WILMER CUTLER PICKERING HALE AND DORR LLP
SONAL N. MEHTA (SBN 222086)
sonal.mehta@wilmerhale.com
ALEXIS J. PFEIFFER (SBN 312007)
alexis.pfeiffer@wilmerhale.com
950 Page Mill Road
Palo Alto, CA 94304 USA
Telephone: 650 600 5051
Facsimile: 650 858 6100

CATHERINE S. OWENS (SBN 307626)
catherine.owens@wilmerhale.com
350 South Grand Avenue, Suite 2100
Los Angeles, CA 90071
Telephone: 213 443 5300
Facsimile: 213 443 5400

Attorneys for Defendant
Facebook, Inc.

DURIE TANGRI LLP
LAURA E. MILLER (SBN 271713)
lmiller@durietangri.com
CATHERINE Y. KIM (SBN 308442)
ckim@durietangri.com
WHITNEY O'BYRNE (SBN 325698)
wobyrne@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

Attorneys for Defendants
Facebook, Inc. and Mark Zuckerberg

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

STYLEFORM IT, a Swedish sole proprietorship,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation; MARK ZUCKERBERG, an individual; and DOES 1-50, inclusive,

Defendants.

Case No. CGC-18-571075

DEFENDANTS FACEBOOK INC. AND MARK ZUCKERBERG'S NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE THE COMPLAINT UNDER CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 425.16; MEMORANDUM OF POINTS AND AUTHORITIES THEREOF

Date: March 13, 2020
Time: 9:30 a.m.
Dept: 302
Complaint: November 2, 2018
Amended Complaint: January 15, 2020
Trial Date: Not Yet Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD,

PLEASE TAKE NOTE THAT on the above date and time, or as soon thereafter as the matter may be heard, in Department 302 of the above-entitled court, located at 400 McAllister Street, San Francisco, CA 94102, Defendants Facebook, Inc. and Mark Zuckerberg, by and through their attorneys, will, and hereby do, move to strike the First Amended Complaint filed by Plaintiff Styleform IT in the above-captioned civil action.[1]

This Special Motion proceeds pursuant to, without limitation, section 425.16 *et seq.* of the California Code of Civil Procedure (California's anti-SLAPP statute). The grounds for the instant Special Motion are more particularly set forth in the Memorandum of Points and Authorities filed concurrently herewith. Briefly and without limitation of the foregoing, Defendants move to strike the First Amended Complaint as a strategic lawsuit against public participation because each cause of action therein arises from Defendants' constitutionally protected activity in connection with a public issue as described in § 425.16; and, further, Plaintiff has not shown—and cannot show—a probability of prevailing on any claim asserted in the First Amended Complaint.

This Special Motion is based upon this Notice of Hearing on Motion and Special Motion to Strike, the attached Memorandum of Points and Authorities, and supporting Declaration of Catherine S. Owens filed concurrently herewith, such matters that the Court may consider by way of judicial notice, the pleadings and records on the file herein, and such further written and oral evidence and argument as may be presented at the time of the hearing.

Dated: February 18, 2020

WILMER CUTLER PICKERING HALE AND DORR LLP

By: */s/ Sonal N. Mehta*
SONAL N. MEHTA
ALEXIS J. PFEIFFER
CATHERINE S. OWENS

Attorneys for Defendant Facebook, Inc.

DURIE TANGRI LLP

By: */s/ Laura E. Miller*

[1] Defendants are filing concurrently an application to designate this case complex so that this motion can be heard in Department 403 or 613 at a date and time convenient for the Court.

LAURA E. MILLER
CATHERINE Y. KIM
WHITNEY O'BYRNE

Attorneys for Defendants
Facebook, Inc. and Mark Zuckerberg

TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTUAL BACKGROUND 1

III. ARGUMENT 3

A. Legal Standard for Special Motions to Strike 3

B. Styleform's Claims Are Subject to a Special Motion to Strike 3

1. Styleform's Claims Arise From Defendants' Speech and Conduct in Furtherance of the Exercise of Their First Amendment Rights 4

2. Styleform Concedes That Facebook's Decision to De-Publish Content Available Through The Platform Is An Issue Of Public Interest 5

3. The Narrow Commercial Speech Exemption Does Not Apply Here 6

C. Styleform Cannot Establish a Likelihood of Success on Its Claims 7

1. All Claims Are Barred by the Communications Decency Act 7

a. Defendants Provide an "Interactive Computer Service." 7

b. The Content Was Provided by Third Parties. 8

c. Styleform Seeks to Hold Defendants Liable for Editorial Functions. 8

2. Styleform's Fraud Claims Are Time-Barred and Insufficiently Pleaded 9

a. Styleform's Fraud Claims Are Barred by the Statute of Limitations. 9

b. Styleform's Fraud Claims Fail Because It Has Not Alleged Reliance. 9

c. Defendants Owed Styleform No Duty to Disclose Their Future Plans. 9

3. Styleform's RICO Claims Fail 12

a. Styleform's RICO Claims Are Time-Barred. 12

b. Styleform Has Not Pleaded a "Pattern of Racketeering Activity." 13

4. Styleform's Sections 17500 and 17200 Claims Likewise Fail 13

a. Styleform Has No Statutory Standing Under Sections 17200 and 17500. 13

b. No Remedies Exist for Styleform's Section 17200 and 17500 Claims. 14

c. Styleform Fails to State a Section 17500 Claim. 14
d. Styleform fails to state a Section 17200 Claim. 14
5. No Cause of Action Supports Styleform's Unjust Enrichment Claim 15
IV. DEFENDANTS SHOULD BE AWARDED THEIR ATTORNEYS' FEES AND COSTS 15
V. CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

Bank of America Corp. v. Superior Court,
198 Cal. App. 4th 862 (2011) 10

Baral v. Schnitt,
1 Cal. 5th 376 (2016) 3

Barnes v. Yahoo!, Inc.,
570 F.3d 1096 (9th Cir. 2009) 7

Barrett v. Rosenthal,
40 Cal. 4th 33 (2006) 7, 8

Barrington v. A. H. Robins Co.,
39 Cal. 3d 146 (1985) 13

Boschma v. Home Loan Center, Inc.,
198 Cal. App. 4th 230 (2011) 5

California Service Station and Automotive Repair Assoc. v. Union Oil Company of California, 232 Cal. App. 3d 44 (1991) 14

Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.,
20 Cal. 4th 163 (1999) 14, 15

Chapman v. Skype Inc.,
220 Cal. App. 4th 217 (2013) 14

Charpentier v. Los Angeles Rams Football Co.,
75 Cal. App. 4th 301 (1999) 11

Church of Scientology v. Wollersheim,
42 Cal. App. 4th 628 (1996) 5

Club Members for an Honest Election v. Sierra Club.,
45 Cal. 4th 309 (2008) 6

Cross v. Facebook, Inc.,
14 Cal. App. 5th 190 (2017) 3, 4,5, 6,7, 8, 9

Crown Chevrolet v. General Motors, LLC,
637 F. App'x 446 (9th Cir. 2016) 12

Durning v. Citibank, International,
990 F.2d 1133 (9th Cir. 1993) 13
Dyroff v. Ultimate Software Group, Inc.,
934 F.3d 1093 (9th Cir. 2019) 8
Equilon Enterprises, LLC v. Consumer Cause, Inc.,
29 Cal. 4th 53 (2002) 3
Federal Agency of News LLC v. Facebook, Inc.,
No. 18-cv-07041-LHK, 2020 WL 137154 (N.D. Cal. Jan. 13, 2020) 8
In re First American Home Buyers Protection Corp. Class Action Litigation,
313 F.R.D. 578 (S.D. Cal. 2016) 15
Fresno Motors, LLC v. Mercedes Benz USA, LLC,
771 F.3d 1119 (9th Cir. 2014) 14
Gawara v. United States Brass Corp.,
63 Cal. App. 4th 1341 (1988) 9
Good Government Group of Seal Beach, Inc. v. Superior Court of Los Angeles County,
22 Cal. 3d 672 (1978) 3
Girard v. Toyota Motor Sales USA, Inc.,
No. CV 07-2281 DSF (JCx), 2007 WL 9735325 (C.D. Cal. Aug. 6, 2007) 13
Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.,
742 F.3d 414 (9th Cir. 2014) 4
Green v. America Online (AOL),
318 F.3d 465 (3d Cir. 2003) 8
Hassell v. Bird,
5 Cal. 5th 522 (2018) 7
Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,
515 U.S. 557 (1995) 4
Ingels v. Westwood One Broadcasting Services, Inc.,
129 Cal. App. 4th 1050 (2005) 15
Ketchum v. Moses,
24 Cal. 4th 1122 (2001) 15

Klayman v. Zuckerberg,
753 F.3d 1354 (D.C. Cir. 2014) 8,9
Kronemyer v. IMDB, Inc.,
150 Cal. App. 4th 941 (2007) 3, 4, 7
Kwikset Corp. v. Superior Court of Orange County,
51 Cal. 4th 310 (2011) 5, 13
Lazar v. Superior Court of Los Angeles County,
12 Cal. 4th 631 (1996) 11, 12
Levine v. Blue Shield of California,
189 Cal. App. 4th 1117 (2010) 9
Lopez v. Nissan North America, Inc.,
201 Cal. App. 4th 572 (2011) 9, 14
Lovell v. City of Griffin,
303 U.S. 444 (1938) 4
McBride v. Boughton,
123 Cal. App. 4th 379 (2004) 15
Medallion Television Enterprises, Inc. v. SelecTV of California, Inc.,
833 F.2d 1360 (9th Cir. 1987) 13
Miami Herald Publishing Co. v. Tornillo,
418 U.S. 241 (1974) 4
In re Napster, Inc. Copyright Litigation,
354 F. Supp. 2d 1113 (N.D. Cal. 2005) 14
Navellier v. Sletten,
29 Cal. 4th 82 (2002) 3
Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.,
591 F.3d 250 (4th Cir. 2009) 8
New.Net, Inc. v. Lavasoft,
336 F. Supp. 2d 1090 (C.D. Cal. 2004) 6
Nygard, Inc. v. Uusi-Kerttula,
159 Cal. App. 4th 1027 (2008) 6

Okorie v. Los Angeles Unified School District,
14 Cal. App. 5th 574 (2017) 3
Pacific Bell Telephone Co. v. Linkline Communications, Inc.,
555 U.S. 438 (2009).....15
People v. Accredited Surety & Casualty Co., Inc.,
125 Cal. App. 4th 1 (2004) 10
Persson v. Smart Inventions, Inc.,
125 Cal. App. 4th 1141 (2005) 11
Ragland v. U.S. Bank National Association,
209 Cal. App. 4th 182 (2012) 5
Reno v. American Civil Liberties Union,
512 U.S. 844 (1997) 4
Rivero v. American Federation of State, Conty & Municipal Employees v. AFL-CIO,
105 Cal. App. 4th 913 (2003) 6
Rubenstein v. The Gap, Inc.,
14 Cal. App. 5th 870 (2017) 11
Service by Medallion, Inc. v. Clorox Co.,
44 Cal. App. 4th 1807 (1996) 5
Sikhs for Justice "SFJ," Inc. v. Facebook, Inc.,
144 F. Supp. 3d 1088 (N.D. Cal. 2015), *aff'd sub nom*, *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017) 7, 8
Simmons v. Allstate Insurance, Co.,
92 Cal. App. 4th 1068 (2001) 3
Simon v. Value Behavioral Health, Inc.,
208 F.3d 1073 (9th Cir.), amended, 234 F.3d 428 (9th Cir. 2000), *overruled on other grounds by Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007) 13
Simpson Strong Tie Co. v. Gore,
49 Cal. 4th 12 (2010) 6
Steel v. Hopsital Corporation of America,
36 F. 3d 69 (9th Cir. 1994) 5

Stewart v. Rolling Stone, LLC,
181 Ca. App. 4th 664 (2010) 7
Thrifty Payless, Inc. v. The Americana at Brand, LLC,
218 Cal. App. 4th 1230 (2013) 10
Turner Broad Systems, Inc. v. FCC,
512 U.S. 622 (1994) 4
United States v. Manion,
339 F.3d 1153 (9th Cir. 2003) 5
Zhang v. Baidu.com, Inc.,
10 F. Supp. 3d 433 (S.D.N.Y. 2014) 1, 4, 6

Docketed Cases

Stackla, Inc. v. Facebook, Inc.,
Case No. 4:19-cv-05849-PHJ (N.D. Cal.) 6

Statutes

18 U.S.C. § 1962(c) 13
18 U.S.C. § 1962 (d) 13
47 U.S.C. § 230 (Communications Decency Act) 1
47 U.S.C. § 230(c)(1) (Communications Decency Act) 7, 8, 9
47 U.S.C. § 230(f)(2) (Communications Decency Act) 7
47 U.S.C. § 230(f)(3) (Communications Decency Act) 8
Cal. Bus. & Prof. Code § 17200 ..... 1, 13, 14
Cal. Bus. & Prof. Code § 17500 ..... 1, 13, 14
Cal. Code Civ. Proc. § 338(d) 9
Cal. Code Civ. Proc. § 339(1) 9
Cal. Code Civ. Proc. § 425.16 ..... 1, 4, 6
Cal. Code Civ. Proc. § 425.16(c) 15
Cal. Code Civ. Proc. § 425.17 7

I. INTRODUCTION

This case is an attack on Defendants' Facebook, Inc.'s and Mark Zuckerberg's free speech rights and should be stricken pursuant to the anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16. Defendants bring this motion because Plaintiff Styleform IT's claims in the First Amended Complaint ("FAC") all turn on one constitutionally protected decision: Facebook's editorial decision to stop publishing certain user-generated content to third party app developers via the Facebook Platform.

The fatal flaw is that Facebook, through its employees and executives including Mr. Zuckerberg, has a right to make editorial decisions as to what third-party content to publish through its Platform. The Facebook Platform is a free service available to third-party app developers through which developers could ask Facebook users who downloaded their app for consent to access content the user shared or could view on Facebook, including content shared with the user by their friends, which Facebook would then publish to developers (through APIs), consistent with the user's privacy settings. Defendants made—and need to be free to continue to make—decisions about what third-party content Facebook publishes through the Platform to protect users' privacy and experience on the Platform. These decisions fall squarely within the anti-SLAPP statute because they are based on Defendants' conduct in furtherance of their constitutional right to free speech on issues of public concern. Specifically, the eight causes of action asserted against Defendants challenge editorial decisions about the third-party content Defendants publish to third-party app developers through its Platform. In a digital world, this is precisely the sort of editorial decision that courts regularly protect under the anti-SLAPP statute. *See, e.g., Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 202 (2017); *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 438 (S.D.N.Y. 2014).

Nor can Styleform meet its burden to offer actual evidence demonstrating a probability of success on the merits of its claims. *First*, Styleform's claims are barred by the Communications Decency Act, 47 U.S.C. § 230 *et seq.* ("CDA"), as each cause of action seeks to hold Defendants, providers of an interactive computer service, liable as the publisher of content created by its users. *Second*, Styleform's RICO and fraud claims are barred by the statute of limitations. *Third*, Styleform lacks standing to assert its claims under Sections 17500 and 17200 of the California Business & Professions Code. *Finally*, Styleform fails to state a cause of action for any of its claims.

II. FACTUAL BACKGROUND

Facebook enables users to communicate, connect, and share with friends, family, and others that share their interests. FAC ¶¶ 44-45. The FAC alleges that Facebook launched Facebook Platform in 2007 and Graph API v.1 in May 2010, which made it easier for developers to integrate their apps with Facebook.

Id. ¶¶ 56, 66. Through Graph API v.1, developers could ask Facebook users who downloaded their app for consent to access content the user shared or could view on Facebook. This content included certain content shared with the user by their friends and which their friends consented to be shared with third parties. *Id.* ¶ 67. Facebook published this content to developers through Graph API, consistent with the privacy settings of both the user and the user's friends. *See id.*[2]

On April 30, 2014, Facebook announced the rollout of Graph API v.2, which made various changes to the Platform. FAC ¶ 225. These changes would implement Facebook's decision to stop publishing information provided by its users to third-party developers via Graph APIs and the Platform. FAC ¶¶ 30, 225. On or around April 30, 2015, Facebook ceased publishing certain content via the Graph APIs. *Id.* ¶¶ 32, 229.[3]

On November 2, 2018, Styleform filed suit, alleging that Defendants' decision to de-publish certain user-generated content via the Platform harmed Styleform's business. Shortly after filing the original Complaint, counsel for Styleform advised Defendants they would be withdrawing from the case and that Styleform would be seeking replacement counsel. To allow time for Styleform to retain new counsel, the parties agreed to several extensions of the deadline to file any motions to the Complaint, including specifically any special motions to strike. Declaration of Catherine S. Owens, Ex. A ("Owens Decl."). As the extended deadline approached, Styleform had still not found replacement counsel. Accordingly, at the request of Styleform's sole proprietor, the Court stayed the case until December 1, 2019, to permit Styleform additional time to find new counsel. Owens Decl. Exs. B and C. Finally, on November 7, 2019, new counsel appeared, and stated their intention to file a FAC. The parties subsequently filed a Joint Ex Parte Application that set the date for the FAC and "the deadline for Defendants to file *any motions* or pleadings responsive to the FAC to February 18, 2020." Owens Decl. Ex. D (emphasis added); *see also* Owens Decl. Ex. E (granting ex parte application). Accordingly, given the Court's stay of proceedings and the parties' stipulations to toll the deadline to file a special motion to strike, Defendants file this motion on February 18, 2020.

[2] An API is a set of functions that allows apps to access the features or data of a system. Here, the Graph API is simply a set of tools that would allow a developer to integrate and access certain user data available on the Facebook Platform. An API "endpoint" is the point at which the API accesses the Platform, i.e., particular endpoints allow for access to particular data on the Platform.

[3] Developers who joined the Platform after the announcement were not afforded the same transition period.

III. ARGUMENT

A. Legal Standard for Special Motions to Strike

California favors "speedy resolution of cases involving free speech" because of the special burden they place on free speech. *Good Gov't Grp. v. Superior Ct.*, 22 Cal. 3d 672, 685 (1978). The anti-SLAPP statute thus provides "a mechanism through which complaints that arise from the exercise of free speech rights 'can be evaluated at an early stage of the litigation process' and resolved expeditiously." *Simmons v. Allstate Ins., Co.*, 92 Cal. App. 4th 1068, 1073 (2001) (citation omitted). The Legislature has instructed that the statute "be construed broadly." Cal. Civ. Proc. Code § 425.16(a); *Equilon Enterprises, LLC v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 60 (2002).

Under the anti-SLAPP statute, "[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 … shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Cal. Civ. Proc. Code § 425.16(b)(1); *see also Cross*, 14 Cal. App. 5th at 194-196 (2017) (granting Facebook's anti-SLAPP motion against suit to compel removal of Facebook page criticizing plaintiff); *Kronemyer v. IMDB, Inc.*, 150 Cal. App. 4th 941, 947, 952 (2007) (granting IMDB's motion against suit to compel inclusion of third-party content).

Proceeding on an anti-SLAPP claim requires a two-part burden shifting analysis. *Navellier v. Sletten*, 29 Cal. 4th 82, 88 (2002). First, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. *Baral v. Schnitt*, 1 Cal. 5th 376, 396 (2016). "A defendant's burden on the first prong is not an onerous one. A defendant need only make a prima facie showing that plaintiff's claims arise from defendant's constitutionally protected free speech or petition rights." *Okorie v. Los Angeles Unified School District*, 14 Cal. App. 5th 574, 590 (2017) (citation omitted). If the court finds that the first step is satisfied, then "the burden shifts to the plaintiff to demonstrate that each challenged claim … is legally sufficient and factually substantiated." *Baral*, 1 Cal. 5th at 396. At this second step, "[t]he court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken." *Id.* In other words, rather than simply rest on the allegations of its complaint, Styleform must support its claims with affirmative evidence.

B. Styleform's Claims Are Subject to a Special Motion to Strike

All of Styleform's claims arise from Defendants' exercise of their speech rights in connection with issues of public interest: Defendants' editorial decision to de-publish certain categories of content created

by Facebook's billions of users that Facebook had previously published through its Graph APIs. Styleform's claims should be stricken pursuant to Section 425.16.

1. Styleform's Claims Arise From Defendants' Speech and Conduct in Furtherance of the Exercise of Their First Amendment Rights.

Defendants' decision to de-publish certain categories of content created by its users was an exercise of editorial discretion taken in furtherance of its constitutional right to free speech, and each of Styleform's claims arises from that exercise of editorial discretion.

Lawsuits that target a platform operator's editorial discretion in the maintenance of its forum are indisputably "based on conduct in furtherance of free speech rights [on matters of public concern] and must withstand scrutiny under California's anti-SLAPP statute." *Greater Los Angeles Agency on Deafness, Inc., v. Cable News Network, Inc.*, 742 F.3d 414, 424-425 (9th Cir. 2014); *Cross*, 14 Cal. App. 5th at 202 (anti-SLAPP statute implicated if suit "directly targets the way a content provider chooses to deliver, present, or publish news content on matters of public interest"); *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 438 (S.D.N.Y. 2014) (holding decision by search engines regarding which results to publish protected by First Amendment). Facebook's decisions about the user-generated content it publishes and does not publish (including to whom it publishes that content) are protected conduct. *See, e.g., Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (publishers may not be compelled to publish content they choose not to); *Turner Broad Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (cable operator entitled to First Amendment protection because "by exercising editorial discretion over which stations or programs to include in its repertoire, cable programmers and operators seek to communicate messages on a wide variety of topics and in a wide variety of formats"); *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. Of Boston*, 515 U.S. 557, 573 (1995) ("Since *all* speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'") The decision to de-publish content is thus afforded the same constitutional protection as the decision to publish it in the first place. *See, e.g.*, *Kronemyer*, 150 Cal. App. 4th at 947 ("It is, of course, well established that the constitutional right of free speech includes the right not to speak.") (citations omitted). And the method by which Defendants publish or de-publish content—here, changes to the Graph API that limit the information disseminated through Facebook's Platform—does not alter the conclusion that they are doing so in furtherance of the exercise of their First Amendment rights. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997) (First Amendment fully protects online speech); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (freedom of the press extends to "every sort of

publication which affords a vehicle of information and opinion").

Styleform's claims are necessarily based on Facebook's decision to de-publish content that Facebook had previously published to developers via the Platform—indeed, that is the entire gravamen of the FAC. Though Styleform's claims have been dressed up to sound in fraud, its complaint is not really that Facebook lied to it, or even to other developers. By Styleform's own admission, Facebook disclosed its intention to de-publish the content at issue a *full year* before it did so. *See* FAC ¶¶ 30, 225. Styleform's real complaint is that Defendants made the underlying decision to stop publishing this content at all. That is the decision Styleform claims was anticompetitive and that allegedly caused its damages. *See, e.g.* FAC ¶¶ 21, 26, 116, 121, 262. And that is the decision Styleform would have this Court unwind—compelling Facebook to publish content that it has chosen to stop publishing. *See* FAC Prayer for Relief (F) (requesting that the Court "[g]rant permanent injunctive relief to remedy the ongoing anticompetitive effects of Defendant's [sic] unlawful conduct"); Owens Decl. Ex. F, Prayer for Relief (C) (requesting a permanent injunction requiring Facebook to "restore the Graph API").

Unsurprisingly, then, Facebook's underlying decision is a critical element of each of Styleform's claims. Every claim in the FAC requires Styleform to show that it was injured by Facebook's protected conduct—e.g., by attempting to show that it suffered harm from Facebook's de-publication decision. *Steele v. Hosp. Corp. of Am.*, 36 F.3d 69 (9th Cir. 1994) (civil RICO claims); *Boschma v. Home Loan Ctr., Inc.*, 198 Cal. App. 4th 230, 248 (2011) (concealment); *Service by Medallion, Inc. v. Clorox Co.*, 44 Cal. App. 4th 1807, 1816 (1996) (misrepresentation); *Ragland v. U.S. Bank Nat'l Ass'n*, 209 Cal. App. 4th 182, 196 (2012) (negligent misrepresentation); *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 323-324 (2011) (Sections 17200 and 17500). Most of the claims likewise require a showing of fraudulent intent, *United States v. Manion*, 339 F.3d 1153, 1156 (9th Cir. 2003) (mail and wire fraud); *Boschma*, 198 Cal. App. 4th at 248 (concealment); *Services by Medallion*, 44 Cal. App. 4th at 1816 (misrepresentation)—which, again, would require this Court to carefully examine the reasons Facebook chose to engage in protected conduct. In these circumstances, it matters not that plaintiffs have attempted to obscure the true nature of their claims by clever pleading; "the nature or form of the action is not what is critical but rather *that it is against a person who has exercised certain rights.*" *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628. 652 (1996) (emphasis added).

2. Styleform Concedes That Facebook's Decision to De-Publish Content Available Through The Platform Is An Issue Of Public Interest.

Courts "construe[] broadly" whether "something is an issue of public interest" and focus their

analysis on the "gravamen of the plaintiff's cause of action." *Cross*, 14 Cal. App. 5th at 199. This is not a high bar; "an issue of public interest … is *any issue in which the public is interested*." *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042 (2008); *see also Rivero v. Am. Fed'n of State, Cty., & Mun. Employees, AFL-CIO*, 105 Cal. App. 4th 913, 924 (2003) (public issue includes "conduct that could directly affect a large number of people beyond the direct participants").

Styleform does not and cannot dispute this point. The FAC itself alleges that the Facebook Platform is used by hundreds of thousands of third-party software developers to improve the functionality and user experience of their mobile and web-based applications. FAC ¶ 61 (400,000 registered developers on Platform by November 2007). And the FAC states that Facebook's "tens of thousands" of developers were allegedly damaged by Facebook's editorial decisions concerning which categories of user-generated content to provide through the Platform. *See, e.g.* FAC ¶ 322. Styleform's own theory thus confirms that "Facebook's ability to decisively police the integrity of its platform is without question a pressing public interest." *Stackla, Inc. v. Facebook, Inc. et al.*, No. 4:19-cv-05849-PJH, ECF No. 42 (Sept. 27, 2019).

3. The Narrow Commercial Speech Exemption Does Not Apply Here.

The commercial speech exemption to the anti-SLAPP statute has no application here. The California Supreme Court has repeatedly emphasized that the exemptions found within Section 425.17 are to be narrowly construed. *See, e.g.*, *Simpson Strong-Tie Co., Inc. v. Gore*, 49 Cal. 4th 12, 22 (2010) (citing *Club Members for an Honest Election v. Sierra Club*, 45 Cal. 4th 309, 316 (2008)). Styleform bears the burden of proof as to the applicability of the commercial speech exemption. *Id.* at 26.

Styleform cannot make the "threshold" showing required to show that this exemption applies, namely "that Defendant is 'primarily engaged in the business of selling or leasing goods or services." *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1103 (C.D. Cal. 2004). In *Cross v. Facebook, Inc.*, the California Court of Appeal held that Facebook is not "primarily engaged in the business of selling or leasing goods or services." 14 Cal. App. 5th at 203. Instead, the court recognized that Facebook provides a free social media platform to more than two billion monthly users. *Id.* at 195. In rejecting the plaintiff's argument that the commercial speech exemption applied, the court held that "while Facebook sells advertising, it is not 'primarily engaged in the business of selling or leasing goods or services.' [The Plaintiff] has not alleged that it is. Nor could he, as Facebook offers a free service to its users." *Id.*; *see also Zhang*, 10 F. Supp. 3d at 438 (decisions by a search engine regarding what results to publish for free are not commercial speech notwithstanding that the search engine sells advertising and has a profit motive).

Nor can it show that Facebook's decision to de-publish user content was a "representation of fact"

made "for the purpose obtaining approval for, promoting, or securing" sales of any Facebook goods or services. Cal. Code Civ. Proc. § 425.17(c). Facebook's decision to cease publishing categories of user content is not a "representation" at all. *See Cross*, 14 Cal. App. 5th at 203. And though Styleform alleges that Facebook's de-publication decision was driven by a goal of increasing ad sales or obtaining user data from "competitors," "there is no legal precedent for converting noncommercial speech into commercial speech merely based on its proximity to the latter." *Stewart v. Rolling Stone, LLC*, 181 Cal. App. 4th 664, 689 (2010), *as modified on denial of reh'g* (Feb. 24, 2010). If "the prospect of some financial benefit from a publication places the material in the area of 'commercial speech,'" that definition "would include virtually all books, magazines, newspapers, and news broadcasts." *Kronemyer*, 150 Cal. App. 4th at 949. There is no authority for such an approach.

C. Styleform Cannot Establish a Likelihood of Success on Its Claims.

Styleform cannot establish a likelihood of success on its claims for the following reasons.

1. All Claims Are Barred by the Communications Decency Act.

Section 230(c)(1) of the CDA establishes a "broad immunity," *Hassell v. Bird*, 5 Cal. 5th 522, 535 (2018) (plurality op.), that "protects from liability any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online," *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1103 (9th Cir. 2009). This protection includes decisions, like those at issue here, to withdraw third-party content: "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, ***withdraw***, postpone or alter content are—barred." *Barrett v. Rosenthal*, 40 Cal. 4th 33, 43 (2006) (emphasis added). Section 230 requires dismissal of a claim where the defendant is a "provider ... of an interactive computer service," and the claim seeks to impose liability on the provider for acting as the "publisher or speaker" of content "provided by another information content provider." 47 U.S.C. § 230(c)(1). Each of these prerequisites is satisfied here.

a. Defendants Provide an "Interactive Computer Service."

The CDA broadly defines "interactive computer service" as "any information service, system, or access software that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). Every court to consider the issue has concluded that Facebook provides such a service within the meaning of the statute. *See, e.g.*, *Cross*, 14 Cal. App. 5th at 206; *Sikhs for Justice "SFJ," Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1093 (N.D. Cal. 2015), *aff'd sub nom*, *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017). Mr. Zuckerberg likewise qualifies as a "provider" of an "interactive computer service" because Styleform's complaint seeks to hold him accountable for "his role

in making that service available." *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357-58 (D.C. Cir. 2014).

b. The Content Was Provided by Third Parties.

Section 230's second prerequisite (that the content at issue have been "provided by another information content provider") is also satisfied. An "information content provider" is "any person or entity that is responsible, in whole or in part, for the *creation* or *development*" of the material at issue. *Id.* § 230(f)(3) (emphasis added). To assess this prerequisite, a court asks whether the online service provider itself "*creat[ed]* or *develop[ed]*" the content at issue, or whether someone else did so. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (emphasis added).

Here, the content that Styleform claims Defendants wrongfully de-published was created and developed by Facebook users. For example, the Friends API "provided a means for developers to traverse a user's network of friends, including the network of friends indirectly connected to them," FAC ¶ 67, thereby allowing developers to access content that individual users provided to Facebook, consistent with their privacy settings. Facebook's users are unquestionably the "content providers" of their own profiles. *E.g.*, *Fed. Agency of News LLC v. Facebook, Inc.*, No. 18-CV-07041-LHK, 2020 WL 137154, at *6 (N.D. Cal. Jan. 13, 2020) ("account, posts, and content" Facebook allegedly "removed" was "provided by the user, not Facebook"). Facebook did not become the co-creator or co-developer of that content simply because it used Graph API to disseminate it to developers. "[F]eatures and functions, including algorithms" that "analyze user posts" and "recommend[] other user groups" "to facilitate the communication and content of others" are "website features," not "content in and of themselves." *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019). Facebook's users—not Defendants—are therefore the creators of the content at issue.

c. Styleform Seeks to Hold Defendants Liable for Editorial Functions.

Styleform's claims also satisfy the CDA's third and final prerequisite, which is met whenever a plaintiff seeks to impose liability for performance of "a publisher's traditional editorial functions." *Barrett*, 40 Cal. 4th at 43. "[R]emoving content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher." *Sikhs*, 144 F. Supp. 3d at 1095; *see also id.* at 1094 ("publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content"). Section 230(c)(1) bars any and all claims "relating to the monitoring, screening, and deletion of content from [a provider's] network—actions quintessentially related to a publisher's role." *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003).

Styleform's claims seek to impose liability on Facebook for de-publishing certain categories of

user-generated content previously available through the Facebook Platform. Deciding "whether to print or retract a given piece of content" goes to the "very essence of publishing." *Klayman*, 753 F.3d at 1359. That is true even though Facebook stopped publishing the content via certain distribution channels (Graph API), rather than de-publishing the content entirely. The situation is no different than a newspaper publisher choosing to include different stories in the regional and national editions of the paper, or a broadcaster choosing to air programs suitable for a more mature audience late at night. Such core publishing decisions—deciding what content to publish and to whom—fall squarely within the CDA's ambit.

2. Styleform's Fraud Claims Are Time-Barred and Insufficiently Pleaded.

a. Styleform's Fraud Claims Are Barred by the Statute of Limitations.

Styleform's claims for concealment (Count III), misrepresentation (Count IV), and negligent misrepresentation (Count V) are each barred by the applicable statute of limitations. A plaintiff has three years from the date of discovery to bring an action for concealment or misrepresentation, *see* Cal. Code Civ. Proc. § 338(d), and just two years to bring a claim for negligent misrepresentation, *id.* at § 339(1). Styleform's claims are based on Defendants' decision to stop publishing certain user content through the Platform, which was announced in April 2014 and implemented in April 2015—more than three years before Styleform filed its original Complaint. *See, e.g.*, FAC ¶¶ 30, 32.

b. Styleform's Fraud Claims Fail Because It Has Not Alleged Reliance.

Reliance is a necessary element of each of Styleform's fraud claims. *See Gawara v. U.S. Brass Corp.*, 63 Cal. App. 4th 1341, 1355 (1988). But Styleform has not alleged with specificity that it relied on any of the statements identified in the FAC. Nowhere does it contend that Styleform's principal witnessed, heard, or read Defendants' alleged statements and misrepresentations. The closest it comes is an allegation that "[d]evelopers *like* Plaintiff and members of the class" were exposed to Facebook's "meetups, conferences, hackathons, and the like," FAC ¶¶ 246-247, followed by the conclusory assertion that "Plaintiff … relied on these training sessions and other statements in deciding to maintain and invest in its technology," FAC ¶ 247, even though Styleform is not alleged to have attended those sessions. Representations allegedly "made generally to the market," such as these, are not sufficient to show reliance (let alone reasonable reliance) by an individual plaintiff. *See Gawara*, 63 Cal. App. 4th at 1355.

c. Defendants Owed Styleform No Duty to Disclose Their Future Plans.

Nor has Styleform adequately pleaded that Defendants had a duty to disclose Facebook's planned Platform changes to developers, as is required for both concealment and fraudulent misrepresentation based on omissions. *See Levine v. Blue Shield of Calif.*, 189 Cal. App. 4th 1117, 1126 (2010) (concealment);

Lopez v. Nissan N. Am., Inc., 201 Cal. App. 4th 572 (2011) (misrepresentation based on omissions). A duty to disclose giving rise to a concealment claim can arise in one of four situations: "(1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts." *Bank of Am. Corp. v. Superior Court*, 198 Cal. App. 4th 862, 870-871 (2011). Styleform does not allege that Defendants owed it a fiduciary duty; rather, it asserts that Defendants fit one of the latter three situations. *See* FAC ¶ 313. None apply here.

First, Styleform's "superior knowledge" theory fails because it cannot credibly say that Facebook's supposed plans to de-publish certain content to most developers while continuing to publish the content to other developers were not reasonably discoverable. *See People v. Accredited Surety & Cas. Co., Inc.*, 125 Cal. App. 4th 1, 9-10 (2004). Indeed, its own allegations contradict that assertion. Styleform does not deny that it agreed to contractual terms that gave Facebook the absolute right to publish or de-publish content. *See* Owens Decl., Ex. G at 10 (Statement of Rights and Responsibilities notifying developers that Facebook "can limit your access to data"). And Facebook disclosed its intent to de-publish certain user content a full year before it did so. FAC ¶¶ 225, 229.

Second, there is no active concealment here. Again, Styleform does not deny that Facebook reserved the right to limit developers' access to user data, and acknowledges that Facebook provided a year's notice that it intended to de-publish certain user content alongside a specific changelog letting developers know what content would no longer be available to them. Styleform's complaint appears to be that this notice was fraudulent because it "buried" information about the content that would be de-published and characterized certain "API endpoints" as "rarely used" while Styleform now contends that that user content was frequently accessed. FAC ¶ 225. Even setting aside the implausibility of Styleform's contention that a subjective statement that certain content was more or less frequently used was fraudulent,[4]

[4] Styleform characterizes Facebook's statement that the APIs that would be restricted were "rarely used," as an affirmative misrepresentation, notwithstanding Facebook's express invitation that developers "visit our changelog for details." *See* FAC ¶¶ 225-226. That statement cannot give rise to a claim for either intentional or negligent misrepresentation because Styleform has not pleaded facts establishing that it relied on that statement—let alone reasonably relied. *See Thrifty Payless, Inc. v. The Americana at Brand, LLC*, 218 Cal. App. 4th 1230, 1239 (2013). The "rarely used" formulation explained why Facebook chose to deprecate certain APIs; it did not and was not intended to identify the specific APIs that were being deprecated. And any reliance on that statement to identify the APIs being depreciated would have been particularly unreasonable in light of the additional information provided in the changelog and referenced

Styleform does not explain how Facebook could have actively concealed information about the de-publication when, according to Styleform's own pleading, Facebook distributed a detailed "changelog" that listed the endpoints through which content would no longer be available so developers would know exactly what changes Facebook would be making. FAC ¶¶ 225, 229. Active concealment exists when "a defendant prevents the discovery of material facts," *Rubenstein v. The Gap, Inc.*, 14 Cal. App. 5th 870, 878 (2017)—not when a defendant makes a public announcement of a fact and distributes details about it.[5]

Third, Styleform has not sufficiently pleaded that Defendants made partial representations that concealed material facts. *See Persson v. Smart Inventions, Inc.*, 125 Cal. App. 4th 1141, 1165 (2005). The crux of Styleform's allegation is that every time Facebook made a public statement about the Platform in 2012-2015, it concealed that it had allegedly decided to stop publishing certain user-created content to developers at some undetermined point in the future. FAC ¶¶ 243-262. Even if one were to accept these allegations as true, Styleform's theories defy both law and logic.

Paragraphs 243-260 of the FAC identify statements that Facebook and its employees allegedly made during speeches or demonstrations in 2012 and 2013 that include general descriptions of the Platform or ways in which developers could leverage the Platform. These statements fall far short of the specificity required to plead fraud based on partial representation. For example, Paragraphs 242-247 generally describe categories of statements but do not identify "how, when, where, to whom, and by what means the representations were tendered." *Lazar v. Superior Ct.*, 12 Cal. 4th 631, 645 (1996). The remaining allegations, while more specific, do not satisfy the requirement that an omitted fact be material—i.e., that "a reasonable [person] would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." *Charpentier v. Los Angeles Rams Football Co.*, 75 Cal. App. 4th 301, 312-313 (1999). Those allegations all concern statements made in 2012 or 2013, when any plans to stop publishing certain user content was still years away. The FAC does not plausibly allege that a developer would have adjusted its conduct in any meaningful way three years before the API change.

---

in the *very same sentence*, which Styleform apparently ignored entirely or conveniently failed to plead. *See id.* (where "the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, … he will be denied a recovery").

[5] Styleform asserts Facebook concealed its agreements with other developers by telling a different developer, Airbiquity, that the APIs "won't be available to anyone" after April 30, 2015. FAC ¶ 237. That allegation does not satisfy the fraud pleading standard (it does not, for example, identify who at Facebook made the statement to Airbiquity). It also has no bearing on whether the agreements were concealed *from Styleform*, the only plaintiff currently before the Court.

Paragraphs 227-228 describe statements Facebook and its employees made during Facebook's 2014 F8 conference. These, too, are insufficiently pleaded. For example, Styleform gestures toward "20 developer sessions preceding the announcement" at which "Facebook falsely and misleadingly touted its Platform," but completely fails to identify what was said, by whom, at those sessions. *See Lazar*, 12 Cal. 4th at 645. Its description of Mr. Zuckerberg's keynote speech fares no better; it simply says that Mr. Zuckerberg "misleadingly emphasized the 'stability' of Facebook's mobile platform." FAC ¶ 227. But Styleform never explains how Facebook's decision to provide a year's notice of changes to the user content that it would publish via the Platform is inconsistent with a "stable" platform, let alone false or misleading.

Ultimately, Styleform's theory is this: because Facebook provided developers with access to its Platform (for free, no less), it was somehow under an obligation to publicly disclose its future planning as to potential future changes to its Platform to those developers any time it described the data or services it *currently* made available. Styleform's theory of the case would mean that technology companies could not demonstrate their products or services without providing a full disclosure of all contemplated changes and upgrades to those products or services. That is not the law. Because Defendants owed Styleform no duty to disclose information about their future plans, all claims that depend on alleged omissions by Defendants must be dismissed.

3. Styleform's RICO Claims Fail.

a. Styleform's RICO Claims Are Time-Barred.

A RICO claim "is subject to a four-year statute of limitations that begins to run when a plaintiff knows or should know of the injury that underlies his cause of action." *Crown Chevrolet v. Gen. Motors, LLC*, 637 F. App'x 446 (9th Cir. 2016). The FAC alleges that the fraudulent activity on which Styleform's RICO claims are based—alleged false statements or omissions about whether Facebook would continue to publish certain user-generated data via its Platform—became public no later than April 30, 2015, when Facebook de-published that user data. *See*, *e.g.*, FAC ¶¶ 31, 271, 285. Yet, the FAC (the first complaint to allege RICO claims) was filed on January 16, 2020, well after the four-year limitations period had run.

Styleform tries to circumvent this bar by alleging that its claims were tolled until November 6, 2019. FAC ¶ 268. According to the FAC, "Defendants managed to hide the specific facts of their fraud from Plaintiffs until November 6, 2019, when NBC News published a trove of thousands of internal Facebook documents and communications that laid bare the truth about Defendants' scheme." *Id.*[6] But this

[6] This statement is easily disproven by the original Complaint, which itself relied on many of these

allegation is directly contradicted by Styleform's initial Complaint, which alleges that "[n]ot until *April 30, 2015*, at the earliest, did any such communication indicate clearly that Facebook was eliminating access to APIs." Owens Decl. Ex. F ¶ 133. There is no basis to toll the statute of limitations here.[7]

b. Styleform Has Not Pleaded a "Pattern of Racketeering Activity."

Styleform's time-barred RICO claim is based on two predicate offenses, mail fraud and wire fraud, which it contends constitute a "pattern of racketeering activity" under 18 U.S.C. § 1962(c). FAC ¶¶ 292-94, 298. That is wrong. To constitute an actionable "pattern of racketeering activity," the "circumstances of the case … must suggest that the predicate acts are indicative of a threat of continuing activity." *Medallion Television Enters., Inc. v. SelecTV of Calif., Inc.*, 833 F.2d 1360, 1363 (9th Cir. 1987). Thus, even where a complaint alleges "numerous related predicate acts," there is no threat of continuity if those acts "arose from a single, isolated event." *Durning v. Citibank Int'l*, 990 F.2d 1133, 1139 (9th Cir. 1993). That is all that is alleged here. Styleform's RICO allegations rest on a business decision that Facebook executed in 2015. There is thus no threat of continuing activity sufficient to support a RICO claim.[8]

4. Styleform's Sections 17500 and 17200 Claims Likewise Fail.

a. Styleform Has No Statutory Standing Under Sections 17200 and 17500.

To establish standing for its Section 17200 and 17500 claims, Styleform "must demonstrate actual reliance on the allegedly deceptive or misleading statements," *Kwikset*, 51 Cal. 4th at 326-327—i.e., by alleging that it actually saw or heard the alleged misrepresentations at issue, s*ee Girard v. Toyota Motor Sales USA, Inc.*, No. 07-cv-2281, 2007 WL 9735325, at *6 (C.D. Cal. Aug. 6, 2007). The FAC is devoid

---

documents (documents Styleform's counsel obtained through discovery in the *Six4Three* litigation). Relying on these documents to draft the complaint in this case may have violated the *Six4Three* protective order, *see* Owens Decl. Ex. G at 10, but Styleform's new counsel cannot now pretend it did not occur.

[7] Nor do Styleform's RICO claims relate back to the filing of the original Complaint. "[W]hen a complaint is amended to allege a new cause of action based on different operative facts, the new cause of action is different in nature from any cause of action contained in the earlier complaint, and … does not relate back." *Barrington v. A. H. Robins Co.*, 39 Cal. 3d 146, 154 (1985). That is precisely the case here. The FAC adds two new causes of action under the federal RICO statute, FAC ¶¶ 281-309, whereas the original Complaint alleged breach of contract, common law fraud, business torts, and violations of California's Business & Professions Code, Owens Decl. Ex. F ¶¶ 187-328. RICO claims require showing a conspiracy, an enterprise, or racketeering activity—a fundamentally different inquiry than was required for the state-law claims in the original Complaint.

[8] Styleform's § 1962(d) claim fails, too. Where "the section 1962(c) claim does not state an action upon which relief could ever be granted ... then the section 1962(d) claim cannot be entertained." *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1084 (9th Cir.), *amended*, 234 F.3d 428 (9th Cir. 2000), *overruled on other grounds by Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007).

of any factual allegations that Styleform itself received and relied upon any statements by Facebook or Mr. Zuckerberg. *Supra* at p. 9. Those alleged misrepresentations form the basis of Styleform's Section 17500 and 17200 claims, FAC ¶¶ 340-58, so Styleform has no standing to bring those claims.

b. No Remedies Exist for Styleform's Section 17200 and 17500 Claims.

Because Styleform is not entitled to restitution or an injunction, the only remedies available under Sections 17200 and 17500, these claims necessarily fail. *See In re Napster, Inc. Copyright Litig.*, 354 F. Supp. 2d 1113, 1127 (N.D. Cal. 2005) (dismissing claims where no remedies available).

"[R]estitutionary relief is limited to money or property lost by the plaintiff and acquired by the defendant." *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1135 (9th Cir. 2014) (emphasis added). But Styleform does not allege that it paid anything to Facebook or Mr. Zuckerberg, or that Defendants indirectly took Styleform's money or property, making restitution improper.

Styleform also cannot obtain an injunction. The FAC makes no allegation that Styleform faces an ongoing threat of harm from Defendants, or that Defendants are likely to engage in similar conduct in the future. *See Cal. Serv. Station etc. Ass'n v. Union Oil Co.*, 232 Cal. App. 3d 44, 57 (1991).

c. Styleform Fails to State a Section 17500 Claim.

To state a claim under section 17500, a party must allege that the defendant made untrue or misleading statements. Cal. Bus. & Prof. Code § 17500. A statement is misleading if "members of the public are likely to be deceived," *Lopez*, 201 Cal. App. 4th at 595 (2011), which is "determined by considering a reasonable consumer who is … within the target population," *Chapman v. Skype Inc.*, 220 Cal. App. 4th 217, 226 (2013). Styleform can bring no Section 17500 claim based on omissions because, as explained above, it has not adequately pleaded any false or misleading statement, let alone that any reasonable consumer (here, an app developer) would have been deceived by any of the (accurate) statements made by Facebook and its employees and executives about Facebook's Platform. *Supra* at p. 9.

d. Styleform fails to state a Section 17200 Claim.

Section 17200 of the Business and Professions Code prohibits "business act[s] or practice[s]" that are "unfair," "fraudulent," or "unlawful." Cal. Bus. & Prof. Code § 17200. Styleform has not pleaded a Section 17200 claim under any of these three alternative theories.

First, Styleform has not identified any actionable "unfair" practice. In cases involving alleged competitors, like this one, *see* FAC ¶ 8, an "unfair" business practice is "conduct that threatens an incipient violation of an antitrust law or violates the policy or spirit of one of those laws." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 186-187 (1999). Styleform has not alleged a violation of

the spirit of the antitrust laws, let alone the laws themselves. An antitrust violation requires harm to *competition*, not to *competitors*. *Id.* at 186. Styleform alleges only that it and other developers were harmed when Facebook stopped publishing certain user content via the Platform, *see, e.g.*, FAC ¶ 348, not that the decision to de-publish that content harmed competition. Styleform's allegations that Facebook entered into reciprocity agreements with certain developers are likewise insufficient. "As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *Pac. Bell Tel. Co. v. Linkline Communs., Inc.*, 555 U.S. 438, 448 (2009).

Second, Styleform has not identified a "fraudulent" business practice cognizable under Section 17200. The "fraudulent" prong requires application of the same standard that applies to claims under the false advertising law. *In re First Am. Home Buyers Prot. Corp. Class Action Litig.*, 313 F.R.D. 578, 608 n.11 (S.D. Cal. 2016). Because Styleform has not alleged any misleading statements under Section 17500, *see supra* at p. 14, it likewise has not pleaded a "fraudulent" business practice under Section 17200.

Third, Styleform has not adequately pleaded that Defendants engaged in any "unlawful" practices. Where a plaintiff fails to state a claim under any predicate law, then it fails to state a claim under Section 17200. *See Ingels v. Westwood One Broad. Servs., Inc.*, 129 Cal. App. 4th 1050, 1060 (2005). Styleform's "unlawful" argument is premised on the Defendants' alleged "violations of common law tort and fraud, statutory fraud, California False Advertising Law, and the Federal RICO Statute." FAC ¶ 350. Thus, Styleform's "unlawful" allegation rise or fall—in this case, fall—with its other claims.

5. No Cause of Action Supports Styleform's Unjust Enrichment Claim.

"Unjust enrichment is not a cause of action … or even a remedy." *McBride v. Boughton*, 123 Cal. App. 4th 379, 387 (2004). It cannot stand alone unless the complaint "plead[s] a cause of action giving rise to a right to restitution." *Id.* at 388. Because Styleform has not and cannot allege any basis for restitution here, Count Six must be dismissed.

IV. DEFENDANTS SHOULD BE AWARDED THEIR ATTORNEYS' FEES AND COSTS

Defendants request an order awarding them reasonable attorneys' fees and costs. "[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." Cal. Civ. Proc. Code § 425.16(c). *See also Ketchum v. Moses*, 24 Cal. 4th 1122, 1131 (2001) ("any SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees.")

V. CONCLUSION

Defendant's special motion to strike Styleform's First Amended Complaint with prejudice should be granted, and Defendants should be awarded their attorneys' fees and costs.

Dated: February 18, 2020

WILMER CUTLER PICKERING HALE AND DORR LLP

By: */s/ Sonal N. Mehta*
SONAL N. MEHTA
ALEXIS J. PFEIFFER
CATHERINE S. OWENS

Attorneys for Defendant
Facebook, Inc.

DURIE TANGRI LLP

By: */s/ Laura E. Miller*
LAURA E. MILLER
CATHERINE Y. KIM
WHITNEY O'BYRNE

Attorneys for Defendants
Facebook, Inc. and Mark Zuckerberg

.