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14
 15 UNITED STATES DISTRICT COURT
 16 NORTHERN DISTRICT OF CALIFORNIA
 17 SAN JOSE DIVISION

18 ADVANCED INTERNET TECHNOLOGIES,))
 19 INC., a North Carolina corporation,))
 20 Individually and on behalf of all others))
 21 similarly situated,))
 22 Plaintiff,))
 23 vs.))
 24 GOOGLE, INC., et al,))
 25 Defendant))
 26))
 27))
 28))

Case No.: 5:05-cv-02579-RMW
E-FILING
NOTICE OF MOTION AND MOTION
FOR CLASS CERTIFICATION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF.
Date: May 12, 2006
Time: 9:00 a.m.
Judge: Hon. Ronald M. Whyte

MOTION FOR CLASS CERTIFICATION;
MEMORANDUM OF POINTS AND AUTHORITIES
 CASE NO. C-05-02579-RMW

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NOTICE OF MOTION FOR CLASS CERTIFICATION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 12, 2006, at 9:00a.m., or as soon thereafter as this matter may be heard before the Honorable Ronald M. Whyte of the United States District Court for the Northern District of District of California, 280 South First Street, San Jose, California, Plaintiff, Advanced Internet Technologies, Inc. (“AIT”) will and hereby does move the Court for an Order pursuant to Rule 23 of the Federal Rules of Civil Procedure certifying a plaintiff class (the “Class”) consisting of:

All persons and/or entities who entered into on-line form contracts known as the “Google Inc. AdWords Program Terms” for United States advertising, and paid money to Google, Inc. for “clicks” on AdWords ads from June 24, 2001 to the present date.

Excluded from the Class are Google, Inc. (“Google”), officers and directors of Google, members of their immediate families and each of their legal representatives, heirs, successors or assigns and any entity in which Google has or has had a controlling interest. AIT will also move the Court to appoint AIT as the Class Representative.

This motion is made pursuant to Rule 23 of the Federal Rules of Civil Procedure. It is made on grounds that: (i) the class is so numerous that joinder of all members is impracticable; (ii) there are questions of law or fact common to the class; (iii) the claims or defenses of AIT are typical of the claims or defenses of the class; (iv) AIT will fairly and adequately protect the interests of the class; (v) common questions of law or fact predominate over individual questions; and (vi) class resolution is superior to other available methods for the fair and efficient adjudication of the controversy.

This motion is supported by the following Memorandum of Points and Authorities, the Declaration of Clarence E. Briggs, the pleadings and records on file in this case, the arguments of counsel, and any other matters properly before the Court.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Google AdWords program permits Google’s customers to purchase advertising that
4 links the customer’s website to Google’s search results as displayed both on Google’s own
5 website and on hundreds of thousands of other participating websites under Google’s “AdSense
6 Program.” Advertisers then pay Google a fee every time someone clicks on their ad.

7 The putative class in this action is comprised of tens of thousands, if not, hundreds of
8 thousands of advertisers who participate in Google’s AdWords program by entering into on-line
9 form contracts with Google for United States advertising. The on-line form contracts all provide
10 that AdWords advertisers will not be charged for “invalid clicks,” which Google defines as
11 including clicks created by “automated tools, robots or other deceptive software” and “manual
12 clicks intended to increase [AdWords Advertisers’] advertising costs or to increase profits for
13 website owners hosting [AdWords customers’] ads.” Thus, the contracts that are the subject of
14 this class action all contain substantively the same pertinent terms.

15 Notwithstanding Google’s contractual promise not to charge its AdWords customers for
16 invalid clicks, AdWords advertisers (such as class representative AIT) are being charged
17 millions of dollars per annum by Google for invalid clicks. Conservative estimates of the
18 “invalid click” activity that is improperly charged to Google AdWords customers have been
19 placed at anywhere from 10% to 30% of all charges. In December 2004, Google’s chief
20 financial officer, George Reyes, characterized “click fraud” (the generic term for what Google
21 refers to as “invalid clicks”) as, “the biggest threat to the Internet economy.” Since Google
22 claims to employ the same computerized programs and filters to ostensibly detect “click fraud”
23 on a system-wide basis, Google’s breaches of its contracts involve inherently class-wide issues.

24 This action sets forth claims based upon breach of contract and unfair business practices
25 (under California Business & Professions Code §17200, Et Seq.) causes of action on behalf of all
26 persons or entities that entered into on-line form contracts for the “Google Inc. AdWords
27
28

1 Program Terms” for United States advertising (“AdWords Program Terms”), and paid money to
 2 Google, Inc. for “clicks” on AdWords ads from June 24, 2001 to the present date.¹

3 A court may certify a class if a plaintiff demonstrates that all of the prerequisites of
 4 Federal Rule of Civil Procedure 23(a) have been met, and that at least one of the requirements of
 5 Federal Rule of Civil Procedure 23(b) have been met. *See* Fed.R.Civ.P. 23; *see also*, *Valentino v.*
 6 *Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir.1996). This action satisfies the prerequisites
 7 for class certification under Rule 23(a): (i) numerosity; (ii) commonality; (iii) typicality; and (iv)
 8 adequacy of representation. This action also satisfies the requirements of Rule 23(b)(3) B
 9 namely, predominance of common questions of law or fact and the superiority of a class action
 10 as a method of adjudication. Accordingly, AIT requests that the Court enter an Order: (i)
 11 certifying this action as a class action pursuant to Fed.R.Civ.P. 23; and (ii) appointing AIT as the
 12 representative of the Class.²

13 II. STATEMENT OF FACTS

14 A. Google’s AdWords Program

15 Google’s free Internet search engine is the most widely-used Internet search engine in the
 16 world. It provides results for hundreds of millions of user searches and covers billions of web
 17 pages each day. Google also sells a number of products and services to individuals and business,
 18 educational and governmental entities. One of the programs Google offers to its business
 19 customers, and Google’s predominant source of revenue, is a keyword-triggered advertising
 20 program called “AdWords.” Google has offered this program since October 2000.

23 ¹ The AdWords Program Terms specifically provide that the agreement is to be “governed
 24 by California law.” Therefore, a single body of substantive state law applies to this action and
 25 the claims and defenses of the litigants. Accordingly, the application of California law to the
 26 defendant and every member of the Class will not violate the constitutional limitations on choice
 of law mandated by the Due Process Clause of the Fourteenth Amendment and the Full Faith and
 Credit Clause of Article IV, § 1 as under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105
 S.Ct. 2965, 86 L.Ed.2d 628 (1985).

27 ² As this Court is aware, AIT’s attorneys also represent a plaintiff in a related action that
 28 also sought class action certification. *Mizera v. Google, Inc.* CV-05-02885 RMW. After further
 consideration, plaintiffs’ attorneys have decided to seek certification with only AIT as the
 representative plaintiff.

1 Google's AdWords program permits Google's advertising customers to purchase
2 advertising that links their websites to Google's search results. Google posts the purchased
3 advertising links on the top and right hand margins of its search engine results pages, based on
4 the keywords that appear in user queries entered into Google's Internet search engine. Thus,
5 Google's advertising customers make their goods or services known and available to a targeted
6 group of potential customers -- Internet users who are conducting searches using words that are
7 related to the advertisers' business. Google's advertising customers pay Google based on the
8 number of Internet users who use the advertising links by clicking on them for the purpose of
9 accessing the advertiser's website to do business with the advertiser.

10 Google's advertisers select the keywords that will trigger their advertisements. Thus, for
11 example, a computer hardware retailer might select keywords such as "computer," "hard drive,"
12 "memory," and the like. Then, whenever a user enters a search string into Google's search
13 engine containing any of these keywords that retailer's paid advertisement appears on top of or
14 to the right of, the search results. Advertisers make bids for the key words that will trigger their
15 advertisements. The highest bidder for a word or phrase generally finds its ad on top of the list.
16 Advertisers then pay Google a fee every time someone clicks on their ad. Payments average
17 approximately fifty cents per click, but can reach over \$100 per click for sought-after terms
18 valuable to advertisers.

19 Other internet search companies besides Google offer variants on Google's AdWords
20 program. These programs are substantially identical to Google's in that all advertisers pay fees
21 to the internet search company each time their ads are clicked. These programs are referred to
22 generically as "pay-per-click".

23 In addition to placing the advertiser's links on the search results page, Google also places
24 the AdWords text ads on other Web sites though Google's "AdSense Program." Under this
25 program, other websites may join the "Google Network" and a Google computer program
26 automatically selects advertisers' links based on the particular AdSense website's content.
27 Again, advertisers pay Google a fee every time someone clicks on their ad as displayed on an
28 AdSense website just as if it were displayed on Google's website. Google then pays a portion of

1 the fees it receives from the advertiser to the AdSense website that displayed the ad. Google's
2 AdSense Program broadens the reach of AdWords text ads and disburses those ads throughout
3 the Internet in a targeted manner. Accordingly, the AdSense Program is a vital and valuable
4 component of Google's AdWords program.

5 **B. Google's Agreement with the Class**

6 With the exception of a small percentage of its advertisers (who would not be members
7 of the Class plaintiff seeks to certify), all AdWords advertisers advertising within the United
8 States enter into an on-line form contract known as the AdWords Program Terms by clicking a
9 button. The on-line form contract is revised from time-to-time, but have remained identical in
10 substance throughout the Class period with respect to the terms that are at issue in this class
11 action. All members of the proposed Class are required to accept the newly revised versions of
12 the Agreements in order to continue to advertise with the AdWords program. [Declaration of
13 Clarence E. Briggs (the "Briggs Dec."), ¶¶ 5 and 9; Exhibits "A" and "F"]

14 The AdWords Program Terms provide that advertisers "shall be charged based on *actual*
15 *clicks . . .*" (emphasis added). Further, the AdWords Program Terms provide that:

16 These Google Inc. AdWords Program Terms ("Terms") are entered
17 into by you and Google Inc. ("Google") regarding the Google
18 AdWords Program ("Program") as further described in the
19 Program's frequently asked questions at
20 <https://adwords.google.com/support/bin/index.py?fulldump=1> (the
"FAQs") (collectively, the "Agreement").

21 The terms of the AdWords Program, as reflected in Google's "FAQs" (frequently asked
22 questions) about the program and AdWords Help Center website, make clear that advertisers
23 may not be charged for "invalid clicks," and that charges for "invalid clicks" will be refunded to
24 the advertiser. [Briggs Dec. ¶¶ 5-8; Exhibits "A" though "E"]

25 The FAQs [Briggs Dec. Exhibit "B"], which are incorporated into the AdWords Program
26 Terms, provide as follows:

27 **Do I pay for every click on my ad?**

28 With Google AdWords cost-per-click (CPC) pricing, you pay
whenever someone clicks on your ad . . . See our high click

1 volume FAQ for more information about sources of legitimate
2 clicks.

3 If you suspect that your ads have been affected by invalid clicks,
4 *see the AdWords help center to learn more about AdWords click
quality.* (Emphasis added)

5 The AdWords Help Center which is linked to the FAQs [Briggs Dec. Exhibits “C”
6 through “E”] provides as follows:

7 **What kinds of clicks does Google consider invalid?**
8

9 Some sources of invalid clicks include:

- 10 • Manual clicks intended to increase your advertising costs or to
11 increase profits for website owners hosting your ads.
12 • Clicks by automated tools, robots, or other deceptive software.

13 We closely monitor these and other scenarios to better protect you
14 from receiving invalid clicks.

15 **What does Google do when invalid clicks are detected?**

16 Google actively implements several [click protection techniques](#) in
17 order to combat invalid click activity. Clicks that Google
18 determines invalid are automatically filtered from your reports. In
19 addition, we apply the following policies for the protection of
20 AdWords advertisers:

- 21 • If we find that invalid clicks have escaped automatic detection,
22 you'll receive a credit for those clicks. This credit will appear on
23 the Billing Summary page of the My Account section in your
24 AdWords account, labeled *Adjustment - Click Quality*.
25 • Any advertiser or publisher participating in invalid click activity or
26 any related offense is subject to legal prosecution. We will also
27 take the appropriate action on the related account.

28 **How will Google credit my account for invalid clicks?**

Google constantly monitors for, and strictly prohibits, invalid click
activity. We work hard to maintain the integrity of our advertising
program and to make sure you're being billed for legitimate clicks
on your ads. If we discover that you've been charged for invalid
clicks in the past two months, we'll apply credits to your account.

1 Thus, pursuant to the AdWords Program Terms, advertisers are charged only for “actual clicks.”

2 Moreover, the FAQs, which are specifically referenced in the on-line form AdWords
3 Program Terms describe a distinction between invalid clicks and “legitimate clicks” and invite
4 advertisers who suspect they have been affected by invalid clicks to “see the AdWords help
5 center to learn more about AdWords click quality.” [Briggs Dec. Exhibit “B”]

6 Finally, the statements set forth in the “AdWords Help Center” also state that Google’s
7 “click protection techniques” are designed “to combat invalid click activity” and that “[c]licks
8 that Google determines invalid are automatically filtered from your reports.” Google admits in
9 the AdWords Help Center that it has a responsibility to detect “invalid clicks and to ensure that
10 our advertisers are not charged for these invalid clicks.” The AdWords Help Center also states
11 that, “If we find that invalid clicks have escaped automatic detection, you’ll receive a credit for
12 those clicks. [Briggs Dec. Exhibits “C” through “E”]

13
14 **C. In Breach of the AdWords Program Terms, Google Routinely Charges**
15 **Advertisers for Invalid Clicks**

16 The vast bulk of perpetrators of invalid clicks in AdWords are participants in Google’s
17 own AdSense program, who click on the text ads hosted on their own sites in order to generate
18 fees from Google which are ultimately paid by the advertiser. Perpetrators of invalid clicks can
19 also exploit the nature of pay-per-click advertising in order to increase the pay-per-click fees
20 paid by competitors and to boost the placement of their own advertisements. [Complaint ¶21]
21 Google is able to ascertain which “clicks” constitute “invalid clicks” [Complaint ¶ 24] but it
22 continues to charge advertisers for “invalid clicks.” [Complaint ¶ 44] Indeed, Google is in a
23 unique position to detect invalid clicks that originates though its own AdSense Program since
24 these sites are affiliates of Google and the entire process takes place within the closed-end
25 Google network of internet links. [Complaint ¶25]

26 Google, notwithstanding its representations, does not take the measures that are necessary
27 to prevent advertisers from being charged for invalid clicks because the vast bulk of Google’s
28 revenue is derived from pay per click advertising, which is only increased by incidents of invalid

1 clicks. [Complaint ¶¶ 30-34] Moreover, Google does not take the measures that are necessary to
2 prevent advertisers from being charged for invalid clicks because, were Google to fully screen
3 out invalid clicks, the pervasiveness of invalid clicks in AdWords would become obvious and
4 this would call Google's entire business model into question.

5 Google knows that advertisers will be charged for invalid clicks and that the
6 advertisements it sells through the AdWords program are worth significantly less than the
7 amount that plaintiff and the Class have bid for key words and have consequently paid to Google
8 for clicks. [Complaint ¶ 31]

9 Google represents to its advertisers that it has a system in place to ensure that advertisers
10 are not charged for invalid clicks, but has failed to take a number of obvious and significant
11 measures to track or prevent invalid clicks, and fails to adequately warn its existing and potential
12 customers about the likelihood that they will be charged for invalid clicks. [Complaint ¶ 32]

13 As alleged in the Complaint, when customers are charged for invalid clicks, Google fails
14 to (a) adequately advise them that they have been charged, and (b) refund them the overcharges
15 that they have incurred. [Complaint ¶33]

16 As alleged in the Complaint, Google has an inherent conflict of interest in preventing
17 invalid clicks since it derives the same amount of income from each invalid click as it does from
18 each valid click. [Complaint ¶34]

19 **III. ARGUMENT**

20 **A. The Proposed Class Meets The Requirements For Certification Under Rule 23.**

21 The decision as to whether to certify a class is committed to the discretion of the district
22 court within the guidelines of Federal Rule of Civil Procedure 23; *see also Cummings v. Connell*,
23 316 F.3d 886, 895 (9th Cir.2003). Rule 23(a) provides four prerequisites that must be satisfied to
24 certify a proposed class: (1) the class must be so numerous that joinder of all members is
25 impracticable, (2) questions of law or fact exist that are common to the class, (3) the claims or
26 defenses of the representative parties are typical of the claims or defenses of the class, and (4) the
27 representative parties will fairly and adequately protect the interests of the class. *See*
28 Fed.R.Civ.P. 23(a).

1 A plaintiff must also establish that one or more of the grounds for maintaining the suit are
2 met under Rule 23(b), including (1) that there is a risk of substantial prejudice from separate
3 actions; (2) that declaratory or injunctive relief benefiting the class as a whole would be
4 appropriate; or (3) that common questions of law or fact predominate and the class action is
5 superior to other available methods of adjudication. *See* Fed.R.Civ.P. 23(b). In determining the
6 propriety of a class action, the question is not whether the plaintiffs have stated a cause of action
7 or will prevail on the merits, but, rather, whether the requirements of Rule 23 are met. *See*
8 *Staton v. Boeing Co.*, 327 F.3d 938, 954 (9th Cir.2003); *see also Eisen v. Carlisle & Jacquelin*,
9 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). The Court is obliged to accept as true
10 the substantive allegations made in the complaint. *See In re Coordinated Pretrial Proceedings in*
11 *Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir.1982); *see also Blackie v.*
12 *Barrack*, 524 F.2d 891, 901 (9th Cir.1975). Therefore the class order is speculative in one sense
13 because the plaintiff may not be able to later prove the allegations. *See Blackie*, 524 F.2d at 901
14 n. 17.

15 However, although the Court may not require preliminary proof of the claim, it "need not
16 blindly rely on conclusory allegations which parrot Rule 23 requirements. Courts may also
17 consider the legal and factual issues presented by plaintiff's complaint." 2 Alba Conte & Herbert
18 B. Newberg, *Newberg on Class Actions*, 7.26 (4th ed.2005). Sufficient information must be
19 provided to form a reasonable informed judgment on each of the requirements of Fed.R.Civ.P.
20 23. *See Blackie*, 524 F.2d at 901 n. 17. In order to safeguard due process interests and the
21 judicial process, the Court conducts an analysis that is as rigorous as necessary to determine
22 whether class certification is appropriate. *See Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 961
23 (9th Cir.2005); *see also Gen. Tel. Co. of the SW. v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364,
24 72 L.Ed.2d 740 (1982).

25
26 **1. The Court Should Certify The Proposed Class Because All Four**
Prerequisites under Rule 23(a) have been met.

27
28 **a. The Class Is So Numerous that Joinder is Impracticable.**

1 The first requirement for class certification under Rule 23(a) is that the class must be so
2 numerous that joinder of all members is impracticable. See Fed.R.Civ.P. 23(a)(1). The
3 requirement depends on the practicality of joinder in light of the facts and circumstances of each
4 case, and does not provide a required minimum number of class members. See *Harris v. Palm*
5 *Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir.1964). Google cannot seriously
6 dispute that the numerosity requirement has been met in this action. While Google guards the
7 number of AdWords advertisers who are parties to the AdWords Program Terms as a “trade
8 secret,” intuitively, the size of the proposed class numbers in the thousands, if not the hundreds
9 of thousands. The exact size of the class need not be known so long as general knowledge and
10 common sense indicate that the class is large. *Schwartz v. Harp*, 108 F.R.D. 279, 281-82 (C.D.
11 Cal. 1985) (A failure to state the exact number in the proposed class does not defeat class
12 certification, and plaintiff’s allegations plainly suffice to meet the numerosity requirement of
13 Rule 23(a)(1)) (citation omitted). A class of this size makes joinder of all members
14 impracticable, if not logistically impossible. This is particularly true where, as here, the Class
15 Members are likely located throughout the country. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
16 1019 (9th Cir. 1998) (certifying nationwide class where class members were dispersed
17 throughout the country). Accordingly, the proposed class meets the numerosity requirement
18 under Fed.R.Civ.P. 23(a)(1).

19 **b. Common Questions of Law and Fact Exist.**

20 Class certification also requires that questions of law or fact exist that are common to all
21 class members and representatives. See Fed.R.Civ.P. 23(a)(2); see also *Hanlon.*, 150 F.3d at
22 1019. The commonality preconditions of Rule 23(a)(2) are less rigorous than the companion
23 “predominance” requirements of Rule 23(b)(3). *Id.* The existence of shared legal issues with
24 divergent factual predicates is sufficient, as is a common core of salient facts coupled with
25 disparate legal remedies within the class. *Id.* Even a single issue common to all members of the
26 class may fulfill the requirement of Rule 23(a)(2). *Wehner v. Syntex Corp.*, 117 F.R.D. 641, 644
27 (N.D. Cal. 1987). Defendants’ alleged conduct—breaching the AdWords Program Terms by
28

1 charging the Class for invalid clicks affected all Class members in precisely the same manner but
2 for the amount overcharged. Among the questions of law and fact common to the Class are:

3 a. whether the on-line form contracts for the “Google Inc. AdWords Program
4 Terms” for United States advertising permits Google, Inc. to charge its customers for
5 invalid clicks;

6 b. whether Google has breached the on-line form contracts for “Google Inc.
7 AdWords Program Terms” for United States advertising by charging its customers for
8 invalid clicks;

9 c. whether Google’s acts, as alleged in the Complaint, violated California
10 Business & Professions Code §17200, Et Seq.;

11 d. whether the members of the Class have sustained damages and, if so, the
12 appropriate measure of damages.

13 This action clearly contains common questions of law and fact shared by all members of the
14 proposed class, thereby making certification appropriate.

15 **c. The Claims are Typical.**

16 Under Rule 23(a)(3), the Court must also find that "the claims or defenses of the
17 representative parties are typical of the claims or defenses of the class." *See* Fed.R.Civ.P.
18 23(a)(3). The requirements of typicality and commonality tend to overlap. *See General*
19 *Telephone Co.*, 457 U.S. at 158, 102 S.Ct. at 2371 ("Both serve as guideposts ... as to whether
20 under the particular circumstances the maintenance of the class action is economical and whether
21 the named plaintiff's claim and the class claims are so interrelated that the interests of the class
22 members will be fairly and adequately protected in their absence.").

23 The typicality requirement of Rule 23(a)(3) is satisfied if the plaintiffs’ claims arise from
24 the same event or course of conduct that gives rise to claims of other class members and the
25 claims asserted are based on the same legal theory. *Blackie*, 524 F.2d 909 at 905. The purpose
26 of the “typicality” requirement is to assure that the named representative’s interests align with
27 those of the class. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Generally,
28 claims are typical if they arise from the same or similar injury, if the action is based on conduct

1 that is not unique to the named plaintiffs, and if other class members have been injured by the
2 same course of conduct. *Id.* Typicality does not require that all members of the class be
3 identically situated. *Hanlon*, 150 F.3d 1011 at 1020. Under the rule’s permissive standards,
4 representative claims are typical if they are reasonably co-extensive with those of absent class
5 members. *Id.*

6 Further, the courts have held that Rule 23(a)(3) requires only that there be no express
7 conflict between the representative parties and the class “over the very issue in litigation” and
8 that the representatives’ “interests” are not antagonistic to those of the class.” *Mersay v. First*
9 *Republic Corp.*, 43 F.R.D. 465, 468-69 (S.D.N.Y. 1968); *accord Stolz v. United Brotherhood of*
10 *Carpenters & Joiners, Local Union No. 971*, 620 F. Supp. 396, 404 (D. Nev. 1985). Here, AIT
11 and all Class members would proceed under identical legal theories. The Complaint alleges that
12 Google breached its agreement with AIT in the same manner that it breached its identical
13 agreements with the other members of the Class. In fact, AIT and the members of the Class were
14 injured by the same common course of conduct on the part of Google and will employ the same
15 evidence to prove their case. Because AIT alleges no facts or legal arguments peculiar to itself,
16 AIT’s claims are typical of those of the class members whom it seeks to represent.

17
18 **d. The Representative Parties Will Fairly and Adequately Protect The**
19 **Interests of the Class.**

20 The representation requirement is meant to assure that the representative parties will
21 fairly and adequately protect the interests of the class. See Fed.R.Civ.P. 23(a)(4). Constitutional
22 due process concerns require that absent class members be afforded adequate representation. *See*
23 *Hanlon*, 150 F.3d at 1020. Such representation is determined by an absence of conflict of
24 interests, and the indication that the named plaintiffs and their counsel will prosecute the action
25 fully on behalf of the interests of the class. *See id.*, *see also, Lerwill v. Inflight Motion Pictures,*
26 *Inc.*, 582 F.2d 507, 512 (9th Cir. 1978) (citation omitted).

27 Both prongs of the “adequacy” test are met here. AIT is a \$30 million internet hosting
28 company that is a party to the AdWords Program Terms and has spent approximately \$475,000

1 in Google's AdWords program. [Briggs Declaration" ¶¶2-4] On September 7, 2005, AIT
 2 advised Google that, after analyzing its log files with respect to Google AdWords traffic for the
 3 months of June, July and August of 2005, an "alarming percentage" of the clicks for which AIT
 4 was charged were "invalid" as the term is defined in Google's AdWords Help Center. [Briggs
 5 Declaration ¶¶14-15] On September 8, 2005, the "Google AdWords Team" acknowledged
 6 receipt of AIT's complaint, but no further action was or has been taken by Google and no money
 7 has been refunded to AIT. [Briggs Declaration ¶16]

8 In determining the adequacy of representation of a class, the emphasis has been and
 9 should be placed on whether the representative's counsel is capable. *Weinberger v. Jackson*, 102
 10 F.R.D. 839, 844 (N.D.Cal. 1984) (citing *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d
 11 Cir.1968), *class upheld on remand*, 52 F.R.D. 253 (S.D.N.Y.1971), *rev'd* 479 F.2d 1005 (2d
 12 Cir.1973), *vacated* 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (Eisen II)). AIT has
 13 retained Chitwood Harley Harnes LLP, a firm that has extensive experience in class action
 14 litigation involving both securities and consumer issues. The Chitwood firm was previously
 15 appointed as lead counsel for a class in the Northern District of California in *In re Providian*
 16 *Financial Corp. Securities Litigation*, Master File No. No. C-01-3952 (CRB), a case that settled
 17 on the day before commencement of trial for \$65 million.³ Plaintiff's other counsel, Kabateck
 18 Brown Kellner LLP and Law Offices of Shawn Khorrami also have substantial experience
 19 litigating class actions in the state of California and elsewhere.⁴

20 The second requirement is also satisfied where, as here, there is a lack of antagonism
 21 between the representative plaintiff and the absent class members. *Lubin v. Sybedon Corp.*, 688
 22 F. Supp. 1425, 1461 (S.D. Cal. 1988); *Weinberger*, 102 F.R.D. at 844-45. Here, AIT's interest in
 23 obtaining the maximum possible recovery is coextensive with, and in no way antagonistic to, the
 24 interests of the members of the Class. AIT, like the members of the proposed Class, sustained
 25

26
 27 ³ Chitwood Harley Harnes LLP's brochure setting forth its qualifications is annexed to the
 Briggs Dec. as Exhibit "M."

28 ⁴ Kabateck Brown Kellner LLP's brochure setting forth its qualifications is annexed to the
 Briggs Dec. as Exhibit "N."

1 damages as a result of Google's breach of contract and unfair business practices. Accordingly,
2 the requirements of Rule 23(a)(4) are satisfied.

3
4 **2. The Court Should Certify The Proposed Class Because One or
More Grounds Under Rule 23(b) Have Been Met.**

5 In addition to the requirements under Rule 23(a), a plaintiff must also establish that under
6 Rule 23(b) one or more of the grounds for maintaining the suit are met, including that (1) there is
7 a risk of substantial prejudice from separate actions; (2) declaratory or injunctive relief
8 benefiting the class as a whole would be appropriate; or (3) common questions of law or fact
9 predominate and the class action is superior to other available methods of adjudication. *See*
10 Fed.R.Civ.P. 23(b). Here, certification is appropriate under both Rule 23(b)(1) and 23(b)(3).

11 Certification is appropriate under Rule 23(b)(1)(a) because the prosecution of separate
12 actions by any of the hundreds of thousands of individual members of the class would self-
13 evidently create a risk of inconsistent or varying adjudications with respect to individual
14 members of the class which would establish incompatible standards of conduct for Google,
15 particularly since any prospective relief would be in the form of a complex injunctive order. *See,*
16 *e.g., Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 67 (S.D.Ohio 1991) (Threat of inconsistent
17 adjudication was real without certifying class of residents, property owners, and lessees within
18 six miles of radioactive materials plant; any injunctive relief would undoubtedly be in form of
19 complex order addressing many specific features of plant operation, and it would be unlikely that
20 two different courts would tailor remedial order in same fashion).

21 Class certification under Rule 23(b)(3) requires that "questions of law or fact common to
22 the members of the class predominate over any questions affecting only individual members."
23 *See* Fed.R.Civ.P. 23(b)(3) Common questions predominate in this case.

24 First, all of the class members are governed by the same (or substantively the same)
25 contract terms. Thus, the issues relating to interpretation of key contract terms, the primary
26 determinant of liability, will be common to all class members. "When viewed in light of Rule
27 23, claims arising from interpretations of a form contract appear to present the classic case for
28

1 treatment as a class action, and breach of contract cases are routinely certified as such.” *Kleiner*
2 *v. First Nat. Bank of Atlanta*, 97 F.R.D. 683, 692 (N.D.Ga. 1983). *See, also, Keele v. Wexler*,
3 149 F.3d 589, 594 (7th Cir. 1998); *Ballard v. Equifax Check Services, Inc.* 186 F.R.D. 589, 594-
4 595 (E.D.Ca. 1999) (claims arising from receipt by class members of identical form collection
5 letters presented common questions of law and fact pursuant Fed.R.Civ.P. 23(b)(3)).

6 Second, Google asserts that it attempts to filter and prevent “invalid” clicks on a global
7 and uniform basis across its system. [See, Briggs Dec. Exhibits “C” and “H”] Thus, Google’s
8 failure to implement measures to prevent invalid clicks, or to prevent customers from being
9 charged for invalid clicks, raises only factual and legal issues that will be common to all class
10 members. These issues will be central to the breach of contract and on the unfair business
11 practices claims.

12 Google may argue that the extent of damage suffered by each class member may differ.
13 The existence of such damage questions, however, does not prevent class certification. “[I]t
14 uniformly has been held that differences among the members [of a class] as to the amount of
15 damages incurred does not mean that a class action would be inappropriate.” 7B CHARLES
16 ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND
17 PROCEDURE § 1781 (2d ed.1986) (collecting cases); see , e.g., *Bogosian v. Gulf Oil Corp.*,
18 561 F.2d 434, 456 (3d Cir.1977) (noting that where proving damages is a mechanical task, “the
19 necessity for calculation of damages on an individual basis should not preclude class
20 determination when the common issues which determine liability predominate”); *Brown v. Pro*
21 *Football, Inc.*, 146 F.R.D. 1 (D.D.C.1992) (finding a proposed damages formula, based on
22 individual contracts entered into by various plaintiff, adequate to calculate antitrust damages); *In*
23 *re Polypropylene Carpet Antitrust Litig.*, 996 F.Supp. 18, (N.D.Ga.1997) (Appel, Chitwood &
24 Harley for the proposed class) (permitting class certification in an antitrust price-fixing case
25 where the plaintiffs proposed to use regression analysis to estimate class members’ damages).
26 Damages can be easily determined from Google’s own records and logs of internet traffic, and
27 will not be the predominant questions that determine the outcome of this litigation. Those
28 questions – the terms of the contractual relationship and Google’s failure to act in breach of that

1 contract and in violation of the California statutes – are common to the class and will
2 predominate in the action.

3 Rule 23(b)(3) also requires that class resolution be “superior to other available methods
4 for the fair and efficient adjudication of the controversy.” The superiority inquiry turns on
5 whether the objectives of the class action procedure will be achieved in the particular case, along
6 with a comparative evaluation of alternative mechanisms of dispute resolution. *Hanlon*, 150
7 F.3d at 1022. The provision provides a non-exhaustive list of factors to be considered in
8 determining whether a class action is superior to other methods of adjudication:

9
10 The matters pertinent to the finding include: (A) the interest of
11 members of the class in individually controlling the prosecution of
12 defense of separate actions; (B) the extent and nature of any
13 litigation concerning the controversy already commenced by or
14 against members of the class; (C) the desirability or undesirability
15 of concentrating the litigation of the claims in the particular forum;
16 (D) the difficulties likely to be encountered in the management of a
17 class action.

18 Fed.R.Civ.P. 23(b)(3).

19 None of these factors under Rule 23(b)(3) weigh against class certification. The class
20 members' interests do not appear to be better served by litigating separate actions. Only a
21 handful of individual actions against Google arising from overcharges for invalid clicks are
22 currently pending out of the hundreds of thousands of class members affected. In addition, for a
23 significant majority of class members, if they do not proceed as a class, they may be unable to
24 litigate their claims individually because of the disparity between litigation costs and what
25 plaintiffs hope to recover. *See, Local Joint Executive Bd.*, 244 F.3d 1152, 1163 (9th Cir. 2001);
26 *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. at 809.

27 Here, class certification would promote judicial efficiency by permitting common claims
28 and issues to be tried once with a binding effect on all parties. Certification would facilitate
settlement by permitting agreements which may potentially bind all parties. Most importantly,
class certification is the only way to afford relief to those whose claims are too small to justify

1 individual lawsuits. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). In
2 *Hanlon*, the Ninth Circuit concluded that:

3
4 Even if efficacious, [separate actions] would prove uneconomic for
5 potential plaintiffs. . . . Litigation costs would dwarf potential
6 recovery. . . . In this sense, the proposed class action is
7 paradigmatic. A fair examination of alternatives can only result in
8 the apodictic conclusion that a class action is the clearly preferred
9 procedure . . . Thus it appears to be in the interest of the plaintiffs to
10 concentrate the claims in the class action.

11 *Hanlon*, 150 F.3d at 1023.

12 AIT knows of no difficulty that will be encountered in managing this case that would
13 preclude its maintenance as a class action. Management difficulties are of significance only if
14 they make the class action less fair and efficient than other available techniques. *Six Mexican
15 Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir. 1990). The mere possibility
16 of problems is not grounds for denying class certification. *Id.* at 1306.

17 The only potential difficulty in managing this case will be calculating the amount of each
18 class members' overcharges for invalid clicks. However, since the criteria for determining
19 invalid clicks would be the same for each member of the class, the calculation can be performed
20 using Google's own records of charges and extracting the charges that were the result of invalid
21 clicks. The calculation in question would be no more complex than those routinely done in
22 "wage-and-hour" cases, which are routinely certified for class action treatment in both the state
23 and federal courts. As described by the Ninth Circuit in such a case:

24 Individualized issues are few, and most of them are likely to be
25 relatively easy. For example, the damages for individual class
26 members will entail a straightforward calculation of which days
27 and how many hours they would have worked, and how much they
28 would have earned in tips. Because dealers' tips were counted and
divided in the casino cashier's cage, Sands has detailed written
records of the tips employees earned in the past. Because Sands
required its dealers to pool tips, there is no variation in tip earnings
based on individual performance. We recognize that there may be
some variation among the individual employees, as well as some
potential difficulty in proof, in demonstrating that they would have
worked on July 4th. But given the number and importance of the

1 common issues, we do not believe that this variation is enough to
2 defeat predominance under Rule 23(b)(3).

3 *Local Joint Executive Bd.*, 244 F.3d at 1163.

4 The class action device is, without question, the only plausible mechanism to obtain relief
5 for the advertisers in Google's AdWords program. Thus, the "superiority" requirement of Rule
6 23(b) is satisfied.

7 **CONCLUSION**

8 For all the foregoing reasons, Plaintiff respectfully requests that this Court grant its
9 motion to certify the proposed class and grant such other and further relief as the Court deems
10 just and proper.

11 DATED: March 6, 2006

Respectfully submitted,

12 CHITWOOD HARLEY HARNES LLP

13
14 By: S/Darren T. Kaplan

15 Darren T. Kaplan (Admitted *pro hac vice*)
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