (BY U.S. MAIL) I am personally and readily familiar with the business practice of Durie
11 Tangri LLP for collection and processing of correspondence for mailing with the United
12 States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to
13 be placed in the United States Postal Service at San Francisco, California.
- 14 (BY MESSENGER SERVICE) by consigning the document(s) to an authorized courier
15 and/or process server for hand delivery on this date.
- 16 (BY FACSIMILE) I am personally and readily familiar with the business practice of
17 Durie Tangri LLP for collection and processing of document(s) to be transmitted by
18 facsimile and I caused such document(s) on this date to be transmitted by facsimile to the
19 offices of addressee(s) at the numbers listed below.
- 20 (BY OVERNIGHT MAIL) I am personally and readily familiar with the business
21 practice of Durie Tangri LLP for collection and processing of correspondence for overnight
22 delivery, and I caused such document(s) described herein to be deposited for delivery to a
23 facility regularly maintained by Federal Express for overnight delivery.
- 24 BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through
25 Durie Tangri's electronic mail system from jposada@durietangri.com to the email
26 addresses set forth below.
- 27 (BY PERSONAL DELIVERY) I caused such envelope to be delivered by hand to the
28 offices of each addressee below.

1 On the following part(ies) in this action:

2 Basil P. Fthenakis
3 CRITERION LAW
4 2225 E. Bayshore Road, Suite 200
5 Palo Alto, CA 94303
6 Telephone: 650-352-8400
7 Facsimile: 650-352-8408
8 bpf@criterionlaw.com

9 David S. Godkin
10 James Kruzer
11 BIRNBAUM & GODKIN, LLP
12 280 Summer Street
13 Boston, MA 02210
14 Telephone: 617-307-6100
15 godkin@birnbaumgodkin.com
16 kruzer@birnbaumgodkin.com

17 *Attorneys for Plaintiff*
18 *Six4Three, LLC*

19 I declare under penalty of perjury under the laws of the United States of America that the
20 foregoing is true and correct. Executed on July 28, 2017, at San Francisco, California.

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22
23
24
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26
27
28

Jennifer Posada