

1 **Jurisdiction and Service:** The basis for the Court’s subject matter jurisdiction over
2 plaintiff’s claims and defendant’s counterclaims, whether any issues exist regarding personal
3 jurisdiction or venue, whether any parties remain to be served, and, if any parties remain to be
4 served, a proposed deadline for service.

5 **This action arises in part under the Lanham Act, 15 U.S.C. §§ 1114 and 1125. This**
6 **Court has federal question jurisdiction over these claims pursuant to 15 U.S.C. § 1121 and**
7 **28 U.S.C. §§ 1331, 1338(a), and 1338(b). The United States District Court for the Southern**
8 **District of Texas has ruled that venue is proper in the Northern District of California under**
9 **28 U.S.C. §1404(a) due to the forum selection clause in the AdWords contract agreed to by**
10 **the parties.**

11 2. **Facts:** A brief chronology of the facts and statements of the principal factual issues in
12 dispute.

13 **Plaintiffs:** **“Flowbee” is a coined, trademarked name owned by Plaintiffs that**
14 **refers to a particular patented vacuum haircutting system. While the Flowbee haircutting**
15 **system has competitors, the competitors are not called Flowbee, nor is Flowbee a generic**
16 **term.**

17 **Google, Inc. has sold the Plaintiffs’ trademarked name, “Flowbee,” to Flowbee’s**
18 **competitor or competitors as a keyword trigger through its “Sponsored Links” program.**
19 **Thus, when a potential Flowbee customer enters the trademarked term “Flowbee” in a**
20 **Google search, the search results display Flowbee’s competitor or competitors either above**
21 **or adjacent to the link to Flowbee’s website. This has violated Plaintiffs’ trademark, has**
22 **caused Plaintiffs financial damages, and has resulted in an unjust financial benefit to Google,**
23 **Inc.**

24 **Google, Inc. has additionally sold the Plaintiffs’ trademarked name, Flowbee, to a**
25 **competitor or competitors as a keyword trigger through Google’s AdSense Program. Thus,**
26 **when a potential Flowbee customer clicks upon the term “Flowbee,” they are directed to**
27

1 competitors of Flowbee. This has violated Plaintiffs' trademark, has caused Plaintiffs
2 financial damages, and has resulted in an unjust financial benefit to Google, Inc.

3 Plaintiffs have brought suit against Google, Inc. for violations of federal
4 trademark/service mark infringement under the Lanham Act, 15 USC, §§ 1114, 1125(a);
5 contributory federal trademark/service mark infringement, Lanham Act, 15 USC, §§ 114
6 and 1125(a); vicarious trademark/service mark infringement, Lanham Act, 15 USC, §§ 1114
7 and 1125(a); false representation under the Lanham Act, Lanham Act, 15 USC, § 1125(a);
8 federal trademark dilution, Lanham Act 15, USC § 1125(c); trademark infringement under
9 Texas law; trademark dilution under Texas law, Tex. Bus. & Com Code § 16.29; unfair
10 competition under Texas law; misappropriation under Texas law; and money had and
11 received under Texas law. Plaintiffs' Original Complaint contains a more thorough
12 description of the Plaintiffs' allegations and causes of action.

13 **Defendant:** Defendant Google is an interactive computer service provider that
14 operates a popular search engine, which is available free of charge to Internet users. In
15 conjunction with this free search engine, Google operates an advertising program called
16 AdWords, which allows hundreds of thousands of people and businesses to promote their
17 products and services through targeted advertising. As part of Google's AdWords program,
18 ads relate to the particular terms and phrases entered by users into Google's search engine
19 may be displayed on the search results page under the heading "Sponsored Links." This
20 program enables users of Google's free search engine to be presented with choices of
21 relevant advertising adjacent to the organic results displayed in response to search queries,
22 which is of particular value to those searching for commercial results.

23 Both Google's organic search results and its revenue-producing AdWords
24 advertisements help Internet users quickly and easily access relevant information. For
25 example, a search for a particular product may yield links to websites of the company
26 offering the product; of retailers or repairers of that product; of competitors who offer
27 information about features of comparable products, including price, that facilitate
28 comparison shopping; maps that show where the product can be found, as well as the

1 location of nearby businesses; videos and images featuring the product; and news, consumer
2 reports, commentary, reviews, and criticism of the product.

3 **Plaintiffs’ purported claims against Google are based on AdWords advertisements**
4 **created and paid for by third-party advertisers. These advertisers bid on the opportunity to**
5 **have their advertisements appear when users of Google’s search engine enter certain words**
6 **or word combinations as search queries. Google believes that truthful advertisements**
7 **containing links to websites offering competitive and relevant products are helpful to**
8 **consumers, not confusing as to source or affiliation, and not a violation of Flowbee’s rights**
9 **by Google. Google contends that it has not violated any of Flowbee’s rights under the**
10 **Lanham Act or otherwise.**

11 **Google’s counterclaim for breach of contract arose from Plaintiffs’ commencement of**
12 **this action in a court other than the Northern District of California, which Flowbee had**
13 **contractually agreed would be the sole place it would file federal actions against Google**
14 **relating to Google programs, including AdWords. As a result of this breach, Google**
15 **incurred significant costs enforcing the venue selection provision of the contract and having**
16 **originally had to litigate in Texas.**

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18 3. **Legal Issues:** A brief statement, without extended legal argument, of the disputed points
19 of law, including reference to specific statutes and decisions.

20 **Plaintiffs: Google’s actions have violated Plaintiffs’ trademark, has caused**
21 **Plaintiffs financial damages, and has resulted in an unjust financial benefit to Google, Inc.**
22 **Plaintiffs have brought suit against Google, Inc. for violations of federal trademark/service**
23 **mark infringement under the Lanham Act, 15 USC, §§ 1114, 1125(a); contributory federal**
24 **trademark/service mark infringement, Lanham Act, 15 USC, §§ 114 and 1125(a); vicarious**
25 **trademark/service mark infringement, Lanham Act, 15 USC, §§ 1114 and 1125(a); false**
26 **representation under the Lanham Act, Lanham Act, 15 USC, § 1125(a); federal trademark**
27 **dilution, Lanham Act 15, USC § 1125(c); trademark infringement under Texas law;**
28 **trademark dilution under Texas law, Tex. Bus. & Com Code § 16.29; unfair competition**

1 under Texas law; misappropriation under Texas law; and money had and received under
2 Texas law. Plaintiffs' Original Complaint contains a more thorough description of the
3 Plaintiffs' allegations and causes of action.

4 **Defendant:** The purpose of trademark law under the Lanham Act, 15 USC §§ 1114
5 and 1125(a), is to facilitate reliable consumer identification of a product. Google's
6 advertising programs promote the purpose of trademark law by giving consumers
7 information they need to identify products and gather information. The use of a
8 trademarked term to refer to a product originating from the trademark owner is not
9 actionable. *Prestonettes, Inc. v. Coty*, 264 U.S. 359 (1924); *Smith v. Chanel*, 402 F.2d 562 (9th
10 Cir. 1968); 16 C.F.R. 14.15. Consistent with that, Google's AdWords program allows the use
11 of Flowbee's alleged trademark in ad text only when the advertiser actually resells Flowbee's
12 products or offers information regarding Flowbee's products. Further, ads that are
13 triggered to be displayed when a user enters Flowbee's alleged trademark as a search query
14 do not cause user confusion as to the source of the offered goods, which is frequently
15 identified in the advertisement, and therefore do not violate the Lanham Act. Because
16 Flowbee's alleged trademark was not famous in 2004 when Google's alleged infringement
17 began, Flowbee's claims for dilution under 15 USC § 1125(c) also fail.

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19 4. **Motions:** All prior and pending motions, their current status, and any anticipated motions.

20 **Plaintiffs:** None at this time.

21 **Defendant:** No motions are currently pending. Defendant anticipates filing a
22 motion for summary judgment.

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24 5. **Amendment of Pleadings:** The extent parties, claims, or defenses are expected to be
25 added or dismissed and proposed deadline for amending the pleadings.

26 **Plaintiff:** February 11, 2011

27 **Defendant:** February 11, 2011

1 6. **Evidence Preservation:** Steps taken to preserve evidence relevant to the issues
2 reasonably evidence in this action, including interdiction of any document-destruction program
3 and any ongoing erasures of e-mails, voice mails, and other electronically-recorded material.
4

5 **Plaintiffs:** Plaintiffs represent that they have instituted reasonable document
6 retention procedures so as to maintain any relevant documents, electronic or otherwise, until
7 this dispute is resolved.

8 **Defendant:** Defendant represents that it has instituted reasonable document
9 retention procedures so as to maintain any relevant documents, electronic or otherwise,
10 until this dispute is resolved.
11

12 7. **Disclosures.** Whether there has been full and timely compliance with the initial disclosure
13 requirements of Fed. R. Civ. P. 26 and a description of the disclosures made.

14 **Plaintiffs:** Plaintiffs filed their Initial Disclosures on September 10, 2009 in the
15 United States District Court for the Southern District of Texas, Corpus Christi Division case.

16 **Defendant:** Defendant served and filed its Initial Disclosures on September 22, 2009
17 in the United States District Court for the Southern District of Texas, Corpus Christi
18 Division.
19

20 8. **Discovery:** Discovery taken to date, if any, the scope of anticipated discovery, any
21 proposed limitations or modifications of the discovery rules, and a proposed discovery plan
22 pursuant to Fed. R. Civ. P. 26(f).

23 **Plaintiffs:** Plaintiffs have served Defendant with their First Set of Interrogatories,
24 Requests for Production, and Requests for Admission. Defendant has answered same.

25 **Defendant:** Defendant has served Plaintiffs with its First Set of Interrogatories and
26 Requests for Production, and Plaintiffs have served their responses.

27 **The parties anticipate completing discovery in the areas raised in Federal Rule 26(f)**
28 **by February 11, 2011. At this time, neither party is aware of any changes that should be**

1 made in the limitations on discovery imposed under the Federal Rules of Civil Procedure or
2 the Local Rules, or of any additional limitations that should be imposed.

3 In addition to the issues set forth herein, the parties will negotiate and submit to the
4 Court a stipulated protective order and ESI protocol. The parties also agree that they need
5 not identify on a privilege log privileged documents created by a lawyer or addressed to a
6 lawyer after the date the complaint was filed.

7

8 9. **Class Actions:** If a class action, a proposal for how and when the class will be
9 certified.

10 **Not applicable.**

11

12 10. **Related Cases:** Any related cases or proceedings pending before another judge of
13 this court, or before another court or administrative body.

14 **None.**

15

16 11. **Relief:** All relief sought through complaint or counterclaim, including the amount
17 of any damages sought and a description of the bases on which damages are calculated. In
18 addition, any party from whom damages are sought must describe the bases on which it contends
19 damages should be calculated if liability is established.

20 **Plaintiffs: Plaintiffs request all damages resulting from Defendant's violation of**
21 **Plaintiffs' trademark, including actual damages, attorney's fees, and costs associated with**
22 **that breach and this litigation, as well as such other and further relief as the Court may**
23 **deem just and proper.**

24 **Defendant: Defendant requests all damages resulting from Plaintiffs' breach of the**
25 **AdWords contract, including all attorneys' fees and costs associated with its litigation in the**
26 **Southern District of Texas, as well as such other and further relief as this Court may deem**
27 **just and proper.**

28

1 12. **Settlement and ADR:** Prospects for settlement, ADR efforts to date, and a specific ADR
2 plan for the case, including compliance with ADR L.R. 3-5 and a description of key discovery or
3 motions necessary to position the parties to negotiate a resolution.

4 **The parties have filed a Notice of Need for ADR Phone Conference with the Court.**

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6 13. **Consent to Magistrate Judge for All Purposes:** Whether all parties will consent to have
7 a magistrate judge, or the Judicial Panel on Multidistrict Litigation.

8 **The parties cannot agree to try this case before a magistrate judge.**

9
10 14. **Other References:** Whether the case is suitable for reference to binding arbitration, a
11 special master, or the Judicial Panel on Multidistrict Litigation.

12 **This case is not suitable for reference to binding arbitration, a special master, or the**
13 **Judicial Panel on Multidistrict Litigation.**

14
15 15. **Narrowing of Issues:** Issues that can be narrowed by agreement or by motion,
16 suggestions to expedite the presentation of evidence at trial (e.g. through summaries or stipulated
17 facts), and any request to bifurcate issues, claims or defenses.

18 **At this time, the parties do not foresee bifurcating any issues, claims, or defenses.**

19 **Subject to the progression of discovery, the parties may be open to narrowing certain issues**
20 **via stipulated facts.**

21
22 16. **Expedited Schedule:** Whether this is the type of case that can be handled on an expedited
23 basis with streamlined procedures.

24 **The parties do not believe that this case is appropriate for an expedited schedule.**

25
26 17. **Scheduling:** Proposed dates for designation of experts, discovery cutoff, hearing of
27 dispositive motions, pretrial conferences, and trial.

28 **Deadline for Fact Witness Depositions: October 29, 2010**

1	Plaintiffs' Designation of Experts, with reports:	December 17, 2010
2	Defendant's Designation of Experts, with reports:	February 11, 2011
3	Deadline for Discovery:	February 25, 2011
4	Deadline for Dispositive Motions:	March 10, 2011
5	Deadline for Pretrial Conferences:	June 6, 2011
6	Trial:	June 13, 2011

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8 18. **Trial:** Whether the case will be tried to a jury or to the court and the expected length of
9 trial.

10 **The trial will be tried to a jury. The expected length of trial is 45 hours.**

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12 19. **Disclosure of Non-Party Interested Entities or Persons:** Whether each party has filed
13 the "Certification of Interested Entities or Persons" required by Civil Local Rule 3-16. **In**
14 **addition**, each party must restate in the case management statement the contents of its
15 certifications by identifying any persons, firms, partnerships, corporation (including parent
16 corporations) or other entitles known by the party to have either: (i) a financial interest in the
17 subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that
18 could be substantially affected by the outcome of the proceeding.

19 **Plaintiffs:** **Plaintiffs filed their Certification of Interested Entities or Persons on**
20 **May 21, 2010. Plaintiffs did file their Certificate of Interested Parties in the United States**
21 **District Court for the Southern District of Texas on August 28, 2009, and a amended one on**
22 **September 10, 2009, before the case was transferred to this Court.**

23 **Defendant:** **Defendant filed its Certification of Interested Entities or Persons on**
24 **May 13, 2010. Defendant also filed a Certificate of Interested Parties in the United States**
25 **District Court for the Southern District of Texas on September 9, 2009, before the case was**
26 **transferred to this Court.**

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28

1 20. Such other matters as may facilitate the just, speedy and inexpensive disposition of this
2 matter.

3 The parties are aware of the Court's guidelines concerning discovery as set forth in the
4 Court's November 20, 2008 order (Docket No. 49). In view of the parties' assessment of their
5 needs in this action, the parties jointly propose the following modifications pursuant to Paragraph
6 11 of that Order.

7 a. Privilege log requirements. As discovery has just begun, the parties contemplate
8 that they may offer a stipulation to the Court regarding the logging of privilege communications in
9 place of the terms of Paragraph 16 of the November 20, 2008 Order. At this time, the parties
10 agree that all privilege logs must be served by October 1, 2010 and that the parties need not
11 affirmatively identify the steps taken to ensure the confidentiality of the allegedly-protected
12 communication, including affirmation that no unauthorized persons have received the
13 communication.

14 b. Scope of Discovery. The parties agree that they need not search voicemails or
15 recordings of phone conversations. Without prejudice to any party's ability to seek discovery
16 relating to the document collection process in the event there is good cause to believe that an
17 incomplete search was made, the parties further agree that they need not affirmatively identify the
18 information relating to the document search and collection process specified in Paragraph 13 of
19 the November 20, 2008 Order.

20 c. Communications with counsel during depositions. The parties agree that the phrase
21 "in the course of examination" on page 6, line 8 of the November 20, 2008 Order shall be
22 construed for purposes of this action to mean while the witness is in the deposition room. For
23 example, witnesses may confer privately with counsel during lunch.

24 d. Documents used to refresh witness recollections. The parties agree that a witness
25 may be questioned as to whether any documents refreshed his or her recollection on a topic
26 examined upon, and if any are identified, such document(s) will be made available to deposing
27 counsel in a reasonably prompt fashion. The parties agree that they need not produce documents
28

1 to deposing counsel at the outset of a deposition pursuant to Paragraph 20 of the November 20,
2 2008 Order.

3 e. Drafts of expert reports and communications with experts. The parties agree that
4 testifying experts shall not be subject to discovery on any draft of their reports in this case and
5 such draft reports, notes, outlines, or any other writings leading up to an issued report(s) in this
6 litigation are exempt from discovery. In addition, all communications to and from a testifying
7 expert, and all materials generated by a testifying expert with respect to that person's work, are
8 exempt from discovery unless relied upon by the expert in forming any opinions in this litigation.
9 Notwithstanding the foregoing, information relating to the design, preparation, conducting, and/or
10 performance of any consumer survey, including drafts of the survey and communications relating
11 to the wording and performance of the survey, shall be subject to discovery.

12 f. FRCP 30(b)(6) depositions. The parties agree that witnesses deposed pursuant to
13 Rule 30(b)(6) may be deposed at the same time in their individual capacity provided that the
14 record is clear as to which questions are being asked exclusively in their 30(b)(6) capacity. The
15 parties agree that such testimony will be counted as set forth in Paragraph 23(b) of the November
16 20, 2008 Order, but that the testimony need not be separately transcribed, bound, or separated into
17 two parts of the day.

18

19

20 /s/ David T. Bright
David T. Bright (*pro hac vice* granted)
WATTS GUERRA CRAFT, L.L.P.
500 North Water Street, Suite 1200
Corpus Christi, Texas 78478
22 (361) 887-0500 Telephone
23 (361) 887-0055 Telecopier

6/9/10
Date

24 /s/ Damien P. Lillis
Damien P. Lillis
State Bar No. 191258
25 SMITH LILLIS PITHA LLP
400 Montgomery Street, Suite 501
26 San Francisco, California 94104
27 (415) 814-0411 Telephone
(415) 217-7011 Telecopier

28 **Counsel for Plaintiffs**

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/s/ Margret M. Caruso

6/9/10

Margret M. Caruso
California State Bar No. 243473
Cheryl Galvin
California State Bar No. 252262
Thomas Watson
California State Bar No. 227264
QUINN EMANUEL URQUHART & SULLIVAN, LLP
555 Twin Dolphin Drive, Fifth Floor
Redwood Shores, California 94065
(650) 801-5101 Telephone
(650) 801-5100 Facsimile

Date

Counsel for Defendant

Filer's attestation: Pursuant to General Order No. 45, Section X(B) regarding signatures, I attest under penalty of perjury that concurrence in the filing of this document has been obtained from David Bright and Damien Lillis.

DATED: June 9, 2010

By: /s/ Margret M. Caruso