

1 Mark B. Mizrahi CA179384  
2 [mmizrahi@brookskushman.com](mailto:mmizrahi@brookskushman.com)  
3 **BROOKS KUSHMAN P.C.**  
4 Howard Hughes Center  
5 6701 Center Drive, Ste. 610  
6 Los Angeles, CA 90045  
7 Tel.: 310-348-8200  
8 Fax: 310-846-4799  
9 *Attorneys for Defendant MaxBounty, Inc.*

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

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

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

**DEFENDANT MAXBOUNTY, INC.’S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF ITS  
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.

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	ii
I. INTRODUCTION .....	1
II. ANALYSIS.....	2
A. Facebook Has Failed To State a Claim under the CAN-SPAM Act Because the Alleged Misconduct Does Not Involve False or Misleading E-Mail .....	3
B. Facebook Has Failed to State a Claim For Violation of the Computer Fraud and Abuse Act And Common Law Fraud Because It Has Not Pled the Circumstances of MaxBounty’s Alleged “Inducement” And “Conspiracy” To Commit Fraud with Particularity .....	5
1. Legal Standards For Pleading Fraud Generally .....	5
2. Facebook Has Not Met The Standards For Pleading The Fraud Provisions Of The Computer Fraud And Abuse Act.....	6
3. Facebook Has Not Met The Standards For Pleading Common Law Fraud .....	8
III. CONCLUSION.....	9

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Ashcroft v. Iqbal</i> , ___ U.S. ___, 129 S.Ct. 1937 (2009).....	7
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	7
<i>Comwest, Inc. v. American Operator Services, Inc.</i> , 765 F.Supp. 1467 (C.D.Cal.,1991) .....	5, 7
<i>Falkowski v. Imation Corp.</i> , 309 F.3d 1123 (9th Cir.2002) .....	2
<i>Hokama v. E.F. Hutton &amp; Co., Inc.</i> , 566 F.Supp. 636 (C.D.Cal.1983) .....	5
<i>In re Worlds of Wonder Securities Litigation</i> , 694 F.Supp. 1427 (N.D.Cal.1988) .....	6
<i>McFarland v. Memorex Corp.</i> , 493 F.Supp. 631 (N.D.Cal.1980). .....	5
<i>Motorola, Inc. v. Lemko Corp.</i> , 609 F.Supp.2d 760 (N.D. Ill. 2009) .....	6
<i>NL Indus., Inc. v. Kaplan</i> , 792 F.2d 896 (9th Cir.1986) .....	2
<i>Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.</i> , 806 F.2d 1393 (9th Cir.1986) .....	5, 7
<i>Wasco Prods., Inc., v. Southwall Techs., Inc.</i> , 435 F.3d 989 (9th Cir.2006) .....	5, 7, 8

### **Statutes**

15 U.S.C. §7701 et seq.....	1
15 U.S.C. §7702(17) .....	3
15 U.S.C. §7704(a)(1).....	3
18 U.S.C. §1030, et seq.....	2, 6

### **Rules**

Fed.R.Civ.P. 12(b)(6).....	2, 4, 8
----------------------------	---------

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

## **I. INTRODUCTION**

Defendant MaxBounty, Inc. (“MaxBounty”) moves the Court for an order dismissing Counts I-III of the complaint, pursuant to Fed.R.Civ.P. 12(b)(6), for the following reasons.

Plaintiff Facebook, Inc. (“Facebook”) alleges that customers of MaxBounty engaged in deceptive advertising on the Facebook.com social network. Facebook does not allege that MaxBounty engages in any deceptive advertising on Facebook.com.

In paragraph 1 of its Complaint, Facebook contends that MaxBounty is the “mastermind” behind deceptive advertising. Yet, in the body of its Complaint, Facebook cites the actions of MaxBounty customers as the cause of the alleged harm. (*E.g.*, Complaint ¶¶ 46-47.) Facebook makes unsupported allegations against MaxBounty solely “on information and belief.” (Complaint, ¶¶ 43-45, 49, 55-56, 62, 67-70, 77-79.) Facebook has no basis to say that MaxBounty is the “mastermind” behind alleged wrongdoing by its customers.

Some of MaxBounty’s customers create advertisements on Facebook.com, an activity expressly permitted by Facebook. These ads include links to sellers of products and services on the Internet. This is common practice on Facebook, and Facebook authorizes such advertising on its web site. (Complaint ¶ 37.)

In Count I, Facebook alleges that MaxBounty has violated the “CAN-SPAM” Act (15 U.S.C. §7701 et seq.). Even if all of its allegations were true, and they are not, Facebook cannot prevail on this claim as a matter of law. The CAN-SPAM Act prohibits fraudulent e-mail. The term “e-mail” is expressly defined in the Act, and it does not include the activities Facebook cites as the basis for its complaint. Facebook makes no allegation (nor can it) that MaxBounty or its customers send deceptive e-mail, or that MaxBounty induces its customers to send deceptive e-mail. The customer advertisements Facebook complains about are not e-mail and therefore cannot give rise to a claim under the CAN-SPAM Act. Accordingly, Facebook has failed to state a claim on which relief can be granted.

1 In Count II, Facebook alleges that MaxBounty has violated the Computer Fraud and  
2 Abuse Act (18 U.S.C. §1030, et seq.). The relevant provision of the Act prohibits improperly  
3 using another's computer to commit fraud. Facebook alleges, on "information and belief" that  
4 MaxBounty "induces" and "conspires" with its customers to violate the Act. However, no  
5 instance of any actual inducement or conspiracy by MaxBounty is pled. Rule 9(b) requires that  
6 circumstances surrounding an alleged fraud be pled with particularity. The Ninth Circuit  
7 requires pleading the time, place, and specific content of the false representations as well as the  
8 identities of the parties to the misrepresentation. Bald allegations of wrongdoing that are based  
9 solely "on information and belief" are insufficient to plead fraud as a matter of law.

10 In Count III, Facebook alleges common law fraud. Similar to its unexplained allegations  
11 with respect to the Computer Fraud and Abuse Act, Facebook alleges that MaxBounty "induces"  
12 and "conspires" with its customers to make fraudulent representations. Facebook fails to plead  
13 any particular instance of inducement or conspiracy to commit fraud by MaxBounty.  
14 Facebook's claims for common law fraud fail for the same reasons as Facebook's claim under  
15 the Computer Fraud and Abuse Act fails.

16 For these reasons, Counts I-III of the complaint should be dismissed pursuant to  
17 Fed.R.Civ.P. 12(b)(6).

## 18 19 **II. ANALYSIS**

20 A motion to dismiss for failure to state a claim may be granted where it is "clear that no  
21 relief could be granted under any set of facts that could be proved consistent with the  
22 allegations." *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1132 (9th Cir.2002). All material  
23 allegations in the complaint are to be taken as true and construed in the light most favorable to  
24 the plaintiff. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.1986).

25 As detailed below, Facebook has not alleged a set of facts on which relief for Counts I, II  
26 and III of the Complaint can be granted.

1 **A. Facebook Has Failed To State a Claim under the CAN-SPAM Act**  
2 **Because the Alleged Misconduct Does Not Involve False or Misleading**  
3 **E-Mail**

4 The CAN-SPAM Act prohibits the following activity:

5 It is unlawful for any person to initiate the transmission, to a protected computer,  
6 of a commercial electronic mail message, or a transactional or relationship  
7 message, that contains, or is accompanied by, header information that is  
8 materially false or materially misleading.

9 15 U.S.C. §7704(a)(1)(underlining added).

10 The Act defines the term “transactional or relationship message” as a particular type of  
11 “electronic mail message.” 15 U.S.C. §7702(17). Accordingly, all liability under the Act turns  
12 on the transmission of false or misleading “electronic mail messages.”

13 The Act defines the term “electronic mail message” as “a message sent to a unique  
14 electronic mail address.” 15 U.S.C. §7702(6). The term “electronic mail address” is defined as:

15 a destination, commonly expressed as a string of characters, consisting of a  
16 unique user name or mailbox (commonly referred to as the “local part”) and a  
17 reference to an Internet domain (commonly referred to as the “domain part”),  
18 whether or not displayed, to which an electronic mail message can be sent or  
19 delivered.

20 15 U.S.C. §7702(5).

21 Liability under the Act therefore requires the transmission of an “electronic mail  
22 message,” sent to a “unique electronic mail address” that includes a “unique user name or  
23 mailbox” and an “Internet domain.” An example of such an e-mail address is  
24 username@domain.com.

25 Facebook makes no allegation that MaxBounty, or its customers, send fraudulent or  
26 deceptive e-mail as that term is defined under the Act. In its allegations supporting its CAN-  
27 SPAM claim, Facebook drops the Act’s “mail” requirement altogether, revealing its inability to  
28 state a proper claim, viz:

61. Upon information and belief, Defendant knowingly and willingly  
participates with Defendant’s affiliates in procuring Facebook users to send, or  
take actions that cause commercial electronic messages to be sent, to all the  
Facebook users’ friends on Facebook. The Facebook users takes [sic] such action  
because they were led to believe they would receive valuable consideration if they  
send commercial messages to their friends. The electronic messages initiated by  
Defendant’s affiliates are “commercial” electronic messages because their

1 primary purpose was the Commercial advertisement or promotion of a  
2 commercial product or service (including content on an Internet website operated  
for a commercial purpose) as provided in 15 U.S.C. § 7702(2)(A).

3 62. Upon information and belief, Defendant induces its affiliates to initiate  
4 commercial messages on Facebook and thereby procures the origination or  
transmission of such message as provided in 15 U.S.C. § 7702(9).

5 63. Defendant intentionally misleads Facebook users by inducing its affiliates to  
6 initiate the transmission of commercial electronic messages through Facebook's  
7 computers to Facebook users that contain header information that is materially  
false or misleading as to the true identity of the initiator of the messages in  
violation of 15 U.S.C. § 7704(a)(1).

8 (Dkt. #1, Complaint, underlining added.)

9 The CAN-SPAM Act does not prohibit "electronic messages." The Act prohibits  
10 "electronic mail messages." The complaint contains no allegation that MaxBounty or its  
11 customers transmit false or misleading electronic mail messages as that term is defined by the  
12 Act.

13 Taking all of Facebook's allegations as true, Facebook has failed to state a claim under  
14 the CAN-SPAM Act for which relief can be granted. Accordingly, Facebook's claim under the  
15 CAN-SPAM Act should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6).  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 **B. Facebook Has Failed to State a Claim For Violation of the Computer**  
2 **Fraud and Abuse Act And Common Law Fraud Because It Has Not**  
3 **Pled the Circumstances of MaxBounty’s Alleged “Inducement” And**  
4 **“Conspiracy” To Commit Fraud with Particularity**

5 **1. Legal Standards For Pleading Fraud Generally**

6 Allegations of fraud must meet the heightened pleading standards of FRCP 9(b). The  
7 Ninth Circuit has interpreted this rule to require a statement of “the time, place, and specific  
8 content of the false representations as well as the identities of the parties to the  
9 misrepresentation.” *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393,  
10 1400-01 (9th Cir.1986); *Comwest, Inc. v. American Operator Services, Inc.*, 765 F.Supp. 1467,  
11 1470-1471 (C.D.Cal.,1991).

12 [T]he requisite factual allegations established by the Ninth Circuit in *Schreiber*  
13 are required for a purpose. Given that allegations of fraud are particularly  
14 injurious to business and professional reputations, a fraud claim may withstand a  
15 Rule 9(b) challenge only if it states “the manner in which [the alleged  
16 misrepresentations] are false, and the facts that support an inference of fraud by  
17 each defendant.”

18 *Comwest, Inc.*, 765 F.Supp. at 1471, *quoting* *McFarland v. Memorex Corp.*, 493 F.Supp. 631,  
19 639 (N.D.Cal.1980).

20 Rule 9(b) requires identification of the “source of the fraud” and specification of the “role  
21 of each defendant in the fraud.” *Id.*, *quoting* *Hokama v. E.F. Hutton & Co., Inc.*, 566 F.Supp.  
22 636, 645 (C.D.Cal.1983). In *Comwest*, the court held:

23 “It is not enough for plaintiffs to make group allegations in such a situation  
24 because collective responsibility is not self-evident. Each defendant is entitled to  
25 know what misrepresentations are attributable to them and what fraudulent  
26 conduct they are charged with.” *In re Worlds of Wonder Securities Litigation*, 694  
27 F.Supp. at 1433. In order to satisfy Rule 9(b), fraud claims “must allege the roles  
28 of defendants in sufficient detail to permit each to assess and answer the various  
claims of ... liability asserted in the complaint.” *Hokama*, 566 F.Supp. at 646.  
Hence, because plaintiff’s First claim for relief fails to attribute any  
misrepresentation or act of fraud to any of the individual defendants, the  
defendants cannot properly be held to answer plaintiff’s fraud claims.

*Comwest, Inc.*, 765 F.Supp. at 1471-1472.

The Ninth Circuit also applies the heightened pleading standard to claims of civil  
conspiracy to commit fraud. *See, e.g., Wasco Prods., Inc., v. Southwall Techs., Inc.*, 435 F.3d



1 989, 990-91 (9th Cir.2006) (plaintiff must plead California civil conspiracy claim with  
2 particularity where object of agreement is fraudulent).

3 Finally, “[i]t is well settled that fraud allegations based on information and belief do not  
4 satisfy the particularity requirement of Rule 9(b) unless the complaint sets forth the facts on  
5 which the belief is founded.” *Id.*, quoting *In re Worlds of Wonder Securities Litigation*, 694  
6 F.Supp. 1427, 1432-33 (N.D.Cal.1988).

7  
8 **2. Facebook Has Not Met The Standards For Pleading The Fraud  
Provisions Of The Computer Fraud And Abuse Act**

9 Facebook alleges a violation of §§ 1030(a)(4) and (b) of the Computer Fraud and Abuse  
10 Act. (Dkt. #1, Complaint at ¶¶77-79.) Those provisions provide:

11 (a) Whoever . . . (4) knowingly and with intent to defraud, accesses a protected  
12 computer without authorization, or exceeds authorized access, and by means of  
13 such conduct furtheres the intended fraud and obtains anything of value, unless the  
object of the fraud and the thing obtained consists only of the use of the computer  
and the value of such use is not more than \$5,000 in any 1-year period.

14 \* \* \*

15 (b) Whoever conspires to commit or attempts to commit an offense under  
16 subsection (a) of this section shall be punished as provided in subsection (c) of  
this section.

17 18 U.S.C. § 1030, underlining added.

18 The heightened pleading requirement of Rule 9(b) applies to the “furtheres the intended  
19 fraud” provision of the Act. *Motorola, Inc. v. Lemko Corp.*, 609 F.Supp.2d 760, 765 (N.D. Ill.  
20 2009) (“Rule 9(b)'s requirement that ‘[i]n alleging fraud . . . , a party must state with particularity  
21 the circumstances constituting fraud,’ . . . quite plainly applies to section 1030(a)(4)'s  
22 requirement that the defendant's acts further the intended fraud.”).

23 Facebook does not allege that MaxBounty itself has committed fraud in violation of the  
24 Act. Instead, Facebook makes conclusory allegations “upon information and belief” that  
25 MaxBounty “induces” and “conspires” with its customers to violate the above provisions of the  
26 Computer Fraud and Abuse Act. (Dkt. #1, Complaint at ¶¶77-79.)

27 Facebook does not identify any details of how MaxBounty allegedly induced or  
28

1 conspired to commit fraud. Facebook does not identify any particular individual at MaxBounty  
2 that induced or conspired with any particular customer to make any particular misrepresentation.  
3 Facebook does not identify a name, date, location or other particular detail concerning any actual  
4 instance of inducement or conspiracy to defraud.

5 Facebook has not pled the required “time, place, and specific content of the false  
6 representations” or the “identities of the parties” at MaxBounty that give rise to Facebook’s  
7 claims of MaxBounty’s “conspiracy” and “inducement” to commit fraud. *See, Schreiber*  
8 *Distributing Co.* 806 F.2d at 1400-01. Facebook ignores the rule that bald allegations of fraud  
9 based on “information and belief” do not satisfy the particularity requirement of Rule 9(b).  
10 *Comwest, Inc.*, 765 F.Supp. at 1471.

11 Facebook’s allegation of “conspiracy” to violate the Act fails because Facebook has not  
12 pled the particular circumstances giving rise to a “conspiracy” between MaxBounty and any of  
13 its customers to commit fraud. *Wasco Prods.*, 435 F.3d at 990-991.

14 Facebook’s conclusory allegations of intent (Complaint at ¶¶77-78) also fall short of the  
15 pleading standards. In *Ashcroft v. Iqbal*, \_\_ U.S. \_\_, 129 S.Ct. 1937 (2009), the respondent  
16 argued that “the Federal Rules expressly allow him to allege petitioners' discriminatory intent  
17 ‘generally,’ which he equates with a conclusory allegation.” *Id.* at 1954. The Supreme Court  
18 rejected that argument, stating “the Federal Rules do not require courts to credit a complaint's  
19 conclusory statements without reference to its factual context.” *Id.* Facebook does not plead any  
20 “factual context” surrounding its allegation that MaxBounty intended to induce fraud or conspire  
21 with its customers to commit fraud.

22 Facebook is using its Computer Fraud and Abuse Act claim to engage in a fishing  
23 expedition, with no actual evidence, and no particular pleading, of MaxBounty’s conduct –  
24 inducement, conspiracy or otherwise – that furthered any intended fraud in violation of the Act.  
25 Such improper fishing expeditions were one basis for the Supreme Court’s ruling in *Bell Atlantic*  
26 that pleadings must comply with the pleading standards set forth in the Federal Rules. *Bell*  
27 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (“It is no answer to say that a claim just  
28

1 shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery  
2 process through ‘careful case management,’ . . . given the common lament that the success of  
3 judicial supervision in checking discovery abuse has been on the modest side.”).

4 Facebook’s claim against MaxBounty fails to comply with Rule 9(b), and Facebook has  
5 failed to state a claim under the Computer Fraud and Abuse Act on which relief can be granted.  
6 Accordingly, Count II should be dismissed under Fed.R.Civ.P. 12(b)(6).

7  
8 **3. Facebook Has Not Met The Standards For Pleading Common Law Fraud**

9 Count III alleges common law fraud. Facebook’s conclusory allegations in Count III are  
10 deficient for the same reasons as Count II discussed above. Upon “information and belief,”  
11 Facebook alleges that MaxBounty “induces” its customers to make “false representations.”  
12 (Complaint at ¶85-86.) Facebook fails to plead any circumstances concerning MaxBounty’s  
13 alleged wrongdoing, such as the actor(s) at MaxBounty that allegedly induced the fraud, or the  
14 nature of MaxBounty’s alleged inducement.

15 As explained above, such allegations fail to meet the heightened pleading requirements of  
16 Rule 9(b), and other controlling authority. In addition, Facebook’s allegation of “conspiracy” to  
17 commit fraud is deficient because Facebook has failed to plead the particular circumstances  
18 giving rise to a “conspiracy” between MaxBounty and any of its customers to commit fraud.  
19 *Wasco Prods.*, 435 F.3d at 990-991.

1 III. CONCLUSION

2 For the above reasons, Counts I-III of the complaint should be dismissed for failure to  
3 state a claim on which relief can be granted pursuant to Rule 12(b)(6).

4  
5 Date: November 30, 2010

6 By: /s/ Mark B. Mizrahi  
7 Mark B. Mizrahi CA179384  
8 [mmizrahi@brookskushman.com](mailto:mmizrahi@brookskushman.com)  
9 **BROOKS KUSHMAN P.C.**  
10 Howard Hughes Center  
11 6701 Center Drive, Ste. 610  
12 Los Angeles, CA 90045  
13 Tel.: 310-348-8200\_  
14 Fax: 310-846-4799

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
*Counsel for Defendant MaxBounty, Inc.*

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

I also certify that I have mailed by United States Postal Service the paper to the following non-participants in the ECF System:

By: /s/ Mark B. Mizrahi  
Mark B. Mizrahi  
mmizrahi@brookskushman.com  
**BROOKS KUSHMAN P.C.**

*Attorneys for Defendant, MaxBountry, Inc.*