

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DEBORAH LOUISE DOUEZ

Plaintiff

AND:

FACEBOOK, INC.

Defendant

Brought under the *Class Proceedings Act*, RSBC 1996, c 50

DEFENDANT'S WRITTEN SUBMISSIONS
(Certification application to be heard November 25-27, 2013)

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Date, time and place: November 25-27, 2013 in Vancouver
Time estimate: Three Days
Written submissions provided by: Defendant

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PART I – OVERVIEW

1. This claim is not appropriate for a class proceeding. Certification should be denied.
2. The plaintiff asserts that Facebook, Inc., which operates a social networking website, committed the statutory tort of invasion of privacy by way of misappropriation of personality when it introduced its Sponsored Stories feature. Sponsored Stories allow businesses, organizations, causes, politicians, entertainers and other entities to pay to increase the likelihood that a user's selected friends will see the same content that the user has *already shared* with those friends on Facebook. Sponsored Stories are only generated after a Facebook user completes an eligible action and has chosen to share that action with their selected friends. It is the user's action that triggers the potential Sponsored Story.
3. The claim asserted in this action is inherently individual and highly fact-specific because it involves the most personal of characteristics – an individual's personality. *This type of claim has never been certified as a class proceeding.* It requires the considered assessment of a multitude of individual inquiries with respect to each particular instance of the alleged tortious

conduct in order to reach a final determination on both the liability and damages questions. None of the essential elements of the cause of action, such as lack of consent, nor defences, such as acquiescence, nor (if liability is established in each instance) the necessary damages considerations, can be assessed in common on a class-wide basis.

4. The plaintiff has attempted to characterize her claim as a simple statutory breach that can be resolved on a class-wide basis. It cannot.

5. The plaintiff has failed to recognize and account for the fact that an individual inquiry is at the heart of each step of the requisite liability and damages issues associated with the inherently individual claim asserted in this action. This failure is fatal to her attempt to have this claim certified as a class proceeding.

6. The plaintiff has failed to put forward an appropriate class definition. The proposed class definition, which fails to recognize the requisite elements and statutory parameters of the claim, is overly broad and inappropriate.

7. The plaintiff has failed to propose a single, proper, genuine common issue that can significantly advance the litigation. The proposed common issue regarding liability cannot be answered for any individual, let alone answered in common on a class-wide basis. The statute requires substantial individual fact-finding in order to determine liability. Without a determination on liability, the proposed common issues related to damages, which necessarily depend on liability, cannot be answered. The common issues proposed by the plaintiff demonstrate her failure to account for the essential elements of the claim and constitute an impermissible attempt to create a short-cut to liability and damages.

8. The plaintiff has failed to demonstrate that a class proceeding is the preferable procedure for the resolution of the issues in this action. There are no common issues regarding liability or damages that can be resolved on a class-wide basis. Every liability and damages issue will break down into individual trials involving an individual fact-finding and legal analysis process for each class member. The multitude of individual inquiries required for each instance of the alleged tortious conduct would make a class proceeding unwieldy and unmanageable. A class proceeding would not achieve judicial economy nor would it enhance access to justice.

9. The plaintiff's proposed litigation plan is seriously deficient. It fails to recognize and account for the substantial individual fact-finding inquiries that are necessary to reach a final determination on both the liability (including available defences) and damages questions.

10. The plaintiff's failures lead to only one result: the dismissal of this application.

PART II – FACTS

The Facebook Website

11. Facebook operates the social networking website accessible at www.facebook.com. Over one billion people currently use Facebook to keep up with friends, upload photos, organize events, share links and videos, play social games, and learn more about the friends, family, causes, business and organizations they care about.¹

12. Facebook is, and always has been, free to use.²

13. As of March 4, 2013, there were approximately 3.5 million users who Facebook can reasonably ascertain reside in British Columbia.³

User Registration and Consent

14. *User Name*. In order to join Facebook, a prospective user must, among other things, provide her name. While Facebook's terms of use require that users provide their real names during the registration process in order to promote authenticity and safety on the Facebook website, some people sign up using fake names or pseudonyms, and Facebook has no effective way of verifying every Facebook user's real name. For example, users have registered with the following names: Zig Zag, First-ladyz Crew, Pull Focus and Underground Feed. Users can, and do, change their names whenever they want. During the period January 12, 2013 to March 10,

¹ Affidavit #1 of James C. Squires, sworn March 26, 2013, at paras 2 and 4 ("Squires Affidavit"), Certification Record ("CR") Vol 1, Tab 6

² Squires Affidavit, at para 3, CR Vol 1, Tab 6

³ Squires Affidavit, at para 3, CR Vol 1, Tab 6

2013, approximately ██████ users who Facebook can reasonably ascertain reside in British Columbia changed their Facebook user name.⁴

15. *User Profile Pictures.* Users may also, but are not required to, upload a profile picture to add to their Facebook timeline. Contrary to the assertion at paragraph 21 of the plaintiff's written submissions, Facebook does not prompt users to upload a profile picture of themselves. On the contrary, subject to Facebook's policies, a profile picture can be an image of virtually anything, including an image of the user, other people, pets, landscapes, text, objects or symbols. A user's profile picture (or a generic silhouette, if the user chooses not to upload a picture) is displayed on the user's Facebook timeline and next to virtually all content shared by that user. Users can, and do, change their profile pictures whenever they want. During the period January 12, 2013 to March 10, 2013, approximately ██████ users who Facebook can reasonably ascertain reside in British Columbia changed their profile picture at least once.⁵

16. Many users have used profile pictures that do not reflect their likeness and some users have never uploaded a profile picture. Facebook has no way of verifying if, at any given time, a profile picture is an actual recognizable likeness of the user.⁶

17. *Terms of Use.* During the registration process, a prospective user must agree to Facebook's terms of use, which are known as the Statement of Rights and Responsibilities.⁷

18. Over time, Facebook's terms of use, which have been, and continue to be, directly accessible from virtually every page of the Facebook website, have evolved. Nonetheless, each version of the terms of use has declared, in some form, that: (i) continued use or access of Facebook constitutes acceptance of the terms of use then in effect; and (ii) the then-current version of the terms of use supersede the prior terms of use.⁸

⁴ Squires Affidavit, at paras 6 and 7, CR Vol 1, Tab 6; Affidavit #1 of James Plambeck, sworn March 26, 2013, at para 7 ("Plambeck Affidavit"), CR Vol 2, Tab 9

⁵ Squires Affidavit, at paras 27-28 and 31, CR Vol 1, Tab 6; Plambeck Affidavit, at para 8, CR Vol 2, Tab 9

⁶ Squires Affidavit, at para 30, CR Vol 1, Tab 6

⁷ Squires Affidavit, at para 6, CR Vol 1, Tab 6

⁸ Affidavit #2 of Sandeep Solanki, sworn March 26, 2013, at para 11 ("Solanki Affidavit"), CR Vol 2, Tab 8

19. *Express Consent.* Most importantly, for the purposes of this action, Facebook’s terms of use expressly provide that users consent and provide Facebook with permission to use their name and profile picture in connection with commercial, sponsored and related content, including the sponsored content challenged by the plaintiff in this action. This is a full answer to the claim asserted in this action. This is not meaningfully addressed in the plaintiff’s written submissions.⁹

20. The terms of use that were in effect when Facebook introduced its Sponsored Stories feature (which is described below) in January 2011 provided, in part, that: “You can use your privacy settings to limit how your name and profile picture may be associated with commercial, sponsored or related content (such as a brand you like) served or enhanced by us. You give us permission to use your name and profile picture in connection with that content, subject to the limits you place” (emphasis added). This language is included in the current terms of use.¹⁰

21. *User Timeline.* Each Facebook user has a unique timeline (previously known as a profile), that displays, among other things, basic biographical information about the user, including their interests and likes, as well as content that the user has shared on Facebook.¹¹

22. *Pages.* In November 2007, Facebook launched Pages, which is a way for businesses, organizations, causes, politicians, entertainers, and other entities to create and maintain a professional presence on Facebook, share information and connect with other Facebook users.¹²

Sharing Content on Facebook

23. Sharing content and information with others is a significant feature of the Internet.¹³

24. When contributing and sharing content in online communities such as Facebook, users are motivated, in part, by: (i) the benefit they expect to receive from their contribution; (ii) being able to provide feedback on products and services they use or care about; and (iii) the ability to

⁹ Solanki Affidavit, at para 15, CR Vol 2, Tab 8

¹⁰ Solanki Affidavit, at paras 19 and 20, CR Vol 2, Tab 8

¹¹ Squires Affidavit, at paras 24-26, CR Vol 1, Tab 6

¹² Squires Affidavit, at para 12, CR Vol 1, Tab 6

¹³ Affidavit #1 of Catherine Tucker, sworn March 26, 2013, at para 7 (“Tucker Affidavit”), CR Vol 1, Tab 7

enhance their own standing within the online community. Being noticed and valued by a community is a key driver of people's online behaviour.¹⁴

25. Users share content on Facebook with their friends in numerous ways, including by: posting status updates (i.e., a short written statement); posting or commenting on photos or videos; creating events or polls; posting comments in a group; sending private messages; and making video calls.¹⁵

26. Users expect that the content that they share on Facebook, such as liking or posting content, will be communicated to their selected friends in many different contexts, including commercial contexts such as advertisements. Many users share content and information *because* it will be communicated to the user's selected friends.¹⁶

27. *The Like Feature.* Users can also share content with their friends by "liking" it (i.e., clicking the associated "like" button, which they can subsequently click at anytime to "unlike" the content). The like button appears next to many types of content on Facebook, including the Facebook pages of businesses, organizations, causes, politicians, entertainers and other entities that have established a presence on Facebook. In addition, the now ubiquitous like button has been added by numerous third party websites so that Facebook users can like news articles, videos, photos and other content on those websites. By clicking the like button (either on or off the Facebook website), a user's like action is posted to the user's timeline. For example, if Jane Smith clicked the like button on the Mavrick Wine Bar Facebook page, the following post would be displayed on Jane Smith's timeline: "Jane Smith likes Mavrick Wine Bar". The graphic below is an example of a like story.¹⁷

¹⁴ Tucker Affidavit, at para 14, CR Vol 1, Tab 7

¹⁵ Squires Affidavit, at paras 37, 39 and 40, CR Vol 1, Tab 6

¹⁶ Tucker Affidavit, at para 7, CR Vol 1, Tab 7

¹⁷ Squires Affidavit, at paras 41-44 and 50, CR Vol 1, Tab 6



28. As with virtually all content that users choose to share on Facebook, information about a user's likes is only displayed to the friends that the user has authorized to view that content. When a user's like action is displayed to others, it is typically accompanied by the user's name and profile picture.¹⁸

29. A user's primary purpose in liking content on Facebook is to communicate with her friends. Clicking the like button is an inherently social and communicative act that, at its core, functions to communicate a user's opinions and preferences to others. Implicit in the act of clicking the like button is an intent and awareness that the like action will be communicated to others.¹⁹

30. *The Check-in Feature.* Users can also share their real-time location by using Facebook's check-in feature. When a user checks-in on Facebook using their mobile device, subject to their privacy settings, that information is posted to the user's timeline and shared with the friends that the user has authorized to view that content.²⁰

31. *The Application Feature.* Users can also share content regarding the applications that they have used on the Facebook platform (e.g. playing games such as Scrabble or Farmville, listening to music on Spotify, connecting with family members on Family Tree). Subject to a user's privacy settings, information about these activities can be published on various parts of the Facebook site and shared with the friends that the user has authorized to view that content.²¹

¹⁸ Squires Affidavit, at para 45, CR Vol 1, Tab 6

¹⁹ Tucker Affidavit, at para 41, CR Vol 1, Tab 7

²⁰ Squires Affidavit, at paras 53-54, CR Vol 1, Tab 6

²¹ Squires Affidavit, at paras 55-56, CR Vol 1, Tab 6

A User's Friends

32. The main relationship that users establish on Facebook is the “friend” relationship, which is a means for connecting with other Facebook users. To become “friends”, a user sends a “friend request” to another user, who can choose to either accept or decline the request. Either person can terminate their “friendship” at any time by “unfriending” the other person.²²

33. Some users only have a handful of friends, while others have hundreds or even thousands of friends. It is estimated that the average user has 190 friends.²³

Privacy Settings

34. The content that a user shares with others on Facebook depends upon the privacy settings established by that user – settings the user can change at any time.²⁴

35. Facebook provides a variety of granular controls that fully empower and enable users to control the extent to which they share posts, photos and other content with other users. For example, content can be limited to: friends, subsets of friends, friends of friends, a single individual or simply the user herself.²⁵

36. In addition to these general privacy settings, users can change the selected friends for specific content on a content-by-content basis through the use of an associated online selector control. Using this control, users can override their general privacy setting and select a different group or subset of friends for specific content at the time it is posted.²⁶

37. Facebook users can change their privacy settings at any time. Users can view all of their historical shared content and activity, as well as the privacy setting associated with it. Users can

²² Squires Affidavit, at para 9, CR Vol 1, Tab 6

²³ Squires Affidavit, at para 10, CR Vol 1, Tab 6

²⁴ Squires Affidavit, at para. 11, CR Vol 1, Tab 6

²⁵ Squires Affidavit, at paras 34-35, CR Vol 1, Tab 6

²⁶ Squires Affidavit, at para 77, CR Vol 1, Tab 6

also retroactively change the applicable privacy settings for all such past content or they can delete it.²⁷

Viewing Content on Facebook

38. When users log into Facebook on a desktop computer, the first page they usually see is their home page. Since 2006, a user's home page has served as a simple and interactive way for users to see content and information from their friends.²⁸

39. The center portion of the home page contains the "news feed", which is, for most users, the primary way in which they access and review shared content on Facebook.²⁹

40. Each user's news feed contains a customized and constantly updating flow of interesting and relevant content from and about her friends, as well as businesses, organizations, causes, news outlets, politicians, entertainers, music groups and other entities that she has chosen to connect with on Facebook.³⁰

41. Just as a user's news feed consists of content and information shared with that user by her friends (subject to their privacy settings), the content and information that the user herself chooses to share with her selected friends appears in their news feeds (among other places).³¹

42. The left-hand side of a user's home page contains links and tools to help users quickly navigate the Facebook website.³²

43. The right-hand side of a user's home page shows a variety of ever changing sponsored and non-sponsored content (i.e., paid and unpaid content) that is personalized for each user and which may change every time the user loads or refreshes a page on Facebook.³³

²⁷ Squires Affidavit, at paras 36 and 38, CR Vol 1, Tab 6

²⁸ Squires Affidavit, at para 15, CR Vol 1, Tab 6

²⁹ Squires Affidavit, at para 21, CR Vol 1, Tab 6

³⁰ Squires Affidavit, at para 22, CR Vol 1, Tab 6

³¹ Squires Affidavit, at para 23, CR Vol 1, Tab 6

³² Squires Affidavit, at para 16, CR Vol 1, Tab 6

³³ Squires Affidavit, at paras 17 and 20, CR Vol 1, Tab 6

Facebook's Marketing Features

44. Facebook offers various marketing features to potential advertisers and sponsors. Only Sponsored Stories are at issue in this action.³⁴

45. The goal of Facebook's marketing features is to show the most relevant and engaging content to users in a way that enhances, and does not disrupt or detract from, their Facebook experience. In pursuing this goal, Facebook's marketing features have evolved as it has continued to develop innovative ways to feature relevant and interesting content about a user's friends.³⁵

Sponsored Stories

46. Facebook introduced Sponsored Stories in January 2011. Sponsored Stories are a marketing feature that allows businesses, organizations, causes, politicians, entertainers and other entities to pay Facebook in order to increase the likelihood that a user's selected friends will see the same content that the user has *already shared* with those friends.³⁶

47. The content included in a Sponsored Story is virtually identical to the content that appeared in the original news feed story associated with the underlying action. For example, both the news feed post for a page like and a page like Sponsored Story would include the name, profile picture and like statement of the user, as well as the name and profile picture of the page sponsoring the story (e.g., Urban Athlete Fitness Studio).³⁷ The graphic below is an example of a Sponsored Story.



³⁴ Squires Affidavit, at para 58, CR Vol 1, Tab 6; *Notice of Civil Claim*, dated March 29, 2012, CR Vol 3, Tab 13

³⁵ Squires Affidavit, at para 59, CR Vol 1, Tab 6

³⁶ Squires Affidavit, at para 71, CR Vol 1, Tab 6

³⁷ Squires Affidavit, at para 72, CR Vol 1, Tab 6

48. Sponsored Stories may appear in either the news feed or on the right-hand side of a Facebook webpage. Sponsored Stories are displayed to the same group of friends with whom the user wanted to, and did, share the original underlying action. For example, if a user shared that she liked the Canadian Broadcasting Corporation's Facebook page with 10 friends, only those 10 friends could see a Sponsored Story triggered by the user's page like. In some cases, Facebook may show a Sponsored Story to a narrower group of users than specified by the user. For example, if a user makes her likes visible to "public" – meaning anyone on the Internet who visits the user's profile page – a Sponsored Story triggered by the user's page like will be, at most, shown only to the user's friends.³⁸

49. The following are examples of the limited types of user actions that may trigger a Sponsored Story:

- page and page post likes: when a user likes a Facebook page or content shared by the administrator of a previously liked Facebook page;
- app used or shared: when a user uses or shares an application on Facebook;
- poll: when a user responds to a question or poll posed by the administrator of a Facebook page;
- check-in: when a user checks-in at a location on Facebook; and
- domain share like: when user likes content on a third-party website, shares content from a third-party website or pastes a link to a third-party website in a status update.³⁹

50. Sponsored Stories are only generated after a user takes an eligible action and has chosen to share that action with their selected friends. It is the user's act that triggers the potential Sponsored Story. And it is only those same friends that the user selected to see her initial action that may see the Sponsored Story.⁴⁰

³⁸ Squires Affidavit, at paras 71 and 73, CR Vol 1, Tab 6

³⁹ Squires Affidavit, at para 74, CR Vol 1, Tab 6

⁴⁰ Squires Affidavit, at para 74, CR Vol 1, Tab 6

51. A user can have a variety of reasons for sharing content on Facebook that may trigger a Sponsored Story. Some users choose to do so in order to show their affinity for the associated item (e.g., their favorite restaurant or clothing brand) or to obtain special access and offers (e.g., pre-sale access to concert tickets). Others do so in order to further define their identity (e.g., sharing political content). The many and varied reasons that a user may share content by clicking the like button is more fully developed at paragraphs 51-70 of the expert affidavit of Dr. Catherine Tucker.⁴¹

52. In addition to the information expressly included in Facebook's terms of use (see paragraphs 17-20 above), a significant number of users should have acquired an understanding that some of their actions could be rebroadcast as a Sponsored Story because they should have: (i) observed that other users' actions appeared in Sponsored Stories; and (ii) reviewed the extensive educational information, including in Facebook's data use policy and online Help Center, regarding Sponsored Stories.⁴²

53. A variety of organizations and entities, including those involved in commercial, political, charitable, entertainment, and sports activities – some of which do not advertise or promote the sale or trading in property or services – elect to sponsor stories.⁴³

User Controls for Sponsored Stories

54. Just as they can limit or prevent the sharing of their content on Facebook, users have a wide variety of specific options to limit or prevent their appearance in Sponsored Stories.⁴⁴

55. A user's action is not eligible to be used as part of a Sponsored Story if the user has restricted the audience for that content to the user himself (i.e., by selecting "only me" in their privacy settings).⁴⁵

⁴¹ Plambeck Affidavit, at para 51, CR Vol 2, Tab 9; Tucker Affidavit, at paras 51-70, CR Vol 1, Tab 7

⁴² Tucker Affidavit, at paras 48 and 49, CR Vol 1, Tab 7

⁴³ Squires Affidavit, at para 75, CR Vol 1, Tab 6

⁴⁴ Squires Affidavit, at para 76, CR Vol 1, Tab 6

⁴⁵ Squires Affidavit, at para 78, CR Vol 1, Tab 6

56. In addition, users can avoid taking actions that may trigger a Sponsored Story. For example, a user can choose not to like Facebook pages, related posts or comments; not check in; not share applications or links; and not use apps or games. Additionally, users can, at anytime, unlike pages and uninstall applications.⁴⁶

57. Users are in full control over the content and information that they make available and choose to share on Facebook. Furthermore, as described below, Facebook has also provided extensive information to educate users and address any privacy-related concerns that they may have. Users are able to control their privacy as much or as little as they want, and each of the millions of Facebook users exercise those controls differently.

Facebook’s Education of Users Regarding Sponsored Stories

58. Facebook has engaged in significant efforts to educate users about its marketing features, including Sponsored Stories, and how they work.⁴⁷

59. Facebook’s online “Help Center” is available to anyone who visits the Facebook website, including non-Facebook users. For Facebook users, the Help Center is accessible by a link included on virtually every page on the website. The Help Center is keyword-searchable and organized by topic.⁴⁸

60. Several Help Center pages directly relate to Sponsored Stories. For example, the following questions currently appear on the “Interacting with Ads” page in the Help Center:

- What are Sponsored Stories?
- Why am I seeing Sponsored Stories?
- Who can see Sponsored Stories about me?
- How are Sponsored Stories different from Facebook Ads?

⁴⁶ Squires Affidavit, at paras 82 and 83, CR Vol 1, Tab 6

⁴⁷ Squires Affidavit, at para 85, CR Vol 1, Tab 6

⁴⁸ Squires Affidavit, at para 86, CR Vol 1, Tab 6

- How are specific Sponsored Stories chosen for me?⁴⁹

61. Facebook also provides information in the Help Center about how users can change their privacy settings to limit who can see their shared content, including:

- When I share something, how do I choose who can see it?
- Can I change the audience for something I share after I share it?
- How do I control who can see what's on my timeline?⁵⁰

62. In addition, Facebook's data use policy, which was previously known as its privacy policy, provides information about Facebook's marketing features. The current data use policy has a section entitled "How advertising and Sponsored Stories work". Contrary to the incorrect assertions at paragraph 76 of the plaintiff's written submissions, the Sponsored Stories subsection includes the following information:

Many of the things you do on Facebook (like "liking" a Page) are posted to your timeline and shared in News Feed. But there's a lot to read in News Feed. That's why we allow people to "sponsor" your stories to make sure your friends and subscribers see them. For example, if you RSVP to an event hosted by a local restaurant, that restaurant may want to make sure your friends see it so they can come too.

If they do sponsor a story, that story will appear in the same place ads usually do or in your News Feed under the heading "Sponsored" or something similar. Only people that could originally see the story can see the sponsored story, and no personal information about you (or your friends) is shared with the sponsor.

Your Show my social actions in Facebook ads setting only controls ads with social context. It does not control Sponsored Stories, ads or information about Facebook's services and features, or other Facebook content.⁵¹ (emphasis added)

63. Furthermore, shortly after the launch of the Sponsored Stories feature, Facebook posted a brief video on the website explaining the Sponsored Stories feature and how it works.⁵²

⁴⁹ Squires Affidavit, at para 87, CR Vol 1, Tab 6

⁵⁰ Squires Affidavit, at para 88, CR Vol 1, Tab 6

⁵¹ Squires Affidavit, at para 91, CR Vol 1, Tab 6

⁵² Squires Affidavit, at para 94, CR Vol 1, Tab 6

64. In December 2011, Facebook initiated a site-wide user-education campaign about its marketing features, including Sponsored Stories. Facebook displayed a message at the top of all users' home pages that read: "About Ads: Ever wonder how Facebook makes money? Get the Details." Users who clicked on the underlined text were redirected to a page entitled "About Advertising on Facebook." The "About Advertising on Facebook" page currently indicates that: "From the beginning, the people who built Facebook wanted it to be free for everyone. It now costs over a billion dollars a year to run Facebook, and delivering ads is how Facebook pays for this." The "Advertising on Facebook" page also includes answers to a number of questions, such as:

- What's the difference between ads and sponsored stories?

Ads and sponsored stories are types of sponsored content on Facebook:

1. Ads: A business creates an ad and pays Facebook to deliver it to the people who are most likely to find it useful. For example, you might see an ad for a local gym if you live nearby, are a certain age and like running. Learn more [ads](#).
2. Sponsored Stories: A sponsored story is different from an ad because it's a story you can already see about activity from people you're connected to, Pages you like or apps you use. A business pays to sponsor these regular stories to increase the chances that you'll notice it. Learn more about [sponsored stories](#).

- Is it true Facebook sells my name and contact info to make money?

No. Facebook does not sell your personal information. Instead, Facebook makes its money from showing you ads. Selling your information would actually be bad for Facebook. Here's why: Facebook was created to help you share and connect with the people in your life. If you don't feel like you're in control of who sees what you share, you probably won't use Facebook as much, and you'll share less with your friends. Not only is that bad for Facebook, it's also bad for you. That's why only the people you choose to share with see your stuff.⁵³
[emphasis added]

The Representative Plaintiff

65. The plaintiff is an individual residing in Vancouver, British Columbia who has used Facebook for free since June 2007, and has continued using Facebook since commencing this action.⁵⁴

66. The plaintiff has changed her Facebook profile picture multiple times over the last two years and some of the profile pictures she has used do not appear to reflect her likeness.⁵⁵

⁵³ Squires Affidavit, at paras 93 and 94, CR Vol 1, Tab 6

⁵⁴ Affidavit #1 of Deborah L. Douez, affirmed July 3, 2012, at paras 3 and 4, CR Vol 1, Tab 3

67. The plaintiff has changed her Facebook privacy settings since she has been a user. The privacy setting for her likes and interests is set to “public”, which means that it is viewable by anyone on the Internet. Her privacy settings for certain other categories of content are set to “only me” (which means that it is only viewable by her) or “friends” (which means that it is only viewable by her Facebook friends).⁵⁶

68. The plaintiff has liked over 100 Facebook pages, any of which can be viewed by anyone on the Internet by virtue of the privacy settings that she has selected. In addition, she has continued to like Facebook pages even after commencing this action. She has also used the check-in feature to share her location on Facebook.⁵⁷

69. The plaintiff is also an active user of other social media tools and websites, such as Twitter.⁵⁸

PART III – THE ISSUE

70. The sole issue on this application is whether this claim should be certified and proceed as a class action. It should not.

PART IV – LAW and ARGUMENT

The Privacy Act

71. In order to properly determine the issue on this application, it is necessary to understand the nature of the claim asserted and the context in which it arises. It is also important to note that this type of claim has never been certified as a class proceeding.

72. The *Privacy Act* recognizes a qualified, fluid right to individual privacy and creates a limited right of action for the invasion of privacy. While it provides some examples, the *Privacy Act* leaves the definition and determination of what constitutes an invasion of privacy to the courts to assess on a case-by-case basis. The *Privacy Act* carefully avoids laying down fixed boundaries and specifically provides that the nature and extent of an individual’s privacy right

⁵⁵ Solanki Affidavit, at para 23, CR Vol 2, Tab 8

⁵⁶ Solanki Affidavit, at para 22, CR Vol 2, Tab 8

⁵⁷ Solanki Affidavit, at para 24, CR Vol 2, Tab 8

⁵⁸ Tucker Affidavit, at para 13, CR Vol 1, Tab 7

varies with the circumstances. An invasion of privacy, especially an invasion of privacy by way of an alleged misappropriation of personality, is inherently individual and highly fact-specific because it involves the most personal of characteristics – the protection of an individual’s personality.⁵⁹

73. Section 1(1) is the activating provision of the *Privacy Act*, and it sets out the guiding principles for the entire statute. It provides that it is a tort, actionable without proof of damages, for a person, wilfully and without a claim of right, to violate the privacy of another. The BC Court of Appeal has concluded that:

To constitute the tort [of invasion of privacy], the violation must be committed “wilfully and without a claim of right”. The nature and degree of privacy to which the person is entitled in any situation or in relation to any matter is fully set out in [ss. 1(2) and 1(3)]...Regard must be had to the provisions of the subsection as a whole. It is plain that whether there has been a violation of privacy of another must be decided on the particular facts of each case. As the learned Judge below said in his reasons for judgment: it is necessary to consider all of the circumstances before determining “the nature and degree of privacy to which a person is entitled”.⁶⁰ [*emphasis added*]

74. Sections 1(2) and 1(3) of the *Privacy Act* combine to impose parameters around the fluid individual right to privacy by setting out the individual, case-specific, contextual factors that must be considered by the court in determining whether there has been a violation of privacy in a particular situation. Sections 1(2) and 1(3) provide that:

(2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

(3) In determining whether the act or conduct of a person is a violation of another’s privacy, regard must be had to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

75. The following fundamental principles are evident from the plain words of the *Privacy Act*:

⁵⁹ *Privacy Act*, RSBC 1996, c 373, Certification Authorities (“CA”) Vol 4, Tab 98; CHH McNairn and AK Scott, *Privacy Law in Canada* (Markham: Butterworths, 2001) at 68-69, CA Vol 4, Tab 106; *Davis v McArthur* (1969), 10 DLR (3d) 250 at 254-255 (BC SC), CA Vol 1, Tab 21, reversed (1970), 17 DLR (3d) 760 (BC CA), CA Vol 1, Tab 20

⁶⁰ *Davis* (BC CA), *supra* at 763-764, CA Vol 1, Tab 20

- (a) an individual's right to privacy is neither fixed nor absolute – it is fluid and changes depending on the particular situation;
- (b) it is necessary to consider all of the surrounding circumstances before determining the nature and degree of an individual's right to privacy in a particular situation; and
- (c) the determination of whether there has been an invasion of privacy in a particular situation requires an assessment of a number of individual factors on a case-by-case basis.

76. Similar to other provincial privacy statutes, one of the examples of an invasion of privacy in the *Privacy Act* is the unauthorized use of another person's name or portrait for the purpose of advertising or promoting the sale of property or services (i.e., commercial misappropriation of personality).⁶¹

77. Section 3(2) of the *Privacy Act* sets out the elements that a plaintiff must establish in order to establish that potential invasion of privacy. However, section 3(2) is not a standalone provision – it sets out specific elements which, if established, may constitute an invasion of privacy. A final determination on liability can only be made after considering the individual, case-specific, contextual factors in the particular situation, as required under section 1 of the *Privacy Act*. This approach, which has been confirmed by the British Columbia Supreme Court, is consistent with the spirit and intent of the legislation, as well as basic principles of statutory interpretation.⁶²

78. The plaintiff's claim, as drafted (including the first proposed common issue), is overly broad and fails to recognize the limited scope of a claim under the *Privacy Act*. Under the *Privacy Act*, the use of another person's name or portrait is not, in itself, actionable. In order to fall within the parameters set by section 3(2), the use needs to be for a certain limited purpose (as

⁶¹ *Privacy Act*, *supra* at ss 1 and 3, CA Vol 4, Tab 98. Also see *The Privacy Act*, RSS 1978, c P-24, ss 2 and 3, CA Vol 4, Tab 101; *The Privacy Act*, RSM 1987, c P125, ss 2 and 3, CA Vol 4, Tab 100; and *Privacy Act*, RSNL 1990, c P-22, ss 3 and 4, CA Vol 4, Tab 99

⁶² *Poirier v Wal-Mart Canada Corp.*, 2006 BCSC 1138 at paras 74-93, CA Vol 3, Tab 72; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21, CA Vol 3, Tab 78; *Melnychuk v Heard*, 1963 CarswellAlta 85 at para 27 (QB), CA Vol 3, Tab 64

described below) and then, pursuant to section 1, it must be subject to a careful consideration of the individual, case-specific, contextual factors present in the particular situation. Under the *Privacy Act*, the use must: (i) be for advertising or promoting; (ii) the sale or other trading in; (iii) property or services. Each element involves a commercial aspect that conveys that the improper use is confined to drawing attention to a transaction that involves the exchange of a commodity for money.⁶³

79. Lack of consent is a fundamental part of any invasion of privacy case. The plaintiff must establish that she had a right to privacy in the particular circumstance, and that her right was violated without her consent. While consent can be express, it can also be implied. Implied consent is presumed from the circumstances, and it is often demonstrated through a combination of knowledge and conduct (or lack thereof).⁶⁴ Implied consent can also be inferred by considering other factors and circumstances. For example, the following purposes may indicate that a user has impliedly consented to the use of her name and likeness:

- (a) receiving information on products, discounts on products and access to exclusive content;
- (b) expressing affinity for an organization and generating awareness of the organization to a larger group of people;
- (c) promoting her own products, brands or organizations;
- (d) affiliating herself in the eyes of her friends with an organization or product is perceived to be cool or hip;
- (e) communicating an aspect of her identity or persona to her friends;
- (f) coordinating with other users;
- (g) organizing for political or social purposes; and

⁶³ *Black's Law Dictionary*, 9th ed, sv "advertising", "sale" and "trade", CA Vol 4, Tab 102; *Canadian Oxford Dictionary*, 2nd ed, sv "advertise", "promote", "sale", "trade", "product" and "service", CA Vol 4, Tab 104

⁶⁴ *St. Pierre v Pacific Newspaper Group Inc.*, 2006 BCSC 241 at para 45, CA Vol 4, Tab 85; *Milton v Savinkoff*, 1993 CanLII 169 at 5-6 (BC SC), CA Vol 3, Tab 65; *Bishop v Stevens*, [1990] 2 SCR 467 at 485, CA Vol 1, Tab 9

- (h) enhancing the community by promoting local businesses.⁶⁵

80. In addition, as required by section 1, in determining whether there has been a violation, the court is required to consider whether the defendant's conduct was reasonable in the circumstances. The fact that a plaintiff has already made the information at issue publicly available, or disclosed it to a third party, will generally defeat an invasion of privacy claim for two independent reasons: (i) the plaintiff's conduct will amount to implied, if not express, consent; and (ii) in light of the plaintiff's prior release of the information, the defendant's conduct in releasing the information is reasonable.⁶⁶

81. In summary, in order to succeed in a claim under section 3(2) of the *Privacy Act*, a plaintiff must establish that:

- (a) her name or portrait was used by another person;
- (b) for:
 - (i) the purpose of advertising or promoting
 - (ii) the sale of, or other trading in,
 - (iii) property or services;
- (c) she did not consent to the use of her name or portrait for the purpose set out in (b);
- (d) the use of her name or portrait for the purpose set out in (b) was a violation of the privacy to which she was reasonably entitled to in the circumstances; and
- (e) the nature, incidence and occasion of the act or conduct and the relationship between the parties supports a finding that there was a violation of privacy.

82. After the plaintiff has established all of the requisite elements of the claim, the defendant may raise any defences applicable to the claim. Among others, the equitable defences of

⁶⁵ Tucker Affidavit, at paras 8 and 51-70, CR Vol 1, Tab 7

⁶⁶ *Privacy Law in Canada*, supra at 79, CA Vol 4, Tab 106; *Wooding v Little*, 1982 CarswellBC 630 (SC), CA Vol 4, Tab 95; *Walker v BC (College of Dental Surgeons)*, 1997 CanLII 1535 (BC SC), CA Vol 4, Tab 98; *Bingo Enterprises Ltd v Plaxton* (1986), 26 DLR (4th) 604 (Man CA), CA Vol 1, Tab 8

estoppel, acquiescence and waiver are available in invasion of privacy cases. As set out below, each of these defences requires an assessment of the plaintiff's particular knowledge and conduct in the circumstances giving rise to the claim. These defences are highly-fact specific and can only be assessed on an individual, case-by-case basis.

83. Damages for invasion of privacy are inherently individual and require a considered assessment of the particular individual circumstances associated with the violation. In assessing damages for invasion of privacy by way of misappropriation of personality, the following factors must be considered: (i) the embarrassment, humiliation and distress suffered by a plaintiff; (ii) the commercial value of the plaintiff's endorsement; and (iii) the nature of the defendant's conduct. Questions about prejudice and the commercial value of an individual's right to privacy and personality are fundamentally individual issues. As a result, damages for invasion of privacy can only be determined on a case-by-case basis following an assessment of highly individual factors.⁶⁷

84. At paragraph 130 of the plaintiff's written submissions, the plaintiff asserts that "there is no evidence to show any class members suffered extraordinary humiliation, damage to reputation or distress caused by the use of their name in Sponsored Story advertisements, beyond damages common to the class as a whole", and, therefore, a damages assessment can solely focus on Facebook's conduct. This statement ignores the necessary individual damages analysis for an invasion of privacy claim, which is based, in part, upon the harm to an individual's privacy and personality as a result of the defendant's conduct. The test requires the determination of whether the particular individual suffered any embarrassment, humiliation, distress or damage to reputation.

The Certification Threshold

85. The requirements for certification are set out in section 4(1) of the *Class Proceedings Act*. The plaintiff bears the burden of establishing that each of the requirements in section 4(1) is met.⁶⁸

⁶⁷ *Poirier, supra* at para 104, CA Vol 3, Tab 72

⁶⁸ *Class Proceedings Act*, RSBC 1996, c 50, s 4 [CPA], CA Vol 4, Tab 97; *Hollick v City of Toronto*, 2001 SCC 68 at para 25, CA Vol 2, Tab 45; *Gary Jackson Holdings Ltd. v Eden*, 2010 BCSC 273 at para 27, CA Vol 2, Tab 34

86. The requirements for certification are inextricably linked: “for an action to be certified as a class proceeding, there must be a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of behaviour of wrongdoers”.⁶⁹

87. While the first requirement is a purely legal question, the remaining four requirements are questions of mixed fact and law. The plaintiff must provide “some basis in fact” and put forward a sound legal position in order to satisfy those requirements.⁷⁰

88. A certification application is an important screening mechanism for claims that are not appropriate for class treatment. On a certification application, the court is tasked with a gatekeeper role that requires carefully scrutinizing and eliminating claims that are inappropriate for class treatment. The court has a responsibility to: (i) protect the defendant from being unjustifiably embroiled in complex and costly litigation; and (ii) ensure the productive use of judicial resources. The ultimate goal is to achieve a just determination of the legitimate issues.⁷¹

89. An order certifying a questionable class action does not benefit the plaintiff or potential class members. It merely postpones the analysis of the difficulties that will have to be addressed later in the litigation. The strong caution from the BC Court of Appeal is particularly applicable to this action:

The relevance of individual circumstances to the plaintiff’s proof of the claims or to defences asserted by [the defendant] should not in my view be brushed aside merely in order to fit the action into the mould of a class proceeding...The objectives of this remedial legislation will not be well served if the court at the certification stage routinely delays addressing structural difficulties that will

⁶⁹ *Frohlinger v Nortel Networks Corp.*, 2007 CarswellOnt 240 at para 25 (SCJ), CA Vol 2, Tab 31; *Kafka v Allstate Insurance Company of Canada*, 2011 ONSC 2305 at para 117, CA Vol 2, Tab 51, affirmed, 2012 ONSC 1035 (Div Ct), CA Vol 2, Tab 50; *Keatley Surveying Ltd. v Teranet Inc.*, 2012 ONSC 7120 at para 63, CA Vol 2, Tab 52

⁷⁰ *Hollick, supra* at para 25, CA Vol 2, Tab 45

⁷¹ *Arabi v Toronto Dominion Bank*, 2006 CanLII 17330 at para 9 (Ont SCJ), CA Vol 1, Tab 6, affirmed, 2007 CarswellOnt 8294 (Div Ct), CA Vol 1, Tab 5; *Chadha v Bayer Inc.* (2001), 200 DLR (4th) 309 at para 10 (majority reasons)(Ont Div Ct), CA Vol 1, Tab 16, affirmed (2003), 223 DLR (4th) 158 (Ont CA), CA Vol 1, Tab 15; *Tiemstra v Insurance Corporation of British Columbia*, 1997 CanLII 4094 at paras 13-14 and 18 (BC CA), CA Vol 4, Tab 91

inevitably arise, in the hope that they can be dealt with “when the time comes” in the midst of a complex trial.⁷²

90. In addition, an order certifying a questionable class proceeding does not advance the administration of justice. The public will be rightly cynical, and the administration of justice will be brought into disrepute, if the massive and enormously expensive class action process is used to prosecute theoretical and insubstantial wrongs.⁷³

91. To the extent that there is any doubt about whether this case meets the certification requirements, it should be resolved by denying certification. The effect of such an order is not to deny the plaintiff’s claim, but simply to put the plaintiff in the same position as any other litigant who comes before the court.⁷⁴

The Evidentiary Record

92. The plaintiff bears the burden of providing “some basis in fact” to satisfy the certification requirements. The plaintiff has failed to meet this burden.

93. The plaintiff’s abbreviated and, on its face, incomplete application record contains the following: an 8 page affidavit from the plaintiff, of which only 2 pages set out the material facts related to her claim; a 4 page affidavit from another Facebook user, only 2 pages of which relate to his activities on Facebook; two affidavits from one of the lawyers appearing as counsel on this application; and, lastly, one affidavit from an articling student employed at the law firm representing the plaintiff. The plaintiff did not file any expert evidence.

94. In contrast, Facebook has submitted an extensive evidentiary record that will allow for a proper and just determination of the issues on this application. Facebook’s responding record contains the following: a comprehensive, 45 page affidavit from Facebook’s product marketing director regarding Facebook’s operating and marketing features; a detailed affidavit from Facebook’s monetization analytics director summarizing relevant statistics about the differences among the proposed class and their Facebook activities, including Sponsored Stories; an affidavit from one of Facebook’s in-house lawyers which provides important information on the contents

⁷² *Parsons v Coast Capital Savings Credit Union*, 2007 BCCA 247 at para 38, CA Vol 3, Tab 70

⁷³ *Singer v Schering-Plough Canada Inc.*, 2010 ONSC 42 at para 231, CA Vol 4, Tab 84

⁷⁴ *Western Canadian Shopping Centres v Dutton*, 2001 SCC 46 at para 45, CA Vol 4, Tab 94

of Facebook's terms of use; an uncontroverted affidavit from an expert in applied microeconomics (who focuses on online advertising, online networks, privacy and the digitization of data); and an affidavit from an articling student in the law firm representing Facebook.

95. The plaintiff's failure to put forward an adequate evidentiary record is apparent from a review of the plaintiff's written submissions. References to the evidence adduced by the plaintiff are few and far between. Instead, the plaintiff primarily refers the following in order to establish the facts on which she relies on in this application: (i) the evidence adduced by Facebook; or (ii) *allegations* in the claim. The plaintiff's failure to put forward a proper evidentiary record, including her failure to put forward any expert evidence, results in her being unable to provide "some basis in fact" to satisfy the certification requirements.

The Certification Threshold Has Not Been Met

96. This action is not suitable for class treatment.

97. First and foremost, the plaintiff's repeated failure to recognize and account for the resolution of the highly fact-specific elements of her inherently individual claim is fatal to her attempt to have this action certified as a class proceeding. This failure permeates the certification application and her written submissions. It is evident in:

- (a) the plaintiff's overly broad and inadequate class definition;
- (b) the absence of any proposed common issues that can be determined on a class-wide basis and that would substantially advance the proceeding;
- (c) the absence of a plausible and credible methodology to adjudicate the proposed common issues regarding liability (including defences) and damages;
- (d) the failure to recognize the overwhelming nature and scope of the requisite individual liability, defence and damages inquiries compared to the proposed common issues; and
- (e) the deficient proposed litigation plan that fails to allow or account for the necessary individual inquiries.

98. The plaintiff's failure to recognize and account for the individual inquiries associated with the claim asserted in this action confirms her intention to avoid addressing any of the problematic certification issues. She cannot compensate for her failures and avoidance strategy by attempting to focus all of the attention on Facebook and its conduct. She has failed to demonstrate any improper conduct by Facebook, and the claim raised in this action, by necessity, is specific to each class member and depends on a series of individual issues.

99. If this proceeding is certified, it will unavoidably devolve into an unmanageable myriad of trials in which each claim of each individual class member will have to be decided at an individual trial on the basis of the specific facts relevant to that particular instance of the allegedly tortious conduct.

100. The action is not viable as a class proceeding. As such, this application should be dismissed.

No Identifiable Class

101. The proposed class definition is overly broad and does not meet the requirements set out in section 4(1)(b) of the *CPA*. It is overly broad because it includes people who do not have a plausible claim and, therefore, no rational connection to the proposed common issues. In addition, it is overly broad because it does not include any temporal limitations.

The Legal Test for a Class Definition

102. Section 4(1)(b) of the *CPA* requires the plaintiff to demonstrate an identifiable class of two or more persons desirous of having their claims tried in common.

103. A clearly defined class is essential for certification. A proper class definition should perform three functions:

- (a) identify those persons who have a potential claim for relief against the defendant;
- (b) identify those persons who are bound by a judgment in the action; and
- (c) describe who is entitled to notice pursuant to the *CPA*.⁷⁵

⁷⁵ *Keatley Surveying Ltd., supra* at para 124, CA Vol 2, Tab 52

104. A class definition must not be overly broad. There must be a rational connection between the class member, the cause of action and the common issues.⁷⁶

105. The proposed class must be defined by reference to objective criteria. The definition must allow a person to assess whether or not she falls within the class. The requirement for a clearly identifiable class is not met if individuals cannot readily tell, with a minimum of effort, whether they form part of the class.⁷⁷

106. In this case, the proposed class consists of “all British Columbia resident persons who are Members of Facebook and whose name, portrait or both have been used by Facebook in a Sponsored Story”.⁷⁸

(a) No Plausible or Colorable Claim

107. The proposed class definition is overly broad because it includes people who do not have a plausible or colorable claim against Facebook. First, the class definition is overly broad because it fails to consider and account for a critical element of the claim advanced in this action (i.e., the critical element of lack of consent). That is to say, even people who expressly or impliedly consented to their appearance in a Sponsored Story are members of the proposed class. Second, the class definition is overly broad because its scope extends beyond the statutory parameters for an actionable claim (i.e., it includes users whose names and profile pictures are not their own). As such, in both cases, the proposed class definition is not rationally connected to the proposed common issues.

108. The mere fact that a group of individuals is identifiable is not sufficient to render them a class for the purposes of the *CPA*. On a certification motion, the onus is on the plaintiff to provide evidence that every member of the proposed class has a plausible claim against the defendant. In other words, the representative plaintiff has an obligation to show that, if the common issues were to be resolved in favour of the proposed class, each of the proposed class members has a ‘colorable’ claim against the defendant. If the plaintiff fails to meet this burden,

⁷⁶ *Keatley Surveying Ltd.*, *supra* at para 124, CA Vol 2, Tab 52

⁷⁷ *Western Canadian Shopping Centres*, *supra* at para 38, CA Vol 4, Tab 94; *Hollick*, *supra* at para 17, CA Vol 2, Tab 45; *Gariepy v Shell Oil Co.*, 2002 CarswellOnt 2270 at paras 47-48 (SCJ), CA Vol 2, Tab 33, affirmed, 2004 CarswellOnt 8813 (Div Ct), CA Vol 2, Tab 32

⁷⁸ *Notice of Application*, dated July 5, 2012, Part 1, paragraph 3, CR Vol 1, Tab 1

the class definition is overly broad and over-inclusive and does not meet the requirements of section 4(1)(b) of the *CPA*. The plaintiff has failed to meet this burden.⁷⁹

109. A proper class definition should not include a reference to any elements that either depend on the resolution of the common issues or require a determination on the merits of the claim. The reason for this is clear: if membership depended upon a successful claim, then an unsuccessful claimant would not be bound by the outcome and would be free to commence further litigation.⁸⁰

110. *Failure to Follow the Statutory Requirements and Parameters.* The plaintiff's proposed class definition is over-inclusive because it includes people who do not have a plausible or colorable claim against Facebook.

111. In order to abide by the prohibition against a merits-based class definition, the plaintiff has proposed a class definition that does not include any reference to the requisite lack of consent element of the claim. As set out above, express or implied consent to the use of a person's name or likeness is a full answer that will defeat the claim pursued in this action. By failing to limit the class definition to those people who did not consent to the impugned activity (as the statutory cause of action requires), the plaintiff has included people who have consented and, therefore, do not have a plausible or colorable claim against Facebook.

112. But, if the plaintiff included the requisite lack of consent element as part of the proposed class definition, she would have offended the prohibition against a merits-based class definition, because the consent issue is a critical and disputed element of the claim.

113. Allowing the plaintiff to avoid this difficulty by approving an overly broad class definition as proposed by the plaintiff (i.e., one that is silent on consent) is not a solution. There is no workable or suitable class definition for this claim that includes the requisite "lack of consent" element but which does not then become an impermissible merits-based class definition. This is precisely the insurmountable class definition problem recently faced by the

⁷⁹ *Hollick, supra* at paras 19-21, CA Vol 2, Tab 45; *Western Canada Shopping Centres, supra* at para 38, CA Vol 4, Tab 94

⁸⁰ *Keatley Surveying Ltd., supra* at paras 159-161, CA Vol 2, Tab 52

plaintiff in *Keatley Surveying Ltd. v Teranet Inc.* For those same reasons, this action is not suitable for class treatment.⁸¹

114. In addition to the merits-based problem, the plaintiff's proposed class definition includes people who do not have a plausible claim because the scope of the definition is broader than the limiting parameters set out in the *Privacy Act*. Leaving aside the subsequent requisite individual analysis under section 1 of the *Privacy Act*, in order to succeed on a section 3(2) claim, a claimant must first establish that:

- (a) another person used the claimant's name or portrait;
- (b) the use was for the purpose of advertising or promoting the sale of property or services; and
- (c) the claimant did not consent to the use of their name or portrait for the purpose referred to in (b).

115. With respect to the use of a claimant's name or portrait, the uncontroverted evidence is that: (i) some Facebook users use fake names or pseudonyms; and (ii) many Facebook users either do not upload a profile picture or have used profile pictures that do not reflect their likeness.

116. Both of these groups of users are nevertheless included in the plaintiff's proposed class definition.

117. However, on a plain reading of the statute, it is plain and obvious that individuals who have: (i) used fake names or pseudonyms; and (ii) used a profile picture other than their own likeness, do not satisfy the requisite elements of the claim advanced in this action and, therefore, do not have a plausible or colorable claim against Facebook. Nonetheless, because of the overly broad nature of the plaintiff's proposed class definition and the plaintiff's failure to account for the limited scope of the claim advanced in this action, these individuals are included in the proposed class definition.

⁸¹ *Keatley Surveying Ltd., supra* at paras 159-167, CA Vol 2, Tab 52

118. This problem is further complicated by the fact that users can, and do, change their names and profile pictures over time. The uncontroverted evidence is that approximately ██████ users who Facebook can reasonably ascertain reside in British Columbia changed their Facebook user name in a 2 month period earlier this year and approximately ██████ users who Facebook can reasonably ascertain reside in British Columbia changed their profile picture at least once over the same time period. Thus, one cannot assume, as the plaintiff proposes, that all Sponsored Stories featured a user's real name or actual likeness.

119. With respect to the use of a name or likeness for the purpose of advertising or promoting the sale of property or services, the uncontroverted evidence is that Sponsored Stories relate to commercial, political, charitable, entertainment and other purposes. Nonetheless, the plaintiff's proposed class definition fails to recognize the limited scope of the claim advanced in this action by sweeping in all Sponsored Stories.

120. The above issues with respect to name changes, profile picture changes and the particular purpose for each use of a user's real name or actual likeness do not permit an individual to know, with a minimum of effort, whether they are included in the proposed class and have a plausible claim.

121. The plaintiff's failure to appreciate and account for the crucial elements and limited scope of her claim has resulted in an overly-broad, over-inclusive and inappropriate class definition.

(b) No Temporal Limitation

122. The class definition is also overly broad and inappropriate because it is unlimited as to time.

123. A class definition must be temporally limited in order to achieve the technical objectives of the class actions regime – that is, to know the class members who are bound by the judgment, to know who should receive notice, and to be able to implement and an effective opt-out process.

In the absence of any temporal restriction, a class definition, such as the one proposed by the plaintiff in this case, is over-inclusive and should be rejected.⁸²

124. In summary, the plaintiff's proposed class definition is overly broad and inappropriate for several reasons. This is not a situation in which it would be appropriate for the court to attempt to unilaterally amend the class definition. The plaintiff's failure and inability to put forward an appropriate class definition is a strong indication that this action is unsuitable for class treatment.

No Common Issues

125. None of the proposed common issues put forward by the plaintiff satisfy the requirements of section 4(1)(c) of the *CPA*. The first proposed common issue, as drafted, is incapable of being answered on an individual basis, let alone on a class-wide basis. The remaining proposed common issues are dependent upon the resolution of the numerous individual inquiries associated with the liability question (including defences) and are incapable of being resolved on a class-wide basis. There are no proper proposed common issues.

The Legal Test for Commonality

126. An issue is only common where its resolution is necessary for the resolution of each class member's claim. While the resolution of a common issue need not be determinative of every class member's claim, every class member's claim must be advanced by resolving the issue.⁸³

127. The main question underlying the common issue requirement is whether allowing the lawsuit to proceed as a class action would avoid the duplication of fact-finding or legal analysis.⁸⁴

128. In order to justify certification, there must be a common issue which, if resolved, would significantly advance the litigation for the entire class. Where the proposed common issues

⁸² *Heward v Eli Lilly & Co.*, 2007 CanLII 2651 at para 73 (Ont SCJ), CA Vol 2, Tab 43, affirmed, 2008 CanLII 32303 (Ont Div Ct), CA Vol 2, Tab 42; WK Branch, *Class Actions in Canada*, looseleaf (Aurora: Canada Law Book, 2008+) at 4-14, CA Vol 4, Tab 103

⁸³ *Hollick*, *supra* at paras 18-19 and 32, CA Vol 2, Tab 45; *Western Canadian Shopping Centres*, *supra* at para 39, CA Vol 4, Tab 94; *Gary Jackson Holdings Ltd.*, *supra* at para 39, CA Vol 2, Tab 34

⁸⁴ *Hollick*, *supra* at para 18, CA Vol 2, Tab 45; *Western Canadian Shopping Centres*, *supra* at para 39, CA Vol 4, Tab 94

cannot be resolved on a class-wide basis without individual proof, the action will not be certified as a class action.⁸⁵

129. An issue will not satisfy the common issue requirement where, although necessary to the determination of each class member's claim, it requires an examination of the individual circumstances of each and every class member. In those circumstances, the issue is not common and is incapable of being resolved across the class. In other words, a common issue cannot be dependent upon individual findings of fact in relation to each individual claimant. The court must ensure that the issue is truly common, as opposed to being drafted in a way so as to appear to be common.⁸⁶

130. The mere presence of common circumstances affecting the proposed class is not enough to satisfy the commonality requirement where the real issues affecting each member require individual factual assessments.⁸⁷

131. An issue must also be a substantial ingredient of every proposed class member's claim to satisfy the commonality requirement. It is not enough to simply show that an issue exists that can be resolved for every class member. The issue must also be capable of significantly advancing the resolution of each class member's claim in order to justify proceeding by way of a class action.⁸⁸

⁸⁵ *Kumar v Mutual Life Assurance Company of Canada*, 2000 CarswellOnt 3739 (SCJ), CA Vol 3, Tab 58, affirmed, 2001 CarswellOnt 4449 (Div Ct), CA Vol 3, Tab 57, affirmed, 2003 CanLII 48334 at paras 44 and 47 (Ont CA), CA Vol 3, Tab 56; *Hart v British Columbia (Attorney General)*, 2013 BCSC 264 at para 79, CA Vol 2, Tab 39

⁸⁶ *Hollick*, *supra* at para 18, CA Vol 2, Tab 45; *Risorto v State Farm Mutual Automobile Insurance Co.*, 2007 CarswellOnt 1014 at para 45 (SCJ), CA Vol 3, Tab 77; *Pro-Sys Consultants Ltd. v Infineon Technologies AG*, 2008 BCSC 575 at paras 143 and 177, CA Vol 3, Tab 75, reversed, 2009 BCCA 503, CA Vol 3, Tab 74; *Hart*, *supra* at para 79, CA Vol 2, Tab 39; *Mackinnon v National Money Mart Company*, 2005 BCSC 271 at para 11, CA Vol 3, Tab 61; *Kafka* (SCJ), *supra* at paras 146, 154 and 158, CA Vol 2, Tab 51; *Dennis v Ontario Lottery and Gaming Commission*, 2010 ONSC 1332, CA Vol 1, Tab 23, affirmed, 2011 ONSC 7024 at para 25 (Div Ct), CA Vol 1, Tab 22; *Fehring v Sun Media Corporation*, 2002 CanLII 29073 (Ont SCJ), CA Vol 1, Tab 29 affirmed, 2003 CanLII 22598 at paras 3 and 6 (Ont Div Ct), CA Vol 1, Tab 28

⁸⁷ *Kumar* (SCJ), *supra* at para 39, CA Vol 3, Tab 58; *Fehring* (SCJ), *supra* at para 16 – 21, CA Vol 1, Tab 29; *Kafka* (SCJ), *supra* at para 153, CA Vol 2, Tab 51

⁸⁸ *Thornburn v British Columbia (Public Safety and Solicitor General)*, 2012 BCSC 1585 at para 98, CA Vol 4, Tab 90; *Cloud v Canada (AG)*, 2004 CanLII 45444 at para 55 (Ont CA), CA Vol 1, Tab 18; *Chadha* (majority reasons) (Div Ct), *supra* at paras 29-36, CA Vol 1, Tab 16; *Garipey* (SCJ), *supra* at para 56, CA Vol 2, Tab 33

132. In order to determine whether the common issues justify a class action, the court should examine the significance of the proposed common issues in the context of the action as a whole. Where the determination of the proposed common issues would not resolve any of the central issues in the case – because those issues require individual inquiries into the particular circumstances for each class member – the proposed common issues do not satisfy the commonality requirement.⁸⁹

133. The absence of commonality in a fundamental proposed common issue is fatal to a certification motion where the remaining proposed common issues are either dependent on that fundamental issue or by themselves would not advance the proceeding to a sufficient extent.⁹⁰

134. Where the resolution of the common issues would not have a significant impact and would not represent a significant step forward in the overall resolution of the class members' claims because it would still be necessary to examine each class member's individual situation and particular circumstances in order to make any determination regarding liability and damages, certification should be denied.⁹¹

135. As with the other certification requirements (except for section 4(1)(a)), the plaintiff must adduce "some basis in fact" in order to satisfy the commonality requirement and conclude that the claims upon which the common issues are based actually exist. The requirement cannot be satisfied through speculative assertions or assumptions. A common issue does not arise "simply because of counsel's assertion that the fact, or the issue, exists and their stated intention to present evidence to prove the fact at trial". Justification must be found in the evidence tendered by the plaintiff.⁹²

⁸⁹ *Western Canadian Shopping Centres*, *supra* at para 39, CA Vol 4, Tab 94; *Moyes v Fortune Financial Corp.*, 2002 CanLII 23608 at para 25 (Ont SCJ), CA Vol 3, Tab 67, affirmed, 2003 CanLII 872 (Ont Div Ct), CA Vol 3, Tab 66; *Tiemstra*, *supra* at para 14, CA Vol 4, Tab 91

⁹⁰ *Dennis* (SCJ), *supra* at para 225, CA Vol 1, Tab 23

⁹¹ *Tiemstra*, *supra* at paras 14 and 18, CA Vol 4, Tab 91; *Hartt*, *supra* at paras 79 and 82, CA Vol 2, Tab 39; *Chadha* (majority reasons) (Div Ct), *supra* at paras 22-33, CA Vol 1, Tab 16; *Price v Panasonic Inc.*, 2002 CarswellOnt 2087 at paras 40-45 (SCJ), CA Vol 3, Tab 73; *Gariepy* (SCJ), *supra* at paras 58-62, CA Vol 2, Tab 33

⁹² *Kafka* (SCJ), *supra* at para 141, CA Vol 2, Tab 51; *Wright v United Parcel Service Canada Ltd.*, 2011 ONSC 5044 at para 127, CA Vol 4, Tab 96; *Risorto*, *supra* at paras 43 and 47, CA Vol 3, Tab 77; *Arabi* (Div Ct), *supra* at para 81, CA Vol 1, Tab 5

No Common Issue Regarding Liability

136. There is no evidence that the first proposed common issue as drafted, can be decided on an individual basis, let alone on a common, class-wide basis.

137. The proposed question, which purports to focus on the liability issue, radically reshapes the necessary elements of the cause of action asserted by the plaintiff by creating a shortcut to liability that avoids the critical individual issues associated with this type of claim. Although there are other deficiencies with this proposed question, the fatal deficiency is that it does not account for, let alone remotely refer to, the requisite lack of consent element.

138. Contrary to the suggestion at paragraph 6 of the plaintiff's written submissions, there is no proposed common issue regarding the question of whether Facebook obtained the requisite consent from class members. The reason for this is clear – the plaintiff herself realizes that the consent issue is not a common issue that can be resolved on a class-wide basis. This is best demonstrated by reference to the plaintiff's own written submissions, which read as follows:

Common Issue #1 – Liability

Did the Defendant commit the statutory tort set out in section 3(2) of the Privacy Act by featuring Class Members' names or portraits in connection with its Sponsored Stories advertising program?

Common Issue #1 addresses liability. It asks whether Facebook violated section 3(2) of the Privacy Act by using the Plaintiff's and Class Members' in its Sponsored Stories advertisements without obtaining their consent. (emphasis added)

139. The critical inconsistency between the first proposed common issue, as drafted, and the plaintiff's own characterization of it could not be more evident. The critical element of consent is nowhere to be found in the proposed common issue. Confusingly, the plaintiff suggests that a determination on the issue of express consent is implied in the determination of the proposed common issue. However, the issue of express consent is not proposed as either a common issue or a sub-issue. In any event, the important related issue of implied consent is completely avoided by the plaintiff.

140. This "liability" question, even if it were properly drafted, could not be answered without embarking upon a series of individual inquiries with respect to each instance of the alleged tortious conduct.

141. First, a class member will have to establish that her name or portrait was used. This is an individual inquiry that will require proof from each class member. For example, in connection with a Sponsored Story triggered by her page like action on November 15, 2011, Jane Smith will have to prove that, on November 15, 2011, she used her real name in her Facebook profile (as opposed to a fake name or pseudonym) or her profile picture was a recognizable likeness of her (as opposed to a picture of another person, a landscape, a pet, an object or no picture at all). If Jane Smith triggered multiple Sponsored Stories during the proposed class period, this manual process would have to be repeated for each instance.⁹³

142. Next, a class member will have to establish that the particular use of the class member's name or profile picture was for the purpose of advertising or promoting the sale, or trading in, property or services. This is an individual inquiry that requires a consideration of the specific facts regarding each Sponsored Story. For example, the use of person's name or portrait in a Sponsored Story triggered by a page like statement for the Breast Cancer Research Foundation would not satisfy the requisite commercial purpose element of the claim.

143. Lastly, before embarking upon the requisite section 1 analysis, a class member must establish that she did not consent to the use of her name or portrait in each instance of the alleged tortious conduct. The consent issue is a crucial individual issue and an essential element of the claim asserted in this action. Consent can flow from the terms of use (i.e., express consent) and it can flow from the individual's own knowledge, conduct and other relevant circumstances (i.e., implied consent). The consent issue is at the core of the statutory tort upon which this claim is based, and it cannot be ignored.⁹⁴

144. A class member will be required to establish the absence of both express and implied consent in order to succeed in her claim. The onus lies with each individual class member to establish a lack of consent. Consent is inherently an individual inquiry; it cannot be established

⁹³ The complexity of this task is reflected by the following facts set out in the Plambeck Affidavit, at paras 7, 8 and 10, CR Vol 2, Tab 9: during the period January 12, 2013 to March 10, 2013, approximately ██████ users who Facebook can reasonably ascertain reside in British Columbia ("BC users") changed their Facebook user name; during the period January 12, 2013 to March 10, 2013, approximately ██████ BC users changed their profile picture at least once; and, during the period September 9, 2012 to March 9, 2013, approximately 1.8 million BC users appeared in Sponsored Stories.

⁹⁴ *Keatley Surveying Ltd.*, *supra* at paras 192-194, CA Vol 2, Tab 52

or extrapolated on a class-wide basis. It can only be determined following a consideration of the circumstances in each individual case.⁹⁵

145. The following non-exhaustive list of individual consent-related issues would have to be evaluated prior to any final determination regarding the liability and damages questions for each individual class member:

- (a) Did the claimant expressly consent?
- (b) If the claimant did not expressly consent, did she impliedly consent?
 - (i) Did the claimant review Facebook's terms of use?
 - (ii) Did the claimant review the Help Center pages regarding Sponsored Stories?
 - (iii) Did the claimant review Facebook's data use policy, including the section regarding Sponsored Stories?
 - (iv) Did the claimant review the information in Facebook's December 2011 sitewide user education campaign regarding Sponsored Stories?
 - (v) What type of content, information and activities did the claimant share on Facebook? What were the claimant's privacy settings for that content?
 - (vi) Did the claimant change her privacy settings?
 - (vii) Did the claimant change the group of friends authorized to view specific individual content?
 - (viii) Did the claimant retroactively change her privacy settings for past content she shared on Facebook?
 - (ix) Did the claimant subsequently unlike content?

⁹⁵ *Harmony Consulting Ltd. v GA Foss Transport Ltd.*, 2012 FCA 226 at paras 29-32, CA Vol 2, Tab 37; *Keatley Surveying Ltd.*, *supra* at para 188, CA Vol 2, Tab 52

- (x) Did the claimant run an advertising campaign that used Sponsored Stories?
 - (xi) Did the claimant opt-out of certain Facebook features?
 - (xii) Did the claimant ever see any Sponsored Stories triggered by her friends' actions? What conduct did the claimant engage in thereafter (e.g., did the claimant click on the like button within the Sponsored Story)?
 - (xiii) Was the claimant ever told that her actions had triggered a Sponsored Story? What conduct did the claimant engage in thereafter?
 - (xiv) Did the claimant have any objection to her inclusion in a Sponsored Story?
- (c) If no to (a) and (b), did the claimant acquiesce in, or waive her right to prevent, her inclusion in a Sponsored Story?⁹⁶

146. The consent analysis is a necessary step in the final determination of this claim. It cannot properly be established (or disputed) without assessing the individual circumstances for each claimant (the plaintiff seems to reluctantly accept this point at paragraph 111(b) of her written submissions when she suggests that an individual's use of Facebook is related to the consent analysis). The assessment of whether a particular Sponsored Story may qualify as a *prima facie* violation of the *Privacy Act* requires an assessment of each alleged instance of tortious conduct. The consent issue, which may involve an assessment the claimant's knowledge and conduct, involves a series of important individual inquiries that need to be determined prior to any final determination on liability. The requisite individual inquiries associated with this claim explain why a claim of this nature has never been certified as a class action.

⁹⁶ An additional, non-exhaustive list of certain factors that would need to be addressed in connection with a determination of implied consent is set out at paragraph 79. In addition, the complexity of these inquiries is reflected by the facts set out in the Plambeck Affidavit, including paras 11-13, 15 and 17, CR Vol 2, Tab 9: during the period December 14, 2012 to March 10, 2013, 2,200 BC users visited the "Interacting with Ads" webpage in the Help Center and 97,000 BC users visited the "Advertising on Facebook" webpage in the Help Center; as of March 7, 2013, ██████ BC users had set their privacy setting for at least one category of their page likes to "only me" (which means that the page likes were only visible to the user herself); during the period September 9, 2012 to March 9, 2013, more than ██████ Sponsored Stories were delivered to BC users; during the period February 11, 2013 to March 11, 2013, more than ██████ BC users clicked the like button in a Sponsored Story; and during the period September 9, 2012 to March 9, 2013, ██████ BC users ran advertising campaigns on Facebook that used Sponsored Stories.

147. Individuals have a right to the exclusive use of their personality for commercial purposes. However, they can expressly give permission to another in exchange for something of value (e.g., using Facebook for free), they can impliedly give permission to another in exchange for a benefit (e.g., discounted merchandise) or they can give permission to another by failing to avoid or preventing a result that they knew was possible or likely to occur in the circumstances (i.e., acquiescence). These largely individualized factual inquiries cannot be assessed in common.

148. A determination on the liability question cannot be a common issue across the class because it would ignore that an individual's right to privacy and the exclusive use of their personality for commercial purposes are ultimately individual issues of entitlement, and the assessment of consent is equally an individual issue.⁹⁷

149. Moreover, fact-specific, individual defences such as estoppel, waiver and acquiescence (which are discussed in more detail below) must also be addressed before arriving at a final determination on the liability question. These defences are not amenable to resolution on a class-wide basis and, therefore, the liability question cannot be a common issue.⁹⁸

No Common Issue Regarding Damages

150. The plaintiff's second proposed common issue deals with damages issues, including the use of aggregate damages. These issues only arise, and can only justify treatment on a class-wide basis, if this court determines that liability issues can be dealt with on a class-wide basis. However, as set out above, liability for the claim asserted in this action can only be determined on a case-by-case basis. Since liability for the alleged privacy violation is an individual issue, certifying questions of damages would not serve any useful purpose and would not advance the litigation because individual trials on liability would have to be held first, and those trials would determine whether damages are available to any class member. As such, the damages questions are premature and the proposed common issues related to damages are moot.⁹⁹

151. Damages for invasion of privacy are discretionary and depend on a subjective inquiry into the highly individual and fact-specific circumstances of each instance of the allegedly

⁹⁷ *Waldman v Thomson Reuters Corporation*, 2012 ONSC 1138 at para 173, CA Vol 4, Tab 92

⁹⁸ *Gary Jackson Holdings Ltd.*, *supra* at para 67, CA Vol 2, Tab 34

⁹⁹ *Kafka* (SCJ), *supra* at para 199, CA Vol 2, Tab 51

tortious conduct. Questions regarding the embarrassment, humiliation and distress suffered by a class member as well as the commercial value of the class member's endorsement of a product or service, must be based upon a consideration of the circumstances specific to the particular class member. It is important to recognize that Sponsored Stories merely involve redisplaying the *same content* that the user has already shared with the *same audience* – her selected friends. Absent a user's decision to take an action that is eligible to be used as part of a Sponsored Story, such as liking a page and sharing that content with her selected friends, no Sponsored Story would be triggered and redisplayed to those same friends. In addition, questions regarding the nature of the defendant's conduct require an assessment of that conduct within the specific context of each individual instance of the allegedly tortious conduct (i.e., it requires an assessment in light of the plaintiff's knowledge and conduct, as well as other relevant factors for each particular situation). As such, there is no basis for a common issue regarding the quantification of damages, let alone an aggregate assessment of damages.¹⁰⁰

152. The recent British Columbia Supreme Court decision in *Poirier v Wal-Mart Canada* is particularly instructive on the issue of damages for an alleged invasion of privacy claim based on a misappropriation of personality. In *Poirier*, Madam Justice Arnold-Bailey considered whether an advertising flyer campaign initiated by the defendant after it dismissed the plaintiff constituted an invasion of privacy by way of misappropriation of personality since it prominently featured the plaintiff's name, likeness and former employee title. The plaintiff was readily identifiable, and his reputation and personality figured into the advertising flyer campaign. In light of the fact that the plaintiff's express and implied consent was vitiated by the defendant's abrupt dismissal of him for cause, Madam Justice Arnold-Bailey concluded, after completing the requisite analysis (i.e., a consideration of section 3 and then section 1 of the *Privacy Act*), that the defendant was liable for the statutory tort of invasion of privacy.¹⁰¹

153. As a result, Madam Justice Arnold-Bailey then determined the appropriate quantum of damages. At the outset, the Court noted that “no evidence has been led as to the nature or extent of harm to the plaintiff caused by the distribution of this advertising, apart from his testimony about the additional embarrassment and humiliation of having others, primarily other Wal-Mart

¹⁰⁰ *Waldman, supra* at para 187, CA Vol 4, Tab 92

¹⁰¹ *Poirier, supra* at paras 2, 9, 18-19, 74-79 and 93, CA Vol 3, Tab 72

employees, be reminded of his former managerial position after his termination. Other friends, and work associates of the plaintiff may also have seen the advertising and been reminded of the plaintiff's dismissal. However, the person most affected was the plaintiff himself."¹⁰²

154. Madam Justice Arnold-Bailey then reviewed the damages awards in similar cases, each of which focused on the individual factual circumstances associated with the particular tortious conduct at issue. In one of the cases, nominal damages were awarded because there was no actual damage to plaintiff. In another case, there was a relatively low damages award, which was calculated on the basis of the assessed market value of the well-known plaintiff's name, image and personality. Yet another case involved a relatively high damages award because of the immense distress and humiliation suffered by the plaintiff in her particular community.¹⁰³

155. Following her review, Madam Justice Arnold-Bailey noted that "the previous cases consider whether embarrassment, humiliation and distress was caused to the person whose privacy was violated, whether the actions of the responsible party were flagrant and callous, and the extent to which the responsible party gained a commercial advantage. In addition, the authorities...reflect two prominent factors which influence the amount of damages being awarded: (1) the injury to the plaintiff, the greater the injury, the greater the damages; and (2) the nature of the defendant's conduct, the higher the degree of carelessness or callousness, the higher the damages".¹⁰⁴

156. In applying those principles to the case before her, Madam Justice Arnold-Bailey concluded that: (i) the plaintiff suffered a degree of humiliation as a result of the advertising campaign because he was publicly portrayed as an employee of the defendant after he was dismissed; (ii) the defendant showed a careless and callous disregard for the plaintiff's privacy and personal circumstances by drawing additional attention to the plaintiff's dismissal by featuring him in the advertising campaign; and (iii) the plaintiff's image, identity and words were

¹⁰² *Poirier, supra* at paras 95, CA Vol 3, Tab 72

¹⁰³ *Poirier, supra* at paras 96-103, CA Vol 3, Tab 72

¹⁰⁴ *Poirier, supra* at paras 104-105, CA Vol 3, Tab 72

widely distributed in the community and used for the purpose of increasing the defendant's commercial success in that community.¹⁰⁵

157. The decision in *Poirier* confirms that a damages assessment with respect to the claim asserted in this action depends on a subjective inquiry into the highly individual and fact-specific circumstances of each instance of the allegedly tortious conduct.

No Common Issue Regarding Aggregate Damages

158. The issue of aggregate damages cannot be certified as a common issue because there is no evidence that the requirements of section 29(1) of the *CPA* will be established at the common issues trial.

159. Section 29(1) of the *CPA* provides that the court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where:

- (a) monetary relief is claimed on behalf of some or all class members;
- (b) no questions of fact or law, other than those relating to the assessment of monetary relief, remain to be determined in order to establish the amount of the defendant's monetary liability; and
- (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.¹⁰⁶

160. Similar to the other certification requirements, the plaintiff must establish that there is "some basis in fact" to support the aggregate damages award question as a common issue. Where the plaintiff seeks to certify an aggregate damages assessment as a common issue, the "some basis in fact" threshold is generally satisfied by expert evidence confirming that there is a methodology that can be used to reasonably determine the extent of liability, and quantum of damages, without proof from individual class members.¹⁰⁷

¹⁰⁵ *Poirier, supra* at paras 106-108, CA Vol 3, Tab 72

¹⁰⁶ *CPA*, s 29(1), CA Vol 4, Tab 97

¹⁰⁷ *Pro-Sys Consultants Ltd. (CA), supra* at para 68, CA Vol 3, Tab 74

161. Expert evidence adduced on the certification application is not subject to the exacting scrutiny required at trial. All that must be shown is that there is a credible or plausible methodology for proving the necessary requirements. Therefore, while the court should not weigh the evidence of experts or prefer the evidence of one or more experts to others, it must be satisfied that there is some evidence which, if accepted at trial, could form the basis for an aggregate damages award.¹⁰⁸

162. In each case relied upon by the plaintiff in support of the certification of an aggregate damages award as a common issue, the respective plaintiff adduced expert evidence that established a credible and plausible methodology to calculate damages on an aggregate basis.¹⁰⁹

163. There is no judicial authority cited by the plaintiff that supports certifying the aggregate assessment of damages as a common issue where there has not been any evidence – expert or otherwise – of a credible and plausible methodology. In this case, the plaintiff has not led any such evidence or put forward any other basis in fact to show that a plausible and credible methodology exists for establishing the extent of liability, and the quantum of damages, on a class-wide basis without proof of harm from individual class members.

164. General and vague suggestions from plaintiff’s counsel regarding an “automated analysis” do not qualify as evidence of a credible or plausible methodology. In addition, criticisms of Facebook’s expert do not qualify as evidence in support of an unarticulated methodology.

165. The only evidence from an expert on this application is from Dr. Tucker, who opined that there is no methodology that could be used to calculate an award of aggregate damages in the circumstances. This opinion is uncontroverted and has not been challenged by any another expert.¹¹⁰

¹⁰⁸ *Pro-Sys Consultants Ltd.* (CA), *supra* at paras 66 and 69, CA Vol 3, Tab 74; *Cloud*, *supra* at para 70, CA Vol 1, Tab 18

¹⁰⁹ Generally see *Pro-Sys Consultants Ltd.* (CA), *supra*, CA Vol 3, Tab 74; *Knight v Imperial Tobacco Canada Limited*, 2006 BCCA 235, CA Vol 2, Tab 53; *Dominguez v Northland Properties Corp.*, 2012 BCSC 328, CA Vol 1, Tab 24

¹¹⁰ Tucker Affidavit, at para 73, CR Vol 1, Tab 7

166. The absence of any proposed methodology is particularly problematic considering the number of individual issues that will need to be addressed in connection with assessing damages.

167. The plaintiff cannot satisfy section 29(1)(b) of the *CPA*. The aggregate damages tool cannot be used where questions of law or fact relating to liability will remain after the resolution of the common issues. The first proposed common issue in this case will not determine liability. A multitude of individual factual and legal inquiries will remain and will need to be determined after the resolution of the first common issue (if it can be resolved), and they will need to be resolved on a case-by-case basis before liability can be finally determined.

168. The plaintiff also cannot satisfy section 29(1)(c) of the *CPA* because the extent of Facebook's liability can only be determined after making the necessary individual inquiries of each class member with respect to each instance of the alleged tortious conduct. It is impossible to determine the extent of liability, as well as quantum of damages, for the claim asserted in this action without making individual inquiries of each class member.¹¹¹

169. The plaintiff cannot establish a reasonable likelihood that the preconditions for an aggregate assessment of damages will be met. As such, this question cannot be certified as a common issue.

170. In addition, and of critical importance, a representative plaintiff cannot attempt to either usurp a class member's potential entitlement to damages or affect the legal liability of a defendant to other class members by unilaterally comprising their legal entitlement to damages in order to avoid inherently individual inquiries. It is, on the factual circumstances of a case, the law that determines a defendant's liability to any given plaintiff, not what another plaintiff may seek to recover.¹¹²

171. It is not for the representative plaintiff to assert, on behalf of the proposed class, that there is no evidence of any individual-specific damages in an effort to argue that damages can be calculated on an aggregate basis without regard to any individual factors. Notwithstanding the requisite damages analysis confirmed in the existing jurisprudence, in her written submissions,

¹¹¹ *Healey v Lakeridge Health Corporation*, 2011 ONCA 55 at paras 70-74, CA Vol 2, Tab 40

¹¹² *Sun-Rype Products Ltd. v Arthur Daniels Midland Co.*, 2011 BCCA 187 at para 87, CA Vol 4, Tab 89, appeal pending; *Keatley Surveying Ltd.*, *supra* at para 199, CA Vol 2, Tab 52

the plaintiff purports to waive and eliminate the consideration of any individual, case-specific factors in assessing damages for other class members. This is yet another example of the plaintiff's continued avoidance of the individual issues inherently associated with the claim asserted in this action.

172. As set out in the preceding general damages section, the assessment of damages for the claim asserted in this action depends on a subjective inquiry into the highly individual and fact-specific circumstances of each instance of the allegedly tortious conduct and, as a result, the damages awards may vary significantly. An aggregate assessment would eliminate the necessary individual considerations and treat everyone, from famous individuals (e.g., celebrities and athletes) to the most anonymous of individuals, the same, regardless of, among other things, the commercial value (if any) of their name, image or personality, the nature of the content sponsored (e.g., political, charitable or commercial), the people to whom the content was displayed (e.g., family, close friends or business acquaintances), the individual's intent (e.g., publicizing a cause or business the individual supports) and the benefits received by the individual (e.g., reputational benefits, discounts or merchandise).

173. The approach put forward by the plaintiff unfairly prejudices and eliminates the potential individual-focused damages entitlements of class members in order to try to fit this otherwise unsuitable claim into the mould of a class action. Furthermore, this purported waiver places the plaintiff in a potential conflict with other class members.

174. It is not an answer to assert that potential class members who seek to avail themselves of all their available legal remedies may opt-out of the class action. It would be unfair and unjust to force those potential class members to opt-out of a class action that has deliberately eroded their legal entitlements in order to attempt to thread the needle of certification.

No Common Issue Regarding Punitive Damages

175. The punitive damages claim in this action does not have the commonality necessary to be certified as a common issue. There is no general rule in the law of British Columbia that punitive damages claims will be bifurcated and certified as common issues. The determination of whether

a punitive damages claim is a proper common issue depends upon the particular facts of the case.¹¹³

176. Punitive damages claims have been bifurcated and certified in product liability and price-fixing class actions in British Columbia, both of which generally involve a relatively complete opportunity to assess the defendant's conduct and moral culpability during a common issues trial. This case will not yield such an opportunity. A proper assessment of Facebook's conduct can only occur after a final determination on liability and damages, both of which will depend on a series of highly individual, fact-specific inquiries. As such, the issue of punitive damages is unsuitable for certification as a common issue.¹¹⁴

177. Furthermore, even where a punitive damages claim has the requisite commonality, the plaintiff is still required to establish that there is "some basis in fact" to substantiate the allegation and for concluding that the issue is real. It is not enough for a plaintiff to baldly plead, as this plaintiff has, that a defendant's conduct is "high-handed, outrageous, wanton, reckless, callous, disgraceful, wilful and entirely without care". The plaintiff has not provided any evidence to support these serious allegations, and the available evidence regarding Facebook's conduct (e.g., privacy controls and the extensive educational information provided to users) suggests otherwise. Furthermore, the plaintiff has continued to use Facebook since issuing this claim and has engaged in the same conduct as before. In addition, in her written submissions, the plaintiff concedes that there is no evidence that any class member has suffered any extraordinary humiliation, damage to reputation or distress as a result of the alleged tortious conduct.

178. Users are in full control over the information and content that they make available and share on Facebook, a free service that provides significant benefits and value for its users. There is no evidence that Facebook has engaged in any conduct that would justify an award of punitive damages. There is no basis in fact to conclude that the punitive damages issue is real. Therefore, it should not be certified as a common issue.

¹¹³ *Koubi v Mazda Canada Inc.*, 2010 BCSC 650 at paras 149 and 157, CA Vol 3, Tab 55, reversed in part, 2012 BCCA 310, CA Vol 3, Tab 54; *Rumley v British Columbia*, 2001 SCC 69 at para 34, CA Vol 4, Tab 80

¹¹⁴ *Koubi (SC)*, *supra* at 149-157, CA Vol 3, Tab 55; *Keatley Surveying Ltd.*, *supra* at para 207, CA Vol 2, Tab 52; *Robinson v Medtronic Inc.*, 2010 ONSC 3777 at paras 13, 37 and 40 (Div Ct), CA Vol 3, Tab 79

No Common Issue Regarding Interest

179. The question of prejudgment interest is wholly dependent upon the final determinations on the liability and damages questions for each class member, neither of which can be assessed on a class-wide basis and neither of which can be certified as common issues.

180. Issues of entitlement to interest and the calculation of prejudgment interest are largely individual, administrative issues that cannot be assessed in common and do not need to be certified as common issues.

181. In addition, the interest issue is not a substantial ingredient of each class member's claim and its resolution would not significantly advance each class member's claim.¹¹⁵

No Common Issue Regarding Injunctive Relief

182. In addition to the request for general and punitive damages, the plaintiff is seeking a permanent injunction to prohibit Facebook from using class members' names or portraits to advertise or promote the sale of property or services without class members' express consent for such use.¹¹⁶

183. Injunctive relief is equitable in nature and, therefore, it is subject to equitable defences. As set out in detail below, Facebook intends to raise the following equitable defences in this action: estoppel, waiver and acquiescence. Facebook intends to assert that these defences apply to bar the claims of many, if not all, class members.

184. The applicability of these defences will involve a consideration of each individual class member's knowledge and conduct. Since there will be a lack of commonality between class members with respect to their individual knowledge and actual conduct, the court cannot extrapolate a finding regarding one class member's knowledge and conduct to another.

185. The request for injunctive relief cannot be determined until there has been a final determination on Facebook's equitable defences, which can only occur upon the conclusion of

¹¹⁵ *Keatley Surveying Ltd.*, *supra* at paras 210-211, CA Vol 2, Tab 52; *Fisher v IG Investment Management Ltd.*, 2011 ONSC 292 at para 80 (Div Ct), CA Vol 2, Tab 30

¹¹⁶ *Notice of Civil Claim*, at 7, CR Vol 3, Tab 16; *Notice of Application*, at 12, CR Vol 1, Tab 1

the necessary individual inquiries of each class member. As a result, the injunctive relief issue is premature and cannot be assessed on a class-wide basis as a common issue.¹¹⁷

186. In addition, the plaintiff has failed to establish that there is “some basis in fact” to support this extraordinary discretionary remedy. There is no evidence from anyone other than the plaintiff supporting the request for injunctive relief.

187. In contrast, there are a number of reasons why injunctive relief would not be in the interests of class members, all of which are supported by the uncontroverted evidence from the only expert put forward on this application.

188. The injunctive relief requested by the plaintiff would introduce many new screens, extra hurdles and interruptions to the user experience. While it has not been subjected to any usability studies, the injunctive relief may lead users to have a potentially annoying experience (as has been demonstrated in comparable research studies). An unsatisfying user experience is not in the interests of either users or Facebook.¹¹⁸

189. In addition, the opt-in nature of the injunctive relief could unnecessarily prevent and decrease the use of Sponsored Stories such that users would not be able to enjoy one of the key features of Facebook – the ability to see interesting and relevant content from their friends.¹¹⁹

190. Furthermore, the opt-in nature of the injunctive relief could decrease the use of Sponsored Stories by third party organizations and entities. This could lead to: (i) a significant impediment Facebook’s ability to support itself through advertising and to continue to offer a free service to users; and (ii) a reduction in the economic incentives offered by third parties to Facebook users (e.g., discounts, free samples, etc.).¹²⁰

191. As a result of the foregoing, even if it were otherwise a proper common issue, the potentially divergent views of class members regarding this extraordinary remedy make it unsuitable for determination on a class-wide basis.

¹¹⁷ *Keatley Surveying Ltd.*, *supra* at paras 213-214, CA Vol 3, Tab 52

¹¹⁸ Tucker Affidavit, at para 90, CR Vol 1, Tab 7

¹¹⁹ Tucker Affidavit, at para 88, CR Vol 1, Tab 7

¹²⁰ Tucker Affidavit, at paras 84 and 87, CR Vol 1, Tab 7

A Class Action Is Not The Preferable Procedure

192. The plaintiff has failed to establish that a class action is the preferable procedure for the resolution of the claim asserted in this action. There is not a single, genuine, proper common issue proposed by the plaintiff that will significantly advance the litigation for the class. Rather, a series of individual inquiries will be necessary to advance the litigation. The final determination on the liability and damages questions can only occur after a series of individual inquiries into the particular circumstances of each instance of the alleged tortious conduct involving each class member. If this claim is certified as a class action, the resulting proceeding will be unwieldy and will inevitably break down into a litany of individual trials involving numerous individual inquiries. The result would be a true monster of complexity and cost – hopelessly unmanageable, unfair to the class members and Facebook, and an extraordinary burden on the court system. It would fail to achieve any judicial economy and would not promote access to justice. Accordingly, the objectives underlying the *CPA* would not be met.

The Legal Test for Preferability

193. In addressing the preferability requirement, the court must consider whether a class action would be a fair, efficient and manageable method of advancing the claim asserted on behalf of the proposed class. The preferability analysis should also take into account whether certification would advance the three objectives underlying the *CPA* – judicial economy, access to justice and behaviour modification.¹²¹

194. In determining whether a class action would be fair, efficient and manageable, the court must consider and balance the extent to which the resolution of the common issues significantly advances the overall action against the extent to which individual issues remain to be determined. This assessment requires a consideration of the litigation as a whole, including any individual assessments that might be necessary, in order to determine whether a class action is the preferable procedure. This entails a practical cost-benefit approach, which takes the potential impact of a class proceeding on class members, the defendant and the court into account.¹²²

¹²¹ *Hollick, supra* at paras 27-28, CA Vol 2, Tab 45; *Cloud, supra* at para 73, CA Vol 1, Tab 18

¹²² *CPA*, at s 4(2)(a), CA Vol 4, Tab 97; *Rumley, supra* at para 36, CA Vol 4, Tab 80; *Hollick, supra* at paras 29-30, CA Vol 2, Tab 45; *Cloud, supra* at para 65. CA Vol 1, Tab 18

195. Manageability is to be assessed in the context of the overall proposed proceeding, not only the common issues. The presence of a common factual core is not enough. Where each proposed class member's experience is idiosyncratic, and the determination of liability would be subject to an assessment of numerous individual factors for each class member, a class action is unmanageable and is not the preferable procedure. If a class action breaks down into a series of individual trials, any judicial economy gained from the class proceeding would be lost.¹²³

196. A class action will not be the preferable procedure where the truly "common" issues are few and are not central to the outcome of the litigation. The resolution of the common issues must significantly advance a determination on the liability issue. A class proceeding will not satisfy the preferable procedure requirement when the common issues are overwhelmed or subsumed by the individual issues, such that the resolution of the common issues will not be the end of the liability inquiry, but only the beginning.¹²⁴

197. The court must look to what is really at issue in the case. If the common issues do not properly capture the heart of the dispute, then a class proceeding is not the preferable procedure.¹²⁵

198. If proceeding as a class action would prevent the defendant from substantively or procedurally exercising its rights to advance individualized defences based upon the unique facts of each class member's claim, a class action would be unfair and would not be the preferable procedure.¹²⁶

¹²³ *Chadha* (majority reasons) (Div Ct), *supra* at paras 31-32 and 37, CA Vol 1, Tab 16; *Price*, *supra* at paras 48, 50 and 53, CA Vol 3, Tab 73; *Kumar* (CA), *supra* at paras 52-53, CA Vol 3, Tab 56

¹²⁴ *Hickey-Button v Loyalist College of Applied Arts and Technology*, 2006 CanLII 20079 at para 55 (Ont CA), CA Vol 2, Tab 44; *Hollick*, *supra* at para 32, CA Vol 2, Tab 45; *Keatley Surveying Ltd.*, *supra* at para 220, CA Vol 2, Tab 52; *Martin v Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744 at paras 357-358, CA Vol 3, Tab 63; *Wright*, *supra* at para 379, CA Vol 4, Tab 96; *Abdool v Anaheim Management Ltd.*, 1993 CanLII 5430 (Ont SCJ), CA Vol 1, Tab 3 affirmed, 1995 CanLII 5597 at 20-21 (Ont Div Ct), CA Vol 1, Tab 2

¹²⁵ *Pearson v Inco Ltd.*, 2005 CanLII 42474 at para 49 (Ont CA), CA Vol 3, Tab 71

¹²⁶ *Fehringer* (SCJ), *supra* at paras 22-23, CA Vol 1, Tab 29; *Kafka* (SCJ), *supra* at para 159, CA Vol 2, Tab 52

199. It is essential that the court carefully consider the preferability requirement when screening potential claims so as to avoid obscuring “the ultimate goal of a just determination between the parties on the altar of expediency”.¹²⁷

A Class Proceeding Would Not Be Fair, Efficient or Manageable

200. Certification of this action as a class proceeding would result in an unmanageable, inefficient and unfair proceeding.

201. The *CPA* expressly provides that, in determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant factors, including the following:

- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- (c) whether the class proceeding would involve claims that are or have been the subject of any other proceeding;
- (d) whether other means of resolving the claims are less practical or less efficient;
- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.¹²⁸

202. *Predominance.* The necessary and disputed individual inquiries in this action will completely overwhelm and predominate over all of the proposed common issues, and will render the entire proceeding unmanageable.¹²⁹

¹²⁷ *Abdool* (SCJ), *supra* at para 50, CA Vol 1, Tab 3

¹²⁸ *CPA*, s 4(2), CA Vol 4, Tab 97

¹²⁹ *Chadha* (majority reasons) (Div Ct), *supra* at para 33, CA Vol 1, Tab 16

203. The consent element, which has deliberately been overlooked by the plaintiff, is a critical aspect of the claim raised in this action. Lack of consent cannot be established (or disputed) on a class-wide basis. The proper determination of both express and implied consent requires a series of necessary individual inquiries and a careful consideration of the particular surrounding circumstances. The determination of the consent issue alone will subsume and overwhelm the proposed common issues.

204. In addition to the consent issue, Facebook's anticipated estoppel, waiver and acquiescence defences will each necessitate individual inquiries and evidence from each individual class member. These defences must be determined before any final determination on liability can be made. The individualized inquiries necessitated by one of these defences, let alone three, will subsume and overwhelm the proposed common issues.

205. Facebook cannot be prevented from exercising its right to advance these individualized defences. Any attempt to determine liability in the absence of considering these defences would be unfair and unjust.

206. If liability is established, the issue of the entitlement to, and quantum of, compensatory damages becomes a live issue. Damages for the claim advanced in this action are inherently individual and will need to be determined on an individual basis with reference to a series of individual inquiries and evidence from each individual class member. The individualized assessment of damages necessary for this claim will subsume and overwhelm the proposed common issues.

207. Both in isolation and in combination, the individual inquiries associated with the consent issue, Facebook's individual defences, and the assessment of damages will completely dwarf the proposed common issues.

208. *Separate Actions.* There is no evidence that any members of the proposed class have a genuine interest in the issues raised in this action, let alone an interest in individually controlling the prosecution of separate actions.

209. *Overlapping Claims.* There is no evidence that the claim asserted in this action is, or has been, raised in any other proceeding.

210. *Other Alternatives.* The claim asserted in this action is, of necessity, highly individual. The multitude of individual inquiries required to reach a final determination on the liability and damages questions means that an individual action would be a far more practical and efficient method of resolving the claim. Further, if necessary and appropriate, in the event that there is actually more than one person who is genuinely interested in pursuing a claim, those claims can proceed by way of joinder and/or consolidation. A class proceeding would be the least practical and efficient means of resolving the highly individual claim asserted in this action.

211. Individual statutory claims for misappropriation of personality have been successfully advanced by individuals, including under the very provision relied on by the plaintiff in this action. An individual action is a preferable alternative given the uniquely individualized nature of the claim. Indeed, a class action has never been certified for this type of claim.¹³⁰

212. *Manageability.* For the reasons set out in the predominance section above, a class proceeding would result in an unmanageable proceeding that would be a monster of complexity and cost. The difficulties associated with the administration of a class proceeding would not be present if the claim is pursued by way of an individual action – a process for which it is best suited.

Judicial Economy Would Not Be Achieved

213. Certification of this proceeding as a class action will completely frustrate the objectives of the *CPA*, which are to promote judicial economy, access to justice and behaviour modification.

214. A class action that will break down into a substantial number of individual trials does not promote judicial economy or improve access to justice.¹³¹

215. The goal of judicial economy is intended to alleviate the burden on judicial resources that arises from parties asking the court to determine the same issue multiple times. However, it will not be satisfied where the common issues are negligible in relation to the individual ones.¹³²

¹³⁰ *Poirier, supra* at para 93, CA Vol 3, Tab 72

¹³¹ *Tiemstra, supra* at para 17, CA Vol 4, Tab 91

¹³² *Hollick, supra* at para 32, CA Vol 2, Tab 45; *Kumar (CA), supra* at paras 52-53, CA Vol 3, Tab 56

216. Given the number and importance of the individual issues that must be determined, a class proceeding for this claim will not achieve the goal of judicial economy. If the proceeding is certified on the basis of the first proposed common issue, the claims of class members will not have been advanced in any significant way and no real judicial efficiency will have been created. The first proposed common issue is not capable of determining the liability issue in favor of even one class member, let alone every class member. The claim asserted in this action requires individualized discovery and individual trials in order to achieve a just determination on the merits.

217. Certification of this action as a class proceeding will create a judicial quagmire. The numerous individual issue arising in this action include not only those raised by the plaintiff, but those raised by the defendant as well. The relevance and importance of individual circumstances, which relate to both the claim asserted and the anticipated defences, should not “be brushed aside merely in order to fit the action into the mould of a class proceeding”.¹³³

218. Leaving aside all of the other necessary individual inquiries that must be made prior to a determination on liability, the issue of consent (the absence of which is a requisite element of the claim, and the presence of which is a full answer to the claim) cannot be determined on a class-wide basis. It must be addressed for each claim and can only be determined on an individual basis with reference to the particular surrounding circumstances for each instance of the alleged tortious conduct. This issue is at the crux of the claim asserted in this action and its importance cannot be ignored.

219. The lack of judicial economy resulting from the individual inquiries required by the claim advanced in this action will be compounded by the individual inquiries necessitated by Facebook’s anticipated equitable defences. Facebook expects to raise the defences of estoppel, waiver and acquiescence. Facebook is entitled to raise and receive a fair hearing on its defences prior to any final determination of liability. Facebook’s defences cannot be ignored; they must be considered in assessing whether a class action is the preferable procedure.

220. *Estoppel*. The applicability of the estoppel defence depends on the particular representations made by, and the intention of, an individual class member. Whether an individual

¹³³ *Gary Jackson Holdings Ltd.*, *supra* at para 63, CA Vol 2, Tab 34; *Parsons*, *supra* at para 38, CA Vol 3, Tab 70

class member has been estopped is a highly fact-specific question that cannot be extrapolated to other class members. The estoppel defence requires individual inquiries that would “predominate [over] the litigation if it [were] certified as a class proceeding, thus offering no real advantage in terms of judicial economy”.¹³⁴

221. *Waiver*. Similar to the estoppel defence, the applicability of the waiver defence depends on determinations regarding on the individual knowledge of each class member, whether the individual class member intended to relinquish one of her rights, and whether that intention was communicated to Facebook. These inquiries are particular to each individual class member and cannot be determined on a class-wide basis.¹³⁵

222. *Acquiescence*. The applicability of the acquiescence defence depends on an assessment of each individual class member’s knowledge and corresponding conduct in the particular circumstances. This assessment requires individual inquiries; it cannot be completed on a common basis.¹³⁶

223. These three equitable defences can only be adjudicated after evidence has been adduced by each individual class member and by Facebook, and the circumstances of each particular situation have been considered. The individual inquiries required as a result of these defences further add to the list of individual inquiries required in this action.¹³⁷

No Real Access to Justice Concerns

224. There are no real access to justice concerns involved in this action and, therefore, certification of this claim as a class action will not enhance access to justice.

225. There is no evidence that a “real and substantial” class exists with respect to this claim. There is no evidence from any member of the proposed class that expressly indicates that they are interested in pursuing a claim for the alleged tortious conduct. The only evidence adduced by

¹³⁴ *Brar v Roy*, 2005 ABCA 269 at para 31, CA Vol 1, Tab 11; *Maracle v Travellers Indemnity Co of Canada*, [1991] 2 SCR 50 at 57, CA Vol 3, Tab 62; *Gary Jackson Holdings Ltd.*, *supra* at para 68, CA Vol 2, Tab 34

¹³⁵ *Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co.*, [1994] 2 SCR 490 at 499-500 and 503, CA Vol 4, Tab 82; *Brennan v Morris*, 1994 CanLII 9241 at para 38 (Alta QB), CA Vol 1, Tab 12

¹³⁶ *M(K) v M(H)*, [1992] 3 SCR 6 at 78-80, CA Vol 3, Tab 60

¹³⁷ *Western Canadian Shopping Centres*, *supra* at para 42, CA Vol 4, Tab 94

the plaintiff regarding the proposed class is by way of an information and belief statement in an affidavit from her counsel which indicates that 14 potential class members have contacted counsel. This means that after the massive media blitz undertaken by the plaintiff and her counsel following the issuance of the claim, the plaintiff was only able to garner the interest of a handful of the over 3.5 million Facebook users in British Columbia. In addition, unlike in other cases, the plaintiff has not produced a list of the interested, potential class members in order support the professed need for access to justice.

226. The proposed class is not historically disadvantaged and does not face any significant barriers to litigation. The only potential barrier is a financial one. However, if this barrier exists, it is a creation of the statute.

Behaviour Modification is Not an Issue

227. Behaviour modification is not an issue in this action and is not a basis upon which to certify this action as a class proceeding.

228. The underlying rationale for the goal of behaviour modification is to ensure that wrongdoers do not ignore their obligations to the public.¹³⁸

229. Where a class action would not advance the goals of judicial economy and access to justice, the fact that it may affect behaviour modification is generally insufficient to justify certification.¹³⁹

230. The plaintiff does not object to the underlying core activity at issue: “When I like a page, I am okay with that information being displayed in my news feed”. In addition, with full knowledge of the consequences of her actions, the plaintiff has continued to engage in the core underlying activity at issue without availing herself of the tools provided by Facebook to address her “concern”.¹⁴⁰

¹³⁸ *Western Canadian Shopping Centres, supra* at para 29, CA Vol 4, Tab 94

¹³⁹ *Chadha* (majority reasons) (Div Ct), *supra* at paras 41 and 62, CA Vol 1, Tab 16; *Kumar* (CA), *supra* at para 55, CA Vol 3, Tab 56

¹⁴⁰ J. Uechi, “The woman who sued Facebook” *The Vancouver Observer* (online: April 3, 2012), Exhibit B to Affidavit #1 of Kate Mulherin, sworn March 26, 2013, CR Vol 2, Tab 10, p 59; Solanki Affidavit, at para 24, CR Vol 2, Tab 8; Plambeck Affidavit, at para 24, CR Vol 2, Tab 9

231. Despite the publicity associated with this proceeding, users continue to use Facebook and share content that may trigger a Sponsored Story without any complaints. Other users have chosen not to share content or have utilized the privacy controls that Facebook has provided to them in order to minimize or eliminate the triggering of Sponsored Stories.

232. It is crucially important to understand that it is the user's voluntary action that triggers the alleged privacy violation. A user may refrain from the action, in which case a Sponsored Story will not be triggered. Alternatively, a user may utilize the privacy controls that Facebook has provided to him in order to prevent the triggering of a Sponsored Story on the basis of the user's actions. A user is in full control over whether or not they will potentially trigger a Sponsored Story. Facebook has enabled and empowered users to modify their conduct, and some users have done so.

233. This is not a case about whether Facebook's conduct needs to be modified – it has educated users and provided them with tools to control the information they share on Facebook.

234. In summary of this point, this claim is not suitable for class treatment. The proceeding would inevitably devolve into a litany of inefficient, unmanageable individual trials that would not achieve any measure of judicial economy. There are no access to justice concerns given that there is no compelling evidence that a real and substantial class exists. Finally, there is no need for behaviour modification. A class proceeding is not the preferable procedure for this action.

No Workable Litigation Plan

235. A litigation plan that sets out a workable method of advancing the proposed class proceeding, including the determination of any individual issues, is of “paramount importance” in the certification analysis. A workable litigation plan must be comprehensive and provide a measure of detail that corresponds to the complexity of the issues proposed for certification. The plan should contemplate problems and contain solutions. The larger the scale of the proceeding, the more important the litigation plan.¹⁴¹

236. The plaintiff's litigation plan fails to recognize that the “resolution” of the common issues will not be a resolution of anything – it will just be the beginning of a series of individual

¹⁴¹ *Caputo v Imperial Tobacco Ltd.*, 2004 CanLII 24753 at paras 74-79 (Ont SCJ), CA Vol 1, Tab 13; *Bellaire v Independent Order of Foresters*, 2004 CarswellOnt 5608 at para 53 (SCJ), CA Vol 1, Tab 7

inquiries and trials that will be necessary to resolve the liability and damages questions. In such cases, the action is not amenable to certification.¹⁴²

237. The plan does not set out a feasible approach for determining the liability and damages questions for the hundreds of thousands or millions of individual claims that would arise if the action were to be certified as a class proceeding. The final determination on the liability (including defences) and damages questions in this case can only be made on a case-by-case basis. Given the number of people that fall within the proposed class definition, it will be virtually impossible for a single judge or court to accomplish this task.

238. The plaintiff's litigation plan does not adequately provide for the adjudication of the multitude of individual issues, which include central issues related to liability, defences and damages. The individual inquiries necessary to achieve a final and just determination on the liability issue are not accounted for and have been omitted from the litigation plan.

239. This crucial omission is particularly instructive and provides yet another example of the plaintiff's continued failure to deal with or address any of the individual issues associated with the claim asserted in this action. The reason for this omission is unmistakable: there is no viable and manageable procedure to deal with the necessary individual liability and damages inquiries within the context of a class action. The crucial questions of consent, knowledge and conduct, all of which require an individual inquiry for each class member, must be fully canvassed in order to achieve a just determination on the merits of the issues in dispute. These questions require full discoveries and trials to be fairly adjudicated, yet these are not accounted for in the litigation plan proposed by the plaintiff.

240. The proposed litigation plan also fails to take Facebook's substantive and procedural rights into account. For example, it does not provide Facebook with an opportunity to either test the evidence of class members with respect to the critical issues of liability and damages or assert its individual equitable defences.

241. The only issue that is tangentially referred to in the litigation plan is the individual assessment of damages (which only applies if no aggregate damages award is made). The proposed approach is this: an administrator will award damages based upon "records" regarding

¹⁴² *Fehring* (SCJ), *supra* at para 36, CA Vol 1, Tab 29

the use of a class member's name or portrait in connection with a Sponsored Story. It is wholly inadequate. The proposed approach plan does not allow for individual damages considerations for any class member, nor does it set out any guidelines or procedures for calculating damages. The proposed approach, which is ambiguous and inconsistent with the individual, contextualized damages assessment required by the existing jurisprudence, is both unfair and unjust.

242. Given the magnitude of the potential class size and the multitude of individual issues to be resolved, this case requires a particularly comprehensive and detailed litigation plan. The plan proposed by the plaintiff fails to meet this standard.

243. The plaintiff's proposed litigation plan is not workable and does not provide "some basis in fact" to conclude that the action could be effectively and efficiently prosecuted as a class action. The inadequacies in the plaintiff's litigation plan demonstrate the unmanageability of a class proceeding for this claim. This is a further independent basis upon which this Court should refuse to certify this action as a class proceeding.¹⁴³

Conclusion on the Certification Requirements

244. The plaintiff has failed to meet the statutory requirements for certification. In particular:

- (a) there is no identifiable class;
- (b) the claims do not raise common issues that may be certified;
- (c) a class proceeding would not be the preferable procedure; and
- (d) the proposed class representative has not produced a workable litigation plan and would not fairly and adequately represent the interests of the class.

245. This claim is fraught with the same problems faced by other claims that were found to be inappropriate for class treatment:

In this case, there is no single common issue that will significantly advance the litigation for the class. Instead an individual inquiry is at the heart of every liability issue. In these circumstances, there can be no doubt that a class action is

¹⁴³ *Wright, supra* at para 413, CA Vol 4, Tab 96; *Arabi* (Div Ct), *supra* at para 123, CA Vol 1, Tab 5; *Caputo, supra* at para 78, CA Vol 1, Tab 13; *Singer, supra* at paras 224-226, CA Vol 4, Tab 84; *Kafka* (SCJ), *supra* at paras 221 and 223-224, CA Vol 2, Tab 51

not the preferable procedure. Every issue will break down into individual trials. A fact-finding and legal analysis procedure will be required for each class member.

In these circumstances, a class action would not be a fair, efficient or manageable procedure to use and it would not promote judicial economy or improve access to justice. Simply put, this is a case where there is no practical utility in allowing the class action to proceed.¹⁴⁴

246. Proving the claim asserted in this action will require an individual inquiry into each element of the cause of action, including the crucial lack of consent element. Facebook's defences will require individual fact-finding regarding each class member's knowledge and conduct. The quantification of compensatory damages will require an inquiry into the individual circumstances of each class member. There is no manageable basis upon which to resolve the individual issues in this case.

PART VI - ORDER SOUGHT

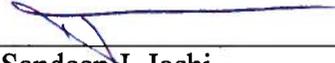
247. Therefore, Facebook respectfully requests that this application be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Osler, Hoskin & Harcourt LLP



Tristram J. Mallett

for 

Sandeep J. Joshi

Lawyers for Facebook, Inc.

¹⁴⁴ *Kafka* (SCJ), *supra* at paras 210-211, CA Vol 2, Tab 51; *Keatley Surveying Ltd.*, *supra* at para 227, CA Vol 2, Tab 52