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UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

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11 FLOWBEE INTERNATIONAL, INC. and
 12 FLOWBEE HAIRCUTTER LIMITED
 PARTNERSHIP,

13 Plaintiffs and Counter-
 14 Defendants,

15 vs.

16 GOOGLE, INC.,

17 Defendant and
 Counterclaimant.

CIVIL ACTION: CASE NO. 4:10-cv-00668-
 LB

**ANSWER TO PLAINTIFFS' COMPLAINT
 AND AFFIRMATIVE DEFENSES AND
 COUNTERCLAIM AGAINST FLOWBEE
 INTERNATIONAL, INC. AND FLOWBEE
 HAIRCUTTER LIMITED PARTNERSHIP
 FOR BREACH OF CONTRACT**

DEMAND FOR JURY TRIAL

Trial Date:

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1 37. Google admits that searchers for “flowbe.com” are shown the question, above any
2 results, “Did you mean: flowbee.com,” followed by a natural listing for the searched for site
3 “flowbe.com.” Google denies the remaining allegations of Paragraph 37.

4 38. Google denies the allegations of Paragraph 38.

5 39. Google admits that advertisers bid on the placement of their advertisements, and
6 the amount of such bids is one factor that may determine placement of the advertisement. Google
7 denies the remaining allegations of Paragraph 39.

8 40. Google denies all of the allegations of Paragraph 40.

9 41. Google denies all of the allegations of Paragraph 41.

10 42. Google denies all of the allegations of Paragraph 42.

11 43. Google admits that Internet users may add a Google Toolbar on their Internet
12 browsers to allow for Google searching even when not viewing a web page that features Google’s
13 search engine, and the allegations of the first two sentences of Paragraph 43. Google denies the
14 remaining allegations of Paragraph 43.

15 44. Google lacks knowledge or information sufficient to form a belief as to the truth or
16 falsity of the allegations of Paragraph 44, and therefore denies the same.

17 45. Google admits that it offers a program called AdWords through which it offers
18 advertisers the opportunity to bid on keywords and have their advertisements displayed on the
19 Internet, including on Google’s search engine in the form of “Sponsored Links” that appear above
20 or to the right of “organic” links. Google denies the remaining allegations of Paragraph 45.

21 46. Google admits that it has previously stated that “[k]eywords are the advertiser's
22 window into the customer's thinking – the most important basis for directing an advertising
23 message to precisely those people who want to see it.” *See* “An in-depth exploration: why
24 search advertising works,” available at <http://www.google.ca/ads/indepth.html> (last accessed Feb.
25 11, 2010). Google also admits that it has previously stated that “[a] list of keywords is, in turn, a
26 snapshot of the people who will use them – incomplete, to be sure, but also uncannily accurate in
27 its ability to bring buyers and sellers together.” *See id.* Google denies the remaining allegations
28 of Paragraph 46.

1 47. Google admits that many advertisers agree to pay Google for each time a web user
2 clicks on a “Sponsored Link” that appears on Google’s search results page.

3 48. Google denies all of the allegations of Paragraph 48.

4 49. Google admits that keywords selected by an advertiser may trigger advertisements
5 in response to user search queries corresponding to keywords selected by an advertiser, and that
6 sometimes advertisers choose to include keywords in the text or body of their advertisements.
7 Google denies the remaining allegations of paragraph 49.

8 50. Google admits that it has adopted a trademark policy and trademark complaint
9 procedure and that Google takes allegations of trademark infringement seriously. Google admits
10 that its terms and conditions prohibit intellectual property infringement by its AdWords
11 advertisers, which are responsible for selecting keywords and ad creatives that do not infringe
12 others’ intellectual property rights. Google denies all remaining allegations of Paragraph 50.

13 51. Google denies the allegations of Paragraph 51.

14 52. Google admits that it could set different rules for its AdWords program, but denies
15 that it makes “infringing use of proprietary marks,” and denies all remaining allegations of
16 Paragraph 52.

17 53. Google denies all of the allegations of Paragraph 53.

18 54. Google admits that its April 29, 2004 S-1 SEC filing reported that it “recently
19 revised [its] trademark policy in the U.S. and Canada” and, as a result, it “no longer disable[s] ads
20 due to selection by our advertisers of trademarks as keyword triggers for the ads.” *See* Form S-1
21 Registration Statement, Google, Inc. (Apr. 29, 2004), *available at*
22 <http://www.sec.gov/Archives/edgar/data/1288776/000119312504073639/ds1.htm> (last accessed
23 Feb. 11, 2010). Google denies all remaining allegations of Paragraph 54.

24 55. Google admits that it has the technical ability to stop advertisers from using certain
25 non-descriptive keywords as AdWords triggers. Google denies the remaining allegations of
26 Paragraph 55.

27 56. Google admits that the quoted language appeared in its 2004 S-1. Google denies
28 the remaining allegations of Paragraph 56.

1 140. Google denies all of the allegations of Paragraph 140.

2 **SEVENTH CLAIM FOR RELIEF:**
3 **TRADEMARK DILUTION UNDER TEXAS LAW**
4 **TEX. BUS. & COM. CODE § 16.29**

5 141. Google incorporates its responses to each and every allegation contained above
6 with the same force and effect as if fully set forth herein.

7 142. Google lacks knowledge or information sufficient to form a belief as to the truth or
8 falsity of the first sentence of Paragraph 142, and therefore denies the same.

9 143. Google denies all of the allegations of Paragraph 143.

10 144. Google denies all of the allegations of Paragraph 144.

11 **EIGHTH CLAIM FOR RELIEF:**
12 **UNFAIR COMPETITION UNDER TEXAS LAW**

13 145. Google incorporates its responses to each and every allegation contained above
14 with the same force and effect as if fully set forth herein.

15 146. The allegations of Paragraph 146 constitute legal conclusions and Google therefore
16 denies them on those grounds.

17 147. Google denies all of the allegations of Paragraph 147.

18 148. Google denies all of the allegations of Paragraph 148.

19 149. Google denies all of the allegations of Paragraph 149.

20 150. Google denies all of the allegations of Paragraph 150.

21 **NINTH CLAIM FOR RELIEF:**
22 **MISAPPROPRIATION UNDER TEXAS LAW**

23 151. Google incorporates its responses to each and every allegation contained above
24 with the same force and effect as if fully set forth herein.

25 152. The allegations of Paragraph 152 constitute legal conclusions and Google therefore
26 denies them on those grounds.

27 153. Google lacks knowledge or information sufficient to form a belief as to the truth or
28 falsity of the first sentence of Paragraph 153, and therefore denies the same.

154. Google denies all of the allegations of Paragraph 154.

155. Google denies all of the allegations of Paragraph 155.

1 156. Google denies all of the allegations of Paragraph 156.

2 157. Google denies all of the allegations of Paragraph 157.

3 **TENTH CLAIM FOR RELIEF:**
4 **MONEY HAD AND RECEIVED**

5 158. Google incorporates its responses to each and every allegation contained above
6 with the same force and effect as if fully set forth herein.

7 159. The allegations of Paragraph 159 constitute legal conclusions and Google therefore
8 denies them on those grounds.

9 160. Google lacks knowledge or information sufficient to form a belief as to the truth or
10 falsity of the first sentence of Paragraph 160, and therefore denies the same.

11 161. Google denies all of the allegations of Paragraph 161.

12 162. Google denies all of the allegations of Paragraph 162.

13 163. Google denies all of the allegations of Paragraph 163.

14 164. Google denies all of the allegations of Paragraph 164.

15 **FURTHER ANSWER AND AFFIRMATIVE DEFENSES**

16 By way of further Answer and as affirmative defenses, Google denies that it is liable to
17 Plaintiffs on any of the claims alleged and denies that Plaintiffs are entitled to damages, treble or
18 punitive damages, equitable relief, attorneys' fees, costs, pre-judgment interest or to any relief
19 whatsoever, and states as follows:

20 **FIRST AFFIRMATIVE DEFENSE**

21 **(Failure to State a Claim)**

22 165. The Complaint, on one or more counts set forth therein, fails to state a claim upon
23 which relief can be granted.

24 **SECOND AFFIRMATIVE DEFENSE**

25 **(Fair Use)**

26 166. The claims made in the Complaint are barred, in whole or in part, by the doctrines
27 of fair use, nominative fair use and/or descriptive use.
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THIRD AFFIRMATIVE DEFENSE

(First Sale Doctrine)

167. The claims made in the Complaint are barred, in whole or in part, by the first sale doctrine.

FOURTH AFFIRMATIVE DEFENSE

(Functionality)

168. The claims made in the Complaint are barred, in whole or in part, on the basis that any marks and use of marks at issue are functional.

FIFTH AFFIRMATIVE DEFENSE

(Innocent Infringement)

169. The claims made in the Complaint are barred, in whole or in part, because any infringement, if any, was innocent.

SIXTH AFFIRMATIVE DEFENSE

(Statutes of Limitations)

170. The claims made in the Complaint are barred, in whole or in part, by applicable statutes of limitations.

SEVENTH AFFIRMATIVE DEFENSE

(Laches)

171. Plaintiffs' claims are barred by laches, in that Plaintiffs have unreasonably delayed efforts to enforce their rights, if any, despite their full awareness of Google's actions.

EIGHTH AFFIRMATIVE DEFENSE

(Res Judicata and Collateral Estoppel)

172. The claims made in the Complaint are barred, in whole or in part, on the basis that prior actions based, in whole or in part, on the same allegations and underlying facts have already been adjudicated.

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NINTH AFFIRMATIVE DEFENSE

(Waiver, Acquiescence, and Estoppel)

173. Each of the purported claims set forth in this Complaint is barred by the doctrines of waiver, acquiescence, and estoppel.

TENTH AFFIRMATIVE DEFENSE

(Non-Infringement)

174. Defendant has not infringed any applicable trademarks under federal or state law.

ELEVENTH AFFIRMATIVE DEFENSE

(No Causation)

175. Plaintiffs' claims against Google are barred because Plaintiffs' damages, if any, were not caused by Google.

TWELFTH AFFIRMATIVE DEFENSE

(No Damage)

176. Without admitting that the Complaint states a claim, there has been no damage in any amount, manner or at all by reason of any act alleged against Defendant in the Complaint, and the relief prayed for in the Complaint therefore cannot be granted.

THIRTEENTH AFFIRMATIVE DEFENSE

(Unclean Hands)

177. Plaintiffs' claims are barred by the doctrine of unclean hands.

FOURTEENTH AFFIRMATIVE DEFENSE

(Lack of Irreparable Harm)

178. Plaintiffs' claims for injunctive relief are barred because Plaintiffs cannot show that they will suffer any irreparable harm from Google's actions.

FIFTEENTH AFFIRMATIVE DEFENSE

(Adequacy of Remedy at Law)

179. The alleged injuries or damages suffered by Plaintiffs, if any, would be adequately compensated by damages. Accordingly, Plaintiffs have a complete and adequate remedy at law and are not entitled to seek equitable relief.

1 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

2 **(No Punitive Damages)**

3 186. Google alleges that no punitive or exemplary damages should be awarded arising
4 out of the claims made in the Complaint under the law of the United States and California
5 because: (i) an award of punitive or exemplary damages would be unconstitutional under the
6 United States and California Constitutions; specifically, the First Amendment to the United States
7 Constitution and Article I, Section 2 of the California Constitution; (ii) any recovery of punitive or
8 exemplary damages arising out of the claims made in the Complaint would constitute the
9 imposition of a criminal fine or penalty without the substantive or procedural safeguards
10 guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by
11 Article I, Section 7 of the California Constitution; (iii) the imposition of any punitive or exemplary
12 damages in this lawsuit would constitute an excessive fine or penalty under Article I, Section 17 of
13 the California Constitution; (iv) any such award is precluded or limited pursuant to Section 3294
14 of the California Civil Code or the United States Constitution and the due process clause; and (v)
15 punitive damages would violate the United States and California Constitutions and common law
16 because such an award is based from procedures that are vague, open-ended unbound in
17 discretion, arbitrary and without sufficient constraints or protection against arbitrary and excessive
18 awards.

19 **ADDITIONAL DEFENSES**

20 187. Google reserves the right to assert additional defenses based on information learned
21 or obtained during discovery.

22 WHEREFORE, Google prays for judgment as follows:

- 23 1. That Flowbee takes nothing by way of its Complaint;
- 24 2. That the Complaint, and each and every purported claim for relief therein,
25 be dismissed with prejudice.
- 26 3. That Google be awarded its costs of suit incurred herein, including
27 attorneys' fees and expenses; and
28

1 **COUNTERCLAIM**

2 Defendant and Counterclaimant Google Inc. (“Google”), for its counterclaim against
3 Plaintiffs and Counter-Defendants Flowbee International, Inc. (“Flowbee Int’l”) and Flowbee
4 Haircutter Limited Partnership (“Flowbee L.P.”), (collectively “Flowbee”) state as follows:

5 **NATURE OF THE CASE**

6 1. Google brings this action for breach of contract against Flowbee under California
7 State Law.

8 2. By originally filing the instant action against Google in the United States District
9 Court, Southern District of Texas, Flowbee breached the mandatory venue selection provision of a
10 contract it entered with Google. That contract required Flowbee to bring “all claims arising out of
11 or relating to . . . Google’s Program(s)” in “the federal or state courts of Santa Clara County,
12 California, USA.” (See Exhibit A, attached.) The United States District Court for the Southern
13 District of Texas held that this contract was valid, enforceable and applied to Plaintiffs’ claims.
14 *See Flowbee Int’l v. Google, Inc.*, Civil Action No. C-09-199 (S.D. Tex. Feb. 8, 2010) (attached as
15 Exhibit B).

16 3. As a result of Flowbee’s breach of this contract, Google was forced to expend
17 money and resources to seek the transfer of the instant action from the improper venue of the
18 Southern District of Texas to the Northern District of California. Google seeks recovery of these
19 damages.

20 **PARTIES**

21 4. On information and belief, Plaintiff and Counterdefendant Flowbee International,
22 Inc. is a corporation organized under the laws of the state of Wyoming with its principal place of
23 business in Corpus Christi, Texas.

24 5. On information and belief, Plaintiff and Counterdefendant Flowbee Haircutter
25 Limited Partnership is a limited partnership organized under the laws of the state of Texas with its
26 principal place of business in Corpus Christi, Texas.

27 6. Defendant and Counterclaimant Google Inc. is a corporation organized under the
28 laws of the State of Delaware with a principal place of business in Mountain View, California.

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PRAYER FOR RELIEF ON COUNTERCLAIMS

WHEREFORE, Google requests that judgment be entered in its favor and against Flowbee as follows:

A. Awarding Google all damages resulting from Flowbee’s breach of the Agreement, including all attorneys’ fees and costs associated with its litigation in the Southern District of Texas.

B. An Order granting Google such other and further relief as this Court may deem just and proper.

DATED: February 18, 2010

Respectfully submitted,

QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP

By _____ /s/
Margret M. Caruso
Attorney for Google Inc.

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DEMAND FOR JURY TRIAL

Google hereby demands a jury trial on all issues which can be heard by a jury.

DATED: February 18, 2010

Respectfully submitted,

QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP

By _____ /s/
Margret M. Caruso
Attorney for Google Inc.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 18, 2010, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

David T. Bright
Mikal C. Watts
Christopher V. Goodpastor
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*Counsel for Plaintiffs Flowbee International, Inc. and
Flowbee Haircutter Limited Partnership.*

By _____ /s/
Margret M. Caruso
Attorney for Google Inc.