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

19 FACEBOOK, INC., a Delaware
 20 corporation,

21 Plaintiff,

22 v.

23 MAXBOUNTY, INC., a Canadian
 24 corporation,

25 Defendant.

26 Case No. 5:10-cv-4712-JF

27 **DEFENDANT MAXBOUNTY, INC.'S**
 28 **REPLY 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.

REPLY IN SUPPORT OF MAXBOUNTY'S
 MOTION TO DISMISS AMENDED COMPLAINT
 Case No. 5:10-cv-4712-JF

1 **A. MaxBounty’s Motion is Not a Motion for Reconsideration; It is**
2 **Based on New Allegations Made in Facebook’s Amended Complaint**

3 The Court ruled that parts of Facebook’s original Complaint were inadequate. (Dkt. #35
4 at 10-11.) It said, “Facebook must provide significantly more factual detail” (*Id.* at 10.)
5 Facebook amended its Complaint adding, *inter alia*, new paragraphs 49-53. (Dkt. #36.) Those
6 new paragraphs detail, for the first time, Facebook’s theories about MaxBounty’s “role” in the
7 alleged wrongdoing. Facebook’s CAN-SPAM claim (Count I), CFAA claim (Count II), and its
8 common law fraud claim (Count III) all arise from the same nucleus of facts regarding
9 MaxBounty’s alleged role, which Facebook has now detailed for the first time. Facebook now
10 alleges that MaxBounty induced unidentified Facebook users to send unidentified false or
11 misleading messages to other unidentified Facebook users. **Facebook’s newly detailed**
12 **allegations reveal that MaxBounty had no role that could possibly give rise to liability**
13 **under the CAN-SPAM Act, the CFAA, or for common law fraud.**

14 Facebook contends that it “made no substantive changes to its CAN-SPAM or CFAA
15 claims.” (Amended Complaint, Dkt. #36 at 1.) That is incorrect. Facebook incorporated the
16 new allegations of ¶¶ 49-53 into its CAN-SPAM and CFAA counts, as both counts turn on
17 MaxBounty’s alleged role in the sending of deceptive messages over Facebook. (*See*, Amended
18 Complaint, ¶63 and ¶81.) In Facebook’s Response Brief, Facebook cited its new allegations
19 when discussing on its CAN-SPAM claim. (Resp. at 2-6, citing Amended Complaint “¶¶50-53,”
20 “¶49,” and “¶¶49-53.”) Similarly, Facebook’s Response Brief cites its new allegations when
21 discussing its CFAA claim. (Response, Dkt. #42 at 6-7, citing Amended Complaint “¶¶42-57,”
22 “¶53”.) Facebook cannot deny that its new allegations are pertinent to its CAN-SPAM and
23 CFAA claims, as well as its fraud claim. The Amended Complaint comfortably includes a
24 “material difference in fact or law exists from that which was presented to the Court before entry
25 of the first order.” L.R. 7-9(b).

1 **B. Facebook’s New Allegations Confirm That MaxBounty Did Not Send**
2 **or Induce the Sending Of False or Misleading Messages in Violation**
3 **of the CAN-SPAM Act (Count I)**

4 Facebook states in its Response that MaxBounty customer Mitchell Fillmore allegedly
5 sent a “message” in violation of the Act. (Dkt. #42 at 4.) Facebook cites new allegations ¶¶ 50-
6 53 of the Amended Complaint to support that contention. However, those allegations do not
7 identify any “message” that Mr. Fillmore allegedly sent using Facebook, let alone a “message”
8 having “header information” that included “materially false or materially misleading”
9 information as the CAN-SPAM Act requires. 15 U.S.C. §7704(a)(1).

10 Facebook argues that MaxBounty is indirectly liable for the transmission of the
11 unidentified messages among Facebook users because MaxBounty acted “intentionally to pay or
12 provide other consideration to, or induce, another person to initiate such a message on one’s
13 behalf.” (Dkt. #42 at 4.) However, the Amended Complaint does not identify any *prima facie*
14 evidence of a relationship between MaxBounty and any (unidentified) sender of any
15 (unidentified) messages. The Amended Complaint identifies no “pay,” no “consideration,” and
16 no “inducement” between MaxBounty and the unidentified senders of the messages at issue.

17 Facebook has mined an FTC report for the term “inducement” to make an analogy to the
18 present case. But Facebook ignores the different context used in the FTC Report. (Dkt. #42 at
19 5.) In the example provided in the Report, the “seller or marketer” is inducing the “affiliate”
20 *who is the actual sender of the e-mail message at issue*. That differs from the present case,
21 where MaxBounty has no relationship whatsoever with the actual sender of the messages at
22 issue. The FTC report makes MaxBounty’s point, not Facebook’s.

23 Facebook also alleges that “MaxBounty promised to provide advance payments to
24 affiliates who engaged in deceptive campaigns on Facebook.” (Dkt. #42 at 5.) Even if that was
25 true (and it is not), the CAN-SPAM Act does not address “campaigns on Facebook.” The Act
26 addresses “electronic mail messages” that include “header information” having “materially false
27 or materially misleading” information – fundamental criteria which the Amended Complaint
28 overlooks entirely. 15 U.S.C. §7704(a)(1).

1 The allegedly misleading “electronic mail messages” at issue in Facebook’s CAN-SPAM
2 claim are not messages sent by MaxBounty, or even MaxBounty’s customers. The messages are
3 unidentified messages exchanged between unidentified Facebook users – two steps away from
4 MaxBounty. Because Facebook did not identify any of the messages that are at issue, it has not
5 shown that the messages included a “header” containing “materially false or materially
6 misleading” information as required to violate the CAN-SPAM Act. 15 U.S.C. §7704(a)(1).
7 Facebook has thus failed to state a claim. *Facebook, Inc. v. ConnectU LLC*, 489 F.Supp.2d
8 1087, 1094-1095 (N.D.Cal. 2007). Facebook recites the language of the statute, but that is
9 insufficient to state a claim as a matter of law. *BellAtlantic Corp. v. Twombly*, 127 S.Ct. 1955,
10 1959 (2007); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2008).

11
12 **C. Facebook’s Failed to Identify Any Facebook Term That MaxBounty**
13 **Allegedly Violated Giving Rise to Its CFAA Claim (Count II)**

14 Facebook cites the recent 9th Circuit decision in *U.S. v. Nosal* in an attempt to distinguish
15 the 9th Circuit’s still-valid law of *LVRC Holdings, LLC v. Brekka*. (Dkt. #42 at 6-7.) While
16 those cases may be distinguished on the facts, that distinction is irrelevant to this case. In *U.S. v.*
17 *Nosal*, the 9th Circuit held that one may exceed his or her authorized access to a computer by
18 violating use restrictions applicable to his or her use of that computer. 2011 WL 1585600, at *6
19 (9th Cir. 2011). In *Brekka*, the 9th Circuit held that a CFAA violation cannot occur if use
20 restrictions are not violated. 581 F.Supp.2d 1127 (9th Cir. 2009).

21 The Amended Complaint does not identify a single Facebook use restriction that
22 MaxBounty has violated. As with Facebook’s CAN-SPAM allegations, Facebook alleges that
23 MaxBounty induced its customers to induce unidentified “Facebook users” to send deceptive
24 messages in violation of Facebook’s terms. (Dkt. #42 at 7.) Regardless of whether those
25 unidentified users sent deceptive messages or not, MaxBounty (a behind-the-scenes computer
26 server) is two steps away. MaxBounty had no role in the alleged deceptive messages sent
27 between Facebook users. Facebook admittedly *hopes* to find some connection between
28

1 MaxBounty and the messages in *discovery* – because it admittedly has no *prima facie* evidence
2 of any connection:

3 In discovery, Facebook expects to uncover the specific techniques created and
4 offered by MaxBounty that were designed to spread spam and evade Facebook’s
detection and abatement efforts.

5 (Dkt. #42 at 7.)

6 Facebook has failed to state a claim under the CFAA against MaxBounty.

7
8 **D. Facebook’s New Allegations Confirm That MaxBounty has Not**
9 **Committed Fraud, or Aided and Abetted, Fraud (Count III)**

10 Facebook’s primary allegation of fraud is that Adam Harrison, a MaxBounty employee,
11 “**encourages and directs [MaxBounty] affiliates to make specific changes to their**
12 **promotional Facebook Pages in order to make them more profitable to [MaxBounty].**”

13 (Dkt. #42 at 9, citing Amended Complaint ¶ 49, bold added by Facebook.) What is fraudulent
14 about increasing profit? Facebook makes unsubstantiated allegations concerning Mr. Harrison’s
15 allegedly fraudulent statements made to MaxBounty’s customers such as Mr. Fillmore – not
16 Facebook or its customers. (*Id.* at 9-10 citing ¶¶51-53.) For example, Facebook alleges that Mr.
17 Harrison “mislead its affiliates into believing that Defendant's campaigns are approved by
18 Facebook.” (*Id.* at ¶51.) However, even if this allegation was true, Facebook does not have
19 standing to sue MaxBounty for alleged fraudulent statements MaxBounty made to Mr. Fillmore
20 or other MaxBounty customers.

21 Furthermore, Facebook’s allegation that MaxBounty aided and abetted fraud committed
22 by MaxBounty’s customers is based on rank speculation. (*Id.* at 9 citing ¶¶50.) The Amended
23 Complaint identifies no *actual instances* of MaxBounty efforts to induce fraud committed by
24 another.

25 In an effort to substantiate “MaxBounty's knowledge of the wrong, MaxBounty's role in
26 furthering the wrong, and MaxBounty's substantial assistance in the wrong” as the Court ordered
27 in its dismissal of Facebook’s fraud claim, Facebook identifies Mr. Harrison’s alleged statement
28

1 to Mr. Fillmore that “MaxBounty approved of the specific techniques that the affiliate had used.”
2 (*Id.* at 10.) Even assuming, for purposes of this motion, that this is true, it is hardly evidence of
3 “MaxBounty's knowledge of the wrong, MaxBounty's role in furthering the wrong, and
4 MaxBounty's substantial assistance in the wrong.” MaxBounty did not know of any wrongdoing
5 and, as explained above, MaxBounty has never believed, and does not believe today, that it has
6 done anything wrong or induced anyone to commit fraud.

7 Facebook has failed to state a claim of fraud as to MaxBounty. MaxBounty is nothing
8 more than a computer server sitting in the background monitoring traffic as it passes across the
9 internet, including traffic through Facebook.com. MaxBounty does not send messages to anyone
10 over Facebook, or engage in marketing campaigns on Facebook. To the extent Facebook
11 contends that Facebook pages or communications on Facebook are fraudulent, Facebook’s claim
12 is with the authors of those pages and communications – not MaxBounty.

13 Facebook’s fraud claim should be dismissed.

14 Respectfully submitted,

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24 ***Attorneys for Defendant, MaxBounty, Inc.***

25 Date: June 24, 2011
26
27
28

CERTIFICATE OF ELECTRONIC SERVICE

1
2 I hereby certify that on June 24, 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/ Thomas A. Lewry
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9 **BROOKS KUSHMAN P.C.**

Attorneys for Defendant, MaxBounty, Inc.