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UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

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CLRB HANSON INDUSTRIES, LLC d/b/a
 INDUSTRIAL PRINTING, and HOWARD
 13 STERN, on behalf of themselves and all others
 similarly situated,

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Plaintiffs,

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v.

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GOOGLE, INC.,

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Defendant.

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CASE NO. C 05-03649 JW

**GOOGLE INC'S OPENING BRIEF IN
 RESPONSE TO COURT'S ORDER TO
 SHOW CAUSE WHY THE CASE
 SHOULD NOT BE REMANDED FOR
 LACK OF JURISDICTION**

Date: November 20, 2006
 Time: 9:00 a.m.
 Dept.: Courtroom 8
 Judge: Honorable James Ware

OPENING BRIEF IN RESPONSE TO COURT'S ORDER

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2 Defendant Google Inc. ("Google") denies that plaintiffs CLRB Hanson Industries, LLC,
3 d/b/a Industrial Printing, and Howard Stern ("Plaintiffs") are entitled to any recovery for their
4 claims. However, this Court should retain jurisdiction over this action because the jurisdictional
5 amount in controversy is facially apparent from Plaintiffs' Second Amended Complaint ("SAC").

6 The Class Action Fairness Act ("CAFA") vests the district court with "original jurisdiction
7 of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000,
8 exclusive of interest and costs, and is a class action in which [the parties satisfy, among other
9 requirements, minimal diversity]." 28 U.S.C. § 1332(d); *see also Davis v. Chase Bank U.S.A.,*
10 *N.A.*, --- F. Supp. 2d ---, 2006 WL 2812343, *2 (C.D. Cal. 2006). CAFA expressly requires that
11 the claims of individual members shall be aggregated to determine the amount in controversy. 28
12 U.S.C. § 1332(d)(6).

13 The procedure in the Ninth Circuit for determining the amount in controversy on removal
14 "requires a district court to first consider whether it is 'facially apparent' from the complaint that
15 the jurisdictional amount is in controversy." *Rippee v. Boston Market Corp.*, 408 F. Supp. 2d 982,
16 984 (S.D. Cal. 2005) (quoting *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th
17 Cir. 1997)). "If it is not, the court may consider facts in the removal petition as well as evidence
18 submitted by the parties." *Id.*

19 As set forth in Google's summary judgment papers, the undisputed facts in this case
20 demonstrate that Plaintiffs' claims are unsupported by the express terms of the parties' advertising
21 agreement, Google billed Plaintiffs consistently with the terms of their agreement, and Plaintiffs'
22 claims are barred in part by the limitations period in the parties' agreement. However, the
23 jurisdictional amount in controversy is determined from the allegations or prayer of the complaint,
24 and "[t]he inability of plaintiff to recover an amount adequate to give the court jurisdiction does
25 not . . . oust jurisdiction." *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289-90
26 (1938); *see also Singer*, 116 F.3d at 375.

1 Here, it is facially apparent from Plaintiffs' SAC that based on their allegations the
2 jurisdictional amount is in controversy. Plaintiffs seek to bring a nationwide class action on behalf
3 of "all persons who were charged by Google more than their set daily budgets for their advertising
4 campaign(s)" and contend that "thousands of people have been damaged by Google's conduct."
5 SAC, ¶¶ 69, 70. They allege that "Google routinely overdelivers ads to allow advertisers'
6 accounts to go over their daily budget." *Id.*, ¶ 49.

7 Plaintiffs further allege that the "Google network is the largest online advertising network
8 in the United States and includes thousands of third-party web sites." *Id.*, ¶ 12. They claim that
9 "U.S. sales from advertiser-paid search results are expected to grow 25 percent this year to \$3.2
10 billion" and that "[p]aid-search advertising generates about 98 percent of Google's revenues." *Id.*,
11 ¶¶ 39, 41. They allege that "Google's revenue is largely dependent upon its AdWords program."
12 *Id.*, ¶ 40. Plaintiffs seek general, compensatory, and consequential damages, attorneys' fees and
13 prejudgment interest, preliminary and permanent injunctive relief, and the imposition of a
14 constructive trust on all advertising fees Plaintiffs claim they, and the class they seek to represent,
15 were improperly charged. *See id.*, Prayer for Relief.

16 Google has hundreds of thousands of advertisers in its advertising network. *See*
17 Declaration of Heather Wilburn ("Wilburn Decl."), ¶ 2. Google does not concede that any of
18 Plaintiffs' claims have merit or that Plaintiffs could ever certify as a class Google advertisers or
19 even some subset of them. However, in view of the large number of Google advertisers, all of
20 whom Plaintiffs allege are affected by Plaintiffs' claims, even the very small amount of damages
21 Plaintiffs argue were suffered by each advertiser could in the aggregate exceed \$5 million.

22 Based on Plaintiffs' allegations, the jurisdictional amount in controversy requirement is
23 satisfied. *See, e.g., Miller v. Home Depot, U.S.A., Inc.*, 199 F. Supp. 2d 502, 516 (W.D. La. 2001)
24 (jurisdictional amount "facially apparent" in 28 U.S.C. § 1332(a) case, involving putative class
25 action brought by consumers against sellers, manufacturers, distributors, and promoters of treated
26 wood product, where plaintiffs sought to bring action on behalf of all persons in the United States
27 who have a legally enforceable interest in the treated wood product and sought recovery for
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1 damages including return of the purchase price, costs of removal and replacement of the material,
 2 cost of soil testing, cost of remediation, injunctive relief, and the establishment of an educational
 3 fund); *see also, e.g., Frazier v. Pioneer Americas LLC*, 455 F.3d 542, 545 (5th Cir. 2006)
 4 (jurisdictional amount in controversy “facially apparent” where plaintiffs did not contest
 5 satisfaction of the general requirements of CAFA and petition sought damages for personal
 6 injuries of at least 500 people and attorneys’ fees).

7 The jurisdictional amount is also satisfied because Plaintiffs concede in their SAC that
 8 “[t]his Court has jurisdiction over this action pursuant to the Class Action Fairness Act of 2005”
 9 and that “[t]he matter in controversy exceeds the jurisdictional amount.” SAC, ¶ 3. Courts may
 10 properly accept a judicial admission from the plaintiff that the jurisdictional amount in controversy
 11 is satisfied as establishing it, particularly where the plaintiff initially chose to file in a state rather
 12 than federal forum since this creates a strong presumption that the plaintiff has not claimed a large
 13 amount in order to confer jurisdiction on a federal court or that the parties have colluded to that
 14 end. *See Singer*, 116 F.3d at 375-76 (within district court’s discretion to accept plaintiff’s
 15 admission, made in plaintiff’s motion to remand, that the amount in controversy exceeded the
 16 jurisdictional requirement); *see also Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 690-91 (9th
 17 Cir. 2006).

18 The jurisdictional amount in controversy requirement of CAFA is satisfied by Plaintiffs’
 19 pleadings. Accordingly, Google respectfully requests that this Court retain jurisdiction over this
 20 action.

21 DATED: November 8, 2006

PERKINS COIE LLP

22 By: /s/ David T. Biderman

23 David T. Biderman

24 Attorneys for Defendant Google Inc.

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