

1 Mark B. Mizrahi, State Bar No. 179384  
 2 [mmizrahi@brookskushman.com](mailto:mmizrahi@brookskushman.com)  
 3 BROOKS KUSHMAN P.C.  
 4 6701 Center Drive, Suite 610  
 5 Los Angeles, CA 90045  
 6 Tel. (310) 348-8200; Fax (310) 846-4799

7 Thomas A. Lewry (Admitted *Pro Hac Vice*)  
 8 [tlewry@brookskushman.com](mailto:tlewry@brookskushman.com)  
 9 John S. LeRoy (Admitted *Pro Hac Vice*)  
 10 [jleroy@brookskushman.com](mailto:jleroy@brookskushman.com)  
 11 BROOKS KUSHMAN P.C.  
 12 1000 Town Center, Twenty-Second Floor  
 13 Southfield, MI 48075  
 14 Tel. (248) 358-4400; Fax (248) 358-3351

15 *Attorneys for Defendant MaxBounty, Inc.*

16 **UNITED STATES DISTRICT COURT**  
 17 **NORTHERN DISTRICT OF CALIFORNIA**  
 18 **SAN JOSE DIVISION**

19 FACEBOOK, INC., a Delaware  
 20 corporation,

21 Plaintiff,

22 v.

23 MAXBOUNTY, INC., a Canadian  
 24 corporation,

25 Defendant.

Case No. 5:10-cv-4712-JF

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

Hearing

Date: Friday, July 8, 2011  
 Time: 9:00 a.m.

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

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 27  
 28 NOTICE OF MOTION TO DISMISS  
 AMENDED COMPLAINT  
 Case No. 5:10-cv-4712-JF

1 PLEASE TAKE NOTICE THAT on Friday, July 8, 2011, at 9:00 a.m., in Courtroom 3,  
2 5th Floor, 280 South 1st Street, San Jose, CA 95113, of the U.S. District Court for the Northern  
3 District of California, San Jose Division, U.S. District Judge Jeremy Fogel presiding, or as soon  
4 thereafter as this matter can be heard, Defendant MaxBounty, Inc. (“MaxBounty”) will bring its  
5 motion for an order dismissing Counts I-III of the Amended Complaint, pursuant to Fed.R.Civ.P.  
6 12(b)(6).

7 The Court should dismiss Count I, because Facebook cannot prevail on its claim that  
8 MaxBounty has violated the “CAN-SPAM” Act. The CAN-SPAM Act prohibits “initiating” or  
9 “procuring” the transmission of misleading messages. Plaintiff does not allege that MaxBounty  
10 had any contact with anyone that sent any of the (unidentified) “electronic mail messages” at  
11 issue in the Amended Complaint. Furthermore, plaintiff did not plead facts that establish that the  
12 (unidentified) “electronic mail messages” at issue contain “header information that is materially  
13 false or materially misleading” as required by the CAN-SPAM Act. In addition, Plaintiff’s  
14 primary allegations are mere conclusions, which are not sufficient to state a cause of action.

15 In Count II, Facebook alleges that MaxBounty has violated the Computer Fraud and  
16 Abuse Act (“CFAA”). One can only violate the CFAA by accessing a protected computer  
17 “without authorization” or by exceeding “authorized access.” MaxBounty and its customers are  
18 authorized users. Furthermore, plaintiff has not exceeded authorized access as the Ninth Circuit  
19 has defined that term. Therefore, Plaintiff fails to state a claim under the CFAA.

20 In Count III, Facebook alleges common law fraud. Facebook fails to plead any particular  
21 “role in furthering” fraud or “substantial assistance in the wrong” as the law and Federal Rules  
22 require. Thus, Plaintiff fails to state a claim for fraud.

1 The grounds for this Motion are set forth more fully in the accompanying Memorandum  
2 of Points and Authorities. A Proposed Order is attached.

3  
4 By: /s/ Thomas A. Lewry  
Thomas A. Lewry (Admitted *Pro Hac Vice*)  
[tlewry@brookskushman.com](mailto:tlewry@brookskushman.com)  
5 John S. LeRoy (Admitted *Pro Hac Vice*)  
[jleroy@brookskushman.com](mailto:jleroy@brookskushman.com)  
6 BROOKS KUSHMAN P.C.  
1000 Town Center, Twenty-Second Floor  
7 Southfield, MI 48075  
Tel. (248) 358-4400; Fax (248) 358-3351

8  
9 Mark B. Mizrahi, State Bar No. 179384  
[mmizrahi@brookskushman.com](mailto:mmizrahi@brookskushman.com)  
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11 Los Angeles, CA 90045  
Tel. (310) 348-8200; Fax (310) 846-4799

12 *Attorneys for Defendant, MaxBounty, Inc.*

13 Date: May 13, 2011

**CERTIFICATE OF ELECTRONIC SERVICE**

1  
2 I hereby certify that on May 13, 2011, I electronically filed the foregoing document  
3 with the Clerk of the Court for the Northern District of California using the ECF System which  
4 will send notification to the following registered participants of the ECF System as listed on the  
Court's Notice of Electronic Filing: Joseph Perry Cutler, James R. McCullagh, and Brian Patrick  
Hennessy.

5 I also certify that I have mailed by United States Postal Service the paper to the following  
6 non-participants in the ECF System: NONE.

7  
8 By: /s/ Thomas A. Lewry  
tlewry@brookskushman.com  
9 **BROOKS KUSHMAN P.C.**

*Attorneys for Defendant, MaxBounty, Inc.*