Mark B. Mizrahi, State Bar No. 179384
mmizrahi@brookskushman.com
BROOKS KUSHMAN P.C.
6701 Center Drive, Suite 610
Los Angeles, CA 90045
Tel. (310) 348-8200; Fax (310) 846-4799

Thomas A. Lewry (Admitted *Pro Hac Vice*)
tlewry@brookskushman.com
John S. LeRoy (Admitted *Pro Hac Vice*)
jleroy@brookskushman.com
BROOKS KUSHMAN P.C.
1000 Town Center, Twenty-Second Floor
Southfield, MI 48075
Tel. (248) 358-4400; Fax (248) 358-3351

Attorneys for Defendant MaxBounty, Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FACEBOOK, INC., a Delaware corporation, Plaintiff, v. MAXBOUNTY, INC., a Canadian corporation, Defendant.	Case No. 5:10-cv-4712-JF **DEFENDANT MAXBOUNTY, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS COUNTS I, II AND III OF FACEBOOK'S AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)** Hearing Date: Friday, July 8, 2011 Time: 9:00 a.m.

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I. INTRODUCTION

Defendant MaxBounty hosts computer servers "behind the scenes" to manage Internet traffic between Internet *advertisers* and *merchants* who sell goods and services on the Internet. MaxBounty, itself, is not an Internet advertiser or a merchant. The advertisers and merchants are MaxBounty's *customers*, referred to by Facebook as MaxBounty's "affiliates." MaxBounty's servers route and track Internet traffic to ensure that the Internet advertisers who refer buying customers to merchants are paid appropriate referral fees. Some of MaxBounty's advertising customers have, in the past, run advertising campaigns on Facebook.com.

Facebook alleges that three of MaxBounty's advertising customers violated the CAN-SPAM Act, the Computer Fraud and Abuse Act (CFAA), and committed fraud through deceptive advertising on Facebook.com. But Facebook did not sue those customers. Instead, Facebook sued MaxBounty, alleging, *inter alia*, (1) that MaxBounty "induced" the customers to violate the statutes, and (2) that MaxBounty "aided and abetted" the customers' allegedly fraudulent advertising.

MaxBounty moved to dismiss Facebook's CAN-SPAM, CFAA, and fraud claims (Counts I-III). (Dkt. #11.) The Court granted the motion as to the fraud claim for lack of particularity, but permitted Facebook to file an amended complaint. (Dkt. #35.)

In its amended complaint, Facebook revealed, for the first time, its "basis" for suing MaxBounty. Its new allegations make clear that Facebook's CAN-SPAM, CFAA, and fraud claims against MaxBounty are meritless – even assuming that all of Facebook's allegations are true. Facebook's new allegations cannot establish MaxBounty's *indirect* liability as a matter of law, and Facebook omits the same critical details with respect to its "aiding and abetting" fraud claim that the Court found lacking in the original complaint.

Therefore, Counts I (CAN-SPAM), II (CFAA) and III (fraud) of the amended complaint should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6).

II. ANALYSIS

A. Facebook's CAN-SPAM Act Claim (Count I) must be Dismissed

1. The Court Must Dismiss Facebook's Claim That MaxBounty Induced A Violation Of The Act Because The Amended Complaint Does Not Allege Any Relationship Between MaxBounty And The (Unidentified) "Facebook Users" Who Sent The Allegedly Improper Emails

In Count I of the Amended Complaint, Facebook asserts a violation of the CAN-SPAM Act, 15 U.S.C. §7701 *et seq*. (Dkt. #36 at ¶¶63-80.) The CAN-SPAM Act prohibits the transmission of "electronic mail messages" that contain "header information that is materially false or materially misleading." 15 U.S.C. §7704(a)(1). The Act can be violated by "initiat[ing]" or "procur[ing]" the transmission of misleading messages. 15 U.S.C. §7702(9). The Act defines the term "procure" to include "induc[ing] another person to initiate such a message on one's behalf." 15 U.S.C. §7702(12).

The "electronic mail messages" at issue in the Amended Complaint are those sent "between users on the Facebook site," in other words, from one Facebook user to another. (Dkt. #36, Amended Complaint, ¶66.) Facebook does not allege that *MaxBounty* sent any of the "electronic mail messages" at issue, or even that *MaxBounty* had any contact with anyone that sent any of the "electronic mail messages." Facebook never identifies (1) an actual sender, (2) an actual recipient, or (3) the content of any actual electronic mail message that was allegedly transmitted in violation of the Act.

Because the unidentified messages at issue were transmitted by unidentified "Facebook users" and not MaxBounty, MaxBounty cannot be liable for the "origination or transmission of such message" under 15 U.S.C. §7702(9). Because the Amended Complaint fails to (and cannot) allege any relationship of any kind between MaxBounty and the "Facebook users" that sent the unidentified messages, Facebook has failed to show that MaxBounty is liable for procurement or inducement of such messages under 15 U.S.C. §7702(9) and (12). Thus, dismissal pursuant to Fed.R.Civ.P. 12(b)(6) is required.

2. The Court Must Dismiss Count I Because The Amended Complaint Does Not Allege That The (Unidentified) Messages Contained "Materially False or Materially Misleading" "Header Information"

Facebook alleges that (unidentified) email messages "contain header information that is materially false or misleading as to the true initiator of the messages." (Dkt. #36, ¶ 69.) But this allegation merely recites the pertinent language of the CAN–SPAM Act without factual details. Nowhere does Facebook identify the content of any allegedly improper email header or show that the header contained "materially false or materially misleading" information as required to violate 15 U.S.C. §7704(a)(1).

Such bare allegations are insufficient as a matter of law. *BellAtlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1959 (2007) ("[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do.") (Internal quotations and citations omitted.) Facebook's allegations in ¶¶70-72 are not "enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." *BellAtlantic*, 127 S.Ct. at 1959.

Magistrate Judge Seeborg previously dismissed a Facebook CAN-SPAM Act claim for this very reason. *Facebook, Inc. v. ConnectU LLC*, 489 F.Supp.2d 1087, 1094-1095 (N.D.Cal. 2007) (dismissing Facebook's CAN-SPAM claim pursuant to Fed.R.Civ.P. 12(b)(6) because "nothing in the complaint suggests that emails subsequently sent to those addresses included headers that were misleading or false as to the source from which they originated, or in any other manner.") Facebook's allegations in the present case are equally deficient and must be dismissed.

3. Count I's Other Allegations Also Lack Sufficient Factual Detail

Facebook makes other boilerplate allegations in Count I, for example in paragraphs 70-74 of its Amended Complaint. While "a court must accept as true all of the allegations contained in a complaint . . .[, t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2008) (citation omitted). For this reason, "a court considering a motion to dismiss can choose to begin by

identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id*. at 1950.

The key allegations in Count I are "[t]hreadbare recitals of the elements of a cause of action," not factual pleadings. Accordingly, the Court must ignore them when deciding this Rule 12(b)(6) motion. But without those allegations, Count I does not state a cause of action, so it must be dismissed.

B. Facebook's Computer Fraud and Abuse Act Claim (Count II) Fails Because MaxBounty And Its Customers Were Authorized To *Access* Facebook's Computers and Post Pages on Facebook.com

The CFAA "was originally designed to target hackers who accessed computers to steal information or to disrupt or destroy computer functionality." *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1130 (9th Cir. 2009). Section 1030(a)(4) states:

> (a) Whoever-
>
> * * *
>
> (4) knowingly and with intent to defraud, **accesses a protected computer without authorization, or exceeds authorized access**, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period;

(18 U.S.C. §1030(a)(4), emphasis added.)

In *LVRC*, the Ninth Circuit made clear that the "without authorization" language of the Act does not prohibit *authorized* computer access, regardless of any alleged wrongdoing that may be done following such authorized access.

> [F]or purposes of the CFAA, when an employer authorizes an employee to use a company computer subject to certain limitations, the employee remains authorized to use the computer even if the employee violates those limitations. It is the employer's decision to allow or to terminate an employee's authorization to access a computer that determines whether the employee is with or "without authorization."

LVRC, 581 F.3d at 1133. Although this is not an employment case, the same principles apply. It is Facebook's decision "to allow or to terminate" MaxBounty or its customers' access to Facebook's computers.

"While the CFAA itself does not define the terms 'authorization' or 'without authorization,' the Ninth Circuit has interpreted the term 'without authorization' to mean 'without any permission at all.'" *AtPac, Inc. v. Aptitude Solutions, Inc.*, 730 F.Supp.2d 1174, 1179 (E.D. Cal. 2010), quoting *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1133 (9th Cir. 2009). In *AtPac*, the Eastern District of California granted the defendants' Rule 12(b)(6) motion to dismiss AtPac's CFAA claim under §1030(a)(4) because the defendants had permission to access the computers at issue – they had used the passwords that the plaintiff had provided them for access to the computer. *AtPac*, 730 F.Supp.2d at 1180-1181.

> What [defendant] chose to do once it accessed the AtPac directories-what its intent in accessing those portions of the ER-Recorder server was-is irrelevant. The CFAA simply does not apply to those who have authority to access specific parts of a computer but do so with an improper purpose. While [defendants] actions may have violated the terms of the License Agreement or other contract with AtPac and may have constituted an inappropriate use of the information, they did not violate the CFAA. *See State Analysis, Inc. v. American Financial Services Assoc.*, 621 F.Supp.2d 309 (E.D.Va.2009).

AtPac, 730 F.Supp.2d at 1181.

There is no dispute that MaxBounty is "a registered Facebook user." (Dkt. #36, Amended Complaint at ¶40.) Thus, MaxBounty accessed Facebook *with* authorization, not "without authorization" as prohibited by the statute. *LVRC*, 581 F.3d at 1133. The same is true for MaxBounty's customers. Otherwise, they could not "post" their promotions on "Facebook Pages" as they were alleged to have done in the Amended Complaint. (Dkt. #36, Amended Complaint, ¶¶ 43-44, 46-47.) The Amended Complaint does not allege these entities were unauthorized "hackers" that accessed Facebook without authorization from Facebook.

Facebook also alleges that MaxBounty's customers violate 18 U.S.C. §1030(a)(4) by operating "in excess of authorization" as defined by Facebook's terms and conditions. (Dkt. #36, ¶83.) The CFAA provides: "the term 'exceeds authorized access' means to access a computer with authorization and to use such access *to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter*." 18 U.S.C. § 1030(e)(6) (italics added).

In *LVRC Holdings*, the Ninth Circuit stated, in *dicta*, that "[a] person who 'exceeds authorized access,' has permission to access the computer, but accesses information on the computer that the person is not entitled to access." 581 F.3d at 1133 (citations omitted). This statement was discussed in *AtPac* as follows:

> [I]f she has authority to access information on a computer then she cannot violate the CFAA by accessing it. *See United States v. Nosal*, No. 08-0237, 2010 WL 934257, at *6 (N.D.Cal. Jan. 6, 2010) ("If a person is authorized to access the 'F' drive on a computer or network but is not authorized to access the 'G' drive of that same computer or network, the individual would 'exceed authorized access' if he obtained or altered anything on the 'G' drive."). Indeed, the *LVRC* court wrote in dicta that, had the issue been before it, it would have also found that Brekka had not exceeded authorized access when he downloaded files from his employer's computer and sent them to his wife during his employment and continued to access his employer's website with his administrative log-in after his employment ended. 581 F.3d at 1135 n. 7.

AtPac, 730 F.Supp.2d at 1180-1181.

The Amended Complaint identifies three sets of terms and conditions that MaxBounty allegedly induced its customers to violate: (1) Facebook's "Statement," (2) Facebook's "Pages Terms" and (3) Facebook's "Advertising Guidelines." (Dkt. #36, Amended Complaint, ¶¶83-84, citing Exhibits B, C and D, respectively.) However, the Amended Complaint does not identify any provision from these documents defining permissible or impermissible *access* to Facebook's computers, let alone any *access* provision that MaxBounty violated or induced its customers to violate. The Amended Complaint does not allege that MaxBounty induced its customers to "use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter" as the Act requires to "exceed authorized access." 18 U.S.C. §1030(e)(4) and (6). Facebook does not allege that MaxBounty's customers "accessed" anything they were not permitted to access, "obtain[ed]" something that the terms and conditions prohibited them from "obtaining," or that they "alter[ed]" something that the terms prohibited them from altering.

Facebook's allegations that its terms and conditions were somehow violated do not, without more, give rise to a claim under the CFAA. As the court in *AtPac* held "[w]hile [defendants] actions may have violated the terms of the License Agreement or other contract

with AtPac and may have constituted an inappropriate use of the information, they did not violate the CFAA." *AtPac*, 730 F.Supp.2d at 1181. Thus, Count II must be dismissed.

C. Facebook's Fraud Claim (Count III) Fails Because It Contains No Factual Allegations MaxBounty Has Engaged In Any Fraud

In its Order dismissing Facebook's original fraud claim, the Court held:

> Facebook alleges no facts concerning who at MaxBounty had knowledge of the alleged scheme, what those individuals knew, or how MaxBounty contributed to the alleged fraud. Nor does Facebook identify any of the affiliates responsible for creating the Facebook pages at issue. Facebook must provide significantly more factual detail in order for the Court to make a reasoned evaluation as to the plausibility of its claim.

(Dkt. #35, Order at 10.)

In the Amended Complaint, Facebook alleges that MaxBounty's customers – not MaxBounty – "generate traffic for Defendant's customers through fraudulent and deceptive means, including false and deceptive promotions posted to Facebook Pages." (Dkt. #36, Amended Complaint, ¶43.) The Amended Complaint does not include any *factual* allegations whatsoever that MaxBounty, itself, has engaged in any fraud. Thus, Facebook's conclusory allegation in Count III that "Defendant intended to and in fact did defraud Facebook" lacks any factual support in the Amended Complaint, and must be dismissed. Fed.R.Civ.P. 9(b); *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1400-01 (9th Cir.1986) (compliance with Rule 9(b) requires a statement of "the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation.").

The Supreme Court in *Iqbal* addressed this very issue. Iqbal argued that "the Federal Rules expressly allow him to allege petitioners' discriminatory intent 'generally,' which he equates with a conclusory allegation." *Iqbal*, 129 S.Ct. at 1954. Rejecting Iqbal's argument, the Court held "the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context." *Id*. The Court explained that "generally" does not mean "conclusory":

> It is true that Rule 9(b) requires particularity when pleading "fraud or mistake," while allowing "[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally." But "generally" is a relative term. In the context

> of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. **It does not give him license to evade the less rigid-though still operative-strictures of Rule 8.** [Citation omitted.] **And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label "general allegation," and expect his complaint to survive a motion to dismiss.**

Id. (emphasis added).

Facebook's fraud claim boils down to its allegation that MaxBounty "aided and abetted" fraud allegedly committed by MaxBounty's customers, referred to in the complaint as "affiliates."

> Through the actions described in the preceding paragraphs, Defendant aids and abets its affiliates' fraud. Defendant has actual knowledge of its affiliates' fraud and provides substantial assistance in furtherance of the fraud by assigning affiliates who are generating a significant amount of Facebook traffic to specific Facebook Affiliate Managers like Adam Harrison, who review affiliates' Pages and **give suggestions for deals and content designed to maximize traffic to Defendant's customers' websites**.

(Dkt. #36, ¶104, emphasis added.)

Facebook alleges that Mr. Harrison provided its customers with unidentified "suggestions" that are "designed to maximize traffic" to MaxBounty's customers. Elsewhere in the complaint, Facebook alleges that Mr. Harrison (1) provided one of its affiliates with "technical help for designing Facebook Pages and for increasing the number of Facebook users who would receive notice and act upon the offers presented," and (2) encouraged the customer to "to run other Facebook campaigns for other similar offers and to use techniques that were designed to increase the effectiveness of these campaigns." (Dkt. #36, ¶52.) These non-specific allegations regarding Mr. Harrison are clearly not instances of aiding and abetting fraud.

In the Order dismissing Facebook's original fraud claim, the Court held:

> A claim for aiding and abetting requires (1) the existence of an independent primary wrong, (2) **actual knowledge by the alleged aider and abettor of the wrong and his or her role in furthering it**, and (3) **substantial assistance in the wrong**." *In re 3Corn Securities Litigation*, 761 F. Supp. 1411, 1418 (N.D. Cal. 1990) (*citing Harmsen v. Smith*, 693 F.2d 932, 943 (9th Cir. 1982)). "Substantial assistance requires that the defendant's actions be a 'substantial factor' in causing the plaintiff's injury." *Impac Warehouse Lending Group v. Credit Sussie First Boston LLC*, 270 Fed.Appx. 570, 572 (9th Cir. 2008) (internal citation omitted).

(Dkt. #35 at 10, emphasis added.)

Facebook's Amended Complaint contains no allegation that Mr. Harrison took any *particular* "role in furthering [the alleged fraud]" or "substantial assistance in the wrong" as the law and the Federal Rules require. Just as the Court found with Facebook's original fraud claim,

> neither the second or third element of aiding and abetting is adequately pled. Facebook claims conclusorily that MaxBounty knows its affiliates are creating misleading Facebook pages and aids and abets this activity by "providing technical support, suggestions for Pages, and financial incentives to affiliates." (Opp. to MTD, 8:18-21; see also Compl. 11 43-45, 85-88). These allegations merely provide a "formulaic recitation of a cause of action" and lack factual support. *Bell Atl. v. Twombly*, 550 U.S. 544, 555 (2007).

(Dkt. #35 at 11.)

Facebook has added only generalized allegations to its Amended Complaint, none of which state a claim against MaxBounty for fraud, or for aiding and abetting fraud. Count III should be dismissed for failure to state a claim upon which relief can be granted.

III. CONCLUSION

For the above reasons, Counts I – III of the Amended Complaint should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6).

Respectfully submitted,

By: /s/ Thomas A. Lewry
Thomas A. Lewry (Admitted *Pro Hac Vice*)
tlewry@brookskushman.com
John S. LeRoy (Admitted *Pro Hac Vice*)
jleroy@brookskushman.com
BROOKS KUSHMAN P.C.
1000 Town Center, Twenty-Second Floor
Southfield, MI 48075
Tel. (248) 358-4400; Fax (248) 358-3351

Mark B. Mizrahi, State Bar No. 179384
mmizrahi@brookskushman.com
BROOKS KUSHMAN P.C.
6701 Center Drive, Suite 610
Los Angeles, CA 90045
Tel. (310) 348-8200; Fax (310) 846-4799

Attorneys for Defendant, MaxBounty, Inc.

Date: May 13, 2011

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on May 13, 2011, I electronically filed the foregoing document with the Clerk of the Court for the Northern District of California using the ECF System which 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.

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

By: /s/ Thomas A. Lewry
tlewry@brookskushman.com
BROOKS KUSHMAN P.C.

Attorneys for Defendant, MaxBounty, Inc.