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9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

11

12 HOLOMAXX TECHONOLOGIES CORPORATION, a Pennsylvania S Corporation,	Case No.: CV 10-04926-JF
13 Plaintiff,	**OPPOSITION TO YAHOO!, INC.'S MOTION TO DISMISS FIRST AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**
14 vs.	
15 YAHOO!, INC., a Delaware Corporation	
16 Defendant.	
17	Date: July 15, 2011
18	Time: 9:00 a.m.
	Judge: Hon. Jeremy Fogel
19	Court: Courtroom 3, 5th Floor

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Fed R. Civ. P. 12(b)(6) 1

Plaintiff Holomaxx Technologies Corporation ("Holomaxx") hereby opposes Defendant Yahoo!, Inc.'s ("Yahoo") Motion to Dismiss First Amended Complaint ("FAC") pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Motion to Dismiss".)

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The gravamen of this action is that Yahoo is intentionally killing Holomaxx's business by blocking its legitimate commercial emails – and the heart of the action is whether a behemoth like Yahoo can kill its small business, internet advertising competitors like Holomaxx with impunity. This latest effort by Yahoo to squelch Holomaxx's second attempt at seeking redress against Yahoo's abuse of power must be denied given the abundance of factual allegations demonstrating that Yahoo's actions were motivated by anti-competitive interests.

In response to Holomaxx's FAC, Yahoo has brought a Motion to Dismiss on the grounds that it is immune from liability pursuant to the Communications Decency Act ("CDA") and that all of Holomaxx's claims are factually deficient. Yahoo's arguments fail for a multitude of reasons.

Yahoo cannot be afforded CDA immunity because Holomaxx's emails are not subjectively or objectively "harassing" or "otherwise objectionable." The volume of Holomaxx's emails that were considered "unwanted" was infinitesimal when compared to the 99.9% of Holomaxx's unobjectionable emails to Yahoo users. In addition, the volume of emails Holomaxx sent per day and per week to each consumer was well below industry standards. Furthermore, Yahoo acted in the "absence of good faith" when it targeted Holomaxx's emails specifically, refused to act within the guidelines set forth by the industry group to which it belongs, and was spurred by anti-competitive interests.

Second, Holomaxx has alleged sufficient facts to state a claim for all its causes of action. For its Intentional Interference with Contract ("IIC") and Intentional Interference with Prospective Business Advantage ("IIPBA") claims, Holomaxx does not need to allege that Yahoo knew the names of Holomaxx's specific business relationships; it is sufficient that it knew that Holomaxx had certain business relationships that were dependent upon its emails being delivered to Yahoo users. In addition, Yahoo was not justified in blocking Holomaxx's emails because it was

1 motivated by anti-competitive interests rather than an interest to protect its users from spam. In
2 addition, Holomaxx has alleged sufficient facts to show that Yahoo had intent to interfere with
3 Holomaxx's business relationships and that it engaged in independent wrongful conduct.
4 With respect to its violation of 18 U.S.C. sections 2510, *et seq*. ("Federal Wiretap Act" or
5 "FWA"), Yahoo is not entitled to any immunity because immunity only applies to individuals and
6 Yahoo's actions were based upon anti-competitive interests and unfair acts. In addition, Holomaxx
7 has sufficiently alleged the "interception" element of the claim. Similarly, Yahoo is not immune
8 from liability pursuant to Holomaxx's 18 U.S.C. sections 2701, *et seq*. ("Stored Communications
9 Act" or "SCA") claim and Holomaxx has alleged facts to show that its private communications
10 were accessed by Yahoo in excess of authorization. Finally, with respect to the violation of 18
11 U.S.C. sections 1030, *et seq*. ("Computer Fraud and Abuse Act" or "CFAA"), Yahoo can be liable
12 for accessing its servers if it exceeds authorized access in doing so, such as it did here when it
13 accessed Holomaxx's emails not to protect Yahoo email users from spam but to snuff-out
14 Holomaxx has a competitor.
15 For the violation of California Penal Code section 630, *et seq*., ("Penal Code"), the relevant
16 penal code sections do not exclude electronic communications by its terms or as interpreted by the
17 courts. Finally, Yahoo is liable for the violation of Business and Professions Code sections 17200,
18 *et seq*. ("Unfair Business Practices") claim because its actions were unlawful, unfair and they
19 caused Holomaxx to suffer an injury-in-fact and loss of money and property as a result.
20 For these reasons, the Court should deny Yahoo's Motion to Dismiss. [1]

21 **II. <u>LEGAL STANDARD</u>**

22 For purposes of a motion to dismiss, the allegations of material fact in a complaint are taken
23 as true and construed in the light most favorable to the plaintiff. *Cousins v. Lockyer*, 568 F.3d
24 1063, 1067 (9th Cir. 2009.) Dismissal is appropriate "only where the complaint lacks a cognizable
25
26 [1] As set forth herein, Holomaxx has stated a claim for all causes of action. If the Court finds the allegations of the FAC insufficient in any respect, Holomaxx requests leave to amend. "Leave to
27 amend must be granted unless it is clear that the complaint's deficiencies cannot be cured by amendment." *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995).
28

legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.,* 521 F.3d 1097, 1104 (9th Cir. 2008). Federal Rule of Civil Procedure (“FRCP”) 8(a)(2) requires only “a short and plain statement of the claim”; a complaint “does not need detailed factual allegations,” but “must contain “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). “A claim has **facial plausibility** when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

Importantly, “the federal rules allow plaintiffs to plead inconsistent claims and theories.” *SOAProjects, Inc. v. SCM Microsystems, Inc.,* 2010 U.S. Dist. Lexis 133596, *24 (N.D. Cal. 2010); *PAE Gov't Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856, 860 (9th Cir. 2007) (parties are often uncertain about the facts and the law when filing a complaint: “In recognition of these uncertainties,” we allow pleadings in the alternative “even if the alternatives are mutually exclusive”.)

Moreover, where the facts necessarily lie solely within the knowledge of the defendant, courts have permitted limited discovery. *Santiago v. Walls*, 599 F.3d 749, 758-59 (7th Cir. 2010); *Jones v. AIG Risk Mgmt.*, 2010 U.S. Dist. Lexis 81662, *13-14 (N.D. Cal. 2010) (where facts known only by defendants, plaintiff should be afforded discovery and opportunity to amend pleadings.) “The Court has the ability to permit such discovery even in the face of dismissal for failure to satisfy *Iqbal* and *Twombly* where” relevant evidence is solely within the province of Defendants, leaving open the possibility of further amendment.” *Santiago*, 599 F.3d at 758-59.

III. ARGUMENT

A. Yahoo Is Not Protected by Immunity Pursuant to the CDA

In blocking Holomaxx's emails, Yahoo played two roles: as judge concerning what emails should be filtered in the best interest of its users, and as a competitor in internet advertising with a vested interest in removing Holomaxx from the email advertising marketplace. This dual role created a clear conflict-of-interest and, Yahoo's decision to permanently block the emails regardless of their legitimacy, a severe abuse of market power. In promulgating CDA immunity, it

1 was clearly not Congress' intent to give Internet Service Providers ("ISPs") playing this dual role
2 the power to abuse its position against its competitors without any liability.[2] *See* 47 U.S.C. §
3 230(b)(2) ("It is the policy of the United States… (2) to preserve the vibrant and competitive free
4 market that presently exists for the Internet…") Indeed, to find Yahoo immune under the CDA
5 would be a debasement of the spirit and express intent of the CDA.

6 As it did in its prior Motion to Dismiss, Yahoo once again argues that it is immune under
7 the CDA and therefore not subject to liability for Holomax's CFAA, IIC, IIPBA,
8 Wiretapping/Eavesdropping penal violations and Unfair Business Practices claims. This time,
9 Yahoo's arguments fail because the FAC adds important factual allegations that: (1) the emails
10 sent by Holomaxx were not "harassing" or "objectionable" under the CDA; and (2) Yahoo acted in
11 the absence of good faith when it blocked Holomaxx's emails. As such, Yahoo is not entitled to
12 immunity under the CDA.

13 1. The emails sent by Holomaxx were neither "harassing" nor "otherwise
14 objectionable" under the meaning of the CDA.

15 Under section 230(c)(2)(A) of the CDA ("Section 230(c)(2)(A)"), immunity is afforded a
16 service provider if it blocks content it determines to be "obscene, lewd, lascivious, filthy,
17 excessively violent, harassing or otherwise objectionable." 47 U.S.C. §230(c)(2)(A). The Supreme
18 Court has already found that, in a statute where a general term follows specific terms, one must
19 presume that the general term is limited in meaning by the preceding terms. *Begay v. United States,*
20 553 U.S. 137, 142 (2008) ("If Congress meant the latter, i.e., if it meant the statute to be all-
21 encompassing, it is hard to see why it would have needed to include the examples at all."); *Hall*
22 *Street Assocs., L.L.C. v. Mattel, Inc*., 552 U.S. 576, 586 (2008) ("Under [the cannon of *ejusdem*
23 *generis*],when a statute sets out a series of specific items ending with a general term, that general
24 term is confined to covering subjects comparable to the specifics it follows.") Pursuant to the
25 reasoning in *Begay* and *Hall Street Associates*, the term "otherwise objectionable" as it appears in
26

27 [2] In fact, it is doubtful that Congress even considered ISPs acting in this dual capacity when drafting the CDA.
28

Section 230(c)(2)(A), must be construed to be directly related to any of the seven, specific terms preceding it, i.e. obscene, lewd, lascivious, filthy, excessively violent, or harassing. *See also National Numismatic Certification LLC v. eBay, Inc.*, 2008 U.S. Dist. LEXIS 109793 (M.D. Fla. 2008); *Goddard v. Google, Inc.*, 2008 U.S. Dist. LEXIS 101890 (N.D. Cal., Dec. 17, 2008.)

As the Court acknowledged in its Order granting Yahoo's Motion to Dismiss Holomaxx's original complaint ("Order"), the Ninth Circuit has expressed concern about giving ISPs like Yahoo unfettered discretion to block content without consequence by hiding behind CDA immunity. (*See* Dkt. 34 at 7.) (citing *Zango v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1178. (9th Cir. 2009) (Fisher, J., concurring) ("a blocking software provider might abuse that immunity to block content for anticompetitive purposes or merely at its malicious whim, under the cover of considering such material "otherwise objectionable.") Indeed, such unfettered discretion has led to abuse and anti-competitive actions, as is the case here with Yahoo.

In its current Motion to Dismiss, Yahoo argues that Holomaxx's emails were "harassing" and therefore "otherwise objectionable" because of the volume of Holomaxx's emails that were the result of user-opt out or that were sent to invalid email addresses. According to Yahoo, this volume of "unwanted" emails amounts to 0.1% *or lower* of all Holomaxx's emails sent to Yahoo users, or 2 million emails or less per year.[3] [4] In fact, for all email sent by Holomaxx to Yahoo users, Holomaxx maintains an email acceptance rate of 99.9% or higher, clearly showing that the emails were sent only to Yahoo users who wished to receive them. (FAC, ¶21.) Holomaxx sends on average 6 million emails per day *in a busy month* to Yahoo users worldwide. (*Id.*) This amounts to 2.190 billion emails sent by Holomaxx per year to Yahoo users around the world. This

[3] The 0.1% complaint rate is actually inflated. As Holomaxx alleges, Yahoo routinely bounces emails suggesting that the email addresses are unwanted or non-existent. (FAC, ¶38.)However, when Holomaxx again sends the email to those same email addresses a few days later, the email is accepted, demonstrating that those email addresses were always valid. (*Id.*) Therefore, the complaint rate should be even less than 0.1%.

[4] Yahoo assumes that the 0.1% rate is due to Yahoo's spam filtering and that the rate would be much higher if the filters were not in place. There is no basis for this assumption in the FAC or anywhere else. In fact, the rate may be even lower if the filters were blocking a large amount of legitimate emails.

also means that 2.184 billion *or more* of Holomaxx's emails are sent to legitimate Yahoo email addresses or are not rejected by the recipients. As such, the 2 million of "unwanted" emails per year is practically a drop in the bucket when compared to the gargantuan volume of legitimate, wanted, unobjectionable emails, and therefore is too small to be considered "harassing" under any analysis.

In addition, Holomaxx has alleged that the volume of email it sends per day per consumer/subscriber (i.e. no more than one email) and per week per consumer/subscriber (i.e. no more than three emails) falls well below the commercial email industry's standard of what is considered harassing (8 to 15 emails per day.) (FAC, ¶¶22-23.) Given that Holomaxx's email volume is well below the industry standard, its emails cannot be deemed "harassing," either objectively or subjectively.

Significantly, Yahoo's claim that its SpamGuard filter intercepted the emails as a result of user complaints is disingenuous. In May 2010, Holomaxx acquired its own IP block and applied with Yahoo to register the new IP addresses for bulk email use, ***which Yahoo accepted.*** (FAC, ¶¶33-34.) Holomaxx began sending emails from these IP addresses on June 7, 2010. (FAC, ¶35.) Almost immediately, Yahoo blocked the emails wholesale before they could even reach their intended recipients. (FAC, ¶35-36.) Therefore, it was impossible for Yahoo to receive complaints about Holomaxx's emails from its users.[5]

Moreover, prior to the wholesale email block, Yahoo had no issue with the quality of Holomaxx's 99.9% legitimate emails. (See FAC, ¶32.) In fact, as per Yahoo's own data, the complaint rate remained at 0.1% or less and did not increase between the time Yahoo was delivering Holomaxx's emails and when it instituted the June 7, 2010 permanent email block. (FAC, ¶38.) In addition, there are no allegations in the FAC that Holomaxx modified its emails prior to the June 7, 2010 permanent block. Instead, the allegations are clear that the emails in structure and content remained the same (i.e. they were not harassing or objectionable) both when

[5] Holomaxx had previously used a shared IP block with email senders that were rightfully identified to be spammers. As a result of this association, **and not as a result of Holomaxx's emails themselves**, Holomaxx faced service issues. (FAC, ¶32.)

1 Yahoo determined that Holomaxx's emails were not spam and delivered them and when it decided
2 to institute a wholesale block on the emails. Given that no change occurred to either the complaint
3 rate or the structure and content of the emails that would have made the previously non-
4 objectionable emails now harassing, Yahoo must have intentionally chosen to specifically block all
5 Holomaxx emails for reasons other than "harassment."[6]

6 Finally, because Holomaxx's emails were not "harassing," and because none of the emails
7 are alleged to be obscene, lewd, lascivious, filthy or excessively violent (and Yahoo does not argue
8 otherwise,) the emails cannot be deemed "otherwise objectionable" pursuant to *Begay* and *Hall*
9 *Street Associates*. *See Begay*, 553 U.S. at 142; *Hall Street Assocs.*, 552 U.S. at 586.

10 For these reasons, not only were Holomaxx's emails neither "harassing" nor "otherwise
11 objectionable," but Yahoo never deemed them to be so when it decided to block Holomaxx's
12 emails wholesale.

13 2. Yahoo acted in the "absence of good faith" when it blocked Holomaxx's
14 emails.

15 Yahoo relies heavily on *e360Insight* throughout its brief for the proposition that courts have
16 awarded ISPs unfettered discretion to block any emails as they see fit. However, the facts in that
17 case are very different than here. There, Comcast was not a direct competitor of e360Insight, and
18 therefore it had no anti-competitive interest in deciding to block e360Insight's emails. *See*
19 *e360Insight*, 546 F.Supp.2d at 606-607. That is not the case here where Yahoo has a strong self-
20 serving, anti-competitive interest to block Holomaxx's emails wholesale. As the FAC alleges,
21 these interests demonstrate that Yahoo acted in the absence of good faith and so cannot be afforded
22 CDA immunity.

23

24 [6] Yahoo claims that it should not be subject to liability under state or federal law due to a
25 "mistaken" choice to block. (*See* MTD 8:15-19, citing *e360Insight, LLC v. Comcast Corp.*, 546
F.Supp.2d, 605, 607-609 (N.D. Ill 2008). While this may be true when Yahoo first filtered
26 Holomaxx's emails, it does not hold true for its decision to institute a wholesale block despite all
evidence provided by Holomaxx that its emails were not spam. The facts show clearly that
27 Yahoo's decision was intentional that it was not based on any belief, mistaken or otherwise, than
Holomaxx's emails were spam.

28

Yahoo argues that Holomaxx has not alleged facts demonstrating an absence of good faith by Yahoo as: (1) the SpamGuard filtering process was an ordinary course of the system's operation; (2) Holomaxx has not alleged an industry standard for filtering "objectionable" emails, as it claims the Court required in its Order (Court's Docket "Dkt." 34); and (3) allegations of anti-competitive interests by Yahoo are insufficient to demonstrate an absence of good faith. Yahoo's arguments are fallacious and are based upon a misreading of the Order as Holomaxx has indeed pled sufficient facts to demonstrate that Yahoo acted in the absence of good faith.

(a) *SpamGuard was programmed by Yahoo to block Holomaxx's emails specifically.*

The FAC alleges that SpamGuard has been programmed by Yahoo to filter out emails it identified as "spam" based on certain email characteristics and regardless of whether or not the emails are actually spam. (FAC, ¶26.) The facts show that SpamGuard wasn't merely engaging in its usual ordinary, daily filter process; Yahoo programmed SpamGuard to specifically target Holomaxx's emails. Prior to Holomaxx acquiring the new IP address block, Yahoo delivered at least some Holomaxx emails (hence its ability to generate the 0.1% complaint rate) but blocked **all** of Holomaxx's emails sent from Holomaxx's newly acquired IP block. (FAC, ¶¶25, 32, 34-36. 38.) Holomaxx prepared each email on the same set of "best practices" that complied with the CAN-SPAM Act such that each of its emails were not so different from each other. (FAC, ¶¶22-24(a)-(h).) Given that Holomaxx had not changed their email practices during any point in this time period, Yahoo must have taken note of the new IP addresses found in Holomaxx's application and programmed its SpamGuard to specifically block all of Holomaxx's emails. (FAC, ¶¶33-34, 36.) Yahoo's intent to target Holomaxx and make the block permanent became painfully evident when it disingenuously told Holomaxx that it "may" reconsider accepting Holomaxx's emails after a six-month waiting period and only after Holomaxx significantly changed its email practices, while refusing to inform Holomaxx which of its email practices were at issue. (FAC, ¶¶8, 39, 47, 48(f).) Clearly, Yahoo was never going to lift the block, even in six months time.

As such, Yahoo's filtering of Holomaxx's own emails could not be part of Yahoo's ordinary routine business operation and Yahoo acted in the absence of good faith. Indeed, Yahoo

behaved exactly in the way that Justice Fischer feared by "abus[ing CDA] immunity to block content for anticompetitive purposes or merely at its malicious whim." *Zango*, 568 F.3d at 1178. (J. Fischer concurring.)

(b) *MAAWGG sets the Industry Standards and Yahoo violated those standards.*

As the FAC alleges, the MAAWG is a group with membership consisting of the largest ISPs in the world that have collaborated to formulate sets of standards or guideposts in dealing with messaging abuses. (FAC, ¶8.) MAAWG is the only such group of its kind in the industry.[7] Holomaxx alleges (and Yahoo does not deny) that Yahoo is a MAAWG member. (*Id.*)

The FAC alleges protocols from the Abuse Desk Common Practices paper published by MAAWG's Collaboration Committee as to how members should respond to blocked email senders who request unblocking, such as Holomaxx.[8] (*Id.* at ¶9.) The paper is based upon "feedback received in the Abuse Desk Best Practices sessions in three MAAWG meetings." (Request for Judicial Notice submitted by Yahoo in support of MTD, Ex. 1.) Yahoo states that the Committee makes clear that the protocol does not represent a set of "best practices." This is a misinterpretation of the statement made by the Committee. The Committee states that the protocol is not meant to "represent an **absolute set** of best practices." (*Id.*) (emphasis added.) This means that while the paper sets forth a set of practices or guidelines for members to follow, it recognizes that there are other practices that may at some point become acceptable as well "based on the particular circumstances of the network/mailboxes served by the abuse desk." (*Id.*) For these reasons, MAAWG does set forth a standard of practice for handling blocked email senders by its

[7] Yahoo makes much about the fact that the MAAWG Abuse Desk Common Practices paper was "from an October 2006 meeting." This is a mischaracterization of the document. The document specifically states that it was assembled with feedback received in sessions from three MAAWG meetings *beginning* in October 2006. (See Request for Judicial Notice submitted by Yahoo in support of MTD, Ex. 1.) The document was published in October 2007. (*Id.*) Regardless if it is 3 ½ years old, no other set of practices have been promulgated by MAAWG or any other group concerning the topic of filtered emails. Until that happens, the MAAWG Abuse Desk Common Practices paper serves as the only industry guidelines or standard on that topic.

[8] Yahoo has requested judicial notice of this MAAWG document and Holomaxx does not object.

1 members. Given that Yahoo is a member of MAAWG, Yahoo approves of MAAWG's authority
2 in setting forth these standards of practice (though Yahoo has made every attempt to distance itself
3 from these practices in its brief.) (*See* e.g. MTD 10:7-11:3.) Yahoo cannot now run from the very
4 industry standards it helped establish and promote.

5 Yahoo also argues that in its Order, the Court asked for allegations of an industry standard
6 addressing "harassing" and "otherwise objectionable" emails. Yahoo mischaracterizes the Court's
7 meaning. In its Order, the Court had suggested that allegations of an objective industry standard
8 concerning the filtering of emails by ISPs by which Yahoo failed to abide, may demonstrate that
9 Yahoo acted in the absence of good faith. (Dkt. 34 at 7.) Holomaxx has provided these allegations
10 in the FAC. The FAC sets forth the objective standards described in the Abuse Desk Best Practices
11 paper in dealing with senders whose emails have been filtered and who are requesting to have their
12 emails unblocked. (FAC, ¶¶9-12.) The MAAWG guidelines provide protocols on how to handle
13 blocked emails after they have been initially filtered. **All the guidelines are designed to help the**
14 **senders resolve the issue causing the block and help the ISPs identify those senders who are**
15 **truly spammers.**

16 According to the practice approved by the vast majority of the Committee members, upon a
17 request for unblocking, the ISP should unblock the emails and give a chance for the sender to fix
18 the problem that caused the block in the first place. (FAC, ¶9.) If the problem is not resolved
19 within a certain period, the block should be reinstated. (*Id.*) Yahoo did not follow this practice, or
20 any of the other MAAWG guidelines. (FAC, ¶¶9-12.) Instead, after it programmed its SpamGuard
21 to block Holomaxx's emails wholesale, it falsely told Holomaxx that the reason for the block was
22 due to user complaints, even though none of the users had received any of Holomaxx's emails from
23 the new IP addresses. (FAC, ¶¶38-41.) Furthermore, in complete opposition to the MAAWG
24 objective standards of practices and the spirit behind these guidelines, Yahoo simply refused to
25 work with Holomaxx to resolve any issue causing the blocks. (FAC, ¶¶47-48.) Instead, it told
26 Holomaxx to try again after six months and to significantly change its email practices, while
27 adamantly refusing to inform Holomaxx which practices were at issue. (FAC, ¶¶8, 39, 47, 48(f).)
28 None of Yahoo's actions demonstrated that it identified Holomaxx to be a spammer. (FAC, ¶¶47-

1 48.)

2 As such, the facts alleged in the FAC show that Yahoo acted against the industry guidelines
3 set forth by MAAWG, a group to which Yahoo belongs and whose authority it approves, when it
4 refused to provide any guidance to Holomaxx after it blocked all emails originating from
5 Holomaxx. These allegations are sufficient to draw a reasonable inference that Yahoo acted in the
6 absence of good faith. *See Iqbal*, 129 S. Ct. at 1949.

7 (c) *Yahoo committed anti-competitive acts in blocking Holomaxx's*
8 *emails.*

9 Yahoo argues that the FAC's allegations that Yahoo had anti-competitive interests when it
10 decided to block Holomaxx's emails are not enough to demonstrate that Yahoo would benefit from
11 excluding Holomaxx from the internet advertising marketplace. Yahoo's argument is without
12 merit as the allegations are sufficient to show that Yahoo was motivated by anti-competitive
13 interests and therefore acted in the absence of good faith. As set forth below, it is without question
14 that Yahoo gains an economic advantage if it blocks Holomaxx from sending email advertising to
15 Yahoo users, as Holomaxx's clients would be forced to pay Yahoo's higher fees in order to reach
16 Yahoo's users. (FAC, ¶15.)

17 The FAC alleges specifically that Yahoo generates revenue from internet advertising to its
18 users. (FAC, ¶15.) Holomaxx also alleges and provides documentary examples showing that
19 Holomaxx and Yahoo engage in internet advertising for the same products and services. (FAC,
20 ¶¶15, 40.) The FAC alleges that Yahoo is one of the largest (if not *the* largest) email services in
21 the world. (FAC, ¶26.) In addition, Yahoo is a direct competitor of Holomaxx in the consumer
22 email and internet advertising marketplace and derives millions (perhaps billions) of revenue
23 annually from such advertising. (FAC, ¶15.)

24 Yahoo clearly has access to all of its users. It stands to reason that any commercial client
25 interested in engaging the services of an internet advertiser or marketer would like to ensure that its
26 advertising reaches the greatest number of people possible. By Yahoo blocking Holomaxx from
27 having access to any of its millions of Yahoo users worldwide, Yahoo can gain tremendous profit
28 as commercial clients who have hired or would have hired Holomaxx will have no choice but to

1 engage Yahoo (instead of Holomaxx) and pay its higher fees so that its advertisements could reach
2 Yahoo users. (FAC, ¶¶15, 39-40.) Such anti-competitive behavior, if sanctioned by the Court, will
3 allow ISPs like Yahoo, who also provide internet advertising services, to shut out all other internet
4 advertisers like Holomaxx from the marketplace without having to give an explanation and without
5 fear of liability, thus driving up the prices for their already expensive services and creating a non-
6 competitive market for such services. (FAC, ¶¶15, 26, 47.)

7 Indeed, Yahoo's motives were evident when it continually refused to unblock Holomaxx's
8 **competing marketing emails** even though Holomaxx provided evidence describing its email
9 practices in detail; affirming that its emails were CAN-SPAM compliant; confirming that all of its
10 sending domains were validated with both SPF and DKIM; noting its low complaint rate based on
11 *Yahoo's own data*; providing a link evidencing its good score from another reputation service; and
12 offering to make any *additional* changes beyond the legal minimum. (FAC, ¶47.) Yahoo's
13 behavior in dealing with Holomaxx, including making insincere recommendations while refusing
14 to provide any real guidance to "fix" the problem, made it clear that Yahoo had no intention of
15 lifting the permanent block on Holomaxx's emails regardless of their legitimacy. (*See* FAC, ¶48(a)-
16 (f).)

17 Based on the allegations in the FAC, one can reasonably infer that the combination of
18 Yahoo's position as a competitor in the internet advertising marketplace with Holomaxx and its
19 wholesale blocking of Holomaxx competing marketing emails, even though it never found
20 Holomaxx's emails to be harassing or objectionable, demonstrates that Yahoo engaged in anti-
21 competitive, illegal, wrongful and unfair business practices. For these reasons, the FAC
22 sufficiently alleges that Yahoo acted in the absence of good faith for purposes of CDA immunity.

23 **B. Holomaxx Has Sufficiently Alleged Each Cause of Action in the FAC**

24 1. Intentional Interference with Contract and Intentional Interference with
25 Prospective Business Advantage

26 Yahoo claims that Holomaxx cannot state a cause of action for IIC because: (1) Yahoo does
27 not have a duty to deliver Holomaxx's emails; (2) its actions were justified as it was attempting to
28 protect its users from spam; and (3) Holomaxx has not pled facts to show that Yahoo had

1 knowledge of the specific contracts that were interfered with or an intent to disrupt Holomaxx's
2 relationships or actual interference. With respect to the IIPBA claim, Yahoo argues generally that
3 Holomaxx did not plead the necessary elements, including an independent wrongful act. As set
4 forth below, all of Yahoo's arguments fail because Holomaxx has adequately pled its IIC and
5 IIPBA claims and Yahoo's actions were not justified.

6 The elements of a cause of action for IIC are as follows: "(1) a valid contract between
7 plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional
8 acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or
9 disruption of the contractual relationship; and (5) resulting damage." *Pacific Gas & Elec. Co. v.*
10 *Bear Stearns & Co.*, 50 Cal.3d 1118, 1126 (1990).

11 For a cause of action for IIPBA, a plaintiff must allege (1) an economic relationship
12 between the plaintiff and a third party, with the probability of future economic benefit to the
13 plaintiff; (2) defendant's knowledge of that relationship; (3) defendant's intentional acts to disrupt
14 that relationship; (4) actual disruption of the relationship and (5) economic harm to plaintiff as a
15 proximate result of defendant's acts. *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.*, 47
16 Cal.App.4th 464, 475 (1996). In addition, the plaintiff must allege that the defendant engaged in
17 some wrongful act apart from the interference itself. *Della Penna v. Toyota Motor Sales*, 11 Cal.4th
18 376, 390-391 (1995).

19 Yahoo incorrectly attempts to focus the IIC claim on Yahoo's lack of duty to deliver
20 Holomaxx's emails. To that end, it relies upon an irrelevant Wisconsin case that addresses
21 Wisconsin's state law requirements for IIC rather than California law. *See Schindler v. Marshfield*
22 *Clinic*, 2006 U.S. Dist. LEXIS 37937 (W.D. Wis. 2006). In addition, Yahoo cites to *e360Insight* in
23 which the IIPBA claim was brought pursuant to Illinois state law and where the court summarily
24 stated that it found no case where "refusal to run an advertisement in a medium with wide
25 circulation" of plaintiff's products or those from whom he is selling constitutes tortious
26 interference." *e360Insight*, 546 F. Supp. 2d at 609 n. 3. Aside from the obvious fact that that case
27 is irrelevant since it is not based on California law and concerns IIPBA, not IIC, Yahoo
28 mischaracterizes the *e360Insight* court's reasoning. The "relationships" the court refers to are with

Comcast users who could potentially buy plaintiff's products; an opt-in list that is tremendously long and speculative. *Id*. Therefore, the focus in that case was not on the ISP's duty, but on the speculative, non-definitive list of potential, prospective buyers. As such, Yahoo's duty (or lack thereof) to deliver Holomaxx's emails is irrelevant to Holomaxx's IIC claim.[9]

Yahoo also claims that its actions in blocking Holomaxx's emails were justified because it was protecting its users from spam. The cases cited by Yahoo have no application here because they deal with unsolicited spam email while Holomaxx's emails are CAN-SPAM compliant and are sent to users who have elected to receive the emails. (FAC, ¶¶17-24); *see White Buffalo Ventures, LLC v. Univ. of Texas*, 2004 U.S. Dist. Lexis 19152, *16-17 (plaintiff sent *unsolicited* emails; quoted language is legislative history for the CAN-SPAM Act); *MySpace, Inc. v. Wallace*, 498 F. Supp. 2d 1293, 1298-99 (C.D. Cal. 2007) ("phisher" hijacked accounts to send adult-themed spam, in violation of the CAN-SPAM Act)).

Further, while Holomaxx has alleged that Yahoo uses its SpamGuard to filter spam, it also alleges that Yahoo's decision to block Holomaxx's emails wholesale once Holomaxx submitted its application with the new IP addresses and before the emails from those addresses could reach Yahoo's users, was not due to legitimate interests to protect its users, but due to its anti-competitive motives to shut Holomaxx out of the internet advertising market. (FAC, ¶¶15, 18, 40.) In this case, SpamGuard wasn't doing the filtering on its own; Yahoo had programmed it to *specifically* block Holomaxx's emails entirely. Yahoo's anti-competitive motives are self-serving, are not in the best interest of Yahoo's users, and do not have any social value that would make Yahoo's actions justified.

Yahoo additionally argues that Holomaxx has not alleged that Yahoo knew of the specific existing contracts/relationships or even relationships that could lead to an economic advantage

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[9] Nevertheless, unlike with the plaintiff in *e360Insight*, the FAC alleges that Yahoo interfered with Holomaxx's relationships with its **commercial clients**, not Yahoo's millions of users. (FAC, ¶¶15, 18, 41) These commercial clients belong to a non-speculative, finite list consisting of "a class of easily identifiable" individuals or entities to constitute valid existing prospective business relationships. *See e360Insight*, 546 F. Supp. 2d at 609 n. 3. Therefore, even under the *e360Insight* court's reasoning, Holomaxx has alleged facts to support its IIC claim.

between Holomaxx and its commercial clients. Yahoo’s argument fails because there is no requirement that Yahoo know the names of the clients with whom Holomaxx had business relationships; Yahoo only needed to be aware that Holomaxx was in certain business relationships that would have been disrupted by Yahoo’s actions. *See Ramona Manor Convalescent Hosp. v. Care Enters.*, 177 Cal.App.3d 1120, 1132-1133 (1986) (court found that knowledge of specific identity or name of existing or prospective relationship interfered with is not a prerequisite to recovery under an IIC or IIPBA claim.) While Yahoo may not have known the specific names of Holomaxx’s existing or prospective clients, Yahoo was certainly aware that Holomaxx had contractual and business relationships that were dependent upon Holomaxx’s advertising emails reaching Yahoo users. Holomaxx has alleged that it informed Yahoo on numerous occasions that it sends emails on behalf of its commercial clients. (FAC, ¶40) Further, since they compete in the internet advertising marketplace, Yahoo was aware that Holomaxx is a direct competitor; knew Holomaxx had contractual and business relationships with commercial clients; and wanted these contractual and business relationships for itself. (FAC, ¶¶15, 40.) In addition, the products and services advertised in Holomaxx’s emails that were scanned and blocked by Yahoo, would have “identified in some [manner]” Holomaxx’s clients. *See Ramona Manor Convalescent Hosp.*, 177 Cal.App.3d at 133.

Holomaxx has also sufficiently alleged Yahoo’s intentional acts to interfere with its existing and prospective business relationships. Holomaxx had referenced its clients to Yahoo on a number of occasions, including its application. (FAC, ¶40.) Furthermore, on one such occasion, Holomaxx informed Yahoo that its business relies upon delivery of its emails to all its subscribers. (*Id.*) As a competitor in the internet advertising business, Yahoo also knew that Holomaxx was “certain or substantially certain” to lose money and its business relationships if the emails did not reach their recipients because the clients would not pay for undelivered mail. (FAC, ¶¶15, 40.); *see also Bank of N.Y. v. Fremont Gen. Corp.*, 523 F.3d 902, 909 (9th Cir. 2008). With this knowledge and motivated by its interests to snag Holomaxx’s clients who would be forced to pay Yahoo’s higher advertising prices to reach Yahoo’s users, Yahoo intentionally blocked all of Holomaxx’s emails from reaching its users, regardless of the emails’ legitimacy. (FAC, ¶¶¶15, 36, 38-39.) Similarly,

1 Yahoo has alleged actual interference with its business relationships and damages.[10] [11] (FAC, ¶¶18,
2 41, 49-52.)
3 Finally, Holomaxx has pled an independent wrongful act by Yahoo in support of its IIPBA
4 claim. The email blocks were independently wrongful because they were motivated by Yahoo's
5 anti-competitive interests, as explained above. To be independently wrongful, the conduct must
6 violate "a statute or other regulation or recognized rule of common law or an established standard
7 of a trade or profession." *Arntz Contracting Co.*, 47 Cal.App.4th at 477. Yahoo knew that by
8 denying Holomaxx access to any of its users, Holomaxx would lose its existing and prospective
9 business relationships and be edged out of the internet advertising marketplace. (FAC, ¶¶15, 36.
10 38, 40.) In addition, Holomaxx's corporate clients would be forced to engage Yahoo's internet
11 advertising services and pay its higher prices in order to reach Yahoo's users. (FAC, ¶15.) These
12 acts by Yahoo are the sort of underhanded conduct that fall below the standards of fair competition
13 and are therefore sufficient to demonstrate that Yahoo engaged in "wrongful conduct." Additional
14 wrongful conduct includes Yahoo's violations of industry standards and federal and state statutes.
15 For these reasons, Holomaxx has alleged sufficient facts to support its IIC and IIPBA
16 claims.
17 2. 18 U.S.C. §§2510, *et seq*. (The Federal Wiretap Act)
18 Holomaxx has properly alleged the elements of a *prima facie* civil case under the FWA: (i)
19 the intentional interception of a wire, oral, or electronic communication (through the use of a
20 device)**;** or (ii) the intentional use or disclosure (or attempted use or disclosure) of the contents of
21 such communication, knowing that it was obtained in violation of the FWA. 18 U.S.C. § 2511;
22
23 [10] Holomaxx had a reasonable expectancy that its existing business relationships would continue such that it would gain a prospective economic advantage. Therefore, interference with its existing business relationships was also an interference with its prospective business advantage.
24
25 [11] Yahoo argues that Holomaxx is required to allege that Yahoo's actions "induced a breach" of its existing business contracts. (MTD 20:24-26.) Yahoo's position is completely wrong. In fact, a
26 plaintiff need not allege an actual breach at all, but only inference with or disruption of the contractual relations. *Pacific Gas & Elec.*, 50 Cal.3d at 1129. Holomaxx has pled this interference
27 by alleging that, as a result of Yahoo's email block, it could not perform its contracts and its clients have not paid Holomaxx. (FAC, ¶41.)
28

(*see* FAC ¶¶ 38, 40, 46, 47, 59-60.) Yahoo wrongly argues that: (1) Holomaxx has no claim under the FWA because Yahoo accessed and filtered its emails in order to protect its customers from spam; (2) Holomaxx has failed to allege sufficient facts to show that its emails were "intercepted"; and (3) Holomaxx's allegations of "use or disclosure" of the contents of the communications and the requisite intent are deficient. These arguments fail, as set forth below.

Yahoo argues that it is protected from liability under the FWA's Section 2511(2)(a)(i) exception because the filtering of Holomaxx's emails was done to protect itself and its users from spam. Section 2511(2)(a)(i) states that "an operator of a switchboard, an officer, employee, or agent" of a provider will not be liable for any interception of an electronic communication done in the normal course of business that is incident to the protection of the property of the provider. 18 U.S.C. § 2511(2)(a)(i). The FAC does not make allegations against any specific individual acting on behalf of Yahoo; instead, the FAC alleges its FWA claim against Yahoo – the service provider. By its terms, Section 2511(2)(a)(i) excludes the service provider and therefore the provider is not immune from liability for any such interception under that section.[12]

Even if the Section 2511(2)(a)(i) exception could apply to Yahoo, Yahoo would still not be immune because it's efforts to permanently intercept and block *all* of Holomaxx's emails (rather than just filter them) was motivated by anti-competitive interests rather an interest to protect "the rights and property of the provider." 18 U.S.C. § 2511(2)(a)(i); (FAC, ¶¶15, 26, 39, 40, 47-48.) Such interception motivated by commercial self-interest is not protected by Section 2511(2)(a)(i). *See U.S. v. Councilman*, 418 F.3d 67, 81 (1st Cir. 2005) (en banc) (defendant vice-president of book listing service who acted as email provider to book dealer customers and who intercepted emails to these customers from Amazon.com in order to gain a commercial advantage, found not to be subject to Section 2511(a)(i)'s exception and liable under FWA.) Thus, Section 2511(2)(a)(i) does not protect Yahoo from liability under the FWA.

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[12] The only reference to providers in this section is an explicit exception to the exception, which does not apply here: *i.e.,* "a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks." 18 U.S.C. §2511(2)(a)(i).

Second, Holomaxx has properly alleged interception. Yahoo claims that the FAC alleges that interception took place after the emails reached Yahoo's own computers i.e. Yahoo's servers were the intercepting device. This is completely incorrect; the FAC specifically alleges that Holomaxx's emails were intercepted and scanned **before reaching Yahoo's receiving server.** (FAC, ¶¶36, 38, 44-45.) Once it reached the receiving server, Yahoo then decided whether or not to accept or reject the email. (FAC, ¶44.) In addition, Holomaxx has alleged the mechanism used to intercept Holomaxx's emails. (FAC, ¶¶44-45.)

Even if Holomaxx did allege Yahoo's servers to be the intercepting device, Holomaxx still states a claim under the FWA because the emails are only at the servers temporarily until they reach their final destination – the users' inboxes. *See Councilman,* 418 F.3d at 79 (upholding FWA indictment where defendant email provider copied incoming emails from server for his own use, because "the term 'electronic communication' includes **transient electronic storage** that is intrinsic to the communication process"); *see also Garcia v. Haskett,* 2006 U.S. Dist. Lexis 46303, *9-10 (N.D. Cal. 2006) (distinguishing between permanent and temporary storage for purposes of FWA; citing *Councilman* with approval)

Again, Yahoo's cases are not on point. *Ideal Aerosmith, Inc. v. Acutronic USA, Inc,* 2007 U.S. Dist. Lexis 91644, *4-6 (W.D. Pa. 2007) (defendant purchaser of assets in bankruptcy was entitled to read emails of employees because it stood in shoes of employer, and monitoring was necessary to ensure email messages were answered promptly);[13] *Crowley v. Cybersource Corp.,* 166 F. Supp. 2d 1263 (N.D. Cal. 2001) (plaintiff sent information directly to the defendant); *Steve Jackson Games, Inc. v. United States Secret Serv.,* 36 F.3d 457, 458 (5th Cir. 1994) (government seized plaintiff's actual computer). Yahoo also relies on the broad language of *Konop v. Hawaiian Airlines, Inc.*; however, *Konop* does not concern email blocking or interception at all (or even *email*), and is therefore also inapposite. *Konop v. Hawaiian Airlines, Inc.,* 302 F.3d 868, 874 (9th

[13] Unlike employers, ISP's like Yahoo can be liable under the ECPA – and unlike employees, subscribers enjoy "a reasonable expectation of privacy in the contents of emails 'that are stored with, or sent or received through, a commercial ISP.'" *United States v. Warshak,* 2010 U.S. App. Lexis 25415, *43 (6th Cir. 2010) (citation omitted). The ECPA includes both the Wiretap Act and the Stored Communications Act.

1 Cir. 2002) (defendant allegedly used someone else's login information to access plaintiff's secure
2 website; "the intersection of these two statutes "is a complex, often convoluted, area of the law,"
3 "ill-suited to address modern forms of communication like [a] secure website").
4 Moreover, Holomaxx has provided sufficient allegations as to how Yahoo intercepted its
5 emails (including the mechanism used), how it used or disclosed the contents of the
6 communications, and the requisite intent.[14] (e.g. FAC, ¶¶15, 43-46.) Yahoo argues that Holomaxx
7 has failed to plead consent or timing of the interception. Neither of these need be pled to state a
8 claim under FWA. *United States v. Szymuszkiewicz*, 622 F.3d 701, 706 (7th Cir. 2010) (rejecting a
9 "contemporaneous" requirement because "there is no timing requirement in the Wiretap Act"); "
10 *In re Pharmatrak,* 329 F.3d 9*,* 19 (1st Cir. 2003) ("for the consent exception under the ECPA in
11 civil cases, [] it makes more sense to place the burden of showing consent on the party seeking the
12 benefit of the exception, and so hold.")
13 To the extent that the Court would prefer allegations beyond "information and belief" and
14 allegations regarding Yahoo's use of a specific interception "device" or software, it should allow
15 Holomaxx to conduct limited discovery on these issues as the information identifying the "device"
16 used by Yahoo to intercept the emails and how it uses or discloses the communications contained
17 therein necessarily lie entirely within the ambit of Yahoo's knowledge. *See Santiago*, 599 F.3d at
18 758-59 (7th Cir. 2010); *Jones*, 2010 U.S. Dist. Lexis 81662 at 13-14 (where facts known only by
19 defendants, plaintiff should be afforded discovery and opportunity to amend pleadings). Otherwise,
20 as pled, Holomaxx has properly alleged a claim under the FWA.
21 3. 18 U.S.C. §§2701, *et. seq.* (Stored Communications Act)
22 The SCA provides a civil remedy for anyone "who (1) intentionally accesses without
23 authorization a facility through which an electronic communication service is provided; or (2)
24 intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents
25
26 [14] To the extent Yahoo argues that Holomaxx is making inconsistent allegations concerning emails intercepted in transit and emails accessed on Yahoo's servers, a plaintiff is allowed to plead
27 inconsistent theories, even if they prove to be mutually exclusive. See *PAE Gov't Servs., Inc.*, 514 F.3d at 860.
28

authorized access to a wire or electronic communication while it is in electronic storage in such system . . ." 18 U.S.C. §§ 2701(a), 2707(a). Holomaxx has properly alleged a claim under the SCA. FAC, ¶¶ 11, 47, 66.

Yahoo argues that its alleged actions fall under the exception of the SCA that excuses it from accessing its own servers. (*See* MTD 19:23-20:14.) The legal authority relied upon by Yahoo for this proposition is not on point. *Fraser* involved employers, who are not generally liable under the ECPA/SCA. *Fraser v. Nationwide Mut. Ins. Co.,* 352 F.3d 107, 111 (3d Cir. 2003). Additionally, in *Crowley,* unlike this case, the plaintiff alleged that he sent his information directly to the defendant. *Crowley,* 166 F. Supp. 2d at 1263 (N.D. Cal. 2001). Therefore, Yahoo can be liable for accessing its own servers if it exceeds authorization to do so.

Yahoo acted in excess of authorization. Holomaxx has alleged in the FAC that its private communications to Yahoo users were accessed by Yahoo. (FAC, ¶¶13, 43, 61.) In addition, this access exceeded the users' authorization because Yahoo was not motivated by legitimate interests. Generally, subscribers of ISPs enjoy "a reasonable expectation of privacy in the contents of emails 'that are stored with, or sent or received through, a commercial ISP.'" *Warshak,* 2010 U.S. App. Lexis 25415 at 43. While Yahoo may have been implicitly authorized by its users to access their emails in order to protect them from spam, Yahoo exceeded its authorization when it accessed and blocked all of Holomaxx's emails from reaching the intended recipients to further its own anti-competitive interests. (FAC, ¶¶ 15, 40.)

Thus, Yahoo's arguments fail and Holomaxx has properly alleged a claim under the SCA. As with the FWA claim above, if the Court would like more specific allegations for the SCA claim, it should allow Holomaxx to conduct limited discovery on these issues as the information necessarily lies solely within Yahoo's knowledge and is not is available to the public. *See Santiago*, 599 F.3d at 758-59 (7th Cir. 2010); *Jones*, 2010 U.S. Dist. Lexis 81662 at 13-14.

4. 18 U.S.C. §§1030, *et seq.* (Computer Fraud and Abuse Act)

The CFAA provides a civil remedy where, *inter alia*, defendant intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains information from a computer used in interstate communication. 18 U.S.C. § 1030(a)(2). Holomaxx has properly

stated a claim under the CFAA by alleging that Yahoo accessed servers in excess of authority and thereby obtained confidential information found in private emails sent by Holomaxx to Yahoo users worldwide. (FAC ¶¶ 13, 43, 67-68.)

Yahoo argues that it cannot be liable for accessing its own servers. Yahoo apparently believes that an ISP can take any action, *carte blanche*, with the confidential information stored on its servers, no matter how unlawful or egregious, and that its conduct can never constitute unauthorized access under the CFAA. Yahoo's position is incorrect. Congress defined "exceeds authorized access" as accessing "a computer *with* authorization and [using] such access to obtain . . . information in the computer that the accesser is not entitled to so obtain . . . ." 18 U.S.C. § 1030(e)(6) (emphasis added); *cf. United States v. Morris*, 928 F.2d 504, 510 (2d Cir. 1991) (holding access unauthorized where it was not "in any way related to [the system's] intended function"). Also, as stated by this Court: "The" CFAA" is applied broadly to "punish those who illegally use computers for commercial advantage." *eBay, Inc. v. Digital Point Solutions, Inc.,* 608 F. Supp. 2d 1156 (N.D. Cal. 2009). The CFAA therefore offers a remedy to "any person" who suffers loss due to violations of the statute, not just the owner of the computer on which the emails were stored. *Theofel v. Farey-Jones*, 359 F.3d 1066, 1078 (9th Cir. 2003) (defendants liable where ISP's provided emails in response to their fraudulent subpoena).

Much of Yahoo's authority concerns employers, not ISPs. As discussed above, subscribers of an ISP enjoy "a reasonable expectation of privacy in the contents of emails" held on the ISP's servers that employees do not. *Warshak,* 2010 U.S. App. Lexis 25415 at 43. Therefore ISPs are not entitled to the content of their users' emails – unlike employers – and the cases cited by Yahoo are irrelevant to the facts in this case. *Cont'l Grp. v. Kw Prop. Mgmt, LLC,* 622 F. Supp. 2d 1357, 1372 (S.D. Fla. 2009) (employee stole trade secrets for her new employer; court stated that "an *employer* . . . clearly has a right to control and define authorization to access its own computer systems") (emphasis added); *Secureinfo Corp. v. Telos Corp.,* 387 F. Supp. 2d 593 (E.D.Va. 2005) (employee granted access to defendant); *LVRC Holdings LLC v. Brekka,* 581 F.3d 1127, 1128 (9th Cir. 2009) (on summary judgment, no evidence that ex-employee defendant had exceeded authorization.)

1 Yahoos reliance on *Role Models* is also misplaced: The court in that action did state that
2 receiving email is not the same as accessinga computer,but the court was not referring to
3 emails that were received on the defendants server (as Yahoo suggests); it was referring to emails
4 that (unlike this action) had been sent from the defendants server by a third party, and received on
5 the defendants *own computer*. *Role Models Am., Inc. v. Jones,* 305 F. Supp. 2d 564, 567 (D. Md.
6 2004)*; see eBay, Inc.,* 100 F. Supp. 1058 at 1070. *E360Insight* is similarly inapplicable: The court
7 in that case rejected the theory that by bouncing emails sent by plaintiff, the defendant had accessed
8 *plaintiff's* computers without access. *e360Insight*, 546 F. Supp. at 608 n.2. Again, Holomaxx
9 makes no such contention in this action.

10 Yahoo argues that Holomaxx has failed to plead a knowing intent to defraudunder
11 Section 1030(a)(4). This is a red herring as the subsections enumerated in Section 1030(a) setting
12 forth actions that would qualify as fraud under the act is in the disjunctive. *See* 18 U.S.C.
13 §§1030(a)(1) (a)(7). Therefore, if one has sufficiently pled allegations to support a claim under
14 Section 1030(a)(2), which Holomaxx has done, it need not plead intent to defraud under Section
15 1030(a)(4). *See LVRC Holdings, LLC*, 581 F.3d at 1131. Moreover, Holomaxx is not required to
16 declare which particular section of the CFAA it bases its claim. So long as it alleges sufficient
17 facts to support a claim for any of the provisions of the CFAA, the claim must survive a motion to
18 dismiss. *Remick v. Manfredy*, 238 F.3d 248, 263-264 (3rd Cir. 2001) (court found that plaintiffs
19 short and plain statement was sufficient to survive a motion to dismiss and the defendant could
20 ascertain the details of the claim through discovery.)

21 As set forth above, Holomaxx has properly alleged a claim under the CFAA.

22 5. California Penal Code §§ 630 *et seq*. (Wiretapping/Eavesdropping)

23 Holomaxx has properly stated causes of action under both Penal Code Sections 631 and
24 632. Yahoo argues that: (1) that Section 630 *et seq*. does not apply to electronic communications;
25 (2) Holomaxx has failed to allege facts to support a claim under Section 631 and (3); Holomaxx
26 fails to state a claim under Section 632 because the emails sent by Holomaxx were not
27 confidentialand no devicehas been alleged. All of Yahoos arguments fail.

28 First, the terms of Sections 631 and 632 can be read to include interception and scanning of

electronic communications. *See* Cal. Pen. Code. §§631, 632. Moreover, nothing in the terms of these code sections exclude electronic communications; in fact, both code sections broadly allow for the possibility of the use of some other means of interception or eavesdropping. *See Id.* at §631 ("… passing over any wire, line, or cable***, or is being sent from, or received at any place within this state…***"); *Id.* at §632 ("by means of a telegraph, telephone, ***or other device, except a radio…***") Furthermore, although Yahoo says it is not aware of any authority applying these statutes to email, this Court has applied Sections 630 *et seq.* to email in at least two cases relied upon by Yahoo.[15] *Bradley*, 2006 U.S. Dist. Lexis 94455, *14-15; *Garcia*, 2006 U.S. Dist. Lexis 46303, *3-4.[16]

Second, as described above, Holomaxx has alleged all the necessary elements for a claim under Section 631. Holomaxx has sufficiently alleged that Yahoo intercepted and scanned the contents of Holomaxx's emails "in transit" without consent by using Bayesian techniques and a collaborative filtration system **before the emails reached Yahoo's servers** and that Yahoo's intent for doing so was to block all Holomaxx's emails so that it may shut Holomaxx from the internet advertising marketplace in which Yahoo competes.[17] (FAC, ¶¶15, 40, 44-48.)

Third, Holomaxx states a claim under Section 632 as its emails are confidential. Section 632 defines "confidential communications" to include communications that "may reasonably

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[15] Yahoo quotes *CashCall, Inc.* to the effect that the policy of Section 631 is meant to protect the privacy of individuals' phone calls; however, the Court in *CashCall* was not excluding (or distinguishing) email communications; the case merely happened to involve phone calls. *CashCall, v. Super. Ct* 159 Cal. App. 4th 273, 294 (2008). Yahoo's other authorities all concerned the exclusionary scope of Section 630 *et seq.* in criminal matters, and all were decided before the general advent of email communications; they are therefore all inapposite. *See United States v. Turner,* 528 F.2d 143 (9th Cir. 1975); *People v. Chavez,* 44 Cal. App. 4th 1144 (1996); *People v. Ratekin*, 212 Cal. App. 1165 (1989).

[16] Both *Bradley* and *Garcia* were dismissed on other grounds.

[17] Yahoo's reliance on *Garcia* for the proposition that courts have dismissed claims with an "in transit" requirement where the complaint also alleges otherwise is without merit. In that case, the plaintiff argued that unread emails are "in transit" whereas read emails are in permanent storage, even though both sets of emails sit on the same server. *Garcia*, 2006 U.S. Dist. Lexis 46303, *10-11. The court rejected this as inconsistent and therefore dismissed the FWA claim. *Id.* at 11. Here, Holomaxx alleges that the emails were scanned before it reached Yahoo's servers and, *alternatively*, after it reached Yahoo's servers. (FAC, ¶¶43-46.) These alternative allegations are permissible in a complaint. *See SOAProjects, Inc.*, 2010 U.S. Dist. Lexis 133596, *24.

indicate that any party to the communication desires it to be confined to the parties thereto and excludes communications where the parties may reasonably expect that the communication may be overheard or recorded. Cal. Pen. Code §632(c). Here, Holomaxx reasonably expected that its emails to Yahoo users were private and had no reasonable expectation that Yahoo would intercept and scan the emails. This was because the emails were not spam and complied with the industry's best practices protocol and so the emails would not have been selected for filtering and blocking. (FAC, ¶¶19-27, 43.) Therefore, Holomaxx's emails were confidential within the meaning of Penal Code section 632. In addition, Holomaxx has alleged a recording mechanism; the mechanisms used to read the emails were Bayesian techniques and a collaborative filtration system employed by Yahoo. (See FAC, ¶¶44-45.)

For these reasons, Holomaxx has stated a claim against Yahoo for violations of Section 631 and 632. [18]

6. <u>California Business and Professions Code §§17200 *et seq*.</u>

To state a cause of action for Unfair Business Practices, a plaintiff must allege that due to the defendant's unlawful, unfair and/or fraudulent business act or practice, plaintiff has suffered (1) an injury in fact and (2) has lost money or property. Cal. Bus. & Prof. Code §17204. As discussed below, Holomaxx's Unfair Business Practices claim is sufficiently pled and must survive Yahoo's Motion to Dismiss.

An unlawful act is one forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made. *In re Pomona Valley Med. Group, Inc.*, 476 F.3d 665, 674 (9th Cir. 2007) (citation omitted). An unfair business act means conduct that threatens the incipient violation of an antitrust law or violates the spirit of one of those laws or otherwise significantly threatens or harms competition. *Cel-Tech Comm., Inc. v. LA Cellular Tel. Co.,* 20 Cal. 4th 163, 187 (1999).

[18] To the extent that the Court would like Holomaxx to allege actual devices that conducted the interception or recording, that information lies only within Yahoo's knowledge. Therefore, Holomaxx requests the Court authorize it to conduct limited discovery on this issue before amending the FAC to include such facts. *See Jones*, 2010 U.S. Dist. Lexis at *13-14.

1 As alleged in the FAC, Yahoo□s conduct is unlawful because it violates the FWA, SCA,
2 CFAA, and Penal Code Sections 630 *et seq*., and also because it constitutes intentional interference
3 with Holomaxx□s contracts and prospective business advantage. In addition, Yahoo□s conduct in
4 blocking the emails wholesale was unfair because it threatened and prevented fair and honest
5 competition of internet marketing services by forcing Holomaxx□s clients to pay Yahoo□s higher
6 advertising fees in order to reach Yahoo users, thereby violating the spirit of antitrust laws. (FAC,
7 ¶¶15, 40, 47); *see Cel-Tech Comm., Inc.,* 20 Cal. 4th at 186-187 (citations omitted.) Furthermore,
8 Holomaxx has alleged that it suffered injuries-in-fact due to Yahoo□s unlawful actions and has lost
9 money and property as a result. (FAC, ¶¶8-15, 36-41, 43-52, 54-57, 61-63, 67-70, 77-80, 87-91,
10 95-97.)
11 For these reasons, Holomaxx has pled sufficient facts to support its Unfair Business
12 Practices claim.
13 **IV. CONCLUSION**
14 As set forth above, the Court should deny Yahoo□s Motion to Dismiss. If the Court grants
15 the Motion, it should grant Holomaxx leave to amend the FAC and also permit limited discovery to
16 uncover the facts to support amendments to its FWA and SCA claims.
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