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16 **UNITED STATES DISTRICT COURT**
 17 **NORTHERN DISTRICT OF CALIFORNIA**
 18 **SAN JOSE DIVISION**

19 FACEBOOK, INC., a Delaware corporation,

20 Plaintiff,

21 v.

22 MAXBOUNTY, INC., a Canadian corporation,

23 Defendant.

Case No. 5:10-cv-4712-HRL

**MAXBOUNTY'S REPLY IN SUPPORT OF
ITS MOTION TO DISMISS COUNTS I, II
AND III OF FACEBOOK'S COMPLAINT
PURSUANT TO FED.R.CIV.P. 12(b)(6)**

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1 **A. Facebook Does Not Plead An “Electronic Mail Message” Sent To A**
2 **“Unique Electronic Mail Address” As Required Under The Act**

3 The CAN-SPAM Act defines the term “electronic mail message” very narrowly. First,
4 the Act defines the term as a “message sent to a “unique electronic *mail address*.” 15
5 U.S.C. §7702(6), emphasis added. The Act then defines an “electronic mail address” as a
6 “*destination*” having two distinct components, a (1) “unique *user name or mailbox*,” and (2) an
7 “an *Internet domain*” to which the message is delivered. 15 U.S.C. §7702(5), emphasis added.
8 Finally, the Act defines a “domain” as an “*alphanumeric designation which is registered with or*
9 *assigned by any domain name registrar, domain name registry, or other domain name*
10 *registration authority as part of an electronic address on the Internet.*” 15 U.S.C. §7702(4),
11 emphasis added. Accordingly, the following criteria are required to establish a “unique
12 electronic mail address” under the Act:

- 13 1. a “destination”
- 14 2. a “unique user name or mailbox”
- 15 3. an “an Internet domain” and
- 16 4. an “alphanumeric designation which is registered with or assigned by any domain
17 name registrar, domain name registry, or other domain name registration authority
18 as part of an electronic address on the Internet.”

19 Nowhere does the complaint allege that MaxBounty (or its affiliates) have sent electronic
20 “mail” messages to an address meeting any of these very specific criteria. Facebook cannot
21 make these allegations, because the messages at issue in this case are merely “suggestions,” not
22 “electronic mail messages.”

23 The complaint alleges that Facebook users (not MaxBounty) may “suggest” Facebook
24 pages (not MaxBounty pages) to *those users’* Facebook “friends.” (Dkt. No. 1 at ¶22.) This is
25 the only provision of the complaint that Facebook cites in its opposition to satisfy the Act’s
26 definition of “electronic mail message.” (Dkt. #31 at 4.) Despite the fact that MaxBounty has no
27 role in this “suggestion” process on Facebook, the friendly suggestion process described in the
28

1 complaint is a far-cry from the sending of unsolicited “electronic mail messages” to a “unique
2 electronic mail address” (*i.e.*, spam), which the CAN-SPAM Act was intended to prevent.¹

3 **No provision of the CAN-SPAM Act prohibits one friend on Facebook from**
4 **suggesting a Facebook page to another friend on Facebook.** While the Act does not require
5 the *format* username@domain.com *per se*,² it nonetheless requires (1) an “electronic mail
6 message” including (2) an “electronic mail address” having (3) a “unique user name or mailbox”
7 and (4) an “internet domain” that is (5) an “alphanumeric designation which is registered with or
8 assigned by any domain name registrar, domain name registry, or other domain name registration
9 authority as part of an electronic address on the Internet.” 15 U.S.C. §7702(4-6). The complaint
10 does not allege that the suggestions between Facebook users at issue meet these very specific
11 criteria, because they do not. Messages among Facebook friends are obviously not the type of
12 “unsolicited commercial e-mail” the CAN-SPAM Act regulates.

13 Furthermore, as explained in MaxBounty’s opening brief, the complaint contains no
14 allegation (1) that MaxBounty is one of the Facebook “friends” at issue, (2) that MaxBounty
15 makes the “suggestions” at issue to Facebook users, or (3) that MaxBounty hosts the suggested
16 Facebook pages at issue. The allegations pertain to actions of MaxBounty customers, and
17 Facebook has not pled any actions by MaxBounty that fall within the scope of the Act.

18 Facebook cites *MySpace v. The Globe.com, Inc.*, 2007 WL 1686966 (C.D. Cal. 2007) to
19 support its argument that Facebook page suggestions, between Facebook friends, somehow
20 constitute “electronic mail messages” as defined under the Act. The *Globe* case is readily
21 distinguishable. There, the plaintiff submitted declarations pursuant to Rule 56 showing that the
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23
24 ¹ “**Unsolicited commercial e-mail**, commonly known as “**spam**,” has quickly become one of the
25 most pervasive intrusions in the lives of Americans.” (S. REP. 108-102, at *2, P.L. 108-187,
CAN-SPAM ACT OF 2003, emphasis added.)

26 ² Facebook contends that MaxBounty’s “sole” argument in its motion was that the messages at
27 issue in this case were not in the format username@domain.com. (Dkt. #31 at 2.) However,
28 MaxBounty merely identified that format as an “example” of an electronic mail message that
would be covered under the Act’s definition. (Dkt. #11 at 3.)

1 messages at issue were sent to what the court considered a “unique electronic mail address.”
2 More specifically, the plaintiff showed that “the **mail** of each MySpace user resides at a **unique**
3 **URL**, consisting of a **string of characters** that includes a reference to a **user name or number**,
4 and the **Internet destination**, www.myspace.com.” (Dkt. #32-1 at *4 (page 5 of 60), emphasis
5 added.) The court held “this evidence shows that MySpace e-messages fall under CAN-SPAMs
6 definition of electronic mail” (*Id.*) Facebook’s complaint, in contrast, merely alleges
7 “suggestions” between Facebook “friends.” (Dkt. No. 1 at ¶22.) Facebook does not even attempt
8 to establish that the suggestions at issue in this case are “electronic mail messages” as defined
9 under the Act.

10 Facebook also cites *MySpace, Inc. v. Wallace*, 498 F.Supp.2d 1293 (C.D. Cal. 2007). In
11 that case, MySpace accused the defendant of “hijacking” MySpace members’ usernames and
12 passwords using a false web page that resembled the MySpace.com login page. (*Id.* at 1298.)
13 This technique is often referred to as “phishing.” (*Id.*) The defendant would then use the login
14 information to log into MySpace user accounts and send messages to others directing them to the
15 defendant’s web sites. (*Id.*)

16 The court in that case *misinterpreted* the Act’s definition of “electronic mail address,”
17 holding that the “unique user name or mailbox” and “internet domain” criteria were *optional*.
18 (*Id.* at 1300.) The Act defines “electronic mail address” as follows:

19 The term “electronic mail address” means a **destination**, commonly expressed as
20 a string of characters, **consisting of a unique user name or mailbox** (commonly
21 referred to as the “local part”) **and a reference to an Internet domain**
(commonly referred to as the “domain part”), whether or not displayed, to which
an electronic mail message can be sent or delivered.

22 15 U.S.C. §7702(5), emphasis added.

23 Traditional principles of statutory construction confirm that the use of commas to set
24 aside the phrase “commonly expressed as a string of characters” in the definition means that the
25 phrase “stands independent of the language that follows.” *U.S. v. Ron Pair Enterprises, Inc.*, 489
26 U.S. 235, 241-242 (1989). In other words, an “electronic mail address” is defined under the Act
27 as [1] “a destination . . . consisting of [2] a unique user name or mailbox . . . and [3] a reference
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1 to an Internet domain . . . to which an electronic mail message can be sent or delivered.”
2 (§7702(5), reference numerals added.) The only optional criteria in the definition is “a string of
3 characters.”

4 There is additional evidence that the court’s interpretation in *MySpace, Inc. v. Wallace*,
5 was incorrect. If the language that followed the phrase “commonly expressed” is optional, as the
6 court held in that case (and as Facebook argues here), then an “electronic mail address” would be
7 defined as merely “a destination.” Postal mail addresses are “destinations” meeting the urged
8 definition, but they are obviously not “electronic mail addresses.” Common sense and cannons
9 of statutory construction both confirm that MaxBounty’s reading of the definition is incorrect.
10 *Sterling Federal Systems, Inc. v. Goldin*, 16 F.3d 1177, 1185 (Fed. Cir. 1994) (“[L]anguage of a
11 section of a statute should not be construed so as to render other language in that section
12 nonsensical.”)

13 Facebook also cites *Facebook, Inc. v. Wallace*, 2009 WL 3617789 (N.D. Cal. 2009).
14 (Dkt. #31 at 3.) However, the court in that case never addressed the issue presented here. The
15 defendant in that case never even entered an appearance. (Dkt. #32-1 at n.2 (page 14 of 60).)

16 Finally, Facebook contends that Facebook users “have set their account preferences to
17 have notifications of Facebook messages . . . sent to a separate email address” and that “such
18 messages would be actionable under the Act.” (Dkt. #31 at 4-5.) MaxBounty (and its affiliates)
19 have nothing to do with how Facebook users set up their Facebook “account preferences.” How
20 could MaxBounty possibly be liable under the Act for the setting of account preferences by
21 Facebook users? Facebook, not MaxBounty, is the entity that forwards the suggestion to an
22 e-mail address. MaxBounty knows nothing about whether a particular user has turned on
23 forwarding. Regardless, the complaint does not allege that MaxBounty somehow set those
24 preferences, or that it encouraged anyone to do so.

1 **B. Facebook’s CFAA Claim Under §1030(a)(4) Is Subject to the Rule 9(b)**
2 **Heightened Pleading Standard**

3 Facebook asserts “on information and belief” that MaxBounty has “conspired” with and
4 “induced” unidentified MaxBounty customers to violate §1030(a)(4) of the Computer Fraud and
5 Abuse Act. (Dkt. #1 at ¶¶77-79.) That provision of the Act requires (1) “intent to defraud,” and
6 (2) “conduct” which “furthers the intended fraud.” 18 U.S.C. §1030(a)(4).

7 While the “intent” portion of “intent to defraud” may be alleged generally, courts
8 applying §1030(a)(4) have held that the heightened pleading standard of Rule 9(b) applies to the
9 “fraud” portion. *Motorola, Inc. v. Lemko Corp.*, 609 F.Supp.2d 760, 765 (N.D. Ill. 2009) (Rule
10 9(b) “quite plainly applies to section 1030(a)(4)'s requirement that the defendant's acts further the
11 intended fraud.”). Alleged *acts* of fraud are universally subject to the heightened pleading
12 standard. Fed.R.Civ.P.9(b); *Motorola*, 609 F.Supp.2d at 765; *Schreiber Distributing Co. v. Serv-*
13 *Well Furniture Co., Inc.*, 806 F.2d 1393, 1400-01 (9th Cir.1986). The same is true with respect
14 to allegations of conspiracy to commit fraud. *See, e.g., Wasco Prods., Inc., v. Southwall Techs.,*
15 *Inc.*, 435 F.3d 989, 990-91 (9th Cir.2006).

16 At least one district court has found a party must plead factual criteria of the Act
17 consistent with the standard set forth in *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) in order
18 sustain a claim under §1030(a)(4). *Cenveo, Inc. v. Rao*, 659 F.Supp.2d 312, 317 (D. Conn.
19 2009). In *Rao*, the court stated that since the plaintiff had failed to plead the criteria of its
20 §1030(a)(4) claim, the complaint lacked “facial plausibility.” *Id.* (citing *Iqbal*, 129 S.Ct. at
21 1949.) On these grounds, the court granted Rao’s motion to dismiss. The court should do the
22 same here.

23 Facebook cites several district court opinions holding that the “intent to defraud”
24 language of the statute can be pled generally under Rule 9(b). (Dkt. #31 at 6.) MaxBounty does
25 not dispute that. However, those cases do not address the Act’s additional requirement of
26 specific “conduct” that “furthers the intended fraud” at issue here – the language addressed in the
27
28

1 *Motorola* case. As explained below, Facebook fails to plead fraud with particularity with respect
2 to MaxBounty.

3
4
5 **C. Facebook Only Pled Acts Of MaxBounty Customers With**
6 **Particularity, Not MaxBounty's Alleged Fraudulent Acts**

7 Facebook recognizes that it must meet specific pleading standards to sustain its claim for
8 aiding and abetting fraud under California law:

9 A claim of aiding and abetting fraud under California law requires that the
10 plaintiff demonstrate that the defendant had [1] **actual knowledge of the**
11 **primary violation** and [2] **substantially assisted" the primary actor's fraud;** in
12 other words, that the **defendant's actions** were a "substantial factor" in causing
13 harm to plaintiff. *Impac Warehouse Lending Grp. v. Credit Suisse First Boston*
14 *LLC*, 270 Fed. Appx. 570, 572 (9th Cir. 2008) citing *Neilson v. Union Bank of*
15 *Cal., N.A.*, 290 F. Supp. 2d 1101 (C.D. Cal. 2003)).

16 (Dkt. #31 at 8, emphasis and numerals added.)

17 Facebook also agrees that “the heightened pleading standard is described as requiring the
18 ‘who, what, where, when and how’ of the misconduct charged” (Dkt. #31 at 7, *citing Vess v.*
19 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102 (9th Cir. 2003)).

20 Facebook has not pled MaxBounty's (1) “actual knowledge of the primary violation,” (2)
21 “substantial assist[ance]” with the fraud, or (3) “actions” with any level of particularity. Under
22 the heading “Defendant’s Unauthorized and Fraudulent Activities,” Facebook pleads detailed
23 acts of MaxBounty’s customers. In one example, Facebook alleges that one of MaxBounty’s
24 customers fraudulently offered \$250 gift cards through the website www.superb-rewards.net.
25 (Dkt. #1 at ¶¶46-48.) In a different example, Facebook alleges that another of MaxBounty’s
26 customers fraudulently offers free iPads to Facebook users through the website [www.better-](http://www.better-rewards.net)
27 [rewards.net](http://www.better-rewards.net). (Dkt. #1 at ¶¶50-51.) In each case, Facebook explains the alleged frauds in detail –
28 but they are indisputably not acts of MaxBounty. Facebook does not plead with any level of
particularity that MaxBounty had “actual knowledge” of the *alleged frauds*, or that MaxBounty
“substantially assisted” in *those frauds*. What, in particular, were the “defendant’s actions” that

1 were a "substantial factor" in causing harm to Facebook? *Impac Warehouse Lending Grp.*, 270
2 Fed. Appx. at 572 (9th Cir. 2008). The complaint does not say.

3 Facebook's allegations against MaxBounty concerning the alleged frauds are generic and
4 conclusory – precisely the types of allegations that Rule 9(b) and the Ninth Circuit prohibits.
5 *Schreiber Distributing*, 806 F.2d at 1400-01. Facebook alleges that MaxBounty provides
6 "assistance" and "technical support" to its customers. (Dkt. #31 at 8-9.) Yet MaxBounty
7 provides assistance and technical support to *all* of its customers – just as Facebook does for *all* of
8 its Facebook users. Using Facebook's pleading standard, Facebook is equally implicated for the
9 alleged "fraud" or "conspiracy to commit fraud" referenced in the complaint.

10 **MaxBounty is a network intermediary. MaxBounty does not control its customers,**
11 **or their Facebook advertising campaigns.** The complaint does not provide any level of
12 particularity for alleged acts of MaxBounty "assistance" and "technical support" *in furtherance*
13 *of the alleged frauds* – the only acts that could give rise to Facebook's claims against
14 *MaxBounty*. The complaint does not allege any particular act of MaxBounty regarding the \$250
15 gift card example, or the iPad example. The complaint does not identify the "who, what, where,
16 when and how" *at MaxBounty* in connection with those particular examples. *Vess*, 317 F.3d at
17 1102.

18 Facebook relies heavily on *Swift v. Zynga Game Network, Inc.*, No. C-09-05443 SBA,
19 2010 WL 4569889 (N.D. Cal. Nov. 3, 2010). (Dkt. #32-1 at 48-58.) In *Swift*, however, the
20 plaintiff identified and plead specific acts of the defendant. *Swift* used direct quotes from
21 Zynga's CEO in order to show that Zynga's acts were "designed to mislead" consumers.
22 Complaint at 3, *Swift v. Zynga Game Network, Inc.*, No. 4:09-cv-05443 (N.D. Cal. November 17,
23 2009). In the instant case, Facebook has made no such allegations with regard to the actions *of*
24 *MaxBounty*, only the actions of MaxBounty's customers.

25 From reading the complaint, MaxBounty has no idea what acts by MaxBounty constitute
26 acts in furtherance of fraud, conspiracy to commit fraud, or fraud itself. Yet, notice of these
27 details to MaxBounty is the entire purpose of the heightened pleading requirement. *Schreiber*
28

1 *Distributing*, 806 F.2d at 1400 (“We have held that Rule 9(b) ‘requires the identification of the
2 circumstances constituting fraud so that the defendant can prepare an adequate answer from the
3 allegations.’”) Facebook’s deficient pleadings do not satisfy the standard set forth in *Twombly*
4 and *Iqbal*. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Iqbal*, 129 S.Ct. at 1949.

5 Respectfully submitted,

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15 Date: January 29, 2011

CERTIFICATE OF ELECTRONIC SERVICE

1
2 I hereby certify that on January 29, 2011, I electronically filed the foregoing document
3 with the Clerk of the Court for the Northern District of California using the ECF System which
4 will send notification to the following registered participants of the ECF System as listed on the
Court's Notice of Electronic Filing: Joseph Perry Cutler, James R. McCullagh, and Brian Patrick
Hennessy.

5 I also certify that I have mailed by United States Postal Service the paper to the following
6 non-participants in the ECF System: NONE.

7
8 By: /s/John S. LeRoy
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