IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DOTSTRATEGY CO,

Plaintiff,

v.

TWITTER INC.,

Defendant.

Case No. 19-cv-06176-CRB

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Twitter, Inc., promises advertisers on its platform that they will only be charged when "people" interact with the accounts or Tweets they are paying to promote. DotStrategy, Co., believes it was charged for interactions with automated accounts ("bots") and that Twitter failed to refund it for those interactions even after it learned that the bot accounts were not, in fact, controlled by "people." DotStrategy has sued Twitter under California's Unfair Competition Law. Twitter moves to dismiss. The motion is denied as to dotStrategy's allegations based on interactions with bots. The First Amended Complaint adequately alleges that dotStrategy suffered economic injury as a result of its reliance on Twitter's false representation that advertisers would only be charged for interactions with "people." However, dotStrategy has not adequately alleged that it was wrongfully charged for interactions with "fake" accounts that were nonetheless controlled by people. Twitter's motion is granted as to those allegations.

I. BACKGROUND

"Twitter is a social networking and microblogging service, enabling registered users to read and post short messages called Tweets." FAC (dkt. 58) ¶ 1. Twitter does not make money by charging users for access to the platform. Id. ¶ 4. Instead, it sells advertising. Id. Advertisers

Twitter charges advertisers based on how many times users interact with the promoted account or content. Id. ¶ 8. At various times it has represented that advertisers pay only for interactions with "people." Id. For example, in 2013, Twitter represented to advertisers that they would "only be charged when people follow your Promoted Account or retweet, reply, favorite or click on your Promoted Tweets." Id. ¶ 37(c). Similarly, in 2014, Twitter claimed that advertisers would "[p]ay only when people follow[ed] [their] account." Id. ¶ 38(c).

DotStrategy is a marketing company which has advertised its services on Twitter. Id. ¶ 21. Between October 2013 and December 2016, dotStrategy placed thirty-four ads on Twitter for which it paid a total of $2,220.76. Id. ¶ 36. DotStrategy alleges that when it placed its ads, it reviewed and relied on Twitter's representations that advertisers would only be charged for interactions with "people." Id. ¶¶ 39, 75.

When it first began advertising with Twitter, dotStrategy agreed to the Twitter Advertising Terms. Huffman Decl. (dkt. 67) ¶ 3.[1] The Advertising Terms include two provisions relevant here. First, they state that Twitter "[t]o the fullest extent permitted by law . . . disclaim[s] all guarantees regarding . . . quality . . . of . . . any User Actions . . . ." Huffman Decl. Ex. B (dkt. 67-2) ¶ 9. Second, they explain that "[c]harges are solely based on [Twitter's] measurements for the Program." Huffman Decl. Ex. B ¶ 11.

A large number of accounts on Twitter are primarily controlled by bots rather than human beings. FAC ¶ 9. In July 2018, Twitter deleted 70 million accounts "it had deemed spammy, inactive, or which were displaying 'erratic' behavior that indicated they were likely bots." Id. ¶ 49

[1] DotStrategy does not oppose Twitter's request for judicial notice of the Advertising Terms, and Twitter correctly notes that the FAC incorporates the Advertising Terms by reference because it implicates the parties' rights and duties under that document. See Coto Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010). Twitter's request for judicial notice of the Advertising Terms is therefore granted. See RJN (dkt. 68). The other documents Twitter requests notice of are either "not subject to reasonable dispute" because their veracity "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned[,]" see Fed. R. Evid. 201(b), (b)(2); see also Moore v. Apple, Inc., 73 F. Supp. 3d 1191, 1197 & n.1 (N.D. Cal. 2014) (materials available online subject to judicial notice); Erickson v. Neb. Mach. Co., No. 15–cv–1147–JD, 2015 WL 4089849, at *1 n.1 (N.D. Cal. July 6, 2015) (materials available on the Wayback Machine subject to judicial notice), or incorporated by reference because they are quoted in or implicated by the FAC, see Coto, 593 F.3d at 1038; Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010) (documents quoted in complaint incorporated by reference).

(quoting another source). Around the same time, 480 of dotStrategy's Twitter followers were deleted. Id. ¶ 50. After a Twitter account has been deleted, it is "as if the account never existed," making it difficult or impossible to find information about the account. Id. ¶ 51 (quoting another source).

DotStrategy believes that Twitter wrongfully charged it for interactions with "fake accounts that often [took] the form of an automated bot." Id. ¶¶ 16–18. It has brought suit claiming that Twitter's misrepresentations violated the UCL. Id. ¶¶ 72–87. Twitter moves to dismiss. See Mot. (dkt. 65).

II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief may be granted. Dismissal may be based on either "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Godecke v. Kinetic Concepts, Inc., 937 F.3d 1201, 1208 (9th Cir. 2019). A complaint must plead "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. When evaluating a motion to dismiss, the Court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007).

Claims for fraud must meet the pleading standard of Federal Rule of Civil Procedure 9(b), which requires a party "alleging fraud or mistake [to] state with particularity the circumstances

constituting fraud or mistake."[2] Rule 9(b) "requires . . . an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (internal quotation marks omitted).

If a court does dismiss a complaint for failure to state a claim, it should "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). A court nevertheless has discretion to deny leave to amend due to "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." Leadsinger, Inc. v. BMG Music Publ'g., 512 F.3d 522, 532 (9th Cir. 2008) (alteration in original) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

III. DISCUSSION

Twitter advances four arguments for dismissal. First, it argues that dotStrategy has not alleged false statements or misrepresentations with the specificity required by Rule 9(b). Mot. at 9–13. Second, it argues that dotStrategy has failed to adequately plead reliance on any ostensible misstatements. Id. at 14–17. Third, it contends that dotStrategy's claims are precluded by disclaimers in the Advertising Terms. Id. at 13–14. Fourth, it argues that dotStrategy has failed to establish UCL standing. Id. at 17–18.

A. False Statements

Twitter complains that the FAC fails to satisfy Rule 9(b) because dotStrategy alleges that Twitter wrongfully charges for "fake," "false," or "spam" accounts without adequately defining those terms. Id. at 10–13. Twitter is correct. DotStrategy clearly considers "bot" accounts (i.e., those controlled entirely or primarily by a computer program rather than a human being) to be fake. See FAC ¶ 17. But, as Twitter points out, and as counsel for dotStrategy confirmed during oral argument, the FAC also alleges that a broader category of human-controlled Twitter accounts are fake, without identifying the outer boundaries of this group. See, e.g., id. ¶ 63 (stating that

"fake Twitter Accounts . . . include[e] but [are] not limited to automated bots."). Although the FAC includes some vague suggestions about what makes a human-controlled account fake, see, e.g., id. ¶¶ 17, 74, 76, 80, its allegations are insufficient to put Twitter on notice as to which of its statements were ostensibly false.

DotStrategy responds that the terms "fake," "false," and "spam" cannot be insufficiently precise, because Twitter itself has used those words to describe activity forbidden on its platform. Opp'n (dkt. 70) at 5–6. This argument fails. The Twitter communications dotStrategy cites may state that "fake" or "spam" accounts are not allowed, see id., but because they do not explain what those terms mean, they do nothing to help satisfy Rule 9(b). DotStrategy suggests its lack of precision should be excused because what makes an account "fake," "false," or "spam" in Twitter's eyes is a "matter[ ] within the opposing party's knowledge." Opp'n at 7 (quoting Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989)). But the fact that Twitter knows what it means when it uses these terms does not excuse dotStrategy's obligation to identify the categories of interactions it was wrongfully charged for.

Any theory of liability premised on interactions with human-controlled accounts fails for the additional reason that the FAC identifies no statement promising that Twitter advertisers would not be charged for interactions with "fake" accounts that were controlled by people. The only alleged misstatements that could possibly be construed as making such a promise are general proclamations about the benefits of advertising with Twitter. See, e.g., FAC ¶¶ 27, 38 (promising that advertising on Twitter can "build an engaged audience to amplify your message" and "an active community of advocates and influencers for your business"). Even assuming these claims are more than non-actionable puffery, but see Reply (dkt. 71) at 9–10, they could not reasonably be construed as a promise that advertisers would not be charged for engagements with human-controlled accounts. A reasonable advertiser would understand that achieving its goals might require some interaction with Twitter users who use the platform to disseminate spam, violate Twitter's terms of service, or otherwise qualify as "fake" despite being human. This is especially true because according to dotStrategy's own allegations, Twitter is rife with such users. See FAC ¶ 53

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