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17 Attorneys for Defendant GOOGLE INC.

18 UNITED STATES DISTRICT COURT
 19 NORTHERN DISTRICT OF CALIFORNIA
 20 SAN FRANCISCO DIVISION

22 OVERTURE SERVICES, INC., a Delaware Corporation,

24 Plaintiff,

25 vs.

26 GOOGLE INC., a California Corporation,

27 Defendant.

No. C02-01991 CRB

**[PROPOSED] STIPULATED
PROTECTIVE ORDER**

1 **STIPULATED PROTECTIVE ORDER**

2 Pursuant to Rule 26(c)(7) of the Federal Rules of Civil Procedure, upon the consent
3 and stipulation of the parties, Plaintiff Overture Services, Inc. (“Overture”) and Defendant
4 Google Inc. (“Google”), and for good cause shown,

5 IT IS HEREBY ORDERED BY THE COURT as follows:

6 1. Any document, or portion thereof, and any other form of evidence or
7 discovery contemplated under Rules 26 through 36 of the Federal Rules of Civil Procedure
8 which, in the good faith opinion of the Producing Party, contains any trade secret or other
9 confidential commercial information, may be designated by the Producing Party as
10 “Confidential.” Confidential information, designated as such in accordance with this Order,
11 shall be disclosed or made available only to persons specified in Paragraphs 4 and 5 herein.

12 All copies of materials properly designated as “Confidential,” and all extracts, abstracts,
13 charts, summaries, and notes made from materials properly designated as “Confidential,”
14 shall be Confidential information.

15 2. Any document, or portion thereof, and any other form of evidence or discovery
16 contemplated under Rules 26 through 36 of the Federal Rules of Civil Procedure which, in
17 the good faith opinion of the Producing Party, contains any trade secret or other confidential
18 or commercial information which the Producing Party believes in good faith gives a
19 competitive advantage over others who do not possess such information, which is not
20 generally known to others in the Producing Party's trade or business, which the Producing
21 Party would normally not reveal to third parties except in confidence or has undertaken with
22 others to maintain in confidence, and which is viewed by the Producing Party as more
23 sensitive than Confidential Information, may be designated by the Producing Party as
24 “Outside Counsel Only information.” Information designated as Outside Counsel Only in
25 accordance with this Order, shall be disclosed or made available only to persons as described
26 in Paragraphs 4 and 5 herein, and is not to be copied or otherwise reproduced except for the
27 limited purpose of conducting this litigation, including preparing exhibits for affidavits,
28 depositions, hearings, or for trial. All copies of materials properly designated as “Outside

1 Counsel Only,” and all extracts, abstracts, charts, summaries, and notes made from materials
2 properly designated as “Outside Counsel Only,” shall be Outside Counsel Only information.

3 3. Confidential Information and Outside Counsel Only information may be made
4 subject to the Protective Order as follows:

5 (a) With respect to documents or copies provided by the Producing Party
6 to the party receiving the discovery responses (hereinafter “the Receiving Party”), by
7 marking the initial page and the page or pages on which any Confidential Information
8 appears with the legend “CONFIDENTIAL UNDER PROTECTIVE ORDER,” and by
9 marking the initial page and the page or pages on which any Outside Counsel Only
10 information appears with the legend “OUTSIDE COUNSEL ONLY UNDER PROTECTIVE
11 ORDER.” The Producing Party shall so mark documents or copies prior to or at the time of
12 supplying them to opposing counsel.

13 (b) With respect to documents or copies produced by the Producing Party
14 for inspection by opposing counsel, such documents are deemed to be, and shall be treated
15 as, Outside Counsel Only documents, whether or not so marked, unless and until opposing
16 counsel requests copies of such documents and the Producing Party supplies such copies to
17 opposing counsel. Copies of such documents supplied to opposing counsel shall be made
18 subject to this Order if, prior to or at the time of supplying them to opposing counsel, the
19 Producing Party marks such copies as “CONFIDENTIAL UNDER PROTECTIVE ORDER”
20 or “OUTSIDE COUNSEL ONLY UNDER PROTECTIVE ORDER,” as provided in
21 Paragraph 3(a) above.

22 (c) Testimony or information disclosed at a deposition may be designated
23 by a Producing Party as Confidential or Outside Counsel Only information by indicating on
24 the record at the deposition the specific testimony or subject matter of the testimony which
25 contains Confidential information or Outside Counsel Only information that is to be made
26 subject to the provisions of this Order. The parties will use their best efforts to make all such
27 designations during the deposition. A Producing Party may later designate testimony or
28 information disclosed at a deposition as Confidential or Outside Counsel Only by notifying

1 all parties in writing, within thirty days of receipt of the transcript, of the specific pages and
2 lines of the transcript, or the subject matter of the testimony that is to be designated
3 Confidential or Outside Counsel Only. Each party shall attach a copy of such written
4 statement to the face of the transcript and each copy thereof in its possession, custody or
5 control. If no confidentiality designation is made at the time of a deposition, such deposition
6 nonetheless shall be treated as Outside Counsel Only information from the taking of the
7 deposition until thirty days after receipt of the transcript, or until receipt of the notice referred
8 to in this paragraph, whichever occurs sooner.

9 (d) In the case of responses to interrogatories, or other discovery requests,
10 or responses, affidavits, briefs, memoranda or other papers filed with the Court, information
11 contained therein may be designated as Confidential or Outside Counsel Only by
12 prominently marking such paper “CONFIDENTIAL UNDER PROTECTIVE ORDER” or
13 “OUTSIDE COUNSEL ONLY UNDER PROTECTIVE ORDER”

14 (e) Tangible objects may be designated as Confidential or Outside Counsel
15 Only by affixing to the object or its container a label or tag marked “CONFIDENTIAL
16 UNDER PROTECTIVE ORDER” or “OUTSIDE COUNSEL ONLY UNDER
17 PROTECTIVE ORDER.”

18 (f) To the extent that information has been produced prior to the entry of
19 this Order which a Producing Party desires to designate as Confidential or Outside Counsel
20 Only, the Producing Party may, within twenty days of the entry of this Order, designate any
21 information as Confidential or Outside Counsel Only by identifying in writing to the
22 Receiving Party which such documents, testimony or tangible objects should be treated as
23 Confidential or Outside Counsel Only.

24 4. (a) Except as provided in Paragraph 5 herein, Confidential information,
25 and any analysis or report containing Confidential information, may be made available to and
26 inspected by:

27 (i) up to six persons per party who have been designated as either
28

1 independent expert witnesses or independent consultants and personnel acting under their
2 direct or indirect supervision; and

3 (ii) the parties' outside counsel and personnel of outside counsel,
4 including specifically the following outside counsel set forth below and their personnel:

5
6 BRINKS HOFER GILSON & LIONE
7 NBC Tower - Suite 3600
8 455 Cityfront Plaza Drive
9 Chicago, Illinois 60611-5599

10
11 LATHAM & WATKINS
12 135 Commonwealth Drive
13 Menlo Park, California 94025

14
15 KEKER & VAN NEST, LLP
16 710 Sansome Street
17 San Francisco, California 94111

18 (iii) Trial and appellate courts for this action, and court reporters
19 and/or videographers and necessary support personnel of such court reporters and/or
20 videographers retained in connection with any hearing or trial of this action or in connection
21 with any depositions taken by any party in this litigation to the extent necessary to transcribe
22 and/or record the deposition testimony and identify exhibits marked in the course of the
23 deposition;

24 (iv) Mock jurors, focus group members, or research group
25 participants selected by trial consultants, jury consultants or by trial counsel in preparation
26 for trial, provided that no documents or physical things embodying Confidential information
27 or Outside Counsel Only information of another party shall be left in the possession of any
28 such person;

(v) Independent litigation support services, including legal
interpreters, document reproduction services, computer imaging services, and demonstrative
exhibit services, provided such individuals are merely performing clerical or ministerial
tasks;

1 (vi) Non-party individuals who are designated in the document or
2 material itself as an author or recipient of the designated document or material;

3 (vii) Up to three employees of the parties who are designated and
4 identified to the other party within thirty days of the effective date of this Stipulated
5 Protective Order; and

6 (viii) The following in-house counsel for the parties:

7 for Overture:

8 Joshua Metzger, Esq.

9 Lynn Loeb, Esq.

10 Jeanine L. Hayes, Esq.

11
12 For Google:

13 David Drummond, Esq.

14 Kulpreet Rana, Esq.

15 Karl Sun, Esq.
16

17 If one or more of the foregoing in-house counsel leaves the employ of his or her respective
18 employer, the affected party may designate, for purposes of this protective order,
19 replacement in-house counsel upon written notice to the other party.

20 (b) Except as provided in Paragraph 5 herein, Outside Counsel Only
21 information, and any analysis or report containing Outside Counsel Only information, may
22 be made available to and inspected by persons described in Paragraph 4(a)(i)-(vi)
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24 For purposes of persons designated as independent expert witnesses or independent
25 consultants pursuant to Paragraph 4(a)(i), each party shall disclose to the other party, by
26 facsimile and first class mail, the identity, residence, signed undertaking, and curriculum
27 vitae of each independent expert witness or independent consultant at least five (5) business
28 days prior only to the first disclosure of Confidential information or Outside Counsel Only

1 information to that independent expert witness or independent consultant. If a party objects
2 to the identified expert or consultant, it shall make its objections known in writing within five
3 (5) business days of notification. If agreement on the independent expert or consultant cannot
4 be reached, the objecting party shall have ten (10) business days after making its objections
5 known to seek a protective order from the Court. In such case, no disclosure shall be made to
6 the expert until the Court has ruled on the motion for a protective order. If the objecting party
7 fails to seek a protective order within that time, the objection shall be deemed waived and
8 Confidential information or Outside Counsel Only information may be disclosed to the
9 independent expert subject only to this Protective Order.

10 It is the specific intent of this subparagraph that Outside Counsel Only information
11 shall not be available to other individuals including the parties, or their employees, except as
12 may be permitted pursuant to Paragraph 5 herein.

13 (c) No Confidential information or Outside Counsel Only information shall
14 be revealed or disclosed, in whole or in part, directly or indirectly, to any individual
15 described in Paragraphs 4(a) or 4(b), with the exception of outside counsel and the personnel
16 of outside counsel as set forth in Paragraph 4(a), or to any individual who is otherwise
17 authorized to receive or view such information pursuant to Paragraph 5, unless and until that
18 individual has been given a copy of this Order and has duly completed and signed an
19 undertaking in the form attached as Exhibit A, any and all of which signed undertakings shall
20 be retained in duplicate by outside counsel of record for the Receiving Party.

21 (d) The limitations on the disclosure of Confidential information apply to
22 all Confidential information, including but not limited to draft memoranda, expert reports,
23 and briefs. The limitations on the disclosure of Outside Counsel Only information apply to
24 all Outside Counsel Only information, including but not limited to draft memoranda, expert
25 reports, and briefs.

26 (e) The parties will meet and confer regarding further restrictions
27 applicable to source code. Pending such discussions, the parties need not produce source
28 code that would otherwise be designated Outside Counsel Only.

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2 5. In the event that counsel for a party deems it necessary to disclose any
3 information of the Producing Party designated Confidential or Outside Counsel Only to any
4 person not specified in Paragraph 4 herein, said counsel first shall notify counsel for the
5 Producing Party in writing of (a) the information or documents to be disclosed, and (b) the
6 person(s) to whom such disclosure is to be made, and shall attempt to reach agreement
7 regarding such disclosure. If agreement cannot be reached, the party wishing such disclosure
8 shall make an appropriate motion. In the event of such motion, this Court shall rule as to
9 whether such disclosure may be made and whether any restrictions or limitations should be
10 placed on such disclosure. Until such motion is decided finally by this Court, no disclosure
11 shall be made.

12 6. The Clerk of the Court is provisionally directed to maintain under seal all
13 information, documents, objects and other materials filed with the Court that have been
14 designated by a party to this action as Confidential or Outside Counsel Only. To assist the
15 Clerk, any document or object that a party wishes to have placed under seal pursuant to this
16 Order shall be filed in the Clerk's Office in a sealed envelope or other appropriate sealed
17 container on which shall be endorsed the title and docket number of this action, an
18 identification of the nature of the contents of the sealed envelope or container, the words
19 "CONFIDENTIAL UNDER PROTECTIVE ORDER" or "OUTSIDE COUNSEL ONLY
20 UNDER PROTECTIVE ORDER," and a statement substantially in the following form:

21 SUBJECT TO PROTECTIVE ORDER ENTERED IN CASE
22 NO. C02-01991 CRB. This envelope, containing documents
23 that are filed in this case by [name of party], is not to be opened
24 nor are the contents thereof to be displayed or revealed except
25 by order of the Court.

26 A second copy of any pleading or paper specifically intended for review by the Court may be
27 hand-delivered to the Court's chambers appropriately marked, in order to assure that the
28 same is brought promptly to the Court's attention. Any party desiring to file any Confidential

1 information or Outside Counsel Only information under seal must comply fully with the
2 Local Rules concerning such filings.

3 7. (a) The parties shall provide, when practicable, advance notice to the Court
4 and other parties when they intend to use Confidential information or Outside Counsel Only
5 information in court proceedings. Nothing in this Order shall prevent a party from using,
6 during depositions, hearings, trial, or other proceedings held in this action, any information
7 or materials designated as Confidential or Outside Counsel Only..

8 (b) At the deposition of a third party, such third party may be shown any
9 document or other material designated as Confidential or Outside Counsel Only, provided
10 that: (i) the third party authored, created, received, or knows of the document or other
11 material; or (ii) the third party is made subject to this Order, pursuant to Paragraphs 4 and/or
12 5 herein.

13 8. The information produced by the parties pursuant to pretrial discovery in this
14 action may be used and disclosed only for purposes of this action. No party or person shall
15 make any other use of any such information, including, but not limited to, use for
16 commercial or competitive purposes or use in any other legal proceeding, except as permitted
17 by a court order.

18 9. No copies of Confidential information or Outside Counsel Only information
19 shall be made except by or on behalf of attorneys of record in this case or persons otherwise
20 bound by this Order. Any attorneys or other persons bound by this Order who make or cause
21 to be made copies of Confidential information or Outside Counsel Only information shall
22 maintain all such copies within their possession or the possession of others who are entitled
23 to access to such Confidential information or Outside Counsel Only information under this
24 Order.

25 10. Nothing in this order shall be deemed to preclude any party from seeking and
26 obtaining modifications of this Order, including, but not limited to, modifications which
27 would provide additional protection with respect to the confidentiality of documents or other
28 discovery materials.

1 11. Nothing herein shall be construed as preventing any party from using or
2 continuing to use any information designated as Confidential or Highly Confidential under
3 this Order if the Receiving Party, its counsel or independent consultants can show as a matter
4 of written record that the information (a) was already known to the Receiving Party from
5 legitimate sources, (b) was independently developed by the Receiving Party, (c) was
6 obtained from the Producing Party without having been identified as Confidential or Outside
7 Counsel Only, or (d) was received after the time of disclosure hereunder from a third party
8 having the right to make such disclosure and was not required to be held in confidence.
9 Should a dispute arise as to any specific information or materials, the burden shall be upon
10 the party claiming that such information or materials is or was publicly known or was
11 lawfully obtained other than through discovery of the Producing Party.

12 12. Nothing herein shall be construed as an agreement or admission: (a) that any
13 information, document or the like designated as Confidential or Outside Counsel Only is in
14 fact confidential or a trade secret; or (b) with respect to the competency, relevance or
15 materiality of any such information, document, testimony, or tangible object. The parties
16 reserve the right to make any and all objections as to the admissibility of the documents
17 produced subject to this Order until trial of this case.

18 13. A party shall not be obligated to challenge the propriety of a Confidential or
19 Outside Counsel Only designation at the time made, and a failure to do so shall not preclude
20 a subsequent challenge thereto. In the event that any party to this litigation disagrees at any
21 point in these proceedings with the designation by the Producing Party of any information as
22 Confidential or Outside Counsel Only, the parties shall try first to dispose, of such dispute in
23 good faith on an informal basis. If the dispute cannot be resolved, the party shall inform the
24 opposing party or third party in writing that the document should not be deemed confidential
25 and shall cite this paragraph. The party objecting to the “Confidential” or “Outside Counsel
26 Only” status of a document must present a motion to the Court objecting to such status. On
27 any such motion, the proponent of the “Confidential” or “Outside Counsel Only” designation
28

1 shall bear the burden of proof. The document shall continue to have such status unless and
2 until such a motion is presented, and during the pendency of any such motion.

3 14. Within sixty (60) days after the conclusion of this action, all documents,
4 objects, and other materials produced or designated as Confidential or Outside Counsel Only,
5 and all reproductions thereof, shall be returned to the Producing Party or shall be destroyed,
6 at the option of the Producing Party. If the Producing Party directs the Receiving Party to
7 destroy such Confidential or Outside Counsel Only materials and copies, then the Receiving
8 Party, within ten days of destroying such materials and copies, must certify in writing that it
9 has destroyed such materials and copies, and serve said certification upon the Producing
10 Party.

11 Insofar as the provisions of this and any other Protective Orders entered in this action
12 restrict the communication and use of information produced thereunder, such Orders shall
13 continue to be binding after the conclusion of this litigation except (a) that there shall be no
14 restrictions on documents that are used as exhibits in Court (unless such exhibits were filed
15 under seal); and (b) that a party may seek the written permission of the Producing Party or
16 further order of the Court with respect to dissolution or modification of any such Protective
17 Orders.

18 15. This Order has been entered to facilitate discovery and presentation of
19 evidence to the Court. Neither the designation of any information, document, testimony or
20 tangible object as Confidential or Outside Counsel Only, nor the failure to make such
21 designation, shall constitute evidence with respect to any issue in this action.

22 16. The terms of this Protective Order shall be applicable to any third party who
23 produces information that is designated by such third party or a party hereto as Confidential
24 or Outside Counsel Only.

25 17. This Order shall not prevent any party from applying to the Court for a further
26 order of injunctive or other relief, and shall not preclude any party from enforcing its rights
27 at law or in equity with respect to any information, document, or thing against any other
28 person, including another party, believed to be violating the rights of any party.

1 It is so Ordered.

2
3 United States District Judge

4 Date

5 **STIPULATED TO:**
6 **OVERTURE SERVICES, INC., Plaintiff**

7 By: /s/ Charles M. McMahon

8 **BRINKS HOFER GILSON & LIONE**
9 Jack C. Berenzweig (*Pro Hac Vice*)
10 William H. Frankel (*Pro Hac Vice*)
11 Jason C. White (*Pro Hac Vice*)
12 Charles M. McMahon (*Pro Hac Vice*)
13 NBC Tower - Suite 3600
14 455 North Cityfront Plaza Drive
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18 **LATHAM & WATKINS**
19 Anthony I. Fenwick (Bar No. 158667)
20 Allon Stabinsky (Bar No. 197642)
21 135 Commonwealth Drive
22 Menlo Park, California 94025
23 Telephone: (650) 328-4600
24 Facsimile: (650) 463-2600

25 **GOOGLE INC., Defendant**

26 By: /s/ Michael S. Kwun

27 **KEKER & VAN NEST, L.L.P.**
28 John W. Keker (Bar No. 49092)
John B. Streeter (Bar No. 101970)
Daralyn J. Durie (Bar No. 169825)
Michael S. Kwun (Bar No. 198945)
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I hereby attest, pursuant to section X of General Order 45, that concurrence in the filing of this document has been obtained from Michael S. Kwun.

Dated: December 13, 2002

By: /s/ Charles M. McMahon
Charles M. McMahon
BRINKS HOFER GILSON & LIONE
Attorney for Plaintiff
OVERTURE SERVICES, INC.

1 **EXHIBIT A**

2 **UNDERTAKING**

3 1. I have carefully read and understand the attached Confidentiality Protective
4 Order (the "Order") which has been entered by the United States District Court for the
5 Northern District of California in an action captioned *Overture Services, Inc., v. Google Inc.*
6 Case No. C02-01991 CRB. The initially capitalized terms in this Undertaking shall have the
7 meanings supplied in the Order.

8 2. Pursuant to the Order, I may be given access to Confidential information
9 and/or Outside Counsel Only information in the above-referenced action. As a condition of
10 access to that Confidential information and/or Outside Counsel Only information, and in
11 consideration of that access; (a) I agree that I shall be bound by and comply with all the
12 terms of the Order, including those limiting disclosure and use of the Confidential
13 information and Outside Counsel Only information, and (b) I submit to the jurisdiction of the
14 United States District Court for the Northern District of California for the enforcement of the
15 Order.

16 3. By reason of this Undertaking, the obligations imposed on me by the Order
17 shall be enforceable by the Producing Party to redress any breach of the Order or this
18 Undertaking.

19 4. I have executed this Undertaking in duplicate on _____
20 whereupon it becomes binding in accordance with its terms.

21 5. My current address is _____, and my current
22 occupation/job description is as follows: _____

23 _____

24 6. I have no prior or current affiliation with either of the parties to this action, OR
25 [explain any prior or current affiliation other than expert consultation in connection with this
26 litigation] _____

27 _____

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this _____ day of _____, 200_ in _____.
