

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

FACEBOOK, INC.,  
Plaintiff,

v.

BRANDTOTAL LTD., et al.,  
Defendants.

Case No. [20-cv-07182-JCS](#)

**ORDER REGARDING MOTION FOR  
LEAVE TO AMEND AND MOTION TO  
DISMISS SECOND AMENDED  
COUNTERCLAIMS**

Re: Dkt. Nos. 161, 169

**I. INTRODUCTION**

Plaintiff Facebook, Inc. brought this action asserting that Defendants BrandTotal Ltd. and Unimania, Inc. (collectively, “BrandTotal”) improperly collected data from Facebook’s social networks. BrandTotal, which is in the business of analyzing advertising data collected from social media websites, asserts counterclaims based on Facebook’s efforts to block its collection of data. The Court previously dismissed some of BrandTotal’s counterclaims, including a counterclaim under the “unfair” prong of California’s Unfair Competition Law (the “UCL”), which the Court dismissed with leave to amend. BrandTotal has amended that counterclaim and seeks leave to assert a new counterclaim for defamation. Facebook opposes adding the new defamation counterclaim and moves again to dismiss the amended UCL “unfairness” counterclaim. The Court held a hearing on August 27, 2021. For the reasons discussed below, BrandTotal’s motion for leave to add a defamation counterclaim is DENIED, and Facebook’s motion to dismiss the “unfairness” counterclaim is GRANTED. Facebook shall answer the surviving counterclaims, which are not affected by this order, no later than September 14, 2021.<sup>1</sup>

<sup>1</sup> The parties have consented to the jurisdiction of a magistrate judge for all purposes pursuant to

**II. BACKGROUND**

This order assumes the parties' familiarity with the background of the case, which is set forth at greater length in the Court's previous orders denying BrandTotal's motion for a temporary restraining order, Order Denying TRO (dkt. 63),<sup>2</sup> granting Facebook's motion to dismiss BrandTotal's original counterclaims with leave to amend, Order re 1st MTD (dkt. 108),<sup>3</sup> and granting in part Facebook's motion to dismiss BrandTotal's first amended counterclaims, Order re 2d MTD (dkt. 158).<sup>4</sup> The factual allegations summarized here are drawn from BrandTotal's counterclaims, which are taken as true for the purpose of Facebook's motion to dismiss. Nothing in this order should be construed as resolving any issue of fact that might be disputed at a later stage of the case.

**A. BrandTotal's Allegations**

In brief, and as is relevant to the present motions, Facebook operates social networks with billions of users, including the eponymous Facebook network and Instagram. BrandTotal collects advertising data from various social networks, including Facebook's, to prepare analysis that it sells to corporate advertisers. One of the means that BrandTotal has used to collect such data is a program called UpVoice, where users whom BrandTotal calls "panelists" voluntarily install a browser extension that tracks and records the advertisements displayed to those users through social media, and in return, BrandTotal provides those panelists gift cards as compensation. The version of UpVoice in use before commencement of this litigation automatically recorded not only data about the ads that users saw, but also users' demographic information, which the browser extension collected from Facebook.

On September 21, 2020, Facebook wrote to Google that UpVoice was "improperly scraping user PII (e.g., gender, relationship status, ad interests, etc.) without proper disclosure." 2d Am. Counterclaim ("SACC," dkt. 161-2) ¶ 69. Google removed UpVoice from its Chrome

<sup>2</sup> *Facebook, Inc. v. BrandTotal Ltd.*, 499 F. Supp. 3d 720 (N.D. Cal. 2020). Citations herein to previous orders in this case refer to page numbers of the versions filed in the Court's ECF docket.

<sup>3</sup> *Facebook, Inc. v. BrandTotal Ltd.*, No. 20-cv-07182-JCS, 2021 WL 662168 (N.D. Cal. Feb. 19, 2021).

<sup>4</sup> *Facebook, Inc. v. BrandTotal Ltd.*, No. 20-cv-07182-JCS, 2021 WL 2354751 (N.D. Cal. June 3,

1 web store, significantly limiting UpVoice’s availability and effectiveness, which in turn limited  
2 BrandTotal’s ability to gather data for its corporate customers. *Id.* ¶ 72. Facebook has also  
3 removed BrandTotal’s accounts from Facebook’s networks. *Id.* ¶ 68.

4 During this litigation, BrandTotal modified UpVoice to automatically collect only data  
5 about ads and to rely on panelists self-reporting their demographic information, and Facebook has  
6 agreed not take action against that modified version of UpVoice pending the outcome of this case  
7 without providing advance notice to BrandTotal. *See* Order Denying as Moot Mot. for Prelim. Inj.  
8 (dkt. 160).

9 **B. Previous Orders and Relevant Procedural History**

10 The Court previously dismissed BrandTotal’s claim for violation of the “unfair” prong of  
11 the UCL, with leave to amend, for failure to allege at least a threatened violation of the antitrust  
12 laws, or some special circumstances that would allow that a claim to proceed without a clear  
13 connection to the antitrust laws. Order re 1st MTD at 16–17; Order re 2d MTD at 24–28. The  
14 Court noted that BrandTotal had not alleged either a coherent and plausible product market or an  
15 exception to the general rule that a market participant may permissibly refuse to deal with a rival.  
16 Order re 2d MTD at 26–28.

17 At a case management conference on February 19, 2021, the Court set a deadline of March  
18 22, 2021 for the parties to seek leave to amend their pleadings, adopting the date jointly proposed  
19 in the parties’ case management statement. Civil Minute Order (dkt. 106); *see* Case Mgmt.  
20 Statement (dkt. 99) at 12. On March 18, 2021, the Court granted the parties’ stipulation to extend  
21 the deadline to amend pleadings from March 22, 2021 to May 21, 2021 to accommodate the time  
22 needed for BrandTotal to produce discovery that might be relevant to Facebook amending its  
23 complaint. *See* dkt. 130. As an exception to that deadline, the Court’s June 3, 2021 order on  
24 Facebook’s second motion to dismiss allowed BrandTotal to amend certain claims the Court  
25 dismissed without prejudice—for interference with BrandTotal’s contracts with investors, for  
26 interference with BrandTotal’s prospective economic advantage with respect to potential  
27 customers, and for violation of the “unfair” prong of the UCL—no later than June 25, 2021.

28 Order re 2d MTD at 20.

**C. Counterclaims at Issue**

BrandTotal's second amended counterclaims include counterclaims the Court previously allowed to proceed (which are not at issue in the present motion), as well as a new counterclaim for defamation, SACC ¶¶ 140–51, and an amended counterclaim for violation of the UCL's "unfair" prong, *see id.* ¶¶ 152–77. The latter now rests on an alleged "market for Third-Party Commercial Advertising Information on personal social networking services in the United States," or in the alternative, such information pertaining to advertising "on the Facebook.com site and Instagram platform." *Id.* ¶¶ 155–59. "Third-Party Commercial Advertising Information" is defined as "analytics about non-SIEP advertisements run by third-party business[es]." *Id.* ¶ 15.<sup>5</sup>

**D. The Parties' Arguments**

BrandTotal moves for leave to add the new defamation counterclaim, arguing there is good cause to modify the scheduling order under Rule 16(b)(4) of the Federal Rules of Civil Procedure because "facts of this case are unusual and identifying the cause of action that fits and redresses the full harm of this situation, complex." Defs.' Mot. (dkt. 161) at 6. BrandTotal also argues that amendment should be allowed under the liberal standard of Rule 15(a)(2). *Id.* at 6–7. Facebook contends that BrandTotal learned of the relevant facts underlying its defamation counterclaim months before it filed its first amended counterclaims in March of 2021, and thus was not diligent in waiting until well after the May 2021 deadline for amendment to seek to add this new counterclaim. Pl.'s Mot. & Opp'n (dkt. 169) at 5–7. Facebook also argues that leave to amend would be futile because its statement to Google about BrandTotal's failure to provide sufficient disclosures was true, citing a potential issue with shared computers. *Id.* at 7–8.

Facebook moves to dismiss once again BrandTotal's counterclaim under the UCL's "unfair" prong for failure to allege a plausible relevant market, *id.* at 9–12, failure to allege monopoly power, *id.* at 12–13, and failure to allege an exception to the rule allowing refusal to

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<sup>5</sup> "SIEP" refers to "social issues, elections or politics." Facebook provides more public information about SIEP advertisements than it provides about to other ads. *See* SACC ¶ 22. SIEP

1 deal, *id.* at 13–17.<sup>6</sup> BrandTotal argues that it has alleged a violation of the spirit of the antitrust  
 2 laws because Facebook is unfairly relying on an order the Federal Trade Commission (“FTC”) to  
 3 exclude competitors from the market for advertising data. Defs.’ Opp’n & Reply (dkt. 170) at 8–  
 4 10. BrandTotal also contends that it has sufficiently alleged a product market (or more  
 5 specifically, two potential product markets in the alternative) and monopoly power. *Id.* at 10–14.  
 6 As for refusal to deal, BrandTotal argues that it “is not asking Facebook to authorize BrandTotal’s  
 7 access” to advertising data, but instead seeking to bar Facebook from using third parties like  
 8 Google and the FTC to interference with BrandTotal’s business, and challenging Facebook’s  
 9 removal of BrandTotal’s accounts on Facebook, which eliminated BrandTotal’s ability to  
 10 advertise its own services on Facebook. *Id.* at 14–16. BrandTotal contends that Facebook’s  
 11 reports to Google and the FTC do not implicate the refusal-to-deal rule, and that BrandTotal’s  
 12 accounts and past course of dealing in advertising on Facebook fall within the exception  
 13 recognized by *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). Defs.’  
 14 Opp’n & Reply at 10–14.

15 In a “Notice of Supplemental Event” filed after briefing on the present motions had closed,  
 16 BrandTotal submitted: (1) an August 3, 2021 press release by Facebook indicating that it had  
 17 disabled access by certain New York University researchers who had been collecting advertising  
 18 data in a manner at least arguably similar to BrandTotal, with Facebook having acted purportedly  
 19 to protect user privacy and comply with an order by the FTC; and (2) an August 5, 2021 letter  
 20 from an FTC official to Facebook’s CEO asserting that the FTC’s order did not prohibit Facebook  
 21 allowing the sort of research at issue, that Facebook had failed to comply with a commitment to  
 22 update the FTC about significant events, and that Facebook’s press release was misleading. *See*  
 23 dkt. 173. These developments are not relevant to the Court’s analysis of the present motions.

24  
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 26 \_\_\_\_\_  
 27 <sup>6</sup> Facebook also moves to dismiss BrandTotal’s counterclaim under the “unlawful” prong of the  
 28 UCL to the extent that it rests on the new defamation counterclaim. The parties agree that to the  
 extent that counterclaim is based on the defamation counterclaim (as opposed to the tortious  
 interference counterclaims the Court previously allowed to proceed) they rise or fall together. *See*

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