**No. _____**

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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In re: FACEBOOK PPC ADVERTISING LITIGATION

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Appeal from the United States District Court
for the Northern District of California
Honorable Phyllis J. Hamilton
CASE No. C 09-3043 PJH

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# PLAINTIFFS' PETITION FOR PERMISSION TO APPEAL DENIAL OF CLASS CERTIFICATION PURSUANT TO FED. R. CIV. P. 23(f)

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. Proc. 26.1, Plaintiffs and Petitioners state that no Petitioner is a nongovernmental corporate party.

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## I. INTRODUCTION

Plaintiffs' petition meets the requirements for review, under Fed. R. Civ. Proc. 23(f), of the district court's manifestly erroneous decision denying class certification. At the core of this case is Facebook's online "click-through" agreement with thousands of large and small advertisers (the "proposed Class members" or "advertisers") who posted advertisements for display to Facebook users on the well-known website, www.facebook.com. Under the standardized online contract, advertisers agreed to pay Facebook on a "cost-per-click" basis, *i.e.*, when a Facebook user clicks on a Class member's advertisement. The district court abused its discretion by failing to recognize that the predominant issue at trial would be whether, under the form contract, Facebook breached the contract with its advertisers by overcharging for clicks.

The court instead erroneously concluded that Plaintiffs failed to establish a contract imposing a duty on Facebook to charge only for valid clicks. Even assuming the court's decision could be read to find the existence of a contract, its holding that the contract gives Facebook unbridled discretion to charge for every "click" (such as numerous repeated clicks in rapid succession by a Facebook user who is impatient with the speed of his or her Internet browser), is wrong. It is black letter law in California that there is an implied covenant

of good faith and fair dealing in every contract that requires Facebook here to exercise its discretion in good faith. Moreover, the industry custom requires such good faith on the part of the sellers of Internet advertising. Finally, the ruling was plain error because the court held Plaintiffs to a higher (and incorrect) standard under Ninth Circuit law regarding adequacy under Rule 23(a)(4) and with regard to their proposed damages methodology under Rule 23(b)(3). Thus, review under Rule 23(f) is necessary to correct the district court's manifest errors in denying class certification.

## II. RELIEF SOUGHT

Plaintiffs seek leave to appeal the order denying class certification. (Exh. A)

## III. QUESTIONS PRESENTED

1. Whether the district court erred in denying class certification because it determined that Plaintiffs failed to prove either the existence of a contract or a contract obligating Facebook to charge only for valid clicks;

2. Whether the district court misapplied the standard of proof to Plaintiffs' liability and damages methodology; and

3. Whether the district court erred in finding that Plaintiffs were inadequate under Rule 23(a)(4).

## IV. STATEMENT OF THE CASE

### A. The Contract Between Advertisers and Facebook

Online contracts are commonplace and are subject to the same rules of interpretation as traditional paper contracts. This is a class action arising out of an alleged breach of an online contract. Facebook used a standardized, non-negotiable Internet form contract to sell advertising whereby advertisers agreed to pay Facebook on a "cost-per-click" basis. The contract consisted of a simple, electronic "click-through" agreement whereby advertisers assent by completing and clicking on a series of Internet pages on the Facebook website.

The meaning of a "click" is at the heart of the agreement as it is the event that triggers the obligation to pay Facebook; yet it is not a defined term set out on the web pages that comprise the contract. Facebook, however, has defined the term "click" elsewhere on its website in a glossary as follows:

> Clicks are counted each time a user clicks through your ad to your landing page.
>
> We [Facebook] have a variety of measures in place to **ensure** that we only report and charge advertisers for **legitimate clicks**, and not clicks that come from automated programs, or clicks that may be repetitive, abusive, or otherwise inauthentic. Due to the proprietary nature of our technology, **we're not able to give you more specific information about these systems.** (emphasis added).

Facebook, like the rest of the online advertising industry (which includes

Google and Microsoft), implements algorithmic-based "rules" that serve as a proxy for determining a Facebook user's intent to view an advertisement. These algorithmic rules, known in the industry as click "filters," determine on a per-click basis the objective characteristics of a click that show whether a click should be billed or not. Thus, if a click violates a rule because of certain characteristics—*i.e.*, clicks were made repeatedly in rapid succession —the click is categorized by the algorithm as "invalid" and is not billed to advertisers.

The rules that Facebook uses to determine which clicks are legitimate or valid (and thus billable) are identical for all advertisers irrespective of their size, industry, or any factor unique to a particular advertiser. Facebook, however, never informs advertisers of the specific rules that it uses to determine what it considers a "legitimate" click because to do so would expose Facebook to potential fraud and compromise the rules it has devised. Thus, advertisers trust Facebook to implement its rules in good faith.

Plaintiffs presented significant evidence showing that Facebook abused that trust by charging advertisers for invalid clicks. The evidence made clear that Facebook breached the contract in two different, but related ways: (1) by setting and modifying its secret click rules in a manner designed to enhance revenue rather than protect advertisers from paying for invalid clicks; and (2) by failing to employ

reasonable measures used in the industry to determine and "audit" its click rules. This is akin to where a purchaser contracts to buy apples with the understanding that the purchaser will purchase them sight unseen. If the evidence showed that the apple seller abused its discretion and knowingly sold non-edible apples because it knew that the buyer agreed to buy them without a prior inspection, the buyer could proceed with a breach of contract action. This case is about the parties' differing interpretation of what constitutes an "edible" apple, *i.e.* a valid (and billable) click.

### B. A Plausible Method Exists for Determining Liability and Damages on a Class-wide Basis Using Facebook's Click Data

Plaintiffs' expert, Dr. Markus Jakobsson, Ph.D., a computer scientist, opined that algorithms could be written reclassifying, on a click by click basis, whether a particular click should have been billable or not. The reclassification would reflect the rules Facebook *should have used* had it exercised good faith in making click validity determinations. As Dr. Jakobsson described, he would use Facebook's historical click data by inputting it into rule-based algorithms created to reflect objectively reasonable filtration rules. The resulting damages involve a simple arithmetic equation reflecting the difference between what advertisers paid and what they should have paid if Plaintiffs' rules governed click validity.

### C. The Named Plaintiffs' Experiences Exemplify Facebook's Liability and the Damages Suffered

Plaintiff Fox Test Prep ("Fox") offers LSAT and GMAT instruction and tutoring in San Francisco. Fox started buying cost-per-click advertising from Facebook in July 2009 and paid Facebook a total of $1,058.13. While Fox continues to buy cost-per-click advertising, it stopped buying it from Facebook after Fox suspected charges for invalid clicks based on tracking software.

Plaintiff Steven Price has a website offering services to car buyers and sellers. He started buying cost-per-click advertising from Facebook in May 2009 and paid Facebook a total of $697.12. Based on tracking software, Price determined that two-thirds of the clicks from Facebook were invalid.

Plaintiffs' expert testified that both Plaintiffs were charged for invalid clicks. Plaintiffs attached to their class certification motion expert analysis demonstrating that they were charged for invalid clicks.

## V. THE DISTRICT COURT'S CLASS CERTIFICATION ORDER

The court denied class certification of Plaintiffs' breach of contract and unfair business practices claims under Cal. Bus. & Prof. Code §§ 17200, *et seq*. Exhibit A hereto (the "Order"). Despite Plaintiffs' unrebutted evidence that all Class members using Facebook's "self serve" Internet process were subject to

*identical* online contracts, the court leaped beyond the requirements of Rule 23. The court stated, "[a]s an initial matter, it is still not clear exactly what comprises the contract," despite a prior motion to dismiss ruling that Plaintiffs did in fact, state a claim for breach of contract for invalid clicks. (Order at 14.) The court denied certification of the contract claim, finding that Plaintiffs "failed to establish that the terms of the contract that were allegedly breached by Facebook are part of any contract between CPC advertisers and Facebook[.]" (*Id.*)

The district court engaged in further contract interpretation, rejecting Plaintiffs' alternative argument that, if Facebook's click definition was not part of the contract, it should be considered objective extrinsic evidence of the meaning of a "click" under the uniform "cost-per-click" contract. The court concluded, "[i]f the contract at issue were truly a standardized form contract, plaintiffs' argument would have more merit. But where, as here, the contract presents such a moving target, the court cannot find that class certification is appropriate." (Order at 16.)

The court then rejected the proposition that extrinsic evidence may be used to interpret the term "click," ruling that Plaintiffs were attempting to add additional terms to the contract as opposed to defining an ambiguous term. [1] In rejecting

[1] The district court's order was contrary to a prior ruling by a different judge denying Facebook's motion to dismiss on the ground that the online contract was ambiguous. In the order denying the motion to dismiss, Judge Jeremy Fogel held that Plaintiffs stated a claim for breach of contract based on invalid click charges

Plaintiffs' position that Facebook's click definition was extrinsic evidence of the types of clicks billable under the contract, the court again engaged in merits-based contract interpretation, erroneously finding that Facebook's integration clause "preclude[d] a finding that the 'click definition' statements outside of the SRR can be used to impose additional contract obligations on Facebook." (Order at 16.)

Despite Dr. Jakobsson's expert report proffering a methodology for analyzing liability and determining damages on a class wide basis, the district court ruled that Plaintiffs' expert's methodology did not demonstrate that common issues predominated. Finally, the court ruled that Plaintiffs were inadequate, finding that they were subject to unique defenses and failed to show "any concrete injury from specific 'invalid' clicks" even though Plaintiffs submitted an expert report demonstrating charges for such clicks. (Order at 10).

## VI. THIS COURT SHOULD REVIEW THE MANIFESTLY ERRONEOUS CERTIFICATION ORDER

Rule 23(f) of the Federal Rules of Civil Procedure provides for interlocutory appeal of class certification orders. Interlocutory appeals are ordinarily granted where, as here, one or more of the following factors have been established:

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notwithstanding a provision disclaiming liability for "click fraud or other improper actions." According to Judge Fogel, the contract was susceptible to Plaintiffs' interpretation that Facebook did not disclaim liability for all invalid clicks, such as double-clicks occurring within a certain time frame, especially in light of Facebook's click definition.

> (1) the district court's class certification decision is manifestly erroneous in some way; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims.

*Chamberlan v. Ford Motor Co*., 402 F.3d 952, 959 (9th Cir. 2005).

A class certification order is manifestly erroneous where "the district court applies an incorrect Rule 23 standard or ignores a directly controlling case." *Id.* at 962 (citations omitted). If the district court's determination was premised on a legal error, that is a *per se* abuse of discretion. *Yokoyama v. Midland Nat'l Life Ins. Co.,* 594 F.3d 1087, 1091 (9th Cir. 2010). Finally, a district court abuses its discretion when its class certification order is based on a conclusion that the plaintiff will not prevail on the legal theories. *See United Steel v. Conoco Phillips,* 593 F.3d 802 (9th Cir. 2010); *Wolin v. Jaguar Land Rover North America,* 617 F.3d 1168, 1173 (9th Cir. 2010).

As Plaintiffs show, the Order is manifestly erroneous and conflicts with the decisions of its sister courts finding that extrinsic evidence of the defendant's intent can be used in interpreting ambiguous terms in a standardized online contract. Thus, review is warranted and appropriate.

### A. The District Court Improperly Evaluated the Merits of the Case in Deciding Class Certification

When deciding a motion for class certification, courts must conduct a "rigorous analysis" to determine "the capacity of a class wide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551–52 (2011); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980 (9th Cir. 2011). Frequently, "that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Ellis*, 657 F.3d at 980 (citing *Dukes*, 131 S. Ct. at 2551).

As this Court recently explained in *Ellis*, to the extent the merits do not overlap with class certification issues, they should not be considered. *Id.*, 657 F.3d at 983 (emphasis added). This distinction between analyzing the merits of the claim to determine the Rule 23 criteria and pre-judging plaintiffs' ability to prove his case must be maintained to comply with Dukes while at the same time respecting that Rule 23 does not require a plaintiff to prove his causes of action.

Nothing in Dukes changes the basic principle that in reviewing a motion for class certification, "the court generally is bound to take the substantive allegations of the complaint as true." *Pina v. Con-Way Freight, Inc.*, No. C 10-00100 JW, 2012 WL 1278301, at *2 (N.D. Cal. Apr. 12, 2012) (citation omitted). Moreover,

courts are not permitted to turn the Rule 23 certification motion into a summary judgment exercise. See *In re Aftermarket Auto. Lighting Prod. Antitrust Litig.*, No. 09 MDL 2007-GW (PJWx), 2011 WL 3204588, at *3, n.2 (C.D. Cal. July 25, 2011) (interpreting *Dukes* and explaining that plaintiff is not required to *prove* class-wide injury at class certification); *In re Cooper Cos. Sec. Litig.*, 254 F.R.D. 628, 641, n. 7 (C.D. Cal. 2009) (courts must consider evidence relating to the Rule 23 determination, but "[a]t the same time, the inclusion of evidence that may speak to the merits of a case does not mean that a district court should mistake class action certification for summary judgment"); *Ballew v. Matrixx Initiatives, Inc.*, No. CV-07-267, 2008 WL 4831481, at *2 (E.D. Wash. Oct. 31, 2008) ("the Court is not resolving whether Plaintiff can establish that she can prove her case. Rather, the narrow question before the Court is whether, under Fed. R. Civ. P. 23, a class action is a proper vehicle for litigating the products liability claims[.]").

Here, however, the court below ignored these basic principles and made manifestly erroneous factual and legal findings that prejudged Plaintiffs' claims.

Plaintiffs' class certification motion was based on a breach of a standardized online contract between advertisers and Facebook to charge Plaintiffs for a certain type of "click," i.e., one that Facebook determined in its discretion to be "legitimate." Plaintiffs proffered undisputed evidence that Facebook used identical

rules in determining a "legitimate" click for each advertiser pursuant to the standard contract. Plaintiffs also proffered unrebutted evidence that the data required to identify invalid clicks was in Facebook's possession.

In denying Plaintiffs' motion under Rule 23(b)(3), the court concluded that Plaintiffs proffered insufficient evidence to establish that under the form contract Facebook was obligated to charge advertisers only for legitimate clicks. (Order at 10-13) ("The court finds that the proposed class cannot be certified under Rule 23(b(3)…In particular, plaintiffs have failed to establish that the terms of the contract allegedly breached by Facebook are part of any contract between CPC advertisers and Facebook."). In several other parts of the court's decision, the court raised doubts about the existence of the contract and Facebook's obligations under it. (Order at 18) ("…it is unclear that the contract is …"). Thus, the court's rejection of the motion was driven by its view that Plaintiffs had failed to establish that the contract obligated Facebook to charge only for legitimate clicks, contrary to a prior ruling denying Facebook's motion to dismiss.

The court committed manifest error by prejudging Plaintiffs' ability to prove that the contract obligated Facebook to charge only for certain types of clicks. *See Wolin*, 617 F.3d at 1173 (citing *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir.1975) (that plaintiff will be unable to prove allegations is not a basis for

declining to certify a class)); *Marlo v. United Parcel Service, Inc.*, 639 F.3d 942, 949 (9th Cir. 2011) (citing *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir. 1983) (noting that a decision on the merits was an improper basis to adjudge class certification)). Rather than analyzing whether the contract at issue was indeed a "form" contract imposing the identical obligations on Facebook and Class members, the court engaged in a summary judgment analysis of the contractual provisions. *Id.*

Moreover, the court's interpretation of Facebook's obligations (or lack thereof) failed to apply the hornbook principle that, where, as here, one contracting party is given discretion to determine the obligations of the other party, it must be exercised reasonably and in good faith. *See Toll Bros. v. Chang Su-O Lin*, No. 09-16955, 2011 WL 3839761, at *4 (9th Cir. Aug. 31, 2011) ("'[e]very contract [under California law] imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement'") (*citing* Restatement (Second) of Contracts § 205); *Cal. Lettuce Growers v. Union Sugar Co.*, 45 Cal. 2d 474, 484 (1955) ("[W]here a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing.").[2] Further, had the court properly analyzed

[2] *See also Carma Developers (Cal.), Inc. v. Marathon Dev. of California, Inc.*, 2 Cal. 4th 342, 373 (1992) (stating that breach of a specific contract provision is not

the contract and found it uniform and standardized, it would have followed the many decisions holding that breach of such a contract is a paradigmatic claim for class action treatment.[3]

### B. The District Court Manifestly Erred in Failing to Consider Objective Extrinsic Evidence and Instead Considered Plaintiffs' Subjective Intent

The court also committed manifest error with respect to its legal conclusion that extrinsic evidence, namely, Facebook's own explanation of the types of "clicks" for which advertisers would be charged, could not be used to interpret the parties' obligations under the contract. While the court was correct that "extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written [integrated] contract," Plaintiffs did not offer extrinsic evidence for that purpose; rather, they proffered extrinsic evidence only to aid in interpreting the ambiguous

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necessary to a breach of the implied covenant of good faith and fair dealing; "the covenant can be breached for objectively unreasonable conduct, regardless of the actor's motive.").

[3] *See, e.g.*, *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Serv., Inc.*, 601 F.3d 1159, 1171 (11th Cir. 2010); *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 41 (1st Cir. 2003); *In re Med. Capital Sec. Litig.*, No. SAML 10-2145 DOC, 2011 WL 5067208, at * 3 (C.D. Cal. July 26, 2011); *Ewert v. eBay, Inc.*, Nos. C-07-02198 RMW, C-07-04487-RMW, 2010 WL 4269259, at *1 (N.D. Cal. Oct. 25, 2010); *In re Checking Account Overdraft Litig.*, 275 F.R.D. 666, 674 (S.D. Fla. 2011) *Berrien v. New Raintree Resorts Int'l, LLC*, 276 F.R.D. 355, 362 (N.D. Cal. 2011); *Fireman's Fund Ins. Cos., v. Ex-Cell-O Corp.*, 702 F. Supp. 1317, 1326 (E.D. Mich. 1988) (citing Restatement § 211, holding that "[s]tandarized agreements should be interpreted similarly").

term "click." Moreover, the court's observation that class members would have had to be "exposed" to or "reviewed" the extrinsic evidence is manifest error.[4] As numerous courts have explained, under California law, a contract "is interpreted whenever reasonable treating alike all similarly situated, without regard to their knowledge or understanding of the standard terms of the writing." Restatement (Second) of Contracts, § 211(2); *Vedachalam v. Tata Consultancy Services, Ltd*, No. C 06-0963 CW, 2012 WL 1110004, at *9 (N.D. Cal. Apr. 2, 2012); *Ewert v. eBay*, 2010 WL 4269259, at *7; *see also Berrien*, 276 F.R.D. at 362; *In re Conseco Life Ins. Sales & Marketing Litig.*, 270 F.R.D. 521, 530 (2010) (contract claim would "not be proved based on each policyholder's understanding of the terms of the policies, but based on the face of the policy documents themselves.").[5]

The district court ignored a case directly on point involving a breach of standardized cost-per-click contract, *Menagerie Prods. v. Citysearch*, No. 08-4263

[4] *In re Western Asbestos Co.*, 416 B.R. 670, 694 (N.D. Cal. 2009) ("The mutual intention to which the courts give effect is determined by the objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters surrounding the circumstances under which the parties negotiated or entered the contract; the object, nature, and subject matter of the contract; and the subsequent conduct of the parties.").

[5] *See also Atlanta Cancer Care, P.C. v. Amgen, Inc.*, 359 Fed. Appx. 714, 716 (9th Cir. 2009) ("Indeed, it is reversible error for a trial court to refuse to consider extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face.") (*citing Wolf v. Sup. Ct.*, 114 Cal. App. 4th 1343, (2005)).

CAS (FMO), 2009 WL 3770668 (C.D. Cal. Nov. 9, 2009). In *Citysearch*, the district court certified the class over the defense arguments that extrinsic evidence of which clicks should be billed under the contract made the case inappropriate for class treatment. As here, the parties disputed whether advertisers were charged for invalid clicks pursuant to a form cost-per-click contract. As the *Citysearch* court concluded: "[E]xtrinsic evidence that the Court would consider in making this determination, such as representations on *Citysearch's* website [about which clicks are billable], can be established on a class wide basis." *Id.* at *10. Thus, the court's consideration of whether a particular class member was exposed to or reviewed the extrinsic evidence, or their understanding of it, is an improper basis for denying certification of a breach of contract claim. *See Rodman v. Safeway, Inc.*, No. C 11-03003 JSW, 2011WL 5241113, at *4-5 (N.D. Cal. Nov. 1, 2011) (in breach of contract case, FAQ was relevant extrinsic evidence regarding the terms of the online contract without consideration of plaintiff's review or exposure to FAQ); *Woods v. Google, Inc.*, No. 05:11–cv–1263–JF, 2011 WL 3501403, at *3-4 (N.D. Cal. Aug. 10, 2001) (analyzing issue of extrinsic evidence and incorporation by reference of an alleged breach of an online advertising contract without reference to whether advertisers read or reviewed the evidence). It is clear the district court improperly reviewed the evidence as if Plaintiffs were pursuing a fraud claim.

### C. The District Court Failed to Apply the Correct Standard of Proof With Respect to Plaintiffs' Methodologies for Establishing Class-Wide Liability and Damages

The District Court also erred in failing to apply the correct standard of proof with respect to demonstrating that liability can be established on a class wide basis. Plaintiffs' expert opined that he would construct algorithms that would reflect the rules that Facebook should have employed during the class period had it been exercising its discretion in good faith.[6] This algorithmic approach for determining whether a click should be billed is *identical* to how Facebook makes its determinations of click validity, the only difference being that Plaintiffs would change certain rule parameters to reflect the proper exercise of discretion in determining click validity. Thus, Dr. Jakobsson opined that he could develop algorithms that would distinguish between valid and invalid clicks, using reliable and generally accepted principles in the computer science community, to determine the extent to which Facebook charged advertisers per click in conformity with its obligations. He further opined that he could design algorithms to identify clicks based on fraud (referred to as "click fraud" and not part of the case) and invalid

[6] Although the court concluded that Dr. Jakobsson's analysis could not predict the rate of false positives, the court failed to consider that Facebook's methodology in charging advertisers presents the same issues. (Order at 19.) Moreover, false positives cannot be predicted until the algorithms are actually drafted.

clicks that are not. As Dr Jakobsson opined, "one can determine for each such click log entry whether it is filtered out due to suspicion of 'click fraud' or is invalid for other reasons." In fact, Dr. Jakobsson's opinion clearly stated he would write such algorithms for the merits part of this case.

The district court misapplied the standard for considering expert testimony in the context of a Rule 23 motion in the Ninth Circuit. *See In Re Online DVD Rental Antitrust Litig.*, No. M 09-2029 PJH, 2010 WL 5396064, at *10 (N.D. Cal. Dec. 23, 2010) ("The court must thus ultimately leave disputes over the results reached and assumptions made with respect to competing methodologies to the trier of fact, and discern only whether the plaintiffs have advanced a plausible methodology to demonstrate that antitrust injury can be proved on a class-wide basis.'…plaintiffs need not supply a "'precise damage formula,'" but must simply offer a plausible method for determining damages that is not "'so insubstantial as to amount to no method at all.'") (citation omitted). In certifying the breach of contract claims in *Citysearch*, the court there found that the plaintiffs' proposed three-step method for establishing liability and calculating damages was at least "plausible" and thus met the requirements for class certification. *Citysearch*, 2009 WL 3770668, at *16-17. Dr. Jakobsson's methodology is identical to methodology and damages model approved in

*Citysearch*. He proposes to create algorithms to reflect the rules that Plaintiffs claim should have been implemented but were not and, as in *Citysearch*, to plug Facebook's click log data into these new algorithms to ascertain whether Facebook charged for clicks that were categorized as illegimate pursuant to the new algorithms. Moreover, unlike in *Citysearch*, Dr. Jakobsson's methodology has already been employed in real life conditions by Facebook, which employs a third-party entity to perform bi-annual and independent click-by-click analyses of Facebook's clicks to determine their legitimacy. Facebook's commissioned work shows the plausibility of Dr. Jakobsson's approach. More is not required at the certification stage. *See Brazil v. Dell Inc.*, No. C-07-01700 RMW, 2010 WL 5387831, at *5 (N.D. Cal. Dec. 21, 2010). The court's detailed criticisms of Plaintiffs' expert's opinion go to the weight of the expert evidence, not to whether the opinion is plausible in the Rule 23 context.

### D. The Named Plaintiffs Are Adequate

The court's order was also manifestly erroneous because it found that Plaintiffs were subject to unique defenses, namely, the failure to comply with a provision requiring advertisers to dispute any charges within 60 days. *Plaintiffs were no longer advertisers with Facebook when it added that provision to its online contract in 2011*. Moreover, the waiver issue is clearly a class-wide one.

Further, Plaintiffs' deposition testimony showed that each knew about the case and about their duties as class representatives. The court's failure to consider this evidence was a clear abuse of discretion. (Order at 10-11.) Finally, Plaintiffs submitted data and expert analysis showing they were charged for clicks that should have been deemed invalid and not billable. Facebook did not rebut this testimony. Thus, the court erred by concluding that Plaintiffs failed to demonstrate that they suffered a concrete injury. (Order at 10.)

## VII. CONCLUSION

For the foregoing reasons, the Court should grant leave to appeal the denial of class certification on behalf of the Plaintiff.

Dated: April 27, 2012

Respectfully submitted,


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## CERTIFICATE OF SERVICE

I, Bita Assad, declare as follows:

I am employed by Finkelstein Thompson, 100 Bush Street, Suite 1450, San Francisco, California 94104. I am over the age of eighteen years and am not a party to this action. On April 27, 2012, I served the following document(s):

**PLAINTIFFS' PETITION FOR PERMISSION TO APPEAL DENIAL OF CLASS CERTIFICATION PURSUANT TO FED. R. CIV. P. 23(f)**

[X] **BY ELECTRONIC SERVICE:** I caused the forgoing to be sent to the persons at the electronic notification addresses listed below.

See attached service list.

[X] **BY U.S. MAIL:** I mailed the foregoing via first-class U.S. mail, postage prepaid, to the participants at the addresses listed below.

See attached service list.

I declare under penalty of perjury under the laws of the State of California and the United States of America and that the above is true and correct. Executed this 27th day of April 2012 at San Francisco, California.

/s/ Bita Assad
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