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12 FACEBOOK, INC.

13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN JOSE DIVISION**

16
17 FACEBOOK, INC., a Delaware
18 corporation,

19 Plaintiff,

20 v.

21 JEREMI FISHER; PHILIP POREMBSKI;
22 RYAN SHIMEALL; and JOHN DOES 1-
23 25, individuals; and CHOKO SYSTEMS
24 LLC; HARM, INC.; PP WEB SERVICES
LLC, iMEDIA ONLINE SERVICES LLC,
and JOHN DOES 26-50, corporations,

25 Defendants.

Case No. C 09-05842 JF

**PLAINTIFF FACEBOOK, INC.'S
RESPONSE TO REQUEST FOR
ADDITIONAL BRIEFING**

1 Plaintiff Facebook, Inc. hereby submits its response to the Court's order requesting
2 Facebook to clarify whether its allegations include conduct that occurred under the prior version
3 of the CFAA. (Dkt. 76).

4 Amendments to the CFAA became effective on September 26, 2008. Facebook does not
5 allege that Defendant's conduct occurred prior to September 26, 2008. All allegations in the
6 Complaint and Motion for Default Judgment should have referenced the current version of the
7 CFAA. Counsel apologizes for the oversight, but after reviewing the citations included in its
8 Motion for Default Judgment against Defendant Philip Porembski believes that the 2008
9 amendments have no substantive effect on the relief requested.

10 Unless noted below, the citations in the Plaintiff's Complaint and subsequent briefing refer
11 correctly to the current version of the CFAA. The following three sections of the CFAA that
12 appear in Plaintiff's Complaint and subsequent briefing were cited incorrectly, and should be
13 changed.

- 14 ■ 18 U.S.C. § 1030(a)(5)(A)(ii) should have been cited as 18 U.S.C.
15 § 1030(a)(5)(B). There is no difference between the language in the two versions.
- 16 ■ 18 U.S.C. § 1030(a)(5)(A)(iii) should have been cited as 18 U.S.C.
17 § 1030(a)(5)(C). The new version is slightly different, adding two words (bolded
18 and underlined): "intentionally accesses a protected computer without
19 authorization, and as a result of such conduct, causes damage **and loss.**"
- 20 ■ 18 U.S.C. § 1030(a)(5)(A)(ii) should have been cited as 18 U.S.C.
21 § 1030(a)(5)(B). There is no difference between the language in the two versions.

22 Plaintiff's Application for Default Judgment (Dkt. 75), now pending before the Court,
23 contains a section requesting injunctive relief based on Defendant Philip Porembski's violations
24 of the CFAA. For the convenience of the Court, a corrected version of section III(E)(2)
25 appearing on pages 17-19 of Facebook's Motion for Default Judgment is provided below, with
26 the corrected citations and additional language appearing in bold underline.

1 **1. Defendants' Violations of the Computer Fraud and Abuse Act Support Entry**
2 **of a Permanent Injunction**

3 In addition to Defendants' violation of the CAN-SPAM Act, the undisputed facts set forth
4 above, Facebook's Complaint and its Motion for Temporary Restraining Order demonstrate
5 Defendants' liability under the Computer Fraud and Abuse Act ("CFAA"). 18 U.S.C.
6 §§ 1030(a)(2) (intentional access and information theft), 1030(a)(4) (knowing access with intent
7 to defraud), **1030(a)(5)(B)** (intentional access that recklessly causes damage), 18 U.S.C.
8 § **1030(a)(5)(C)** (intentional access that causes damage **and loss**). These violations arise from
9 Defendants' unauthorized use of Facebook user login information to gain access to other users'
10 accounts and to thereafter access Facebook's services and obtain information from Facebook
11 without authorization.

12 The CFAA provides a private right of action for the knowing and unauthorized access of a
13 computer used in interstate commerce that causes loss or damage in excess of \$5,000. The CFAA
14 also allows claims based upon attempted violations. 18 U.S.C. § **1030(b)**.

15 Throughout their cycle of spamming, phishing, unauthorized access, and monetary profit,
16 Defendants accessed Facebook's computers and network without authorization or in excess of
17 authorization by using accounts belonging to others and by knowingly accessing Facebook for
18 unauthorized purposes.¹ Complaint ¶¶ 38, 50, 61, 66-68; Facebook Decl. ¶¶ 8-11, 18, 20.
19 Defendants purposefully circumvented Facebook's security measures and performed tests to
20 ensure that their spam could infiltrate user accounts. Facebook Decl. ¶¶ 17-18, 20; Facebook
21 Decl. ISO Default ¶¶ 5-6. Facebook has expended resources far in excess of \$5,000 to
22 investigate, remediate, and prevent Defendants' unauthorized access and activities and make
23 hardware and software upgrades and repairs to better combat their illegal and unauthorized
24 activities. Complaint ¶ 91-92; Facebook Decl. ¶ 18-20.

25 ¹ All of the unauthorized activity at issue in this case occurred after Defendants received
26 Facebook's cease and desist letter which clearly and unambiguously stated that Facebook had gathered
27 evidence that Defendants were responsible for the spam messages, that spamming was against Facebook's
28 Terms, and that it was also illegal under federal law. Cutler Decl. ISO Default, ¶ 8, Exhibit C. In
addition, Defendants took intentional steps to circumvent the technical measures established by Facebook
to stop them from accessing Facebook. Facebook Decl. ¶ 18. Therefore, there can be no doubt
Defendants' continued access to Facebook's website and services constitutes unauthorized access.
Complaint ¶¶ 38, 50, 61, 66-68; Facebook Decl. ¶¶ 8-11, 18, 20.

1 18 U.S.C. § 1030(a)(2) prohibits the intentional accessing of protected computers without
2 authorization or exceeding one's authorized access and causing losses of more than \$5,000.
3 Defendants repeatedly violated this statute by purposefully exceeding their authorized access to
4 the Facebook service by using other Facebook users' accounts without authorization to obtain
5 information and send spam messages in violation of Facebook's SRR. Complaint ¶¶ 39-42, 88;
6 Facebook Decl. ¶¶ 9-11, 17.

7 18 U.S.C. § 1030(a)(4) prohibits knowingly and with the intent to defraud, accessing
8 protected computers without authorization or exceeding authorized access, to further the intended
9 fraud and obtain more than \$5,000 in value. 18 U.S.C. § 1030(a)(4). As explained above in
10 Section III(B), Defendants repeatedly accessed Facebook's protected computers cloaked as
11 legitimate Facebook users. They misappropriated the accounts and identities of innocent
12 Facebook users and used them to fraudulently represent that the messages were sent by the users
13 of the misappropriated accounts. Defendants also defrauded Facebook users by falsely
14 representing the true purpose of their messages. Complaint ¶ 43-56, 59-60; Facebook Decl.
15 ¶¶ 15-17.

16 18 U.S.C. § **1030(a)(5)(B)** prohibits intentionally accessing protected computers (a)
17 without authorization, and recklessly causing an aggregate loss of \$5,000 or more, or (b) without
18 authorization and causing aggregate damage or loss of \$5,000 or more.

19 Defendants violated 18 U.S.C. § **1030(a)(5)(B)** by repeatedly accessing Facebook's
20 computers without authorization and recklessly causing harm to Facebook. Complaint ¶¶ 39-42,
21 61-62; Facebook Decl. ¶¶ 9-11, 17. Even if Defendants' actions are not determined to be reckless,
22 they violate 18 U.S.C. § **1030(a)(5)(C)**, because they caused over \$5,000 of aggregated damage
23 **and loss** to Facebook through their actions. Complaint ¶ 65; Facebook Decl. ¶ 18.

24 Facebook's request for injunctive relief under the CFAA was not substantively altered by
25 the amendment of the statute. *See* 18 U.S.C. § 1030(g). If anything, the addition of the phrase
26 "and loss" to 18 U.S.C. § 1030(a)(5)(C) reinforces Plaintiff's contention that its losses, in addition
27 to whatever damage Defendant's conduct caused, also serve as grounds for Plaintiff's request for
28 liability and relief under the CFAA.

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DATED: November 1, 2010

PERKINS COIE LLP

By: /s/
Joseph P. Cutler

Attorneys for Plaintiff Facebook, Inc.