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3 \*\* E-filed 03-28-2011\*\*  
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8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN JOSE DIVISION**

11  
12 FACEBOOK, INC., a Delaware corporation,

13 Plaintiff,

14 v.

15 MAXBOUNTY, INC., a Canadian corporation,

16 Defendant .  
17

Case Number CV-10-4712-JF

ORDER<sup>1</sup> GRANTING IN PART AND  
DENYING IN PART MOTION TO  
DISMISS

[Re: Docket No. 11]

18  
19 Pursuant to Fed. R. Civ. Pro. 12(b)(6), Defendant MaxBounty Inc. (“MaxBounty”) moves  
20 to dismiss Claims One through Three asserted by Plaintiff Facebook, Inc. (“Facebook”) for  
21 failure to state a claim upon which relief may be granted. The complaint includes claims for: (1)  
22 violation of 15 U.S.C. § 7701 (“CAN-SPAM Act”); (2) violation of 18 U.S.C. § 1030  
23 (“Computer Fraud and Abuse Act”); (3) fraud; (4) tortious interference with contract; (5) breach  
24 of contract; (6) violation of 15 U.S.C. § 1125(c) (federal trademark dilution); and (7) violation of  
25 15 U.S.C. § 1125(a) (false designation of origin). Facebook seeks compensatory, statutory, and  
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28 <sup>1</sup> This disposition is not designated for publication in the official reports.

1 punitive damages. Facebook also requests disgorgement of profits, reasonable costs, and  
2 attorney’s fees.

3 **I. BACKGROUND**

4 Facebook is a popular social networking website with more than 500 million active users.  
5 (Compl. ¶ 10.) It is designed to be “a network that helps people communicate more efficiently  
6 and effectively with their friends, family, and co-workers.” (*Id.*) To become a Facebook user an  
7 individual must provide his or her real identity. (*Id.* at ¶¶ 11-12.) Commercial, political, and  
8 charitable organizations also may establish a presence on Facebook by creating “pages” to which  
9 users can connect their profiles. (*Id.* at ¶ 14.) All users must agree to Facebook’s statement of  
10 rights and responsibilities. Facebook’s advertising guidelines prohibit false, misleading,  
11 fraudulent, and deceptive advertisements. (*Id.* at ¶ 37(c).) They also prohibit advertisements that  
12 are “deceptive or fraudulent about any offer made,” (*Id.* at ¶ 37(d)), and any advertisement that  
13 includes a “discount or free offer . . . must link to a page that clearly and accurately offers the  
14 exact deal the advertisement has displayed . . . .” (*Id.* at ¶37(h).) Moreover, advertisements that  
15 contain, facilitate or promote spam are prohibited, (*Id.* at ¶ 37(j)), and if obtaining the promoted  
16 benefit requires user enrollment in a third-party subscription service then that requirement must  
17 be stated both in the advertisement and on the Facebook page. (*Id.* at ¶ 37(k).)

18 MaxBounty is an advertising and marketing company that uses a network of publishers to  
19 drive traffic to its customers’ websites. Its marketing program is based on a cost-per-action  
20 model (“CPA”). As explained on MaxBounty’s website, “an advertiser under the CPA model  
21 pays only when a specific action is taken on their website. The advertiser defines the action in  
22 advance and only pays when the action is taken . . . [g]enerally speaking, the more involved the  
23 action, the higher a publisher would expect to be paid for generating it.”<sup>2</sup> MaxBounty acts as an  
24 intermediary between its network of publishers (advertisement content creators) and its  
25 customers (third-party advertisers). MaxBounty appears to generate revenue for its CPA  
26 program through a shared compensation agreement with its network of publishers.

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<sup>2</sup>This information is available on <http://www.maxbounty.com/faq.cfm>.

1 Facebook alleges that MaxBounty engaged and continues to engage in impermissible  
2 advertising and commercial activity on Facebook.com. (Compl. ¶¶ 40-41.) It asserts that  
3 MaxBounty misleads its affiliates “into believing that its campaigns are approved by Facebook . .  
4 . .” (*Id.* at ¶ 44.) It claims that MaxBounty facilitates traffic to its contracting advertiser websites  
5 by “provid[ing] technical support to its affiliates on how to create fake Facebook campaigns, and  
6 [by] provid[ing] substantial advance payments to its affiliates that agree to participate in  
7 [MaxBounty’s] Facebook campaigns.” (*Id.*)<sup>3</sup> Facebook also claims that MaxBounty’s conduct  
8 has caused it economic damage, has “tainted the Facebook experience,” resulting in economic  
9 loss to many Facebook users, and has caused and continues to cause significant harm to  
10 Facebook’s reputation and goodwill. (*Id.* at ¶¶ 53-54.)

#### 11 **A. The Alleged Fraudulent Scheme**

12 Facebook alleges that MaxBounty, through its network of affiliates, creates fake  
13 Facebook pages that are intended to re-direct unsuspecting Facebook users away from  
14 Facebook.com to third-party commercial sites. (Compl. ¶¶ 46-52.) It provides examples of two  
15 such pages in the complaint. (*Id.*) Both pages utilize a similarly structured, multi-step scheme:  
16 in the first step, MaxBounty establishes a network of affiliates; in the second step, MaxBounty’s  
17 affiliates create numerous Facebook pages that function like (and in effect are) advertisements; in  
18 the third step, the page displays a message indicating that upon registration a user will be able to  
19 take advantage of a “limited time offer,” such as receiving a gift card or becoming a product  
20 tester for a high-end product (e.g. an Apple iPad); in the fourth step, the Facebook user is  
21 induced by the page and begins the registration process. (*Id.*) The registration process requires  
22 three discrete user actions: (1) to become a “fan” of the page, (2) to invite all of his or her  
23 Facebook friends to join to the page, and (3) to complete additional administrative registration  
24 requirements. (*Id.* at ¶¶ 46, 50.) Upon completion of these requirements, Facebook users are not  
25 sent the promised item but instead are directed “to a domain registered to and managed by  
26 \_\_\_\_\_

27 <sup>3</sup>Facebook alleges that MaxBounty’s technical support includes “content suggestions and  
28 other tools that help and encourage its affiliates create fraudulent and deceptive Facebook pages.”  
(Compl. ¶ 45.)

1 Maxbounty that then redirects the user to a third-party commercial website . . . .” (*Id.* at ¶¶ 47,  
2 50.) The third-party commercial site informs the user that he or she must complete still more  
3 steps in order to obtain the promised item. (*Id.* at ¶¶ 48-52.) Such additional steps include  
4 signing up for numerous “sponsor offers,” which typically are offers for memberships in  
5 subscription services. (*Id.*) Facebook asserts that “[MaxBounty] receive[s] payment for the  
6 traffic it delivers to [the third-party commercial sites] based on the [number of] users who  
7 successfully complete[] the steps to receive a free gift.” (*Id.* at ¶¶ 48, 51.)

### 8 **B. MaxBounty’s Motion to Dismiss**

9 MaxBounty argues that Facebook’s claim under the CAN-SPAM Act is insufficient as a  
10 matter of law because the “customer advertisements Facebook complains about . . . are not email  
11 and therefore cannot give rise to a claim under the Act.” (Mot. to Dismiss, 1:7-11.) Facebook  
12 contends that communications on its website come within the meaning of “electronic mail  
13 messages” under the CAN-SPAM Act. It argues that any other conclusion would be against the  
14 weight of the authority and run counter to “the plain language and legislative purpose of the act.”  
15 (Pl.’s Opp. to MTD, 2:18-24.)

16 MaxBounty also contends that Facebook’s claim under the Computer Fraud and Abuse  
17 Act (“CFAA”) fails to satisfy the heightened pleading standard of Fed. R. Civ. Pro. 9(b), arguing  
18 that a plaintiff must plead with particularity “conduct which furthers the intended fraud.” (Reply  
19 to Pl.’s Opp., 5:3-15.) Facebook asserts that “the majority of courts, and courts of this circuit,  
20 have held that claims under the CFAA are subject only to the notice pleading requirements of  
21 Rule 8(a).” (Pl.’s Opp., 6:9-12.) Even assuming *arguendo* that Rule 9(b) does apply, Facebook  
22 contends that its pleading is sufficiently particular. (*Id.* at 7:4-7.) MaxBounty also argues that  
23 Facebook has failed to plead adequately the elements of its state law claims for fraud, aiding and  
24 abetting, and conspiracy. (MTD, 1:18-23; 6:23-7:13). Facebook contends that its pleading is  
25 sufficiently particular as to those claims as well.

## 26 **II. LEGAL STANDARD**

27 “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a  
28 cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v.*

1 *Centinela Hosp. Center*, 521 F.3d 1097, 1104 (9th Cir. 2008). For purposes of a motion to  
2 dismiss, “all allegations of material fact are taken as true and construed in the light most  
3 favorable to the nonmoving party.” *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-338 (9th  
4 Cir. 1996). However, “[w]hile a complaint attacked by Rule 12(b)(6) motion to dismiss does not  
5 need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his  
6 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of  
7 the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955  
8 (2007) (internal citations omitted). Leave to amend must be granted unless it is clear that the  
9 complaint’s deficiencies cannot be cured by amendment. *Lucas v. Department of Corrections*, 66  
10 F.3d 245, 248 (9th Cir. 1995).

### 11 III. DISCUSSION

#### 12 A. Whether The Communications At Issue Are “Electronic Mail Messages” Under 13 CAN-SPAM Act.

14 The CAN-SPAM Act makes it “unlawful for any person to initiate the transmission, to a  
15 protected computer, of a commercial electronic mail message, or a transaction or relationship  
16 message, that contains, or is accompanied by, header information that is materially false or  
17 materially misleading.” 15 U.S.C § 7704(a)(1). An “electronic mail message” is defined as “a  
18 message that is sent to a unique electronic mail address,” (*Id.* at § 7702(6)), and an “electronic  
19 mail address” means a “destination, commonly expressed as a string of characters, consisting of a  
20 unique user name or mailbox and a reference to an Internet domain (commonly referred to as a  
21 “domain part”), whether or not displayed, to which an electronic mail message can be sent or  
22 delivered.” *Id.* at § 7702(5); *MySpace v. Wallace*, 498 F.Supp.2d 1293, 1300 (C.D. Cal. 2007).

23 MaxBounty argues that the “customer advertisements Facebook complains about are not  
24 e-mail and therefore cannot give rise to a claim under the CAN-SPAM Act.” (MTD, 1:23-24.)  
25 MaxBounty attacks Facebook’s characterization of the messages at issue as “electronic  
26 messages” and contends that strict adherence to the statutory definition of “electronic mail  
27 message” is necessary in evaluating the sufficiency of a CAN-SPAM Act claim. (*Id.* at 3:21-  
28 4:12.)

1 No court in this circuit has addressed directly whether the CAN-SPAM Act applies to  
2 social networking communications under circumstances in which an electronic message is not  
3 delivered to an “inbox.” However, courts in the Central District of California have rejected  
4 similar requests for a narrower construction of the Act in at least two cases. *See MySpace v.*  
5 *Wallace*, 498 F.Supp.2d 1293, 1300 (C.D. Cal. 2007); *see also Myspace v. The Globe.Com, Inc.*,  
6 2007 WL 168696, at \*4 (C.D. Cal. February 27, 2007). In *Myspace v. The Globe.Com*, the court  
7 interpreted the provisions of the CAN-SPAM Act expansively, observing that, “[t]he overarching  
8 intent of this legislation is to safeguard the convenience and efficiency of the electronic  
9 messaging system, and to curtail overburdening of the system’s infrastructure . . . [l]imiting the  
10 protection to only electronic mail that falls within the narrow confines set forth by [d]efendant  
11 does little to promote the Congress’s overarching intent in enacting CAN-SPAM.” *The*  
12 *Globe.Com, Inc.*, 2007 WL at \*4.

13 In *MySpace v. Wallace*, the court again acknowledged expressly that a broad  
14 interpretation of the CAN-SPAM Act “supports the stated purpose of the Act, namely, curtailing  
15 the rapid and detrimental growth of commercial electronic mail that has overburdened electronic  
16 mail systems. *Wallace*, 498 F.Supp.2d at 1300. The court concluded that “[t]o interpret the Act  
17 in the limited manner as advocated by [d]efendant would conflict with the express language of  
18 the Act and would undercut the purpose for which it was passed.” *Id.* This Court agrees that the  
19 Act should be interpreted expansively and in accordance with its broad legislative purpose.

20 Facebook argues that *MySpace v. The Globe.com* and *MySpace v. Wallace* support its  
21 position that “messages sent and received within the Facebook site qualify as ‘electronic mail  
22 messages’ under the Act.” (Pl.’s Opp., 2:23-24.) However, there are significant differences  
23 between the MySpace cases and this one. First, both of the MySpace cases involved “phishing  
24 schemes.” Here, Facebook claims that MaxBounty and its affiliates rely primarily on actions  
25 taken by Facebook users themselves in order to further its alleged scheme. (Compl. ¶¶ 46-52.)  
26 In addition, all of the MySpace.com e-messages were delivered to a MySpace.com user “inbox.”  
27 The defendants’ arguments in those cases detailed the technical differences between e-messages  
28

1 and traditional e-mail. *See MySpace v. Wallace*, 498 F.Supp.2d 1293, 1300 (C.D. Cal. 2007);  
2 *Myspace v. The Globe.Com, Inc.*, 2007 WL 168696, at \*4, (C.D. Cal. February 27, 2007)).

3 Notwithstanding these differences, in both MySpace cases the court rejected the argument  
4 that an “electronic mail message” must be capable of characterization as “e-mail” or must be  
5 directed to a traditional e-mail address or inbox. Instead, the court defined “electronic mail  
6 address” as meaning nothing more specific than “a destination . . . to which an electronic mail  
7 message can be sent, and the references to local part and domain part and all other descriptors set  
8 off in the statute by commas represent only one possible way in which a destination can be  
9 expressed.” *MySpace v. Wallace*, 498 F.Supp.2d 1293, 1300 (C.D. Cal. 2007) (internal  
10 quotations omitted); *see also Myspace v. The Globe.Com, Inc.*, 2007 WL 168696, at \*4 fn 3  
11 (C.D. Cal. February 27, 2007)). The court reasonably concluded that Congress was aware of  
12 “various forms of electronic communications when it drafted the act” and thus the plain language  
13 of “electronic mails address” includes “alternate forms while also recognizing that the most  
14 commonly used form of electronic address was the traditional email with a local part and domain  
15 part (i.e. user@domain.com).” *Wallace*, 498 F.Supp.2d at 1300.

16 Consistent with this approach, in order for the Facebook pages at issue to be considered  
17 “electronic mail messages,” they must be “sent to a unique electronic mail address,” (15 U.S.C. §  
18 7702(6)), that is, to “a destination . . . to which an electronic mail message can be sent . . . .”  
19 (*Id.*) In MaxBounty’s alleged scheme, a user is instructed to effect transmission of Facebook  
20 pages to all of his or her Facebook friends. (Compl. ¶¶ 46, 50.) Based on a number of factors,  
21 including individual user account settings, the pages are transmitted to destinations including the  
22 user’s “wall,” the “news feed” or “home” page of the user’s friends, the Facebook inbox of the  
23 user’s friends, and to users’ external e-mail addresses. (Compl. ¶¶ 10-24; Pl.’s Opp., 4:24-5:3).

24 Significantly, these transmissions require at least some routing activity on part of  
25 Facebook. “While the routing employed by [Facebook] may be less complex and elongated than  
26 those employed by ISP’s, *any* routing necessarily implicates issues regarding volume and traffic  
27 utilization of infrastructure-issues which CAN-SPAM seeks to address.” *The Globe.Com, Inc.*,  
28 2007 WL at \*5. A determination that the communications at issue here are “electronic

1 messages” thus is consistent with the intent of Congress to mitigate the number of misleading  
2 commercial communications that overburden infrastructure of the internet. 15 U.S.C. § 7701(a);  
3 *see also MySpace v. Wallace*, 498 F.Supp.2d 1293, 1300 (C.D. Cal. 2007)). Accordingly, the  
4 Court concludes that Facebook’s CAN-SPAM Act claim is sufficiently pled.

5 **B. Whether Rule 9(b) Applies to Facebook’s CFAA Claim.**

6 Facebook alleges two violations of the CFAA. First, it claims that MaxBounty’s conduct  
7 violates 18 U.S.C. § 1030(a)(4), which provides that:

8 [w]hoever knowingly and with intent to defraud, accesses a protected computer without  
9 authorization, or exceeds authorized access, and by means of such conduct furthers the  
10 intended fraud and obtains anything of value, unless the object of the fraud and the thing  
11 obtained consists only of the use of the computer and the value of such use is not more  
12 than \$5,000 in any 1 year period shall be punished as provided in subsection (c) of this  
13 section.

14 18 U.S.C. § 1030(a)(4). Second, it alleges a violation of 18 U.S.C. § 1030(b), which provides  
15 that “[w]hoever conspires to commit or attempts to commit an offense under subsection (a) of  
16 this section shall be punished as provided in subsection (c) of this section.” 18 U.S.C. § 1030(b).  
17 MaxBounty concedes that the element of scienter (“knowingly and with intent”) may be plead  
18 “generally,” (MTD, 6:18-22; Def’s Reply, 5:7-11),<sup>4</sup> but it contends that the “the Act’s additional  
19 requirement of specific ‘conduct’ that ‘furthers the intended fraud’” is subject to the heightened  
20 pleading requirements of Rule 9(b). (MTD, 6:18-22; Def’s Reply, 5:7-26).<sup>5</sup>

21 This Court has held that fraud “under the CFAA only requires a showing of unlawful  
22 access; there is no need to plead the elements of common law fraud to state a claim under the  
23 Act.” *eBay Inc. v. Digital Point Solutions, Inc.*, 608 F.Supp.2d 1156, 1164 (N.D. Cal. 2009)  
(citing *Hanger Prosthetics & Orthotics, Inc. v. Capstone Orthopedic, Inc.*, 556 F.Supp.2d 1131  
(E.D. Cal. 2008) (“The term ‘defraud’ for purposes of §1030(a)(4) simply means wrongdoing

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24 <sup>4</sup>MaxBounty contends that Facebook’s pleadings meet neither the heightened pleading  
25 standard under Rule 9(b) nor the lesser pleading standard under *Twombly/Iqbal*. (MTD, 7:14-  
26 21.)

27 <sup>5</sup>MaxBounty also argues that Rule 9(b) should apply to a claim brought pursuant to  
28 §1030(b) because the Ninth Circuit has applied a heightened pleading standard to claims of civil  
conspiracy to commit fraud. (MTD, 5:25-26) (citing *Wasco Prods., Inc. v. Southwall Techs.,  
Inc.*, 435 F.3d 989, 990-91 (9th Cir. 2006)).



1 and does not require proof of common law fraud.”)). MaxBounty’s reliance on *Motorola, Inc. v.*  
2 *Lemko Corp.*, 609 F.Supp.2d 760, 765 (N.D. Ill. 2009), is unpersuasive. Although the court in  
3 that case concluded that “Rule 9(b)’s requirement that ‘[i]n alleging fraud . . . , a party must state  
4 with particularity the circumstances constituting fraud,’” and that it “quite plainly applies to  
5 section 1030(a)(4)’s requirement that the defendant’s acts further the intended fraud,” (*Id.* at  
6 765), the decision does not cite any authority for its conclusion. Indeed, approximately two  
7 months after its decision in *Motorola, Inc.* the same court held that:

8           The heightened pleading standards of Rule 9(b) do not apply to the Computer Fraud and  
9 Abuse Act. Neither of the statutory provisions relied upon [1030(a)(2) & (a)(4)] by SKF  
10 require an allegation of fraud; intent to defraud is not the same and does not implicate the  
11 heightened standard. *Motorola*, 609 F.Supp.2d at 764-65 (holding that Rule 9(b) does not  
12 apply to a section 1030(g) claim alleging violations of sections 1030(a)(2) and (a)(4). . . .

13 *SKF USA, Inc. v. Bjerkness*, 636 F.Supp.2d 696, 719 fn 13 (N.D. Ill 2009). The Court sees no  
14 reason to depart from its previous analysis.<sup>6</sup>

### 15           **C. Whether Facebook Has Pled Common Law Fraud Sufficiently.**

#### 16                   **1. Rule 9(b) standard**

17           Under Fed. R. Civ. Pro. 9(b), “[i]n all averments of fraud or mistake, the circumstances  
18 constituting fraud or mistake shall be stated with particularity.” However, intent, knowledge, and  
19 other conditions of the mind may be averred generally. Fed. R. Civ. Pro. 9(b). A complaint  
20 meets this standard if it alleges “‘the time, place, and content of the alleged fraudulent  
21 misrepresentation or omission; the identity of the person engaged in the fraud; and the  
22 circumstances indicating falseness’ or ‘the manner in which [the] representations [or omissions]  
23 were false and misleading.’” *Genna v. Digital Link Corp.*, 25 F.Supp.2d 1038 (N.D. Cal. 1997)  
24 (brackets in original) (quoting *In re GlenFed Sec. Litig.*, 42 F.3d 1541, 1547-58 n.7 (9th Cir.  
1994)). Conclusory allegations that a defendant’s conduct was fraudulent is insufficient. *In re*  
*Worlds of Wonder Securities Litigation*, 694 F. Supp. 1427, 1432 (N.D. Cal. 1988).

#### 25                   **2. Common law fraud**

26  
27           <sup>6</sup>Since a violation of §1030(b) simply involves a claim of conspiracy to violate  
28 §1030(a)(4), a determination that Rule 9(b) does not apply to §1030(a)(4) also applies to claims  
under §1030(b).

1 The elements of a viable claim for fraud under California law, are: (1) a  
2 misrepresentation; (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e. to induce  
3 reliance; (4) justifiable reliance; and (5) resulting damage. *Lazar v. Superior Ct.*, 12 Cal.4th 631,  
4 638 (1996). Generally, fraud allegations may not be based solely on information and belief.  
5 *McFarland v. Memorex Corp.*, 493 F.Supp. 631, 638-39 (N.D. Cal. 1980). This general rule may  
6 be relaxed when facts are peculiarly within the knowledge of the other party. *Fong v. U.S.*, 300  
7 F.2d 400, 409 (9th Cir. 1962) (holding that plaintiff’s allegations were sufficiently plead because  
8 they stated facts primarily within the defendant’s knowledge); *see also Russell v. Epic*  
9 *Healthcare Mngmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999) (finding the 9(b) standard may be  
10 relaxed when facts “relating to the alleged fraud are peculiarly within the perpetrator’s  
11 knowledge . . .”). Even under a more relaxed standard, a plaintiff “must still set forth the  
12 factual basis for his belief,” and mere speculation and conclusory allegations are insufficient to  
13 state a claim. *Russell*, 193 F.3d at 308. Here Facebook alleges no facts concerning who at  
14 MaxBounty had knowledge of the alleged scheme, what those individuals knew, or how  
15 MaxBounty contributed to the alleged fraud. Nor does Facebook identify any of the affiliates  
16 responsible for creating the Facebook pages at issue. Facebook must provide significantly more  
17 factual detail in order for the Court to make a reasoned evaluation as to the plausibility of its  
18 claim.

### 19 3. Aiding and abetting the alleged fraud

20 “A claim for aiding and abetting requires (1) the existence of an independent primary  
21 wrong, (2) actual knowledge by the alleged aider and abettor of the wrong and his or her role in  
22 furthering it, and (3) substantial assistance in the wrong.” *In re 3Com Securities Litigation*, 761  
23 F. Supp. 1411, 1418 (N.D. Cal. 1990) (citing *Harmsen v. Smith*, 693 F.2d 932, 943 (9th Cir.  
24 1982)). “Substantial assistance requires that the defendant’s actions be a ‘substantial factor’ in  
25 causing the plaintiff’s injury.” *Impac Warehouse Lending Group v. Credit Sussie First Boston*  
26 *LLC*, 270 Fed.Appx. 570, 572 (9th Cir. 2008) (internal citation omitted). Here Facebook has  
27 specifically described the primary wrong, which is the creation of fake Facebook pages that are  
28 intended to mislead Facebook users into spamming their friends and subsequently directing them

