No. VLC-S-S-122316
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DEBORAH LOUISE DOUEZ

PLAINTIFF

AND:

FACEBOOK, INC.

DEFENDANT

Brought Pursuant to the *Class Proceedings Act*, RSBC 1996, c 50

PLAINTIFF'S WRITTEN REPLY
CERTIFICATION

TABLE OF CONTENTS

PART 1 – INTRODUCTION

1. To achieve their goals, both Facebook and class proceedings depend upon economies of scale.

2. In class actions, the economies of scale are achieved by bringing together numerous claims that, standing alone, are too economically insignificant to advance.

3. For Facebook, the economy of scale is derived in part by leveraging hundreds of millions of Facebook members into an advertising platform that takes and uses their names or portraits and displays that personal information to other Facebook members in advertisements.

4. In this case, the Plaintiff's claim would not be economically feasible on an individual basis. And approximately 1.8 million people in British Columbia are in her same situation. This application for class certification is about whether those 1.8 million people can join together to advance their claims against one of the largest advertising corporations in the world.

5. Facebook's submission in response to the Plaintiff's application focus largely upon the merits of the case. Its arguments demonstrate the overwhelming battle any individual will face should they seek to pursue Facebook on their own. Facebook's dense array of merits arguments attack the Plaintiff's claims by focusing upon consent to the use of their names or portraits. In essence, Facebook says it can defeat the Plaintiff's claims because Class Members consented to Facebook's use of their names or portraits through the Statement of Rights and Responsibilities

(the "**Statement**") or because of their activities on the Facebook Website. Facebook also relies upon various equitable defences which it says defeat the Plaintiff's claims.

6. A certification application is not the time or place to resolve these merits arguments. The Plaintiff looks forward to meeting Facebook's merits arguments at the trial of the common issues. But she wishes to do so with the benefits of a level playing field, after full and proper discovery, and by leveraging the economies of scale available through a class proceeding.

PART 2 - FACTS

The Facebook Website

7. At paragraphs 14 and 15 of its argument, Facebook claims some prospective users input "fake names or pseudonyms" when they sign up for Facebook membership. While some Facebook Members do use pseudonyms, Facebook takes steps to enforce its real name policy and considers "authentic identity" to be critical to the Facebook experience.[1] In any event this is a non-issue. Facebook users who do not use either their own name or portrait fall outside the scope of the Class definition proposed by the Plaintiff.

8. In response to paragraph 17, the Plaintiff does not accept that the Statement is binding upon her or upon the Class Members.

9. In response to paragraph 19, to the extent Facebook purports to rely upon the Statement as a source of consent, such reliance is common to the entire Class and it is properly assessed at the trial of the common issues. Indeed, Facebook claims that the Statement affords it a "full answer" to the Plaintiff's and Class Member's claims. In making such an assertion, Facebook essentially concedes that the interpretation and application of the Statement is a common issue. Determining the issue will materially advance the litigation.

---

[1] Plaintiff's Argument for Certification at para 22.

10. In response to paragraph 20, Facebook's Statement is misleading. Facebook users cannot opt out of Sponsored Stories. Users can control the audience for their own postings. But they are effectively unable to prevent the appearance of a Sponsored Story advertisement featuring their name or portrait, and Facebook does not notify the user when it has used the person's name or portrait in a Sponsored Story advertisement.

11. In response to paragraphs 23 to 31, the Plaintiff takes no issue with the Facebook Website's "sharing" features. The Plaintiff's claim concerns Facebook's misappropriation of Class Members' names or portraits within the Facebook Website for use in its Sponsored Stories advertisements. Class Members' alleged possible motivations for using the Facebook Website are irrelevant to Facebook's conduct in taking and displaying the Plaintiff and Class Members' names or portraits for use in advertisements contrary to the *Privacy Act*.

12. At paragraph 47, Facebook claims Sponsored Stories advertisements are "*virtually identical to the content that appeared in the original news feed story associated with the underlying action*". Facebook uses the qualifier "virtually", meaning "nearly", because in fact the content in Sponsored Stories advertisements often differs from the original News Feed Story. In particular, in creating the advertisement Facebook may supplement the original "story" with additional content supplied by its client, such as a Page post or video from that client. The Facebook Member whose name or portrait appears in the Sponsored Story might never see the content their name or portrait is being used to endorse.[2] Furthermore, we must not lose sight of the fact that the original post is one thing, but a Sponsored Story advertisement is another. Even if the Sponsored Story was identical in appearance to the author's original post, once it is usurped by Facebook it becomes in substance something very different from the original post. It is made an advertisement. Facebook has been paid money by its client to recycle that "Story" as an advertising vehicle for the property or services.

[2] Affidavit #2 of Greg McMullen, affirmed April 23, 2013 (the "McMullen #2 Affidavit") at Exhibit A, p 3-4 – CR Vol 2, Tab 11.

13. Additionally, Facebook mischaracterizes its own conduct. It suggests Class Members are solely responsible for appearing in Sponsored Stories advertisements. For example, at paragraph 50, Facebook argues: "*. . . It is the user's act that triggers the potential Sponsored Story. . .* ." Facebook fails to include itself in the equation. In fact, Facebook alone creates Sponsored Stories advertisements. It does so with software algorithms which are unknown to Class Members. Those algorithms turn otherwise innocuous user actions (such as clicking a Like Button) into advertisements.

14. Indeed, Facebook Members can engage in many so-called Social Actions on the Facebook Website. But a Sponsored Story advertisement is only created and displayed if a Facebook client has paid Facebook to use the Facebook Member's name or portrait in a Sponsored Story advertisement associated with that action. If no client pays Facebook, no Sponsored Story advertisement is created.

15. Concerning paragraph 51, there is no evidence that any Class Member performed a Social Action with the intention of having their name or portrait used in a Sponsored Story advertisement.

16. In answer to paragraph 52, it is no defence for Facebook to say its conduct is acceptable because Class Members saw it engaging in misconduct and should, therefore, have known Facebook would mistreat them in the same way. The question is simply whether Facebook engaged in the statutory misappropriation of personality tort set out at section 3 of the *Privacy Act* (use of Class Members' names or portraits without their consent). In any event, this is a merits issue to be determined within the Common Issues trial. In particular, the question will be whether a Class Member's claim can be defeated for acquiescence (which is a defence that differs from the defence of implied consent) because that Class Member's news feed displayed "Friends" appearing in Sponsored Stories?

17. The issue of consent is common for all Class Members. The Facebook Website is a uniform environment housing all of the information relied upon by Facebook to ground its consent arguments. In this regard, at paragraph 52, Facebook suggests

Class Members have consented to Facebook's use of their names or portraits in Sponsored Stories based upon the following documents and information, all of which are derived from the Facebook Website: (i) the Statement, (ii) other users' appearance in Sponsored Stories advertisements; and (iii) "extensive educational information, including . . . Facebook's Data Use Policy and online Help Center". Facebook also claims Class Members' conduct on the Facebook Website may also constitute consent (paragraph 79).

18. The first issue (the effect of the Statement) concerns express consent. The subsequent issues relate to implied consent or perhaps acquiescence. Whether any of the materials available on the Facebook Website, and conduct engaged in by Class Members on the Facebook Website, constitute consent sufficient to avoid Facebook's liability is properly considered on a class-wide basis.

19. At paragraph 145, Facebook sets out a laundry list of consent issues, almost all of which apply uniformly to all Class Members (the Plaintiff does not concede that any of the issues raised by Facebook qualify as consent – express or implied). For example, at paragraph 145(b)(iii) Facebook suggests that a user reviewing Facebook's Data Use Policy has consented to use of his or her name in a Sponsored Story. The issues are first addressed as common issues. For example: does the Data Use Policy disclose to Class Members that their names or portraits will be used by Facebook in a Sponsored Story: does such disclosure provide the requisite consent under the *Privacy Act*: and if so, is it binding on minors? If the court provides affirmative answers to this common defence issue, then the remaining individual question for Class Members is far simpler: Did the Class Member read the Data Use Policy?

PART 3 – THE LAW

Evidence at Certification Stage

20. At paragraphs 92 to 95, Facebook appears to suggest the Court ought to consider certification on the basis of a page count of affidavits filed by the respective parties, rather than the content of those affidavits and the parties' legal arguments.

21. At paragraph 95, Facebook claims, without citing authority, that because the Plaintiff cited Facebook's evidence in her argument, the Plaintiff has failed to provide "some basis in fact" for the elements of the certification test.

22. In determining whether there is "some basis in fact" to support certification, the Court does not inquire into the merits or require the plaintiff to establish a *prima facie* case or a genuine issue for trial. As Cullity J. explained in *Grant v Canada (Attorney General)*:[3]

> If that were the test, certification motions would indeed involve some assessment of the merits of the plaintiff's claims and they would be considerably more protracted. At least for the purposes of the inquiry into commonality, it appears that the evidence must show merely that there is some basis in reality for the assertion that the Class members have claims raising issues in common with the claims of the plaintiff.

23. Consistent with standard practice in class proceedings in British Columbia, there has been no discovery of the parties.[4] This puts the Plaintiff at an information disadvantage.

24. The Plaintiff brought her claim and made her Application on the basis of limited evidence available to her. She knew Facebook had used her name or portrait in Sponsored Stories advertisements because she had been told by friends that they had seen her featured in the same. She has proved this in her affidavit and Facebook does not dispute her on this point. Facebook responded, armed with significantly more information about its own internal Website workings and the

---

[3] *Grant v Canada (Attorney General)*, 2009 CanLII 68179 (ONSC) at para 21 – Book of Authorities ("BA") Vol 2, Tab 36; *Glover v Toronto (City)*, 2009 CanLII 16740 at para 15 – CA Vol 2, Tab 35.

[4] *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2007 BCSC 1663 at paras 23-27 – CA Vol 3, Tab 76; *Charlton v Abbott Laboratories*, 2013 BCSC 21 at paras 42-44 – CA Vol 1, Tab 17.

Plaintiff's appearance in Sponsored Stories (recall that Class Members do not see themselves featured in Sponsored Stories advertisements – Facebook displays these advertisements to a Class Member's Friends, but not to the featured Class Member). The Plaintiff is entitled to rely upon evidence filed by Facebook in showing some basis in fact to substantiate her claim and application for certification.

25. Facebook undeniably used the Plaintiff's name or portrait in Sponsored Stories advertisements and it admits that it earns an income from its Sponsored Stories advertisements. Facebook's answer is to claim the Plaintiff consented to her appearance in Sponsored Stories advertisements. She says she did not consent. Facebook relies upon the Statement and other documents found exclusively upon the Facebook Website to support its consent defence. At this stage the Court is not called upon to undertake a merits analysis to decide which party is correct.

26. It is immaterial whether the facts are derived from the Plaintiff's own affidavits or from Facebook's admissions and affidavits. Regardless of the source of the information, the Plaintiff has clearly provided some basis in fact to support this aspect of the certification test.

The Test for Certification

27. In response to Facebook's argument at paragraphs 88 to 91, on a certification application the Court's "gatekeeper role" or "screening mechanism" is limited to "ensuring that the technical and procedural elements of the [certification] test are satisfied . . ." If the Plaintiff satisfies the criteria in section 4(1)(a) of the *Class Proceedings Act*, the Court has no residual capacity to refuse certification, regardless of any views it may have as to the merits of the action or the social utility of the litigation.[5]

[5] *Waldman v Thomson Reuters Corporation*, 2012 ONSC 1138 ("*Waldman*") at para 8; *Class Proceedings Act*, RSBC 1996, c 60 (the "*CPA*"), s 4(1)(a) – CA Vol 4, Tab 92.

Privacy Act and Cause of Action

28. Although Facebook says in its Application Response that the Plaintiff's claim does not disclose a cause of action, it does not appear to directly challenge this element of the certification test in its written argument.[6]

29. In reply to paragraph 81, Facebook confuses the elements of the cause of action under section 3(2) of the *Privacy Act* with the elements of the cause of action created by section 1(1) of the *Privacy Act* on the basis that it attempts to import additional requirements into the section 3(2) tort. It is clearly doing so in an attempt to argue that individual issues overwhelm common issues.

30. At paragraph 72, Facebook argues that "[s]ection 1(1) is the activating provision of the *Privacy Act*, and it sets out the guiding principles for the entire statute." At paragraphs 76 to 78, Facebook goes further, claiming section 3(2) of the *Privacy Act* is not an independent actionable tort, but rather just "[76] . . . *one of the examples of an invasion privacy in the Privacy Act*."

31. Facebook's position is untenable. Sections 1 and 3 create separate statutory torts.

32. Section 1 of the *Privacy Act* creates the tort of "violation of privacy of another". Pursuant to section 1(1): "It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another" [emphasis added].

33. Section 3 of the *Privacy Act* creates a distinct misappropriation of personality tort, described in the *Privacy Act* as the "unauthorized use of name or portrait of another". Pursuant section 3(2): "It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose" [emphasis added].

---

[6] Application Response of Facebook at Part 5, para 1(a) – CR Vol 1, Tab 2.

34. Sections 1 and 3 each define separate and distinct statutory torts, each with its own definition. Section 3(2) would be entirely superfluous if it simply constituted a subspecies or an "example" of the section 1(1) invasion of privacy tort.

35. Based upon its flawed conclusion that section 1 governs the operation of the *Privacy Act* in its entirety, and its assertion that section 3(2) is not an independent actionable tort, Facebook tries to import the requirements of the section 1(1) tort into its argument opposing certification (see Facebook's argument at paragraphs 74 to 77 and 81). Its flawed conclusion and approach to the *Privacy Act* render its arguments devoid of merit.

36. Remarkably, while Facebook provides considerable discussion of the requirements of the section 1 tort, it provides no authority for its claim that those factors must be considered as a part of a claim under section 3(2).

37. Facebook relies upon *Poirier v Wal-Mart Canada Corp*, in which the Court references section 1(1) before going on to "find that the actions of the defendant fall squarely within the tort defined in s. 3(2)".[7] *Poirier* does not state that the section 3(2) tort does not stand alone, or that section 1 criteria must be considered before assessing a claim under section 3(2).

38. Facebook also discusses *Davis v McArthur* concerning the requirements under section 1 of the *Privacy Act*. *Davis* is a 1969 case in which the defendant planted a tracking device on his estranged wife's car to monitor her movements.[8] The case does not concern a claim under section 3(2) and has no bearing upon this case. Section 3(2) is concerned to remedy the statutory tort of misappropriation of a person's name or portrait for use in an advertisement. This is not, as Facebook asserts at paragraph 80 of its argument, an "invasion of privacy claim".

39. Also at paragraph 80, Facebook claims that "as required by section 1", under section 3(2) the court must consider the reasonableness of the defendant's conduct. This cannot be. How can Facebook or any other defendant ever say it

---

[7] *Poirier v Wal-Mart Canada Corp*, 2006 BCSC 1138 ("*Poirier*") at paras 74-76 – CA Vol 3, Tab 72.
[8] *Davis v McArthur*, (1969), 10 DLR (3d) 250 at 255 (BCSC) – CA Vol 1, Tab 21.

acted reasonably in using a person's name or portrait in an advertisement without that person's consent? Cases cited by Facebook certainly fail to support such a proposition.

40. In one case cited by Facebook, the Court found that the College of Dental Surgeons of BC acted reasonably when it investigated a dentist accused of serious misconduct. As such the Court found the College had not committed the tort created by section 1(1) of the *Privacy Act*.[9] The other case cited by Facebook concerns qualified journalistic privilege in publishing information that was in the public interest.[10] Again, the case did not concern misappropriation of a plaintiff's name or portrait for use in an advertisement. Neither case cited by Facebook considered section 3(2) of the *Privacy Act*.

41. Facebook's argument at paragraph 80 underscores the problem with its approach, which confuses the sections 1 and 3 *Privacy Act* torts. At paragraph 80 it argues that "*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 [because the plaintiff's conduct] will amount to implied, if not express, consent*" and because, in Facebook's submission, the prior release renders reasonable the "*defendant's conduct in releasing the information*".

42. The mere fact that a Class Member previously made certain information publicly available, for example by disclosing their location at Business X by using Facebook's "Check In" feature, does not grant Facebook license to turn a profit for itself by using that Class Member's public disclosure to create an advertisement for Business X featuring the Class Member's name or portrait. Similarly, the mere fact that a Class Member clicks the Like Button associated with Business X does not give Facebook the right to use that Class Member in an advertisement for Business X. The tort described at section 3(2) of the *Privacy Act* seeks to remedy such conduct. In contrast, a defendant might not be liable under section 1 of the

---

[9] *Walker, Jr v The College Of Dental Surgeons Of BC*, 1997 CanLII 1535 (BCSC) – CA Vol 4, Tab 93.

[10] *Wooding v Little* (1982), 24 CCLT 37 (BCSC) – CA Vol 4, Tab 95.

Privacy Act for the tort of invasion of privacy on the basis that the defendant has disclosed to a Class Member's friends information already disclosed by the Class Member to those same people.

43. In short, making a statement in public does not serve as consent for an advertiser to appropriate that statement and turn it into advertising. The case cited by Facebook to support its argument again involves a claim under section 1, not section 3, and considers the disclosure of documents that were already in the public domain to the Attorney General's office for use in an upcoming trial, not in order to exploit that information as paid advertising.[11]

Identifiable class

44. In response to paragraph 108, Facebook overstates the burden the Plaintiff faces in defining an identifiable class. The onus does not rest with the Plaintiff to (in the words of Facebook) "*provide evidence that every member of the proposed class has a plausible claim against the defendant*". The authorities cited by Facebook – *Hollick* and *Western Canada Shopping Centres* – do not stand for such a proposition. Rather, as the Supreme Court of Canada held in *Hollick*: "It falls to the putative representative to show that the class is defined sufficiently narrowly."[12] The Supreme Court went on to explain:[13]

> The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad – that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue.

45. In *Western Canada Shopping Centres*, cited by Facebook for the above erroneous proposition, the Supreme Court of Canada stated: "…While the criteria should bear a rational relationship to the common issues asserted by all class members,

---

[11] *Bingo Enterprises Ltd v Plaxton* (1986), 26 DLR (4th) 604 (Man CA) – CA Vol 1, Tab 8.
[12] *Hollick v Toronto (City)*, 2001 SCC 68 ("*Hollick*") at para 20 – CA Vol 2, Tab 45.
[13] *Hollick, supra* at para 21 – CA Vol 2, Tab 45.

the criteria should not depend on the outcome of the litigation …"[14] This is very different from Facebook's assertion that *Western Canada Shopping Centres* requires that "*every member of the proposed class has a plausible claim against the defendant*."

46. The proposed class definition does include all people with "plausible claims" against Facebook (to use Facebook's words). At the common issues trial Facebook might defeat some of those claims if the Plaintiff fails to establish that the Statement do not constitute consent pursuant to section 3 of the *Privacy Act* (assuming the onus rests with the plaintiff, which will remain for argument), or if Facebook proves implied consent arising from the limited number of possible Facebook Website user actions or Facebook Website documents.

47. At paragraph 113 Facebook suggests that the Plaintiff is trapped in a *Catch-22* situation. It says the proposed definition is over-inclusive because it includes people it says have consented to Facebook's conduct, then says the Plaintiff cannot narrow the class definition to include only those who have consented, as that would create a merits-based class definition. The result is a circular argument in which a class could never be properly defined.

48. If Facebook's argument were to be accepted, class actions would rarely (if ever) achieve certification. For example, every negligence class action will include some class members who may not have been harmed, but harm is an essential ingredient to a finding of negligence. Thus, on Facebook's logic, the class definition in every negligence action is overbroad because it includes individuals who were not harmed. But the class definition cannot be narrowed without becoming a merit-based class definition.

49. Facebook cites *Keatley Surveying Ltd v Teranet Inc* for the proposition that the Plaintiff cannot articulate a class definition that is over-inclusive or which undermines the rule against a merit-based class definition.[15] In *Keatley* the court

---

[14] *Western Canada Shopping Centres v Dutton*, 2001 SCC 46 at para 38 – CA Vol 4, Tab 94.
[15] *Keatley Surveying Ltd v Teranet Inc*, 2012 ONSC 7120 ("*Keatley*") – CA Vol 2, Tab 52.

rejected the plaintiff's class definition because it found that the proposed definition was merits-based. The case says nothing about over-inclusive class definitions.

50. *Keatley* concerned breach of copyright. The plaintiff proposed a class definition consisting of "*All land surveyors in Ontario […] who are the owners of copyrights in drawings, maps, charts and plans that have at any time appeared on the Defendant's electronic database without such copyright holder's written assignment or license*."

51. The Court found that "[m]embership in Keatley's proposed class definition depends on the outcome of the very issue in dispute at the heart of this action. To be a class member, one must be a 'holder of copyright' in a plan of survey that has appeared on Teranet's electronic database . . . without the holder's consent." And, further, that "[t]he proposed class definition requires a determination of the issues of copyright ownership and consent to use plans of survey. The definition is rendered circular and is inherently unworkable."[16]

52. In the present case the Plaintiff proposes a simple, straightforward, and workable class definition confined to individuals whose names or portraits or both have been used by Facebook in a Sponsored Story advertisement. The definition clearly identifies persons to be included in the class, receive notice, and be bound by the result. At the merits stage the Court will consider whether and to what extent Class Members are able to prove their claims, including the lack of consent. The result will be binding on all Class Members who have not opted out.

53. In response to paragraph 116, Facebook incorrectly states that the proposed class definition includes people who used fake names or portraits. In fact, the class definition is confined to people whose names or portraits were used by Facebook in Sponsored Stories. The definition does not include individuals with both fake names and fake portraits.

54. In response to paragraph 122, the proposed Class is comprised of people featured in Facebook's Sponsored Stories advertising program. Facebook's evidence is

[16] *Keatley, supra* at paras 162 and 165 – CA Vol 2, Tab 52.

that the Sponsored Stories advertising program was implemented in January 2011, creating a clear line before which the claim cannot extend.

55. As in *Heward v Eli Lilly & Company*, the case cited by Facebook to support its argument on temporal limitations, if the Court wishes to include an end date in the class definition, the Court could certify a class definition ending on the date of an order certifying the action as a class proceeding.[17]

56. Facebook's merits arguments at paragraphs 81, 114, and 119 should be addressed on their merits at the trial of the common issues on behalf of all members of the defined Class who share those issues. The Plaintiff says Facebook is misinterpreting the *Privacy Act*. She will argue that all of the Sponsored Stories advertisements constitute "advertising" pursuant to section 3 of the *Privacy Act*. "Advertise" is defined to include the following: "*call attention to by a published announcement; describe or present (goods, services) publicly with a view to promoting sales*."[18]

57. In particular, section 3 prohibits non-consensual use of Class Members' names or portraits for the purpose of (a) advertising property or services and (b) promoting the sale of, or other trading in, property or services. The Plaintiff will argue that the Sponsored Story advertisements constitute a prohibited use [of] the name or portrait of another for the purpose of advertising property or services; or for the purpose of promoting the sale of, or other trading in, property or services (*per* section 3). She says this is so whether the advertisements concern products or services of a commercial, charitable or political nature. Facebook is incorrectly interpreting section 3 of the *Privacy Act* to attempt to avoid its application to advertisements that do not promote "sale or trading" (see Facebook's argument at paras 81 and 114). The Plaintiff says the section is to be broadly construed, and that it applies as outlined above. In any event, this is a merits argument. If at the common issues trial the Court finds that section 3 only applies to commercial

---

[17] *Heward v Eli Lilly & Company*, 2007 CanLII 2651 (ONSC) ("*Heward*") at para 73, aff'd 2007 CanLII 26607 (ONSC) – CA Vol 2, Tab 43.

[18] *Shorter Oxford English Dictionary*, 5th Ed (2002) – CA Vol 4, Tab 108.

advertisements, Facebook will need to identify which of the Class Members appeared in commercial advertisements rather than advertisements for charitable, political or other services.

Common Issues

General principles

58. In reply to paragraph 135 and as discussed above, there is no requirement that the "some basis in fact" be found in the evidence introduced by the plaintiff – it can come from any evidence in the record.

Common Issue #1:

59. In response to paragraph 137 and as discussed above, Facebook has attempted to contort the *Privacy Act* to limit the application of the stand-alone tort created by section 3(2). It has attempted to graft on individual issues that are not present in the section 3(2) tort and make little sense in the context of a misappropriation of personality claim.

60. In response to paragraphs 138 to 149, consent to Facebook's use of the Class Members' names or portraits in Sponsored Stories advertising is one of the core issues to be assessed at the trial of the common issues. Facebook claims that consent must be assessed individually for each Class Member, but this assertion contradicts Facebook's evidence and submissions.

61. First, Facebook argues that its standard form contract – the Statement – provides express consent to such use and provides "a full answer to the claim asserted in this action" (paragraphs 19 to 20). However, when it comes to considering whether there are common issues, Facebook ignores the Statement and seems to forget its earlier reliance upon the same. As set out in the Plaintiff's written submissions, the Plaintiff disagrees with Facebook's interpretation of the standard form language of the Statement. The proper interpretation of that standard form contract can be decided by the Court on a common basis for the entire Class. Resolution of this question alone substantially advances the litigation.

62. Courts have regularly held that the proper interpretation of a standard form contract can be certified as a common issue. The question was discussed in some detail in *Lam v University of British Columbia*, in which the BC Court of Appeal held as follows:[19]

> [55] There is no question that the resolution of this issue would "move the litigation forward" in a material way. As the chambers judge noted, the real question on the common issues analysis for issue 7 is whether there is a need to resort to evidence of matters outside the language of the contract or, alternatively, whether it can be seen that the external context is common across members of the proposed class. In *Class Actions in Canada,* looseleaf (Aurora: Canada Law Book, 2009), Ward Branch states at 5.610:
>
> > ... the prospects for achieving certification are improved if there exists one uniform contract ...
>
> [56] Similarly, at 5.780:
>
> > ... in the common-law provinces, contract-based class actions have found favour with courts where the proposed common issues call for interpretation of a standard form contract or a common representation. However, where the claim requires consideration of individual representations, it is unlikely to be certified.
>
> [57] In *De Wolf v. Bell ExpressVu Inc.* (2008), 58 C.P.C. (6th) 110 (Ont. S.C.J.), Mr. Justice Perell said:
>
> > 32 There can be a common issue about the interpretation of the Bell ExpressVu contract, and, in particular, there can be a common issue about the legal characterization of the administrative fee as "interest" or as "liquidated damages" provided that the external context is common or typical across the members of the class. In that situation, there is commonality in the standard contract and in the factual nexus in which that contract is to be interpreted and performed. [Emphasis added.]
>
> [58] This case involves a standard form contract. The issue is simply whether on the contract's true interpretation UBC is entitled to its protection. That interpretation will require an examination of the words of the contract. As UBC concedes, the "liability exclusion clause is written in clear, concise, plain language which anyone with basic knowledge of English should be able to understand". Further, the interpretation will require consideration of the contract's context,

[19] *Lam v University of British Columbia*, 2010 BCCA 325 at paras 55-60 – CA Vol 3, Tab 59.

> which includes the commercial circumstances underlying the contract. That context will be, in the words of Perell J. in *De Wolf,* either "common or typical across the members of the class". This is not a case in which individual assessments will be necessary in order to determine whether UBC is protected by the standard form contract. Contrary to what the respondent says at para. 80 of its factum, that interpretation does not depend on "the understandings of the individual clients". The subjective understanding of a client is irrelevant and inadmissible. What is relevant is what an objective bystander would say the parties intended the contract to mean. That can be determined by looking at the "clear, concise, plain language" of the contract and the common or typical contextual factors surrounding the contract. UBC seems to concede as much by stating:
>
> > What should have been clear to any reader is that neither the Andrology Lab, nor the organization that operated it (whether UBC Hospital, or later UBC) can be liable for breach of contract or negligence in respect of the storage of the samples. [Emphasis added.]
>
> [59] While UBC's interpretation may or may not be correct, what is important for present purposes is that UBC suggests that a proper interpretation of the contract can be achieved "by any reader". This suggests that the proper interpretation can largely be determined, as would be expected of a standard form contract, by reading the standard form document.
>
> [60] The conclusion that issue 7 requires consideration of individual circumstances was clearly wrong and a reversible error. In my respectful opinion, issue 7 is common and its resolution will materially move the litigation forward.

63. Second, Facebook argues that even if the Statement does not give express consent to use Facebook Members' names or portraits in Sponsored Stories advertising, certain actions taken by Facebook Members within the Facebook Website can constitute an implied consent. The Plaintiff disagrees, and says that the entire analysis must depend on the terms of the Statement, the uniform functions of the Facebook Website, and their interaction with the *Privacy Act* – an analysis that will be the same for each Class Member. Facebook has not cited any authority for its statement that an implied consent is sufficient consent under the provisions of the *Privacy Act* – another issue that can be addressed in common for the entire class.

64. Even if Facebook is right and an implied consent could theoretically defeat a claim under the *Privacy Act*, the question of which actions, if any, could constitute an implied consent is a question that can be answered in common for the entire Class. Facebook has already set out the array of conduct it says can constitute an implied consent.[20] The Court can consider each of these at the trial of the common issues, ruling on which (if any) can imply the degree of consent required by the *Privacy Act*. Answers to these questions would significantly narrow individual issues that might be left unresolved.

65. In response to paragraph 144, the cases cited by Facebook involve the regime established under the *Copyright Act*, which requires that the plaintiff show a lack of express consent, but <u>if the defendant brings implied consent into issue, it is up to the defendant to demonstrate implied consent</u>. These burdens are set out in the Federal Court of Appeal's decision in *Harmony Consulting Ltd v GA Foss Transport Ltd* (emphasis added):[21]

> [32] The following extract from a brief article published by David Vaver in reaction to the Federal Court decision in *Aga Khan* summarizes perfectly my thoughts on the matter:
>
> > Burden of proof rules allocate the costs and risks of gathering and presenting evidence, and help filter good cases from the bad. They should not be "impractical and unduly burdensome" on plaintiffs and should advance the purposes of the law involved. The *Copyright Act* has special burden of proof rules that give a plaintiff the benefit of presumptions on authorship, copyright and title if the defendant contests them, and presumptions of copyright subsistence and ownership where the right is registered. The latter presumptions satisfy the plaintiff's initial burden to produce some evidence on the issue; they do not shift his legal burden of proof. There is no presumption about consent and no reason to imply one, let alone a more draconian reversal of the legal onus of proof. It is rarely a chore for a plaintiff to prove he gave no express consent: he knows best whether he did or not. And even if it is a chore, that is a small price to pay for a right that stops

[20] Facebook's Written Submissions on Certification at para 145
[21] *Harmony Consulting Ltd v GA Foss Transport Ltd*, 2012 FCA 226 at para 32 – CA Vol 2, Tab 37.

> people for sometimes over a century from doing what they would otherwise be free to do.
>
> A defendant who says he has the plaintiff's implied consent equally puts this point in issue, but then it seems reasonable for the defendant to plead and prove the facts on which he relies, and the inferences to be drawn from them. The plaintiff can then produce whatever tends to rebut this case. That does not change the ultimate legal burden of proof, which remains on the plaintiff throughout. Only the evidentiary burden shifts to the defendant: he needs to produce some evidence of consent or the plaintiff's prima facie case succeeds. If, on weighing the evidence, the court is satisfied the plaintiff gave no implied consent, he wins. If the defendant does show implied consent, the plaintiff fails to discharge his onus and loses. In theory, if the evidence is left in a state where the court is unsatisfied that the plaintiff did not grant implied consent, the plaintiff also loses. Few cases ever stand on that knife-edge but some can, as this Note later shows.

66. Facebook has given no authority for its claim that a similar burden rests on the Plaintiff in claims under section 3(2) of the *Privacy Act*. But even if Facebook is right that such a burden exists, the lack of express consent can be shown on a class-wide basis. There is no evidence that any Facebook Members entered into individual contracts with Facebook that would replace the terms of the Statement, or that Facebook sought or obtained the express consent of any Class Members for use of their names or portraits in Sponsored Stories advertisements.

67. At paragraph 146, Facebook baldly asserts that "*[t]he requisite individual inquiries associated with this claim explain why a claim of this nature has never been certified as a class action*". Yet, Facebook cites no examples of cases in which certification of similar actions has been refused, or even cases in which similar claims have been advanced. If Facebook has in hand a prior application for certification under the *Privacy Act,* section 3(2), then it ought to produce the same rather than simply assert that "*a claim of this nature has never been certified as a class action*". The Plaintiff is not aware of any other applications for certification brought on the basis of the tort set out at section 3(2) of the *Privacy Act* or the similar statutes in other jurisdictions. Even if this makes the case novel (it does not

as the tort is not novel), certification must not be denied on the basis of the novelty of the claim advanced.[22]

68. In response to paragraphs 147 and 149, Facebook raises the defences of acquiescence and implied consent. The question of whether acquiescence or implied consent can ever provide requisite consent under section 3(2) of the *Privacy Act* are common to the entire Class and should be answered at the trial of the common issues.

69. In response to paragraph 148, the existence of the interest protected by section 3(2) of the *Privacy Act* is not dependent on an individual assessment, as Facebook suggests is the case and as was the case in *Waldman*. In *Waldman*, the right in question was the existence of copyright in lawyers' work product, which depends on "creativity, authorship, ownership, and individual consent". Furthermore, despite these individual issues, in *Waldman* the court certified the elements of the proposed common issue that applied to the conduct of the defendant.[23]

Common Issue #2:

70. At paragraph 151, Facebook cites *Waldman* to support its argument that "*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 tortious conduct*."

71. The decision in *Waldman* was specific to the statutory damages provisions in the *Copyright Act*, which require that individual copyright holders make an election as to whether they wish to receive general damages or statutory damages. As well, the nature of the works at issue in *Waldman* varied dramatically from work to work and class member to class member.[24] This analysis of statutory damages under the *Copyright Act* is of no application to a case involving the assessment of

---

[22] *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at 980 – CA Vol 2, Tab 47.
[23] *Waldman, supra* at paras 173-176 – CA Vol 4, Tab 92.
[24] *Waldman, supra* at paras 14 and 184-188 – CA Vol 4, Tab 92.

nominal damages under the *Privacy Act* where Facebook acted in the same way in relation to each Class Member.

72. In response to paragraph 152, the Court in *Poirier* did not consider the factors set out in section 1 of the *Privacy Act* or express how those factors should be applied. It merely quoted section 1 before moving to its section 3(2) analysis.[25] The Court looked to previous cases involving section 3(2), not to factors under section 1.

73. In response to paragraphs 156 and 157, Facebook ignores the fact that the Court in *Poirier* noted explicitly that very little evidence had been provided as to the damage suffered by the plaintiff. Instead, the analysis focused on Wal-Mart's conduct in running the advertisement and the nature of the advertisement itself.[26]

74. Finally, as discussed below, even if the Court determines that individual assessment is required to answer some of the questions faced by the Court, the *CPA* offers ample power for the Court to create streamlined processes through which any necessary individual questions can be answered.

Aggregate damages

75. In response to paragraph 172, Facebook again asks the Court to answer merits-based questions at certification, without the benefit of a full evidentiary record. The Court is not asked at this stage to decide whether aggregate damages are available. Rather, at certification the Court is to decide whether that question should be answered in common at the trial of the common issues. This is the approach taken by the BC Court of Appeal in *Knight v Imperial Tobacco*:[27]

> Although there may be elements of novelty and difficulty with the proposed methodology of damages calculation advanced by the respondent, it seems to me that it is appropriate for this issue to be left to be worked out in the laboratory of the trial court. Then, if and when the issue reaches this Court, we will have the benefit of a full record upon which to assess the appropriateness of any damages award that may be made pursuant to the proposed methodology.

---

[25] *Poirier, supra* at paras 74-76 – CA Vol 3, Tab 72.
[26] *Poirier*, *supra* at paras 106-109 – CA Vol 3, Tab 72.
[27] *Knight v Imperial Tobacco Canada Limited*, 2006 BCCA 235 at para 40 – CA Vol 2, Tab 53.

76. In its merits-based argument against the availability of aggregate damages, Facebook again attempts to expand the list of issues that must be considered in a claim under section 3(2), again without citing authority for this expansion. For example, the "individual's intent" in taking a Social Action and "benefits received by the individual" for taking that Social Action are irrelevant to the assessment of damages under section 3(2).

77. In response to paragraphs 170 to 174, Facebook makes the bizarre claim that Class Members' interests are best served by denying certification. To ground this claim, Facebook creates a hypothetical argument, unsupported in evidence, that a handful of Class Members have suffered damages that are disproportionately large in comparison to damages suffered by other Class Members.

78. At paragraph 174, Facebook asserts, without citing authority, that "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". British Columbia courts have held the opposite – an opt out mechanism is an adequate answer for class members who have concerns about the scope of the claims made or relief sought by the Plaintiff. As the BC Supreme Court held in *Endean v Canadian Red Cross Society*:[28]

> [68] That is not to say that the issues raised by the CRC on this point are trivial. However, the theories of liability not pled by Ms. Endean would complicate the action and present further difficulties of proof. It may be that class members with very serious injuries and the prospect of large damage awards will want to opt out of the class and proceed with individual actions in which they can raise all possible theories of liability against all possible defendants, no matter the associated costs and difficulties of proof. That should not preclude a class action for the vast majority of claimants who have the potential for only modest awards and for whom individual actions are not feasible: see *Harrington*, *supra*, at 113.

[28] *Endean v Canadian Red Cross Society*, 1997 CanLII 2079 (BCSC) at para 68 – CA Vol 1, Tab 25.

Punitive damages

79. In response to paragraph 175 to 176, the Plaintiff's position is that liability and damages can be assessed at the trial of the common issues. If, on a full evidentiary record, the Court decides that such an analysis is impossible, it can simply refuse to assess punitive damages on a common basis.

80. In response to paragraphs 176 to 178, Facebook again advances merits-based arguments that are not properly part of an application for certification. In response to these arguments, the Plaintiff notes that she has cited numerous examples of Facebook presenting misleading or confusing information to Class Members regarding the reality of Sponsored Stories advertising.[29] Whether this and other conduct merits an award of punitive damages should be left to the trial court to decide.

Common Issue #3

81. Although it has not filed a Response to Claim in this action, Facebook says at paragraphs 82 and 184 that it plans to rely on various equitable defences, including estoppel, waiver, and acquiescence. At paragraph 184 Facebook says "these defences apply to bar the claims of many, if not all, class members". The availability of these defences is a common issue that should be certified.

82. In response to paragraph 185, refusal to certify equitable relief in *Keatley* is distinguishable. In *Keatley*, the equitable relief required an analysis of the conduct of individual surveyors. But that analysis was required by the facts of that case, not the nature of equitable relief generally. In *Keatley*, many of the proposed class members were involved in extensive consultation throughout the development and implementation of Teranet and the scheme challenged by the plaintiff in that case. Many were employed by Teranet in the creation of the service it offers. Some even bid to be a part of the consortium of survey firms that became Teranet.[30] By contrast, there is no evidence here to indicate that any Class Members had any

[29] See for example Plaintiff's Argument for Certification at paras 62-76.
[30] *Keatley, supra* at paras 15-41 – CA Vol 2, Tab 52.

individual knowledge of the Sponsored Stories advertising regime that was not made available to all Class Members through the Facebook Website.

83. At paragraphs 186 to 191, Facebook argues that there is no evidence that Class Members apart from the Plaintiff are in favour of the injunctive relief sought. Facebook attempts to bolster this argument with the suggestion that the injunctive relief may have a negative impact on some Class Members, including the hypothetical argument that Facebook would be unable to continue to support itself through advertising revenue if it were forced to obtain consent from Class Members before using them in advertising.

84. In answer to the first point – that the Plaintiff should have introduced evidence from Class Members who support the injunctive relief – a certification hearing is not a referendum of the class members: "There are no provisions [in the *CPA*] that expressly or implicitly mandate, or even suggest, that the suitability of a class proceeding is to be determined by a polling of the class prior to the certification motion."[31]

85. In answer to the second point – that because the Class Members have "potentially divergent views" on the relief sought – courts have rejected similar arguments even when there is evidence from class members opposing the relief sought. For example, in *Great Atlantic & Pacific*, a franchise case, a class member swore an affidavit opposing certification on the grounds that the relief sought could "screw up the system we have now".[32] The defendant made similar arguments, saying that if the plaintiff were successful, it would reassess all its franchise agreements. The court rejected these arguments and certified the action, finding that "this is effectively an argument that there should be no litigation at all".[33]

---

[31] *1176560 Ontario Ltd v Great Atlantic & Pacific Company of Canada Ltd*, 2002 CanLII 6199 (ONSC) ("*Great Atlantic & Pacific*") at para 32 – CA Vol 1, Tab 1.
[32] *Great Atlantic & Pacific, supra* at para 30 – CA Vol 1, Tab 1.
[33] *Great Atlantic & Pacific, supra* at para 46 – CA Vol 1, Tab 1.

Preferable procedure

Common issues predominate

86. Courts have cautioned against denying certification on the basis of "unwarranted speculation" about what complexities might arise following the trial of the common issues:[34]

> Although the plaintiffs have the burden of satisfying the court that the procedure under the CPA will be "workable" or manageable, and must do so on the balance of probabilities, I believe the court should be careful to ensure that, on this question in particular, it does not engage in unwarranted speculation and hold the plaintiffs to standards that assume a degree of foresight that neither they, nor the court, possess at this stage.

87. Facebook has made the word "individual" its mantra, repeating it 187 times throughout its 60 page response. However, this repetition does not get around the fact that the issues at the "heart of the litigation" are common to all of the Class Members.

88. First, Facebook cannot escape the fact that the Statement it relies on as a "full answer" to the claims is the same for every Class Member, and a finding on the applicability and effect of the Statement will be required to resolve the claims of each Class Member.

89. Second, the features of and information available through the Facebook Website are common to all Class Members. Each Class Member has access to the same Social Actions, the same Help Center, and the same privacy controls. Findings on these issues can be made in common for the entire class. The Plaintiff says that few, if any, issues will be left unresolved after the trial of the common issues.

---

[34] *Heward, supra* at para 112 – CA Vol 2, Tab 43.

90. As Facebook has argued throughout its brief that this action will break down into a multitude of individual inquiries that will create a "monster of complexity". As discussed throughout this reply, the Plaintiff does not agree.

91. Even if Facebook is correct, and after the determination of these common issues there are residual individual issues to be addressed, the *CPA* offers a powerful toolset with which to manage residual individual issues in a streamlined, efficient manner. The effective use of those tools was explored in *Scott*, rejecting exactly the arguments advanced by Facebook in this case:[35]

> [132] There will be individual inquiries needed once the common issues have been resolved. That does not, of itself, preclude certification. I conclude that certification will not create a monster of complexity. I do so for several reasons.
>
> [133] First, in the circumstances of this case, the nature and extent of the individual issues cannot be determined until the common issues are decided. Only once the rights and obligations arising from the basic agreement are identified can the remaining issues be clearly defined.
>
> [134] Second, sub-classes may be created as the litigation proceeds. That would reduce the need for individual inquiries.
>
> [135] Third, the defendants argue that the individual participation of all class members is required to assess the nature of the legal obligations owed, determine whether there has been a breach, and determine what damages resulted. However, the actual evidence presented suggests that individual inquiries will be the exception, rather than the rule. It is also likely that questions of reasonableness of the rates will be based on expert evidence. That will reduce the number of witnesses called.
>
> [136] Fourth, though the individual inquiries are complex in the sense that the class is large, the actual issues at stake are not unduly complicated.
>
> [137] Fifth, the Act gives the court a great deal of flexibility to resolve individual issues in creative ways designed to ensure efficiency, while at the same time not derogating from or supplementing the substantive rights of the parties: *Chadha v. Bayer Inc*. reflex, (2001), 200 D.L.R. (4th) 309 (Ont. Sup. Ct., Div Ct.) at para. 66.

---

[35] *Scott v TD Waterhouse Investor Services (Canada) Inc*, 2001 BCSC 1299 ("*Scott*") at paras 132-141 – CA Vol 4, Tab 83.

> [138] In particular, s. 12 of the Act gives the court authority to make "any order it considers appropriate respecting the conduct of the class proceeding to ensure its fair and expeditious determination, and for that purpose to impose on one or more of the parties the terms it considers appropriate."
>
> [139] Section 27 of the Act deals specifically with how individual issues should be determined. It gives the court authority to: determine those individual issues in further hearings presided over by the judge who determined the common issues or by another judge of the court; appoint one or more persons including, without limitation, one or more independent experts to conduct an inquiry into those individual issues under the Supreme Court Rules and report back to the courts; or, with the consent of the parties, direct that those individual issues be determined in any other manner.
>
> [140] Section 27 also provides the court with authority to give any necessary directions relating to the procedures that must be followed in conducting those proceedings. In giving those directions, the court must choose the least expensive and most expeditious method of determining the individual issues that is consistent with justice to members of the class or subclass and the parties. In doing so the court may dispense with any procedural step that it considers unnecessary, and authorize any special procedural steps including steps relating to discovery, and admission of evidence and means of proof, that it considers appropriate.
>
> [141] The Act also says that the Rules apply to class proceedings to the extent that those rules are not in conflict with the Act: s. 40. This gives the court additional powers to deal with individual issues. The object of the Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits: Rule 1(5). The Rules, for example, provide for evidence to be given at trial by affidavit: Rule 40(44). The Rules also provide for the delivery of expert reports so as to avoid the unnecessary attendance at court of expert witnesses: Rule 40A.

Access to justice, behavior modification, and alternative procedures

92. Facebook has advanced a number of arguments from paragraphs 224 through 234 based on the idea that because few Class Members have come forward to express a desire to participate in the proceeding, and because Class Members continue to use the Facebook Website, there are no access to justice concerns that need to be addressed, and that Facebook's behavior does not need modifying.

93. Given the lack of transparency in Facebook's Sponsored Stories advertising program, it is not surprising that few Class Members have come forward with complaints. Facebook has not provided Facebook Members any means by which they can see if they have been used in Sponsored Stories advertisements.[36]

94. These same arguments were made and rejected by this Court in *Scott*, which involved foreign exchange rates on securities transactions. Like this case, the plaintiffs in *Scott* were the only people complaining about the conduct at issue, in large part because of the complexity of the matter and the lack of transparency in how the fees were assessed. The Court's finding is equally applicable to the case at bar:[37]

> [142] There are other reasons that lead me to conclude that a class proceeding is the preferable proceeding. A prominent feature of this case is that the plaintiffs are the only people who have complained about the way rates are set. At this stage, neither access to justice nor judicial economy is at the forefront. Behaviour modification is the primary goal of this class proceeding. I must assume, for this purpose, that the allegations of wrongfully taking an undisclosed profit can be proven. It is in the public interest to ensure that the defendants are not permitted to fill in contractual gaps the way they see fit without judicial controls, and to be sure that they do not, and are not tempted to, take advantage of their position.
>
> [143] A class member is unlikely to know about the conduct in issue because of the nature of that conduct. A class proceeding provides notice of the allegations to clients of the defendants. Individual class members can opt out once notified if they choose to do so.
>
> [144] Similarly, the allegations are such that individual class members are unlikely to make their own claims. The dollar value of any loss is said to be from $50.00 to $400.00 to $500.00. Yet, because of the number of class members, the total loss could be millions of dollars: Chadha v. Bayer Inc., noted above.

95. At paragraph 230, Facebook says that the Plaintiff "does not object to the underlying core activity at issue". This is a misrepresentation of the Plaintiff's position and of the Sponsored Stories advertising program generally. In the media article cited by Facebook, the Plaintiff says that she understands that performing a

---

[36] Plaintiff's Argument for Certification at para 49.
[37] *Scott, supra* at paras 142-144 – CA Vol 4, Tab 83.

Social Action will result in that Social Action being displayed on her Profile. Social Actions are not the subject of the Plaintiff's complaint. The Plaintiff's complaint is about the appropriation of these Social Actions for use in advertising featuring the Plaintiff's name or portrait.

96. Facebook suggests at paragraphs 210 to 211 that if Class Members want justice, they should bring individual actions, which it argues would be a "far more practical and efficient method of resolving the claim".

97. Putting aside the idea that 1.8 million individual claims could possibly be more practical and efficient than a single action with the procedural tools available under the *CPA*, this suggestion is not supported by evidence or authority. It is not enough for a defendant to simply assert that other procedures are preferable. As Winkler J (as he then was) wrote in *Great Atlantic & Pacific Co*: [38]

> Mere assertion that the procedures exist affords no support for the proposition that they are to be preferred. The defendant must support the contention that another procedure is to be preferred with an evidentiary foundation.

98. The "practical reality" in this case is that there are no other procedures that will be able to address the Class Members' claims. The alternative to a class action is no action at all. As the Court wrote in *Scott*:[39]

> [145] The practical reality is that absent certification, the issues may go unresolved because of the relatively insignificant quantum of any individual claim. That would be unfair and should be discouraged when the claims in the aggregate are substantial: *Howard Estate v. British Columbia* 1999 CanLII 6193 (BC SC), (1999), 66 B.C.L.R. (3d) 199 (S.C.).
>
> [146] In addition, the legal arguments required and the factual basis underlying them are sophisticated. Experienced lawyers, as well as expert witnesses are needed. Individual class members would be unlikely to either want to, or be in a position to, retain these professionals. The class proceeding places the defendants and the class members on a more equal footing in that respect.

---

[38] *Great Atlantic & Pacific, supra* at para 27 – CA Vol 1, Tab 1.
[39] *Scott, supra* at paras 145-146 – CA Vol 4, Tab 83.

Representative plaintiff

No conflict

99. Although Facebook baldly asserts at paragraph 173 that the Plaintiff is in a potential conflict of interest with other Class Members, the Defendants do not offer evidence from a single proposed Class Member who supports such an assertion, nor from any Class Member who does not want this action to proceed as a class action.

Litigation plan

100. Facebook has argued at paragraphs 235 to 243 that the Plaintiff's litigation plan is not adequate because it does not set out a means to resolve the individual issues Facebook says will arise.

101. A litigation plan does not have to be perfect, and litigation plans will often be amended as the action progresses and unforeseen issues arise. As explained by Michael Eizenga:[40]

> ...Courts have not required this plan to be cast in stone at the time of the certification hearing. The representative plaintiff's plan set out a workable method of advancing the proceedings, which can be expanded or fine-tuned as the class action progresses. The judge and counsel can collaborate and develop a comprehensive plan by pre-trials, case management and actual trials in order to ensure the action proceeds efficiently. While a plaintiff ought to submit a plan, an incomplete plan or one in need of amendment or additions can ordinarily be remedied following certification. The practice has developed that a plan of proceeding ultimately will be developed with the court and the other party(ies):
>
> > [I]n the more typical plaintiff class cases, the development of a plan has, in practice, been a collaborative effort between the representative plaintiff and the defendants, with the court playing a supervisory role [Chippewas of Sarnia Band v. Canada (AG), [1996] OJ No. 2475, 29 OR (3d) 549 (Gen. Div.),

[40] Michael A Eizenga, Michael J Peerless, Charles M Wright and John E Callaghan: *Class Actions Law and Practice*, Second Edition (LexisNexis Canada Inc., 2009) at para 3.179 – CA Vol 4, Tab 105.

> at p. 571, additional reasons given at [1996] OJ No. 2820, 2 CPC (4th) 322 (Gen. Div)].
>
> …An action can be certified with a litigation plan that is deficient in some aspects but yet still workable. In *Robinson v. Medronic Inc*., the court certified the action and gave the parties 60 days to make their best efforts to address the deficiencies identified by the defendants and the court…

102. Consistent with the court's consideration of the litigation plan as a "work in progress", the Plaintiff anticipated at section 57 of the litigation plan that "this plan will be reconsidered and may be revised under the continuing case management authority of the Court, if required, both before and after the determination of the common issues."[41]

103. To the extent that there are any individual issues to be addressed following a favourable determination of the common issues, section 27(1) of the *CPA* confers upon the Court substantial flexibility in terms of directing how individual issues should be determined. Any modifications required to the litigation plan to address individual issues are best addressed after conclusion of the common issues, when the parties and the Court will have a concrete understanding as to what, if anything, remains to be decided.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Vancouver, British Columbia this 11th day of June, 2013.

CHRISTOPHER A. RHONE and
GREG MCMULLEN
Branch MacMaster LLP
Lawyers for the Plaintiff

[41] Douez Affidavit at Exhibit H, p 37.