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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

1 STEVE MIZERA, An Individual, Individually
2 and on behalf of all others similarly situated,

3 Plaintiff,

4 vs.

5 GOOGLE, INC., a Delaware Corporation,
6 and DOES 1 through 100, Inclusive,

7 Defendants.

Case No. 5:05 –cv-02885 RMW

E-FILING

**JOINT CASE MANAGEMENT
STATEMENT AND [PROPOSED]
ORDER**

Date: November 18, 2005

Time: 10:30 a.m.

Judge: Hon. Ronald M. Whyte

Date Comp. Filed: July 17, 2005

Trial Date: None Set

8 Plaintiff Steve Mizera (“Mizera”) and defendant Google, Inc. (“Google”) submit this
9 Case Management Statement and Proposed Order and requests the Court to adopt it as its Case
10 Management Order in this case. The parties have met and conferred over this statement and
11 have agreed to jointly file this statement
12
13
14

I. DESCRIPTION OF THE CASE

15 Mizera brings this action alleging that Google overcharged for pay-per-click advertising
16 by charging Mizera for “fraudulent clicks.” Mizera defines “click fraud” in his Complaint as
17 “when someone clicks on an internet search advertisement with an ill intent and with no
18 intention of doing business with the advertiser.” Mizera asserts causes of action for (1) breach of
19 contract, (2) unjust enrichment, and (3) unfair business practices and seeks class certification.
20

21 Google filed a motion to dismiss the unjust enrichment cause of action on September 20,
22 2005. On October 4, 2005, Mizera filed a Statement of Non-Opposition pursuant to Civil L.R. 7-
23 3(b). The motion was then taken off calendar as a result of the case being re-assigned to the
24 Hon. Ronald M. Whyte. To date, Google has neither re-noticed the motion nor filed an answer
25 to the amended complaint.

26 The parties are not yet in a position to identify all of the principal factual and legal issues
27 in dispute. But it is clear that the parties will dispute at least the following factual and legal
28 issues: (1) whether a class should be certified in this action; (2) whether Google charged Mizera

1 and the class for “fraudulent clicks”; (3) whether Google’s alleged charging of Mizera and the
2 class for “fraudulent clicks” constitutes a breach of contract; and (4) whether Google’s alleged
3 charging of Mizera and the class for “fraudulent clicks” constitutes an unlawful, unfair, and/or
4 fraudulent business act and practice.

5 **II. RELATED ACTION**

6 This Court has Ordered that the instant action is related to the action entitled *Click*
7 *Defense, Inc. v. Google, Inc.* (United States District Court for the Northern District of California,
8 Case No. C 05 02579 RMW). In addition, the parties intend to enter a Stipulation to have the
9 instant action consolidated with the *Click Defense* action, and to coordinate discovery and the
10 filing of class certification motions before this Court.

11 **III. CLASS ACTION STATEMENT**

12 Plaintiff believes that this action is maintainable as a class action pursuant to Federal
13 Rule of Civil Procedure 23(a) and (b).

14 This action is brought on behalf of all persons and/or entities that paid money to Google
15 for advertising through Google’s “AdWords” program. Excluded from the Class are Defendants,
16 officers and directors of the Company, members of the immediate families and each of their legal
17 representatives, heirs, successors or assigns and any entity in which Google has or has had a
18 controlling interest.

19 Mizera is entitled to maintain this action pursuant to Federal Rule of Civil Procedure
20 23(a) and (b) in that:

21 1. Class Action Prerequisites

22 (a) the members of the Class for whose benefit this action is brought are
23 dispersed throughout the United States and are so numerous that joinder of all Class members
24 is impracticable. Plaintiff believes that Class members number in the thousands. Members
25 of the Class may be identified from records maintained by Google and may be notified of the
26 pendency of this action by mail, using a form of notice similar to that customarily used in
27 class actions;

1 (b) Plaintiff’s claims are typical of those of the Class as all members of the Class
2 are similarly affected by Google’s actionable conduct as alleged herein;

3 (c) Plaintiff will fairly and adequately protect the interests of the Class and has
4 retained counsel competent and experienced in class action litigation including class actions
5 within the Northern District of California. Plaintiff has no interests antagonistic to, or in
6 conflict with, the Class that Plaintiff seeks to represent;

7 (d) a class action is superior to other available methods for the fair and efficient
8 adjudication of the claims asserted herein, because joinder of all members is impracticable.
9 Furthermore, because the damages suffered by individual members of the Class may be
10 relatively small, the expense and burden of individual litigation make it virtually impossible
11 for Class members to redress the wrongs done to them. The likelihood of individual Class
12 members prosecuting separate claims is remote;

13 (e) Plaintiff anticipates no difficulties in the management of this action as a class
14 action; and

15 (f) the questions of law and fact common to the members of the Class
16 predominate over any questions affecting individual members of the Class. Among the
17 questions of law and fact common to the Class are:

- 18 i. the pervasiveness of advertising “click fraud”;
- 19 ii. the construction of the agreement between Google and the Class;
- 20 iii. Google’s acts and/or omissions as alleged herein;
- 21 iv. whether Google’s promotional and advertising materials for its
22 “AdWords” program misrepresented and/or omitted material facts with
23 respect to the pervasiveness of “click fraud”;
- 24 v. whether Google has breached its agreement with the class;
- 25 vi. whether Google has taken adequate measures to prevent “click fraud;”
- 26 vii. whether Google has properly accounted and for and refunded fees it has
27 wrongfully collected from identified victims of “click fraud”;
- 28

1 viii. to what extent the members of the Class have sustained damages
2 and the proper measure of damages; and
3 ix. the agreement between Google and the class provides that it is to be
4 “governed by California law.” Therefore, a single body of substantive state
5 law applies to this action such that a nationwide class may be certified.

6 2. In addition the prosecution of separate actions by or against individual members
7 of the class would create a risk of:

8 (a) inconsistent or varying adjudications with respect to individual members of
9 the class which would establish incompatible standards of conduct for the party opposing the
10 class, and

11 (b) adjudications with respect to individual members of the class which would as
12 a practical matter be dispositive of the interests of the other members not parties to the
13 adjudications or substantially impair or impede their ability to protect their interests;

14 3. Further, in allegedly charging the class for fraudulent clicks Google has acted or
15 refused to act on grounds generally applicable to the class, thereby making appropriate final
16 injunctive relief or corresponding declaratory relief with respect to the class as a whole; and

17 4. Questions of law or fact common to the members of the class predominate over
18 any questions affecting only individual members, and that a class action is superior to other
19 available methods for the fair and efficient adjudication of the controversy as demonstrated by
20 the following pertinent matters:

21 (a) The interest of members of the class in individually controlling the
22 prosecution or defense of separate actions is minimal;

23 (b) The only other litigation concerning the controversy already commenced by or
24 against members of the class was commenced in Arkansas state court notwithstanding that
25 the agreement between Google and all members of the class provides that, “[t]his Agreement
26 must be . . . adjudicated in Santa Clara County, California,” which is within the Northern
27 District of California;

28

1 (c) It is desirable to concentrate the litigation of the claims in the Northern
2 District of California insofar in that (1) Google resides in this judicial district, (2) a
3 substantial part of the events or omissions giving rise to the claims asserted herein occurred
4 in this judicial district, (3) Google is subject to personal jurisdiction in the Northern District
5 of California and (4) the agreement between Google and all members of the class provides
6 that the agreement is to be “governed by California law”;

7 (d) The difficulties likely to be encountered in the management of a class action
8 are minimal and the Northern District of California has significant experience in managing
9 class actions of this type.

10 Google disputes all of the above statements to the extent that the same could be
11 construed as an admission that certification of a class is appropriate or legally permissible in this
12 litigation.

13 The parties jointly propose that the court consider whether the case can be maintained as
14 a class action on May 12, 2006.

15 **IV. ALTERNATIVE DISPUTE RESOLUTION**

16 The parties have not filed a Stipulation and Proposed Order Selecting an ADR process as
17 yet, however the parties jointly request mediation as their preferred ADR process.

18 **V. DISCLOSURES**

19 The parties have not made the disclosures required by Rule 26, Federal Rule of Civil
20 Procedure. The parties will attempt to meet and confer on the appropriate schedule for these
21 disclosures. The parties propose to follow the schedule set forth in the Federal Rules of Civil
22 Procedure and make its disclosure within seven days of the case management conference.

23 **VI. DISCOVERY**

24 The parties likely intend to pursue all discovery methods available under the Federal
25 Rules of Civil Procedure, including depositions, interrogatories, requests for admission, and
26 requests for production. Consistent with the Court’s Case Management Order in the related
27 *Click Defense* action, the parties request that discovery be limited before class certification to the
28 following: (a) requests for the production of documents and things; (b) no more than twenty

1 interrogatories including all discrete subparts; and (c) no more than five depositions. The parties
2 request the following schedule:

- 3 11/25/05 Deadline for plaintiff to amend complaint;
- 4 2/6/06 Deadline for plaintiff to file motion for class certification;
- 5 3/20/06 Deadline for defendant to file response to plaintiff's motion
6 for class certification;
- 7 4/10/06 Deadline to complete discovery on class certification issues;
- 8 4/17/06 Deadline for plaintiff to file reply in support of its motion for class
9 certification;
- 10 5/2/05 Parties to exchange exhibit lists and pre-marked exhibits
11 for class certification hearing;
- 12 5/12/06 Hearing on Motion for Class Certification at 9:00 a.m.; and
- 13 5/12/06 Status conference with all parties at 10:30 a.m.

VII. TRIAL SCHEDULE

14 The parties jointly request that the Court set a trial date at the status conference following
15 the hearing on plaintiff's motion for class certification.

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17

18 Dated: November 15, 2005 KEKER & VAN NEST, LLP

19

20 By: /s/ Daralyn J. Durie

21 DARALYN J. DURIE

22 Attorneys for Defendant

23 GOOGLE, INC.

24 Dated: October 17, 2005 CHITWOOD HARLEY HARNES LLP

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26 By: /s/ Darren T. Kaplan

27 DARREN T. KAPLAN

28 Attorneys for Plaintiff

STEVE MIZERA

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CASE MANAGEMENT ORDER

The Case Management Statement and Proposed Order is hereby adopted by the Court as the Case Management Order for the case and the parties are ordered to comply with this Order.

Dated:

By: _____
THE HONORABLE RONALD M. WHYTE
UNITED STATES DISTRICT COURT JUDGE