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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

13 RYAN UNG, CHI CHENG and ALICE
ROSEN, on Behalf of Themselves and All
14 Others Similarly Situated,

15 Plaintiffs,

16 v.

17 FACEBOOK, INC.,

18 Defendant.

Case No. 11-CV-02829-JSW-PSG

**FACEBOOK, INC.’S SUPPLEMENTAL
BRIEF REGARDING JURISDICTION UNDER
THE CLASS ACTION FAIRNESS ACT (28
U.S.C. § 1332(d))**

Judge: Hon. Jeffrey S. White

Courtroom: 11

Trial Date: Not yet set

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 Facebook, Inc. (“Facebook”) hereby submits this Supplemental Brief Regarding
3 Jurisdiction under the Class Action Fairness Act (“CAFA”) (28 U.S.C. § 1332(d)) pursuant to the
4 Court’s Order dated November 28, 2011 (“Nov. 28, 2011 Order”). This brief is supported by the
5 concurrently filed Declarations of Jas Athwal and Matthew D. Brown.

6 **I. INTRODUCTION**

7 This Court has jurisdiction over this action under CAFA. The amount-in-controversy
8 prong of CAFA jurisdiction is satisfied in two ways. First, Plaintiffs’ own allegations in their
9 Class Action Complaint (“Complaint”) establish that the amount in controversy in this action
10 exceeds CAFA’s jurisdictional minimum of \$5,000,000. Second, Facebook has shown that the
11 funds from which Plaintiffs apparently seek disgorgement exceed \$5,000,000. Under Ninth
12 Circuit case law, Facebook has therefore satisfied its burden under CAFA of showing that more
13 than \$5,000,000 is “in controversy.” Further, Plaintiffs’ silence on the jurisdictional amount
14 should be interpreted in favor of jurisdiction. The Court, therefore, has jurisdiction over this
15 action and should grant Facebook’s pending motion to dismiss.

16 **II. BACKGROUND**

17 On May 9, 2011, Plaintiffs filed their Class Action Complaint in Santa Clara Superior
18 Court, alleging that Facebook collected personal data related to Internet users’ browsing history.
19 (*See* Compl. ¶ 1.) Plaintiffs bring the action on behalf of two putative subclasses of Internet
20 users:

- 21 1) all Facebook members who visited a website displaying the
22 Facebook “Like” button from April 22, 2010 to the date of filing of
23 this complaint; 2) all non-Facebook members who visited a website
24 in the Facebook Connect network and subsequently visited a
website displaying the Facebook “Like” button from April 22, 2010
to the date of filing of this complaint.

25 (*Id.* ¶ 19.) Plaintiffs assert that “[t]here are tens of millions of Internet users who have been
26 tracked via the Facebook ‘Like’ button.” (*Id.* ¶ 22.)

27 Plaintiffs assert claims for alleged violations of the California constitutional right of
28 privacy and for unjust enrichment. (*Id.* ¶¶ 28-39.) In addition to injunctive relief and fees and

1 costs, Plaintiffs seek “[d]isgorgement of all revenue earned from selling or otherwise trading on
2 the private information obtained from Plaintiffs and the Class via the Facebook ‘Like’ button.”
3 (*Id.* Prayer for Relief.) Plaintiffs allege in support of their claim for unjust enrichment that
4 “Facebook has received and retained money belonging to Plaintiffs and the Class as a result of
5 collecting and storing its users’ personal information, which is an asset, and selling it to third
6 parties for marketing purposes” (*Id.* ¶ 35.) Plaintiffs further allege that “[u]nder principles
7 of equity and good conscience, Facebook should not be permitted to retain money belonging to
8 Plaintiffs and the Class that it unjustly received as a result of its actions.” (*Id.* ¶ 37.)

9 Plaintiffs do not plead a specific amount of damages. (*See* Compl.; Nov. 28, 2011 Order
10 (“Plaintiffs do not plead a specific amount of damages in their Complaint.”).) Instead, Plaintiffs
11 allege that “[t]he personal information collected by Facebook is an asset of the sort that is priced,
12 bought, and sold in discrete units for marketing and other purposes.” (Compl. ¶ 16.) As an
13 example of the alleged value of similar information,¹ Plaintiffs cite a customer of a company
14 named Allow Ltd. who “received a payment of \$8.95 for letting Allow tell a credit card company
15 he [was] shopping for new plastic.” (*Id.* ¶ 18.) The customer is alleged to have received 70% of
16 the value of the sale. (*Id.*)

17 Citing these allegations, Facebook removed Plaintiffs’ action to the Northern District of
18 California, San Jose Division, on June 9, 2011, pursuant to CAFA, 28 U.S.C. § 1332(d). (Notice
19 of Removal (“Notice”) (Dkt. No. 1) ¶¶ 4-22.) Plaintiffs have not objected to Facebook’s removal
20 of their action. On July 20, 2011, Facebook filed a motion to dismiss the Complaint, asserting
21 that Plaintiffs have not adequately alleged injury in fact and fail to state any claims for relief. On
22 September 1, 2011, Plaintiffs filed their opposition; Plaintiffs did not raise CAFA jurisdiction in
23 their Opposition.² On September 28, 2011, Facebook filed its reply.

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26 ¹ Facebook denies the allegations in the Complaint. Facebook cites Plaintiffs’ allegations strictly
27 to establish the amount in controversy under CAFA and without prejudice to the arguments in its
28 motion to dismiss or the facts, arguments, and defenses that Facebook may otherwise assert.

² On September 27, 2011, this action was reassigned to this Court for further proceedings.

1 On November 28, 2011, the Court *sua sponte* issued an Order requesting supplemental
2 briefing on whether the amount-in-controversy requirement under CAFA has been satisfied.
3 (Nov. 28, 2011 Order.) After the Court issued the Nov. 28, 2011 Order, counsel for Facebook
4 contacted counsel for Plaintiffs to determine whether they believed their claims in the aggregate
5 were greater than \$5,000,000. (Declaration of Matthew D. Brown (“Brown Declaration”) ¶ 2.)
6 Plaintiffs stated that they do not currently have a position as to the amount in controversy. (*Id.*)

7 **III. ARGUMENT**

8 “[T]he party asserting federal jurisdiction has the burden of showing the case meets the
9 statutory requirements for the exercise of federal jurisdiction and therefore belongs in federal
10 court.” *Lewis v. Verizon Commc’ns, Inc.*, 627 F.3d 395, 399 (9th Cir. 2010). Under CAFA, a
11 putative class action is removable if, among other requirements, “the matter in controversy
12 exceeds the sum or value of \$5,000,000, exclusive of interests and costs” *See* 28 U.S.C.
13 § 1332(d)(2). “Where the complaint does not specify the amount of damages sought, the
14 removing defendant must prove by a preponderance of the evidence that the amount in
15 controversy has been met.” *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 683 (9th Cir.
16 2006). “Under this burden, the defendant must provide evidence that it is ‘more likely than not’
17 that the amount in controversy satisfies the federal diversity jurisdictional amount requirement.”
18 *Id.* (quoting *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996)). As the
19 Court noted in its Nov. 28, 2011 Order:

20 To determine the defendant has met its burden, “the court should
21 consider, in addition to the complaint itself, ‘facts in the removal
22 petition and . . . summary judgment-type evidence relevant to the
23 amount in controversy at the time of removal.’” *Lowdermilk [v.*
United States Nat’l Ass’n], 479 F.3d [994,] 1004 (quoting *Singer v.*
State Farm Mutual Ins. Co., 116 F.3d 373-74, 377 (9th Cir. 1997)).
24 Such “summary judgment-type evidence” includes affidavits and
25 interrogatories. *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 980 (9th
Cir. 2005) (citing *De Aguilar v. Boeing Co.*, 11 F.3d 55, 57-58 (5th
Cir. 1993)).

26 (Nov. 28, 2011 Order at 2.)

27 This “burden is not ‘daunting,’ as courts recognize that under this standard, a removing
28 defendant is not obligated to ‘research, state, and prove the plaintiff’s claims for damages.’”

1 *Stevenson v. Dollar Tree Stores, Inc.*, No. CIV S-11-1433 KJM DAD, 2011 WL 4928753, at *3
2 (E.D. Cal. Oct. 17, 2011) (citation omitted). “The removing party, as the proponent of federal
3 jurisdiction, bears the burden of describing how the controversy exceeds \$5 million. This is a
4 pleading requirement, not a demand for proof. . . . A removing defendant need not confess
5 liability in order to show that the controversy exceeds the threshold.” *Spivey v. Vertrue, Inc.*, 528
6 F.3d 982, 986 (7th Cir. 2008) (citation omitted). “In measuring the amount in controversy, a
7 court must assume that the allegations of the complaint are true and that a jury will return a
8 verdict for the plaintiff on all claims made in the complaint. The ultimate inquiry is, therefore,
9 what amount is put ‘in controversy’ by the plaintiff’s complaint or other papers, not what the
10 defendant will actually owe for the actual number of violations that occurred, if any.” *Ray v.*
11 *Wells Fargo Bank, N.A.*, No. CV 11-01477 AHM (JCx), 2011 WL 1790123, at *5 (C.D. Cal. May
12 9, 2011) (citation omitted).

13 Under these standards, the amount-in-controversy requirement under CAFA is satisfied
14 here.

15 **A. Plaintiffs’ Allegations Regarding the Value of “Personal Information” Satisfy**
16 **the CAFA Amount-in-Controversy Requirement.**

17 The amount in controversy is greater than \$5,000,000 based, first, on Plaintiffs’
18 allegations in the Complaint. Where “intangible harm is alleged[,] the parties need not predict the
19 trier of fact’s eventual award with one hundred percent accuracy.” *Valdez v. Allstate Ins. Co.*,
20 372 F.3d 1115, 1117 (9th Cir. 2004). Instead, the removing party may rely on the plaintiff’s own
21 assessment of the value of their claims. *See Carvahlo v. Equifax Info. Servs., LLC*, 629 F.3d 876,
22 886-87 (9th Cir. 2010). For example, in *Carvahlo*, the plaintiff was asked in her deposition
23 whether “\$25,000 apiece” would be “insufficient” to resolve that action, which had been brought
24 on behalf of a class containing 500 potential plaintiffs. *Id.* at 885-87. The Ninth Circuit held that
25 from this testimony, the defendant could reasonably determine that the amount in controversy
26 was \$12,500,000 (\$25,000 multiplied by 500), and therefore greater than the jurisdictional
27 minimum. *See id.* at 887.

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1 The same reasoning applies here. Plaintiffs seek disgorgement of the value of data
2 Facebook allegedly collected regarding them. (*See* Compl. ¶¶ 35, 37.) Plaintiffs allege that
3 similar data is valued at \$8.95. (*Id.* ¶¶ 16-18.) When multiplied by the minimum number of
4 members Plaintiffs allege are in their class, 10 million (*id.* ¶ 19 (alleging “[t]here are tens of
5 millions of Internet users who have been tracked via the Facebook ‘Like’ button”)), the potential
6 amount in controversy is \$89,500,000. Thus, although Facebook maintains that Plaintiffs did not
7 suffer any injury in fact, the Complaint’s allegations establish that the amount in controversy is
8 well above the jurisdictional minimum under CAFA.

9 **B. CAFA’s Amount-in-Controversy Requirement is Also Satisfied by Evidence**
10 **Concerning Facebook’s Advertising Revenues.**

11 The amount-in-controversy requirement is also satisfied by evidence that Facebook’s
12 revenues from advertisements and sponsored content are well in excess of the jurisdictional
13 minimum of \$5,000,000. (Declaration of Jas Athwal (“Athwal Decl.”) ¶ 2.)³ The Ninth Circuit’s
14 decision in *Lewis* applies here. In *Lewis*, the plaintiff sued Verizon in California state court,
15 alleging that she and others had paid unauthorized fees for a premium service. *See Lewis*, 627
16 F.3d at 397. Verizon removed to federal court under CAFA. *Id.* In support of removal, Verizon
17 submitted an affidavit of a Verizon employee that stated that potential members of the class “were
18 billed more than \$5 million” during the class period for the premium service. *Id.* The plaintiff
19 moved to remand the action to state court, arguing that Verizon had not met its burden under
20 CAFA because, of the charges referred to in the affidavit, some of the amount would have gone to
21 legitimate, rather than unauthorized, charges. *Id.* at 398. The district court granted the plaintiff’s
22 motion to remand. *Id.* The Ninth Circuit vacated the remand order, ruling that the Verizon
23 employee’s affidavit, which it described as showing only “that the potential damages *could*
24 exceed the jurisdictional amount,” “satisfie[d] Verizon’s burden.” *Id.* at 397 (emphasis added).
25 The Ninth Circuit explained that “[t]he amount in controversy is simply an estimate of the total
26 amount in dispute, not a prospective assessment of defendant’s liability.” *Id.* at 400; *see also*

27 ³ Facebook may satisfy its burden under CAFA by providing “summary judgment-type
28 evidence,” including declarations. (*See* Nov. 28, 2011 Order at 2.)

1 *supra* at 3-4 (citing *Stevenson*, 2011 WL 4928753, at *3; *Spivey*, 528 F.3d at 986; *Ray*, 2011 WL
2 1790123, at *5).

3 Here, Plaintiffs allege that “Facebook has received and retained money belonging to
4 Plaintiffs and the Class as a result of collecting and storing its users’ personal information”
5 (Compl. ¶ 35.) Plaintiffs also allege that “Facebook should not be permitted to retain money
6 belonging to Plaintiffs and the Class that it unjustly received as a result of its actions.” (*Id.* ¶ 37.)
7 On the basis of these allegations, Plaintiffs seek, among other relief, the “[d]isgorgement of all
8 revenue earned from selling or otherwise trading on the private information obtained from
9 Plaintiffs and the Class via the Facebook ‘Like’ button.” (*Id.* Prayer for Relief.) Facebook denies
10 that Plaintiffs suffered any injuries or are entitled to any of the relief requested, but for purposes
11 of jurisdiction, Plaintiffs’ theory of harm is relevant to the jurisdictional amount. *Ray*, 2011 WL
12 1790123, at *5 (“In measuring the amount in controversy, a court must assume that the
13 allegations of the complaint are true and that a jury will return a verdict for the plaintiff on all
14 claims made in the complaint.”).

15 Plaintiffs’ theory of harm is vague, but insofar as Plaintiffs’ allegations that Facebook
16 earns revenue from using their data could be interpreted to mean that Facebook used such data to
17 provide targeted marketing, these allegations support jurisdiction.⁴ *Stevenson*, 2011 WL
18 4928753, at *4 (holding that defendant met its burden on removal when it relied on “ambiguous”
19 allegations to calculate jurisdictional amount). Although Facebook does not disclose its revenues
20 publicly, Facebook’s revenues from advertisements and sponsored content during the period from
21 May 1, 2010 to May 1, 2011 (which is encompassed by Plaintiffs’ class period) were well in
22 excess of five times the \$5,000,000 jurisdictional threshold. (Athwal Decl. ¶ 2.) This evidence
23 satisfies Facebook’s burden of showing that, assuming the allegations in Plaintiffs’ Complaint to
24 be true, the amount in controversy “*could* exceed the jurisdictional amount,” *see Lewis*, 627 F.3d
25 at 397 (emphasis added), and the Court has jurisdiction over the action.

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27 ⁴ As provided in its Privacy Policy, Facebook *does not* (i) share users’ information with
28 advertisers without users’ permission or (ii) tell advertisers which specific users are targeted by
advertisements. (*See* Facebook’s Request for Judicial Notice (Dkt. No. 12) Ex. B, Section IV.)

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C. Plaintiffs’ Silence on the Amount in Controversy Should Be Interpreted in Favor of Jurisdiction.

Plaintiffs’ silence on the amount in controversy should be interpreted in favor of jurisdiction. Once again, *Lewis* is on point here. In *Lewis*, the plaintiff failed to proffer evidence that the total “unauthorized fees” were less than \$5,000,000 and did not “concede that the class sought a recovery of less than” that amount. *Id.* at 398; *see also id.* at 400. The Ninth Circuit determined “on this record, the entire amount of billings is ‘in controversy.’” *Id.* at 400. Plaintiffs here have also placed more than \$5,000,000 in controversy. They have never objected to Facebook’s removal of this action to federal court, and they have failed to take a position on whether they seek more than the jurisdictional minimum of \$5,000,000. (*See Brown Decl.* ¶ 2.) As such, the Court should interpret Plaintiffs’ silence on the jurisdictional amount as favoring jurisdiction.

IV. CONCLUSION

For the foregoing reasons, Facebook respectfully submits that the Court’s jurisdiction over this action is proper under CAFA, 28 U.S.C. § 1332(d) and the Court should grant its pending motion to dismiss.

Dated: December 7, 2011

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