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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION _____

SIX4THREE, LLC,
Plaintiff & Petitioner,

v.

THE SUPERIOR COURT OF SAN MATEO COUNTY,
Respondent.

FACEBOOK, INC, ET AL.,
Defendants & Real Parties in Interest.

THE SUPERIOR COURT OF SAN MATEO COUNTY • NO. CIV 533328
HON. MARIE S. WEINER, JUDGE • TEL: (650) 261-5102

PETITION FOR PEREMPTORY WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF

CALIFORNIA APPELLATE LAW GROUP LLP
Audra S. Ibarra (No. 177464)*
Kelly A. Woodruff (No. 160235)
Susan K. Horst (No. 71263)
96 Jessie Street
San Francisco, CA 94105
(415) 649-6700 • Fax: (415) 649-6700
audra@calapplaw.com

CRITERION LAW
Basil P. Fthenakis (No. 88399)
2225 E. Bayshore Rd.
Suite 200
Palo Alto, CA 94303
(650) 352-8400 • Fax: (650) 352-8408
bpf@criterion.com

BIRNBAUM & GODKIN, LLP
David S. Godkin (Pro Hac Vice)*
James E. Kruzer (Pro Hac Vice)
280 Summer Street
Boston, MA 02210
(617) 307-6100
godkin@birnbaumgodkin.com

ATTORNEYS FOR PETITIONER
SIX4THREE, LLC

Certificate of Interested Entities or Persons

Pursuant to Cal. Rules of Court, rule 8.208, it is disclosed that #2 LLC and Ted Kramer each hold an ownership interest of 10 percent or more in Six4Three, LLC.

Dated: August 11, 2017

California Appellate Law Group LLP
Audra S. Ibarra
Kelly A. Woodruff
Susan K. Horst

By /s/ Kelly A. Woodruff
Kelly A. Woodruff

Attorneys for Petitioner **Six4Three, LLC**

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SIX4THREE, LLC,
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Respondent.

FACEBOOK, INC, ET AL.,
Defendants & Real Parties in Interest.

PETITION FOR PEREMPTORY WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF

Introduction

It is settled law that a company's executives can be held individually liable for damages when they conspire to commit a wrongful act or when they engage in tortious conduct, even in their official employment capacity and even when their conduct is not directed specifically at the aggrieved party.

Contrary to this well-established legal principle, the superior court denied petitioner Six4Three, LLC's

timely and proper motion to amend its complaint to name as defendants six Facebook, Inc. executives (Proposed Defendants) who allegedly conspired to implement the fraudulent and anti-competitive scheme that destroyed Six4Three's business and is the subject of this case.

In denying Six4Three's motion, the superior court prematurely and erroneously found "as a matter of law" that the proposed amendments were insufficient to support individual liability, despite allegations that each of the six Proposed Defendants were personally responsible for the conduct that gave rise to the complaint.

In this timely, verified petition, Six4Three seeks a peremptory writ of mandate, prohibition, or other extraordinary writ to compel respondent, the Superior Court of San Mateo County, to set aside its July 11, 2017 order denying in part Six4Three's motion for leave to file an amended complaint substituting the Proposed Defendants for previously-named doe defendants, and to instead enter an order granting leave to amend.

A peremptory writ is warranted because the allegations against the Proposed Defendants are

plainly sufficient. The superior court's ruling deprives Six4Three of its right to sue the executives even though the amended complaint demonstrates they actively conspired to implement and conceal a scheme to shut down over 40,000 software applications, including Six4Three's, for purely anti-competitive reasons.

Petition for Peremptory Writ of Mandate, Prohibition, or Other Appropriate Relief

I. The Parties

1. Six4Three is the petitioner here and the plaintiff in the action below, *Six4Three, LLC v. Facebook, Inc., et al.*, pending in the Superior Court of San Mateo County, Case No. CIV 533328.

2. The Superior Court of San Mateo County is the respondent here.

3. Facebook, Inc. is the real party in interest here and the defendant in the action below.

II. Timeliness of Petition

4. The superior court issued its order granting in part and denying in part Six4Three's Motion for Leave to File Third Amended Complaint (Motion to Amend) on July 11, 2017. (Exh. 43, p. 1225.) Six4Three is filing this petition as soon as

reasonably practicable since receiving the court's order.

5. Six4Three's counsel has made diligent efforts to obtain a certified transcript of the hearing on the Motion to Amend, but have been advised that the court reporter is under court order to complete transcripts in other cases on appeal and that it is unlikely she will begin working on the transcript "anytime soon." (Exh. 44, p. 1231-1233.)

6. The superior court ordered Six4Three to file and serve its Third Amended Complaint (TAC) without the individual defendants by July 28, 2017. (Exh. 43, p. 1225.) To ensure compliance with other deadlines set by the superior court and to avoid delay, Six4Three filed its TAC on July 28, 2017. (Exh. 45, p. 1290.)

III. Authenticity of Exhibits

7. All exhibits accompanying this petition are true and correct copies of original documents filed with the Superior Court of San Mateo County, except Exhibits 44 and 45, which are a declaration in lieu of a transcript and the register of actions, respectfully.

8. The complete register of actions from the Superior Court of San Mateo County's website is included as Exhibit 45.

9. The exhibits are incorporated by reference as though fully set forth in this petition, and reproduced in their entirety in the concurrently filed Exhibits in Support of Petition for Peremptory Writ of Mandate, Prohibition, or Other Appropriate Relief. The exhibits are paginated consecutively, and page references in this petition are to the consecutive pagination.

10. For ease of reference and the convenience of the Court, Volumes I and II of the exhibits contain all documents filed in support of and opposition to Six4Three's Motion to Amend, as well as a declaration in lieu of transcript of the hearing on the motion and the superior court's order. Volume III contains all other portions of the record below potentially relevant for background purposes.

11. Sealed Volumes IV and V contain various documents which were filed conditionally under seal by the parties, and ultimately sealed by the superior court's order of July 10, 2017 (Exh. 38), which order refers to the confidential documents attached to and

referenced in the filed pleadings rather than to the parties' filings themselves. These documents also appear in redacted form in Volumes I and II.

This petition does not reveal the contents of any documents sealed by the superior court. It is therefore openly filed. (Cal. Rules of Court, rule 8.46(d)(9).)

IV. Summary of Material Facts

A. Six4Three's Action Against Facebook

12. Six4Three filed this action against Facebook on April 10, 2015, seeking damages for Facebook's unfair and unlawful business practices in using the Facebook Platform as a "bait and switch" scheme in violation of California's Unfair Competition Law and intentionally interfering with Six4Three's contracts with customers and prospective customers. (Exh. 46, pp. 1297-1306.) Six4Three alleged that Facebook engaged in a scheme to lure software developers such as Six4Three into developing mobile applications for use on Facebook, thereby helping Facebook to grow its number of users, to enhance the user experience, and to generate additional advertising revenue, but once those goals were achieved, Facebook cancelled the developers' access to its user data so that Facebook could create its own

competing applications or award contracts to only select companies who agreed to pay for additional services from Facebook. By cancelling Six4Three's access to the data upon which it had built its app, Facebook succeeded in putting Six4Three out of business. (Exh. 46, pp. 1297-1306.)

13. After Facebook successfully demurred to the original and first amended complaints, Six4Three filed its Second Amended Complaint (SAC) on February 26, 2016. (Exh. 1, p. 15.) The SAC asserted five causes of action against Facebook: (1) violation of Business and Professions Code sections 17200 et seq.; (2) promissory estoppel; (3) negligent misrepresentation; (4) intentional interference with contract; and (5) intentional interference with prospective business relations. (Exh. 1, p. 15.)

14. Facebook demurred to the SAC, and on June 30, 2016, the superior court overruled Facebook's demurrer with respect to Six4Three's first, third, fourth, and fifth causes of action, and sustained the demurrer with respect to the second cause of action. (Exh. 47, pp. 1307-1308.)

15. After the court's ruling on the demurrer, the parties had several discovery disputes requiring

Six4Three to file motions to compel further responses. (Exh. 3, pp. 192-193; Exh. 45, pp. 1259-1269.) Because of these motions, Facebook made an initial production of documents beginning on December 1, 2016. (Exh. 2, p. 65; Exh. 5, p. 370.)

B. Six4Three's Motion to Amend

16. Six4Three's review of Facebook's initial document production revealed facts giving rise to additional causes of action against Facebook and to claims against six of Facebook's executives who had personally engaged in the alleged misconduct. (Exh. 2, p. 66; Exh. 3, pp. 193-194.)

17. Consequently, on March 20, 2017, Six4Three filed its Motion to Amend, seeking to add four new causes of action and to substitute six Facebook executives for certain doe defendants. (Exh. 2, pp. 59, 121; Exh. 3, p. 266.)

18. Six4Three argued that Facebook's initial production of documents established facts justifying the additional causes of action and the additional defendants. (Exh. 2, p. 66.) Regarding the Proposed Defendants, Six4Three argued that each of the six Facebook executives was personally involved in Facebook's scheme to lure developers such as

Six4Three into expending money and effort to build applications to run on the Facebook Platform and then to shut down data access to those developers because they were competitive with Facebook's business. (Exh. 2, pp. 66, 68.) Specifically, Six4Three's proposed amendments alleged that proposed defendant Mark Zuckerberg personally decided and directed subordinates to design and effectuate the anti-competitive scheme Six4Three alleges in this action, and that the other Proposed Defendants all "actively approved, participated, ratified, directed and acquiesced in" the conspiracies and schemes alleged and personally "engaged in malicious, oppressive and fraudulent conduct in actively concealing and intentionally misrepresenting material facts" causing Six4Three damage. (Exh. 2, p. 68.)

19. In addition to numerous allegations about proposed defendant Zuckerberg's direction of the unlawful scheme, the proposed TAC made specific factual allegations about each of the other Proposed Defendant's personal involvement in the "bait and switch" scheme. For instance, the proposed TAC alleged that: (1) proposed defendants Christopher Cox, Samuel Lessin, and Javier Olivan were responsible for

directing subordinates to identify competitive applications whose data access would be restricted (Exh. 2, pp. 148-149, 161); (2) proposed defendants Michael Vernal and Ilya Sukhar were responsible for architecting and overseeing the plan to conceal Facebook's actions and anti-competitive motives from the application developers, the public, and even Facebook employees (Exh. 2, pp. 148, 161-162, 179); and (3) all the Proposed Defendants were responsible for implementing the scheme of determining which applications would be permitted special access, setting financial terms for companies to gain data access, and shutting down data access to those applications that did not agree to special financial terms (Exh. 2, pp. 148-150, 161).

20. Six4Three therefore sought to sue and seek damages from the Proposed Defendants under six causes of action that sound in tort and fraud, namely concealment, intentional misrepresentation, negligent misrepresentation, intentional interference with contract, intentional interference with prospective economic relations, and negligent interference with prospective economic relations. (Exh. 2, p. 121, Exh. 3, p. 266.)

21. Facebook opposed Six4Three's Motion to Amend on April 3, 2017. (Exh. 4, p. 348.) Facebook argued that Six4Three had been dilatory in seeking to add new claims and defendants, and that all facts involving the Proposed Defendants had been known since at least December 2016 or January 2017 and facts concerning proposed defendant Zuckerberg had been known since before Six4Three filed its SAC. (Exh. 4, pp. 355-360.) Facebook also argued that granting Six4Three's motion would greatly increase expenses and cause undue delay. (Exh. 4, pp. 360-361.) Finally, Facebook argued that the amendment would be futile because Six4Three's proposed amendment did not state a cause of action against Facebook or the Proposed Defendants. (Exh. 4, pp. 361-366.)

22. With respect to the proposed causes of action against the Proposed Defendants,[1] Facebook asserted that Six4Three had not sufficiently pled its fraud claims (concealment and intentional and negligent misrepresentation) under the required heightened pleading standard required to state a

[1] Six4Three's TAC asserted claims for breach of contract and unfair competition under Business and Professions Code section 17200 against Facebook only.

claim for fraud (Exh. 4, p. 364), and that Six4Three's tortious interference claims were "improperly duplicative of its breach of contract claim" (Exh. 4, pp. 365-366). However, Facebook made no specific argument as to why amending the complaint to assert the tortious interference claims against the Proposed Defendants would be futile (see Exh. 4, pp. 365-366), and did not argue that the Proposed Defendants could not be found liable for any of the proposed claims as a matter of law because they were acting in their official capacities as employees of Facebook (Exh. 4, pp. 364-366).

23. Six4Three filed its reply on April 27, 2017. (Exh. 13, p. 949.) Six4Three first argued there was no delay in filing the Motion to Amend because it was not until Six4Three received Facebook's initial document production in December 2016 that Six4Three became aware of the depth of proposed defendant Zuckerberg's involvement in the scheme or the identities of the other five Proposed Defendants who were personally engaged in the scheme. (Exh. 13, pp. 953-956.) And because Facebook removed the case to federal court in January, and it was not remanded to the superior court until late February, Six4Three brought its

motion at the earliest opportunity. (Exh. 13, pp. 953-956.) Six4Three also argued that none of the new claims or claims against the Proposed Defendants were futile because the TAC alleged sufficient facts at the pleading stage to warrant allowing amendment. (Exh. 13, pp. 957-962.)

24. The superior court issued Case Management Order #2 on June 1, 2017, allowing Six4Three to take the deposition of Facebook's person most knowledgeable (PMK) about Facebook's decision to eliminate data access to developers such as Six4Three, and allowing both parties to submit supplemental briefs on the Motion to Amend after the deposition. (Exh. 28, pp. 1105-1108.)

25. Six4Three deposed Facebook's PMK on June 21, 2017, and on June 23, 2017, Facebook submitted its supplemental opposition to the Motion to Amend. (Exh. 32, p. 1119.) Facebook argued that the deposition testimony established that the allegations in Six4Three's proposed TAC had no basis in fact. Facebook asserted that Six4Three's allegations against Facebook and the Proposed Defendants could be broken down into five categories, each of which the PMK deposition showed to be

untrue. Notably, Facebook argued that, *as a factual matter*, Six4Three would not be able to prevail on its new claims, but did not argue that, *as a matter of law*, the Proposed Defendants could never be liable for the claims asserted in the proposed TAC. (Exh. 32, pp. 1120-1125.)

26. Six4Three filed its supplemental memorandum on July 5, 2017. (Exh. 36, p. 1198.) Responding to Facebook's supplemental memorandum, Six4Three argued, *as a factual matter*, that the PMK deposition demonstrated that Facebook deliberately misrepresented and concealed the reasons for shutting down data access and that Facebook concealed the unlawful behavior of the Proposed Defendants. Specifically, Six4Three argued that the deposition and the documents produced by Facebook established each of the Proposed Defendant's involvement in the unlawful scheme. (Exh. 65, pp. 2738-2747.)

C. The Superior Court's Order

27. On July 10, 2017, the superior court held a hearing on the Motion to Amend and, on July 11, 2017, the court issued an order denying Six4Three's motion to add claims against the Proposed Defendants

but granting Six4Three's motion to add its new causes of action and make all other amendments to its allegations that it proposed in its Motion to Amend. (Exh. 42, p. 1209; Exh. 43, pp. 1224-1227.)

28. At the hearing on the motion, the superior court rejected Facebook's argument that the Motion to Amend was untimely and noted that the statute of limitations had not yet run. The superior court also rejected Facebook's argument that amending the complaint would cause undue burden, expense or delay, because only four depositions had been taken so far and no trial date had been set. (Exh. 44, pp. 1230-1231.)

29. Regarding Six4Three's motion to add the Proposed Defendants, the superior court denied the motion "on the basis of futility as the proposed amendments are insufficient *as a matter of law* to support individual liability." (Exh. 43, p. 1225, emphasis added.) The superior court noted at the hearing that it was basing its ruling on the findings that the TAC did not allege that any of the Proposed Defendants acted outside the scope of their employment or their duty to Six4Three, and did not allege that any of the Proposed Defendants had any

knowledge of Six4Three or acted intentionally to cause damage to Six4Three. (Exh. 44, pp. 1229-1230.)

30. Notably, the superior court did not analyze whether the allegations asserted against the Proposed Defendants were insufficient to state a claim under any particular proposed cause of action in the TAC. Rather, the court simply held "as a matter of law" that amending the complaint to add the Proposed Defendants would be futile because Six4Three could not establish individual liability of any of the Facebook executives. (Exh. 43, p. 1225.)

V. Necessity for Writ of Mandate, Prohibition, or Other Appropriate Relief

31. Six4Three has no plain, speedy, and adequate remedy at law. No immediate appeal lies from the July 11, 2017 order. And Six4Three cannot file a motion for reconsideration (Code Civ. Proc., § 1008) as no new facts or law are present.

32. Writ relief is warranted under these circumstances because the superior court abused its discretion in denying Six4Three leave to amend its complaint based on an erroneous conclusion of law and without a showing of prejudice to the Proposed

Defendants, and Six4Three has a right to require the superior court to perform its duty.

33. The order is erroneous as a matter of law, substantially prejudicing Six4Three as it bars a significant portion of Six4Three's case at the outset without any opportunity to marshal evidence and proceed on the merits. (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273-1274; *Nazaroff v. Superior Court* (1978) 80 Cal.App.3d 553, 557-558, disapproved on another ground in *Thing v. La Chusa* (1989) 48 Cal.3d 644; *Babb v. Superior Court* (1971) 3 Cal.3d 841, 851.) Judicial economy is served by resolving the case on petition for extraordinary relief, as inevitable reversal on appeal will result in a needless second trial. (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1183; *Byram v. Superior Court* (1977) 74 Cal.App.3d 648, 654.)

34. Where a trial court abuses its discretion in denying leave to amend a complaint, writ relief is warranted. (See *Louie Queriolo Trucking, Inc. v. Superior Court* (1967) 252 Cal.App.2d 194, 198 (*Louie Queriolo Trucking*) [where trial court abuses discretion in denying leave to amend, "a writ of

mandate should issue inasmuch as there is otherwise no adequate remedy"]; see also *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048 (*Kittredge*) [issuing peremptory writ in the first instance where trial court abused discretion in denying leave to amend complaint]; *California Casualty Gen. Ins. Co. v. Superior Court* (1985) 173 Cal.App.3d 274, 278, 284 (*California Casualty*) [issuing peremptory writ of mandate directing trial court to vacate order denying leave to amend and enter an order granting leave], disapproved on another ground by *Kranscov v. Am. Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390.)

Prayer

Petitioner Six4Three therefore prays that this Court:

1. Issue a peremptory writ of mandate, prohibition, or other appropriate relief in the first instance (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178) commanding respondent, the Superior Court of San Mateo County, in its Case No. CIV 533328 to set aside the portion of its July 11, 2017 order denying Six4Three's Motion to Amend naming individual Facebook executives as defendants, and to enter a new and different order granting the motion in its entirety.

2. Or, if a peremptory writ is not issued in the first instance, issue an alternative writ directing respondent superior court as set forth in paragraph 1 above or show cause why it should not be compelled to do so. Six4Three further prays that upon return of the alternative writ, this Court issue a peremptory writ of mandate, prohibition, or other appropriate relief, commanding respondent superior court to set aside and vacate the portion of its July 11, 2017 order denying Six4Three's Motion to Amend naming individual Facebook executives as defendants, and to

enter a new and different order granting the motion in its entirety.

3. Award Six4Three costs pursuant to California Rules of Court, rule 8.493.

4. And grant Six4Three such other extraordinary relief as may be appropriate and just.

Respectfully submitted,
California Appellate Law Group LLP
Audra S. Ibarra
Kelly A. Woodruff
Susan K. Horst

By /s/ Kelly A. Woodruff
Kelly A. Woodruff

Attorneys for Petitioner **Six4Three, LLC**

Verification

I, Kelly A. Woodruff, declare as follows:

I am an attorney at law duly admitted to practice in the State of California and of counsel with the California Appellate Law Group LLP, counsel for petitioner in this action. I have read the foregoing Petition for Peremptory Writ of Mandate, Prohibition, or Other Appropriate Relief and know the contents thereof. I make this verification as Six4Three's counsel because I am familiar with the facts relevant to this petition. The facts referred to in this petition are true based on my personal knowledge from my review of the pleadings, briefs, and other documents filed in the superior court.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on August 11, 2017, at San Francisco, California.

/s/ Kelly A. Woodruff
Kelly A. Woodruff

Memorandum of Points and Authorities

I. Plaintiffs are liberally allowed to amend pleadings where, as here, defendants will not be prejudiced.

A trial court may, in the furtherance of justice, allow a party to amend any pleading on any terms as may be proper. (Code Civ. Proc., §§ 473, subd. (a), 576.) While the trial court has discretion in deciding whether to permit an amendment to a pleading, the exercise of this discretion must be sound and reasonable and not arbitrary or capricious. (*California Casualty*, *supra*, 173 Cal.App.3d 274, 278.) Moreover, the court's discretion "should be exercised liberally in favor of amendments, for judicial policy favors resolution of all disputed matters in the same lawsuit." (*Kittredge*, *supra*, 213 Cal.App.3d 1045, 1047, citing *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 939.) Indeed, the policy favoring leave to amend is so strong that "'it is a rare case in which "a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case."'" (*California Casualty*, *supra*, 173 Cal.App.3d at p. 278.)

Where, as here, the trial court denies a motion for leave to amend a complaint based on an erroneous interpretation of law, the denial is an abuse of discretion. (See *Kittredge*, *supra*, 213 Cal.App.3d at p.

1048 [trial court abused its discretion in denying leave to amend where court based ruling on erroneous conclusion that the law does not recognize the causes of action sought to be asserted]; see also *California Casualty*, *supra*, 173 Cal.App.3d at pp. 280-281 [while court may deny motion to amend if proposed amendment fails to state facts sufficient to constitute a cause of action, those situations are limited to "cases in which the insufficiency of the proposed amendment is established by controlling precedent and where the insufficiency could not be cured by further appropriate amendment."]; *Solit v. Tokai Bank, Ltd., New York Branch* (1999) 68 Cal.App.4th 1435, 1448 (*Solit*) [where trial court erroneously concluded proposed amendment would not state viable cause of action, denial of leave to amend was an abuse of discretion]; *Louie Queriolo Trucking*, *supra*, 252 Cal.App.2d 194, 198-200 [where trial court erroneously determined proposed amendment failed, as a matter of law, to constitute a defense, trial court abused discretion].)

Likewise, California law is well-established that it is an abuse of discretion to deny an amendment unless the adverse party can show meaningful prejudice, such as the running of the statute of

limitations, trial delay, the loss of critical evidence, or added preparation costs. (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 296-297 (*Mesler*); *Solit*, *supra*, 68 Cal.App.4th 1435, 1448; *Kittredge*, *supra*, 213 Cal.App.3d at p. 1048; *Atkinson v. Elk Corp*. (2003) 109 Cal.App.4th 739, 761 (*Atkinson*).)

Where the trial court abuses its discretion in denying leave to amend a pleading, writ relief is appropriate to correct the trial court's erroneous ruling and allow the plaintiff to proceed on the merits. (*Kittredge*, *supra*, 213 Cal.App.3d at pp. 1048-1049 [issuing a peremptory writ of mandate in the first instance directing the trial court to allow amendment]; *California Casualty*, *supra*, 173 Cal.App.3d at p. 284 [issuing a peremptory writ of mandate directing trial court to allow amendment]; *Louie Queriolo Trucking*, *supra*, 252 Cal.App.2d at p. 198; see also *Solit*, *supra*, 68 Cal.App.4th at p. 1448 [though court could have remanded to trial court to reach issues of delay and prejudice from amendment, court concluded "there is only one way the trial could exercise such discretion – to grant Solit's motion for leave to amend," directing

trial court to vacate order denying leave to amend and to enter order granting motion].)

II. The superior court made a clear error of law and therefore abused its discretion in denying Six4Three's Motion to Amend.

Six4Three's proposed amendment sought to name as defendants six Facebook executives, each of whom was alleged to have been *personally involved* in the actions giving rise to Six4Three's claims and to have *personally* benefitted from the alleged scheme. (See, e.g., Exh. 2, pp. 148-149, 161-162, 172, 179.) Although Facebook did not argue that the Proposed Defendants could not, as a matter of law, be individually liable for the proposed causes of action against them,[2] the superior court denied Six4Three's Motion to Amend on the sole basis that "as a matter of

[2] Facebook's opposition to the Motion to Amend focused primarily on Six4Three's lack of diligence in bringing its Motion to Amend, an argument which was rejected by the superior court (Exh. 44, pp. 1230-1231), and secondarily on how Six4Three's proposed amendments did not state a claim as to *Facebook*, another argument which was rejected by the superior court (Exh. 43, pp. 1224-1227). The cases on which Facebook relied below are not relevant to the issues addressed in this petition, namely whether the TAC asserted legally sufficient claims against the *Proposed Defendants*, and are therefore not addressed in this memorandum.

law" the proposed amendments were insufficient to support individual liability. That conclusion was a clear error of law. Moreover, Facebook did not argue, nor did the superior court conclude, that any of the Proposed Defendants would suffer meaningful prejudice from the amendment.

Under these circumstances, the superior court abused its discretion in denying Six4Three's Motion to Amend.

A. The Proposed Defendants may be found individually liable for tortious conduct in which they participated, and the superior court erred in holding they cannot.

The superior court denied Six4Three's Motion to Amend on the basis that "the proposed amendments are insufficient *as a matter of law* to support individual liability." (Exh. 43, p. 1225, emphasis added.) The superior court erred.

Six4Three proposed to assert six tort causes of action against Proposed Defendants, all related to Facebook's alleged "bait and switch" scheme to unjustly enrich Facebook and harm developers including Six4Three. (Exh. 3, p. 196.) Six4Three's proposed TAC alleged that proposed defendant

Zuckerberg personally decided and directed subordinates to design and effectuate the alleged anti-competitive scheme, and that the other Proposed Defendants all actively approved, participated, ratified, directed, and acquiesced in the conspiracies and schemes that allegedly gave rise to the causes of action in the TAC. (Exh. 2, pp. 122-128, 148-149, 161-162.) The proposed TAC also satisfied all the fact-pleading requirements for alleging civil conspiracy as it relates to the six causes of action alleged against Proposed Defendants. (Exh. 2, pp. 121-189.)

The superior court's conclusion that the Proposed Defendants cannot be personally liable under any of Six4Three's causes of action because they were acting in their capacity as employees of Facebook has been soundly and consistently rejected by California courts. While corporate directors and officers will not be personally liable for torts committed by the corporation merely because of their official position, it is well-established that such officers and directors can be individually liable for corporate wrongs in which they actively participate. (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 505 (*Frances T.*); *United States Liab. Ins. Co. v.*

Haidinger–Hayes, Inc. (1970) 1 Cal.3d 586, 595; *PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1379-1380 (*Kadisha*).)

Indeed, the "legal fiction of the corporation as an independent entity was never intended to insulate officers and directors from liability for their own tortious conduct." (*Kadisha*, *supra*, 78 Cal.App.4th at p. 1380.) To the contrary, "'[i]t is thoroughly well settled that a person is personally liable for all torts committed by him, consisting in misfeasance – as fraud, conversion, acts done negligently, etc. – notwithstanding he may have acted as the agent or under directions of another. And this is true to the full extent as to torts committed by the officers or agents of a corporation in the management of its affairs.'" (*Frances T.*, *supra*, 42 Cal.3d at pp. 514-515 (conc. opn. of Bird, C.J.).)

Thus, in *Frances T.*, the plaintiff's proposed amended complaint asserted allegations that each of the named directors personally participated in the tortious activity. The Supreme Court reversed the trial court's sustaining of a demurrer without leave to amend, holding that plaintiff's allegations concerning personal participation were "sufficient to withstand a

demurrer." (*Frances T.*, *supra*, 42 Cal.3d at p. 511.) Likewise, in *Kadisha*, the trial court granted summary judgment to the individually-named officers and directors on the basis that they had never authorized or directed any employee to engage in any wrongful conduct. The Court of Appeal reversed, finding a triable issue of fact as to whether the individuals personally participated in the tortious conduct. (*Kadisha*, *supra*, 78 Cal.App.4th at pp. 1379-1381.) Further, the court held that a "corporate director or officer's participation in tortious conduct may be shown not solely by direct action but also by knowing consent to or approval of unlawful acts." (*Id.* at p. 1380.)

In *Classen v. Weller,* this Court did not mince words in noting the clear error of the trial court which granted summary judgment to the corporation's president because he had acted solely in his representative capacity on behalf of the corporation: "corporate officers are liable for their tortious acts committed on behalf of the corporation. [Citations.] . . . Therefore, it is a *question of fact* whether [the president of the company] committed such an act on behalf of [the company]; he was not entitled to a

summary judgment based on any *presupposed lack of personal responsibility*." (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 48, emphasis added.) And in *Golden v. Anderson*, the Second District Court of Appeal also reversed a trial court's grant of summary judgment: "The [trial] court found that, since the evidence showed these three defendants were acting in their representative capacities as managing agents of the defendant corporations, they were immune from liability. The court erred in so concluding. Plaintiff's action is for an intentional tort. All persons who are shown to have participated are liable for the full amount of the damages suffered." (*Golden v. Anderson* (1967) 256 Cal.App.2d 714, 719-720.)

Furthermore, the superior court's conclusion that the Proposed Defendants cannot be subject to individual liability because they did not directly interact with Six4Three or because they did not direct their alleged conduct at Six4Three has also been consistently rejected by California courts. A corporate officer's wrongful conduct need not be directed specifically at Six4Three, nor does the officer need to have had any direct interaction with Six4Three for personal liability to attach.

It is settled law in California that Six4Three "is entitled to damages from those defendants who concurred in the tortious scheme with knowledge of its unlawful purpose" and "the requisite concurrence and knowledge may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances." (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 784-785, internal quotation marks omitted; see also *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, 604 ["those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him." (internal quotations omitted)]; *Holder v. Home Sav. & Loan Assn. of Los Angeles* (1968) 267 Cal.App.2d 91, 108 [tacit consent as well as express approval will suffice to hold a person liable as a coconspirator].) Knowledge of or specific intent to injure Six4Three is not required to establish liability. (*Ramona Manor Convalescent Hosp. v. Care Enters.* (1986) 177 Cal.App.3d 1120, 1133 ["We are not persuaded knowledge of the injured party's specific

identity or name is a prerequisite to recovery. . . . [¶] Care's decision to hold over beyond the termination of the lease under which it had possession was made with the knowledge that such action would frustrate the legitimate contractual expectations of a specific, albeit unnamed, new lessee. That is all it was required to know to incur liability."].)

The superior court found *as a matter of law* that Proposed Defendants cannot be found liable for tortious conduct, in which they allegedly personally participated and in which they conspired with each other and with Facebook to commit, because they were acting within the scope of their employment and their conduct was not aimed specifically at Six4Three. (Exh. 43, p. 1225; see Exh. 2, pp. 121-189.) The superior court's conclusion was erroneous under the well-established principles articulated by the above cases. Therefore, the superior court abused its discretion in denying Six4Three's Motion to Amend based on this erroneous legal conclusion. (*Kittredge*, *supra*, 213 Cal.App.3d at p. 1048.)

B. To the extent the trial court's ruling was based on conflicting views of the facts, denial of the Motion to Amend was an abuse of discretion.

Not only did the superior court err in concluding *as a legal matter* that Six4Three's allegations did not support individual liability of the Proposed Defendants, but it also erred to the extent it concluded *as a factual matter* that Six4Three could never establish liability against the Proposed Defendants. At the hearing on the Motion to Amend, the superior court seemed persuaded by Facebook's argument that the Proposed Defendants were not personally involved in the decision to restrict data access to Six4Three and, in fact, had no knowledge of Six4Three or intent to injure it, and therefore could not be liable. (Exh. 44, pp. 1229-1230.)

The superior court abused its discretion in resolving factual disputes against Six4Three before it even had the opportunity to plead its case, let alone test the merits of it. In *Kittredge*, plaintiff retailer brought an action against the manufacturer of ski bindings alleged to have caused a customer injury for breach of its indemnification agreement. Three years later, plaintiff sought to amend the complaint to assert causes of action for breach of the covenant of good faith

and fair dealing and tortious denial of the existence of contract. (*Kittredge*, *supra*, 213 Cal.App.3d at p. 1047.) The trial court denied the motion to amend, and plaintiff sought a writ of mandate in the Court of Appeal. The manufacturer argued that the trial court's ruling was proper because the law did not recognize a cause of action for tortious denial of liability under a contract, and that no action for breach of the covenant of good faith and fair dealing exists under the circumstances. (*Ibid.*) The Court of Appeal rejected the argument in its entirety:

> Marker misses the point. . . . Kittredge's right to bring this action is clear for Marker's argument *merely raises a factual dispute to be resolved by a jury*. . . . [¶] . . . [E]ven if the proposed legal theory is a novel one, "the preferable practice would be to permit the amendment and allow the parties to test its legal sufficiency by demurrer, motion for judgment on the pleadings or other appropriate proceedings." (*California Casualty Gen. Ins. Co. v. Superior Court* (1985) 173 Cal.App.3d 274, 281.)

(*Kittredge*, *supra*, 213 Cal.App.3d at pp. 1047-1048, emphasis added.)

Similarly, in *Atkinson*, the trial court denied plaintiff's motion for leave to amend the complaint on the eve of trial to add new claims. Defendant argued that the proposed amendment was simply a retooling of allegations in a previously-dismissed cause of action

and could not be sustained. (*Atkinson*, *supra*, 109 Cal.App.4th at p. 760.) The Court of Appeal rejected the argument, concluding "[a]ssuming without deciding that [defendant's] assertion is true, we believe that the better course of action would have been to allow Atkinson to amend the complaint and then let the parties test its legal sufficiency in other appropriate proceedings." (*Ibid.*) The court thus held the trial court abused its discretion in denying leave to amend the complaint. (*Ibid.*; see also *Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, 965 ["If the original pleading has not framed the issues in an articulate and precise manner, a plaintiff should not be precluded from having a trial on the merits."].)

Here, Facebook did not argue, let alone establish that "controlling precedent" precluded Six4Three's claims against Proposed Defendants as a matter of law. (*California Casualty*, *supra*, 173 Cal.App.3d at p. 281.) Rather, Facebook argued *as a factual matter* that Six4Three could not establish liability against the Proposed Defendants because they were not personally involved in the tortious conduct and had no knowledge of or intent to injure Six4Three. (Exh. 32, p. 1121-1125.) To the extent the superior court based

its denial of the Motion to Amend on this factual dispute, it abused its discretion. (*Kittredge*, *supra*, 213 Cal.App.3d at pp. 1047-1048 [where proposed amendment contains sufficient allegations of liability, "it should be allowed to amend its complaint. No more is necessary at this stage."]; *California Casualty*, *supra*, 173 Cal.App.3d at p. 281 [unless controlling precedent establishes no viable cause of action exists as a matter of law, amendment must be allowed].)

C. Because there is no showing of prejudice to the Proposed Defendants, the superior court abused its discretion in denying the Motion to Amend.

The liberal policy of allowing amendment of pleadings is so strong that it is considered an abuse of discretion to deny leave to amend in the absence of meaningful prejudice to the opposing party. (*Mesler*, *supra*, 39 Cal.3d at pp. 296-297; *Kittredge*, *supra*, 213 Cal.App.3d at p. 1048; *Atkinson*, *supra*, 109 Cal.App.4th at p. 761.) In opposition to Six4Three's Motion to Amend, Facebook argued only that amendment would prejudice *Facebook* by increasing its costs. (Exh. 4, p. 361 ["If Six4Three is permitted to amend its claims . . . , Facebook's discovery costs will

stretch into the millions of dollars."].) The superior court rejected that argument and allowed Six4Three to amend its complaint against Facebook. (Exh. 43, p. 1225.)

Facebook did not argue, let alone make a showing, that amendment would cause any prejudice specifically to the Proposed Defendants. Nor could it. Six4Three established that the statute of limitations had not run, and it could have brought a separate action against the Proposed Defendants on the proposed claims. It would benefit all parties to have all claims resolved in a single action, and certainly would not cause Proposed Defendants any unique prejudice aside from the mere fact of being named in a lawsuit.

Because there would be no prejudice to the Proposed Defendants from allowing them to be named in this action, the superior court abused its discretion in denying Six4Three's Motion to Amend. (*Kittredge*, *supra*, 213 Cal.App.3d at p. 1048 ["[I]t is an abuse of discretion to deny leave to amend where the opposing party was not misled or prejudiced by the amendment."]; *Atkinson*, *supra*, 109 Cal.App.4th at p. 761 [defendant did not claim that it would be

prejudiced by amendment; therefore, trial court abused discretion in denying amendment].)

Conclusion

In direct contravention of settled California precedent, the superior court refused to allow Six4Three to sue individual Facebook executives who allegedly directly participated in the unlawful scheme that put Six4Three out of business and is the subject of this lawsuit.

Six4Three respectfully requests this Court grant this petition, directing respondent, the Superior Court of San Mateo County, to vacate and set aside its order denying in part Six4Three's Motion to Amend to substitute as defendants six Facebook executives in place of doe defendants, and to enter an order granting leave to amend.

Respectfully submitted,
California Appellate Law Group LLP
Audra S. Ibarra
Kelly A. Woodruff
Susan K. Horst

By /s/ Kelly A. Woodruff
Kelly A. Woodruff

Attorneys for Petitioner **Six4Three, LLC**

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Dated: August 11, 2017

/s/ Kelly A. Woodruff
Kelly A. Woodruff