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9 **UNITED STATES DISTRICT COURT**
 10 **NORTHERN DISTRICT OF CALIFORNIA**
 11 **SAN JOSE DIVISION**

12 FACEBOOK, INC., a Delaware
 13 corporation,
 14
 15 Plaintiff,
 16 v.
 17 MAXBOUNTY, INC., a Canadian
 18 corporation,
 19 Defendant.

Case No. 5:10-cv-4712-JF (HRL)

**DEFENDANT MAXBOUNTY, INC.'S
 NOTICE OF MOTION AND MOTION TO
 DISMISS COUNTS I, II AND III OF
 FACEBOOK'S COMPLAINT PURSUANT
 TO FED.R.CIV.P. 12(b)(6)**

Hearing

Date: February 11, 2011
 Time: 9:00 A.M.

*[Memorandum of Points and Authorities
 filed concurrently herewith]*

1 PLEASE TAKE NOTICE THAT on Friday, February 11, 2011, at 9:00 a.m., in
2 Courtroom 3, 5th Floor, 280 South 1st Street, San Jose, CA 95113, of the U.S. District
3 Court for the Northern District of California, San Jose Division, U.S. District Judge
4 Jeremy Fogel presiding, or as soon thereafter as this matter can be heard, Defendant
5 MaxBounty, Inc. (“MaxBounty”) will, and hereby does, move the Court for an order
6 dismissing Counts I-III of the complaint, pursuant to Fed.R.Civ.P. 12(b)(6).

7 Count I, wherein Facebook alleges that MaxBounty has violated the “CAN-SPAM” Act,
8 should be dismissed, because Facebook cannot prevail on this claim as a matter of law. The
9 CAN-SPAM Act prohibits fraudulent e-mail. The customer advertisements Facebook complains
10 about, however, are not e-mail and therefore cannot give rise to a claim under the CAN-SPAM
11 Act.

12 In Count II, Facebook alleges that MaxBounty has violated the Computer Fraud and
13 Abuse Act. The relevant provision of the Act prohibits improperly using another’s computer to
14 commit fraud. Rule 9(b) requires that circumstances surrounding an alleged fraud be pled with
15 particularity. Facebook’s bald allegations of MaxBounty’s conspiracy with customers to commit
16 fraud under the Act go unexplained. Facebook’s conclusory allegations, which are based solely
17 “on information and belief,” as to MaxBounty are insufficient as a matter of law.

18 In Count III, Facebook alleges common law fraud. Similar to its unexplained allegations
19 with respect to the Computer Fraud and Abuse Act, Facebook alleges that MaxBounty “induces”
20 and “conspires” with its customers to make fraudulent representations. Facebook fails to plead
21 any particular instance of inducement or conspiracy to commit fraud by MaxBounty.
22 Facebook’s claims for common law fraud fail for the same reasons as Facebook’s claim under
23 the Computer Fraud and Abuse Act fails.

24 This Motion is based upon this Notice of Motion and Motion, the concurrently filed
25 Memorandum of Points and Authorities in support of thereof, the pleadings and papers on
26 file, and upon such written or oral evidence or arguments as the Court permits.
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1 Date: November 30, 2010

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